Symposium Paper: Afterthoughts: International Commercial Contracts and Arbitration[#]

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ABSTRACT

This article mainly responds to Professor Bonell's three proposals (on page 177 of this volume) to expand usage of the *UNIDROIT Principles of International Commercial Contracts* (UPICC). As UPICC are primarily opt-in rules, they can be more ambitious than the United Nations Sales Convention (CISG). They also needed to be, being designed for all commercial contracts—including many more relational contracts. This imparts a somewhat different 'vibe' to UPICC, creating one impediment to the proposal for a UN Declaration urging interpretation of CISG in light of UPICC. As a formal reasoning based legal system, particularly in contract law, Australia also still struggles with such soft law initiatives. More promising will be law reform clarifying that courts, not just arbitrators in proceedings with the seat in Australia governed by the *UNCITRAL Model Law on International Commercial Arbitration,* are free to apply 'rules of law'—including UPICC—as the governing law. Elevating UPICC into a *Model Law for International Commercial Contracts* would also be useful. Australia could then adopt or adapt provisions as the basis for more comprehensive reform of its contract law. This would better mesh with burgeoning relational transactions, and many norms (such as good faith) could also extend to domestic dealings.

Introduction

From their first edition in 1994, the *UNIDROIT Principles of International Commercial Contracts* ('UPICC') covered more topics than the United Nations Convention on Contracts for the International Sale of Goods 1980 ('CISG'), in force from 1988 and incorporated into Australian law the following year). Especially during the final stages of negotiating CISG, several topics had to be omitted (e.g., arguably, pre-contractual liability) or watered down (e.g., direct and non-derogable obligations on contracting parties).[1] This was mainly to secure

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[#] This paper was prompted by the presentations and lively discussions at the CLE Seminar on 'The *UNIDROIT Principles of International Commercial Contracts*: What Do They Mean for Australia?' held at Sydney Law School on 25 June 2008.

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[1] See e.g. L Spagnolo, 'Opening Pandora's Box: Good Faith and Pre-Contractual Liability in the CISG' (2008) 21 *Temple International and Comparative Law Journal* 261.

general acceptability, particularly on the part of Anglo-Commonwealth states. Even when states had acceded to CISG, prima facie binding their firms selling goods to counterparts in other CISG member states (pursuant to Art 1(1)(a)), firms were permitted to opt out of CISG in whole or in part (Art 6). Anglo-Commonwealth courts and lawyers have not applied CISG as frequently or consistently as counterparts particularly from major civil law tradition jurisdictions. Yet CISG did establish a common language for addressing core issues of contract formation and performance.[2]

The first edition of UPICC heralded a new round of harmonisation in this field, often reproducing wording from CISG. But the Principles added new or more specific obligations (e.g. Art 1.8 on good faith and Art 2.1.15 on pre-contractual liability). UPICC needed to be more ambitious because the provisions were not limited to international sales of goods. They could afford to be so because generally applied on only an opt-in basis—unlike CISG, which applies pursuant to Art 1 unless parties exclude it through CISG Art 6. The second edition of UPICC (2004) further expanded coverage, into areas such as third parties, assignment and limitation periods.[3] A Working Group completed a third edition draft in mid-2010, expected to be formalised for public release by 2011.[4] The Working Group considered adding possible provisions on 'termination for just cause', but eventually decided not to include them in the third edition of UPICC. The proposed provisions were aimed at covering situations not amounting to excusable *force majeure* (Art 7.1.7, like CISG Art 79) or even 'hardship' (Arts 6.1.2-3) or 'fundamental non-performance' (i.e. serious or material breach justifying termination: Art 7.3.1, more detailed than CISG Art 25).[5] Such topics are particularly

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[2] L Nottage, 'Who's Afraid of the Vienna Sales Convention (CISG)? A New Zealander's View from Australia and Japan' (2005) 36 *Victoria University of Wellington Law Review* 815. See also H Sono, 'Japan's Accession to the CISG: the Asia Factor' (2008) 25 *Journal of Japanese Law* 195 and N Kashiwagi, 'Accession by Japan to the Vienna Sales Convention (CISG)' (2008) 25 *Journal of Japanese Law* 207. The Japanese parliament approved Japan's accession on 19 June 2008. More generally, see also I Schwenzer and P Hachem, 'The CISG – Successes and Pitfalls' (2009) 54 *American Journal of Comparative Law* 457.

[3] MJ Bonell, 'UNIDROIT Principles 2004: The New Edition of the Principles of International Commercial Contracts Adopted by the International Institute for the Unification of Private Law' (2004) *Uniform Law Review* 5.

[4] An interesting theoretical and intensely practical issue is what edition of UPICC parties intend for courts or arbitrators to apply. Ralf Michaels argues that the parties should be held to have intended to be bound the edition in force at the time the dispute comes to be resolved, partly because 'it was always known that they would be revised', unless the parties have expressly chosen a different edition of UPICC or 'a change would lead to the frustration of the parties' legitimate expectations', in Stefan Vogenauer and Jan Kleinheisterkamp (eds) *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)* (Oxford University Press, 2009) 40. For a similar issue as to what parties generally expect in regard to updated versions of arbitration rules, see Simon Greenberg and F. Mange, 'Institutional and Ad Hoc Perspectives on the Temporal Conflict of Arbitral Rules' (2010) 27(2) *Journal of International Arbitration* 225. It is best to remove uncertainty by clarifying the point in the contract itself or via rules, such as Art 2.1 of the Expedited Arbitration Rules of the Australian Centre for International Commercial Arbitration (ACICA): see Jonathan DeBoos et al 'ACICA's Expedited Arbitration Rules' in Luke Nottage and Richard Garnett (eds) *International Arbitration in Australia* (Federation Press, 2010) 103, 114-15 (Part III.K).

[5] See <http://www.unidroit.org/english/documents/2007/study50/s-50-104-e.pdf>. Although these draft proposals seemed to leave considerable uncertainties, the hard reality is that national laws also struggle to deal adequately with distributorships and other contemporary relational contracts. Compare e.g. V Taylor 'Continuing Transactions and Persistent Myths: Contracts in Contemporary Japan' (1993) 19 *Melbourne University Law Review* 352.

important in long-term 'relational contracts', especially cross-border service transactions like distributorships or licensing contracts.[6] UPICC has thus moved with the times in developing new norms to govern trading in services, not just in goods, rather like in 1994 when the World Trade Organization added the *General Agreement on Trade in Services (*and a treaty on *Trade Related Aspects of Intellectual Property Rights*) to the long-standing *General Agreement on Tariffs and Trade*.

Perhaps after many more decades of experience with CISG, and UPICC applied on a 'soft law' basis, at least some of the Principles may be folded into a Protocol to CISG—including, perhaps, narrower scope for firms in acceding states then to exclude provisions in that Protocol. Meanwhile, however, Professor Bonell[7] outlines three softer means of expanding the already considerable usage of the Principles by judges (including of course Justice Finn),[8] arbitrators, legislators, and lawyers negotiating and drafting cross-border commercial contracts. Already a decade ago, empirical research showed that the *lex mercatoria* and similar concepts—increasingly exemplified by UPICC's detailed provisions and growing jurisprudence—were quite widely used in the practice of arbitrating, negotiating and (especially) drafting international contracts. For arbitrators, this practice derived not so much from an express choice of the *lex mercatoria* as the governing law, for example, but more from using the *lex mercatoria* to supplement or interpret other applicable international or domestic law.[9] When arbitrators do so, procedural fairness generally requires them to give all parties sufficient opportunity to present arguments based on the *lex mercatoria*, just as they would

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[6] See Robertson's contribution to this Issue. For fascinating empirical studies on (more or less) relational contracting in the contemporary cross-border diamond trade, timber trade, software industry and legal services—followed by ambitious attempts to retheorise how private and public governance enables sustainable business activity—see Volkmar Gessner (ed) *Contractual Uncertainty in International Trade* (Hart, 2009).

[7] See Professor Bonell's contribution to this Issue, updating his Seminar presentation: 'The UNIDROIT Principles of International Commercial Contracts: Present State and Prospects for the Future'. See also more generally MJ Bonell, 'The CISG, European Contract Law and the Development of a World Contract Law' (2008) 54 *American Journal of Comparative Law* 1.

[8] See some of Justice Finn's judgments available at <http://www.unilex.info/dynasite.cfm?dssid=2377&dsmid=13619> and his contribution to this Issue. See also M Sychold, 'The Impact of the UNIDROIT Contract Principles on Australian Law', in E Cashin Ritaine and E Lein (eds) *The UNIDROIT Principles 2004: Their Impact on Contractual Practice, Jurisprudence and Codification* (Schulthess, 2008) 149.

[9] See K-P Berger (ed) *The Practice of Transnational Law* (Kluwer, 2001) and L Nottage 'Practical and Theoretical Implications of the Lex Mercatoria for Japan: CENTRAL's Empirical Study on the Use of Transnational Law' (2000) 4(2) *Vindobona Journal of International Commercial Law and Arbitration* 132. More broadly and despite paragraph 3 of UPICC's Preamble—but in the context of Courts faced with parties' invocation of the lex mercatoria—Ralf Michaels argues that 'caution seems in order: the lex mercatoria is different from the PICC in important ways, and parties, by choosing the lex mercatoria, may not expect the PICC to apply or may even be trying actively to avoid their application' (above n 4, 51). While noting that arbitrators should also scrutinise designation of the lex mercatoria as perhaps a 'negative choice' excluding UPICC, Mathias Scherer acknowledges many more instances where they view UPICC as evidence of such transnational law: in Stefan Vogenauer and Jan Kleinheisterkamp (eds) *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)* (Oxford University Press, 2009) 89. On courts and arbitrators using UPICC to supplement or interpret national law or international instruments, see also respectively Michaels (above n 4, 56-68) and Scherer (above n 4, 95-100). For a more pessimistic assessment for interpreting international law, compare Henry Gabriel, 'The UNIDROIT Principles of International Commercial Law [sic]' in KE Lindgren (ed) *International Commercial Litigation and Dispute Resolution* (Ross Parsons Centre of Commercial, Corporate and Taxation Law, 2010) 106, 116.

when applying foreign law.[10] However, the extent of that opportunity will depend on the applicable arbitration law. Under s 18C of Australia's *International Arbitration Act 1974* (Cth), as amended in July 2010, for example, each party need only be given a 'reasonable' opportunity—no longer a 'full' opportunity—to present its case.[11]

1. UNCITRAL Declaration on UPICC to Interpret CISG

To expand UPICC usage, Professor Bonell first suggests some form of *Declaration from the United Nations Commission on International Trade Law* (UNCITRAL) recommending interpretation of CISG, including Art 7(2) requiring gaps in CISG to be interpreted in light of its general principles, in light of successive editions of UPICC. This might be useful, since there seem to be 'many roads to Rome' (and possibly some dead-ends) on this point within current arbitral practice and influential academic commentary.[12]

However, my first concern is that the 'general principles' underlying UPICC (or, for Australians, their 'vibe')[13] do not necessarily equate to those of CISG, which is crafted for less relational cross-border sales of goods. Hence, for example, the UPICC's broader 'hardship' provision, creating a potentially lower threshold (although still set quite high by arbitrators) for more flexible relief including duties to renegotiate or even 'court adjustment' to restore contractual equilibrium. CISG adopts a more (neo)classical and 'formal reasoning' based approach to such problems, partly reflecting less scope for them to arise in sales of goods.[14] Courts and even arbitrators from Anglo-Commonwealth jurisdictions, which have built up and often maintain substantive and procedural law along with supporting institutions to promote such formal reasoning, are more likely to emphasise such differences.

My related concern is that courts in those jurisdictions, in particular, are likely to take much less notice of some non-binding UN recommendation encouraging them to interpret in a particular (broader) way the Australian legislation incorporating CISG, despite its international origins and character. In other areas, the record of the Australian High Court over the last decade has been markedly less 'internationalist' than even the House of Lords,

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[10] Compare the International Law Association International Commercial Arbitration Committee's Report and Recommendations on 'Ascertaining the Contents of the Applicable Law in International Commercial Arbitration' (2008) accessed online at <http://www.ilahq.org/en/committees/index.cfm/cid/19> and reproduced in (2010) 26 *Arbitration International* 193.

[11] However, parties should be able to specify a more demanding standard, e.g. by selecting Arbitration Rules that provide for a 'full' opportunity. See L Nottage and R Garnett, 'Introduction', in Luke Nottage and Richard Garnett (eds) *International Arbitration in Australia* (Federation Press, 2010) 26-27.

[12] See e.g. JY Gotanda, 'Using the UNIDROIT Principles to Fill Gaps in the CISG', in D Saidov and R Cunnington (eds) *Contract Damages: Domestic and International Perspectives* (Hart, 2008) accessed online at <http://ssrn.com/abstract=10192772007>.

[13] For non-Australian readers in particular, see *The Castle* (Directed by Rob Sitch, Working Dog Productions, 1997).

[14] See L Nottage, 'Changing Contract Lenses: Unexpected Supervening Events in English, New Zealand, Japanese, US and International Sales Law and Practice' (2008) 14 *Indiana Journal of Global Legal Studies* 385, and e.g. the Arbitral Award of 30 November 2006 through the Centro de Arbitraje de México (CAM)—summary via <http://www.unilex.info/dynasite.cfm?dssid=2377&dsmid=13618&x=1>.

which has undergone a sea change.[15] Lower courts in Australia have also struggled to generate globally-acceptable interpretations of the *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958*, in its original formulation.[16] That makes me sceptical that UNCITRAL's recommendation for a more liberal interpretation of the New York Convention's writing requirement[17] will have much independent effect in Australia. Formal reasoning based legal systems, with a strict hierarchy of courts and *stare decisis*, have more difficulty with diffuse 'sources' of law.

2. More Scope for Courts and Arbitrators to Apply UPICC

Thus, although a Declaration is worth trying, I believe we are more likely to generate more engagement with UPICC within Australia from a second proposal by Professor Bonell. It should be made clear that courts, not just arbitrators in proceedings with the seat in Australia that are governed by the *UNCITRAL Model Law on International Commercial Arbitration 1985* (ML-ICA, given force of law by s17 of the *International Arbitration Act 1974* (Cth) are free to apply 'rules of law'—including UPICC—as the governing law.

Under Art 28(1) of the ML-ICA, adopted in the *International Arbitration Act 1974* (Cth) as last amended in 2010, arbitrators in Australian cases *must* apply such 'rules of law' if the parties have expressly designated them. If the parties have not expressly designated UPICC or any other substantive law system to govern their underlying dispute but have selected Arbitration Rules like those of the Australian Centre for International Arbitration Arbitration (ACICA)—either its generic or Expedited Arbitration Rules—then the arbitrators *may* also apply UPICC (not just a national law) as the governing law.[18] However, parties and their legal advisors need to opt in to such sets of Rules to obtain this possibility of UPICC being applied because the 2010 amendments to the Act do not turn ACICA's approach into a new default rule. The amended Act retains Art 28(2), which only allows the arbitrators to apply a (national) 'law' if the parties have not made an express choice.

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[15] J Crawford, 'International Law in the House of Lords and the High Court of Australia 1996-2008: A Comparison' (2009) 28 *Australian Yearbook of International Law* 1 (with an earlier version at <http://law.anu.edu.au/Cipl/Lectures &Seminars/2008/KirbyLecture_Crawford.pdf>).

[16] R Garnett, 'The Current Status of International Arbitration Agreements in Australia' (1999) 15 *Journal of Contract Law* 29; L Nottage and R Garnett, 'The Top Twenty Things to Change in or Around Australia's International Arbitration Act' in L Nottage and R Garnett (eds) *International Arbitration in Australia* (Federation Press, 2010) 149 (with an earlier version at <http://ssrn.com/abstract=1378722>).

[17] See <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2006recommendation.html>. However, amendments in July 2010 to the International Arbitration Act 1974 (Cth) do add provisions (ss 2D and 39) emphasising the legislative objective of enforcing awards in a timely manner, and also expressly relaxing the writing requirements for agreements specifying international arbitration with the seat in Australia. See Nottage and Garnett, above n 10, 19-28 (Part II).

[18] See S Greenberg, R. Weeramantry and L. Nottage 'ACICA's Arbitration Rules of 2005 – Revisited', in L Nottage and R Garnett (eds) *International Arbitration in Australia* (Federation Press, 2010) 79, 94-6 (Part II.G). Compare the UNCITRAL Arbitration Rules as revised in 2010, which still do not allow this discretion to arbitrators: J Crawford, 'Developments in International Commercial Arbitration: The Regulatory Framework' in L Nottage and R Garnett (eds) *International Arbitration in Australia* (Federation Press, Sydney, 2010) 253, 263-6 (Part II.C).

Nor does the amended Act change ML-ICA Art 34(2)(a)(i) on setting aside of awards and Art 36(1)(a)(i) on enforcement of foreign awards to allow the parties to choose 'rules of law' to govern the arbitration agreement itself. ML-ICA Arts 7 and 8, which have no express provisions on the law governing that agreement when it comes to staying court proceedings to allow international arbitrations to commence, have not been amended either so as to allow the governing law to be 'rules of law' such as UPICC. This represents a missed opportunity for Australia to expand the scope for applying the Principles in the context of international commercial arbitration.

What about the governing law for the underlying contract itself, in Australian court proceedings because no arbitration agreement exists? There appears to be no binding case law on point. And the latest edition of a leading Australian textbook on private international law provides little indication as to whether 'limits on choice' might result in courts excluding 'rules of law' such as UPICC, and instead applying only the contract 'law' of a particular jurisdiction.[19] The textbook does remark that 'where a foreign law is chosen by the parties, the choice must be of a 'system of private law'; that is, the law of a particular country or law area', but a note defers to an earlier work by the late Professor Peter Nygh 'as regards the choice of international law or the *lex mercatoria*'.[20] In the European Union, however, the *Rome I Regulation 2008* ended up not permitting the parties to choose 'rules of law' as the law governing their dispute. Such rules can only be incorporated by reference, and are therefore subject to mandatory or default rules of the otherwise applicable national contract law.[21] Almost all national legal orders still appear to prevent Courts applying instruments such UPICC as the governing law, although typically there is no express ruling on this and sometimes there seem to be some exceptions particularly in states with codified choice of law rules.[22] Legislative reform in Australia to uphold clearly at least an express selection of 'rules of law' as the governing law, in court proceedings not just in arbitration, deserves further consideration.

This is especially important if we are to take seriously the Attorney-General's promotion of the Federal Court as a hub for commercial litigation in the Asia-Pacific region.[23] Despite

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[19] Martin Davies, Andrew Bell and Paul Le Gay Brereton, *Nygh's Conflict of Laws in Australia* (LexisNexis Butterworths, 8th ed, 2010) 394-6. See also PE Nygh and M Davies, *Conflict of Laws in Australia* (Lexis Nexis Butterworths, 7th ed, 2002) 357-64.

[20] Davies et al, above n 18, 388 n11, referring to PE Nygh, *Autonomy in International Contracts* (Clarendon Press, 1999) chap 8. The latter had argued that the rules of the *lex mercatoria* could be identified and it should be applicable if the parties choose to apply it expressly or by clear implication, but that—like any other foreign law—it 'can be overridden by the mandatory law of the forum, and possibly that of another State with a close interest, and by public policy' (198).

[21] See Art 3(1) of the Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the Law Applicable to Contractual Obligations (in effect for contracts concluded from 17 December 2009 and replacing the 1980 *Convention on the Law Applicable to Contractual Obligations*). An earlier draft had left open that possibility. See Alexander Belohlavek 'Law Applicable to the Merits in International Arbitration and Current Developments in European Private International Law' 1 (2010) *Czech Yearbook of International Law* 25, 32-3.

[22] Such as Louisiana and Oregon; see Michaels, above n 4, 42-50.

[23] The Attorney-General, The Hon Robert McClelland, *Australian Financial Review Legal Conference 2008*, 17 June 2008 (cited in Robertson's contribution to this Issue; see specifically para 5 of <http://www.attorneygeneral.gov.au/

[footnote continued on the next page]

Australia's adoption of the ML-ICA in 1989 and other efforts, we have not yet succeeded in developing Australia even as a major arbitral venue in our region.[24] The reasons are manifold but arguably one is a residual hesitation by courts to respect party autonomy, and another may even be a more diffuse parochialism.

3. Model Law for International Commercial Contracts

We also therefore need to give serious consideration to the third suggestion from Professor Bonell: elevating the Principles into a Model Law for International Commercial Contracts.[25] Countries like Australia could then adopt or adapt all or part of this new Model Law as the basis for more comprehensive reform of its contract law, better reflecting the growth of relational transactions. Some norms also could be extended to (most) domestic dealings. After all, with the 1985 ML-ICA, New Zealand did that in 1996, Japan did so in 2003, and the *International Arbitration Act* as amended in 2010 is now being used as the agreed core for amendments to the uniform Commercial Arbitration Acts in Australia's States and Territories, which apply exclusively to domestic arbitrations.[26] The ML-ICA was successful partly because core provisions—limiting court intervention first in allowing arbitrations to get underway, and then in reviewing the arbitrators' awards—largely reproduced provisions or ideas from the *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958*. After 20 years of experience with CISG, a Model Law based on UPICC similarly may find considerable traction.

However, the 1985 ML-ICA successfully added many more details compared to the New York Convention, especially regarding the middle phase of arbitral proceedings. In doing so, it was able to draw on many experiences of parties, lawyers and adjudicators considering the 1976 UNCITRAL Arbitration Rules. Those too applied on an opt-in basis. But so far UPICC has been less widely used than the UNCITRAL Rules for conducting arbitrations. Hence I would recommend a Model Law on International Commercial Contracts that limits itself, at least initially, to UPICC articles most frequently applied in practice. This would probably mean a Model Law based on the topics covered in the first edition, not the second edition or forthcoming third edition.

Even so, and despite the use of UPICC as a model for legislation having 'become perhaps their most important role' worldwide,[27] I would expect considerable resistance in Australia to

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www/ministers/mcclelland.nsf/Page/Speeches_2008_SecondQuarter_17June2008-AustralianFinancialReviewLegal Conference>.

[24] Nottage and Garnett, above n 10, 1-14 (Part I.A).

[25] See MJ Bonell, 'Towards a Legislative Codification of the UNIDROIT Principles?' [2007] *Uniform Law Review* 233.

[26] L Nottage, 'Japan's New Arbitration Law: Domestication Reinforcing Internationalisation?' (2004) 7 *International Arbitration Law Review* 54; L Nottage, 'Reforming International Commercial Arbitration (ICA) Law: The UN, New Zealand – Why Not Australia?' (2008) 7 Australian ADR Reporter (Chartered Institute of Arbitrators – Australian Branch) 15-9, also available at <http://sydney.edu.au/law/scil/documents/2009/SCILWP6Finalised.pdf>; L Nottage and R Garnett, above n 10 (Part I.B).

[27] Michaels, above n 4, 68 (going on to review their impact on global and regional unification initiatives as well as inspiration for more specific reforms to various national law reforms).

updating our own contract law based on such a Model Law. Some would probably advocate an even shorter and simpler 'Contract Code'.[28] But the most influential objections aimed at legislators would probably come from those familiar and sympathetic to more formal reasoning based Anglo-Commonwealth contract law. Unless and until key legal institutions supporting that particular vision of law undergo major change, they will probably prevail.[29] But at least a Model Law would prompt further philosophical, empirical and doctrinal debate in this country, and probably much more in many of Australia's major trading partners worldwide.

Conclusion

The *UNIDROIT Principles* deserve a wider audience among Australian practitioners and legal academics. They force us to rethink core assumptions about substantive contract law and contemporary business practices, especially in cross-border contexts but also potentially in domestic settings. The Principles also demand closer study of private international law and international commercial arbitration, at a time when Australia is attempting to reposition itself as a regional venue for international dispute resolution services. At a more theoretical level, as the scope of application for private governance norms expands in transnational settings, we need to press for—and actively participate in—a 'more openly structured and inclusive law-making procedure' to generate those norms.[30]

Fortunately, a new generation of Australian jurists is already gaining a rich introduction to UPICC, and their application in arbitration proceedings, particularly for those students engaged in the Intercollegiate Negotiation and Arbitration Competition held every December in Tokyo.[31] Seminars like those that inspired the present response, and the updated presentations in this volume, are another important mechanism to raise awareness of 'the world out there'.[32]

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[28] MP Ellinghaus, T Wright et al, *Models of Contract Law: an Empirical Evaluation of Their Utility* (Themis Press, 2005). For small states such as Tokelau, however, compare Anthony Angelo, 'Contract Codes, Coral Atolls and the Kiwi Connection' in Hans-Juergen Ahrens (ed) *Festschrift fuer Erwin Deutsch zum* 70. Geburtstag (Carl Heymanns, 1999) 877. For New Zealand itself, see also R Sutton 'Codification, Law Reform and Judicial Development' (1996) 9 *Journal of Contract Law* 204.

[29] See also the difficulties of developing in New Zealand even the neoclassical vision of contract law enshrined in the US Restatement – Second of Contracts (1981) despite the indefatigable efforts particularly of D McLauchlan, "The "New" Law of Contract in New Zealand' (1992) *New Zealand Recent Law Review* 436. Compare L Nottage, *Form, Substance and Neo-Proceduralism in Comparative Contract Law: The Law in Books and the Law in Action in England, New Zealand, Japan and the U.S.*, (PhD Thesis, Victoria University of Wellington Law, 2002), accessed online at <http://researcharchive.vuw.ac.nz/handle/10063/778>, especially Chapter 1 and Part Two Introduction (both revised in 2007 and available via <http://sydney.edu.au/law/anjel/content/anjel_research_pub.html>).

[30] See, more generally, Gralf-Peter Calliess and Peer Zumbansen, *Rough Consensus and Running Code: A Theory of Transnational Private Law* (Hart, 2010) 140.

[31] Indeed, 'Team Australia' comprising students from the University of Sydney, the University of New South Wales and the Australian National University has twice won the Competition. That itself is truly transnational in the further sense of having rounds conducted in Japanese as well as in English. See <http://sydney.edu.au/law/anjel/content/anjel_teaching_comp.html>.

[32] Compare Lord Justice Bingham, 'There Is a World Elsewhere: The Changing Perspectives of English Law' (1992) 41 *International and Comparative Law Quarterly* 513.