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The Australasian Law Teachers Association (ALTA) is a professional body which represents the interests of law teachers in Australia, New Zealand, Papua New Guinea and the Pacific Islands.

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- (d) Professional development opportunities for legal academics;
- (e) Professional legal education and practices programs.

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**INTERNATIONALISATION AND THE TEACHING OF  
CONTRACT LAW**

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## I INTRODUCTION

Perhaps it is fitting to start the paper with a question namely ‘what is the purpose of teaching contract law?’ Such a question would draw a multitude of responses. The obvious answer would be; because it is a compulsory unit. An extended answer would include the observation that it is useful to teach students the principles of contract law. How many contract syllabuses contain simply a listing of contract rules such as ‘the elements of estoppel’ followed by a multitude of cases. In other words, the teaching of contract law takes precedent over critical thinking and understanding of legal principles.<sup>1</sup>

This begs the question whether the purpose of contract law is a memory game, namely to test how many cases a student can remember and apply to the correct principle such as formation of contract, or to recognise in case law principles which fit into the legal concepts and hence foster legal reasoning. The fact that the former does not deliver the expected outcome can be demonstrated. Most students who fail contract law do so because they have not understood the legal principles underpinning contract law. If the question were asked; ‘explain acceptance and list relevant case law to support your answer’, very few students would fail.

It is for this particular reason that this paper will look at the teaching of contract law in a different light which no doubt will draw comments from the ‘traditionalists’. It is accepted that most cases are resolved on the facts. The law is only applied if the facts are unclear and some interpretative mechanism is needed to find the solution. Furthermore the starting point to any unraveling of a contractual dispute is the contract and not contract theory.

It is therefore the contention of this paper that the answer to the question regarding the purpose of teaching contract law is to foremost assist students to think critically and

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<sup>1</sup> This does not mean that the writing of text books should necessarily follow the same paths. It is useful to fall back to the rules which are as an example necessary in forming a contract and finding the relevant case law. However, as noted this is the task of the text book but not the task of a contract lecturer.

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2006 Refereed Conference Papers**

understand legal concepts and reasoning by using contract law to fill in the gaps. It is the 'critical thinking' part which is the primary object. Contract law is merely the vehicle by which this goal is achieved. This paper does not intend to give a complete answer to the problem but rather it is intended to be the opening salvo in the debate

It will be demonstrated that emphasis should be given to the internationalisation of contract law. Such an approach could be extended to the teaching of the law of obligation. As a result the learning of contract case law becomes secondary. It is not suggested that the teaching of case law and contract rules should be abandoned. The suggestion is that students in order to support their learning will need to rely on rules and cases to give authority to conclusions they may draw.

In brief, the principles of the law of obligation are not confined to a single legal system. These principles are universal and hence international in character. The starting point to the law of obligation must be domestic law.

Most contract teachers unfortunately are either not aware of, or ignore the fact that another body of State contract law, namely the United Nations Convention on Contracts for the International Sale of Goods (CISG) is also part of contract law. The need to understand the total body of contract law in any state is self-evident, as failure to determine the correct law governing a contract may probably amount to malpractice. The fact that the CISG is not applied very often in Australia is no excuse in dismissing this important area from the curriculum. The introduction of the CISG is made on the grounds that teachers have an 'obligation to their students and [to the students' future clients] to familiarise themselves with the body of contract law which is the law [of Australia] and is applicable to contracts worth [millions] each year'.<sup>2</sup>

Much can be learnt considering that the CISG, like any other convention, is a political compromise which took note of all major legal systems at the time of its drafting. This makes this convention an ideal tool for teaching, as the CISG displays differences as

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<sup>2</sup> William Dodge, 'Teaching the CISG in Contracts' (2000) 50 *Journal of Legal Education* 72, 94.

well as similarities with the common law, and provides an ideal starting point to question solutions to contractual problems.

Furthermore the traditionalist approach also ignores the fact that the common law solution to say the formation of contracts is not the only solution. Hence in a comparative sense civil law should also be drawn into the discussion to highlight the fact that internationally a common principle attracts divergent solutions.

There is no doubt that internationalisation of the curriculum should be an integral part of legal education. Then why and how can contract law, which is a compulsory subject, be internationalised?

The answer is that the scope of contract law can be widened to include all domestic legislation which moulds and forms contract law such as the *Sales of Goods (Vienna Convention) Act*<sup>3</sup>. Most importantly a domestic legal practitioner appearing in a domestic court on behalf of a local client can come into contact with international law. Furthermore, where appropriate, reference should also be made comparatively to the proposed solutions of other legal systems, notably the civil law system. In the end the important part of any subject - and contract law should be no exception - is to teach students to think critically about legal rules and find a logical solution to a contractual dispute. Contract law is not only confined to the subject 'Contracts 1', it influences economic life in general. Employment, arbitration, conflict of laws and family law just to mention a few areas of law, are reliant on contractual principles. This is a powerful argument to teach principles of contract law which result in the ability to think critically about contractual problems. Only students who mastered this part will acquire a tool which is readily transportable and can be applied successfully in other legal areas.

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<sup>3</sup> This Act has been introduced in all States of the Commonwealth including the Territories in identical form.

## II AN OVERVIEW

### A *A Cautionary Tale Perry Eng. P/L. v Bernold AG*<sup>4</sup>

This case is an illustration and warning to those who ignore the CISG or are not aware that an international sale is governed by the CISG. A plaintiff in Australia tried to sue a Swiss firm. The contractual term was:

[t]he Contract shall be deemed to have been made in the State of South Australia and all matters relating directly or indirectly thereto or arising directly or indirectly therefrom shall be governed in all respect by the Laws of the State of South Australia and the parties submit to the exclusive jurisdiction of the State of South Australia Courts.<sup>5</sup>

The plaintiff relied on the South Australian *Sale of Goods Act*. As Burley J. correctly pointed out the CISG is part of the law of South Australia and hence the CISG, and not the Goods Act, is applicable. Burley J commented that: ‘The statement of claim has been drawn up on the assumption that the South Australian Sale of Goods Act applies. This seems to me to be fatal to the plaintiff's ability to proceed to judgment.’<sup>6</sup>

It is surprising that the earlier four appearances by Perry Engineering were not forcibly rejected on the grounds that the wrong law has been applied.

This example highlights the fact that teaching of contract law needs to be extended in order for students to be able to understand legal rules and understand the significance of these rules in an international context. It is obvious that there are a limited number of allotted hours which are available to teach this subject. However it is argued that too much time is spent analysing case law. By concentrating on legal principles case law is understood as supporting and giving authority to the principles. Students, given the right tools, will be able to extend their reading and analyse case law independently. Arguably once the principles are understood in a wider context, that is the general principles of formation, terms, breach of terms and remedial aspects are

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<sup>4</sup> No. SCGRG-99-1063 [2001] SASC 15.

<sup>5</sup> Ibid.

<sup>6</sup> Ibid.

explained, case law follows logically and can be explored by students with minimal help from lecturers.

### ***B The Law of Obligation***

The first point, which needs to be put across to students, is the nature of contract law. Contractual obligations are based on consent and hence contract law delivers a set of default rules. It saves parties the need to negotiate all obligations they wish to enter into.

Contract law in its doctrinal context is part of the wider law of obligations.<sup>7</sup> Of the three elements in determining the obligations owed by individuals to each other only one, namely to perform and keep promises, is governed by contract law. To avoid causing harm is regulated by the law of torts and to restore certain unjust gains by the law of restitution. This would lead to the understanding by students that all laws float in a sea of municipal laws and hence are interrelated.

## **III EXAMPLES WHERE INTERNATIONALISATION OF CONTRACT LAW CAN TAKE PLACE**

Considering that the purpose of this paper is to open the debate on a change in teaching of contract law only two instances will be referred to where an internationalisation of the curricula is possible. There are of course other areas, such as the parole evidence rule, which should and could be useful tools in any curriculum.

### ***A Contract Formation***

Several issues in contract formation lend themselves to the introduction of international instruments. The most obvious issues are first, firm offers, secondly the mailbox rule, and thirdly the battle of the forms.

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<sup>7</sup> Jeannie Paterson, Andrew Robertson and Peter Heffey, *Principles of Contract Law* (2<sup>nd</sup> ed, 2005) 5.

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**Australasian Law Teachers Association - ALTA  
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The introduction to contract formation arguably is to use the civil law where it can be pointed out that consideration is not a recognised principle. International conventions also follow the civil law model. A simple example can be used to illustrate the differences.

The question of firm offers is an excellent example to illustrate the above point further. In common law it is understood that a firm offer is only valid if it is supported by consideration or reliance. Furthermore it is important to point out that amongst common law countries there is no uniform approach to firm offers. The UCC changes the rule allowing a merchant to make an irrevocable offer without the need for consideration.<sup>8</sup> However the rule contains a number of restrictions. The middle ground is taken up by article 16 of the CISG which allows the offeror to make a firm offer without any limitations. Students should come to the conclusion that article 16 reflects a compromise between the civil law and common law traditions. A further useful example is how countries perceive what a compromise entails. The Scandinavian States opted out of the entire Part II of the CISG pursuant to article 92 because they felt that article 16 did not represent a compromise but rather was too closely aligned with the common law.<sup>9</sup>

It is a perfect opportunity to highlight different approaches to the question of formation of contracts. Students can be encouraged to comment on the usefulness or purpose of consideration and explain why and what purpose consideration fulfills in the formation of contracts. As pointed out above, firm offers can extend and foster the appreciation of comparative analysis.

In relation to the mailbox rule the common law position is that the acceptance is effective as soon as the letter is dispatched. It does not matter whether it reaches the offeror or not. In contracts the CISG article 18(2) encapsulates the receipt rule that is 'it becomes effective when it reaches the offeror'. Students can learn that 'a risk

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<sup>8</sup> UCC article 2-205.

<sup>9</sup> See also Joseph Lookofsky, 'Alive and Well in Scandinavia: CISG Part II' (1999) 18 *Journal of Law & Commerce* 289.

should typically be placed on the party best able to prevent the loss or to insure against it'.<sup>10</sup> This conclusion should later be remembered when areas such as impossibility and mistake are discussed.

In relation to the battle of the forms interesting parallels can be drawn. The common law adopted the mirror image rule which in practice resulted in the application of the last shot rule. The UCC changed this rule in article 2-207 providing that: '[a] definite and reasonable expression of acceptance ... operates as an acceptance even though it states terms additional to or different from those offered'.<sup>11</sup> The CISG on the other hand does adopt essentially the mirror image rule in article 19(1) but then attempts to soften the rule in article 19(2) by pointing out that if the offer is not materially altered it is still capable of acceptance. However in article 19(3) the CISG defines 'materially'. The definition is so wide that in effect the mirror image rule persists.<sup>12</sup> Of interest to this debate is an analysis of *Filanto S.p.A. v Chilewitch International Corp.*<sup>13</sup> a U.S. case, where the court applied the CISG wrongly. The pivotal issue was the difficulty in pinpointing exactly which document was the offer and which one was the acceptance.<sup>14</sup>

This analysis will achieve two things, first students are introduced to a different style of case reporting, and secondly, they will be able to understand an application of statutes to facts, and be able to point to arguments where the court got it wrong. In essence it teaches students to think critically.

### ***B Breach of Contract***

A second area is breach of contract. The problem of a breach of contract attracts widely divergent solutions and every legal system uses technical expressions and

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<sup>10</sup> Dodge, above n 2, 81.

<sup>11</sup> Ibid 82.

<sup>12</sup> Art 19(3) states: 'Additional or different terms relating, among other things, to the price, payment, quality and quantity of the goods, place and time of delivery, extent of one party's liability to the other or the settlement of disputes are considered to alter the terms of the offer materially.'

<sup>13</sup> 789 F.Supp.1229 (S.D.N.Y, 1992).

<sup>14</sup> Albert Kritzer, Editorial Remarks,

<<http://www.cisg.law.pace.edu/cisg/wais/db/editorial/920414u1editorial.html>> at 15 February 2007

techniques recognised nowhere else.<sup>15</sup> To devise correct and just remedies - which take account of both parties and are economically defensible - are the key considerations for the success of any remedial system. A certain degree of certainty is required in order for parties to calculate the risk of entering into contracts. It is of doubtful utility if a party can only discover the merits of a remedial system once a claim is lodged. There are few legal systems in the world where certainty as to the remedies is not known in advance.

As indicated above different systems use different solutions to the same problem and some examples serve a useful illustrative purpose. Briefly the German legal system distinguishes between 'impossibility', 'delay' and 'positive breach'. Such distinctions have not been greatly esteemed elsewhere nor do Germanic or Anglo-American lawyers appreciate the French system where it takes a judicial decree to release parties from their contractual obligations.<sup>16</sup> It should be pointed out that the German Law of Obligation has seen a major modernisation in the context of the EU endeavor to reach common principles and structures of the Law of Obligations in Europe. As a consequence the German Civil Code was revised and amongst other reforms the basic concept of a breach of contract was rewritten by following solutions found in the CISG.<sup>17</sup>

In common law distinctions are drawn between minor breaches and major breaches, which is breach of a warranty or a breach of condition. But in general, the effects of a breach of a contract have been succinctly put by Holmes when he stated: 'The duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it – and nothing else'.<sup>18</sup>

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<sup>15</sup> Konrad Zweigert and Hein Kötz, *Introduction to Comparative Law* (3<sup>rd</sup> ed, 1998) 510.

<sup>16</sup> *Ibid.*

<sup>17</sup> See Peter Schlechtriem, 'The German Act to modernize the Law of Obligations in the Context of Common Principles and Structure of the Law of Obligations in Europe' (2002) *Oxford University Comparative Law Forum* <<http://ouclf.iuscomp.org/articles/schlechtriem2.shtml>> at 26 February 2007.

<sup>18</sup> Oliver Wendell Holmes, 'The Path of the Law' (1897) *Harvard Law Review* 462.

The statement does overlook the fact that compulsory or specific performance is possible, but frequently damages are the sole option for a party who incurs damage due to a breach of a contract.

Both the CISG as well as civil law are useful instruments to point to the types of remedies which can be claimed. The causation theory of the civil law should be contrasted with the foreseeability rule of the CISG.

No doubt *Hadley v Baxendale*<sup>19</sup>, on which the extent of damages is based, is needed to explain the common law approach, namely the contemplation rule. It is useful in this context to explain to students that on the surface both the common law as well as the CISG rely on *Hadley*<sup>20</sup>, but in reality there is a difference between the two approaches.

Furthermore the CISG allows both parties to elect the remedy of specific performance which is rarely applied in common law jurisdictions. Students therefore can be asked to question the common law approach on this issue and find reasons why the common law should make specific performance available on a more routine basis.

Another area which is of interest is the question of fundamental breach and the remedies flowing from such an event. The common law does not contain a rule on fundamental breach but the CISG does so in conjunction with the remedy of damages.

As a concluding point the notion of gap filling should also be approached. How do domestic courts approach international conventions? As they are part of our domestic law they need to be applied by domestic courts and domestic legal personnel. However the tendencies of an ethnocentric approach and the inability to distinguish the source of the legislation in relation to the interpretation must be highlighted. In this context the tool of gap filling needs to be addressed.

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<sup>19</sup> (1854) 9 Exch 341; 156 ER 145 ('*Hadley*').

<sup>20</sup> *Ibid.*

### **III CONCLUSION**

It is hoped that this short paper will open the debate on the content and method of teaching contract law in Australia. Above all contract teachers have a professional obligation to introduce students to all of the contract law in Australia and not merely the common law. This includes the CISG.

As a second line of argument - and perhaps because of the CISG - the curriculum should be internationalised in order for students to appreciate the principles of contract law which govern some aspects of the law of obligations. Only with a comparative view in mind will students be able to understand these differences. With this in mind they should appreciate the effect and reasons for these differences. - Students will appreciate that more than one solution is available to solve contractual problems. With these tools students will be able to read and understand the vast selection of common law and international jurisprudence and hopefully understand the application of contract law to particular situations confronting business.