

PARTY AUTONOMY

Party autonomy - it sounds a wonderful thing or at least I thought so until 12.55 pm last Friday. I made an innocent call to Malcolm Holmes about the paper I was to give today only to find myself being suborned into delivering an after dinner speech. I remonstrated with him, refused, told him there would be no humour at all (which there is not) and here I am giving the speech. He said he would not tell me who put my name forward. He did not have to. James Allsop has large fingerprints. I was a bit actor in a Full Court decision with my colleague in the Comandate Marine case. I was sufficiently misguided to include a short concurring judgment with the following observation relating to an arbitration clause in a time charter. This is all I said:

“... whatever advantage or disadvantage accrued to Pan from having both the relevant legal effects of its pre-contractual conduct and its *Trade Practices Act* claims determined in London according to English law (including relevant principles of conflict of laws), this is what has been agreed to by the parties as international commercial contractors. There is no legal principle of, nor is there any policy immanent in, Australian law that denies them what they have agreed. On the contrary, s 7 of the *International Arbitration Act* upholds it.”

For that candour I am paying tonight.

You need not fear my giving you a short lecture on choice of law rules in private international law. I know my interests – and my limitations. I will, though, have a deal to say about international commercial contracts. They add a new dimension to party autonomy – it is the power to agree the applicable law of the contract and/or of arbitration – and they provide interesting perspectives on national legal systems. Simply to illustrate this point I recently read the following from an IBA conference paper delivered in Melbourne in 1994 with which some of you may be familiar:

“[...] there are Japanese companies that would be horrified if the applicable law were to be that of the United States. The reason is that they fear jury trials and punitive damages as well as discovery, especially when claims concern the quality of their merchandise. So in this case, they prefer arbitration, which is secret, usually final, and resolved by a specialist.”

I would observe in passing that the quote is arresting as it indicates the importance to be attributed not only to substantive law, but also to the laws of civil procedure, in selecting a foreign forum. Little wonder that this is now being addressed internationally as, for example, in the ALI/Unidroit *Principles of Transnational Civil Procedure* of 2004.

Before I get to international contracts – and my concern tonight is only with commercial contracts in any event – there are two preliminary matters I would like to touch upon. One is about party autonomy or freedom of contract, the other about domestic contract law itself.

First, freedom of contract. We all mutter the mantra of party autonomy, although with greater or lesser conviction, because we realise that that autonomy is itself constrained by legal and practical forces – legislation, public policy, considerations of power, circumstance and need, and so on. One of the things that does surprise me, though, is the level of hostility to particularly legal constraints on freedom of contract that lawyers in this country exhibit. In my view, if contract as an institution is to have integrity, if Australian contract law is to

maintain its standing in the global arena, it must have effective legal safeguards against undue exploitation and advantage taking in contract formation. It must secure fair dealing in contract performance and enforcement. That we need such safeguards and standards is widely accepted internationally in civil and common law countries. I would simply note in this that, as domestic contract codes have been revised around the world for political and for economic reasons in the 1990s, these requirements have come to the fore.

Simply to illustrate this let me quote to you in translation Articles 3 to 6 of the Contract Law of the People's Republic of China. They provide:

“Article 3. The Principle of Equality

The position of the parties shall be equal. No party shall impose its own will on the other party.

Article 4. Freedom of Contract

Any party has the right to enter a contract in his free will under the law. No unit or individual shall illegally interfere.

Article 5. Obligation of Equality

All parties shall follow the principle of equality when formulating rights and obligations for both sides.

Article 6. Obligation of Good Faith

All parties shall follow the principles of honesty and faithfulness when executing their rights or performing their obligations.”

The explanation of these in the introduction contained in my copy of the PRC Laws of Contract is itself revealing:

“After the twenty years of economic reform, the Chinese economy has been integrated with the world economy. Chinese legislators realized that they had to adopt some general contract principles that are accepted internationally. Therefore, the new contract law is incorporated with many of contract principles and legal terms of civil law, some of the contract principles of common law, and some terms used in the United Nations Convention on the International Sale of Goods and in the American Uniform Commercial Code. The major principles adopted in the new contract law are: equality, fairness, honesty and faithfulness, and limited freedom of contract.”

Against this background and in light of my experience with Unidroit in the preparation of the *Principles of International Contract*, I would have to say that the reluctance of many judges and scholars alike to accept the need, or the appropriateness, of a duty of good faith and fair dealing in Australian contract law simply calls to mind the final line of Scott-Fitzgerald's, *The Great Gatsby*:

“So we beat on boats against the current born back ceaselessly into the past.”

Good faith is not a Trojan horse. All it requires is fidelity to the bargain struck by parties to a contract, and fair dealing in light of that contract and the parties conduct inter se. I would also have to say that I am far from convinced that the place of good faith in our contract law is at all secure.

This brings me to the subject of our domestic contract law. When I brought out *Essays on Contract Law* twenty years ago, a United States reviewer described in the following way Australian contract law as it emerged from the pages of that volume:

“It is interesting for its own sake. It appears to be a living museum of an earlier and simpler age of the common law.”

I will let you ponder the justice of this. I will also let you ponder how our contract law would look and work were it not for the provisions of the *Trade Practices Act 1974*. What I wish to raise briefly is the subject of judicial renovation of contract law. My obvious premise here is that Australian contract law is perhaps a little tired, perhaps a little inadequate to the world in which it now finds itself.

I would merely suggest that areas such as estoppel, the whole area of suspension and renunciation of rights dealt with variously by waiver, estoppel, variation and election, contract interpretation and the implication of terms, for example, could do with some attention as could long term contracts at least in relation to such matters as termination for just cause (e.g. because of a breakdown of trust and confidence between the parties). This suggestion exposes a difficulty for us.

While to me it has not been a self evident proposition that there should be one common law of Australia, such is clearly the law and has recently been reaffirmed by the High Court in *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* [2007] HCA 22. An odd consequence of this insistence is to destroy in large measure what has been the refuge of traditional thinkers about our contract law. This is that parliament can change the common law, if it does not agree with judicial decision on it. The concomitant proposition is that ordinarily it is for the Parliament and not the courts, save in simple or clear cases, to vary or modify a settled rule or principle of the common law because it is ill-suited to modern circumstances. All one can now say is, with our one common law, it would require either heroic acts of cooperative federalism or the Commonwealth's use of its legislative powers over corporations and trade and commerce (so far as they go) to effect significant changes to contract law across the nation.

The High Court has now cemented its position as the custodian of the vitality of our common law including for present purposes our contract law. It would not be appropriate for me to comment on how the High Court has performed and might perform that task, although I would say that the Australian community may well be entitled to feel that the Court itself has now an enhanced responsibility as a law maker in relation to the common law and its renovation.

There are two further observations I would make. First, is it not the case that we may with profit be able to look beyond the confines of our own shores in adapting our contracts and our contract laws to contemporary requirements. I will return to this in a moment. Here I would merely add that my perception is that we are being asked to be less inclined to engage in comparative private law than we were even in the relatively recent past. If I am correct in this, it is unfortunate. We are too small a country to generate the range of problems capable of sustaining a self sufficient common law of contract. We have always borrowed from abroad. We do not seem to date to have let loose a legal rabbit.

My second observation is this. It does seem to me that, despite the decision of the High Court in *Re Wakim*, this country still retains great capacity to host international commercial legal activity and to evolve bodies of contract, commercial and procedural laws suited to that end.

In relation to this, and putting arbitration to one side, I would pose the following question. Where parties to an international commercial contract have a real choice as to the proper law of the contract and the contract itself has an obvious Australian connection, does Australian law as it now stands hold out real attractions in that choice? If there is a negative answer to this, is this because of characteristics of our domestic law which render it unattractive and justifiably so when compared with other available options? Is it for structural reasons or for reasons related to our civil procedures? Recall the Japanese example I gave earlier. All I am suggesting here is that these are questions which are worthy of address.

Now let me turn directly to international commercial contracts. This is not an audience in which I need talk at any length about the dramatic changes that have occurred in commerce throughout the world since the early 1990's. These changes have coincided with a technological revolution. All I would wish to emphasise is that international trade is no longer the province of the experienced few. Increasingly small and medium sized businesses engage regularly in cross-border transactions. Simply observe the Australian wine labels you can see all over the world. Boutique wineries are to be found amongst them in significant numbers.

This phenomenon has exposed a stark problem for contracting parties principally because cross-border transactions continue to a large extent to be subject to domestic laws and this because a contract cannot exist independently of a local legal system. The American contract scholar, Perillo, highlighted the problem in this in his comment:

“... as the market changes from the gathering of merchants in a limited geographical spot to a global interchange of communications, the myriad local laws of the marketplace are no longer adequate to assure the commercial community that even-handed rules will govern their transactions.”

I earlier said I would not lecture you on conflict of law rules, and I won't. The point I wish to make is this. Party autonomy seems to me to be seriously compromised in international commercial contracts and in a variety of ways. Principally contractors are captives of the problem of choice of law even if they appreciate they may make one. Often enough the choice for one of the parties will be illusory because of the relative positions of the parties themselves. With less experienced actors the choice may well be the child of ignorance for this simple reason that cost will defeat obtaining adequate legal advice. Then there is the problem of the parties who will not agree to each other's law but who will agree to a neutral law. But as a German commentator recently observed:

“The search for a neutral law can be cost-intensive. Often, in practice, the impression is that the choice of neutral law was the result of a gamble rather than a reasoned decision, with both parties having no concrete idea of the consequences of their choice.”

The history of international conventions I would add does not offer a large amount by way of confidence building that these problems are easy in overcoming.

We tend to overlook that much in the law of contract is in the nature of defaults rules which only apply if the parties have not provided to the contrary. In the context of arbitration, domestic and international, it is common for parties to provide to the contrary. I need not speak here of Article 28 of the Uncitral Model Law or of s 22 of the *Commercial Arbitration Act*. It is in this domain that Unidroit's Principles of International Commercial Contracts are having their purchase, at least internationally.

The real international challenge here is not in the selection of the arbitral law, but in eliminating the untoward effects flowing from the adventitious roles that domestic laws can play because of conflict of law rules, in international transactions.

Perhaps the Hague Conferences' 2005 *Convention on Choice of Courts Agreements* may provide a solution. Perhaps, more imaginatively we may in time see our way clear to fully acknowledging an international *lex mercatoria* that embodies neutral, coherent and reasonable principles. A distant dream?

I recognise that it is about here that I risk becoming a partisan for the Unidroit Principles. So it must be time to sit down.