

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

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

**“Afterthoughts”**

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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).<sup>1</sup> 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.<sup>2</sup>

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.<sup>3</sup> 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).<sup>4</sup> Such topics are particularly important in long-term “relational contracts”,

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<sup>1</sup> 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).

<sup>2</sup> 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](http://www.law.usyd.edu.au/anjel/content/anjel_research_pap.html). The Japanese parliament approved Japan's accession on 19 June 2008.

<sup>3</sup> 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).

<sup>4</sup> 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).

especially cross-border service transactions like distributorships or licensing contracts.<sup>5</sup> 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.<sup>6</sup>

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 possibly some dead-ends) on this point within current arbitral practice and influential academic commentary.<sup>7</sup>

However, my first concern is that the “general principles” underlying UPICC (or, for Australians, their “vibe”<sup>8</sup>) 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.<sup>9</sup> 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.<sup>10</sup> Lower courts in

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<sup>5</sup> See Donald Robertson’s remarks prepared for this Seminar.

<sup>6</sup> See Justice Finn’s remarks prepared for this Seminar, and some of his judgments available at <http://www.unilex.info/dynasite.cfm?dssid=2377&dsmid=13619>.

<sup>7</sup> 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>.

<sup>8</sup> 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))).

<sup>9</sup> 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](http://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&x=1>

<sup>10</sup> 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.

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.<sup>11</sup> That makes me skeptical that UNCITRAL's recommendation for a more liberal interpretation of the New York Convention's writing requirement<sup>12</sup> 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.<sup>13</sup> 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.<sup>14</sup> Yet, despite Australia's adoption of the Model Law in 1989 and other efforts, for various reasons we have not yet 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.<sup>15</sup> The latter was successful partly because core provisions – limiting

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<sup>11</sup> 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](http://www.arbitrators.org.au)).

<sup>12</sup> See [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/2006recommendation.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2006recommendation.html).

<sup>13</sup> 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* (7<sup>th</sup> ed 2002, Lexisnexis) pp 357-64. Legislative reform to allow at least express selection of "rules of law" is desirable.

<sup>14</sup> 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](http://www.attorneygeneral.gov.au/www/ministers/RobertMc.nsf/Page/Speeches_2008_17June2008-AustralianFinancialReviewLegalConference)).

<sup>15</sup> L. NOTTAGE, *Japan's New Arbitration Law: Domestication Reinforcing Internationalisation?* 7 *International Arbitration Law Review* 54 (2004); L. NOTTAGE, *Reforming International Commercial*

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 "Contract Code".<sup>16</sup> 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.<sup>17</sup> 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.

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*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](http://www.arbitrators.org.au) (2008).

<sup>16</sup> M. P. ELLINGHAUS, T. WRIGHT, et al., *Models of Contract Law: An Empirical Evaluation of Their Utility* (Annandale, N.S.W.: Themis Press, 2005).

<sup>17</sup> 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 McLauchlan. Compare D. McLAUHLAN, *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](http://www.law.usyd.edu.au/anjel/content/anjel_research_pub.html)).