Law Wars: Australian Contract Law Reform vs. CISG vs CESL

Dr. Lisa Spagnolo
Faculty of Law,
Monash University
Commercial Law Group
lisa.spagnolo@monash.edu
Introduction

- War?
- Perspective
- Background, reform process, influences
2. Australian Background

- Federal system
- State/Territory (Provincial)
  - Legislation
  - Caselaw
- Divergences
- Anachronistic, complex
2.1 Divergences between States/Territories within Australia

- Not the ‘chaotic mess’ was in US in 1952
- Contract Law statutes, some states have them, others do not
- Third party benefit
- Capacity
2.2 Complex and Antiquated Australian Contract Law

- Sales law & overlay Australian Consumer Law
- High Court of Australia not clarified
  - parol evidence rule (eg subsequent conduct)
  - duty to perform in good faith
  - Consideration - Prior legal duty rule & Practical Benefit Exception
  - overhaul?
- unfortunate tendency for multiple judgements
- BUT Electronic Transactions Acts
  - all States & Territories (except Qld)
  = 2005 UN Electronic Communications Convention
3. Australian Reform Agenda

3.1 Preface to 2012: The Profession

- Little appetite for law reform
- Profession content
- Successive legislative reform on specific issues
- Australians involved in development international law UNICITRAL, UNIDROIT
- But profession lack enthusiasm, for example, CISG
- 2009, senior judicial officers and academics criticized lack of engagement Aust profession with international law
- Australian law firms increasingly merged global firms
3.2 Events of 2012

- 22 March 2012, Federal Attorney General discussion paper
- aim ‘[to] explor[e] the scope for reforming Australian contract law to make it simpler, fairer and more efficient’
- Possibility of a codified law reflecting international trends
- Noted the judicial and academic criticisms
- Time for submissions closed 20 July 2012: submissions are mostly from academics, non-lawyer/business groups, then lawyer associations/peak bodies.

Profession argues
- divergences need fixing
- but opposes CISG as a model
4. Does Australia Need Law Reform?

- Every change involves costs, but no change = inefficient (old/complex/diverse) & increasingly different from law of other nations.
- Academic submissions – should seriously look at harmonized instruments.
- Profession - prefers minimal changes.
- Legal practices have boomed in recent decades & so has the level of legal complexity.
- Most vocal opposition comes from law firms.
- Same behaviour influences choices to opt out of the CISG, despite comparative efficiency.
- Information asymmetry may have a powerful impact on reform.
5. What Model for Australian Reform?

- CISG, UNIDROIT Principles, CESL

5.1 CISG

- Sensible to synchronize Australian domestic law
  - with international sales in Australia
  - with the basis for many domestic reform initiatives elsewhere
- minimize transaction costs and improve predictability
- It would also address resistance to CISG by Australian practitioners and courts
- CISG model tried and tested basis for domestic reform around the world
- For commercial transactions, CISG appropriate basis for reform in Australia.
5.2 UNIDROIT Principles of International Commercial Contracts

- Sensible to synchronize Australian domestic law
  - with international sales in Australia
  - with the basis for many domestic reform initiatives elsewhere
- Minimize transaction costs and improve predictability
- It would also address resistance to CISG by Australian practitioners and courts
- CISG model tried and tested basis for domestic reform around the world
- For commercial transactions, CISG appropriate basis for reform in Australia.
5.3 Proposed Common European Sales Law (CESL)

- consumer protection & online trading & related services
- ‘opt in’ regime
- Structurally challenging – combination of B2B and B2C
- Attorney-General’s discussion paper notes optional contractual rules often fail in Australia due to practitioner resistance
- Has considerable potential to protect consumers (and SMEs)
- Not a suitable regime for commercial transactions - significant intrusions into party autonomy, pre-contractual disclosure requirements
- For B2C has some advantages, but many already in ACL
- If Australia adopted as opt out scheme covering B2B would breach obligation to implement CISG
5.3 Proposed Common European Sales Law (CESL)

- consumer protection & online trading & related services
- ‘opt in’ regime
- Structurally challenging – combination of B2B and B2C
- Attorney-General’s discussion paper notes optional contractual rules often fail in Australia due to practitioner resistance
- Has considerable potential to protect consumers (and SMEs)
- Not a suitable regime for commercial transactions - significant intrusions into party autonomy, pre-contractual disclosure requirements
- For B2C has some advantages, but many already in ACL
- If Australia adopted as opt out scheme covering B2B would breach obligation to implement CISG
5.4 Swiss Proposal

- Suggests UNCITRAL discuss whether further work needs to be done in the broader area of general contract law
- seeks support for work on areas previously avoided for fear of failure to reach consensus
- not seek to overhaul the CISG
6. Conclusion

- National code unlikely. More likely is gradual movement, soft law ‘restatement’, and/or modest hard law reforms by States.

- On 16 October 2012, in Parliamentary Committee, Minister stated the government would consider the feedback before deciding next step

- Direction takes may depend on the extent B2C

- The Swiss Proposal may have an effect on this process, and may be incorrectly perceived as proof something ‘wrong’ with CISG

- In truth, it has been a tried and tested steady blueprint.

- Important Swiss Proposal is explained in Australia & Australian government participates in it