Codifying Contract Law

International and Consumer Law Perspectives

Edited by
Mary Keyes and
Therese Wilson

Markets and the Law

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Preface

This book arose out of a symposium held in Bali, Indonesia, in May 2013, at which the authors engaged in lively debate concerning the question of codifying contract law. As reflected in this book, the authors' viewpoints were many and varied, which made for wonderful discussions in Bali and, it is hoped, will provide the impetus for on-going debate and discussion for readers of this book.

We would like to sincerely thank all of the authors, not only for their contributions but also for their excellent company as we enjoyed together the Balinese hospitality of The Mansion, Ubud.

Thanks also to Griffith Law School for generously funding the symposium, and most particularly to the Griffith Law School Dean, Professor William Macneil and Griffith Law School Deputy Head Research, Professor Brad Sherman, for their support. Special thanks is due to the Griffith Law School Manager, Carol Ballard and her assistant, Madonna Adcock, for their hard work in making sure that everything ran smoothly in Bali.

Finally, we would like to say how much we have enjoyed working together on this project, having been friends and colleagues for some years now with the intention of combining efforts at some point, but never really seizing the opportunity until now. It has truly been a pleasure.

Mary Keyes and Therese Wilson

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1 Introduction

On 22 March 2012 the Australian federal Attorney-General's Department released a discussion paper on reform of Australia's contract law,[1] and invited submissions.[2] This prompted a debate as to whether Australian contract law was in need of reform, as well as to the form which any such modification ought to take.[3] Many submissions considered the possibility of a codification or restatement of Australian contract law, citing such reasons as the need for greater certainty and predictability of Australian contract law, and internationalization of Australian contract law with a view, for example, to attracting international litigation and arbitration to Australia.[4]

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1 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) ('Discussion Paper').

2 A number of these submissions are referred to in detail in Nottage, Chapter 7 in this collection.

3 There have been several previous proposals to codify Australian contract law. See particularly Joseph G Starke 'A Restatement of the Australian Law of Contract as a First Step Towards an Australian Uniform Contract Code' (1978) Australian Law Journal 234; Victorian Law Reform Commission, An Australian Contract Code, Discussion Paper No 27 (Victorian Law Reform Commission 1992); MP Ellinghaus and EW Wright, Models of Contract Law: An Empirical Evaluation of their Utility (Federation Press 2005). Since the chapters in this collection were completed, three Australian academics who have been enthusiastic proponents of codification have presented the Australian Attorney-General with a 'Draft Australian Law of Contract', in response to the Attorney-General's Discussion Paper. The Draft Australian Law of Contract claims to simplify and modernize the Australian law and to harmonize it with the law of other countries: MP Ellinghaus, D StL Kelly, EW Wright, 'A Draft Australian Law of Contract' (Newcastle Law School, Working Paper No 03.03.14, 2014, available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2403603> accessed 15 July 2014).

4 See generally <http://www.ag.gov.au/Consultations/Documents/SubmissionstotheReviewofAustralianContractLaw> accessed 15 July 2014.

Australia is an interesting case study for this discussion, as it is a common law country whose contract law is to be found primarily in case law alongside a myriad of statutes that might apply to particular categories of contract. The general body of contract law is largely unchanged from the English law inherited by Australia in the nineteenth century. It is almost universally accepted that there is room for clarification, refinement and improvement with respect to many aspects of Australian contract law,[5] and some academics and lawyers believe that the challenge of securing a place for Australian contract law in international trade litigation and arbitration also requires consideration.[6] Is codification an appropriate mechanism for addressing these concerns?

A code has been defined as:

> … an instrument enacted by the legislature which forms the principal source of law on a particular topic. It aims to codify all leading rules derived from both judge-made and statutory law in a particular field … it has an organizing and indexing role that an ordinary statute does not share.[7]

Whether such an instrument can function effectively within the context of common law methodology, or without causing law to become unnecessarily and unhelpfully rigid, are questions that have been raised by a number of common law scholars.[8]

Whether codification is a necessary or desirable step towards internationalization is another contested question. Skinner writes that:

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5 These are comprehensively identified by Bigwood, in this collection, Chapter 8, text accompanying nn 6–15, with references. See also N Seddon, R Bigwood and M Ellinghaus, Cheshire and Fifoot Law of Contract (10th Australian edition, LexisNexis Butterworths 2012), xi; Andrew Stewart, 'What's Wrong With the Australian Law of Contract?' (2012) 29 Journal of Contract Law 74.

6 See, especially, Paul Finn, 'Internationalisation or isolation: The Australian cul de sac? The case of contract' in Elise Bant and Matthew Harding (eds) Exploring Private Law (Cambridge UP 2010), ch 2; Don Robertson, 'The International Harmonisation of Australian Contract Law' (2012) Journal of Contract Law 1. Although as a party to the United Nations Convention on Contracts for the International Sale of Goods ('CISG') Australia already has what might be called a 'partial' international contract law code that applies to contracts involving Australians and nationals from other signatory states, or that will apply where, under private international law rules, Australian law applies to a contract for the international sale of goods: see CISG, Art. 1(1)(a) and (b). The Attorney-General's Discussion Paper (n 1) followed a substantial review of the Australian legislative framework for international commercial arbitration, which led to reforms to the International Arbitration Act 1974 (Cth).

7 Catherine Skinner, 'Codification and the Common Law' (2009) 11(2) European Journal of Law Reform 225, 228.

8 Ibid. See generally discussion at 229–231.

> With its disparate nature, the common law may be unfit for export. By failing to explore the possibilities of codification, common law jurisdictions could be missing an opportunity to make meaningful contributions to global legal development.[9]

This is a matter of some concern to a number of Australian lawyers[10] although others might argue that codification itself inhibits any legal development, let alone global legal development, and that the flexibility of the common law remains superior.[11]

Notwithstanding some common law resistance to codification, there are examples of legislation enacted in common law jurisdictions, including Australia, which come close to satisfying the definition of 'code' given above. Some of these statutes have contributed significantly both to improving the certainty and the logical development of an area of law. These statutes are examples of partial or sectoral codification, refining the law in its application to particular issues or sectors.[12] One example is the English Sale of Goods Act 1893, which Atiyah describes as a 'declaratory Act' in the sense of declaring the law on a particular subject matter.[13] While the Act specifically preserves the application of the common law and is in that sense not a code, the comprehensiveness of this legislation is said to have caused judges to focus on the language of the statute and its natural meaning, without applying pre-statute case law, thus breaking with traditional common law statutory interpretation methods.[14]

A more recent example is the UK Arbitration Act 1996 which aimed at being a clear statement of the English law of arbitration, to be interpreted by the courts without reference to pre-statute case law, drawing instead on the legislation's overall purpose.[15] In terms of the internationalization imperative that is often associated with recent codification projects, it has been noted that the UK Arbitration Act 1996 has:

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9 Ibid, 226. See also Roy Goode, 'Insularity or Leadership? The Role of the United Kingdom in the Harmonisation of Commercial Law' (2001) 50 International and Comparative Law Quarterly 751.

10 See generally <http://www.ag.gov.au/Consultations/Documents/SubmissionstotheReviewofAustralianContractLaw> accessed 15 July 2014.

11 Skinner, 'Codification and the Common Law' (n 7), 228–231.

12 In relation to partial codification, see Bigwood in this collection, Chapter 8. In relation to sectoral codification, see Micklitz in this collection, Chapter 5.

13 Patrick Atiyah, 'Common Law and Statute Law' (1985) 48(1) The Modern Law Review 1, 16. The United Kingdom Sale of Goods Act is the basis of legislation of the same name enacted in all Australian states and territories: for example, Sale of Goods Act 1923 (NSW).

14 Discussed in Skinner, 'Codification and the Common Law' (n 7), 233, citing Lord Herschell in *Vagliano v The Bank of England* [1891] AC 107 at 144.

15 Ibid, 234, citing the House of Lords in *Lesotho Highlands Development Authority v Impregilo Spa and others* [2006] 1 AC 221.

> ... significantly enhanced London's attractiveness as a centre for national and international arbitration, which was one of its express purposes.[16]

In the United States, the Uniform Commercial Code has been described as a highly successful Code which has provided legal clarity while maintaining flexibility, and led to interpretation based on the purpose of the code and on drawing analogies with the principles on which it is based, rather than interpretation based on case law precedent. This is said to have been made possible by: its comprehensiveness as a Code; the direction contained in Article 1-103[17] to construe the code consistently with its underlying purposes, notwithstanding a preservation of common law and equitable principles where not inconsistent with the provisions of the code; and the extensive commentaries and guidelines that accompany its Articles.[18] This is a model worthy of consideration in any codification project in a common law jurisdiction.

Many of the questions and issues that arise with respect to codification of law are explored in this book. The book commences with a discussion on the internationalization imperative for codification of contract law. It then turns to regional issues, exploring firstly codification attempts in the European Union (EU), in Japan, and then issues relevant to codification in the common law jurisdictions of Australia, New Zealand and the United States. Codification in common law systems brings its own challenges, in the sense that whereas a Code is intended to provide the solution to any legal question related to its content without resort to outside legal sources, in a common law system case law precedent would always have to be relevant to at least the interpretation of the Code's provisions.

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16 Ibid, 235. A similar purpose was a key motivation for recent amendments to the International Arbitration Act 1974 (Cth): Mr McLelland (Attorney-General), International Arbitration Bill 2010, Second Reading, Commonwealth of Australia, House of Representatives, Hansard, Wednesday 25 November 2009, p 12,790.

17 § 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.

(b) Unless displaced by the particular provisions of [the Uniform Commercial Code], the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, and other validating or invalidating cause supplement its provisions.

18 Atiyah, 'Common Law and Statute Law' (n 13), 27; Skinner, 'Codification and the Common Law' (n 7), 240, 245.

2 The Internationalization Imperative

The first chapter by Mary Keyes, 'The Internationalization of Contract Law', uses Australian contract law as an example of a system in need of internationalization, in the senses of ensuring the suitability and relevance of the law to a context in which many contracts have cross-border elements and particularly taking into account important legal developments which have occurred in response to that context in many other legal systems, including England and several Asian countries. Keyes describes an insularity and parochialism in both Australian contract law and Australian private international law that extends to legal education, which focuses almost exclusively on domestic contract law. Most law schools do not mandate the study of any aspect of internationalization of the law; for example, most curricula neglect the United Nations Convention on Contracts for the International Sale of Goods ('CISG'), to which Australia is party and which therefore forms part of Australia's contract law pertaining to international sale of goods contracts. Private international law is generally treated as a separate area of law from the several areas of private law, including contract. Keyes also describes Australian contract law as uncoordinated, noting in particular the confusing lack of integration between statute and common law, which may be exacerbated in international cases. The tendency of Australian courts to assert jurisdiction in international disputes is said to support the need for a less parochial Australian contract law. The chapter concludes that Australian contract law and private international law are not appropriate to a context in which cross-border transactions are common, and suggests that the reform of Australian law should be informed by recent international developments.

Schwenzer's chapter on 'Regional and Global Unification of Contract Law' takes the internationalization debate more broadly, beyond the Australian case study. It explores the need for a comprehensive, international contract law code for commercial contracts which expands upon the CISG and deals with areas not covered by it, such as contract validity. Schwenzer argues that such internationalization is important for commercial contracts given the significant increase in international trade in recent years. On the other hand, she argues that consumer contracts are best left to regulation by domestic legal systems. This raises an interesting question as to the appropriate scope of any codification project. Should it focus on international and commercial contracts, leaving international consumer contracts, and perhaps other international contracts in which one party is presumed to be more vulnerable than the other,[19] to be dealt with by a domestic contract law system chosen to govern any disputes arising under the contract? Is it not equally important that consumer contract law be clear and accessible across state boundaries? Is it not the case that consumer contracts are often the clearest examples of unequal bargaining power in contractual relationships? This is important because Schwenzer provides as an impetus for a uniform, international

19 For example, contracts of employment and insurance contracts.

commercial contract law code the problem of commercial contracts involving parties with unequal bargaining power. As she notes, this disparity in bargaining power might result in the law of the stronger party's jurisdiction being chosen to govern any dispute arising under the contract, often to the detriment of the weaker party.[20] Schwenzer's other concern relates to parties with equal bargaining power who may choose what they perceive to be a 'neutral' third law to govern the contract, not really understanding the nature and content of the law that they are choosing. She suggests that this kind of problem is best addressed by the development of uniform law.

The third chapter focusing on the question of internationalization of contract law is Wilson's 'The Challenges of Good Faith in Contract Law Codification'. Wilson asks whether, if internationalization is an important consideration in any codification project, this should include the incorporation of the good faith doctrine, as derived from civil law systems and subsequently incorporated into many international instruments,[21] into the contract law of a common law system. Wilson argues that part of any internationalization of Australian contract law should be the incorporation of the good faith doctrine, given that this is a doctrine well understood by lawyers in nation states with which Australia engages in international trade, both from civilian systems and other systems the law of which has been influenced by civil law codes. Good faith is a doctrine which many of Australia's trading partners might expect to find in the law governing their contract, to protect against unfair advantage-taking at the pre-contractual negotiation, contract performance and contract termination stages. The chapter seeks to address the concerns of common lawyers regarding the alleged 'uncertainty' of good faith, by noting that the concept is not so far removed from, and is no more or less difficult to clearly articulate than, an obligation to act with good conscience, which is the foundation of equitable doctrines, many of which apply to contracts. The chapter then goes on to note, however, that in seeking to internationalize a domestic body of law or to develop an international code, existing domestic legal systems may be resistant to foreign legal concepts. Those concepts become what Teubner calls 'legal irritants'[22] which will be re-moulded and re-shaped by the host system. The changes will not be a neat 'transplant' but an organic re-shaping through which, in the same way that languages develop, the law can develop to allow for international understandings. While the doctrine of good faith may change in the Australian context and this might also result

20 This is regulated in many legal systems, but not explicitly in Australia, by protective principles which limit the effect of choice of law agreements in contracts involving consumers and employees: for example, Rome I Regulation, Art.6 (consumers), Art.7 (insureds), Art.8 (employees).

21 For example, UNIDROIT Principles of International Commercial Contracts 2010, Art 1.7.

22 Gunther Teubner, 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences' (1998) 61(1) The Modern Law Review 11.

in changes to the doctrine in other jurisdictions, it is argued that this may have a generally positive effect in the sense of enhancing commonalities in the development of international understandings of contract law.

3 Regional Perspectives on Contract Law Codification

Focusing on the EU and its predominantly civil law context, Micklitz raises concerns regarding the very nature of codification in a 'market state' environment in his chapter: 'Codification Mania and the Changing Nation State: A European Perspective'. Micklitz regards the development of civil codes in Europe as having been part of nineteenth-century nation building strategies, but argues that codification in the context of the new EU market state needs to be approached differently. Referring to the failed European Civil Code project in 2001, Micklitz argues that the project had been too deeply rooted in 'nation state thinking'. It is nation state thinking which focuses on traditional areas of private law such as contract and tort, using concepts such as freedom of contract to build capitalist economies. Developing private law at the EU level requires very different thinking, as the EU is not a nation state. Micklitz questions the very possibility of systematization and rationalization of law through any codification which is intended to operate beyond nation states, given that each state might be viewed as a subsystem governed by particular rationalities. The development of private law through a *market* state such as the EU as opposed to a nation state, should, according to Micklitz, be concerned with the development of law regarding 'economic transactions with a social outlook', with a view to building both an economic and a social order beyond national economies and societies. Micklitz also explores the idea that the systematization of an area of private law such as contract law may be redundant in the market state context and that there needs to be a move away from 'traditional private law' to 'new regulatory private law'. He notes that there are a number of market subsystems requiring their own distinct regulation or systematization, for example in the areas of energy, telecommunications and financial services. He also argues that consumer law should be kept separate from the private law regulation of commercial law, due to the focus of consumer law on the pre- and post-contractual stages, rather than on contract formation, revocability of offers and so forth. Certainly, the chapter calls upon us to consider a more sophisticated and nuanced approach to the codification or systematization of contract law, particularly where the proposed code is an international, 'market state' focused code rather than a national one.

Continuing to explore codification in a civil law, but national, context is Sono's chapter entitled 'Integrating Consumer Law into the Civil Code: A Japanese Attempt at Re-codification.' While Schwenzer and Micklitz oppose the incorporation of consumer law into contract law codes, at least where they are codes of an international nature, Sono considers the possibility of an integration of consumer law into the domestic Japanese Civil Code (JCC). He refers to the

on-going reform of the JCC, in particular regarding contract law in Book 3. The impetus for reform is said to be the need for modernization, transparency and global harmonization. In keeping with all of these goals, there was a proposal to integrate the Japanese Consumer Contracts Act (CCA) and case law pertaining to consumer contracts into the JCC. This would serve the purpose of modernization through recognizing the consumer – and most importantly the vulnerable consumer – as a 'person' under the JCC in place of its traditional assumption that contracting parties were strong and rational. It would assist in transparency and clarity as the JCC would serve as a true Code, not needing to be supplemented by Acts such as the CCA or case law; and it would also assist with global harmonization. Sono describes how, under pressure from both business groups and consumer advocates who opposed the integration of consumer law into the JCC (the former due to concerns about paternalism and the latter due to concerns about difficulties in amending law as necessary once it became embedded in the Code) the full integration of the CCA into the JCC was abandoned. The proposal for reform of contract law under the JCC through the incorporation of consumer law principles is now confined to the inclusion of a duty of disclosure on business where silence can amount to 'fraud by silence'; consideration being given to unequal bargaining power in applying good faith provisions; a principle of 'gross disparity', similar to the equitable concept of unconscionability; and rules regarding the incorporation of standard terms that cause excessive disadvantage to one party. Sono concludes by suggesting that while the abandonment of a comprehensive codification of consumer law may be regarded as disappointing by some, it does leave consumer law with the space to develop through targeted legislation and case law, which may be an appropriate outcome for this area of law.

The focus of the book then shifts to the national, common law contexts of Australia, New Zealand and the United States.

Nottage's chapter is entitled 'The Government's Proposed Review of Australia's Contract Law: An Interim Positive Response'. Nottage notes the need for greater certainty, accessibility, harmonization and internationalization of Australian contract law, which he describes as confusing and complex. Contrary to the positions taken by Schwenzer and Micklitz in their chapters, Nottage does advocate for consumer issues to be part of any contract law codification. In the Australian context this is important because of the current confusion and uncertainty surrounding consumer law, not least because of the various and conflicting definitions of 'consumer' incorporated into the Australian Consumer Law.[23] Given the reliance by consumers on what Nottage refers to as 'background contract law for minimum standards of protection', the interests of consumers under consumer contracts would be well served by increasing the clarity and accessibility of consumer contract law. Nottage regards codification as an opportunity to improve, modernize and internationalize Australian contract law. The chapter concludes with suggestions for reform which do involve considerable

23 Australian Consumer Law 2010 (Cth).