

Symposium Paper: The *UNIDROIT Principles*: An Australian Perspective

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I intend to view the *UNIDROIT Principles of International Commercial Contracts* ('Principles')¹ through the prism of Australian law and to suggest ways in which it may enrich Australia's 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, 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*² twenty years ago, a United States reviewer described 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 and simpler age of the common law'.³

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* (Cth). What I wish to raise first is the subject of renovation of contract law. My obvious premise here is that Australian contract law is a little tired, a little inadequate to the world in which it now finds itself. It needs regeneration.

I would suggest, for example, that areas such as estoppel—the whole area of suspension and renunciation of rights dealt with variously by waiver, estoppel, variation and election⁴—contract interpretation and the implication of terms 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 it is by no means 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*.⁵ An odd consequence of this insistence is to destroy what has been the refuge of traditional thinkers of 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 Parliament and not the courts, save in simple or clear cases, to vary or modify a settled

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¹ See Michael Bonell, *An International Restatement of Contract Law: the UNIDROIT Principles of International Commercial Contracts* (3rd ed, 2005). For a detailed commentary on the Principles see Vogenauer and Kleinheisterkamp (eds), *Commentary on the Unidroit Principles of International Commercial Contracts (PICC)* (2009). See also D Oser, *The UNIDROIT Principles of International Commercial Contracts: a Governing Law?* (2008).

² Paul Finn (ed), *Essays on Contract* (1987).

³ Review (1989) 17 *International Journal of Legal Information* 55-6.

⁴ See *GEC Marconi Systems Pty Ltd v BHP Information Technology Pty Ltd* (2003) 128 FCR 1 [352]-[477].

⁵ *Farab Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89 [135].

rule, or principle, of the common law if it is ill suited to modern circumstances. All one now can 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. The following comments are made with this reality in mind. 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 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? 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.⁶ 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. To date, we do not seem to have let loose a legal rabbit.

Now to turn briefly to the *UNIDROIT Principles of International Commercial Contracts*. I emphasise at the outset they have been designedly formulated, as Prof Bonell has suggested, with international commerce and not consumer transactions in mind. Furthermore they are, on the whole, 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. 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, 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 they are principled, coherent and intelligible—a claim I do not consider we can confidently make for our own law. Here I will talk only of major themes they reveal. The first, I need hardly expand 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 thereof.⁷

⁶ See Sir Anthony Mason, 'Future Directions in Australian Law' (1987) 13 *Monash University Law Review* 149.

⁷ The *UNIDROIT Principles of International Commercial Contracts*, arts 1.1 and 1.5.

The second 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.⁸ 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 need 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 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 there is regard 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 is perhaps the most dominant one in the Principles. It is enshrined in Article 1.7 which bluntly states that each party must act in accordance with good faith and fair dealing in international trade. Somewhat surprisingly 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 to be settled, as far as possible, in accordance with their underlying general principles, hence the significance of good faith. I am 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.⁹ The Australian attitude is 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 the parties to a contract and fair dealing in light of that contract, in its setting and of the parties conduct *inter se*. I am far from convinced that the place of good faith in Australian contract law is at all secure.

Article 1.7 is reflected in quite a number of more specific provisions of the Principles; for example, Article 1.8 refers to inconsistent behaviour (or ‘estoppel’). It is equally and obviously manifest in Article 2.1.15. This deals with negotiations in bad faith. Due to its novelty, it is worth referring to 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.

⁸ *Ibid*, art 3.2.

⁹ Alternatively, see the recent decision of the Supreme Court of Singapore in *Ng Giap Hon v Westcomb Securities Pte Ltd* [2009] SGCA 19.

(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 Articles 5.1.3, 4.8 and 5.1.2, dealing respectively with supplying any omitted term or implying obligations.

Finally on this theme, I would note 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 have expressed like sentiments.¹⁰ This said with little by way of critical evaluation the High Court of Australia, the House of Lords and the Supreme Court of New Zealand have all reaffirmed the old orthodoxy.¹¹

The Principles 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.

¹⁰ *Australian Medic-Care Co Ltd v Hamilton Pharmaceutical Pty Ltd* (2009) 261 ALR 501 [116]-[121].

¹¹ See, *Agricultural and Rural Finance Pty Ltd v Gardiner* (2008) 251 ALR 322 [35], [163]; see also, *Franklins Pty Ltd v Metcash Trading Ltd* [2009] NSWCA 407 [306]-[328]; *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38; *Vector Gas Ltd v Bay of Plenty Energy Ltd* [2010] NZSC 5.