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Australia's Proposed Exercise in Contract Law Reform: International Convergence and Regional Implications

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AUSTRALIA'S PROPOSED EXERCISE IN CONTRACT LAW REFORM

International Convergence and Regional Implications

In July 2012, the Australian Attorney-General's Department began soliciting comment regarding the best way to reform Australian contract law to render it more suitable for the demands of 21st century commerce. The effort marks an appreciation of the changing commercial environment and challenges the traditional common law preference for piecemeal, organic reform through case law. The proposed effort has implications for the global convergence of legal systems and further poses practical questions as to what form any such contractual reform should take. Codification in the European, civil law sense is a possible but unlikely outcome. A persuasive but non-binding restatement of law offers flexibility, but may add to confusion where the dominant doctrinal trend is not evident, thereby leading to the question of "what" to restate. Accordingly, there are clear obstacles to the process. This commentary suggests, however, that these obstacles should not be allowed to undermine the effort. With the growing scope and intensity of cross-border trade, parties from disparate legal systems are interacting with each other in ever-closer commercial proximity. Exercises aimed at rendering the common law less opaque and easier to navigate can contribute to the development of the common grammar necessary to facilitate this interaction. The end point of Australia's reform process may not be clear, but an exercise aimed at "rationalising" certain aspects of common law doctrine through a process of organised reform may be an idea whose time has come. This commentary sketches out some of the key considerations from a comparative, practical and global perspective, highlighting in the process the relevance of such reform efforts to the region.

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I. Introduction

1 In July 2012, the Australian Attorney-General's Department began soliciting comment regarding the best way to reform Australian contract law to render it more suitable and adaptable to the demands of 21st century commerce.[1] As significant as any future recommendations may be, it is the advent of this exercise in and of itself that signals the new international legal reality. It marks an appreciation of the demands of the global economy in one of the jurisdictions ideally poised to take advantage of the world's most dynamic regions, lying as it does on the periphery of the Asia Pacific region and benefiting from a common law heritage steeped in the development of flexible commercial relations.

2 The Australian government's request for comment marks a concrete manifestation of the growing convergence in commercial relations. It constitutes a recognition that for contracting processes to be effective in this new age, they must be both transparent and accessible to parties from diverse legal systems, thereby offering commercial certainty derived from a type of common grammar.[2] This may always have been true, but these criteria have assumed greater urgency and importance as the modern market place increasingly reflects a market place for legal rules[3] and a greater reliance on cross-border trade, stemming from complex supply chains, better communications technology and globalised trade flows.

3 With choice of law clauses being given broad scope and recognition, parties have a myriad of options from which to choose. Moreover, the governing law of the contract can now be calibrated to complement the curial law selected for arbitration procedures and the related selection of the appropriate forum. A flexible, transparent and accessible contract law and related doctrine can spur commerce, while making Australia a suitable forum for dispute resolution. Such initiatives have also been promoted with great success by other key trading hubs in the region, such as Singapore, whose modern arbitration law and flexible and transparent contract law are gaining adherents throughout the region.[4] Crafting, or rather consolidating, a package of doctrine appears

1 Australian Attorney-General's Department website <http://www.ag.gov.au/Consultations/Pages/ReviewofAustraliancontractlaw.aspx> (accessed 3 June 2013).

2 The Law Society of New South Wales, "Australian Government Review of Australian Contract Law" (July 2012) <http://www.lawsociety.com.au/cs/groups/public/documents/internetyounglawyers/644777.pdf> (accessed 3 June 2013).

3 Jan Smits, "Diversity of Contract Law and the European Common Market" (Maastricht Faculty of Law Working Paper 2005/9) <http://arno.unimaas.nl/show.cgi?fid=3772> (accessed 3 June 2013).

4 Michael Pryles, "Singapore: The Hub of Arbitration in Asia" (undated) <http://www.siac.org.sg/images/stories/articles/35th%20Article%20-%20Michael%20Pryles%20-%20Singapore%20The%20Hub%20of%20Arbitration%20in%20Asia.pdf>

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to be a laudable endeavour at this critical juncture in the development of the world economy, paying due regard to relevant trade flows, and the ongoing emergence of the Asia Pacific region as perhaps the new centre of commercial gravity.

4 With regard to the Australian government's request for notice and comment, this commentary will focus on three issues:

(a) the significance of the exercise for global legal convergence and the need to look at comparative approaches;

(b) the available modalities beyond codification for reforming Australian contract law; and

(c) some specific thoughts regarding the utility of the exercise from a regional perspective, including its relationship to fostering commercial comity with major trading partners throughout the region, including Singapore, China, Korea, Japan and New Zealand.

II. Global convergence – Comparative issues

5 The cross-border dimension of the Australian government's recent solicitation of notice and comment on its contract law dovetails with other reform efforts of a more transnational nature. Australia is examining its law from the inside out with the other initiatives looking or having looked at the situation from the outside in, the denationalised focus having been at the heart of these efforts. The UNIDROIT Principles[5] aimed at facilitating international trade, the Principles of European Contract law[6] and the broader UN Convention on the International Sale of Goods ("CISG")[7] provide concrete examples of such laudable endeavours. With this plethora, some might say surplus, of instruments, the question arises as to whether, and if so, how the Australian government's request should be taken up. There appears to be a desire to develop doctrine that can "bridge" the differences between

(accessed 3 June 2013). See also Asia One, "Singapore has shown growth as an arbitration hub" (10 June 2012) <http://www.asiaone.com/News/Latest%2BNews/Singapore/Story/A1Story20120610-351692.html> (accessed 3 June 2013).

5 UNIDROIT Principles of International Commercial Contracts 2010 (International Institute for the Unification of Private Law, Rome) <http://www.unidroit.org/english/principles/contracts/principles2010/integralversionprinciples2010-e.pdf> (accessed 10 June 2013).

6 The Principles of European Contract Law 2002 <http://www.jus.uio.no/lm/eu.contract.principles.parts.1.to.3.2002/> (accessed 10 June 2013).

7 United Nations Convention on Contracts for the International Sale of Goods 1980, adopted by the United Nations General Assembly on 11 April 1980 <http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG.html> (accessed 10 June 2013).

various systems and their approaches to certain key issues.[8] As noted, a similar aspiration is already reflected in a number of instruments on the international level. If the scope is limited to international sales transactions, the CISG offers a practical compromise regarding offer and acceptance between the civil and common law systems and other operational issues regarding contract formation,[9] the UNIDROIT norms have addressed the role of "good faith,"[10] a core concept of civil law countries but one which continues to inspire healthy, albeit diminishing, skepticism among the members of the common law world. Moreover, the Principles of European Contract Law appear to have tackled the issue of the reliance on extrinsic evidence for contractual interpretation,[11] another issue which has historically separated the common law and civil law worlds. This issue is also addressed to a broader geographical group in Art 8 of the CISG.[12]

6 With all of this existing, rigorous and sophisticated analysis from which to choose, one wonders what, if anything, can be added to the available solutions. It is here that the Australian exercise distinguishes itself and where it might serve as a useful precedent or template for other jurisdictions currently contemplating the reform of their contract law. The Australian government's request manifests a recognition that reform will not take place on a blank slate. As a loyal heir to the English common law tradition, with its abundant case law and established doctrine, Australia cannot undertake a wholesale reform of domestic contract law without due reference to its existing structure and content.

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8 Australian Attorney-General's Department, "Improving Australia's Law and Justice Framework: A Discussion Paper to Explore the Scope for Reforming Australian Contract Law" (2012) ss 2.11 and 4.5, at pp 6 and 12, respectively <http://www.ag.gov.au/Consultations/Documents/ReviewofAustraliancontractlaw/DiscussionpaperImprovingAustraliaslawandjusticeframeworkAdiscussionpaperexploringthescopeforreformingAustraliancontractlaw.pdf> (accessed 3 June 2013).

9 Dr Larry A DiMatteo, "Critical Issues in the Formation of Contracts under the CISG" (2011) <http://www.cisg.law.pace.edu/cisg/biblio/dimatteo6.html> (accessed 3 June 2013). See also Burt A Leete, "Contract Formation under the United Nations Convention on Contracts for the International Sale of Goods and the Uniform Commercial Code: Pitfalls for the Unwary" (1992) 6 Temp Int'l & Comp LJ 193 at 194.

10 UNIDROIT Principles of International Commercial Contracts (2004 Ed) Art 1.7 <http://www.unidroit.org/english/principles/contracts/principles2004/blackletter2004.pdf> (accessed 3 June 2013). See also Klaus Peter Berger, "International Arbitral Practice and the UNIDROIT Principles of International Commercial Contracts" (1998) 46(1) AJCL 129 at 143; E Allan Farnsworth, "Duties of Good Faith and Liability for Bad Faith under the UNIDROIT Principles, Relevant International Conventions and National Laws" (1994) 3 Tul J Int'l & Comp L 47.

11 Commission on European Contract Law, "The Principles of European Contract Law" (1999 text in English) Art 5:102 <http://frontpage.cbs.dk/law/commission_on_european_contract_law/PECL%20engelsk/engelsk_partI_og_II.htm> (accessed 3 June 2013).

12 Article 8 of CISG <http://www.cisg.law.pace.edu/cisg/text/e-text-08.html> (accessed 3 June 2013).

The quasi-adoption of the CISG as Australia's domestic law for sales contracts, as was essentially done in China,[13] is therefore not an option.

7 The Australian exercise does not seek a transnational solution *per se*, culminating in a set of harmonised principles, but rather a domestic solution aimed at making the law more transparent and consistent with the evolving transnational legal environment. Australia does not seek to transplant from without but to adapt from within. Accordingly, the overriding focus is on how domestic law can better relate to the external reality and not the reverse. Something to which Australia and other jurisdictions who are adherents to the common law tradition can therefore aspire is to render their guiding contract law and principles less opaque and more accessible. In a competition for legal rules, Australia can offer a basket of doctrine and procedures that allows a contracting party to make an informed choice as to the governing law of the contract and the preferred venue for dispute resolution.

8 As outlined in the Australian government's briefing paper, the current legal landscape includes an amalgam of cases and statutes, each of which can impact the parties' expectations in new and unforeseen ways. For instance, relatively recent consumer protection statutes[14] can suddenly intervene to condition contractual interpretation and thereby upset the previously agreed contractual dynamic. The briefing paper suggests that contracting efficiently under Australian contract law is a question of not just what, that is what it is, but also of where, that is where to find it.[15] Such issues are compounded when non-Australian or foreign parties from alien jurisdictions are involved.

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13 See *Law and Policy for China's Market Socialism* (John Garrick ed) (Routledge, 2012) at p 73. It is worth noting that China's Uniform Contract Law of 15 March 1999 <http://www.wipo.int/wipolex/en/text.jsp?file_id=182632> (accessed 10 June 2013) takes further inspiration from the UNIDROIT Principles; see Zhang Yuqing & Huang Danhan, "The New Contract Law in the People's Republic of China and the UNIDROIT Principles of International Commercial Contracts: A Brief Comparison" (2000) 3 *Uniform Law Review* 429 <http://www.unidroit.org/english/publications/review/articles/2000-3-zhang-e.pdf> (accessed 10 June 2013).

14 For example, ch 3 of Australia's Consumer Law and Fair Trading Act (No 21 of 2012) <http://www.austlii.edu.au/au/legis/vic/consol_act/aclafta2012372/> (accessed 3 June 2013).

15 Australian Attorney-General's Department, "Improving Australia's Law and Justice Framework: A Discussion Paper to Explore the Scope for Reforming Australian Contract Law" (2012) s 2.2 at p 3 <http://www.ag.gov.au/Consultations/Documents/ReviewofAustraliancontractlaw/DiscussionpaperImprovingAustraliaslawandjusticeframeworkAdiscussionpaperexploringthescopeforreformingAustraliancontractlaw.pdf> (accessed 3 June 2013).

III. Convergence and codification

9 Simplifying an uneven landscape of cases, doctrine, and statutes calls forth a threshold question of legal convergence and comparative law. Should Australian contract law be codified? Codification remains the cornerstone of most civil law systems, even as case law encroaches to assume the status of a crypto or quasi-source of law. As commerce becomes more complicated and multifaceted, the question then arises as to whether a general codification of contractual doctrine and principle could render Australia and other common law jurisdictions more hospitable for international transactions.

10 It is unlikely that Australia could opt for the "straight-jacketing" codification nominally present in civil law jurisdictions, given its common law heritage of judge-made law and judicial policy-making. However, one wonders if some variant or degree of codification could perhaps strike a better balance between the inherent tensions of certainty and flexibility. As a federal state of established and growing commercial heft, Australia could perhaps look to the United States' Uniform Commercial Code ("UCC")[16] as a possible model. The UCC, in Art 2, lays out basic contractual principles for the 50 states, minus Louisiana, with a view to simplifying and consolidating the sprawling doctrine of the US commercial behemoth. Article 2 sets forth authoritative statements of doctrine covering, *inter alia*, issues of offer and acceptance, good faith and damages.[17] Moreover, it also provides a consolidated statement of doctrine, which can be juxtaposed against the provisions of the CISG, also a part of US law, to assist parties in assessing the contractual landscape. In short, external parties are offered clear, analytical reference points in making their contractual decisions. The UCC responds to the diversity of a federal system by allowing the individual states to customise provisions as part of the adoption process. It provides clarity by offering a concise statement of core doctrine. It also offers a vessel for evolution.[18] Significantly, the Australian government's briefing paper highlights the need to develop doctrine that keeps pace with the developing digital economy.[19]

16 Official UCC text available from the American Law Institute website <http://www.ali.org/index.cfm?fuseaction=publications.ppage&node_id=86> (accessed 10 June 2013).

17 See, for example, §§ 2-206, 2-403 and 2-701 to 2-725 of the UCC <http://www.law.cornell.edu/ucc/2/article2.htm> (accessed 3 June 2013).

18 For example, amendments were made in 1998 and 2010 to Art 9 of the UCC on secured transactions in personal property <http://www.uniformlaws.org/Act.aspx?title=UCC%20Article%209%20Amendments%20(2010)> (accessed 10 June 2013).

19 Australian Attorney-General's Department, "Improving Australia's Law and Justice Framework: A Discussion Paper to Explore the Scope for Reforming Australian Contract Law" (2012) s 2.7 <http://www.ag.gov.au/Consultations/Documents/ReviewofAustraliancontractlaw/DiscussionpaperImprovingAustraliaslawandjustice

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11 Contrary to the all-encompassing codification ethos present in civil law countries, the UCC, as are other codes in common law countries, is meant to be read against the existing case law.[20] It is, therefore, not so much a reform of existing contract law but rather a consolidation thereof. A contracting party approaching the US as a jurisdiction can therefore orient his or her research toward an objective benchmark, which consolidates the law of the various jurisdictions. Such investigation may not be conclusive in terms of the parties' ultimate choice, but it provides at least an initial reference point regarding the operative doctrine, including the attendant interpretive principles, such as "good faith".[21] It gives any party, particularly one from an external system, a window on the US landscape.[22]

12 Given Australia's complex matrix of provincial and federal law, coupled with the quirks of common law jurisprudence, it is at least arguable that the UCC offers a relevant model and that some type of analogous consolidation may be in order. Codes will always be subject to interpretation, particularly in a common law jurisdiction, but as civil law form, if not substance *per se*, begins to assume a preponderant role in an increasing number of jurisdictions throughout the world,[23] it appears that some form of consolidation, if not outright codification, may be in order. A code, if adopted, will not reflect the ethos of the civil law where such instruments are viewed as pre-empting the field. However, it might provide a useful consolidation at a time when the prevailing movement is toward transparent norms designed to give parties the benefit of their bargain. The selection of priority areas and issues remains open, with some type of juxtaposition between settled areas of law and those still in a state of flux perhaps offering the best prospect for rendering the exercise useful and worthwhile.

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frameworkAdiscussionpaperexploringthescopeforreformingAustraliancontractlaw.pdf> (accessed 3 June 2013).

20 John Henry Merryman & Rogelio Pérez-Perdomo, *The Civil Law Tradition – An Introduction to the Legal Systems of Europe and Latin America* (Stanford University Press, 3rd Ed, 2007) ch V, "Codes and Codification".

21 See §§ 1-201(b)(20), 1-203 and 2-403 of the UCC.

22 The objectives of the UCC are concisely captured in § 1-103:

> **Construction of [Uniform Commercial Code] to Promote its Purposes and Policies: Applicability of Supplemental Principles of Law.**
>
> (a) [The Uniform Commercial Code] must be liberally construed and applied to promote its underlying purposes and policies, which are: (1) to simplify, clarify, and modernize the law governing commercial transactions; (2) to permit the continued expansion of commercial practices through custom, usage, and agreement of the parties; and (3) to make uniform the law among the various jurisdictions.

23 Lord Goff of Chieveley, "The Future of the Common Law" (1997) 46 Int'l & Comp LQ 745 at 749; Gunther A Weiss, "The Enchantment of Codification in the Common Law World" (2000) 25 Yale J Int'l L 435.

IV. Other options for consolidation – A restatement

13 Should the move toward codification be deemed too radical, the Australian briefing paper opens the way toward a middle road, which involves a "Restatement of Australian Contract Law".[24] While falling short of a binding code, such a document would constitute an authoritative, highly persuasive statement of contract law in Australia. As such, it, too, could provide a useful orienting pole for non-domestic parties interested in gaining an understanding of both the potential and the pitfalls of opting for Australian contract law to govern their transactions. While such an exercise appears eminently reasonable as an interim solution on the way to promulgating a code, it is important to bear several considerations in mind. First, as noted, the "restatement" would be persuasive, but not binding. It may, therefore, lead to additional confusion concerning the exact state of the law.[25] The other consideration, which is perhaps more pregnant with practical implications, is that of the doctrine to be specifically restated. As a federal state, Australia will have diverse doctrinal interpretations present in its current contract law,[26] particularly on unsettled issues, such as the use of extrinsic evidence in contractual interpretation and the scope, if any, for the application of "good faith" in interpreting contractual obligations and proper performance.

14 A restatement would, therefore, implicate the problem of whether to restate the most progressive or the most restrictive interpretation with regard to such unsettled issues. An analogy can be drawn to the Second Restatement of Torts in the United States, which in 1963[27] restated the most far-reaching interpretation of strict liability then extant as articulated by the activist California Supreme Court,[28]

24 Australian Attorney-General's Department, "Improving Australia's Law and Justice Framework: A Discussion Paper to Explore the Scope for Reforming Australian Contract Law" (2012) s 6.4 at p 19 <http://www.ag.gov.au/Consultations/Documents/ReviewofAustraliancontractlaw/DiscussionpaperImprovingAustralias lawandjusticeframeworkAdiscussionpaperexploringthescopeforreformingAustralia ncontractlaw.pdf> (accessed 3 June 2013).

25 Dr Bruno Zeller, "The CISG and the Common Law; The Australian Experience" (submission to the Review of Australian Contract Law, 2012) at pp 19–20.

26 See Australian Attorney-General's Department, "Improving Australia's Law and Justice Framework: A Discussion Paper to Explore the Scope for Reforming Australian Contract Law" (2012) ss 2.10 and 3.10 <http://www.ag.gov.au/Consultations/Documents/ReviewofAustraliancontractlaw/DiscussionpaperImproving AustraliaslawandjusticeframeworkAdiscussionpaperexploringthescopeforreforming Australiancontractlaw.pdf> (accessed 3 June 2013). See also James Allsop, "Good Faith and Australian Contract Law – A Practical Issue and a Question of Theory and Practice" 2010 Sir Frank Kitto Lecture <http://www.lawlink.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/vwFiles/allsop281010.pdf/$file/allsop281010.pdf> (accessed 10 June 2013).

27 Restatement (Second) of Torts §402A (1963–1964) (US).

28 See *Greenman v Yuba Power Products Inc* 377 P 2d 899 (1963).

thereby sparking the exponential increase in tort suits some ten years later. In short, it will be important for any "restatement committee" to reflect on those principles they wish to restate as the operative norm lest the law of unforeseen consequences take hold.

15 If Australia's goal is to reform its contract law in a usable and meaningful way, it might be best to promulgate a restatement with an attached draft code. In so doing, potential "consumers" of the law, would have a statement of theory, coupled with a statutory rendition of how such provisions would look and operate in practice. Moreover, the restatement could also seek to clarify the relationship of the draft code to other statutory pronouncements, thereby laying out ground rules and flagging potential areas of controversy. In tandem, the draft contract code could also cross-reference these statutes, providing for exceptions or otherwise clarifying the scope of application where appropriate. An explanatory and operational rendering of how the law could or perhaps should be consolidated and clarified might provide a useful benchmark for decision-making at the level of the parties, their lawyers and the judiciary, with commitment from all three stakeholders being necessary for meaningful reform. A restatement or a code, for that matter, could also sketch out the extent to which domestic Australian contract law would pay due deference to the particular approaches reflected in international instruments, such as the UNIDROIT Principles and the CISG, either by adopting or distinguishing them. Interestingly, China's Uniform Contract Law promulgated in 1999 allows for precisely this type of juxtaposition, comparison and assessment.[29]

V. Collateral benefits – Relationship to other international instruments

16 The briefing paper of the Australian Attorney-General's Department points out that international instruments, such as the UNIDROIT Principles and the CISG, are not well understood.[30] With

29 See *Law and Policy for China's Market Socialism* (John Garrick ed) (Routledge, 2012) at p 73. It is worth noting that China's Uniform Contract Law of 15 March 1999 <http://www.wipo.int/wipolex/en/text.jsp?file_id=182632> (accessed 10 June 2013) takes further inspiration from the UNIDROIT Principles; see Zhang Yuqing & Huang Danhan, "The New Contract Law in the People's Republic of China and the UNIDROIT Principles of International Commercial Contracts: A Brief Comparison" (2000) 3 *Uniform Law Review* 429 <http://www.unidroit.org/english/publications/review/articles/2000-3-zhang-e.pdf> (accessed 10 June 2013).

30 Australian Attorney-General's Department, "Improving Australia's Law and Justice Framework: A Discussion Paper to Explore the Scope for Reforming Australian Contract Law" (2012) s 5.11 at p 17 <http://www.ag.gov.au/Consultations/Documents/ReviewofAustraliancontractlaw/DiscussionpaperImprovingAustralias lawandjusticeframeworkAdiscussionpaperexploringthescopeforreformingAustralian contractlaw.pdf> (accessed 3 June 2013).

regard to the latter, the briefing paper correctly highlights the skepticism with which the CISG has been met, as national lawyers steeped in their own law are loath to opt for an international construct of which the interpretation may vary when the provisions are subjected to the disparate eyes and lenses of domestic court judges.[31] This has led some to conclude that the CISG has succeeded in harmonising rules, but not systems with the latter conditioning the manner in which the principles will be applied. The CISG is experiencing a push and pull arising from unifying desires and sovereign impulses. It is noteworthy that Japan and Korea have recently joined with a view to consolidating their role in elaborating the law of commercial sales transactions.[32] China has gone further by reforming its domestic sales law to reflect many provisions of the CISG.[33]

17 One of Australia's stated goals is to facilitate trade with its principal partners, many of whom, such as China, Japan and Korea, are in the civil law orbit.[34] Australia is a signatory to the CISG, meaning that this document, designed to be a bridge to the civil law world, is part of the Australian legislative landscape. The CISG will be the governing law of the contract with another signatory country unless the parties opt out pursuant to Art 6.[35] It might, therefore, be advisable for any reform project to explain and summarise the approach taken by the Australian courts in interpreting the CISG and to explain how such interpretations reinforce, supplement, or perhaps even contradict the body of domestic Australian contract law with regard to the international sale of goods. The point here is that with the CISG as the first step towards the formal

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31 As demonstrated by the United Nations Commission on International Trade Law's collection of case law with national court interpretations of CISG provisions <http://www.uncitral.org/uncitral/en/case_law/digests/cisg.html> (accessed 10 June 2013).

32 The entry into force for Japan was 1 August 2009 and for Korea it was 1 March 2005 <http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html> (accessed 10 June 2013).

33 Australian Attorney-General's Department, "Improving Australia's Law and Justice Framework: A Discussion Paper to Explore the Scope for Reforming Australian Contract Law" (2012) <http://www.ag.gov.au/Consultations/Documents/ReviewofAustraliancontractlaw/DiscussionpaperImprovingAustraliaslawandjusticeframeworkAdiscussionpaperexploringthescopeforreformingAustraliancontractlaw.pdf> (accessed 3 June 2013).

34 Australian Attorney-General's Department, "Improving Australia's Law and Justice Framework: A Discussion Paper to Explore the Scope for Reforming Australian Contract Law" (2012) at pp 12–13 <http://www.ag.gov.au/Consultations/Documents/ReviewofAustraliancontractlaw/DiscussionpaperImprovingAustraliaslawandjusticeframeworkAdiscussionpaperexploringthescopeforreformingAustraliancontractlaw.pdf> (accessed 3 June 2013).

35 Article 6 of CISG reads: "The parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions" <http://cisgw3.law.pace.edu/cisg/text/e-text-06.html> (accessed 3 June 2013).

harmonisation of Australian law with that of external legal systems emanating from the civil law system, no attempt at reform would be complete without addressing this document.

18 The CISG tackles issues of good faith,[36] albeit in oblique terms, and thereby offers law reformers adequate scope to clarify the use of this concept both in the application of the CISG and eventually in domestic contract law. Similarly, the CISG champions a contextual approach to contractual interpretation. In Gunther Teubner's words, the CISG may be a type of "legal irritant" introducing transplanted concepts that have not as yet been fully assimilated by the domestic law.[37] As such, it provides those interested in reforming the law with a formal object of study and perhaps also a defined way forward for enunciating such doctrinal change as may eventually render domestic Australian contract law more compatible with that of its civil law trading partners.

VI. Overall significance of the exercise – Regional implications

19 A general reform project, which encompasses a dimension aimed at clarifying the interpretation of the CISG in the Australian courts and, more broadly, that enunciates clear guidelines for contentious issues such as the use of extrinsic evidence in contractual interpretation and the scope and application of good faith is not without significance for other countries in the region. Indeed, such an exercise could be a harbinger of future developments among certain members of the Asia Pacific region, thereby leading to a common or at least a harmonised position among those states issuing from the common law tradition. The CISG provides an ideal laboratory as this treaty is common to Singapore, New Zealand and Australia.

20 The CISG provides much raw material for clarifying certain aspects of contract law, particularly as they relate to those issues touched upon, but perhaps left unresolved by the CISG. Good faith offers one such area. The well-known CISG provision in Art 7(1) states that "[i]n the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade".[38] This has led certain commentators from the common law world to view this provision as a dead letter, requiring only some form of due regard,

36 CISG Art 7 <http://cisgw3.law.pace.edu/cisg/text/e-text-07.html> (accessed 3 June 2013).

37 Gunther Teubner, "Legal Irritants: Good Faith in British Law or How Unifying Law Ends up in New Divergences" (1998) 61(1) MLR 11 at 11.

38 CISG Art 7 <http://cisgw3.law.pace.edu/cisg/text/e-text-07.html> (accessed 3 June 2013).

while prompting their civil law brethren to view the provision as a quasi-adoption of the principle.

21 Domestic courts within the common law orbit have moved toward a type of halting, some might say crypto, recognition of the concept in their domestic jurisprudence. With regard to defining the content of "good faith," Lord Bingham held in *Director General of Fair Trading v First National Bank plc*[39] that good faith encompasses a notion of "fair dealing".[40] Australia itself has drifted toward a *de facto* recognition of the principle with regard to express commitments to negotiate in good faith in cases such as *Aiton Australia Pty Ltd v Transfield Pty Ltd*,[41] while acknowledging that a precise definition of the concept remains elusive.[42]

22 In an interesting and important case from the Singapore Court of Appeal, V K Rajah JA, referring to the cases mentioned above and speaking for the court, espoused the view that express clauses requiring that disputes be settled in good faith merited legal recognition by the court. The language and operative reasoning sought, *inter alia*, to reconcile cultural as well legal attitudes toward this concept:[43]

> We think that the 'friendly negotiations' and 'confer in good faith' clauses highlighted in the above quotation are consistent with our cultural value of promoting consensus whenever possible. *Clearly, it is in the wider public interest in Singapore as well to promote such an approach toward resolving differences.* [emphasis in original]

23 With regard to the sensitive area of whether an implied duty of good faith governs the parties' exercise of contractual rights, the Australian High Court has yet to speak, thereby leaving another patchwork of cases from the federal states to define the area, with *Renard Constructions (ME) Pty Ltd v Minister for Public Works* ("*Renard Constructions*")[44] constituting one of the more seminal and forward-leaning interpretations in this regard. Moreover, whether an implied duty of good faith, if found to exist at all, should be implied as a matter of fact or law continues to divide the states, leading to additional questions about the scope, effect and content of any such putative duty.[45]

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39 [2001] UKHL 52.

40 *Director General of Fair Trading v First National Bank plc* [2001] UKHL 52 at [36].

41 (1999) 153 FLR 236.

42 *Aiton Australia Pty Ltd v Transfield Pty Ltd* (1999) 153 FLR 236 at [81]–[84] and [132]. For a more recent case and similar holding, see also *United Group Rail Services Ltd v Rail Corp New South Wales* [2009] NSWCA 177; (2009) 74 NSWLR 618.

43 *HSBC Institutional Trust Services (Singapore) Ltd v Toshin Development Singapore Pte Ltd* [2012] 4 SLR 738 at [40].

44 (1992) 26 NSWLR 234.

45 Compare, for example, *Esso Australia Resources Pty Ltd v Southern Pacific Petroleum N L* [2005] VSCA 228, holding that a duty of good faith could be implied into

(*cont'd on the next page*)

As one author wryly puts it, since *Renard Constructions*, "whole forests have been felled to produce judicial and academic writing on the meaning of good faith in contract law".[46]

24 A reform project, such as the one proposed by Australia, would provide an ideal vehicle for enunciating the state of the law or its desired direction. As mentioned, such an exercise and those carrying it out must be mindful of the need to avoid creating further confusion, but if done with sufficient measure this pitfall can be avoided. Increasingly, a number of the key issues, including contextual interpretation and good faith, are surfacing in diverse jurisdictions, giving rise to the piecemeal interpretation and incremental legal development that are the hallmarks of the common law tradition and its focus on "controlled" flexibility.[47] It may be, however, that the time has come to help this process along with formal statements to serve as guideposts for the law.

25 Sceptics will assert that common law evolution has served societal interests, noting that attempts at imposing codified solutions have been resisted.[48] The reflexive opt-out by common law parties from the CISG lends support to this thesis.[49] It may be that the attempt to update or consolidate Australian contract law could obviate rather than exacerbate such situations. A "restatement" would be an opportunity to look out over the geographical and legal horizon and to make some judgments as to what approaches from the panoply of international instruments currently at the parties' disposal should be integrated into Australian contract law. As a domestic initiative, the Australian context

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some commercial contracts as a matter of fact to affect certain contractual rights and powers, with *Alstom Ltd v Yokogawa Australia Pty Ltd (No 7)* [2012] SASC 49, holding that every commercial contract can be deemed to incorporate an implied duty of good faith.

46 The Honourable Marilyn Warren AC, "Good Faith: Where are We at?" (2010) 34 *Melbourne University Law Review* 344 at 345.

47 See, for example, James Allsop, "Good Faith and Australian Contract Law – A Practical Issue and a Question of Theory and Practice" 2010 Sir Frank Kitto Lecture <http://www.lawlink.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/vwFiles/allsop281010.pdf/$file/allsop281010.pdf> (accessed 10 June 2013).

48 See, for example, The Honourable Thomas Frederick Bathurst, "Codification of Contract Law – A Flawed Proposal" (Submission to the Review of Australian Contract Law, 2012) at pp 8–11; Andrew Stewart, "What's Wrong with the Australian Law of Contract? (Submission to the Review of Australian Contract Law, 2012) and Law Council of Australia, "Response to Discussion Paper 'Improving Australia's Law and Justice Framework: A Discussion Paper to Explore the scope for Reforming Australian Contract Law'" (Submission to the Review of Australian Contract Law, 20 July 2012).

49 Dr Bruno Zeller, "The CISG and the Common Law: the Australian experience" (Submission to the Review of Australian Contract Law, 2012) at p 19; Luke Nottage, "The Government's Proposed 'Review of Australian Contract Law': A Preliminary Positive Response" (Submission to the Review of Australian Contract Law, 2012) at p 11.

would furnish the guiding ethos, yielding areas that could be clarified or "rounded off" to provide a better fit with external developments and, more amorphously but just as importantly, expectations. Such an exercise could, therefore, constitute a type of bridge between the existing denationalised propositions, such as the UNIDROIT Principles and the CISG, and the domestic context, providing a road map to parties as to the manner in which such instruments are likely to be used and interpreted by domestic courts. With the "restatement" safeguarding flexibility while giving predictability to the manner in which such international or transnational instruments will be used, the exercise may give Australian contract law a greater cross-border coherence and, in so doing, enhance the utility of existing instruments for facilitating trans-border trade. More broadly, a harmonised approach among the common law members of ASEAN propelled by a domestic reform effort or efforts could also facilitate commercial relations with ASEAN's non-common law members, thereby giving the bloc greater but still flexible coordination at a time when trade and tighter economic integration are at the forefront of the agenda.

VII. Conclusion – "Failure" is an option

26 Sceptics point to the protracted process and limited success that Europe has had in developing a transnational civil code or in harmonising specific parts of the civil law.[50] The Principles of European Contract Law have provided a loose non-binding framework, but still fall far short of the law reformers' broader aspirations regarding a unified European civil law.[51] This has prompted certain commentators to look upon organised reform efforts with scepticism, citing their unwieldiness and low probability of success and, conversely, the efficacy of incremental, organic reform. The argument holds that the reform exercise is unnecessary and is more likely than not to fail. Accordingly, the exercise itself is not worthwhile. It may be, however, that "failure" is an option and a somewhat attractive one at that. Even if the reform exercise does not lead to a formal binding code, an unlikely outcome (or even a formal restatement) may be that the exercise itself will prove worthwhile. If staffed by individuals possessing the requisite prestige, knowledge and commercial experience, such an exercise could produce useful work regarding the future direction of the law. It may be that not all of the contentious issues will be settled, but perhaps some of them

50 Martin Doris, "A Submission on "Improving Australia's Law and Justice Framework – A Discussion Paper to Explore the Scope of Reforming Australian Contract Law" (Submission to the Review of Australian Contract Law, 2012) at p 5.

51 The Honourable Thomas Frederick Bathurst, "Codification of Contract Law – A Flawed Proposal" (Submission to the Review of Australian Contract Law, 2012) at pp 6–7.

will be suitably resolved, allowing for authoritative restatements to be issued on these topics.

27 At the dawn of the 21st century when commerce is more integrated than ever before and jurisdictions are striving to make themselves commercially flexible, exercises geared at creating a common legal grammar, if not a common substantive law, are not to be unduly discarded or prematurely quashed. There is an evolving transnational legal architecture in the form of the CISG, diverse instruments such as the UNIDROIT Principles and the Principles of European Contract Law, and the developing set of best practices in transnational arbitration.[52] To the extent that a law reform commission looks at this environment and the related substantive issues from a systematic and systemic perspective designed to make domestic law more compatible with these approaches, or to highlight relevant differences, such an exercise offers immediate utility. It is not so much that "failure is an option," but rather that the exercise will not "fail" if it is carried out and viewed in this light.

28 Common law jurisdictions have varying degrees of resistance to the type of organised law reform carried out in many civil law jurisdictions and in the European Union. The development of the aforementioned UCC in the US, spearheaded by Professor Karl Llewelyn, much of whose training was carried out in Germany, constitutes one somewhat exceptional instance of significant cross-over in this regard. However, the exercise proposed by Australia, and which could perhaps be picked up by other common law jurisdictions in the region, need not be as full-blown as that leading to the development of the UCC. Rather, a systematic examination of the case law and relevant statutes compared to the approaches taken to certain core issues in existing international instruments could provide a rough initial framework for the inquiry. This framework could then be developed as required to encompass additional issues. Conversely, a reform exercise could seek to deal with the whole of domestic law, while highlighting those issues of particular significance to trans-border commerce. The point is that the reform process could be organised in a number of different ways with different types of scope and emphasis. Moreover, even if the exact contours are ill-defined and the precise end point of the process unclear, these obstacles should not undermine the attempt. The commercial stars may have aligned to render some form of "rationalisation" of an idea whose time has come.

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52 Geoff Lindsay, "The Common Law Tradition: Contract Law in an Age of Statutes" (Revised paper delivered on 29 March 2012, at the Centre for Continuing Legal Education of the Faculty of Law, University of New South Wales) at pp 63–65.

29 There is a manifest convergence of legal systems arising from globalisation and the increasing interaction of common law and civil law legal systems.[53] As these links intensify through the growing network of free trade agreements and bilateral investment treaties, the increasing importance of regional groupings, such as ASEAN and the European Union, and the active promotion of new trade initiatives, such as the Trans-Pacific Partnership Agreement presently under negotiation, exercises aimed at rendering the common law easier to navigate and apply should not be avoided for reasons of difficulty or blind adherence to one's own tradition and practices. A more practical and organised approach to law reform, particularly in an area with transnational implications, would appear to be a useful way to bridge the civil law-common law divide and in so doing to place Australia and other like-minded progressive common law jurisdictions at the forefront of commercial developments in the region. Indeed, it may be that the Australian exercise could serve as a type of template for other common law jurisdictions in the region, including Singapore, whose commercial aspirations and future prospects will increasingly depend on a legal system that interfaces harmoniously with the substantive law, procedures and attitudes of its partners both within and without the region, with a view to promoting elastic, yet predictable legal dialogue and resulting commercial certainty.

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53 See Katja Funken, "The Best of Both Worlds – The Trend towards Convergence between the Civil Law and the Common Law System" (2003) *European Law eJournal* 24 <http://www.researchgate.net/publication/228224746_The_Best_of_Both_Worlds_-_The_Trend_Towards_Convergence_of_the_Civil_Law_and_the_Common_Law_System> (accessed 10 June 2013).