

FORM, SUBSTANCE, AND NEO-PROCEDURALISM IN COMPARATIVE CONTRACT LAW:

**LAW IN BOOKS AND LAW IN ACTION IN NEW ZEALAND, ENGLAND,
THE UNITED STATES OF AMERICA, AND JAPAN**

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Thesis submitted in fulfilment of the requirements of the PhD in Law

Victoria University of Wellington

October 2001

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ABSTRACT

Part One of this thesis develops the “form-substance” analytical framework proposed by Atiyah and Summers to contrast English and US law generally, comparing also New Zealand and especially Japanese law. From this perspective, it argues that both US and Japanese law prefer distinctly more substantive reasoning, whereas both English and New Zealand law maintain a more formal orientation. **Part Two** focuses on three areas of contract law, and the development of contract law theory, arguing that the framework helps explain differing approaches adopted in these jurisdictions. Closer attention to the “law in action” as well as the “law in books”, however, results in refinements to their analytical framework. It also suggests that “neo-proceduralist” models of law generally, and private law in particular, may be becoming increasingly important in both explaining and justifying developments in all four legal systems. **Part Three** introduces several of these models, which go beyond “form-substance” dichotomies without necessarily being inconsistent with them. This thesis therefore aims to offer new perspectives in three disciplines: comparative legal studies, contract law, and general legal theory.

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FOREWORD

This work is the culmination of more than a decade of research, teaching, and practice focused on New Zealand and Japanese law, especially contract law, conducted primarily in New Zealand and Japan. It is a revised version of my work submitted on 2 September 1999 to Victoria University of Wellington, and returned to me with the invitation to revise some portions within one year. This opportunity for further reflection has reinforced my conviction that the thesis offers a timely contribution to comparative law methodology, contract law theory, and general legal theory, especially for a New Zealand audience.

New vantage points presented by fellowships in Europe and Canada, and a new appointment in Australia, have helped refine the core argument that legal reasoning and institutions in New Zealand and England retain a strong formal orientation, while those in Japan and the United States remain distinctly more substantive. Further reflection, and emerging debates especially in New Zealand, have highlighted the difficulty particularly in deciding which of England and New Zealand remains more wedded to formal reasoning and institutions. A converse problem remains in positioning Japan in relation to the US. But I remain all the more convinced that a significant gulf still separates both pairs of countries, raising doubts about ready convergence especially on US models, and more generally on a straightforward globalisation of law, including contract law. I also remain of the view that new processes and forums may be emerging in all four countries that are broadly similar. Yet the fact that these are *processes* make it likely that important divergences in *outcome* may still result.

Such conclusions and the analysis presented in this thesis relate directly to recent debates on certainty in New Zealand law,¹ and on New Zealand's "legal method" (especially judicial method), discussed in a Legal Research Foundation conference held in Auckland on 2 March 2001.² Following the retirement of Lord Cooke of Thorndon as President of the Court of Appeal, and more recently from judicial office in England, the main proponent of more substantive reasoning has been Justice Thomas,³ who retired from the Court in September 2001. Justice Fisher has also drawn on an analytical framework similar to that developed in Part One of this thesis, to argue that New Zealand law (especially judge-made law) is moving towards more substantive reasoning.⁴ However, Justice Fisher accepts that the situation remains very different to the US, and also notes indications of change in England. He is also more circumspect than Justice Thomas about the desirability of this trend. Clear opponents to Justice Thomas include Jim Evans⁵ and Peter Watts⁶, who draw on tendencies towards more

¹ See for example the Symposium Issue of the Otago Law Review (Volume 9 Issue 4) published in late 2000.

² See R Bigwood (ed) *New Zealand Legal Method* (Butterworths, Wellington, forthcoming 2001).

³ E Thomas "A Critical Examination of the Doctrine of Precedent" in R Bigwood (ed) *Legal Method in New Zealand: Essays and Commentaries* (Butterworths, Wellington, forthcoming 2001).

⁴ R Fisher "New Zealand Legal Method: Influences and Consequences" in R Bigwood (ed) *Legal Method in New Zealand: Essays and Commentaries* (Butterworths, Wellington, forthcoming 2001).

⁵ J Evans "Questioning the Dogmas of Realism" in R. Bigwood (ed) *Legal Method in New Zealand: Essays and Commentaries* (Butterworths, Wellington, forthcoming 2001; also forthcoming in [2001] NZ L Rev).

⁶ P Watts "The Judge as Casual Law-Maker" in R Bigwood (ed) *Legal Method in New Zealand:*

formal reasoning arguably exhibited by other members of New Zealand's judiciary.⁷ Other scholars and judges have now started to articulate a range of perspectives and intermediate normative positions.⁸

In parallel, a lively debate has emerged in New Zealand about the direction in which its contract law is and should be heading. One major interest concerns principles of contract interpretation. David McLauchlan has waged a vigorous campaign to move New Zealand in the direction taken by some English judges and commentators, drawing also on mainstream US contract law. For instance, he argues that formal reasoning focused on literal interpretation and inadmissibility of extrinsic evidence is illogical and unprincipled, and broadly counter to the move towards more substantive reasoning in New Zealand contract law.⁹ He has found a strong ally in Justice Thomas.¹⁰ But others, such as Watts, have protested strongly that there is still no such trend in New Zealand case law, or that it would be undesirable in any event.¹¹ More generally, with the benefit of a deep appreciation of movements in Australian law, Rick Bigwood has questioned whether contract law in New Zealand has experienced great change, and argued for a more cautious reformulation rooted in contemporary liberal philosophy.¹² Watts¹³ and John Smillie¹⁴ appear to go even further, building on the self-professed formalism still vigorously advocated by Brian Coote.¹⁵

Normatively, my own sympathies lie more with Justice Thomas and David McLauchlan. Objectively, on a resolutely comparative analysis which looks beyond the world consisting mainly of appellate court judgments, while taking seriously their normative implications, I agree with the perceptions that New Zealand law as whole and its contract law in particular have not moved towards more substantive reasoning to the extent advocated by McLauchlan and Justice Thomas. Further, I believe that both formal and substantive reasoning patterns and legal institutions are starting to be transcended by a new paradigm focused on distinctive processes, or at least that this should be a normative ideal for a complex industrialised democracy like New Zealand.

I am grateful therefore for this timely opportunity to add this work to emerging debates, especially in New Zealand. In particular, I record my thanks to the reviewers of my original work for their constructive comments. I also appreciate enormously the encouragement and help extended to me by those in the three institutions I have been

Essays and Commentaries (Butterworths, Wellington, forthcoming 2001).

⁷ See for example I McKay "Interpreting Statutes – A Judge's View" (2000) Otago L Rev 755.

⁸ See for example A Tipping "A View From the Trenches: A Commentary on the Essays by Justice Thomas and Professor Watts" in R Bigwood (ed) *Legal Method in New Zealand: Essays and Commentaries* (Butterworths, Wellington, forthcoming 2001).

⁹ See for example D McLauchlan "A Contract Contradiction" (1999) 30 VUWLR 175.

¹⁰ See for example *Yoshimoto v Canterbury Golf Int'l Ltd* [2001] 1 NZLR 523. See also *Electricity Corporation of NZ v Fletcher Challenge Energy Ltd* (10 October 2001) Court of Appeal, CA 132/00, Richardson P, Thomas, Keith, Blanchard and McGrath J (Thomas J dissenting).

¹¹ Above n 6.

¹² R Bigwood "Conscience and the Liberal Conception of Contract: Observing Basic Distinctions" Part One (2000) 16 JCL 1; Part Two (2000) 16 JCL 191.

¹³ Compare for example P Watts "The Role of Conscience: A Commentary on Bigwood *Conscience and the Liberal Conception of Contract*" (2000) 6 NZBLQ 64.

¹⁴ See for example J Smillie "Certainty and Civil Obligation" (2000) 9 Otago L Rev 633.

¹⁵ See for example B Coote "Contract - An Underview" in B. Brown (ed) *Contract - An Underview: A Souvenir of a Valedictory Lecture* (Legal Research Foundation, Auckland, 1995) 13; B Coote "Security of Contract and the New Zealand Contract Statutes" (2000) 16 JCL 37.

associated with over the last year, especially Christian Joerges at the European University Institute in Florence, Bill Neilson at the University of Victoria in Canada, and colleagues at the University of Sydney: John Carter, Patrick Parkinson, Elizabeth Peden, Petra Schmidt, Greg Tolhurst, Alex Ziegert, and especially David Harland. For extremely helpful comments on large portions of various versions of this thesis, I thank Rick Bigwood, who also generously provided (in August 2001) the manuscripts of his forthcoming edited collection on *New Zealand Legal Method*.¹⁶ I am also grateful to Don Holborow, David Campbell, David Nelken, and Leon Wolff for advice and encouragement over the last year.

Many other people have helped in earlier stages of the planning, research and writing of this thesis. I acknowledge a number of them in footnotes in the thesis, but I particularly thank the following. I am greatly indebted to Tony Angelo for sparking and sustaining my interest in Japanese law and comparative law generally, when an all too impressionable student at Victoria University of Wellington; and for his scrupulous reviews of earlier drafts of this thesis. Frank Holmes kindly took me on to assist in the Institute of Policy Studies' project on New Zealand's economic relations with East Asia, encouraging me to maintain a broader perspective on Japan. Andrew Ladley inspired me to delve deeper into legal theory. He also planted the seed of the notion of turning the award of a Japanese Ministry of Education post-graduate scholarship, in 1990, into a first step towards a PhD thesis. Later, as colleagues, their encouragement was crucial in making me persevere in that. Others, especially David McLauchlan, Bob Dugan, and Paul Walker (now back in practice in London), gently brought me back to the ground in my teaching and research in Wellington. Geoff McLay provided welcome encouragement, and help with elusive citations. Jonathan Crawford, and other New Zealand lawyers I have worked with, provided in parallel an intensely rewarding exposure to commercial law and practices in New Zealand and especially Japan.

I am also greatly indebted to Zentaro Kitagawa, who welcomed me as a Monbusho scholar to Kyoto University for what turned into four instead of two years' research. His seminars and guidance introduced to me not just the different world of Japanese contract law, but equally the different worlds of German and US contract law. Combined with exposure to the work of Atiyah and Summers, stressing major differences between US and English law, this helped me develop the core insight for the research brought together in this thesis. Kitagawa-sensei encouraged me to begin exploring this insight for my LLM thesis at Kyoto University. I have been greatly assisted in fleshing this out, over the years, from the theoretical paradigms and empirical results from comparative sociology of law first introduced to me by Takao Tanase. Kitagawa-sensei's former assistant, Kenji Yamamoto, was also particularly helpful during my time at Kyoto University. All the more so, as a colleague from April 1997 to March 2000 at Kyushu University. Other colleagues there whom I must single out for special thanks include Mark Fenwick, Tom Ginsburg (now at the University of Illinois), Shiro Kawashima, Narufumi Kadomatsu, Toshimitsu Kitagawa, Hiroo Sono, Dimitri Vanoverbeke (now at the Catholic University of Leuven), and Yoshitaka Wada. Over the last decade or so, I have also learned and benefited greatly from work with lawyers in Japan, especially Toshio Iimura, Keijiro Kimura, and Haruo Okada, and the

¹⁶

Above n 1.

staff and legal advisors of Mitsui & Co Ltd and its subsidiaries in New Zealand and Australia.

Many others in Japan, New Zealand, and around the world, have provided much assistance and encouragement. Through collaboration in co-authored works, Harald Baum and the late Christian Wollschläger helped me to look at Japanese law in a broad context, with more Teutonic rigour. Hans Leser provided much encouragement during the writing of this thesis. Veronica Taylor has long been a source of inspiration and friendly advice. That began with her suggestion to study under Kitagawa-sensei back in 1989, and included making me an "honorary Australian" for an important Asian Law colloquium held at the Australian National University in 1995. Mark Ramseyer kindly commented on a first draft of Chapter One and other parts of the original thesis. Many others are acknowledged specifically in footnotes, along with foundations and institutions which provided funding for associated research. I am also grateful for the cooperation of several generations of students at Victoria University and LLM students at Kyushu University, as well as my class of Contract Law students at the University of Sydney over the last semester, for enduring the infliction of some of the ideas which have now found final form in this thesis. Finally, I thank long-suffering library staff and administrative assistants at the various institutions I have been honoured to be part of over the last decade, and Roy Maslen for technical assistance with word-processing software.

My most heartfelt thanks must go to my immediate family, especially to Hisae Kobayashi, Moana, Erica, and a third child expected in early November 2001, for their enormous patience.

NOTE ON STYLE

- In general, this thesis follows the style recommended in K Evans, G McLay and H Schwartz *Victoria University of Wellington Law Review Style Guide* (1999).
- Because there are so many, footnotes are numbered consecutively for each of: the General Introduction, the Introduction to Part One, Chapter One, the Introduction to Part Two, Chapter Two, Chapter Three, Chapter Four, and the Introduction to Part Three combined with Chapter Five.
- Throughout, the United States of America is referred to as “the US”.
- All spelling has been changed to British spelling, even when the original uses American spelling.
- All translations are mine, unless otherwise mentioned.

GENERAL INTRODUCTION

*Medio tutissimus ibis**

This thesis aims to contribute to three main areas of contemporary debate: comparative law, contract law, and general legal theory. A major concern is to locate Japanese law within a broader comparative context. The **Introduction to Part One** begins by questioning some persistent views of Japanese law as unique, or at least fundamentally different compared with “Western” law.¹ Acknowledging the “interpretive turn” in comparative legal studies, which argues that observers’ perceptions are framed by personal experiences and milieu,² this section sketches how views of Japan may have been influenced by fluctuating economic and political relations between Japan and the US or Europe. It suggests that different patterns of encounters between Japan and New Zealand may create space for a new perspective. A more general methodological point is made too, namely that perceptions of difference are more likely to arise when only two legal systems are compared, whereas multiple points of comparison may offer a better vantage point for ascertaining significant similarities as well as differences.

Chapter One then extends an analytical framework developed by Atiyah and Summers,³ which set out important distinctions even within the “common law tradition”. Introducing more evidence from empirical research, it shows how Japanese law generally shares some important similarities with US law. Both are oriented towards “substantive” legal reasoning – directed towards “moral, economic, political, institutional, or other social consideration[s]”⁴ – and key legal institutions support that orientation. The English law tradition, including New Zealand law, is arguably much

* “You will go most safely by the middle way”: Ovid (43BC – AD17) *Metamorphoses* Book 3, I.466, translated in A Partington (ed) *Oxford Dictionary of Quotations* (4th new ed, Oxford UP, Oxford, 1992).

¹ See for example U Mattei “Three Patterns of Law: Taxonomy and Change in the World’s Legal Systems” (1997) 45 *AJCL* 5, 28, 36-40; K Zweigert and H Koetz (T Weir trans) *Introduction to Comparative Law* (3 ed, Clarendon Press, Oxford, 1998) 295-302; M Chiba “Japan” in P-L Tan (ed) *Asian Legal Systems* (Butterworths, Sydney, 1997) 82.

² See for example V Taylor “Spectres of Comparison: Japanese Law Through Multiple Lenses” in T Ginsburg, L Nottage and H Sono (eds) *The Multiple Worlds of Japanese Law* (University of Victoria, Victoria 2001) 15, 15:

When we teach or research or practice that knowledge we call ‘Japanese law’ we are entering a field that is largely one of our own creation. ‘Japanese law’ exists in our minds and our writings, but it maps very imperfectly the worlds of jurisprudence and legal practice, as they exist in Japan. ‘Japanese law’ is not a neutral label; it comes with built-in inferences, drawn from our own locale and from those of colleagues with whom we share the ‘field’.

Such an approach can invite comparative law scholars to declare their developmental background, present writing environment, and intended audience. Compare for example K Anderson “Kent’s World: A Personal Approach to the Various Worlds of Japanese Law” in T Ginsburg, L Nottage and H Sono (eds) *The Multiple Worlds of Japanese Law* (University of Victoria, Victoria 2001) 36. For what it is worth, the present writer was born and lived in England for two years; in New Zealand, for a total of sixteen years; in the US, for one and half years; in Japan, for a total of about seven years; and other countries, for the remaining seven. He has practised as well as taught law in New Zealand and (more sporadically) Japan, over the last decade; and writes for audiences consisting of academics and (to a lesser extent) practitioners in a range of countries.

³ P S Atiyah and R S Summers *Form and Substance in Anglo-American Law: A Comparative Study of Legal Reasoning, Legal Theory, and Legal Institutions* (Clarendon Press, Oxford, 1987).

⁴ Atiyah and Summers, above n 3, 1.

more “formal”. These provide the four main points of comparison in this thesis, although some mention is made of developments especially in Germany, Australia and transnational law, to further demonstrate the explanatory potential of the analytical framework. Thus, the analysis challenges some conventional categorisations of Japanese law by proposing a different taxonomy more sensitive to context, inspired by the interpretive turn in comparative law but eschewing thorough-going post-modernism.⁵

Part Two contends that the contrast between more substantive Japanese and US law, on the one hand, and more formal English and New Zealand law, on the other, can also be uncovered in a wide range of contract law settings. Those involve differing patterns in the historical development of contract law theory (**Part Two Introduction**); the role of formal requirements in contract formation (**Chapter Two**); contractual unfairness (**Chapter Three**); and the main doctrines elaborated to deal with changed circumstances (**Chapter Four**). As in the broader examination attempted in Chapter One, it is difficult to locate precisely the position taken by the more formal legal systems with respect to each other, and by the more substantive ones with respect to each other. New Zealand law appears more substantive than English law regarding formal requirements, but more formal in its contract law theory development, in dealing with contractual unfairness (especially in view of the slowly growing influence of European law on English law), and possibly in applying its doctrine of frustration (although case law is sparse). Japanese law appears more substantive than US law in its contract law theory development, its approach to formal requirements, and in dealing with changed circumstances, but more formal (at least until recently) in regulating contractual unfairness. Overall, New Zealand contract law might be viewed as more formal than English law, at one end of a spectrum, and Japanese law as more substantive than US law, at the other. This differs somewhat from the overall assessment of each legal system attempted in **Chapter One**, in which English law generally appears more formal than New Zealand law (albeit moving more strongly towards a substantive approach in recent years), while US law appears more substantive than Japanese law. However, it is worth recalling the saying that “a foolish consistency is the hobgoblin of small minds”.⁶ Moreover, the precise relative positioning is not crucial to

⁵ Thus, in terms of one recent overview of the field of comparative legal studies, the thesis challenges mainstream “categories” scholarship and bears closest affinity with “context” scholarship, distinguished by a broader view of the sources of comparison and greater personal commitment to foreign law as an object of comparison. It differs from “discourse” scholarship, which turns away from methods of 20th century legal and social science scholarship in favour of literary theory and cultural studies. One extension of this approach is Riles’ suggestion, inspired by the way in which Wigmore collected and exhibited striking artifacts related to different legal systems (including Japan), that comparative law should simply juxtapose a rich variety of legal phenomena and leave observers to draw their own conclusions. See A Riles “Wigmore’s Treasure Box: Comparative Law in the Era of Imagination” (1999) 40 Harv J Int’l L 221. While this may be useful in prompting interest in a field of study, it means abandoning key tenets of modern law and social science, and ignores pervasive evidence of the benefits of “mental mapping”. Compare G Blasi “What Lawyers Know: Lawyering Expertise, Cognitive Science, and the Functions of Theory” (1995) 45 J Legal Educ 313; A Peters and H Schwenke “Comparative Law Beyond Post-Modernism” (2000) 49 ICLQ 800; and L Nottage, T Ginsburg and H Sono “The Worlds, Vicissitudes and Futures of Japan’s Law” in T Ginsburg, L Nottage and H Sono (eds) *The Multiple Worlds of Japanese Law* (University of Victoria, Victoria 2001) 1, 2-8.

⁶ E W Thomas “A Critical Examination of the Doctrine of Precedent” in R Bigwood (ed) *New Zealand Legal Method* (Butterworths, Wellington, forthcoming), citing – at the outset – Ralph Waldo

this thesis. The key argument is that both New Zealand and English law remain distinctly more formal than both Japanese and US law, in general as well as in important contractual settings.

This thesis makes no strong claims about how representative or important contract law is for each of these four legal systems overall. It contends only that contract law is significant enough in each for the dichotomy identified in this area to reinforce that identified in **Chapter One** through overviews of the legal systems overall. Consistently with the comparative law approach adopted, the latter more general analysis is also important to keep in broader context the contract law elaborated by courts, legislatures, and the parties in their everyday dealings. Further, the decision to deal with contract law, as well as the selection of particular topics, are driven by the goal of contributing to ongoing debates in contract law theory. Thus, the topics discussed are necessarily selective, but they address key aspects of the classical and neoclassical models of contract law. These have long been the subject of critical attention in the US and Japan, engendering more recent debates first in England and then in New Zealand (**Part Two Introduction**). In particular, both models focus on the parties' initial agreement, and exhibit a reluctance (especially in the classical variant) to find that binding legal relations have been entered into (the focus of **Chapter Two**), to add obligations not sourced in the parties' specific agreement (**Chapter Three**), and to allow contractual obligations to be altered over time (**Chapter Five**).⁷

Lessons from comparative law and evolving trends in contract law theory also dictate the methodology adopted in this thesis, incorporating consideration of the "law in action" as well as the "law in books" (especially case law and legislation).⁸ In addition, an expansive view of law can be justified in terms of the "neo-proceduralist" paradigm explored in **Part Three**. This paradigm goes beyond distinctions based on form and substance like those developed by Atiyah and Summers, but it is not necessarily inconsistent with them. **Chapter Five** describes two important variants of the paradigm developed by legal theorists recently: the systems-theoretic approach proposed by Luhmann⁹ and elaborated by Teubner,¹⁰ and Habermas' discourse theory

Emerson "Self Reliance" in *Emerson's Essays* (1980) 57.

⁷ See for example P S Atiyah *An Introduction to the Law of Contract* (5 ed, Clarendon Press, Oxford, 1995) 7-15; Gilmore *The Death of Contract* (Ohio State UP, Columbus (Ohio), 1974) 14-15; I Macneil "The Many Futures of Contract" (1974) 60 S Cal L Rev 691; T Uchida "The New Development of Contract Law and General Clauses - A Japanese Perspective -" in ICCLP (ed) *Japanese and Dutch Laws Compared* (ICCLP, Tokyo, 1993) 119. Compare also R J Mooney "An American View of New Zealand Contract Law" (1991) 21 VUWLR 69; L A DiMatteo "Equity's Modification of Contract: An Analysis of the Twentieth Century's Equitable Reformation of Contract Law" (1999) 33 New England L Rev 265, 266-267.

⁸ These two phrases are used extensively in R Pound *Introduction to the Philosophy of Law* (rev ed, Yale UP, New Haven, 1955).

⁹ See for example N Luhmann *Rechtssoziologie [Sociology of Law]* (Rowohlt, Reinbek, 1972); N Luhmann "Communication About Law in Interaction Systems" in K Knorr-Cetina and A V Cicourel (eds) *Advances in Social Theory and Methodology: Toward an Integration of Micro- and Macro-Sociologies* (Routledge & Kegan Paul, Boston, 1981) 234; N Luhmann "The Unity of the Legal System" in G Teubner (ed) *Autopoietic Law: A New Approach to Law and Society* (de Gruyter, Berlin, 1988) 1; N Luhmann "Quod Omnes Tangit: Remarks on Juergen Habermas's Legal Theory" (1996) 17 *Cardozo L Rev* 883.

¹⁰ See for example G Teubner *Recht als Autopoietisches System [Law as an Autopoietic System]* (Suhrkamp, Frankfurt am Main, 1989); G Teubner "Substantive and Reflexive Elements in Modern Law" (1983) 17 *L & Soc'y Rev* 240; G Teubner "How The Law Thinks: Toward a Constructivist Epistemology

of law.¹¹ Teubner argues that law should be conceived as a social sub-system involving “diverse communicative processes that observe social action under the binary code of legal/illegal”.¹² Such processes guide adjudication by courts, but they also can be implicated in fora beyond highly institutionalised settings involving the coercive powers of the nation-state.¹³ Habermas accepts the key insight of systems theory, namely that social sub-systems increasingly differentiate themselves from one another, but sees more scope for revitalising general “communicative action” oriented towards mutual understanding. This involves mediating law’s “facticity”, its existence as sanctioned governmental force, and its “validity” or foundation in “rationally motivated beliefs”,¹⁴ through institutionalisation at various levels. His key interest lies in strictly institutionalised fora such as courts (generating a “discourse of application” to authoritatively resolve disputes), and legislative bodies (involving a “discourse of justification” among participants of equal standing). However, Habermas’ theory allows for similar mediation between facticity and validity in other contexts, including arguably the contractual arrangements elaborated by parties in the shadow of state law.¹⁵ Thus, the theories elaborated in **Part Three** add a jurisprudential and sociological basis for the thesis’ focus not only on case law (given due weight particularly in **Chapter Two**) and legislation (discussed especially in **Chapter Three**); but also the practices and norms in long-term contracting, revealed by some empirical research (**Chapter**

of Law” (1989) 23 L & Soc Rev 727.

¹¹ J Habermas (W Rehg trans) *Between Facts and Norms* (MIT Press, Cambridge Mass, 1996).

¹² G Teubner “The Two Faces of Janus: Rethinking Legal Pluralism” (1992) 13 Cardozo L Rev 1443, 1451.

¹³ Compare also B Tamahana “A Non-Essentialist Version of Version of Legal Pluralism” (2000) 27 J L & Soc’y 296, 306-313. Tamahana is even more radical in identifying law simply as whatever people identify and treat through their social practices as “law”. However, this inhibits adequate consideration of structure in social systems, a key advantage of the approach taken by Luhmann and Teubner, as Habermas concedes. See below Chapter Five Part II.B.

¹⁴ R Cotterrell “Law and Community: A New Relationship?” (1998) 51 CLP 367, 372.

¹⁵ Compare for example J Habermas “A Short Reply” (1999) 12 Ratio Juris 445, 448. It can be argued, for instance, that the public arena extends beyond the legislature to include “the work of the local school governance committee, the community policing beat organisation, and their analogues in areas such as the provisions of services to firms or to distressed families”: J Cohen “Reflections on Habermas on Democracy” (1999) 12 Ratio Juris 385, 414. This expanded public sphere, moreover, can generate a “constitutionalisation” of private law elaborated not just through courts, but also through a range of “private governance regimes” such as technical standardisation, production of rules for professionals, and contractual networks. Consequently, for instance:

Especially in the practice of general clauses (such as good faith or reasonableness), the private law courts would insist on the threshold weight of abstract constitutional principles as provisional interpretive fix-points, while at the same time granting leeway to highly decentralised, participatory and context-sensitive forms of experimentation with standards.

See O Gerstenberg “Justification (and Justifiability) of Private Law in a Poycontextural World” (2000) 9 Social and Legal Studies 419, 424. Such arguments continue to evolve from longstanding debates about Habermas’ theories. See also for example K Yamamoto “*Keiyaku Kosho Kankei no Hoteki Kochiku ni tsuite no Ichi Kosatsu* [A Perspective on the Legal Structure of Contract Negotiation Relationships]” (1989) 100 Minsho Zasshi 245. However, it remains an open question whether they, and other refinements or insights, can or should be viewed as “neo-Habermasian” or rather as substituting a new general theory. Compare for example K Avio “Scarcity, Discourses of Implementation, and Habermasian Law and Democracy” (2000) 13 Ratio Juris 148 with K Ladeur, *Can Habermas’ Discursive Ethics Support a Theory of the Constitution?* (EUI Working Paper LAW No 99/4, European University Institute, Florence, 1999).

Four).¹⁶

The latter research also provides some support for the emergence of neo-proceduralist tendencies in contracting involving Japan and New Zealand, suggesting new interpretations of empirical studies into contracting in England and the US.¹⁷ Chapter Five goes on to indicate how these theories can also be applied to several developments in Japanese law. The attempt is one of the first of its kind in the English language,¹⁸ and is the most tentative part of the thesis. However, it links up to similar recent attempts to apply such theories in other jurisdictions, notably England.¹⁹ The analysis therefore indicates the possibility for broader convergence in *processes* of legal development in legal systems oriented towards formal, as well as substantive, reasoning. Nonetheless, the *outcomes* from these processes are likely to diverge, perhaps especially because of the contrast in underlying reasoning patterns and related legal institutions. Like other other theorists comparing legal systems generally, and contract law itself, this thesis is therefore sceptical about claims of a rapid globalisation of law (especially involving convergence on US models).²⁰ Nonetheless, it acknowledges indications of some important transformations and harmonising tendencies, and suggests in passing a number of promising avenues for further inquiries into the nature of globalisation.

In sum, the core of this thesis is directed at the advancement of contract law theory, but in a broader comparative context which also seeks to go beyond post-modernism in methodological approach, ultimately tying these issues to contemporary debates in general legal theory.

¹⁶ As Cotterrell and Habermas point out, philosophy and normative legal theory or reconstruction must proceed in tandem with sociological and empirical research: Cotterrell, above n 14, 373-375.

¹⁷ Compare for example H Collins and C Scott "United Kingdom" in G Brueggermeier (ed) *Rechtsprobleme von Qualitätsmanagementvereinbarungen und EG-Binnenmarkt [Legal Problems of Quality Assurance Agreements and the EU Internal Market]* (Nomos, Baden-Baden, 1998) 239; J Esser "Institutionalising Industry: The Changing Forms of Contract" (1996) 21 L & Soc Inq 593.

¹⁸ See also T Ginsburg "System Change? A New Perspective on Japan's Administrative Procedure Law" in T Ginsburg, L Nottage and H Sono (eds) *The Multiple Worlds of Japanese Law* (University of Victoria, Victoria 2001) 107.

¹⁹ See for example J Black "Proceduralising Regulation: Part I" (2000) OJLS 598.

²⁰ See generally L Nottage "Convergence, Divergence and the Middle Way in Unifying or Harmonising Private Law", EUI Working Paper in Law No 2001/1 (European University Institute, Florence, 2001, available freely through <www.iue.it/LAW/publicat.htm>).

PART ONE: POSITIONING JAPANESE LAW

INTRODUCTION

For some in New Zealand, a thesis comparing Japanese law and especially Japanese contract law may seem exotic or even oxymoronic. After all, it was a comparative lawyer at Victoria University of Wellington who in 1976 translated into English Yoshiyuki Noda's influential textbook on Japanese law, which proclaimed boldly: "the Japanese do not like law".¹ A translation of a work by Noda's colleague at Tokyo University, Takeyoshi Kawashima, also published around that time, asserted equally strikingly that:²

In Japanese contracts, the parties not only do not stipulate in a detailed manner the rights and duties under the contract, but also think that even the rights and duties provided for in the written agreement are tentative rather than definite.

Such views, suggesting the marginality of law or at least a very different attitude towards the law in Japan, found a ready audience in the West during the era of cultural relativism which followed the Vietnam War, the disintegration of *pax americana*, and post-Oil Shock economic decline in industrialised Western economies.³ They have contributed to an ingrained "legal orientalism", stressing differences rather than possible similarities, with respect to Japanese law and Asian law more generally.⁴

A recent example of this is the assertion by an Italian comparative law professor, widely known in the US, that Japan and China both are distinguished by "the rule of traditional law", rather than "the rule of professional law" characteristic of English, German or US law.⁵ Likewise, in the recently translated third edition of their widely read textbook on comparative law, Konrad Zweigert and Hein Kötz persist in grouping Japan with the People's Republic of China in a generic "Far Eastern Legal Family", supposedly distinguished by a common tradition rooted in Confucian ideology.⁶ They suggest that Hiroshi Oda is right to object to this grouping in earlier editions; but are not convinced of his view "that Japanese law is part of the

¹ Y Noda (A Angelo trans) *Introduction to Japanese Law* (Tokyo UP, Tokyo, 1976) 106. See also for example C Kim and C Lawson "Law of the Subtle Mind: The Traditional Japanese Conception of Japanese Law" (1979) 26 ICLQ 491.

² T Kawashima (C Stevens trans) "The Legal Consciousness of Contract in Japan" (1974) 7 L in Japan 1, 17. See also for example Y Noda "*La conception du contrat des japonais* [The Japanese Conception of Contract]" (1979) No Special - 1 RIDC 411.

³ L Nottage "Trade Law Harmonisation in the Asia-Pacific Region: A Realist's View from New Zealand - and a Way Forward?" [1995] NZLJ 295.

⁴ V Taylor "Beyond Legal Orientalism" in V Taylor (ed) *Asian Laws Through Australian Eyes* (Law Book Company, Sydney, 1997) 47.

⁵ U Mattei "Three Patterns of Law: Taxonomy and Change in the World's Legal Systems" (1997) 45 AJCL 5, 28, 36-40 (although conceding that Japan may tend a little towards "the rule of professional law", whereas China tends towards "the rule of political law").

⁶ K Zweigert and H Kötz (T Weir trans) *Introduction to Comparative Law* (3 ed, Clarendon Press, Oxford, 1998) 295-302. For more legal orientalism from a noted German comparative lawyer, albeit in the context of a methodology which gives great weight to difference and culture more generally, see B Grossfeld *Kernfragen der Rechtsvergleichung* [Key Issues in Comparative Law] (Mohr, Tübingen, 1996) 8.

Romano-Germanic family of law, with some elements of American law".⁷ While conceding that his views show "that the doctrine of legal families should not be taken too seriously, for it can often lead to simplifications which do violence to the facts", Zweigert and Kötz retain the grouping in their third edition. It seems that they perceive as still significant a "traditional distaste for written rules of law and litigation" and "that for a long time the many codes on the European model which were enacted in Japan had very little influence on the realities of legal life there", although they concede that these two factors may be waning.⁸ Nonetheless, rather than carefully investigating not only the extent of socio-legal change in Japan, and new theoretical frameworks proposed to analyse them over the last few decades, they and Mattei revert to the broad-brush legal orientalism still prevalent among "mainstream" comparative lawyers, as well as many casual commentators in Europe and the US.⁹

Probably as a result of this unwillingness to go beyond generalisations and stereotypes, European and especially American observers have appraised supposed differences rather disparately over the decades. In part, the appraisals appear to track fluctuating comparative economic performance and trade policy responses. In the 1950s and 1960s, for instance, they called for more modernisation and democratisation of the Japanese legal and constitutional system. By the 1970s and early 1980s, perceptions of more consensual means of dispute resolution and cooperative long-term contracting in Japan instead came to be held up as models for emulation in jurisdictions like the US.¹⁰ By the end of the 1980s, however, persistent and growing trade surpluses in Japan's favour helped reinforce a shift back towards a critical or "revisionist" attitude: fundamental differences in governance structures in Japan had to be changed instead.¹¹ At first, those were seen as primarily dictated by entrenched "bureaucratic informalism".¹² More recently, Japanese politicians have been urged increasingly to rise above their immediate personal or party interests to lead Japan into a brave new era. This may parallel new perspectives developed by observers of Japanese law and politics over the last decade, especially Mark Ramseyer's thesis that politicians from the Liberal Democratic Party (LDP) have been able to exert indirect control over the bureaucracy because of LDP domination of Japan's parliamentary democracy for more than four decades.¹³ Calls for Japan to reform itself, rather than for the rest of the world to

⁷ Zweigert and Koetz, above n 6, 299 (citing H Oda *Japanese Law* (Butterworths, London, 1992), 6). Compare H Leser *Einfuehrung in die Rechtsvergleichung [Introduction to Comparative Law]* (FernUenivaersitaet, Hagen, 1999) 26, who also prefers to locate Japan in a "fourth continental European legal family".

⁸ Zweigert and Koetz, above n 6, 66.

⁹ See also F Upham "The Place of Japanese Legal Studies in American Comparative Law" (1997) *Utah L Rev* 689; P de Cruz *Comparative Law in a Changing World* (3 ed, Cavendish, London, 1999) 207-211; D Watts *The Times Guide to Japan* (Times Books, London, 1993) 55-67.

¹⁰ Z Kitagawa "Kokusai Masatsu no Naka no Nihonho [Japanese Law in the Midst of International Friction]" (1990) 500 *NBL* 27.

¹¹ K van Wolferen *The Enigma of Japanese Power: People and Politics in a Stateless Nation* (1 ed, Macmillan, London, 1989).

¹² F Upham *Law and Social Change in Post-War Japan* (Harvard UP, Cambridge, Mass, 1987) often has been read this way: see for example Y Matsuura "Law and Bureaucracy in Modern Japan" (1989) 41 *Stanford Law Rev* 1627. But see F Upham "Privatized Regulation: Japanese Regulatory Style in Comparative and International Perspective" (1997) 20 *Fordham Int'l L J* 396.

¹³ Beginning with M Ramseyer and F M Rosenbluth *Japan's Political Marketplace* (Harvard UP, Cambridge (Mass), 1989).

emulate Japan, certainly have become louder as Japan's relative economic performance has worsened throughout the 1990s.

New Zealand, by contrast, has not witnessed such swings in economic and political relations with Japan since World War II. It is also a small country which emerged only slowly, through the 20th century, from the shadow of the British Empire, both economically and in terms of its legal system. New Zealand therefore has hardly been in a strong position to tell other jurisdictions in what directions they should be heading.¹⁴

New Zealanders also tend to be rather pragmatic, judging things by particular experiences rather than overarching theory.¹⁵ It is probably very significant, then, that growing economic relations with Japan after World War II have resulted in a range of legal disputes or encounters which do not accord with generalisations about Japanese attitudes towards law, and in relation to contracts.¹⁶ Following rapid increases in energy prices in the late 1970s, for instance, it was the New Zealand side (the Muldoon government) which attempted to renegotiate the fixed price at which electricity from the Manapouri power scheme had been supplied to the Bluff aluminium smelter, a joint venture operated by the Comalco multinational but with very considerable Japanese participation.¹⁷ This can be contrasted with the infamous "Sugar Case" around the same time, in which the Japanese parties to a long-term supply contract attempted to renegotiate an agreed fixed price with their Australian suppliers after the market moved against them. Among Australians, apparently, this generated enduring stereotypical views of Japanese attitudes towards contract and the law.¹⁸ The prominence of the

¹⁴ L Nottage "Contract Law and Practice in Japan: An Antipodean Perspective" in H Baum (ed) *Japan: Economic Success and Legal System* (de Gruyter, Berlin, 1997) 197 (updated and expanded in L Nottage "Contract Law and Practice in Japan: An Antipodean Perspective - Revisited" (1997) 31 *Hikakuho Zasshi* [Comparative L Rev] 55). A good recent example of self-restraint or even self-effacement is the keynote address given by Susan Glazebrook, partner in a large New Zealand law firm and departing president of the Inter-Pacific Bar Association, at its conference in Bangkok in 1999: D McNamara "The Rule of Law and Economic Recovery in Asia" (1999) 521 *Lawtalk* 13.

¹⁵ See R Sutton "Lord Cooke and the Academy: A View from the Law Schools" in P Rishworth (ed) *Struggle for Simplicity: Essays for Lord Cooke of Thorndon* (Butterworths, Wellington, 1997) 13, 23. He quotes Lord Cooke as defining New Zealand's "national identity" to include "egalitarianism, a love of practical fairness, and a suspicion of anything too theoretically or abstractly reasoned"; but adds that it "would be interesting to probe [such] views, and the assumptions which lie behind them, more closely". See also below Part Two Introduction Part IV. Compare M Smith "Australian Perspectives on Asian Law: Directions for the Next Decade" in V Taylor (ed) *Asian Laws Through Australian Eyes* (Law Book Company, Sydney, 1997) 3 (making similar suggestions about Australians); and J Braithwaite "Community Values and Australian Jurisprudence" (1995) 17 *Syd L Rev* 351. See also L Wolff "Japanese Law as 'Other' Law: A Reflective Essay on 100 Years of Australasian Scholarship on Japanese Law", Proceedings of the Australasian Law Teachers Association conference, Wellington, 4-7 July 1999, Vol 2 (showing less wildly fluctuating and more pragmatic approaches towards Japanese law from Australian and some New Zealand scholars over the last century).

¹⁶ See for example Kawashima, above n 2.

¹⁷ For a concise overview of the dispute, see H Templeton *All Honourable Men: Inside the Muldoon Cabinet, 1975-84* (Auckland UP, Auckland, 1995) 72-78. For detailed background information on the scheme, see N Peat *Manapouri Saved!* (Longacre Press, Dunedin, 1994). In the mid-1980s, moreover, further suggestions of renegotiations led to the government being sued twice by the smelter joint venture: see *Comalco Power (NZ) Ltd v A-G* (19 December 1986) unreported, High Court, Wellington Registry, CP 404/86, Heron J; and *Comalco Power (NZ) Ltd v Douglas & Anor* (28 March 1987) unreported, High Court, Wellington Registry, CP 128/87, Greig J.

¹⁸ See generally R M March *The Japanese Negotiator: Subtlety and Strategy Beyond Western*

Manapouri saga, perceived by some as the birth of a nation-wide environmentalist movement in New Zealand,¹⁹ may have encouraged quite a number of New Zealanders to see Japanese companies instead as rather tough or inflexible contracting parties.

A similar view may have emerged among those involved in contract or commercial litigation with Japanese parties in New Zealand courts throughout the 1980s and 1990s. Searching legal databases maintained by the Wellington District Law Society Library, for instance, quickly uncovers one category of cases involving Japanese residents or Japanese companies incorporated in New Zealand, albeit not all necessarily with majority Japanese shareholding.²⁰ However, there is evidence from other jurisdictions that Japanese affiliates overseas tend to adapt to their local legal environment. The proverb, "do in Rome as the Romans", also has a Japanese equivalent: *go ni ite wa go ni shitagau*. So perhaps not too much should be read into these cases.

A second category, though, involves businesspeople resident in Japan or companies incorporated there.²¹ Of course, even combined, these cases cannot justify a stereotype of Japanese as litigious, since absolute numbers are small and these individuals or companies may be unrepresentative, having embarked on international as opposed to domestic commercial dealings. But they suggest that a significant body of New Zealand lawyers and judges, businesspeople and others involved in the cases, and some academic commentators (not just specialists in Japanese or comparative law) would likely question the stereotype of the non-litigious Japanese which continues to capture the imagination of many in the US and Europe. Recent examples illustrating the continued attraction of this stereotype include writings in the US on Japanese contracting, product liability, arbitration, and cyber-law.²²

Logic (Kodansha, Tokyo, 1988), 97-107. See also below Chapter Four Part III.B.

¹⁸ V Taylor "Continuing Transactions and Persistent Myths: Contracts in Contemporary Japan" (1993) 19 Melbourne University L Rev 352. For Canadians, the Quintette Coal dispute may have had a similar impact, because there too it was the Japanese side which attempted to renegotiate prices in a long-term supply contract. See W Neilson "Price Adjustments in Long-Term Supply Contracts: The Saga of the Quintette Coal Arbitration" (1991) 18 Canadian Bus LJ 76.

¹⁹ P K Wells "The Conservation Regime: Manapouri Revisited" (1999) Proceedings of the Australasian Law Teachers Association conference, Wellington, July 4-7 1999, Vol 2.

²⁰ See Appendix A at the end of this thesis. Databases searched included LINX, Briefcase, CCH Company Law Cases, and New Zealand Court of Appeal cases.

²¹ See Appendix B at the end of this thesis.

²² See, respectively, A J Bolla "The (Im)Probable Future in Japanese Charter Parties: The Language of Law" (1998) 29 J Mar L & Comm 107, and P McConnaughay "Rethinking the Role of Law and Contracts in East-West Commercial Relationships" (2001) Va J Int'l L 427 (compare Part Four Chapter Four below); A Bernstein and P Fanning "'Weightier than a Mountain': Duty, Hierarchy, and the Consumer in Japan" (1996) 29 Vanderbilt J of Transnational Law 45 (compare L Nottage and Y Wada "Japan's New Product Liability ADR Centers: Bureaucratic, Industry, or Consumer Informalism?" (1998) 6 ZJapanR 40; L Nottage and M Kato "Product Liability" in M Matsushita (exec ed), *Japan Business Law Guide* (looseleaf, Sydney, CCH Australia: first instalment published in December 1999, second instalment in June 2000); McConnaughay, cited in this footnote, 452-3 (compare L Nottage "Educating Transnational Commercial Lawyers for the 21st Century: Towards the Vis Arbitral Moot in 2000 and Beyond" (1999) 66 Hosei Kenkyu F1; and L Nottage "The Vicissitudes of Transnational Commercial Arbitration and the *Lex Mercatoria*: A View from the Periphery" (2000) 16 Arb Int'l 73); D Rosen "Surfing the Sento" (1997) 12 Berkeley Tech LJ <<http://www.law.berkeley.edu/journals/btlj/articles/12-1/rosen.html>> (compare L Nottage "Cyberspace and the Future of Law, Legal Education, and Practice in Japan" (1998) 5 Web C Current Leg Issues

Searches of New Zealand legal databases also uncover many other instances in which New Zealanders have encountered the reality of commercial law and practice in Japan, in cases even where no Japanese individual or company is actually party to litigation.²³ More diligent efforts, including searches of newspaper or other databases to capture reports of disputes before these get to court or of major commercial transactions involving Japanese parties,²⁴ undoubtedly would uncover an even broader array.

Such encounters – combined with less of a “colonising impulse”²⁵ stemming from New Zealand’s own colonial history, peripheral position in world affairs, and stable economic relations with Japan since World War II – suggest that a perspective incorporating New Zealand may prove valuable in revisiting the received wisdom about Japanese law and contracting. Now is a good time to do so, as Japan through the 1990s has continued to undergo significant socio-economic restructuring,²⁶ often prompted by trade liberalisation and calls for deregulation stressing more contract-based governance structures.²⁷ A comprehensive reassessment also has become more feasible, thanks to the exponential increase in Japanese law related literature made available in Western languages over the last few decades, especially over the internet in recent years.²⁸

Adding one more point of reference to a comparison, moreover, should assist in locating and evaluating more precisely areas of difference and similarity. A flaw in

<<http://webjcli.ncl.ac.uk/1998/issue5/nottage5.html>>. In this literature, it seems little has changed since it was noted a decade ago that: “In comparative work on Japanese law, ‘culture’ is king” (J M Ramseyer and M Nakazato “The Rational Litigant: Settlement Amounts and Verdict Rates in Japan” (1989) 17 *J of Leg Studies* 262, 263).

²³ Many involve used cars. See generally D Nottingham *Car Wars: The True Story of the Odometer Winding Scandal* (Howling at the Moon Publishing, Auckland, 1998) 91-111, and for example *Wilson (for Motor Vehicle Dealers Institute) v Interim Finance Ltd & Ors* (23 October 1998) unreported, High Court, Auckland Registry, AP 141/98, Giles J (contract for sale of used cars, later imported into New Zealand, held to have been effected in Japan, by Interim Finance Ltd as agent for purchasers and Japanese exporters). See also for example *Maclean v Arklow Investments Ltd* [1998] 3 NZLR 681, 712 per Thomas J (documentary evidence “indicate the enormous difficulty and complexity in obtaining a commitment from a major participant [Japanese company, Kanematsu, for a forest purchase proposed by Maclean] naturally inclined to protect its own interests”); *European Pacific Banking Corporation Ltd v Television New Zealand Ltd* [1994] 3 NZLR 43 (Japanese banks also were involved in European Pacific transactions generating tax credit certificates issued by the Cook Islands authorities).

²⁴ For example, the NZ\$1 billion purchase of shares in Lion Nathan Ltd by Kirin Brewery Company: see Simpson Grierson Law, *1998 Review* (Auckland, 1999) 8-9; “Nippon Suisan Gains Control of New Zealand Fish Processor” *The Nikkei Weekly*, 2 March 2001, 3.

²⁵ Compare J Gessner “Praesumptio similitudinis? A Critique of Comparative Law” (1995) 2 *Proceedings of the 1995 Annual Meeting of the RSCL (International Sociological Association)*, Tokyo, 1-4 August 1995, Section Meetings Supplement 2, 41.

²⁶ See generally L Nottage “Top Ten Changes and Continuities in Japanese Law and Society - 1997” (1998) NZACL Yearbook 3: 1997 611; and L Nottage “Japan” in *Doing Business in Asia* (looseleaf, CCH Asia Pte Ltd, Singapore, updates 41 and 42, 2000).

²⁷ See generally for example V Taylor “Consumer Contract Governance in a Deregulating Japan” (1997) 27 *VUWLR* 99; V Taylor “Re-Regulating Japanese Transactions: The Competition Law Dimension” (2000) 3/2 *ICCLP Review* 16 (available through <<http://www.j.u-tokyo.ac.jp/~icclp/Review3-2.pdf>>).

²⁸ M K Scheer *Japanese Law in Western Languages 1974-1989: A Bibliography* (German-Japanese Lawyers Association, Hamburg, 1992); H Baum and L Nottage *Japanese Business Law in Western Languages: An Annotated Selective Bibliography* (Fred B Rothman, Littleton (Colorado), 1998); L Nottage “Japanese Business Law in Cyberspace: Preliminary Usage Patterns for the Japanese Law Links Webpage” (2000) 1 *Aust J Asian L* 91.

much of the literature in English on Japanese law, and especially contract, is that it has involved contrasting just two countries: in particular, Japan and the US.²⁹ When only two systems are compared, it is very likely that differences will tend to stand out. Adding more dimensions to the comparison can reveal that instead those two systems in fact bear a number of important similarities, with the additional systems compared showing the more significant differences. This thesis therefore compares not only Japanese and US law, but also English and New Zealand law. From this broader perspective, it contends that differences between Japanese and US law have indeed been exaggerated. Much more pronounced differences appear between those legal systems, on the one hand, and the English law tradition, which still includes New Zealand law, on the other.

For instance, English and especially New Zealand jurists still do not recognise a general duty of good faith even in contractual performance.³⁰ Further, both English and New Zealand law adopt a distinctly more restrictive approach towards the prerequisites for, and effects of, the doctrine of frustration. Both US and Japanese law do recognise a general duty of good faith, and have moved in some similar directions with respect to doctrines applying in the event of extreme change in circumstances.³¹ Such commonalities become less surprising when it is realised that the latter two legal

²⁹ This is true even of J O Haley *Authority without Power: Law and the Japanese Paradox* (Oxford U P, New York, 1991) 1. The author begins by noting that while Japan may appear to exhibit more aversion to legal ordering than in the West, "From an East Asian perspective, the bonds of family are weaker in Japan than those of territorial or corporate communities and of contract. Japan is also a more litigious, legalistic society, one in which the claims of rule by and of law seem quite relevant in comparison to other East Asian societies". However, the implicit or explicit comparison in the rest of the book is overwhelmingly the US. See also T Uchida *Keiyaku no Jidai: Nihon Shakai to Keiyakuho [The Contract Era: Japanese Society and Law]* (Iwanami Shoten, Tokyo, 2000) 165-167, persuasively criticising the contrast drawn almost exclusively between Japan and the US, in T Tanase "Kankeiteki Keiyakuron to Hochitsujokan [Relational Contract Theory and Perceptions of Legal Order]" in T Tanase (ed) *Keiyaku Hori to Keiyaku Kanko [Contract Law and Contract Practices]* (Kobundo, Tokyo, 1999) 1]. In discussing the requirement of good faith in contractual negotiations, McConnaughay (above n 22, 469) at least notes that the principle is found in "a few civil law jurisdictions, most notably the Netherlands". Disappointingly, however, he concludes simply that "presumably, 'good faith' in the Dutch regime does not capture all of the values and circumstances to which law and contracts might be subordinate in non-Western commercial traditions" (above n 22, 470), ignoring the fact that most "non-Western" jurisdictions discussed (like Japan) make good faith part of their *legal* tradition.

Another problem has been the tendency to compare Japanese businesspeople or business practices, with US lawyers and law: see W Gray "The Use and Non-Use of Contract Law in Japan: A Preliminary Study" (1984) 17 L in Japan 98; T Uchida "The New Development of Contract Law and General Clauses - A Japanese Perspective -" in ICCLP (ed) *Japanese and Dutch Laws Compared* (ICCLP, Tokyo, 1993) 119. Compare the comparative empirical study below Chapter Four Part III.

³⁰ As explained below (Chapter Three Part IV.B), English jurists have been driven increasingly to exploring this notion through the growing importance of European Union law, in particular. A burgeoning literature in England attests to this. By contrast, the only sustained analysis of contractual good faith in a New Zealand law journal appears to be one by this writer, L Nottage "Form and Substance in US, English, New Zealand and Japanese Law: A Framework for Better Comparisons of Developments in the Law of Unfair Contracts" (1996) 26 VUWLR 247.

³¹ See, respectively, below Chapter Three and Chapter Four Part II. Similarly showing the benefits of comparing multiple legal systems, a French scholar's doctoral thesis has recently demonstrated how German law has been the boldest in developing a generalised duty of good faith; how French law has been the most reticent; and how Japanese law has adopted an intermediate position. See B Jazulot *La bonne foi dans les contrats: étude comparative de droit français, allemand et japonais [Good Faith in Contract: A Comparative Study of French, German and Japanese Law]* (Daloz, Paris, 2001).

systems drew heavily on German private law jurisprudence and theory from before World War II. In the US, this came through key figures like Karl Llewellyn, the architect of the Uniform Commercial Code (UCC) and a leading legal realist, whose visits to Germany exposed him to legal sociology and civil law methodology in Europe.³² In Japan, influential scholars such as Izutaro Suehiro drew on early American legal realism as well as the ideas of Eugen Ehrlich to focus on practices and custom, along with the actual results reached by judges, as opposed to legal doctrines and rules.³³ This thesis cannot explore in detail such crossovers in legal history, nor those

³² For his contribution to legal realism, see especially W Twining *Karl Llewellyn and the Realist Movement* (U Oklahoma Press, Norman, 1973); N E H Hull *Roscoe Pound and Karl Llewellyn* (U Chicago Press, Chicago/London, 1997), 223-77. On German influences compare also P Gewirtz "Editor's Introduction" in K Llewellyn (M Ansaldi trans) (ed) *The Case Law System in America* (U Chicago Press, Chicago/London, 1989), xi-xiii, with U Drobnig "Llewellyn and Germany" in U Drobnig and M Reh binder (eds) *Rechtsrealismus, multikulturelle Gesellschaft und Handelsrecht: Karl N Llewellyn und seine Bedeutung heute [Legal Realism, Multi-cultural Society, and Commercial Law: Karl Llewellyn and his Significance Today]* (Duncker & Humblot, Berlin, 1994) 17, 35-39. On possible borrowing of German contract law theory in developing UCC provisions relating to commercial impracticability (below Chapter Four Part II), see J Wladis "Impracticability as Risk Allocation: The Effect of Changed Circumstances upon Contract Obligations for the Sale of Goods" (1988) 22 Georgia L Rev 503. For Llewellyn's overwhelming influence on promoting the UCC generally, see also below Part Two Introduction Part I.

³³ G Rahn *Rechtsdenken und Rechtsauffassung in Japan [Legal Thought and Conceptions of Law in Japan]* (CH Beck, Munich, 1990), 143-148; D Kettler and C Tackney "Light From a Dead Sun: The Japanese Lifetime Employment System and Weimar Labor Law" (1997) 19 Comp Lab L & Pol'y J 1; A Bartels-Ishikawa *Theodor Sternberg – Einer der Begründer des Freirechts in Deutschland und Japan* (Duncker & Humblot, Berlin, 1998). See also generally K Yoshida "Riarizumu Hogaku to Rieki Kyoryoron ni kansuru 'Kisoriron' teki Kosatsu [A View from the Perspective of 'Basic Legal Theory' on Legal Realism and Balancing of Interests Methodology]" in N Segawa (ed) *Shihogaku no Saikochiku [The Reconstruction of Private Law Theory]* (Sapporo Daigaku Tosho Kankokai, Sapporo, 1999) 81. Another significant figure in pre-World War II legal scholarship in Japan was Eiichi Makino, a foremost advocate of "free law" theory along German lines as well as primarily responsible for developing the doctrine of good faith (Rahn, cited in this footnote, 141-142; J O Haley *The Spirit of Japanese Law* (U Georgia Press, Athens/London, 1998) 49, 163). Perhaps even more important for private law was Hideo Hatoyama, who tried to take the doctrine of good faith beyond German theory, stressing its links with "natural reason (*jori*): Rahn, *ibid*, 148-150. The latter concept had some longstanding antecedents in Japanese law, and was even recognised as a subsidiary source of law between 1875 and 1896: W Roehl "Rechtsgeschichtliches zu *jori* [The Legal History of "Jori"]" (1996) 1 ZJapanR 67. See also Jazulot, above n 31, 50-8. See also generally below Part Two Introduction Parts I and II.

between the US and England,³⁴ or between England and New Zealand.³⁵ Instead, Chapter One begins by expanding on Atiyah and Summers' "form-substance" analytical framework to map and compare central features of the contemporary legal landscape – a range of dimensions in legal reasoning, and key legal institutions or actors – in each of the four jurisdictions.³⁶ Overall, US and Japanese legal systems resemble each other significantly, at least compared to both English and New Zealand legal systems. This overall conclusion also emerges from application of the framework to a range of contractual settings in Part Two of this thesis, reinforcing the need to go beyond some enduring stereotypes of Japanese law and contracting.

³⁴ See for example R A Cosgrove *Our Lady The Common Law: An Anglo-American Legal Community, 1870-1930* (New York UP, New York, 1987).

³⁵ See generally P Spiller, J Finn and R Boast *A New Zealand Legal History* (Brookers, Wellington, 1995).

³⁶ The United States consists of several jurisdictions, of course, namely the various states, the District of Columbia, and the federal jurisdiction (Zweigert and Koetz, above 6, 238-255). Nonetheless, this thesis will usually refer generically to "US law", and to the US as one "jurisdiction". This is partly for convenience. It is also because several aspects of the legal system compared are reasonably common to various states, at least when compared to Anglo-New Zealand or Japanese law (see below Chapter Two, Part II.C). Unifying influences in US law overall arise primarily from (i) federal legislation and case law development; (ii) the conception of an overarching Common Law, especially as inculcated by the leading law schools and journals; (iii) national bar associations; (iv) the National Conference of Commissioners on Uniform State Laws (NCCUSL); (v) the American Law Institute (ALI); and consequent (vi) borrowing by state legislators and judges, as well as academics, from other parts of the US. Points (i)-(v) were stressed as long ago as 1948 by Hessel Yntema. Forty years later, his colleague Whitmore Gray asked why nonetheless "diversity in private law was still the norm and uniformity the exception in the United States today?": W Gray "E Pluribus unum? A Bicentennial Report on Unification of Law in the United States" (1986) 50 *RabelsZ* 111, 112.

A recent analysis concludes that, although the question of progress towards uniformity is like asking whether a glass is half empty or half full: "From the perspective of persons trained in a different legal culture, Professor Yntema paints a more accurate picture. Despite the diversity in private law noted by Professor Gray and the relatively limited application of federal legislation, the legal system – including not just formal legal rules, but also the participants, procedures and institutions that support and apply these rules – incorporates significant common assumptions and practices": P Winship "Unification of Law in the United States: An Updated Sketch" [1996-4] *Uniform L Rev* 633, 635-636. This thesis' comparison of key areas of US confirms significant inter-state borrowing in case law development (below Chapter Two Part II.C); and (below Chapter Three, and Chapter Four Part II) draws on the important Uniform Commercial Code (developed by NCCUSL) and influential *Restatements of Contract* (promulgated by the ALI). On the role of Restatements, see generally J Gordley "European Codes and American Restatements: Some Difficulties" (1982) 81 *Colum L Rev* 140. See also generally J Priestley "A Guide to the Comparison of Australian and United States Contract Law" (1989) 12 *UNSWLR* 4.

This thesis also follows P S Atiyah and R S Summers *Form and Substance in Anglo-American Law: A Comparative Study of Legal Reasoning, Legal Theory, and Legal Institutions* (Clarendon Press, Oxford, 1987) 53-54 in discussing almost exclusively England and English law. This is because Scotland, at least, has retained a distinctive legal system in many respects, both generally (T B Smith "The Preservation of the Civilian Tradition in 'Mixed Jurisdictions'" in A Yainopoulos (ed) *Civil Law in the Modern World* (Louisiana State U P, Kingsport Tenn, 1965) 3) and in its contract law (W M McBryde "Promises in Scots Law" (1993) 42 *ICLQ* 48).

CHAPTER ONE: FORM AND SUBSTANCE IN JAPANESE, US, ENGLISH AND NEW ZEALAND LAW GENERALLY

- I The Challenges of Atiyah and Summers' "Form-Substance" Framework
- II Form and Substance in Legal Reasoning and Legal Institutions
 - II.A Authoritative Formality: Constitutions, Legislation, Courts, and Lawyers
 - II.B Content Formality: Determining Rules by Fiat, and Under- or Over-Inclusiveness
 - II.C Mandatory and Interpretive Formality: "Hard and Fast Rules"
 - II.D Enforcement Formality and Truth Formality: Two Varieties of Formality
- III Conclusions

I The Challenges of Atiyah and Summers' "Form-Substance" Framework

*Rui wa tomo o atsumaru**

Atiyah and Summers developed their "form-substance" dichotomy to argue that legal reasoning and legal institutions were consistently more formal in England compared to the US. Their study attracted generally favourable reviews, with John Bell suggesting for instance that it would become:¹

required reading for anyone who studies both English and American law and ... a classic of legal scholarship. Never before have two scholars of such eminence in their own jurisdictions sat down to write together a work which analyses the nature of their legal systems in such depth and with such care. Of course, two people will inevitably be selective ...

Atiyah and Summers themselves concluded by suggesting that more research should be undertaken with respect to their theses, acknowledging that "no pair of scholars can hope to be fully conversant with the whole of one system of law, let alone two".² They invited scholars to identify and evaluate any further counter-examples in each of their two legal systems; to explore possible further dimensions in legal reasoning and institutional structure, and the ways in which they relate with each other; and to develop specific hypotheses to test from a social scientific perspective, rather than the broader-brush qualitative approach adopted in their work.³ Researchers writing in diverse fields, from a range of methodological standpoints, have risen to these challenges to varying degrees. Many have been inspired to explore differing orientations in areas of English and US law which Atiyah and Summers alluded to in much less detail, or not at all.⁴ Others have considered more recent developments in areas which

* "Like attracts like" (Japanese proverb).

¹ J Bell "Book Review" (1993) 22 *Anglo-Am L Rev* 126, 126.

² P Atiyah and R Summers *Form and Substance in Anglo-American Law: A Comparative Study of Legal Reasoning, Legal Theory, and Legal Institutions* (Clarendon Press, Oxford, 1987) 428.

³ Above n 2, 429.

⁴ See for example K N Hylton "Fee-Shifting and the Predictability of Law" (1995) 71 *Chi-Kent L Rev* 427; C Conrad "Scapegoating the Jury" (1997) 7 *Cornell J L & Pub Pol'y* 7; R J Krotoszynski "Autonomy, Community, and the Traditions of Liberty: The Contrast of British and American Privacy Law" (1990) *Duke L J* 1398; R J Krotoszynski "*Brind & Rust v Sullivan*: Free Speech and the Limits of a Written Constitution" (1994) 22 *Fla St U L Rev* 1; D Partlett "From Victorian Opera to Rock and Rap: Inducement to Breach of Contract in the Music Industry" (1992) 66 *Tul L Rev* 771; D Partlett "Legal Hot Zones" (1996) 56 *La L Rev* 781; D F Partlett "Tort Liability and the American Way: Reflections on Liability for Emotional Distress" (1997) 45 *AJCL* 171; G R Shreve "Symmetries of Access in Civil

they examined quite closely.⁵ In the inaugural Clarendon Law Lectures delivered at Oxford University in 1995, Judge Richard Posner attempted to develop and test empirically several hypotheses contrasting English and US legal systems.⁶ More generally, in the forty-ninth series of Hamlyn Lectures delivered in late 1997, Roy Goode drew on the “trail-blazing work” by Atiyah and Summers to reiterate that, to this day, “the emphasis in English law is very much on formal reasoning and in American law on substantive reasoning”.⁷ These studies overwhelmingly support their claims of significant and entrenched differences in legal reasoning and institutional structure. Part II of this Chapter argues that such differences remain prominent in contemporary English and US law generally, and help to uncover and explain differences in three major areas of contract law discussed in Part Two of this thesis.

Another question, however, is whether these two legal systems may be converging. David Partlett, in his favourable review essay, suggests that Atiyah and Summers nonetheless may have underestimated a growing cross-fertilisation of English law from Commonwealth jurisdictions as well as the US.⁸ A few years later, in a lecture in Sydney in 1992, Atiyah himself suggested that the growing significance of the law of the EEC (now the European Union or EU) may be:⁹

leading English law down a number of paths which plainly point to an increase in unpredictability in law, and a decrease in legal formality. In some ways these changes may suggest a greater convergence between the English and American traditions.

Yet Atiyah and Summers seem to have been right in implying that such convergence becomes more problematic in the light of the interlocking and often internally consistent aspects of the respective legal systems:¹⁰

a legal system consists of so many interlocking parts – including not only the substantive law, but also the conventions and customs governing the personnel of the law – that changes in one part

Rights Litigation” (1990) 66 *Indiana L J* 1; W S Jordan “Legislative History and Statutory Interpretation: The Relevance of English Practice” (1994) 29 *U San Fran L Rev* 1; K Teeven “A History of Legislative Reform of the Common Law of Contract” (1994?) 26 *U Tol L Rev* 35; S Dow “The Doctrine of *Price v Neal* in English and American Forgery Law” (1998) 6 *Tul J Int’l & Comp L* 113; M Cloud “Pragmatism, Positivism, and Principles in Fourth Amendment Theory” (1993) 41 *UCLA L Rev* 199; M Cloud “The Fourth Amendment During the *Lochner* Era: Privacy, Property, and Liberty in Constitutional Theory” (1996) 48 *Stan L Rev* 555; D T Coenen “Priorities in Accounts: The Crazy Quilt of Current Law and a Proposal for Reform” (1992) 45 *Vand L Rev* 1061; C R Sunstein “Problems with Rules” (1995) 83 *Calif L Rev* 953; A Phang “Positivism and the English Law of Contract” (1992) 55 *MLR* 102. See also below in Part Two of this thesis.

⁵ See for example P D Carrington “Butterfly Effects: The Possibilities of Law Teaching in a Democracy” (1992) *Duke L J* 741; M Schwarzschild “Class, National Character, and the Bar Reforms in Britain: Will There Always Be An England?” (1994) 9 *Conn J Int’l L* 185; J Friesen “When Common Law Courts Interpret Civil Codes” (1996) 15 *Wisc Int’l L J* 1. See also below in Part II of this Chapter.

⁶ R Posner *Law and Legal Theory in England and America* (Clarendon Press, Oxford, 1996). Ironically, for a foremost proponent of the economic analysis of law, he was led to various speculations as to broader differences in “national legal culture”.

⁷ R Goode *Commercial Law in the Next Millennium* (Sweet & Maxwell, London, 1998) 25.

⁸ D Partlett “The Common Law as Cricket” (1990) 43 *Vand L Rev* 1401.

⁹ P S Atiyah “Justice and Predictability in the Common Law” (1992) 15 *UNSWLJ* 448, 461. See generally also B Markesinis (ed) *The Gradual Convergence: Foreign Ideas, Foreign Influences and European Law on the Eve of the 21st Century* (Clarendon Press, Oxford, 1993).

¹⁰ Above n 2, 431.

must be expected to have rippling ramifications elsewhere. But it will often take time for the other parts of the legal system to realign themselves with changes of this character.

The rest of this Chapter and Part Two of this thesis demonstrate the enduring significance of some key differences in legal reasoning and legal institutions – broadly defined – in England and the US. That conclusion should not be too surprising in the light of general legal theory suggesting the coherence of legal systems,¹¹ or its relative autonomy vis à vis other social sub-systems.¹² Theories of relative autonomy do not necessarily foreclose the possibility of change, as described in Part Three of this thesis. Yet they highlight the problematic nature of legal evolution even amidst globalisation of economic, political and social relations. This helps explain the gradual transformations described in this Chapter.¹³

The coherence of legal systems, however, is another point on which Atiyah and Summers invited broader comparative research. Indeed, they remarked:¹⁴

Japan (as well as various other nations) has borrowed large segments of its legal system (including whole codes) from foreign countries. Compared with England and America, is there, in these borrowing countries, a relative lack of *fit* (or a significantly lower level of fit) between the degree of formality of legal reasoning, and other pieces that go into the mosaic?

This thesis concludes that contemporary Japanese law also exhibits a strong degree of coherence, similar to that in the US. Despite some counter-tendencies, the same holds for New Zealand law, except that its orientation remains instead quite resolutely formal along the dimensions suggested by Atiyah and Summers, following the English law tradition.¹⁵

The latter conclusion finds broad support from a paper prepared for a major conference hosted by the Legal Research Foundation on 2 March 2001. Fisher J draws heavily on the work of Atiyah and Summers to bring out contrasts still between legal institutions and patterns in legal reasoning (especially judicial reasoning) in New Zealand and the US.¹⁶ His Honour argues that until two or three decades ago, New

¹¹ See for example R Dworkin *Law's Empire* (Fontana, London, 1986).

¹² See especially below Chapter Five Part II.B.1.

¹³ Compare for example K Keith "Governance, Sovereignty and Globalisation" (1998) NZACL Yearbook 3: 1997 477.

¹⁴ Above n 2, 430 (original emphasis).

¹⁵ This Chapter thus provides an analytical framework to deal with a crucial issue left open by E W Thomas "Fairness and Certainty in Adjudication: Formalism vs Substantivism" (1999) 9 Otago L Rev 459, 487 ("I can give no guidance why formalism persists both within the legal profession and the judiciary [in New Zealand] ...").

It also answers affirmatively the question put by J Steyn "Does Legal Formalism Hold Sway in England?" (1996) 49 CLP 43. Lord Steyn believes that "in the last twenty-five years there has been a *gradual* shift away from using *exclusively* formalist techniques", and that "in a modern liberal democracy the shift *should generally* be away from formalism" (Steyn, cited in this footnote, at pages 46-47, emphasis added). He generously concedes that his article cannot "prove these assertions. A *magnum opus* by an academic lawyer would be necessary to do justice to the topic (at pages 47-48). The present author does not pretend to provide a *magnum opus* definitely settling this question, but argues that a rigorous and broad-based comparative approach shows the difficulties involved in trying to move away from formal reasoning patterns and supporting institutions. For further discussion of the variant of "formalism" discussed by Lord Steyn, see below Part II.C (especially "interpretive formality").

¹⁶ R Fisher "New Zealand Legal Method: Influences and Consequences" in R Bigwood (ed)

Zealand law was characterised by the following features:

- reception of English law and institutions, resulting in the pragmatism shared by many other common law jurisdictions;
- reliance on English sources of law, but heightened prominence given to local judgments;
- less time pressure on judges compared to the US;
- “case specific reasoning” (attention to facts and dicta of individual precedents, rather than unifying principles and general propositions which are the starting point for legal analysis in the US);
- formalism (notably in deferring to precedent and preferring literal meanings in statutory interpretation);
- judicial restraint; and
- political neutrality.

However, forces for change are said to have come from:

- growing resort to New Zealand courts (although only superior courts are mentioned¹⁷), due for instance to the population becoming more diverse, and Parliament referring more controversial questions to Courts or enacting more broadly worded legislation;
- less influence from England, as it becomes increasingly linked with continental Europe and New Zealand looks further afield, assisted by New Zealand academics who also increasingly look beyond black-letter law, and especially as domestic legislation has burgeoned; and
- improved access to legal source material.

Nonetheless, Fisher J notes that significant differences to the US remain among all defining features of the legal method which he perceives as having emerged in New Zealand:

- international eclecticism;
- “case specific reasoning”;
- respect for legislative intent and precedent;
- “passive formalism” (“passive” because focusing still on considerations motivating the original legislator or judge, “formalist” in focusing on legal pedigree and mode of articulation);
- “creative formalism” (resolving new issues “by doctrinalism, extrapolation from literalist constructions, and drawing on factual analogies from non-binding precedents”);
- rudimentary policy analysis (especially among younger practitioners, and noticeable in New Zealand legal textbooks);
- sustained political neutrality; and

Legal Method in New Zealand: Essays and Commentaries (Butterworths, Wellington, forthcoming 2001).

¹⁷ Compare L Nottage and C Wollschlaeger “What Do Courts Do?” [1996] NZLJ 369 (adding data for District Courts and population growth to show that overall civil litigation rates have been quite stable since the 1970s, in contrast to many industrialised countries).

- retention of a right of appeal to a court in another country (the Judicial Committee of the Privy Council).

This Chapter covers many of these points to reinforce the general conclusion that New Zealand's legal system as a whole has not moved sharply towards US-style substantive reasoning and supporting institutions. However, it builds more carefully on the various dimensions proposed by Atiyah and Summers, to bring out further contrasts and to provide a basis for the analysis of contract law in Part Two of the thesis. It also goes further than Fisher J's analysis, which contrasts the US and some shifts in New Zealand and only notes in passing some transformations for instance in England, by comparing four legal systems. Such a comparison does complicate the analysis, perhaps explaining why even comparing three legal systems has not yet been attempted systematically by others.¹⁸ Nonetheless, examining various dimensions of legal reasoning and legal institutions generally, in the rest of this Chapter, suggests a spectrum along the lines set out in Figure 2 below (at the end of Part III of this Chapter). Comparing three areas of contract law suggests an array along the lines of Figure 3 below (in the Introduction to Part Two of the thesis). The precise positioning of English law vis à vis New Zealand law on the one hand, and US and Japanese law on the other, remains debatable. Yet clear differences emerge between the two pairs of legal systems, revealing considerable coherence in orientation both at the level of the general legal system, and in a broad area of law such as contract law. That serves to counter stereotypes and over-generalisations about certain alleged peculiarities of Japanese law (discussed in the Introduction to this Part). It also demonstrates that the analytical framework developed by Atiyah and Summers retains broader importance for comparative legal studies.¹⁹

¹⁸ This is despite another invitation by Atiyah, in his 1992 lecture. He remarked that Australian law may lie "somewhere between" English and US law (above n 9, 454); and also that Australian law may be moving in similar directions to English law under the influence of EEC law – but leaving "others to explore that possibility" (above n 9, 461). Another reason why no-one seems to have taken up that further challenge is the enormous difficulty in one researcher getting a good enough feel for three legal systems – let alone four – to be able to compare them convincingly (compare Bell, above n 1). Perhaps this explains why subsequent broader comparative research projects directed by Summers have involved large teams of researchers: see especially D N MacCormick and R S Summers (eds) *Interpreting Statutes: A Comparative Study* (Dartmouth, Aldershot, 1993); D N MacCormick and R S Summers *Interpreting Precedents: A Comparative Study* (Dartmouth, Aldershot, 1997). This approach, however, has involved the sacrifice of focus and analytical rigour. As a result, some criticise too ready over-generalisations from the comparative reports, useful though these are in themselves: see for example M Adam "The Rhetoric of Precedent and Comparative Legal Research" (1999) 62 MLR 464.

¹⁹ See also B Grossfeld *Kernfragen der Rechtsvergleichung [Key Issues in Comparative Law]* (Mohr, Tuebingen, 1996) 6. Compare K Zweigert and H Kötz (Weir, Tony trans) *Introduction to Comparative Law* (3 ed, Clarendon Press, Oxford, 1998) 73. Conceding that drawing distinctions among legal systems will depend on one's aims, they state: "Thus for [Atiyah and Summers] the character of a legal system depends very much on whether 'form' or 'substance' predominates in its judicial reasoning, its interpretation of statutes or its court procedures. After analysing and comparing the case-law, the legislative techniques, the role of judge and advocate, and the nature of legal training in England and the United States, they conclude that the two legal systems are really very different, so different indeed that many a reader will think that English law, with its tendency towards more formal argument, is closer to the continental legal systems than to that of the United States ...". Nonetheless, in Part II of their work comparing specific legal doctrines (especially in contract law), Zweigert and Kötz often run together "Anglo-American law" or at least describe differences without linking them to broader differences within

II Form and Substance in Legal Reasoning and Legal Institutions

Atiyah and Summers argue that analytically it is possible and useful to distinguish between two types of reasons. A “substantive reason is a moral, economic, political, institutional or other consideration”, whereas:²⁰

a formal reason is a legally authoritative reason on which judges and others are empowered or required to base an action or decision, and such a reason usually excludes from consideration, overrides, or at least diminishes the weight of, any countervailing substantive reason arising at the point of decision or action. For example, it is a formal reason for making a decision that *there is a valid legal rule that*, in the given circumstances, D ought to pay damages to P. Unlike a substantive reason, a formal reason necessarily presupposes a valid law or other valid legal phenomenon, such as a contract or a verdict. Indeed, the very existence of this law or other legal phenomenon, as interpreted, is a formal reason or generates a formal reason for deciding an issue. Thus, authoritativeness is an essential attribute of a formal reason. A formal reason is also ordinarily in some degree mandatory, that is, it normally prevails over any contrary substantive reasons in the application of the law.

This highlights immediately two aspects of formal reasoning: “authoritative formality” (discussed below, Part II.A) and “mandatory formality” (Part II.C). Atiyah and Summers refine these further along with two other dimensions of legal reasoning: “content formality” (Part II.B) and “interpretive formality” (Part II.C). They also argue that English law, and its supporting institutional framework (court system, legislative process, legal profession, and so on), prefer or foster more formal reasoning compared to US law. Atiyah and Summers add that US law generates more “truth formality” and “enforcement formality” (Part II.D), two varieties of formality which reinforce a more formal orientation overall, even if not types of formal reasoning in themselves. Their further definitions of these two varieties of formality, along with the four dimensions of legal reasoning just mentioned, are developed and explored below in conjunction with the institutional framework in New Zealand and Japanese law as well.

II.A Authoritative Formality: Constitutions, Legislation, Courts, and Lawyers

Authoritative formality always arises, Atiyah and Summers suggest, because “rules or other phenomena (such as contracts or verdicts) which generate reasons must be recognised as legally authoritative”.²¹ This type of formality in legal reasoning varies along two sub-dimensions. First, it may involve low or high “validity formality”, depending on whether legal standards by which the validity of legal phenomena is determined are “content-oriented” (inviting inquiry into substance) as opposed to “source-oriented” (requiring inquiry into the mode of origin to determine validity). One example given of a source-oriented standard, generating high validity formality and hence more authoritative formality and more formal reasoning generally, is a standard

the two legal systems. By developing Atiyah and Summers’ framework in a more sustained manner, the present thesis aims to revisit stereotypes about Japan; reexamine contract law and practice in broader comparative perspective (in Part Two of the thesis); and ultimately – clearly not an aim of Zweigert and Koetz – to link comparative legal studies with general legal theory (Part Three).

²⁰ Atiyah and Summers, above n 2, 2 (original emphasis).

²¹ Above n 2, 12.

which says simply that “a duly enacted statute is law”.²² English and New Zealand law, which retain quite strict doctrines of parliamentary sovereignty, can be seen as favouring this type of formal approach.²³ US law, and to a lesser extent Japanese law, undermine such a strict doctrine by allowing judicial review based on codified constitutions with the status of supreme law, containing very broadly phrased “content-oriented” standards of validity (for example, freedom of expression).²⁴ The resultant authority and central constitutional role of the US courts stands in stark contrast to the position of courts in England and New Zealand.²⁵ A related distinctive feature of US law is the centrality of its constitutional documents, which Roger Cotterell believes have reinforced direct “popular sovereignty”, and shielded the latter from the dominance of parliamentary sovereignty which became so prevalent in England.²⁶

²² Above n 2, 12.

²³ Above n 2, 46-47. For New Zealand, see generally M McDowell and D Webb *The New Zealand Legal System* (Butterworths, Wellington, 1995) 113-117; K Upston-Hooper “Slaying the Leviathan: Critical Jurisprudence and the Treaty of Waitangi” (1998) 28 VUWLR 683; R Boast “Customary Law and Legal Anthropology” in R Boast, A Erueti, D McPhail and N Smith (eds) *Maori Land Law* (Butterworths, Wellington, 1999) 1.

²⁴ Atiyah and Summers, above n 2, 75-76. Compare L W Beer “Freedom of Expression: The Continuing Revolution” in P Luney and K Takahashi (eds) *Japanese Constitutional Law* (Tokyo UP, Tokyo, 1993) 220; R Krotoszynski “The Chrysanthemum, the Sword, and the First Amendment: Disentangling Culture, Community, and Freedom of Expression” (1998) Wisc L Rev 905. Some provisions are more tightly drafted in Japan’s 1946 Constitution. A good example is art 31, with narrower scope than the due process clauses in US law. Seemingly this was because progressives in the Occupation forces did not want the newly created Supreme Court to strike down legislation on the basis of breach of substantive due process, in the way the US Supreme Court did for some New Deal legislation. See Y Okudaira “Forty Years of the Constitution and its Various Influences: Japanese, American, and European” in P Luney and K Takahashi (eds) *Japanese Constitutional Law* (Tokyo UP, Tokyo, 1993) 1, 13-16. On the drafting of the Constitution, see generally K Inoue *Macarthur’s Japanese Constitution: A Linguistic and Cultural Study of its Making* (U Chicago Press, Chicago, 1991); C Kades “The American Role in Revising Japan’s Imperial Constitution” (1989) 104 Pol Sci Q 215

²⁵ For a critique rare among US commentators, see M Tushnet *Taking the Constitution Away From the Courts* (Princeton UP, Princeton, 1999). Jeremy Waldron (*Law and Disagreement*, Oxford UP, New York, 1999) also advocates according more priority to the legislature. However, in a review essay suggesting that Waldron goes too far in restraining judicial review, Richard Posner (now Chief Judge of the US Court of Appeals for the Seventh Circuit), begins by noting:

Jeremy Waldron, law professor and political philosopher, is a New Zealander educated there and in England, and, although he has lived and worked in [the US] for many years, he brings to the study of American constitutional theory the valuable perspective of an outsider.

R Posner “Review of Jeremy Waldron, *Law and Disagreement*” (2000) 100 Columbia L Rev 582, 582. A recent illustration of the still dominant and largely accepted role of the courts in the US constitutional system is *Bush v Gore*: compare F Goodman “Preface” (2001) 574 Annals of The American Academy of Political and Social Science 9, 13-16; R Posner “Florida 2000: A Legal and Statistical Analysis of the Election Deadlock and the Ensuing Litigation” [2000] Sup Ct Rev 1.

²⁶ R Cotterell “The Symbolism of Constitutions: Some Anglo-American Constitutions” in I Loveland *A Special Relationship? American Influences on Public Law in the UK* (Clarendon Press, Oxford, 1995) 25, 39 (original emphasis):

A fundamental difference between the British and American contexts ... is that in the former no doctrine of popular sovereignty – no image of “the people” as an active law-making collectivity – was available to become attached to the contents of a specific *document* as fundamental constitutional law and become an enduring reference point in constitutional thought. Thus, the common law tradition subsumed specific enactments within itself as exemplifications of common law principle while validating the processes of parliamentary legislation.

A second sub-dimension of authoritative formality is “rank formality”. This will be higher if formal reasons are assigned a clear rank depending on strict rules of priority.²⁷ In the present author’s view, this depends in turn partly on how many different sources exist, since this calls for more complicated rules of priority. Partly, it should depend on the nature of those rules, which may be themselves more or less formal along all the dimensions and sub-dimensions of formal reasoning identified by Atiyah and Summers. As they point out, US law contains the following plethora of sources of law, stemming in part from constitutional vetting of legislation and further complicated by a federal structure, namely:²⁸

- The federal Constitution;
- Federal legislation;
- Federal administrative rules and regulations;
- Treaties duly entered into by the President and ratified by the US Senate;
- Federal judicial decisions;
- State constitutions;
- State legislation;
- State administrative rules and regulations; and
- State judicial decisions

Further complications are how “self-executing” treaties,²⁹ and customary international law,³⁰ fit into this normative structure of US law. “Conflict of law” rules to resolve such problems, as well as US rules of private international law determining whether foreign law should be applied, also exhibit remarkably low rank formality.³¹ Rank formality is further undermined by a more flexible approach to *stare decisis*, due in part to the complex structure of federal and multiple state courts.³² Conflicting decisions or differing approaches invite courts to examine other US jurisdictions’ judgments for the quality of their reasoning (also adding to content-oriented authoritative formality), even though not strictly bound (the more source-oriented approach, following from a stricter doctrine of *stare decisis*).³³ At least some courts, moreover, appear quite open to drawing from jurisdictions overseas.³⁴ This tendency may have been boosted by the

²⁷ Atiyah and Summers, above n 2, 43.

²⁸ Above n 2, 55.

²⁹ K Baghdadi “Apples and Oranges - The Supremacy Clause and the Determination of Self-Executing Treaties” (1997) 20 *Hastings Int'l & Comp L Rev* 701; C M Vasquez “The Four Doctrines of Self-Executing Treaties” (1995) 43 *AJCL* 695.

³⁰ G Kelly “Does Customary International Law Supersede a Federal Statute?” (1999) 37 *Colum J Tran L* 507.

³¹ Atiyah and Summers, above n 2, 56-69. Compare also for example F Juenger “Two European Conflicts Conventions” (1998) 28 *VUWLR* 527, 530-531, 536.

³² Atiyah and Summers, above n 2, 128-130. See also H Jacob “Courts and Politics in the United States” in H Jacob and others (eds) *Courts, Law and Politics in Comparative Perspective* (Yale UP, New Haven/London, 1996) 16, 21-23, 28-29, 65-66.

³³ See for example below, Chapter Two, Part II.C. See also generally J Hardisty “The Effect of Future Orientation on the American Reformulation of English Judicial Method” (1979) 30 *Hastings LJ* 523, 532 (less bound by precedent). For a radical proposal, by American standards, see for example M Paulsen “Abrogating *Stare Decisis* by Statute: Can Congress Remove the Precedential Effect of *Roe* and *Casey*?” (2000) 109 *Yale LJ* 1535.

³⁴ Especially New Yorks courts (H von Freyhold “Cross-Border Legal Interactions in New York

influx of immigrant academics, especially from Germany before and during World War II, reinforcing also the influence of academic commentators in US law generally.³⁵

In Japan, article 94 of the Constitution included a new power: "local governments may ... enact ordinances within the limits of the law". The Local Government Law further specified this grant of authority, and added the police power to local functions. These grants are generous relative to many other unitary states, although distinctly less so than in the US and other federal systems. Central government has also tended to guard its authority jealously, challenging (in and especially out of court) disliked local government policies as not "within the limits of the law". Nonetheless, local governments have been active in areas such as pollution control.³⁶ A major practical limit to decentralising authority has been the increasing dependence of prefectures on central government budget funding.³⁷ However, legislation passed on 8 July 1999 reconfigured relations between central and local government.³⁸ While it is too early to ascertain long-term implications, already there are signs of local authorities trying to wrest more control of finances away from the central government,³⁹ potentially reinforcing their powers as laid out in legislation.

In sharp contrast to the US, the Japanese court system is unitary and highly centralised. This should heighten rank formality, but it has been complicated or reduced in many other respects. Although perhaps to a declining extent, Japanese courts draw quite extensively – but rarely expressly – on legal principles and sometimes even findings from foreign jurisdictions.⁴⁰ This may follow from the continued influence of legal academics.⁴¹ Many maintain a strong interest in comparative law dating back to

Courts" in V Gessner (ed) *Foreign Courts: Civil Litigation in Foreign Legal Cultures* (Dartmouth, Aldershot et al, 1996) 43. See also below Chapter Two Part II.C.1. But see S Miner "Reception of Foreign Law in the US Federal Courts" (1995) 43 *AJCL* 581; P M McFadden "Provincialism in United States Courts" (1995) 81 *Cornell L Rev* 4.

³⁵ See for example M Reimann "A Career in Itself: The German Professoriate as a Model for America Legal Academia" in M Reimann (ed) *The Reception of Continental Ideas in the Common Law World* (Duncker & Humblot, Berlin, 1993) 166. See also generally W P LaPiana *Logic and Experience: The Origin of Modern American Legal Education* (Oxford UP, New York, 1994).

³⁶ S R Reed *Japanese Prefectures and Policy-Making* (U Pittsburgh Press, Pittsburgh, 1987), 24-5, 63-87; S Kawashima "A Survey of Environmental Law and Policy in Japan" (1995) 20 *North Carolina J of Int L and Commercial Regulation* 231, 259-261.

³⁷ K E Calder *Crisis and Compensation: Public Policy and Political Stability in Japan* (Princeton UP, 1987) 274-311. See generally F Horie "Intergovernmental Relations in Japan: Historical and Legal Patterns of Power Distribution Between Central and Local Governments" in J Jun and D Wright (eds) *Globalization and Decentralization: Institutional Contexts, Policy Issues, and Intergovernmental Relations in Japan and the United States* (Georgetown UP, Washington DC, 1996) 48; M Muramatsu *Local Power in the Japanese State* (U California Press, Berkeley et al, 1997); Y Sugimoto *An Introduction to Japanese Society* (Cambridge UP, Cambridge, 1997) 208-210.

³⁸ Compare for example "Editorial: Rethink Organisational Framework", *The Daily Yomiuri*, Tokyo, 12 June 1999 (available through LEXIS in the ALLASI library).

³⁹ L Nottage "Tax Policy in Japan for the 21st Century: Decentralisation and Digitalisation" (September 2000) 44 *CCH Asiawatch Newsletter* 6.

⁴⁰ Z Kitagawa *Rezeption und Fortildung des Europäischen Zivilrechts in Japan [Reception and Development of European Civil Law in Japan]* (Alfred Metzner Verlag, Frankfurt, 1970); E Hoshino (J O Haley trans) "The Contemporary Contract" (1972) 5 *L in Japan* 1.

⁴¹ T Isomura "*Nihonho no Tenkai (4) - Gakusetsu no Hatashita Yakuwari* [Developments in Japanese Law (4): The Role Played by Academic Theory]" in T Hironaka and E Hoshino (eds) *Minpoten no Hyakunen (I) [One Hundred Years of the Civil Code (I)]* (Yuhikaku, Tokyo, 1998) 505.

the Meiji era.⁴² More importantly, following the civil law tradition, Japanese judges are not bound by *stare decisis*,⁴³ although a centrally directed and bureaucratic career judiciary along with crowded dockets create pressure towards uniformity. Rank formality is also complicated by the way in which the supremacy of constitutional review has emerged. The Supreme Court's power to undertake judicial review of legislation enacted by the Diet, under the Constitution, was confirmed in 1948. It took until 1952 to establish the power of lower courts to rule on claims of unconstitutionality.⁴⁴ Subsequently, courts have been quite reluctant to extend judicial review principles to administrative proceedings, although this may now be changing. Even today, the Supreme Court in particular tries to decide cases narrowly. It often restricts even a finding of unconstitutionality to particular facts, or bases its decision more on statutory interpretation than a discussion of broad constitutional principles.⁴⁵ Of course, some have pointed out that even the US Supreme Court tends narrowly to decide constitutional issues, "one case at a time".⁴⁶ The Japanese Supreme Court does remain comparatively reticent in finding enacted legislation to be unconstitutional. Even when it does reach such a conclusion, it does not always provide an effective remedy, in part because its power is limited to referring the matter back to the legislature for attention.⁴⁷ Overall, however, Japanese law is left with more possible sources for authoritative norms, vying for priority in quite an opaque fashion. This can be seen in the question of incorporation of international law norms into domestic law,⁴⁸ most notably recently in a District Court decision recognising the northern Ainu minority as an indigenous people.⁴⁹ In consequence, rank formality is generally quite low in Japan.

⁴² Y Noda "Comparative Jurisprudence in Japan: Its Past and Present" (1975) 8 L in Japan 1; (1976) 9 L in Japan 4.

⁴³ J O Haley *The Spirit of Japanese Law* (U Georgia Press, Athens/London, 1998) 92-97, 114-22. See also generally J Merryman, D Clark and J O Haley *The Civil Law Tradition: Europe, Latin America and East Asia* (Michie, Charlottesville (Va), 1994).

⁴⁴ Respectively, 8 July 1948, Supreme Court (4 Keishu 801); 8 October 1952, Supreme Court.

⁴⁵ Okudaira, above n 24, 16-23.

⁴⁶ C Sunstein *One Case at a Time: Judicial Minimalism on the Supreme Court* (Harvard UP, Cambridge (Mass), 1999). This may be an accelerating trend: see A Hellman "The Shrunken Docket of the Rehnquist Court" [1996] Sup Court Rev 403. Pressure in this direction also may be very strong in highest courts with powers of constitutional review. See for example D Beatty "Constitutional Rights: Japan and Canada" (1993) 41 AJCL 535; D Beatty "Law and Politics" (1996) 44 AJCL 131.

⁴⁷ As Okudaira points out (above n 24, 19-20), the malapportionment cases – finding elections unconstitutional but not voiding them – had additional statutory complications. Compare W Bailey "Reducing Malapportionment in Japan's Electoral Districts: The Supreme Court Must Act" (1997) 6 Pac Rim L & Pol'y J 167.

⁴⁸ S Ago "The ILO's Supervision and Japan" (1995) J Ann Int'l L 3; Y Iwasawa "Implementation of International Trade Agreements in Japan" in M Hilf and U Petersmann (eds) *National Constitutions and International Economic Law* (Kluwer, Boston, 1991) 299; H K Park "*Japan v Kim Sun-Ki*" (1998) 92 AJIL 301.

See also K Watanabe "*Joyaku no Teiketsu to Kokunaiho Seibi - Iwayuru Joshi Sabetsu Haishi Joyaku Hijunji no Giron o Tegakari to shite* [Adjusting Domestic Law and Concluding Treaties: The Debate on Ratifying the So-Called Convention Abolishing Discrimination Against Women]" in M Nakamura and H Maeda (eds) *Rippokatei no Kenkyu - Rippo ni okeru Seifu no Yakuwari [Studies in Legislative Process: The Roles of the Government in Enacting Laws]* (Shinzansha, Tokyo, 1997) 132; K Port "The Japanese International Law "Revolution": International Human Rights Law and its Impact in Japan" (1991) 28 Stan J Int'l L 139.

⁴⁹ T Sonohara "Towards a Genuine Redress for an Unjust Past: The Nibutani Dam Case" (1997)

Rank formality is further complicated by the phenomenon of “administrative guidance”, involving actions by public officials to persuade a private entity to voluntarily cooperate in a purpose they see as desirable.⁵⁰ It became hotly discussed first within Japan in the 1960s and especially the 1970s, after the Ministry of International Trade and Industry (MITI) took informal measures to deal with Oil Shock disruptions to petroleum markets. Criticisms mounted especially from outside Japan in the 1980s and early 1990s, in response to trade friction and calls for greater transparency in Japanese markets and public administration.⁵¹ The Administrative Procedure Law 1993 may formalise and restrict administrative guidance, for instance by allowing regulatees to request it to be made in writing. Yet it is still unclear how much such provisions are being invoked, and what changes have directly ensued in practice.⁵²

<<http://www.murdoch.edu.au/elaw/issues/v4n2/sonoha42.html>>; M Levin “Essential Commodities and Racial Justice: Using Constitutional Protection of Japan’s Indigenous People to Inform Understandings of the United States and Japan” (2001) 33 NYU J Int’l L & Pol 419. On the Ainu, see generally T Kitakamae “Ainu Concepts of Social Order and the Law of Japan” (1987) 2 Law and Anthropology 239; R Siddle “Ainu: Japan’s Indigenous People” in M Weiner (ed) *Japan’s Minorities: The Illusion of Homogeneity* (Routledge, London, 1998) 17; Sugimoto, above n 27, 184-189 (also stressing, contrary to received wisdom, that Japan has a comparative high proportion of ethnic minorities).

The Emperor was a further and very important source of legal authority under the Meiji Constitution, and some revival of this in some form is not totally inconceivable. That, however, would require an exceptionally bold interpretation of Art 1 of the present Constitution, under which the Emperor is a symbol of Japan, the state and the unity of the Japanese people. In practice, moreover, the impetus for such a move seems highly improbable. Even the well-publicised spectacles around the time of Hirohito’s last days in 1989 seem to have been the result of canny calculations by business and political interests, at a particular juncture. See O Watanabe “The Sociology of *Jishuku* and *Kicho*: The Death of the Showa Tenno as a Reflection of the Structure of Contemporary Japanese Society” (1989) 1 Japan Forum 275. Similarly, Crown prerogative powers in the UK are now very limited. See Atiyah and Summers above n 2, 54; C Vincenzi *Crown Powers, Subjects and Citizens* (Pinter, London/Washington, 1994) 1-34. The same appears to hold in New Zealand, even after the complication of changing the electoral system to proportional representation (compare G Palmer and M Palmer *Bridled Power: New Zealand Government under MMP* (Oxford UP, Auckland, 1997) 43-48; A Quentin-Baxter “Implications for the Governor-General” in A Simpson (ed) *The Constitutional Implications of MMP* (VUW School of Political Science and International Relations, Wellington, 1998) 96), due the careful restraint exercised by the incumbent Governor-General (M Hardie-Boys “Continuity and Change: The 1996 Election and the Role of the Governor-General” in A Simpson (ed) *The Constitutional Implications of MMP* (VUW School of Political Science and International Relations, Wellington, 1998) 78).

⁵⁰ T Nakagawa “Administrative Guidance: A Tentative Model of How Japanese Lawyers Understand It” (1998) 32 Kobe University L Rev 1. See generally M Young “Judicial Review of Administrative Guidance: Governmentally Encouraged Consensual Dispute Resolution in Japan” (1984) 84 Colum L Rev 924.

⁵¹ M Young “Structural Adjustment of Mature Industries in Japan: Legal Institutions, Industry Associations and Bargaining” in S Wilks and M Wright (eds) *The Promotion and Regulation of Industry in Japan* (Macmillan, Hampshire/London, 1991) 135; F Upham “Privatizing Regulation: The Implementation of the Large-Scale Retail Stores Law” in G Allinson and Y Sone (eds) *Political Dynamics in Contemporary Japan* (Cornell UP, Ithaca, 1993) 264; compare H Otake “Revising the Interpretation of the Japanese Economy: Political Intervention and Market Competition in the Distribution System” in M Muramatsu and F Naschold (eds) *State and Administration in Japan and Germany* (de Gruyter, Berlin, 1997) 305.

⁵² K Duck “Now that the Fog has Lifted: The Impact of Japan’s Administrative Procedures Law on the Regulation of Industry and Market Governance” (1996) 19 Fordham Int’l LJ 1686. Generally on the Law, see also L Koedderitzsch “Japan’s New Administrative Procedure Law” (1991) 21 L in Japan 105.

The enactment in 1999 of official information legislation seems likely to prove much more significant in controlling bureaucratic discretion.⁵³

Japanese courts have played quite an active role in setting normative confines within which administrative guidance is permissible, but those confines depend on the context. The courts have been stricter with respect to an agency's requests for cooperation with its extra-statutory standards (for example, in waste disposal).⁵⁴ But they have been more lenient towards an agency intervening in private conflicts (for example, among developers and local residents, by delaying issuance of a permit). Intervention is permitted, thus promoting negotiations, until regulatees make it clear that they will not negotiate any longer or until the underlying dispute has been resolved.⁵⁵ Courts also have been lenient when the agency acts to deal with unexpected emergencies (as with MITI after the Oil Shock).⁵⁶ All three categories involve extra-statutory purposes, not part of "statutory programmes".⁵⁷ The more lenient attitude of the courts at least in the latter two categories therefore lessens rank formality in Japan, by expanding the possibility for justifiable autonomous executive action. Authoritative formality also is lessened by delimiting the scope of justified conduct only in broad, more content-oriented terms.⁵⁸ However, instances of "jawboning" by bureaucrats in similar situations can be found in the US as well.⁵⁹ Moreover, in other

⁵³ See generally "Tsukaikonasu Chikara o Yashinai [Fostering the Strength to Make It Work]" *Asahi Shimbun*, Tokyo, 8 May 1999, 5; N Kadomatsu "The New Administrative Information Disclosure Law in Japan" (1999) 8 *Zeitschrift für Japanisches Recht* 34. The Law has only been in effect since 1 April 2001.

⁵⁴ Nakagawa, above n 92, 10. J M Ramseyer "Rethinking Administrative Guidance" in M Aoki and G Saxonhouse (eds) *Finance, Governance and Competition in Japan* (Oxford UP, London, 1999) 199 points out that these instances of more active court control involve local governments, not central government. He also argues that this supports his longstanding contention (above n 24) that the post-War Japanese judiciary has followed the preferences of the ruling LDP.

⁵⁵ Nakagawa, above n 50, 11-12. The leading case a Supreme Court judgment of 16 July 1985 (*Nakatani [Nakaya] v Tokyo-To*, partially translated in Y Yanagida and others *Law and Investment in Japan: Cases and Materials* (Harvard UP, Cambridge (Mass), 1994), 133-136).

⁵⁶ Above n 50, 13-14. See also J Ramseyer "The Costs of the Consensual Myth: Antitrust Enforcement and Institutional Barriers to Litigation in Japan" (1985) *Yale LJ* 605; T Mito "Business-Government Relations in Japan: MITI and the Petroleum Industry During the High Economic Growth Era" (1998) 9 *Research Bulletin of the International Student Center* (Kyushu University) 147.

⁵⁷ Nakagawa, above n 50.

⁵⁸ Interestingly, Nakagawa (above n 50, 6) characterises as "substantive informality" these three types of administrative guidance. See also T Nakagawa "Administrative Informality in Japan" (2000) 52 *Admin L Rev* 175.

⁵⁹ Indeed, in *Eastern Airline Inc v McDonnell Douglas Corp* (1976) 532 F2d 957 (5th Cir), the US Court of Appeals held that compliance with the government's "jawboning" was sufficient to excuse McDonnell Douglas from its contractual obligation to supply jetliners to Eastern. Similar promotion of deferral to informal government pressure may also have underpinned the decision in the same Circuit a decade later. In *Nissho Iwai Ltd v Occidental Crude Sales Inc* 729 F 2d 1530 (5th Cir 1984), the appellant (a Japanese corporation, no less!) successfully claimed that Occidental should not be excused from its obligation to supply oil because the latter had not negotiated enough with the Libyan government, which ended up interrupting oil flow. Granted, some empirical studies have noted more consensual informal relations between private parties and regulators in Japan (see for example J L Badaracco *Loading the Dice: A Five Country Study of Vinyl Chloride Regulation* (Harvard Business School Press, Boston, 1985), K Aoki and J W Cioffi "Same Wine in Different Bottles: A Case Study of Waste Management Regulation in the United States and Japan" (1997) Paper presented at the Annual Meeting of the Law and Society Association, Aspen, 30 May 1999), compared to the "adversarial legalism" said to be rampant in the US (R Kagan "Should Europe Worry about Adversarial Legalism?" (1998) 17 *OJLS* 165; but see J

contexts in Japan, administrative guidance can be seen as involving informal implementation, but in pursuit of statutory policy goals or programmes rather than extra-statutory purposes. This is less disruptive of rank formality. Overall, then, the Japanese legal system should not be seen as radically more substantive in its reasoning in this respect.

Unlike US and Japanese law, English and New Zealand law still recognise more limited sources of law and draw much clearer rules of priority among them. Atiyah and Summers suggest that English law really just involves two sources: legislation (with primary legislation trumping secondary legislation) and case law.⁶⁰ They did note the rapid expansion of judicial review in England since the 1970s, a trend which has been maintained.⁶¹ Their point about judicial review's not really undermining the authority of the legislature, however, is still well taken. After all, finding secondary legislation to be ultra vires means finding it to be beyond powers granted by Parliament in the enabling statute, which reinforces Parliament's sovereignty.⁶² Striking down regulations more directly, for unreasonableness, has remained rare.⁶³ Superior courts in England have been particularly reluctant to go beyond the enforcement of legitimate procedural expectations, to protect legitimate expectations of substantive benefit, after engaging in a wide-ranging balancing of public authorities' objectives and reasoning as opposed to the reasonableness of the applicant's

Rees "Development of Communitarian Regulation in the Chemical Industry" (1997) 19 L & Pol'y 477; J O Haley "Mission to Manage: The US Forest Service as a 'Japanese' Bureaucracy" in K Hayashi (ed) *The US-Japanese Economic Relationship: Can It Be Improved?* (Simon Schuster, New York, 1989) 196. More empirical studies, in various areas, should be conducted in those countries, as well as the UK where informal relations also seem more prevalent (J Braithwaite and V Braithwaite "The Politics of Legalism: Rules versus Standards in Nursing-Home Regulation" (1995) 4 Soc & Leg Stud 307). The point here is simply that instances of bureaucratic informality and "administrative guidance" can be found in the US, sometimes even validated by the courts, as well as in Japan. This therefore complicates rank formality in both jurisdictions. (It may also reflect and reinforce the development of neo-proceduralist or reflexive rationality in modern law: see below Chapter Five Part II.B.1 and II.B.3.)

⁶⁰ A very recent illustration is the Court of Appeal's about-face in *Awwad v Gerarhty & Co (a firm)* [2000] 1 All ER 608 (noted by N Andrews [2000] CLJ 265). This makes it clear that English common law will not permit contingency fees beyond those permitted by statute law development over the 1990s. More generally, however, there are recent suggestions that the English constitution may increasingly engage with a growing variety of less rigidly ranked normative sources. See for example N W Barber "Sovereignty Re-examined: The Courts, Parliament, and Statutes" (2000) 20 OJLS 131; and N Walker "Beyond the Unitary Conception of the United Kingdom Conception?" [2000] Public L 384.

⁶¹ Atiyah and Summers, above n 2, 46-47, 55; H Kritzer "Courts, Justice and Politics in England" in H Jacob and others (eds) *Courts, Law and Politics in Comparative Perspective* (Yale UP, New Haven/London, 1996) 81, 157 (citing three studies by Maurice Sunkin).

⁶² This is so even for cases such as *R v Secretary of State for Social Security, ex p Joint Council for the Welfare of Immigrants* [1996] 4 All ER 385 (CA). There the Court of Appeal struck down regulations issued under the Social Security (Contributions and Benefits) Act 1992, denying benefits to those who sought asylum after entering the UK (rather than on entry), as inconsistent with rights under the Asylum and Immigrations Appeals Act 1993. Parliament's sovereignty remains the focus, although the case demonstrates perhaps more daring by courts in determining what was intended. Note also that even this result led to Parliament restoring the disallowed regulations in the Asylum and Immigration Act 1998. See also for example M Elliott "The Ultra Vires Doctrine in a Constitutional Setting: Still the Central Principle of Administrative Law" (1999) 58 CLJ 129. But see some contrary views brought together in C Forsyth (ed) *Judicial Review and the Constitution* (Hart, Oxford, 2000); and A Halpin "The Theoretical Controversy Concerning Judicial Review" (2001) 64 MLR 500.

⁶³ See A Carroll *Constitutional and Administrative Law* (Financial Times, London, 1998) 276.

expectations.⁶⁴ The broader US notion of substantive due process has not emerged, having been subsumed in doctrines of the rule of law, Parliamentary sovereignty and the concept of jurisdiction. This also is related to English courts having developed due process doctrines incrementally out of the Common Law, with no constitutional codification.⁶⁵ In other areas of law with potentially broader political implications, appellate courts in England also appear to remain very deferential towards Parliament.⁶⁶

Another possible complication, noted by Atiyah and Summers but only briefly, was the potential for EU law to become a major new source of law in England. That possibility has become more real since they wrote;⁶⁷ but limits remain apparent. English courts do appear increasingly willing to refer questions on EU law to the European Court of Justice. Yet average referrals remain low compared to other major EU member states.⁶⁸ Further, referrals remain a roundabout means of promoting EU law. "Direct effect" of rights under EU treaties, regulations, and even Directives, has

⁶⁴ But see M Roberts "Public Law Representations and Substantive Legitimate Expectations" (2001) 64 MLR 112 (noting differences among recent case law from the Court of Appeal, made up of different judges); R Best "Legitimate Expectation of Substantive Benefit" [2000] NZLJ 307 (noting that *R v North and East Devon Health Authority, ex p Coughlan* [2000] 2 WLR 622 (CA) may signal a move towards the latter approach, with implications for New Zealand law). There are parallels with the focus of Anglo-New Zealand courts on procedural impropriety, rather than substantive unfairness (as in the US and especially Japan), in contract law: see below Part Two Chapter Three).

⁶⁵ D Galligan *Due Process and Fair Procedures: A Study of Administrative Procedures* (Clarendon Press, Oxford, 1996) 187-192. The open-ended standards set out in the Administrative Procedures Act, enacted in the US in 1946, parallel those in its main constitutional documents. See T Hayes "Judicial Review and Codification" 20 Legal Stud 517, 522-524 (contrasting Australia's more tightly drafted Administrative Decisions (Judicial Review Act 1977); and below Part II.D).

⁶⁶ See generally R J Martineau *Appellate Justice in England and the US: A Comparative Analysis* (William S Hein, Buffalo (NY), 1990). See for example *C (A Minor) v DPP; sub nom Curry v DPP* [1995] 2 WLR 383 (HL, upholding old rule restricting children's criminal liability); *Fitzpatrick v Sterling Housing Association Ltd* (The Independent, 29 July 1997) (CA, refusing to extend tenancy law rights to those in stable same-sex relationships). Compare *Airedale NHS v Bland* [1993] AC 789 (HL, upholding the right to end the life of a vegetative accident victim). Posner (above n 6, 111) cites this case as evidence that "English judges are flexing their muscles to a degree unprecedented since before World War I". In that case, though, the Court had no option but to make a decision one way or the other, while several Law Lords stressed that in general important social and moral issues should be settled in and by Parliament (C Elliott and F Quinn *English Legal System* (2 ed, Addison Wesley Longman, Harlow, 1998), 16). But see Kritzer, above n 61, 156 (arguing that "English courts are increasingly willing to tell the government officials, at both national and local levels, that their action is wrong").

⁶⁷ Atiyah and Summers, above n 2, 54. See also Atiyah, above n 9; Kritzer, above n 61, 166-173. For a comparison of EU with New Zealand constitutional law, see generally C Callahan "Constitutionalisation of Treaties by the Courts: The Treaty of Waitangi and the Treaty of Rome Compared" (1999) 18 NZULR 334.

⁶⁸ See for example *R v International Stock Exchange ex parte Else* [1993] QB 534 (CA, per Bingham MR). Some notable recent cases, however, have not made referrals: M Horspool "Statutory Interpretation of European Community Law by English Courts" in M Freeman (ed) *Legislation and the Courts* (Dartmouth, Aldershot, 1997) 95, 109-11. Kritzer (above n 61, 168) indicated that annual referrals were low compared with France and Germany. A more recent data set confirms that over 1958-1998 UK courts made fewer annual referrals (only 10.13) than Germany (31.67), France (16.18), Italy (13.59), the Netherlands (12.35), and Belgium (12.26). However, the UK's referral rate has grown consistently since the 1980s, reaching an average of 18.7 over 1992-7, compared to 49.5 for Germany, 30.7 for Italy, 17.2 for Belgium, and 15.8 for France. See A S Sweet & T L Brunell "The European Court, National Judges and Legal Integration" (2000) 6 European LJ 117, 120 (Figure 2 and Table 1; the data set is available through <<http://www.iue.it/RSC/>>). Compare C Lenz & G Grill "The Preliminary Ruling and the United Kingdom" (1996) 19 Fordham Int'l LJ 844.

become more important following the *Factortame* litigation. Mostly, however, this has been subsumed within the doctrine of parliamentary sovereignty.⁶⁹ To be sure, in certain areas such as sex discrimination, EU law has had a major impact in practice.⁷⁰ A further normative influence has come from the European Convention on Human Rights. Yet this too has only come indirectly, until very recently. Its express incorporation now into domestic English law, through the Human Rights Act 1998, may expand this influence. However, the process of incorporation itself can be seen as a reinforcing of parliamentary sovereignty. The restricted form of incorporation, notably in terms of courts' powers to strike down contrary legislation,⁷¹ also suggests a reluctance to recognise fully a new source of law (potentially reducing rank formality), as well as hesitation with regard to the Convention's very source-oriented standards of validity (further potentially diminishing authoritative formality). This forms an undercurrent to the pressing but unresolved issue of the possible "horizontal effect" of the Human Rights Act, making Convention rights directly enforceable against private parties, as well as public authorities.⁷² A related issue is the evolving approach of English courts and commentators with respect to important norms of international law.⁷³

⁶⁹ See for example D Nicol "The Legal Constitution: United Kingdom Parliament and European Court of Justice" (1999) 5/1 J Legisl Studies 135; C Boch *EC Law in the UK* (Pearson Education Ltd, Harlow, 2000) 27-36; Carroll, above n 63, 88:

the attitude of English judges to the relationship between English statute and European Community law remains founded on an interpretation of Parliament's will as expressed in the EEC Act 1972, s 2(4). Hence, in construing legislation in accordance with Community law and, in the event of conflict, giving primacy to the same, judges claim to be doing no more than was intended and authorised by the sovereign body. That is much different than (and falls short of) recognising Community law as part of a superior constitutional and legal order to which the legislative sovereignty of the United Kingdom has been sublimated for so long as the Community remains in being. According to this English view of things, therefore, it remains possible for Parliament to reassert its sovereign power, even in relation to directly effective Community law, providing its intention to do so is clear and unequivocal.

But compare for example P P Craig "Sovereignty of the United Kingdom Parliament After *Factortame*" (1991) 11 Yearbook of European Law 221.

⁷⁰ See for example *R v Secretary of State for Employment ex parte Equal Opportunities Commission* [1995] 1 AC 1; C E Epp *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective* (U Chicago Press, Chicago, 1998) 139-140, 149-153. Compare also Sweet & Brunell, above n 68, 126 (noting an above average referral rate to the European Court of Justice from the UK for this category of case).

⁷¹ See K D Ewing "The Human Rights Act and Parliamentary Democracy" (1999) 62 MLR 79. Murray Hunt contends that the important role granted to Parliament in the Act implies a communitarian rather than liberal scheme of rights protection; but is concerned that entrenched deference to parliamentary sovereignty will reinforce formal reasoning of English courts when asked to interpret the Act. See M Hunt "The Human Rights Act and Legal Culture: The Judiciary and the Legal Profession" (1999) J L & Soc'y 86, 90-94. Note also that s 2(1) of the Act only requires English courts interpreting Convention rights to take the decisions of the European Court of Justice into account, rather than requiring them to apply it. See C McCrudden "A Common Law of Human Rights? Transnational Judicial Conversations on Constitutional Rights" (2000) 20 OJLS 499, 503-504. See also J Limbach "The Concept of the Supremacy of the Constitution" (2001) 64 MLR 1, 6-7. Compare N Walker "Setting English Judges to Rights" (1999) 19 OJLS 133; B Markesinis (ed) *The Impact of the Human Rights Bill on English Law* (Oxford UP, London, 1998).

⁷² See for example N Bamforth "The True 'Horizontal Effect' of the Human Rights Act 1998" (2001) 117 LQR 34.

⁷³ See generally R Gardiner "Interpretation in the English Courts Since *Fothergill v Monarch Airlines* (1980)" (1995) 44 ICLQ 620; R Gardiner "Treaties and Treaty Materials: Role, Relevance, and

It is too soon to gauge precisely the effects of incorporation of the Convention,⁷⁴ or other constitutional reforms that were initiated by the Blair government soon into its first term of office.⁷⁵ Devolution of more law-making power to Scotland and Wales appears relatively limited.⁷⁶ Unlike Japan and especially the US, where local authorities have powers unless specifically excluded, the Scotland Act 1998 grants powers only for specified areas of law-making, thus excluding all others. It also expressly recognises the Westminster Parliament's right to override legislation passed by the Scottish Parliament even in those areas.⁷⁷ In contrast to recent developments in Japan, moreover, the process of devolution in England has involved central government retaining very strict control over finances.⁷⁸ Accordingly, a high level of authoritative formality will probably be maintained in England. Nonetheless, its recent "rolling programme of devolution" has finally released political forces which may eventually propel English law towards more substantive reasoning.⁷⁹ Further complicating authoritative formality, "devolution statutes" like the Scotland Act appoint the Judicial Committee of the Privy Council – not the House of Lords – as the final court of appeal for overturning legislation enacted by the devolved legislatures which is incompatible with the European Convention on Human Rights. In the cases decided since October 2000, moreover, two Scots Law Lords have sat on the Committee.⁸⁰

On the other hand, despite remarkable growth in legislative activity over the 20th century, development of English law through the courts remains very important. They have been adept in preserving the core of the Common Law as judge-made law.⁸¹

Accessibility" (1997) 46 ICLQ 643. See also *Fisher v Minister of Public Safety and Immigration (No 2)* [2000] 1 AC 434 (PC, upholding *R v Secretary of State for the Home Department, ex p Brind* [1991] 1 AC 696 (HL), refusing to give direct effect to a treaty not incorporated into domestic law); followed in *Higgs v Minister of National Security* [2000] 2 AC 228 (PC). But see now *Lewis v Attorney-General of Jamaica* [2000] 3 WLR 1785 (PC, allowing unincorporated treaty norms to be considered in determining natural justice). This most recent twist in the saga of the rights of death-row prisoners in American island states is roundly applauded by E W Thomas "A Critical Examination of the Doctrine of Precedent" in R Bigwood (ed) *Legal Method in New Zealand: Essays and Commentaries* (Butterworths, Wellington, forthcoming 2001).

⁷⁴ One commentator suggests that the Act simply cements into place a trend for English courts to refer to the Convention anyway, and is pessimistic about its likely future impact because of additional issues regarding standing, levels of damages awarded, and so on. See L Clements "The Human Rights Act – A New Equity or a New Opiate: Reinventing Justice or Repacking State Control?" (1999) *J L & Soc'y* 72.

⁷⁵ See generally R Brazier "New Labour, New Constitution?" (1998) 49 *NILQ* 1; V Bogdanor "Labour and the Constitution - Part 1: The Record" in B Brivati and T Bale (eds) *New Labour in Power: Precedents and Prospects* (Routledge, London, 1997) 111.

⁷⁶ See generally R Brazier "The Scotland Bill as Constitutional Legislation" (1998) 19 *Stat L Rev* 12; J McFadden "The Scottish Parliament: Provisions for Dispute Resolution" (1998) *Jurid Rev* 221.

⁷⁷ See for example P Craig and M Walters "The Courts, Devolution and Judicial Review" (1998) *Pub L* 272.

⁷⁸ Compare Nottage, above n 29, with R Hazell & R Cornes "Financing Devolution: The Centre Retains Control" in R Hazell (ed) *Constitutional Futures: A History of the Next Ten Years* (Oxford UP, Oxford, 1999) 196.

⁷⁹ Compare R Hazell & B O'Leary "A Rolling Programme of Devolution: Slippery Slope or Safeguard of the Union?" in R Hazell (ed) *Constitutional Futures: A History of the Next Ten Years* (Oxford UP, Oxford, 1999) 21.

⁸⁰ A O'Neill "Judicial Politics and the Judicial Committee: The Devolution Jurisprudence of the Privy Council" (2001) 64 *MLR* 603, 606.

⁸¹ S Hedley "How Has the Common Law Survived the 20th Century?" (2000) 50 *Northern*

This heightens the importance of questions such as how English judges interpret prior case law, how they view and apply doctrines of precedent, and how this may complicate patterns of normative authority. Of particular interest is the degree to which they may draw on content-oriented standards of validity, such as broad principles upon which the Common Law is supposedly based, which could undermine rank formality by creating a new source of formal validity. Despite some judges advocating and applying such an approach, overall the English courts appear to maintain a strong commitment to authoritative formality, at least compared to the US.

Thus, although the Court of Appeal technically is not bound by its own precedents, in practice it departs from them very rarely. The same applies to the House of Lords, despite its Practice Statement of 1966.⁸² Some have suggested that the Statement, allowing the House to depart from its own precedents, was prompted by the attraction of reasoning developed by courts in other Commonwealth jurisdictions. The House of Lords' shift back to more limited scope for recognising tort liability for pure economic loss, in the early 1990s, likewise may have been encouraged by the approach of the High Court of Australia.⁸³ However, few other examples of the "centrifugal force"⁸⁴ of Commonwealth jurisprudence on English courts spring to mind. Similarly, although some judges are more interested in comparative law generally,⁸⁵ so far this has had little effect on results reached in particular cases.⁸⁶

The Practice Statement of 1966 was also influenced by Lord Denning's plea in 1959 for the House to take responsibility for developing the law and dispensing justice. Lord Reid later made efforts to address this concern, notably in a work published in 1972.⁸⁷ Noting statements of Lord Lowry recently, however, Neil MacCormick and

Ireland LQ 283.

⁸² R Youngs *English, French and German Comparative Law* (Cavendish, London, 1998) 55. Thomas J (above n 73) notes that since 1966, the House has overruled its own decisions in only eight cases, and declined to do so in twelve. Atiyah and Summers observe that between 1966 and 1980, the US Supreme Court overruled 55 of its own decisions, to which figure should be added overruling by state supreme courts: Atiyah and Summers, above n 2, 139.

⁸³ M Smith "The Use and Abuse of Foreseeability: Some Observations on Judicial Law Making in the Common Law System" in H Leser and T Isomura (eds) *Wege zum Japanischen Rechts - FS Kitagawa* (Berlin, 1992) 523.

⁸⁴ J Beatson "Has the Common Law a Future?" (1997) 56 CLJ 291, 292. See also Partlett, above n 8. Compare for example the unwillingness of English courts to develop the doctrine of unconscionable bargains to control contractual unfairness (below Chapter Three Part II.B.1), despite its retention in almost all Commonwealth jurisdictions (including New Zealand, at least in theory: see below Part II.C.1 of this Chapter).

⁸⁵ Lord Goff "The Future of the Common Law" (1997) 46 ICLQ 745; T Bingham "There is a World Elsewhere: The Changing Perspectives of English Law" (1992) 41 ICLQ 513; J Steyn "The Role of Good Faith and Fair Dealing in Contract Law: A Hair Shirt Philosophy?" [1991] Denning LJ 131.

⁸⁶ Compare for example the judgments of Bingham LJ in *Interfoto Library Ltd v Stiletto Ltd* [1989] QB 433 (below Chapter Three Part III.B.1) and especially *The Super Servant Two* (below Chapter Four Part II.A); and Steyn J in *Star Steamship Society v Beogradska Plovidra* [1988] 2 Lloyd's LR 583 (*The Junior K*). See also for example the approach preferred by the House of Lords in *White v Jones* [1995] 1 All ER 691. But see B Markesinis "Five Days in the House of Lords: Some Comparative Reflections on *White v Jones*" (1995) 3 Tort LJ 169.

⁸⁷ See, respectively, Lord Denning *From Precedent to Precedent* (Clarendon Press, Oxford, 1959); Lord Reid "The Judge as Law Maker" (1972) 12 J Soc Public Teachers of Law 22. Lord Steyn also singles out these two developments as critical; but notes that although Lord Reid made it clear "that in a situation of choice a judge may be guided by common sense, legal principles, his sense of justice, and ... policy factors [, that] position was perfectly consistent with Lord Reid's unswerving loyalty to the

others have concluded that “British judges remain cautious and reluctant shamelessly to assume the law makers’ mantle”.⁸⁸ Thus, since the 1960s there does appear to have been a gradual movement away from according authority to precedents on the (“natural law” or “law-as-custom”) theory that they are evidence of the law to be uncovered by judges of practical wisdom and legal learning, or the (positivist) theory that judges can make law “interstitially” where legislation or precedents cannot be found. Rather, “the modern stress ... is on law as grounded in principles partly emergent from practice and custom, partly constructed out of moral or ideological elements that bring together practice and contemporary values in a coherent order ...”.⁸⁹ Nonetheless, after considering institutional considerations like those just mentioned, MacCormick and others conclude that.⁹⁰

If we are all – up to a point – realists about precedent, there remains a variety of reasons to do with tradition, stability, predictability and deference to parliamentary authority that are probably sufficient to preserve the relative rigidity and formality within the common law world of the British model of precedent.

New Zealand law, statutory and judge-made, also remains formal along most of these dimensions. This is apparent, first, in the even more attenuated form in which a Bill of Rights was eventually enacted: the New Zealand Bill of Rights Act 1990. Initially, courts did interpret the legislation quite broadly, putting at risk traditional doctrines of parliamentary sovereignty.⁹¹ Since the mid-1990s, however, they appear to be taking a distinctly more restrictive approach.⁹² Secondly, judicial review in

supremacy of Parliament”: see J Steyn, above n 15, 48.

⁸⁸ Z Bankowski, D N MacCormick & G Marshall “Precedent in the United Kingdom” in D N MacCormick and R S Summers *Interpreting Precedents: A Comparative Study* (Dartmouth, Aldershot, 1997) 315, 352 (also citing *C (a Minor) v DPP*, *The Times*, 17 March 1995, where Lord Lowry suggested caution where Parliament had not legislated on the point, where social policy was in dispute, fundamental legal doctrines were involved, or finality and certainty could not be guaranteed by judicial change). Lord Steyn (above n 15) expressly adopts Lord Reid’s devotion to Parliamentary sovereignty.

⁸⁹ Bankowski and others, above n 88, 330, 352.

⁹⁰ Above n 88, 332; ,

⁹¹ M Principe “The Demise of Parliamentary Sovereignty? Canadian and American Influences Upon the New Zealand Judiciary’s Interpretation of the Bill of Rights Act 1990” (1993) *Loyola LA Int’l & Comp LJ* 167.

⁹² H Schwartz “The Short and Happy Life and Tragic Death of the New Zealand Bill of Rights Act” (1998) *NZ L Rev* 233. Compare also A Butler “The Bill of Rights Debate” (1997) 16 *OJLS* 323; A Butler “Strengthening the Bill of Rights” (2000) 31 *VUWLR* 129; A Butler “Judicial Indications of Inconsistency – A New Weapon in the Bill of Rights Armoury?” [2000] 1 *NZ L Rev* 58; A Butler “Declaration of incompatibility or interpretation consistent with human rights in New Zealand” [2001] *Public L* 28. James Farmer has also raised doubts recently about the Court of Appeal’s ongoing commitment to a vital role in the public law arena more generally, noting the Privy Council’s overruling of the Court in *Mercury Energy Ltd v ECNZ* [1994] 2 *NZLR* 385 (judicial review of a state-owned enterprise); *Treaty Tribes Coalition v Urban Maori Authorities* [1997] 1 *NZLR* 513 and *Phipps v Royal Australasian College of Surgeons* [2000] 2 *NZLR* 513 (both cases involving natural justice). He also notes that the Court of Appeal is reluctant to draw on US case law. See J Farmer “The New Zealand Court of Appeal: Maintaining Quality After the Privy Council” in R Bigwood (ed) *Legal Method in New Zealand: Essays and Commentaries* (Butterworths, Wellington, forthcoming 2001); and compare I Loveland “Introduction: Should We Take Lessons from America?” in 1, 16-23 (contrasting the extensive use of US law in the highest courts in Canada, India and Australia, with signs of faltering interest in US law on the part of English superior courts).

administrative law has grown, as in England; but remains bounded by similar principles.⁹³ Thirdly, New Zealand courts, like their English counterparts, have been reluctant to develop case law by analogy to developments in statute law more generally.⁹⁴ Fourthly, without the likes of EU Law, creating at least partial breaches in the tower of parliamentary sovereignty in England, New Zealand courts face even greater difficulties in bringing into consideration norms of international law which are not specifically incorporated into domestic legislation.⁹⁵ Indeed, in *Boscawen*

⁹³ P Joseph "Delegated Legislation in New Zealand" (1997) 18 Stat L Rev 85. Thomas J's recent suggestions that the grounds for judicial review should be broadened are not generally supported: H Hancock "*Waitakere* Unreasonableness" [1998] NZLJ 187. Compare also J Hodder "Irrationality: A Synonym Too Far?" in New Zealand Law Society (eds) *Public Law: Update on Administrative Law and Judicial Review* (NZ Law Society, Wellington, 1998) 29.

⁹⁴ Opponents of analogical use of statutes include P S Atiyah "Common Law and Statute Law" (1985) 48 MLR 1; and T Allan *Law, Liberty and Justice* (Clarendon, Oxford, 1993). However, in the Chatham Lecture delivered on 30 October 1998, a senior Law Lord suggested that in English courts "regard should be paid to the policy inherent in any relevantly analogous statute": T Bingham *The Business of Judging: Selected Essays and Speeches* (Oxford UP, Oxford, 2000) 387. More recently, a former Law Commissioner notes examples in which English courts nonetheless have used statutes directly, such as *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827 (encouraged to uphold an exemption clause after the Unfair Contract Terms Act 1977 was enacted to cover other situations) and *Wong Mee Wan v Kwan Kin Travel Service* [1996] 1 WLR 38 (PC, considering regulations to decide what terms were reasonable to imply into a package holiday contract). He argues that such developments should be encouraged, in view for instance of the increasing legislation derived from the EU and changes in methods of interpreting statutes. However, concerns include Sir Guenter Treitel's suggestion that new legislation on contracts for the benefit of third parties should have no indirect impact on common law cases outside its scope. See J Beatson "The Role of Statute in Common Law Doctrine" (2001) 117 LQR 247, 253, 255, 267-269.

In *South Pacific Manufacturing Co Ltd v NZ Security Consultants and Investigators Ltd* [1992] 2 NZLR 282, 297-298, Cooke P approved the approach in *Photo Production*. One scholar in New Zealand has since urged the analogical use of statutes: G Gunasekara "Judicial Reasoning by Analogy with Statutes: A Heresy or a New Avenue for the Development of the Common Law?" (1993) NZLJ 446; G Gunasekara "Judicial Reasoning by Analogy with Statutes: Now an Accepted Technique in New Zealand?" (1998) 19 Stat LR 177. Powerful opponents, however, include Jim Evans and Peter Watts (see the analysis in the latter's "The Judge as Casual Law-Maker" in R Bigwood (ed) *Legal Method in New Zealand: Essays and Commentaries* (Butterworths, Wellington, forthcoming 2001), citing a forthcoming book chapter by Evans).

Analogical use of statutes is more acceptable in jurisdictions which draw on civil law methodology, such as France (D Harris and D Tallon (eds) *Contract Law Today: Anglo-French Comparisons* (Clarendon Press, Oxford, 1989) 189-190), German and (perhaps to a lesser extent) Japan: G Rahn *Rechtsdenken und Rechtsauffassung in Japan [Legal Thought and Conceptions of Law in Japan]* (CH Beck, Munich, 1990) 417-425. See also below Chapter Two Part II.D; Chapter Three Part IV.A.

⁹⁵ In his writings as an academic, Law Commissioner, and (extra-judicially) as a Justice of the Court of Appeal, Sir Kenneth Keith has tended to advocate an expansive approach. See for example K Keith "The Application of Human Rights Law in New Zealand" (1997) 32 Texas Int'l LJ 401; K Keith "The Impact of International Law on New Zealand Law" (1998) 6 Waikato L Rev 1; K Keith "Roles of the Courts in New Zealand in Giving Effect to International Human Rights - With Some History" (1999) 29 VUWLR 27. However, in a very recent work ("Sources of Law, Especially in Statutory Interpretation, with Suggestions About Distinctiveness" in R Bigwood (ed) *Legal Method in New Zealand: Essays and Commentaries* (Butterworths, Wellington, forthcoming 2001), while responding convincingly to criticisms that the Court of Appeal has been activist in referring to international instruments to interpret statutes (namely, J Allan "Statutory Interpretation and the Courts" (1999) 18 NZULR 439), Sir Kenneth is decidedly circumspect as to how Courts should approach international texts not yet incorporated into national law. In a contribution to the same volume (J Evans "Questioning the Dogmas of Realism" in R Bigwood (ed) *Legal Method in New Zealand: Essays and Commentaries* (Butterworths, Wellington,

Properties Ltd v Governor-General,⁹⁶ the Court of Appeal upheld regulations setting tariffs on used cars from Japan which were in breach of GATT, despite section 9(2)(2) of the Tariff Act 1988 requiring tariffs to be set in conformity with New Zealand's international obligations. The Court held that the regulations were later validated by Parliament by means of the blanket Subordinate Legislation (Confirmation and Validation) Act 1991). A further reflection of the difficulty in allowing international law norms their own "voice", not heard only through the mediation of Parliament, is the lack of progress in the Law Commission's recommendation to change the incorporation process for treaties by institutionalising broad-based consultation prior to ratification.⁹⁷

On the other hand, Cheryl Saunders has speculated that deference to Parliament may be significantly greater in England, compared to Australia and New Zealand, where the institution accordingly has been threatened. Reforms over the last decade or so have aimed to bolster the roles and influence of Parliament in New Zealand.⁹⁸ Although this move is aimed in part at restoring greater independence vis à vis the executive, thus complicating authoritative formality, it then simplifies it by insisting on Parliament's

forthcoming 2001; also forthcoming in [2001] NZ L Rev), Sir Kenneth's judgment in *Sellers v Maritime Safety Inspector* [1999] 2 NZLR 44 is roundly criticised for applying a presumption that statutes are not intended to contravene international law, when the legislation appeared to contain no ambiguity. A former Law Commissioner also criticises this judgment as another instance of "judicial supremacism": D F Dugdale "Framing Statutes in an Age of Judicial Supremacism" (2000) 9 Otago L Rev 600, 606. Conversely, several commentators indicate some disappointment with impediments to, or a reluctance of, New Zealand Courts to apply international law norms more actively. Compare for example A Butler and P Butler "The Judicial Use of International Human Rights Law in New Zealand" (1999) 29 VUWLR 173; M Poole "The Use and Abuse of International Instruments" in New Zealand Law Society (ed) *Public Law: Update on Administrative Law and Judicial Review* (NZ Law Society, Wellington, 1998) 13; M Poole "International Instruments in Administrative Decisions: Mainstreaming International Law" (1999) 30 VUWLR 91. For subsequent illustrations of reticence on the part of the Court of Appeal, see for example *Mendelssohn v A-G* [1999] 2 NZLR 268; and *R v Pora* [2001] 2 NZLR 37. Thanks to Tony Shaw for identifying these cases.

⁹⁶ Unreported (1 December 1994) Court of Appeal, CA 9/94, Richardson, Casey & McKay JJ.

⁹⁷ Compare NZ Law Commission *The Treaty-Making Making Process: Reform and the Role of Parliament* (Report No 45, Wellington, 1997) with M Poole "The Globalisation of New Zealand Law" in NZ Law Society (ed) *Public Law: Update on Administrative Law and Judicial Review* (NZ Law Society, Wellington, 1998) 1. The recommendation that treaties be tabled in Parliament has been followed, by contrast, but there had been an early precedent for that: see K Keith "The New Zealand Treaty Practice: The Executive and the Legislature" (1963) 1 NZLR 273.

⁹⁸ C Saunders "Thinking About Parliament" in A Simpson (ed) *The Constitutional Implications of MMP* (VUW School of Political Science and International Relations, Wellington, 1998) 27, 29, 31. On the reforms, see generally G Palmer *New Zealand's Constitution in Crisis* (John McIndoe, Dunedin, 1992). A recent indication of Sir Geoffrey Palmer's longstanding concern about proliferation of sources of normative authority is his criticism of the growing prominence of "rules" in addition to statutes and regulation. He argues that New Zealand does not need "three levels of law-making rather than two". But if a case can be made to the contrary, he says, one proposal is to require agreement of the full Cabinet before such rules are made. This is consistent with his earlier preference for reinforcing parliamentary supremacy because Cabinet is accountable to Parliament. Perhaps reflecting the fact that he is no longer in Parliament, however, he also mentions an alternative approach: "following American developments, ... restrict [rules] to measures which can be successfully negotiated to a consensus by the agency and those affected by the proposed rule" (G Palmer "Deficiencies in New Zealand Delegated Legislation" (1999) 30 VUWLR 1, 35). In light of the overall formal orientation of New Zealand law, it seems very unlikely that it will move rapidly towards the US approach (on which see more generally J Freeman "Collaborative Governance in the Administrative State" (1997) 45 UCLA L Rev 1).

sovereignty. Even the much fanfaired change in electoral law, to a multi-member proportional (MMP) system,⁹⁹ can be appraised in this light.

At various stages in his judicial career, Lord Cooke has hinted that there may be some fundamental rights which New Zealand courts will uphold even if Parliament purports to take them away.¹⁰⁰ However, these remain obiter dicta, not developed systematically by other New Zealand judges. Lord Cooke's views have attracted some sympathy among senior members of the judiciary in England, notably Lord Woolf, but they have been "treated appropriately dismissively" – in the words of a former Law Commissioner in New Zealand recently – by the present Vice-Chancellor.¹⁰¹ Lord Cooke's views also underpin his opinion that making New Zealand a republic would mean a constitutional revolution; but that is not shared by leading constitutional scholars either.¹⁰² More generally, deference to the legislature still follows strongly in New Zealand, probably all the more so given its unicameral system (making it easier for Parliament to intervene).¹⁰³ The entrenchment of parliamentary supremacy is also apparent in a seemingly growing trend for the government to promptly enact statutes circumscribing court judgments of which it disapproves.¹⁰⁴

More challenging to the normative hierarchy of New Zealand law has been the increasing prominence of norms contained in the Treaty of Waitangi.¹⁰⁵ These have widened the scope of constitutional discourse in New Zealand.¹⁰⁶ Yet there are deep

⁹⁹ Compare generally K Asaka "Electoral Reform in Japan: A Comparative Constitutional Perspective" (1997) 27 VUWLR 25; C Rudd and T Ishikawa *Electoral Reform in New Zealand and Japan: A Shared Experience?* (Massey University New Zealand Centre for Japanese Studies, 1994).

¹⁰⁰ See the cases cited in R Cooke "Fundamentals" [1988] NZLJ 158; and generally M Kirby "The Struggle for Simplicity: Lord Cooke and Fundamental Rights" (1998) 24 Commonwealth L Bull 496.

¹⁰¹ Dugdale, above n 95, 607, citing Lord Irving "Judges and Decision-Makers: The Theory and Practice of *Wednesday Review*" [1996] Public L 59, 75-78, critical of Lord Woolf "Droit Public – English Style" [1995] Public L 57, 68-69..

¹⁰² A Stockley "Parliament, Crown and Treaty: Inextricably Linked?" (1997) 17 NZULR 19, 18. Compare for example F M Brookfield "Republican New Zealand: Legal Aspects and Consequences" (1995) 310 NZ L Rev 310.

¹⁰³ Compare generally R Cooter and T Ginsburg "Comparative Judicial Discretion: An Empirical Test of Economic Models" (1996) 16 Int'l Rev of Law and Economics 295. For examples of deference in New Zealand, see for example *Whiting v Diver Plumbing & Heating Ltd* [1992] 1 NZLR 560, per Tipping J (gently implying that the Contracts Enforcement Act 1956 should be amended); I McKay "Interpreting Statutes – A Judge's View" (2000) Otago L Rev 743 (evinced a strict approach); N Wheen "Desperate Remedies and the West Coast Sawmillers" (2001) 19 NZULR 351, 366 (discussing cases where the requirement of consultation was narrowly construed, and a "takings" clause was not implied into the Bill of Rights Act 1990). But see S Baldwin "New Zealand's National Legal Identity" (1989) 4 Cant L Rev 173, 175 (suggesting that the lack of an Upper House may have encouraged judges like Lord Cooke to attempt to counterbalance Parliamentary power).

¹⁰⁴ One prominent holding overruled in recent years is *Daniels v Thompson* [1998] 3 NZLR 22 (where a majority of the Court of Appeal decided that claims for exemplary damages could not be brought against someone who had been subject to prior criminal proceedings, whether or not those proceedings resulted in a guilty verdict, because of the prohibition against "double jeopardy").

¹⁰⁵ See for example R Cooke "The Challenge of Treaty of Waitangi Jurisprudence" (1994) 2 Waikato L Rev <<http://www.liinz.org.nz/liinz/other/wlr/1994/Article1-Cooke.html>>.

¹⁰⁶ P G McHugh "Sovereignty This Century: Maori and the Common Law Constitution" Proceedings of the Australasian Law Teachers Association conference, Wellington, July 4-7 1999, Vol 2; P G McHugh "Constitutional Voices" (1996) 26 VUWLR 499. See also J G A Pocock "Law, Sovereignty and History in a Divided Culture: The Case of New Zealand and the Treaty of Waitangi" (1998) 43 McGill LJ 481.

historical continuities in the current resurgence of interest in the Treaty, as in the way the debate has been framed by legislative granting of rights.¹⁰⁷ Parliamentary sovereignty has been reaffirmed in this process, with bolder statements of principle proposed by some judges being ignored or put quietly to rest.¹⁰⁸ Normative closure is further promoted by insisting that (a) legislative settlements involve *iwi* (tribes), even though traditionally it seems that smaller units controlled resources;¹⁰⁹ (b) settlements be final;¹¹⁰ and (c) recognition of Maori customary law be limited.¹¹¹

In theory, New Zealand's legal system could generate lower rank formality through having the possibility of three appeals, unlike Japan and England which generally recognise only two.¹¹² A further complication affecting rank formality was, for many years, a noticeable difference in approach between the highest appellate court, the Judicial Committee of the Privy Council (dominated by more conservative Law Lords), and the Court of Appeal under Cooke P.¹¹³ This confused the normative hierarchy in New Zealand law. Proposals to abolish appeals to the Privy Council, especially since the mid-1990s,¹¹⁴ therefore can be seen as a rather radical attempt to restore clearer rank formality. However, tensions regarding appeals to the Privy Council

¹⁰⁷ See for example P Spiller, J Finn and R Boast *A New Zealand Legal History* (Brookers, Wellington, 1995) 172-173; R Boast "Maori Fisheries 1986-1998: A Reflection" (1999) 30 VUWLR 111.

¹⁰⁸ See for example Callahan, above n 67; R Boast "Maori Land and the Treaty of Waitangi" in R Boast, A Erueti, D McPhail and N Smith (eds) *Maori Land Law* (Butterworths, Wellington, 1999) 269, 272-274. Consistent with this is the call for more incorporation of Maori voice in law-making: M Wilson "The Reconfiguration of New Zealand's Constitution: The Transformation of Tino Rangatiratanga into Political Reality" (1997) 5 Waikato L Rev 17, 24-25. For a vigorous call for less interference by New Zealand courts in Treaty matters, see D Round "Judicial Activism and the Treaty: The Pendulum Returns" (2000) 9 Otago L Rev 653.

¹⁰⁹ Boast, above n 107, 112-113.

¹¹⁰ See K Minogue *Waitangi: Morality and Reality* (NZ Business Roundtable, Wellington, 1998); A Mikaere "Settlement of Treaty Claims: Full and Final, or Fatally Flawed?" (1997) 17 NZULR 425.

¹¹¹ See for example R Boast "New Zealand Common Law and Customary Law" in R Boast, A Erueti, D McPhail and N Smith (eds) *Maori Land Law* (Butterworths, Wellington, 1999) 12, 18. See also R Boast "F O V Acheson and Maori Customary Law" (1999) 30 VUWLR 661.

¹¹² See generally Yanagida and others, above n 55, 41-47. Japan differs in that the first (*koso*) appeal was available not only from a district court in first instance; but also from a summary court (*kan'i saibansho*, with some parallels with New Zealand's Disputes Tribunals: Y Wada "Osutoraria/Nyujirando no Funso Shinpansho [Disputes Tribunals in Australia and New Zealand]" (1998) 1 Uebu Jyanaru <<http://hosha.law.kyoto-u.ac.jp/default.htm>>). The summary court has jurisdiction over claims of up to Yen 900,000 (about NZ\$15,000), except now if *shogaku tetsutsuki* are elected for claims of up to Yen 300,000 (Code of Civil Procedure ("New CCP", Law No 109, 1996, art 368). A further instance of the entrenchment of formal reasoning in New Zealand may be the recent calls for more "legal" expertise among Dispute Tribunals referees: compare J McDermott and J Skinner "New Zealand's Disputes Tribunals: Growth of a 'People's Court' Under Threat" (1999) Proceedings of the Australasian Law Teachers Association conference, Wellington, 4-7 July 1999, Vol 2. In addition, greater rank formality is injected into the New Zealand court system by appellate courts being more ready to accept first instance findings of fact, compared to the US and even England or Australia recently. See G Hammond "Comparative Perspectives: A Commentary" in R Bigwood (ed) *Legal Method in New Zealand: Essays and Commentaries* (Butterworths, Wellington, forthcoming 2001), citing *Rae v International Insurance Brokers (Nelson Marlborough) Ltd* [1998] 3 NZLR 190.

¹¹³ On the shifts in Law Lord conservatism, see for example Epp, above n 70, 127-131 (through to the early 1990s); and J Hodder "International Crimes and Immunities" (1998) 21/3 TCL 1 (the late 1990s).

¹¹⁴ See for example New Zealand Business Roundtable *Appeals to the Privy Council* (New Zealand Business Roundtable, Wellington, 1995).

were diffused somewhat when the Privy Council made some careful decisions appointing New Zealand judges to hear some of its cases, and deferred to purportedly well-established Court of Appeal jurisprudence and/or "local circumstances".¹¹⁵

Different complications emerged from the early 1990s. The Law Lords became less conservative, and indeed they were occasionally joined until 2001 by Lord Cooke, created a life peer in the House of Lords upon his retirement from the Court of Appeal. Conversely, there is evidence of growing conservatism in the Court of Appeal under Richardson P in the latter half of the 1990s. James Farmer has recently raised concerns that pressures for efficient case processing due to an increasing work load appear to have led the Court (a) to adopt a "minimalist approach" to particular cases, neglecting opportunities for embarking on broader inquiries and settling contested legal principles; (b) discouraging multiple judgments; and (c) downplaying the importance of oral argument on legal principle. He also criticises the Court of Appeal's unwillingness to grapple with contemporary economic theory in competition law cases, compared even to the Privy Council, and argues generally that New Zealand Courts (except possibly the Court of Appeal under Cooke P) have traditionally been followers rather than leaders.¹¹⁶ Richardson P has recently confirmed the growing work load of the Court of Appeal in recent decades, lower proportions of lengthy judgments, and lower proportions of multiple or dissenting judgments (with, moreover, fewer citations recently to decisions of the Australian High Court decisions, apparently due to its tendency for judges to issue judgments adopting differing approaches). His Honour does note that references to law reform material and legal periodicals have risen significantly since 1960.¹¹⁷ However, from an empirical analysis of the 377 most recent reported decisions of the

¹¹⁵ Notably, for instance, in *Invercargill City Council v Hamlin* [1996] 1 NZLR 513, reaffirming the expansive liability of local authorities for pure economic loss (compare Smith, above n 83). For a strong critique of deference to New Zealand case law and circumstances perceived as distinctive, see P Watts, above n 94. Compare generally K Glover "Severing the Ties that Bind? The Development of a Distinctive New Zealand Jurisprudence" (2000) 8 Waikato L Rev 25; P Spiller "Special Leave to Appeal" (1998) NZLJ 3; M Richardson "The Privy Council and New Zealand" (1997) 46 ICLQ 908.

¹¹⁶ J Farmer, above n 92. As an example of "minimalism", he cites *Attorney-General v E* [2000] 3 NZLR 257, and the dissenting judgment by Thomas J (arguing that the case should not be disposed of simply by overturning Fisher J's finding on legitimate expectations, but should consider wider issues concerning the exercise of discretion by an immigration officer). On the Privy Council's greater willingness to engage with US antitrust and economic principles, Farmer cites *Clear Communications Ltd v Telecom Corporation of NZ Ltd* [1997] 1 NZLR 513.

¹¹⁷ I Richardson "Trends in Judgment Writing in the New Zealand Court of Appeal" in R Bigwood (ed) *Legal Method in New Zealand: Essays and Commentaries* (Butterworths, Wellington, forthcoming 2001). Table 1 of this contribution records, for instance, that the Court rendered only 78 decisions in 1960; 246, in 1980; 396, in 1990; and around 460 in 1997 and 2000. Figure 4 thereof shows that, as a percentage of the total number of decisions cited in any one year, the number of Australian decisions rose from four percent in 1960 to twelve percent in 1990, before declining to five percent in 2000. It should be added that even in the period from 1945 to 1962, New Zealand courts referred to Australian precedents to a "surprising extent": D Mathieson "Australian Precedents in New Zealand Courts" (1963) 1 NZULR 77, 77. The recent downturn therefore suggests an increasingly parochial Court of Appeal, further reducing rank formality in New Zealand's legal system. Compare also the much higher rate of dissenting judgments in appellate courts in the US compared to England, discussed by Atiyah and Summers, above n 2, 283-289. Multiple decisions are also very common in the US (see for example A Hochschild "The Modern Problem of Supreme Court Plurality Decision: Interpretation in Historical Perspective" (2000) 4 Wash U J L & Pol'y 261), whereas Sir Ivor Richardson indicates that this increasingly prominent feature of case law from the High Court of Australia is one reason for declining references to it in New Zealand's Court of Appeal.

Court of Appeal as of December 2000, Russell Smyth observes that the Court cites proportionately fewer law review articles per case than either the High Court of Australia or the US Supreme Court, suggesting a Court which is less innovative, policy-oriented or activist.¹¹⁸ This tension, now between a seemingly more conservative Court of Appeal and the Judicial Committee of the Privy Council (made up predominantly by Law Lords) heading in a less conservative direction, is an important factor behind renewed proposals to abolish appeals to the Privy Council. If only because of New Zealand's new Labour government, most commentators assume that abolition will now occur, focusing attention on what likely appellate structure will arise in its stead.¹¹⁹ The end result, however, will certainly be a greater degree of rank formality in New Zealand's court hierarchy compared to that which has prevailed for the last two decades.

Just focusing on the existence and wording of constitutional structures or instruments, and the emergence of more or less "activist" judges or courts, is unlikely to explain adequately all the important dimensions in a legal system's overall orientation towards formal versus substantive reasoning. This point emerges from Epp's comparative analysis of the "rights revolution" in the US since the 1960s, and some more limited trends in the same direction in the UK more recently. Generally, more attention to basic human rights should inject more "content-oriented" standards of validity into those legal systems.¹²⁰ Epp convincingly shows the importance of changes over this period in the "support structures" for mobilising at least some important rights, such as those involving sex discrimination. These structures include the changing nature of the legal profession, expanding availability to certain types of contingency fees, access to legal aid, and so on.¹²¹

Similarly, in comparing England and the US, Atiyah and Summers bring into the picture many aspects of the broader institutional framework. They suggest, for instance, that comparative deference to legislative solutions, and to superior courts or binding precedents, are related to differences in England and the US in how legislation is enacted, and how the judiciary and the legal profession more generally are organised. Specifically, they argue that the English reliance on enacting legislation is justified by

¹¹⁸ R Smyth "Judicial Robes or Academic Gowns? Citation to Secondary Authority and Legal Method in the New Zealand Court of Appeal" in R Bigwood (ed) *Legal Method in New Zealand: Essays and Commentaries* (Butterworths, Wellington, forthcoming 2001). See also R Smyth "Judicial Citations – An Empirical Study of Citation Practice in the New Zealand Court of Appeal" (2000) 31 VUWLR 847. It could be objected that law review articles are not cited for other reasons, such as counsel not drawing them to the Court's attention. However, counsel will be disinclined to cite law review articles if they perceive the Court as less willing to draw on such writings, which are often prescriptive or policy-oriented. Thanks to Tony Angelo for raising this point.

¹¹⁹ See for example Farmer, above n 92. His paper responds to the Attorney-General's Discussion Paper, "Reshaping New Zealand's Appeal Structure" (Wellington, December 2000, available at <<http://www.executive.govt.nz/minister/wilson/privy-council/index.html>>). The New Zealand Law Society journal quoted most newspaper editorial writers as agreeing with the paper's proposal to end links: Note, "NZ's Appeal Structure" (2001) 554 Lawtalk 24. However, confidence in the Privy Council may have been revived recently after it reversed the Court of Appeal's decision to order lawyers to contribute personally to the costs of the litigant against whom they were acting: see *Harley v McDonald* [2001] 2 WLR 1749 (PC), and an earlier note by D Webb "Harley Costs: A Note of Caution" [2000] NZLJ 453.

¹²⁰ Compare also Fisher, above n 16.

¹²¹ Epp, above n 70, 44-70, 140-155.

the comparative ease in which this can be achieved in practice, due for instance to the considerable fusion of the executive with the legislature and the very limited powers of the House of Lords, unlike the US where both the Senate and the President remain distinct, each with extended veto powers.¹²² Deference to statutory provisions, as a primary source of authority in legal reasoning in England, is also more readily justified because of the high quality of drafting stemming from a single parliamentary office.

A greater willingness to defer to previous decisions of the same court or to higher courts, they argue, is further reinforced by the traditionally homogeneous nature of the legal profession, particularly the Bar supplying most of the judiciary.¹²³ The 1990s did bring accelerating growth in the number of lawyers in England; more diversification in their makeup; and reforms permitting solicitors to obtain rights of audience in superior courts. However, empirical studies show that very few solicitors actually have obtained and use those new rights.¹²⁴ There was also considerable opposition to proposals to grant rights of audience in superior courts mainly to government lawyers.¹²⁵ The tradition of drawing judges primarily from the Bar is likely to continue despite the House of Lords limiting the immunity of barristers from suits for professional negligence.¹²⁶ The Bar, especially the senior counsel who still provide the overwhelming proportion of influential judges, remains a strongly male and white institution.¹²⁷ Hence it is unlikely that the English judiciary will rapidly lose its present homogeneous character.¹²⁸ Until it becomes more diversified, a more adventurous approach – resulting for instance in less authoritative formality – probably cannot be expected.¹²⁹ By contrast, the legal profession in the US is much more heterogeneous.¹³⁰

¹²² A radical recent proposal, for a constitutional law scholar in the US, involves abandoning the presidential system in favour of the Westminster system. See B Ackerman "The New Separation of Powers" (2000) 113 Harv L Rev 634. The institutional upheaval that would be required is obvious from his comparative analysis.

¹²³ Atiyah and Summers, above n 2, 298-305, 329-335, 347-368. See also Kritzer, above n 61, 86-92; R Abel *The Legal Profession in England and Wales* (Basil Blackwell, Oxford, 1989).

¹²⁴ M Zander "Rights of Audience in the Higher Courts in England and Wales since the 1990 Act: What Has Happened?" (1997) 4 Int'l J Legal Profession 167.

¹²⁵ See for example J Steyn "The Role of the Bar, Judge and the Jury: Winds of Change" (1999) Pub L 51.

¹²⁶ D Webb "Dismantling Advocates' Immunity" [2000] NZLJ 327. Restricting immunity may undermine barristers' willingness to fulfil the duty they owe to the Court, which Atiyah and Summers (above n 2, 367) and Posner (above n 6, 21-30) mention as a link towards a more unified Bar and judiciary than in the US. However, it is too early to be sure, and it seems that other links have been more important, especially similar socio-economic backgrounds and institutions such as the Inns of Court. Compare Bingham, above n 94, 355-362; J Flood "Barristers" (August 2001 manuscript for a forthcoming comparative study of lawyers, edited by Albert Kritzer). Thanks to John Flood for providing the latter manuscript.

¹²⁷ Out of just over 10,000 barristers in practice at the end of 2000, only 26 percent are female; 9 percent, non-Caucasian; and 3 percent, women of colour. Of the approximately 1000 Queen's Counsel, only 82 are women and 25 come from ethnic minorities. See Flood, above n 126.

¹²⁸ On the latter, see C Elliott and F Quinn *English Legal System* (2 ed, Addison Wesley Longman, Harlow, 1998) 97-98.

¹²⁹ Sir Guenter Treitel has suggested that English judges have become less assertive as the franchise has expanded, since with every advance of democracy the non-representative nature of the judiciary became more conspicuous (quoted in Posner, above n 6, 34). Of interest in this respect, then, is some growing interest in reforming the process by which English judges are appointed: see Elliott and Quinn, above n 128, 92, 97-98. This also became a topic of debate in New Zealand from the mid-1990s (see for example R Kerr "Judging the Judiciary" [1998] NZLJ 329). However, no significant changes

This has carried over into its judiciary, with further diversity arising from judges often being elected by popular elections, and considerable lateral career moves (in and out of political life, for instance).¹³¹

Examination of “support structures” for asserting civil rights through the courts, and of legal institutions more generally, is also crucial in positioning New Zealand. Empirical scholarship on the legal profession is sparse, but one study in the early 1980s brought out patterns of social stratification closer to those in England than in the US.¹³² The subsequent growth of large law firms, and the increasing numbers of persons being admitted as lawyers, also parallels developments in England.¹³³ Yet it seems likely that large law firms in New Zealand remain closer in organisational beliefs and expectations to those still prevalent among large law firms in England, compared to those in the US.¹³⁴ Further, despite New Zealand’s long tradition of lawyers being able to qualify and work as both barristers and solicitors,¹³⁵ functional specialisation has emerged and judges are still drawn overwhelmingly from those working as barristers sole. Social class has probably been less important in the New Zealand Bar compared to England,¹³⁶ resulting in a less homogenous judiciary. However, New Zealand does have some

have resulted (see L Nottage “New Zealand Law through the Internet: The Commonwealth Law Tradition and Socio-Legal Experimentation” (1999) 6 E Law: Murdoch U Electronic Journal of Law <<http://www.murdoch.edu.au/elaw/issues/v6n1/nottage61.html>>).

¹³⁰ R M Abel *American Lawyers* (Oxford UP, New York, 1989).

¹³¹ Atiyah and Summers, above n 2, 130-132; H Jacob “Courts and Politics in the United States” in H Jacob and others (eds) *Courts, Law and Politics in Comparative Perspective* (Yale UP, New Haven (Conn), 1996) 16, 66-69.

¹³² G Murray “New Zealand Lawyers: From Colonial GPs to the Servants of Capital” in R Abel and P Lewis (eds) *Lawyers in Society: The Common Law World* (Berkeley, U California Press, 1989).

¹³³ For another rare socio-legal study, by a New Zealander who spent most of his career in the US (and now teaches business management at Auckland University), see M J Powell “Business Management and the Professions: The Changing Nature of the Legal Profession” in J Deeks and N Perry (eds) *Controlling Interests: Business, the State and Society* (Auckland, U Auckland Press, 1991). See also generally D Brock, M Powell & C R Hinings (eds) *Restructuring the Professional Organization: Accounting, Health Care and Law* (Routledge, London, 1999).

¹³⁴ One recent study shows how a large English firm adheres much more to the traditional professional partnership than a US firm of comparable stature: J Flood “Professionals Organizing Professionals: Comparing the Logic of United States and United Kingdom Law Practice” in D Brock, M Powell & C R Hinings (eds) *Restructuring the Professional Organization: Accounting, Health Care and Law* (Routledge, London, 1999) 154. Compare M Galanter “Law Abounding: Legalisation Around the North Atlantic” (1992) 55 MLR 1.

¹³⁵ Spiller and others, above n 107, 236-237. Functional specialisation, and the retention in New Zealand of English traditions such as barristers being appointed Queen’s Counsel, have been questioned as possibly contrary to anti-competition law: A Bollard and P Scott “Competition and the Legal Profession” [1996] NZLJ 275. True to that tradition, the Law Society promptly retorted that such features should be retained because the New Zealand legal profession serves wider public interests: Note “Competition Policy Should Not Override Public Interest: Forbes” (1996) 454 Lawtalk 5. It may become more difficult to maintain this attitude if more empirical research is undertaken showing the increasingly competitive nature of the New Zealand legal profession (see Powell, above n 133; M Fay and J Bell, “Lawyers’ Attitudes To Competition and Advertising” [1996] NZLJ 462). Yet retention of the Queen’s Counsel system seems more likely in view of the resilience of traditional patterns within the legal profession, and the lack of socio-legal studies in New Zealand legal academia (see below Part II.C).

¹³⁶ Compare Flood, above n 126. In England, the High Court still does not appear to have any non-Caucasian judge, and higher courts still do not have any women judges. By contrast, in recent years a Maori has been appointed to New Zealand’s High Court (Justice Durie), and a woman has been appointed Chief Justice (Chief Justice Elias).

notable “legal dynasties”, which have generated leading practitioners dominating long periods of its modern history.¹³⁷ Unfortunately, there is an acute dearth of empirical data in New Zealand on these points.¹³⁸ Nonetheless, the impression remains of a much more homogenous legal profession and judiciary in both New Zealand and England, at least compared to the US.¹³⁹

At first sight, Japan seems closer to the English law tradition than to US law, for the executive is fused with the legislature.¹⁴⁰ Indeed, this link has been cemented by one political party (the LDP) retaining power in both Houses of the Diet for most of the period since 1950. That has also reduced the potential for the upper house to exercise some veto powers.¹⁴¹ All this might suggest that Japan, like England and New Zealand, can readily enact legislation, thus encouraging a more formal rather than more substantive orientation in its legal system generally. In fact, until deregulation gained momentum over the 1990s, enactment of legislation – even that which might seem to clearly favour the LDP – seem less frequent and certainly slower in post-War Japan than one would expect given the dominance of one political party. Partly this stemmed from the ability of opposition parties and other interest groups to invoke arguments based on the Constitution, and otherwise mobilise the legal system for political or policy-making purposes.¹⁴²

That is so even if (as just mentioned) the courts are reluctant to strike down as unconstitutional legislation once enacted. Some have gone on to suggest that in politically charged cases Japanese judges tend to decide in favour of the central government and LDP policy preferences. Ramseyer and Rasmussen find some statistical

¹³⁷ See for example P Spiller *The Chapman Legal Family* (Victoria UP, Wellington, 1992). As Thomas J has observed recently: “By and large, [New Zealand judges] are perceived as a conservative, middle to upper class, frequently second or third generational privileged elite”: E W Thomas “The Conscience of the Law” (2000) 6 *Waikato L Rev* 3, 3.

¹³⁸ Compare for example P Spiller “Realism in the Court of Appeal: The Value of the Oral Tradition” (1998) 2 *Ybk of NZ Jurisprudence* 34.

¹³⁹ See also Fisher, above n 16.

¹⁴⁰ See generally K Takahashi “Contemporary Democracy in a Parliamentary System” in P Luney and K Takahashi (eds) *Japanese Constitutional Law* (Tokyo UP, Tokyo, 1993) 87.

¹⁴¹ Under art 59 of the Constitution, even if the House of Representatives approves a Bill (even by a simple majority), the House of Counsellors can reject it, in which case the House of Representatives can get it enacted directly but only by approving it by a two-thirds majority. Although admittedly limited, this veto power is a potentially very real one. Accordingly it is odd that Cooter and Ginsburg (above n 103) fail to recognise it at all in their comparative study of judicial (in)dependence. A different question is whether recognising it would affect the statistically significant correlations identified by the regression analysis. If not, it shows the lack of robustness of such analysis.

¹⁴² On the former, see for instance the promulgation of legislative amendments in line with “new” Guidelines on US-Japanese Security agreed between the Japanese and US governments over three years ago: see for example T Yamauchi “*Shin-Gaidorain Kanrenho to Kenpojo no Mondaiten* [Constitutional Difficulties with the Legislation Relating to the New Guidelines]” (1999) 1160 *Juristo* 36. On the latter, compare generally E Feldman *The Rituals of Rights in Japan: Law, Society and Health Policy* (Cambridge UP, Cambridge, 2000).

Another development, also tending to complicate authoritative formality, is the steady increase in the numbers of members’ Bills – both submitted and enacted – over the last few years: see “Lawmakers Try to Make Laws: Young Guns Drop Money Game, Fight Bureaucratic Control” *JapanTimes*, Tokyo, 23 March 1999, 1. Compare also Atiyah and Summers, above n 2, 302-303; and S G Palmer “The Evolution of a Legal System: A Dialogue” (Paper presented to the Australasian Law Teachers Association conference, Wellington, 4-7 July 1999) (highlighting a rise in Members’ Bills since the introduction of MMP, yet conceding that very few are enacted as such).

evidence that those judges who do not, end up with worse career paths.¹⁴³ Deciding in favour of the status quo in constitutional cases, however, is a feature shared by many final appellate courts,¹⁴⁴ and possibly some intermediate ones. Their thesis also seems inconsistent with little, if any, evidence that LDP cabinets have directly appointed “party hacks” or known LDP sympathisers to the Supreme Court.¹⁴⁵ It also begs the question of what cases can be defined as “politically charged”. The thesis would become more convincing if similar career disadvantages could be shown for judges who took activist, anti-LDP approaches in post-War litigation involving employee dismissals, industrial pollution, or product liability.¹⁴⁶ In any event, Ramseyer and Rasmussen find no significant correlations in Commercial Code cases, which they take to support their thesis in that these are not “politically charged”.¹⁴⁷ That qualification is particularly important for the purposes of this research, because it implies that contract case law development also cannot be expected to exhibit systematic bias, even on a highly jaundiced view of possible politicisation of the judiciary in Japan in the public law arena.

Rather than political conservatism, moreover, a narrow focus on efficient case processing appears a more significant explanation.¹⁴⁸ That focus is reinforced by the bureaucratic organisation of the Japanese judiciary; comparatively limited funding for the courts and fewer judges;¹⁴⁹ and perhaps a tendency towards conceptual reasoning found in some jurisdictions in the civil law tradition.¹⁵⁰ Those factors threaten to constrict the scope for substantive reasoning. Specifically, they should encourage the often noted emergence of de facto observance of other courts’ precedents, despite the theory that Japanese judges are not strictly bound by a doctrine of stare decisis.¹⁵¹ As Haley observes: “As career government officials, they do not enjoy the same autonomy nor the overtly policy-making role of common-law judges” (by which he probably has in mind US judges, not those in the English law tradition). Yet he quickly continues: “The constraints of a centrally organised bureaucracy should not be overstated. Judges

¹⁴³ J M Ramseyer and E Rasmussen “Why Are Japanese Judges So Conservative in Politically Charged Cases?” (1999) Paper Presented at the Annual Meeting of the Law and Society Association, Chicago, 27-30 May 1999. See also J M Ramseyer “The Puzzling (In)dependence of the Courts: A Comparative Approach” (1996) 23 J Leg Stud 721; J M Ramseyer and E Rasmussen “Judicial Independence in a Civil Law Regime: The Evidence from Japan” (1997) 13 J of L, Econ & Org 259.

¹⁴⁴ See for example Beatty, above n 46.

¹⁴⁵ Compare Haley, above n 43, 109-114, 118-122.

¹⁴⁶ See, respectively, D H Foote “Judicial Creation of Norms in Japanese Labor Law: Activism in the Service of - Stability?” (1996) 43 UCLA L Rev 635; Upham, above n 51; L Nottage “The Still-birth and Re-birth of Product Liability in Japan” in D Nelken and J Feest (eds) *Adaptation of Legal Cultures* (Hart, Oxford, 2001) 147.

¹⁴⁷ Ramseyer and Rasmussen, above n 143. It could also be objected that commercial law issues do have political ramifications, although these appear more prominently when enactment or amendment of legislation is discussed (below Chapter Three Part IV) than when judges decide cases.

¹⁴⁸ See M Abe “The Internal Control of a Bureaucratic Judiciary: The Case of Japan” (1995) 23 Int’l J of the Sociology of Law 303.

¹⁴⁹ Nijuissei Seisaku Kenkyujo (ed) *Minji Shiho no Kasseika ni Mukete [Towards the Revitalisation of Civil Justice]* (Nijuissei Seisaku Kenkyujo, Tokyo, 1998).

¹⁵⁰ Haley, above n 43, 47-48. See also L Nottage “Contract Law, Theory and Practice in Japan: Plus ça Change, Plus c’est la Môme Chôse?” in V Taylor (ed) *Asian Laws Through Australian Eyes* (Law Book Company, Sydney, 1997) 316.

¹⁵¹ Above n 43.

in Japan do enjoy considerable individual as well as collective autonomy. The balance between constraint and freedom is quite delicate".¹⁵² Such autonomy, combined with other factors such as the judges' extensive powers to ascertain and review facts, helps explain instances of both private and public law cases (especially among District Courts) reaching seemingly contradictory results.¹⁵³ While this opens another path to substantive reasoning in Japan's legal system, it means that law is not swallowed up by politics in the manner suggested by Ramseyer.

Formal tendencies in Japanese law are further reinforced by the nature of the legal profession. Qualified practising attorneys (*bengoshi*) only get appointed as judges very occasionally.¹⁵⁴ That reduces the sense, still prevalent among New Zealand and especially English barristers, of being an "officer of the Court".¹⁵⁵ *Bengoshi* also desire and highly value independence and the freedom from control of others.¹⁵⁶ Yet they do share important bonds with the Japanese judiciary due to a variety of factors: often shared educational backgrounds (most coming from leading law faculties); a period of shared training (at government expense) before qualifying either as an attorney or a judge; their limited numbers; and the protracted "trial by colloquy" characteristic of civil procedure in the civil law tradition, encouraging cooperation between advocates and judges.¹⁵⁷ *Bengoshi* also share a coherent sense of ethical responsibilities, which judges can also draw on if necessary. Arguably, this sense follows from having a smaller Bar, and in turn it helps underpin the broadly phrased provisions of the Code of Attorney Ethics in Japan.¹⁵⁸ This may change, along with many other recent reforms, especially the doubling of the numbers who pass the bar examination every year, over the 1990s, and a concomitant shortening in the government-funded training period.¹⁵⁹

¹⁵² Haley, above n 43, 92, 93. See also J O Haley "Judicial Independence in Japan Revisited" (1995) 25 L in Japan 1.

¹⁵³ Respectively, see for example L Nottage, above n 146; and D O'Brien with Y Ogoshi *To Dream of Dreams* (U Hawaii Press, Honolulu, 1996).

¹⁵⁴ Haley, above n 43, 50-58.

¹⁵⁵ That sense even leads Posner (above n 6, 21-30) to include English barristers as "judicial adjuncts", so as to recalculate a ratio of "lawyers" to "judges" which is much lower than that for the US (even adding law clerks to its "judges") – and instead closer to that in Continental European jurisdictions. While an interesting attempt at a functional comparison, this seems to go too far. Anyway, any such sense is being undermined in New Zealand due to for example the rise of large law firms, who see their loyalties as overwhelmingly to their clients – or even their own firms. See for example T Molloy *Thirty Pieces of Silver* (Howling at the Moon Productions, Auckland, 1998) 312-322, 397-398 (on the tax schemes promoted by Russell McVeigh); D Shale "Shake the Tree" [2000] NZLJ 139 (on the decision of Kensington Swan to form an alliance with the legal services branch of a "big five" global accountancy firm, KPMG Legal, after his firm "several years ago had decided that a legal firm was just like any other commercial business").

¹⁵⁶ Haley, above n 43, 53-54.

¹⁵⁷ See generally J Davis *Dispute Resolution in Japan* (Kluwer, Dordrecht, 1996) 252-257. The term "trial by colloquy" is taken from C Buehring-Uhle *Arbitration and Mediation in International Business* (Kluwer, The Hague/et al, 1996) 25 (citing Fischer-Zernin & Junker, "Arbitration and Mediation: Synthesis or Antithesis?" (1988) 5 J Int'l Arb 21, 29-30). See also generally S Kiefel "Civil Procedure: Some Comparisons" (1999) 18 Australian Bar Rev 173.

¹⁵⁸ S A Leonard "Attorney Ethics and the Size of the Japanese Bar" (Jan-Mar 1992) *Japan Quarterly* 86.

¹⁵⁹ Compare T Nishimura "The Code of Ethics Applicable to *Bengoshi*" (Paper presented to the Temple University CLE Seminar, Tokyo, 1 December 1998, and available at <<http://www.tuj.ac.jp/law/benethics.html>>); with R Hamano "Japanese Lawyers in Transition" (1998) 49 *Rikkyo Hogaku* 325; L Nottage "Cyberspace and the Future of Law, Legal Education, and Practice in

In sum, closer examination of broader institutional realities in Japan does suggest a more formal orientation than in the US. Nonetheless, in key features making up authoritative formality, the two legal systems have very much in common, and both contrast with English and New Zealand law.

II.B Content Formality: Determining Rules by Fiat, and Under- or Over-Inclusiveness

Atiyah and Summers argue that a second dimension to formal reasoning lies in content formality, related to acceptance of arbitrariness.¹⁶⁰ This dimension too is determined by two factors or sub-dimensions. The first is the extent to which the rule or other legal phenomenon is shaped by fiat, rather than particular reasons of substance. An example given of high content formality in this respect is the rule of the road that people should drive on the left (in England, also New Zealand, and even Japan¹⁶¹) as opposed to the right (the US, of course). The second factor involved, they argue, is the extent to which a rule is under-inclusive or over-inclusive in relation to its objectives. For instance:¹⁶²

Requirements of form, such as a rule requiring a will to be signed by two witnesses, are often significantly over-inclusive (they invalidate wills even where there is ample evidence from other sources that the will does represent the testator's true desires) and to that extent have higher content formality.

This example deserves further exploration, as emblematic of an important sub-dimension of legal reasoning generally.¹⁶³ Compared to US law, English law traditionally has maintained stricter rules as to formal requirements in will-making.¹⁶⁴ So has New Zealand, despite a recent proposal to adopt a more substantive approach.¹⁶⁵ Japanese law lies somewhere in between. The Civil Code allows for three formalities.¹⁶⁶ The most formal is the "notarised will", where the testator dictates the terms of the will to a notary public (*koshonin*), in the presence of two witnesses. Secondly, there is the

Japan" (1998) 5 Web Journal of Current Legal Issues
<<http://webjcli.ncl.ac.uk/1998/issue5/nottage5.html>> (forthcoming in revised form in G Greenleaf & M Ibusuki (eds) *Transnational Cyberspace Law*, Hart, Oxford, 2001).

¹⁶⁰ Atiyah and Summers, above n 2, 13-14.

¹⁶¹ R McGregor *Japan Swings: Politics, Culture and Sex in the New Japan* (Yenbooks, Tokyo, 1996) 42 argues that this rule was transplanted from England. That may have been so, for English automobiles were popular in Meiji Japan. It has been suggested, however, that the rule of "keeping left" was to allow mostly right-handed *samurai* to draw their longswords quickly. This entire topic cannot be pursued further here.

¹⁶² Atiyah and Summers, above n 2, 13.

¹⁶³ The sub-dimension is also examined in relation to one aspect of the law of contract formation, below Part Two Chapter Two.

¹⁶⁴ See J H Langbein "Substantial Compliance with the Wills Act" (1975) 88 Harv L Rev 489; R Miller "Substantial Compliance and the Execution of Wills" (1987) 36 ICLQ 559.

¹⁶⁵ NZ Law Commission *Succession Law: A Succession (Wills) Act* (Report No 41, Wellington, 1997) (proposing for example a dispensing power, allowing Courts to enforce will despite formal irregularities if there is proof of the testator's intentions). These reform proposals have had a long gestation period (compare for example R Tobin "The Wills Act Formalities: A Need for Reform" (1991) NZLJ 191), and their attempt to move New Zealand towards more substantive reasoning may encounter considerable difficulties. See below Chapter Two Parts II.B and III.

¹⁶⁶ Respectively, arts 969, 970, and 968.

“secret will”. The testator must sign the will, stamp it as well as the envelope it is placed in, and deliver the latter to a notary public in the presence of two witnesses, declaring it to be a will along with his or her name and address. The least formal is a type of “holographic will”, where the testator must write out by his or her own hand (*jihitsu*) the will’s provisions, the date, his or her name, and then stamp it. In the latter category, moreover, Japanese courts have interpreted broadly the requirements of dating and of including the testator’s name.¹⁶⁷ In 1994, the Supreme Court even accepted as valid a carbon paper copy of the will.¹⁶⁸ Generally Japanese courts undertake a broad-based inquiry to determine whether the will represents the true intentions of the party, remedying procedural irregularities provided substantial equality among heirs is respected or the dispositions are reasonable.¹⁶⁹

Atiyah and Summers also point out that statutory rules, whose verbal form tends to be more fixed than rules established by judge-made pronouncements, are often more over- or under-inclusive. Moreover, “statutory rules tend to have more arbitrary content, at least in the sense that there will be many more or less arbitrary provisions as to time, place and amount in statutes dealing (for instance) with taxation or social security”.¹⁷⁰ This, they argue, bears on their primary thesis.¹⁷¹

the same rules of the common law tend to have less content formality in American than in England; statute law tends to be more precisely drafted in England, and to that extent has more of the arbitrary and thus higher content formality than in America; and statute law is itself a more important form of law in England than in America.

Reinforced again by some features of its legal infrastructure, especially a specialist Office of Parliamentary Counsel proud of its prowess in legislative drafting,¹⁷² New Zealand law follows more the approach of English law.¹⁷³ Japanese law, especially in practice, appears to bear more affinity with US law. In particular, commentators have often pointed to the broad wording in Japanese legislation which is eventually enacted. Such wording often appears to stem in part from the comparatively wide-ranging process of bargaining and compromise among political actors and interest groups, as well as among the variety of executive agencies which compete in producing opinions

¹⁶⁷ Respectively, see for example the judgment of 2 July 1916, Great Court of Cassation (21 Minroku 1176: sufficient if the name identifies the testator adequately); and the judgment of 31 May 1979, Supreme Court (33 Minshu 4-445: sufficient if a mistaken date can be readily corrected from other provisions or circumstances).

¹⁶⁸ 19 October 1994, Supreme Court (1477 Hanji 52). Prior to this judgment, most (but not all) scholars and courts had interpreted art 968 as not permitting the recording of the will’s provisions by mechanical means, such as typewriters or word processors: see T Kuki “*Tsujo no Hoshiki* [Normal Formalities]” in Z Nakagawa and E Kato (eds) *Shinpan Chushaku Minpo* [Civil Law Commentary - Revised Edition] Vol 28 (Yuhikaku, Tokyo, 1993) 82-83. However, the Tokyo Family Court (20 April 1973, 25/10 Kagetsu 114) had previously upheld a typewritten will. This recent Supreme Court judgment may augur further relaxation of the “handwriting” requirement too, or perhaps legislative amendment.

¹⁶⁹ See generally T Matsumoto “*Yuigon no Hoshiki* [Formalities for Wills]” (1995) 11 *Kazoku Shakai to Ho* 53.

¹⁷⁰ Atiyah and Summers, above n 2, 14.

¹⁷¹ Above n 2, 14.

¹⁷² See for example N J Jamieson “Getting Down to the Act - Further Memoirs of an Antipodean Lawmaker” (1994) 15 *Stat L Rev* 192.

¹⁷³ See for example J Prebble “The Interpretation Provisions of the New Zealand Income Act 1994” (1999) 30 *VUWLR* 49, 62 (contrasting US law).

and draft legislation.¹⁷⁴ The Cabinet's Legislative Drafting Office often only becomes involved in finalising a Bill at the last moment.¹⁷⁵

This aspect might be linked to what Atiyah and Summers propose briefly and cryptically as "rule of law" formality, in that less precise legislative provision (or no provision at all) can run against values involved in "prospective general rules, clarity, certainty, predictability, equality before the law, and provision of a fair opportunity to obey".¹⁷⁶ Critiques of Japanese law from English commentators are understandable on this ground, particularly the scope it opens for administrative guidance by executive agencies operating under or implementing generally worded legislation, with consequent broad discretion and lack of certainty.¹⁷⁷ Similar critiques from US commentators are more surprising, given the lower content formality – and possibly even rule of law formality – found in their own legal system.¹⁷⁸

II.C Mandatory and Interpretive Formality: "Hard and Fast Rules"

A third dimension of formal reasoning proposed by Atiyah and Summers is mandatory formality, involving the overriding (or excluding from consideration, or diminishing the weight of) at least *some* contrary substantive reasons. This too involves primarily two aspects. One is "prima facie mandatory formality", which is higher if the legal rule is stated in explicit, unqualified terms. An example given is a rule prohibiting the driving of vehicles in a park, as opposed to prohibiting "unreasonably noisy" ones.¹⁷⁹ A second aspect is the ultimate degree of mandatory formality which arises after defences and collateral doctrines have been taken into account. Many types of defences and doctrines are possible, allowing for more substantive reasoning. That also follows if a rule involves lower "interpretive formality", adopting a less formal interpretative method which shapes the resulting formal reason:¹⁸⁰

An interpretation is highly formal if it merely focuses on the literal meaning of words, or on the narrow confines of normative conduct or other phenomena to be interpreted. Interpretation may be less formal and more substantive in one of two ways. Interpretation may be substantive to the extent that the interpreter searches for and gives effect to the underlying purposes and rationales

¹⁷⁴ A good example of this, leading to a broadly worded statute, is Japan's Product Liability Law (No 85, 1994): see Nottage, above n 146.

¹⁷⁵ See generally H Hiramatsu "Seifu ni okeru Naikaku Hoseikyoku no Yakuwari [The Role of the Cabinet's Legislative Drafting Office in the Government]" in M Nakamura and H Maeda (eds) *Rippokatei no Kenkyu - Rippo ni okeru Seifu no Yakuwari [Studies in Legislative Process: The Roles of the Government in Enacting Laws]* (Shinzansha, Tokyo, 1997) 282; K Watanabe "Joyaku no Teiketsu to Kokunaiho Seibi - Iwayuru Joshi Sabestsu Haishi Joyaku Hijunji no Giron o Tegakari to shite [Adjusting Domestic Law and Concluding Treaties: The Debate on Ratifying the So-Called Convention Abolishing Discrimination Against Women]" in M Nakamura and H Maeda (eds) *Rippokatei no Kenkyu - Rippo ni okeru Seifu no Yakuwari [Studies in Legislative Process: The Roles of the Government in Enacting Laws]* (Shinzansha, Tokyo, 1997) 132; M Seki "The Drafting Process for Cabinet Bills" (1986) L in Japan 168.

¹⁷⁶ Atiyah and Summers, above n 2, 415. Compare below Chapter Five Part II.A.

¹⁷⁷ M Dean "Administrative Guidance in Japanese Law: A Threat to the Rule of Law" (1991) JBL 398.

¹⁷⁸ A fairer appraisal has been provided recently by F Upham "Ideology, Experience, and the Rule of Law in Developing Societies", paper presented at the University of Michigan conference, "Change Continuity, and Context: Japanese Law in the Twenty-First Century", Ann Arbor, 6-7 April 2001.

¹⁷⁹ Compare Atiyah and Summers, above n 2, 16-17.

¹⁸⁰ Above n 2, 15.

which are implicit in the text or which can be ascertained from other sources (such as legislative history). Sometimes no such purposes or rationales can be identified, but interpretation can still be substantive to the extent that the decision-maker then relies on substantive reasons drawn from other non-legal sources - for example, where a judge draws on his own background political morality, or on a public morality which he attributes to the legislature or to the public.

Atiyah and Summers argue that legislation, compared to case law rules, encourages more formal reasoning along these dimensions as well as others (especially content formality).¹⁸¹ They then suggest that England generally relies far more on statute than on case law, and thus has a much more formal system. Supporting this conclusion with quantitative data is acknowledged to be difficult, because for instance "there are no settled criteria by which to individuate a statutory scheme as embodying one statute rather than two or more".¹⁸² However, Atiyah and Summers point to the vague formulations found in US constitutional and other public law statutes, making these areas of law more like those developed through (often less formal) case law; and evidence of a long tradition of legislative rather than judicial reform in English private law.¹⁸³ New Zealand clearly follows the English pattern in these respects, and the overall degree of formal reasoning in New Zealand will have been boosted by its propensity to promulgate very large amounts of primary and secondary legislation despite so-called "deregulation" since the mid-1980s.¹⁸⁴ Despite a similar tendency as Japan has restructured its economy and polity over the 1990s, legislation generally appears less tightly drafted.

Atiyah and Summers identify some structural differences consistent with English law adopting a more formal approach, along this dimension, compared to the US. Literal interpretation of statutes, for instance, runs in parallel with a more careful drafting and enactment process. They also point to a traditional reluctance to investigate legislative history in interpreting statutes.¹⁸⁵ That tendency still can be detected in

¹⁸¹ Above n 2, 96-98. But see below Chapter Three Parts III.A and IV.A (suggesting that legislative process, especially in the US, may become so heavily politicised that formality is comparatively diminished even when statutes are enacted).

¹⁸² Above n 2, 98-99. Compare R Cooter & T Ginsburg, above n 103

¹⁸³ Above n 2, 100, 140-1 (reforms through statute in England, in contrast to many parts of the US, include implied warranties of habitability in residential leases, bad faith discharge of employees, abolition of the common law contributory negligence rule, liability of occupiers, control of exemption clauses under the Unfair Contract Terms Act 1977, modification of effects from changed circumstances through the Law Reform (Frustrated Contract) Act 1943). To this should be added now the Contracts (Rights of Third Parties) Act 1999 (Beatson, above n 94, 267-269). New Zealand has also adopted legislation to deal with these problems, instead of leaving them primarily to the courts. One distinctive further legislative intervention is the Law Reform (Testamentary Promises) Act 1949: see S Nield, "If You Look After Me, I Will Leave You My Estate": The Enforcement of Testamentary Promises in England and New Zealand" (2000) 20 *Legal Studies* 85, 87-88.

¹⁸⁴ The proclivity to legislate appears very deep-rooted. Compare for example G Palmer *Unbridled Power? An Interpretation of New Zealand's Constitution and Government* (Oxford UP, Wellington, 1979) and G Palmer "The New Zealand Legislative Machine" (1987) 17 *VUWLR* 285; with G Palmer and M Palmer *Bridled Power: New Zealand Government Under MMP* (Oxford UP, Auckland, 1997) and Nottage, above n 159. Statute law's encouragement of formal reasoning of various types helps explain why New Zealand contract law remains so wedded to classical or neoclassical models (below Part Two). This is so despite the enactment of various "Contract Statutes" especially from 1969 through to 1982 (below Part Two Introduction Part IV.C).

¹⁸⁵ Above n 2, 100-112.

commentary in England following *Pepper v Hart*.¹⁸⁶ However, Sir Kenneth Keith notes a recent decision of the House of Lords in which Lord Cooke did find *Hansard* useful, and contends that New Zealand “Courts and Parliament have not formulated strict prerequisites for the use of [such] material, in terms for instance of ambiguity or absurdity”.¹⁸⁷ However, strong criticism of the use of legislative history is found also in New Zealand,¹⁸⁸ despite a rigid rule excluding access to extrinsic evidence having been undermined prior to *Pepper v Hart*.

Consistently with a more substantive orientation overall, Japanese courts and commentators always have looked closely at legislative history. Following the approach in most civil law jurisdictions, slowly and sporadically trickling into English law mainly through EU law,¹⁸⁹ Japanese law has long maintained a purposive or teleological approach to statutory interpretation.¹⁹⁰ Courts in the US also adopt a broader approach, although in recent years some Supreme Court Justices (notably Antonio Scalia) have advocated “originalist” interpretations of the US Constitution.¹⁹¹ That may indicate a

¹⁸⁶ [1993] AC 593. See generally S D Girvin “Hansard and the Interpretation of Statutes” (1993) 22 *Anglo-Am L Rev* 475. Critical commentary includes F Bennion “How They Got It All Wrong in *Pepper v Hart*” (1995) *British Tax Review* 325; R Zimmerman “Statuta Sunt Stricte Interpretanda?” (1997) 56 *CLJ* 315, 318-20; and M Freeman “Positivism and Statutory Interpretation: An Essay in the Retrieval of Democracy” in S Guest (ed) *Positivism Today* (Dartmouth, Aldershot, 1996) 6. *Three Rivers Direct Council v Bank of England (No 2)* [1996] 2 All ER 363 appears to go further than *Pepper v Hart*, by permitting reference to *Hansard* even when the statute appeared unambiguous on its face. That holding may have followed, however, from the statute having been enacted to fulfil obligations arising from a EU Directive. See generally Horspool, above n 68. Recently, Lord Steyn has observed that in his experience *Pepper v Hart* arguments “have never produced anything significant”; and that, although they occasionally might produce something useful, this happens so rarely and at such cost that “the pragmatic case against the decision ... is strong”: “Interpretation: Legal Texts and their Landscape” in B S Markesinis (ed) *The Clifford Chance Millennium Lectures: The Coming Together of the Common Law and the Civil Law* (Hart, Oxford, 2000) 88. See also J Steyn “*Pepper v Hart*: A Re-examination” (2001) 21 *OJLS* 59.

¹⁸⁷ Keith, above n 95 (“Sources of Law”), citing *R v Environmental Secretary ex parte Spath Holme Ltd* [2001] 2 WLR 15, 44 (per Lord Cooke).

¹⁸⁸ For example J Evans “Controlling the Use of Parliamentary History” (1998) 18 *NZULR* 1; Evans, above n 95; N Jamieson “Legislation Through the Millennial Looking Glass” (2000) 9 *Otago LR* 713, 719. Compare also I McKay, above n 103, 755 (observing that “the New Zealand Courts have not adopted as liberal an approach as that which found favour in *Pepper v Hart*, although even the House of Lords will only do so when the words are ambiguous”, and that his Honour and other Justices of the Court of Appeal “have tried to discourage the excessive citation of [Parliamentary] materials”).

¹⁸⁹ Horspool, above n 68; and *Three Rivers*, above n 186.

¹⁹⁰ See for example T Isomura “*Hokai-shaku Hoho no Shomondai* [Issues in Legal Interpretation]” in T Isomura (ed) *Gendai Hogaku Kogi [Lectures on Contemporary Law]* (Yuhikaku, Tokyo, 1978) 85, 88. The Japanese approach is apparently even broader than that preferred in German, for instance; but the “pendulum may be swinging back”: Rahn, above n 94, 426.

¹⁹¹ A large-scale comparative study of statutory interpretation, conducted over the 1980s, noted instances of a broader approach in the US compared to England. These included less logical-conceptual argumentation, constructing implications from general legal concepts; more appeals to substantive reasons of policy influential in an general area of law; and more appeals to independent substantive reasons (morality, policy ideas, etc). See R Summers & M Taruffo “Interpretation and Comparative Analysis” in D N MacCormick and R S Summers (eds) *Interpreting Statutes: A Comparative Study* (Dartmouth, Aldershot, 1993) 461, 472-473.

On indications of subsequent retrenchment, see for example Sunstein, above n 46, 209-243. Some commentators have also noted lower courts adopting a narrower approach: see for example J P Nehf “Textualism in the Lower Courts: Lessons from Judges Interpreting Consumer Legislation” (1994)

move to increased interpretive formality, as well as more source-oriented standards of validity and hence greater authoritative formality.

Atiyah and Summers also compare the differing attitudes in England and the US, beyond the statutory context, regarding the tension between literal meaning and underlying substantive purposes or morality. Of particular interest, in view of the recent debate in New Zealand,¹⁹² is the role of judges. Emphasising the different institutional environment, Atiyah and Summers argue that Anglo-American differences in “constitutional positions, political influence, case selection procedures, and reliance on arguments from the bar tend to make the English judiciary much more cautious in exercising their law-making function”.¹⁹³ Related differences involve law clerks, dissent rates, federalism, and homogeneity of the bar and the judiciary.¹⁹⁴ Lord Denning is the exception proving the rule, in their view, that English judges have maintained a stricter attitude towards precedents of higher courts and been more unwilling to boldly and extensively explore underlying policy considerations drawn from a range of sources.¹⁹⁵ Atiyah and Summers conclude:¹⁹⁶

Of course, within the parameters of the English judicial tradition, levels of activism vary with the individual judges (as no doubt they do in America) and also with the times. Robert Stevens, for instance, has argued with a great deal of supporting evidence that the English law lords saw

26 Rutgers LJ 1. Others recently have criticised excessive use of legislative history in interpreting US statutes, proposing reforms along recent English lines: see for example Jordan, above n 4. See also generally J J Brudney “Congressional Commentary on Judicial Interpretations of Statutes: Idle Chatter or Telling Response?” (1994) 93 Mich L Rev 1.

Nonetheless, consistently with the approach of Atiyah and Summers, it has also been stressed that adopting more formal *reasoning*, for instance for statutory interpretation, will depend on and have repercussions on other *institutions*. In a manner representative of US legal scholarship, this is seen predominantly as problem for empirical inquiry. See C Sunstein “Must Formalism Be Defended Empirically?” (1999) 66 U Chi L Rev 636; A Vermeule “Interpretation, Empiricism and the Closure Problem” (1999) 66 U Chi L Rev 698.

¹⁹² Above n 129; R Bigwood (ed) *Legal Method in New Zealand: Essays and Commentaries* (Butterworths, Wellington, forthcoming 2001).

¹⁹³ Atiyah and Summers, above n 2, 268-269, 269-281. Another institutional factor related to judicial processes and roles is the degree to which judgments may be cited in court. In *Roberts Petroleum Ltd v Bernard Kenny Ltd* [1983] 2 AC 192, the House of Lords attempted to restrict citation of unreported judgments from electronic media: compare Bankowski and others, above n 88, 321. More generally, pursuant to para 8 of the Chief Justice’s Practice Note regarding “Citation of Authorities” issued on 9 April 2001, [2001] 1 WLR 1001, advocates may cite only one authority per proposition of law unless reasons are given for citing more. Further, para 9.2 requires that any advocate citing an authority from another jurisdiction must (i) comply with para 8; “(ii) indicate in respect of each authority what that authority adds that is not to be found in authority in this jurisdiction; or, if there is said to be justification for adding to domestic authority, what that justification is; and (iii) certify that there is no authority in this jurisdiction that precludes the acceptance by the court of the proposition that the foreign authority is said to establish”.

¹⁹⁴ Above n 2, 281-297, 349-350, 356-357. Recent statistics confirm that dissents in the House of Lords remain much lower than in the US (8.9 percent over 1955-1965 and 9.3 percent over 1966-1999, compared to 60.72 percent in the Supreme Court over 1930-1989). See J Alder “Dissents in Courts of Last Resort: Tragic Choices?” (2000) 20 OJLS 221, 238 (n 87). He also notes less tradition of “relentless dissent”; and adds that dissents in the House of Lords are more restrained than in the Supreme Court, where the style is not infrequently acrimonious.

¹⁹⁵ Above n 2, 290-291.

¹⁹⁶ Above n 2, 349 (citing R Stevens *Law and Politics* (U North Carolina Press, Chapel Hill, 1978).

themselves as having a more policy, if not downright political, function in the late nineteenth and early twentieth centuries, that the period 1940-1955 was a period of extreme abdication from policy, a period of high formalism, while in the years between 1956 and 1976 a move back towards a more policy-oriented approach can be discerned. Others may wish to qualify this picture in various ways, or may find the dating of these periods open to question. But for present purposes, it is enough to say that these movements in the direction of a substantive approach in the House of Lords are minimal in comparison with the degree of policy orientation displayed by more adventurous American judges. With rare exceptions, English appellate judges for at least the past century have been professional lawyers whose main loyalty has been to the profession and to the law as a non-political institution, as they thought it to be.

This conclusion helps explain the emergence of a more conservative House of Lords over the 1980s and early 1990s, and puts in perspective a widely perceived counter-tendency (towards greater liberalism) from the mid-1990s.¹⁹⁷ Such shifts have prompted publication recently of an empirical study demonstrating the scope of discretion which actually exists in the House of Lords. Judgments are shown to vary systematically depending on the Law Lord in question; and strict interpretations of precedent or legislation arguably give way to general preferences for recognisable interests, such as commercial or state interests in negligence claims and the civil service in welfare entitlement claims.¹⁹⁸

Such criticisms further undermine a narrow declaratory view of law, according to which judges have no role in creating law. Lord Bingham, senior Law Lord, argues that this view is gainsaid anyway because “[i]n England, the last quarter century has seen fundamental Judge-made changes in the law” in many fields.¹⁹⁹ On the other hand, he rejects the opposite “Denning” school of thought which “not only acknowledges a lawmaking role for the Judges, but glories in that role and asserts a right to pursue it wherever established law impedes the doing of justice in an individual case”.²⁰⁰ Lord Bingham believes that the majority of English judges now acknowledges “that Judges do make law, and [regard] this as an entirely proper judicial function, provided it is exercised within certain limits”, such as whether (a) citizens have ordered their affairs based on an earlier understanding of the law; (b) amendment would require comprehensive legislation; (c) the issue is the subject of legislative activity; (d) it involves an area distant from judicial experience; and (e) it involves a current social policy with no consensus in the community.²⁰¹ He suggests that such judges are activists, in “keeping pace with change in the consensus”; but not creatives, in “the use of the law to generate change in the consensus”, as defined by Lord Devlin two decades ago.²⁰² This view is consistent with a gradual shift since the 1960s regarding judicial

¹⁹⁷ Above n 113.

¹⁹⁸ D Robertson *Judicial Discretion in the House of Lords* (Clarendon Press, Oxford, 1998).

¹⁹⁹ Bingham, above n 94, 29, lists – in addition to “the creative, if somewhat erratic approach of the English Courts to questions of negligence where the victim has suffered economic loss” – the law relating to public interest immunity; sovereign immunity; forum non conveniens; restitution; tax avoidance schemes; pre-emptive interlocutory remedies; the currency in which judgment may be given; and, pre-eminently, judicial review. But see for example on judgment currency, Atiyah and Summers, above n 2, 140 (US-style anticipatory overruling was not permitted, in *Miliangos v George Frank (Textiles) Ltd* [1976] AC 443).

²⁰⁰ Bingham, above n 94, 28, 32-33.

²⁰¹ Bingham, above n 94, 27, 31-32.

²⁰² Bingham, above n 94, 33.

views towards the authority of precedent, perceived by some of Lord Bingham's contemporaries. However, the latter note that in England:²⁰³

in the absence of a single documentary constitution ... the two main documentary sources of legal argumentation are statutes ... and precedents. Even arguments from principles or from policy normally seek to ground statements of either in some previous dicta of judges, or to anchor principle or policy in some relevant statute.

Similarly, while identifying and advocating a move towards more substantive reasoning, Lord Steyn highlights a range of impediments arising still from the working environment of English judges (even in the House of Lords). These include case load pressures, lack of law clerks to help prepare judgments, counsel concentrating on precedent and conceptual arguments, no Brandeis briefs, and dependence on arguments presented by counsel.²⁰⁴

By contrast, Atiyah and Summers indicate that US appellate court judges are less afraid of adopting a "creativist" approach, partly reflecting the above-mentioned differences in court structures and processes.²⁰⁵ In leading or forging social consensus, moreover, US courts have been open to techniques such as the Brandeis brief and scholarly research to draw on an array of material going beyond principles permeating law books, or even a sense of justice derived from personal experiences of the judges – anyway more varied in the US.²⁰⁶ Such techniques are also important when US judges behave as activists in Lord Bingham's sense, which they do readily for instance in discarding old precedents, by seeking out changes in political or socio-economic circumstances to update the law.²⁰⁷ This distinctly more expansive scope of inquiry and generally more progressive attitude is reflected in, and is reinforced by, the influential legal theory propounded by Ronald Dworkin.²⁰⁸

a view of 'integrity' in which propositions of law are true if they follow from the principles of justice, fairness and procedural due process that provide the best constructive interpretation of the community's legal practice, an approach that requires judges to draw on their own convictions about justice and fairness.

These distinctions are consistent with the patterns uncovered by Roger Cotterrell in a pathbreaking empirical study published in 1990 comparing references to "community" and related ideas in judgments from 1979 in the US Supreme Court, as opposed to higher English courts. The latter referred to the *interests* of the community, and often

²⁰³ Bankowski and others, above n 88, 324.

²⁰⁴ Steyn, above n 15, 54-55.

²⁰⁵ Atiyah and Summers, above n 2, 275. An excellent example of a "creativist" judge, at least over much of his career, is Chief Judge Richard Posner. Compare for example Posner, above n 6; above n 25.

²⁰⁶ Atiyah and Summers, above n 2, 267-297.

²⁰⁷ Bankowski and others, above n 88, 374-375, 392.

²⁰⁸ Atiyah and Summers, above n 2, 264. Avery Katz adopts a position largely consistent with Dworkin's assertion of the potential for coherent moral reasoning to be uncovered, and applied by judges. It can be argued, however, that such views of law bear deeper similarities with that propounded by "classical formalists", namely a system which is complete (right answers are available in every case), formal (in the sense of being able to derive these from logical working out of the system), conceptually ordered (deriving rules from a few fundamental principles), and socially acceptable (by generating normative allegiance). See R Pildes "Forms of Formalism" (1999) 66 U Chi L Rev 607, 608-611.

specific sub-communities; but there were very few references to shared community values as an independent source of authority. By contrast, in the US:²⁰⁹

The community if portrayed as *active*. It thinks, acts, feels and can suffer injury much like an individual ..., has a conscience, and has its views and values represented through judge and jury. Its impact on law is portrayed as direct. Ambiguity as to the extent of community fits conveniently the diversity of legal jurisdictions within a federal system. But, however extensive or inclusive the community, it is consistently seen as the source of moral authority of law, or the constituency to which law must be responsible, or the locus of values to which law must relate.

Cotterrell contrasts this with the enduring attraction in England of a positivist notion of *imperium*, or top-down rule of law founded on parliamentary sovereignty.

Arguably, moreover, the expanded scope in the US for investigating community norms should allow not only for broader based “activist” judging (limited to reflecting those norms in case law) but also more “creativist” judges (reorganizing them to promote a particular moral vision). Such differences may be particularly noticeable in public law, where courts in both England and the US appear to have been more ready to diverge from precedent to consider substantive considerations. But contrasts should also emerge in private law given the links to broader patterns of legal reasoning and institutions described above.²¹⁰

There have been decidedly fewer publications by Japanese judges about their role, and even fewer empirical studies on their attitudes. However, academic commentary points to a strong and perhaps growing willingness to update Japanese law, especially the Codes enacted in the late 19th century, to reflect socio-economic realities. This reflects a strong influence from legal realism in the US, as well as the latter’s German antecedents (below Part Two Introduction Part II). The tendency may have been strongest in Japanese private law.²¹¹ One aspect of this is a strong sense of providing justice for the individual parties to the case.²¹² Pursuing this line may even allow for “creativist” judging, leading society towards new ideals. On the whole, however, Japanese judges appear to focus on providing “acceptable” results given current community expectations. Hence they tend towards what Lord Bingham terms “activism”, albeit with distinctly less of the deference to Parliament and other restraints still prevalent in England.²¹³

²⁰⁹ R Cotterrell “Law’s Image of Community and Imperium” (1990) 10 *Studies in Law, Politics and Society* 3, 14 (original emphasis).

²¹⁰ Bankowski and others, above n 88, 350; R Summers “Precedent in the United States” in D N MacCormick and R S Summers *Interpreting Precedents: A Comparative Study* (Dartmouth, Aldershot, 1997) 355, 371. Compare Steyn, above n 15, 52, suggesting a less substantive approach by English judges particularly in contract law, as opposed to public law.

²¹¹ See generally Rahn, above n 94; below Part Two Introduction. Judges earlier in the century were less adept in updating private law, due to a propensity to import foreign legal theories (mainly from Germany) despite inconsistencies with Japan’s legislation: see Z Kitagawa *Rezeption und Fortildung des Europäischen Zivilrechts in Japan [Reception and Development of European Civil Law in Japan]* (Alfred Metzner Verlag, Frankfurt, 1970). Compare Ramseyer and Rasmussen, above n 143.

²¹² Indeed, some criticise a tendency for Japanese courts to carry this from private law into competition law, undermining more economic analyses of relevant markets: see S Kozuka “Competition Law, Deregulation, and Juridification” in T Ginsburg, L Nottage & H Sono (eds) *The Multiple Worlds of Japanese Law: Disjunctions and Conjunctions* (University of Victoria Centre for Asia-Pacific Initiatives, Victoria BC, 2001) 101.

²¹³ Compare Bingham, above n 94; Bankowski and others, above n 88.

There are also instances of formal reasoning by Japanese judges even in the private law arena.²¹⁴ More generally, Japanese judges have increasingly interpreted legislative provisions in favour of a “theory of presupposed ultimate facts” (*yoken jijitsu ron*) to distribute the burden of proof, promoting what Ichiro Kitamura has termed “precision justice” in civil proceedings.²¹⁵ Allowing and requiring more attention to factual findings, and promoting efficient case processing, this has not been directed primarily at substantive reinterpretations of the law. Institutionally, moreover, the ability to engage in more creativist judging is hampered by the lack of a system for amicus or Brandeis briefs, although this may be partly offset by an expert witness system rooted in continental European law. Boundaries between disciplines in legal education and scholarship can also impede promotion of social scientific research, and its incorporation into civil law theory-building and adjudication.²¹⁶

Nonetheless, a more substantive orientation is underscored by institutional starting points, such as the lack of doctrine of *stare decisis*; the strong tradition of legal sociology in Japan; and legal realist or other jurisprudential theories which have found a broad audience, including among judges.²¹⁷ This orientation may be less extreme than in the US, but there are important commonalities.

Thus, judge-made law both in the US and Japan appears more actively to seek out and engage underlying substantive purposes or morality. This contrasts not only with the situation in England, but also New Zealand. Despite some early and contemporary tendencies towards a more creative approach, most appellate court judges in New Zealand nowadays appear to follow what Lord Bingham defines as the majority view in England.²¹⁸ Consequently, any thesis of a uniquely New Zealand legal method or identity, based on distinctly more substantive based reasoning, appears to go too far.²¹⁹

Some influential judges in the new colony were quite reformist, seeing New Zealand as providing an opportunity to improve on English law. One aspect of this involved simplifying rules and procedures of English law. Partly this stemmed from the need to accommodate the indigenous Maori population, vastly outnumbering the new settlers. However, the latter became disgruntled with these concessions, inhibiting the development of extensive cultural and legal pluralism until its revival two or three

²¹⁴ See for example V Taylor “Continuing Transactions and Persistent Myths: Contracts in Contemporary Japan” (1993) 19 Melbourne University L Rev 352.

²¹⁵ I Kitamura “The Judiciary in Contemporary Society: Japan” (1993) Case Western J Int’l L 263, 270.

²¹⁶ L Nottage “Contract Law, Theory and Practice in Japan” in V Taylor (ed) *Asian Laws Through Australian Eyes* (Law Book Company, Sydney, 1997) 316. But see now for example T Uchida *Keiyaku no Jidai: Nihon Shakai to Keiyakuho [The Contract Era: Japanese Society and Law]* (Iwanami Shoten, Tokyo, 2000) 280-302. See also generally H Sono “The Multiple Worlds of *Nihon-ho*” in T Ginsburg, L Nottage & H Sono (eds) *The Multiple Worlds of Japanese Law: Disjunctions and Conjunctions* (University of Victoria Centre for Asia-Pacific Initiatives, Victoria BC, 2001) 47.

²¹⁷ Above n 211.

²¹⁸ Bingham, above n 94, 28 (citing *Burt v Governor-General of New Zealand* [1992] 3 NZLR 672, 683, in which the Court of Appeal stated: “While accepting that it is inevitably the duty of the Court to extend the scope of common law review if justice so requires, we are not satisfied that in this field justice does so require, at any rate at present”).

²¹⁹ See also R Sutton & R Bigwood “Taking Stock: Legal Method in New Zealand Today (and for the Future?)” in R Bigwood (ed) *Legal Method in New Zealand: Essays and Commentaries* (Butterworths, Wellington, forthcoming 2001).

decades ago.²²⁰ A more enduring legacy appears to have been “the search for simplicity” in developing New Zealand law,²²¹ together with feelings of distinctiveness and reformist zeal.

Richard Sutton speculates that the urge towards making the law more accessible, but also more acceptable, “to ordinary people who have no particular interest in abstract theory or historical subtleties”, may relate to peculiar features of New Zealanders or differences in legal practice.²²² However, he focuses on law reform initiatives in the 1960s as generating a new attitude towards legal change, including among the judiciary. Sutton notes that many of the members of the various part-time Law Reform Committees established in 1966 later became Court of Appeal judges, and that.²²³

quite a lot of the law reform committees’ work consisted of clearing away the legal debris of past centuries. The idea was to allow the Court freedom to develop new and more acceptable rules over a period of time.

The most visible examples were some of the “Contract Statutes” enacted in the 1970s, which not only simplified the law on illegality, mistakes and remedies, but also conferred broad discretions for judicial relief.²²⁴

Nonetheless, the willingness of New Zealand judges to take this cue in developing the law should be seen in the light of the gradual transformations in England described above. Consistently with the evolving views of influential judges and the House of Lords’ Practice Statement of 1966, an amendment that year also allowed the Judicial Committee of the Privy Council to render one dissenting opinion as well as a collective majority opinion.²²⁵ Partly the result of longstanding pressure from Australia, this change may have encouraged New Zealand judges to take a more active (or even creative) role in developing their own law. Over this important period through to the early 1980s, moreover, those involved in the part-time Committees benefited from shared backgrounds in a still relatively small legal community, consultation almost exclusively within the legal profession and related bodies, and a focus on relatively discrete areas of law. These factors no doubt encouraged a common understanding about what rules needed attention, and possibly about what overarching factors were relevant to any newly conferred legislative discretions.²²⁶

²²⁰ J Bassett “The New Zealand Legal System: Early Historical Influences” in R Bigwood (ed) *Legal Method in New Zealand: Essays and Commentaries* (Butterworths, Wellington, forthcoming 2001).

²²¹ Compare generally P Rishworth (ed) *Struggle for Simplicity: Essays for Lord Cooke of Thorndon* (Butterworths, Wellington, 1997); and A Tipping “A View From the Trenches: A Commentary on the Essays by Thomas J and Professor Watts” in R Bigwood (ed) *Legal Method in New Zealand: Essays and Commentaries* (Butterworths, Wellington, forthcoming 2001), defining good judgment writing in New Zealand under the rubric “SOB”: simplicity, openness, and brevity).

²²² R Sutton “Lord Cooke and the Academy: A View from the Law Schools” in P Rishworth (ed) *Struggle for Simplicity: Essays for Lord Cooke of Thorndon* (Butterworths, Wellington, 1997) 13, 16.

²²³ Above n 222, 18.

²²⁴ See for example D W McLauchlan “Contract and Commercial Law Reform in New Zealand” (1984) 11 NZULR 36, 39-46. Compare below Part Two Introduction Part IV.

²²⁵ Compare Alder, above n 194, 235-237.

²²⁶ Compare Sutton, above n 222, 17. See also G Hammond “The Part-Time Law Reform Committees: An Overview” (1988) 13 NZULR 135, 148 (asking however how influential their work was “outside what might be termed the senior circles of the profession”); below Part Two Introduction Part II.

By the early 1980s, however, criticisms of the work of the Committees had arisen primarily as a result of entrusting them broader and more politically charged topics, compounded by limited public consultation and funding. The New Zealand Law Commission was set up in 1985, sending a clear message to the Courts: it “would handle large-scale law reform, and matters which had a high political sensitivity, or required skills and techniques beyond the normal abilities of Judges”.²²⁷ This must have had an ambivalent effect on the judiciary overall. Traditionalists, of which New Zealand had had its share even after World War II,²²⁸ or new members of the judiciary, would have felt more justified in deferring to statute-based law reform. But those following some transformations in judicial thinking in England, especially after the experience of participating in New Zealand’s part-time Reform Committees, would have found it difficult to abandon their new philosophy or perspective on the judges’ role in developing the law.

Such a tension does appear to have some antecedents, as indeed there were precursors for legislation allowing broad scope for discretionary relief by Courts. An example of the latter is legislation on testamentary promises enacted and amended in the 1940s.²²⁹ By 1969, albeit perhaps influenced by the early deliberations of the Law Reform Committees, a prominent judge had criticised a tendency “on the part of some modern law reformers to conclude that it is unnecessary to state a general rule, and that a statute may provide best in the interests of justice if, without stating any general principle, it leaves the matter of relief entirely to the discretion of the court”.²³⁰ From the 1980s, moreover, growing concern was expressed about the potential uncertainty of the Contract Statutes.

On the other hand, a decade after New Zealand’s Court of Appeal finally decided in 1971 that it would no longer automatically follow decisions of the House of Lords, Sir Robin Cooke (as he then was) began with New Zealand’s testamentary promises legislation to expose an “exploded hypothesis: the ideal that the common law should be the same throughout the Commonwealth”.²³¹ Further examples of alleged divergences in New Zealand focused on criminal law, tort law, and equity in personal relationships.

²²⁷ Above n 222, 19. An interesting parallel development is the increasing “politicisation” of the American Law Institute (ALI), one of the major law reform bodies in the US: compare R Hyland “Perspectives on Private Law Codification in America in the 21st Century” (Paper presented at the Civil Code Centennial Conference, “Legislation in the 21st Century and Private Law”, Tokyo, 12 November). However, the ALI is private rather than governmental, which already lessens authoritative formality compared to the likes of the New Zealand Law Commission. It has also always been a large institution, even before attempts to boost its membership and promote further consultation in order to enhance legitimacy, and politicisation of the ALI over recent decades has been intense. The ALI’s role in promoting substantive reasoning, in various guises, is therefore much more significant than that of the Commission and other bodies involved in law reform in New Zealand.

²²⁸ For example, as conceded even by the sympathetic biographer of a prominent judge in New Zealand this century, “he was a judicial conservative with a liberal personal philosophy”: J Finn “Sir Kenneth Gresson: A Study in Judicial Decision-Making” (1997) 6 *Cant L Rev* 481, 486.

²²⁹ Nield, above n 183. A recent reform proposal would extend relief not only to those promised benefits under a will, but also to situations in which the deceased has “unjustly benefited”: New Zealand Law Commission *Succession Law: A Succession (Adjustment) Act* (Report No 39, Wellington, 1997). However, the proposal has not been implemented, perhaps due to concern about further erosion of bright-line rules.

²³⁰ A Turner “Changing the Law” (1969) 3 *NZULR* 404.

²³¹ R Cooke “Divergences – England, Australia and New Zealand” [1983] *NZLJ* 297, 299.

In 1987, Sir Robin added to these areas some distinctive developments mainly in administrative law, employment law, real and personal property law, and contract law (especially the new statutes).²³² All these developments were said to constitute a distinct national legal identity, although an underlying theme – abandoning “the pretence of legal formalism” in favour of “conscious value judgments” and policy considerations – was only briefly sketched.²³³ Two years later, again in reviewing developments in public law, employment law, and constructive trusts, Sir Robin added that New Zealand judges more openly acknowledge that instead of deciding new points primarily by deduction, “the search is rather for the solution that seems fair and just after balancing all the relevant considerations”.²³⁴ However, remarkable optimism was shown concerning the ability to agree on what constitutes fairness, an optimism buttressed by the sense that New Zealand’s democratic and egalitarian society retains a largely common set of values with fairness ranked highly.²³⁵ These presuppositions have not been explored, and the key appears to be the uncovering of policy considerations (such as fairness) by analysing lines of judicial authority.²³⁶

A similar approach is revealed in a lecture in 1990 proclaiming “the reasonable expectations of the parties” as a touchstone for civil obligations.²³⁷ Nonetheless, Sir Robin has indicated that differences can be drawn between commercial and consumer contracts, and has not advocated overturning core established principles in company law.²³⁸ His main contribution to reforming contract law in the 1990s is an attempt to simplify the law on remoteness of damages, by substituting the test laid down in an early English precedent for a list of policy considerations and other relevant factors, building on views he expressed in 1978.²³⁹ However, the old test appears to have prevailed in later cases, and Sir Robin’s general approach has drawn considerable concern.²⁴⁰

²³² R Cooke “The New Zealand National Legal Identity” (1987) 3 *Cant L Rev* 171, 172-180. A few paragraphs were also devoted to environmental law, intellectual property law, evidence, and statutory interpretation.

²³³ Above n 232, 171.

²³⁴ R Cooke “Fairness” (1989) 19 *VUWLR* 421, 422; Baldwin, above n 103, 179.

²³⁵ Cooke, above n 234, 422-423.

²³⁶ Compare Cooke, above n 232, 171; and generally Lord Cooke *Turning Points in the Common Law* (Clarendon Press, Oxford, 1997). See also Sutton, above n 222, 20.

²³⁷ R Cooke “Dynamics of the Common Law” in *Proceedings of the Ninth Commonwealth Law Conference* (Auckland, 1990) 1, 4. See also R Cooke “Introduction” (1995) 9 *JCL* 3, 6 (“In contract as in other fields, the reasonable expectations of persons in the shoes of the respective parties may be seen as a governing concept permeating the common law”).

²³⁸ J Farmer “Lord Cooke and Judicial Decision-making: A Perspective from the Commercial Bar” in P Rishworth (ed) *Struggle for Simplicity: Essays for Lord Cooke of Thorndon* (Butterworths, Wellington, 1997) 53, 63, 65.

²³⁹ Compare *McElroy Milne v Commercial Electronics Ltd* [1993] 1 *NZLR* 39, attempting to break the spell of *Hadley v Baxendale* (1854) 9 *Exch* 341, with R Cooke “Remoteness of Damage and Judicial Discretion” (1978) 37 *CLJ* 289.

²⁴⁰ Compare *BNZ v NZ Guardian Trust Co Ltd* [1999] 1 *NZLR* 664 (CA); *JB Caldwell Ltd v Logan House Retirement Home Ltd* [1999] 2 *NZLR* 99 (HC). For a critique mainly that the factors listed in *McElroy* do not support Sir Robin’s conclusion in that case, see R Ahdar “Remoteness, ‘Ritual Incantation’ and the Future of *Hadley v Baxendale*: Reflections from New Zealand” (1994) 7 *JCL* 53. Although not directed specifically to Lord Cooke, Peter Watts also relates the factor-listing approach to “reductionism” – collapsing principles into one overarching principle – and concludes: “The ‘trust me, this is not the same thing as palm tree justice’ sentiment that sometimes also comes with reductionism

On the other hand, a renewed governmental interest in public law since the inauguration of the New Zealand Law Commission, notably enactment of the Bill of Rights Act 1990, did not deter Sir Robin from developing his vision of rights over the first half of 1990s.²⁴¹ Further, in 1995 he remarked:²⁴²

As a general aim, although not of course as an absolute rule, Parliamentary legislation should be seen as desirable only when judges fail to amend or develop it in performance of their rightful responsibility. The work of Law Commissions is valuable to courts as well as legislatures.

Contemporaneously, Thomas J provided a rare attempt to relate similar themes to broader discussions in legal philosophy.²⁴³ It drew an immediate and remarkably acrimonious rebuke by Don Dugdale, a well-known practitioner and later a Law Commissioner.²⁴⁴ A recent restatement by Thomas J insists that fairness, part of a broader sense of justice, “is immanent within the community”.²⁴⁵ This has drawn an even more powerful charge of “moral realism”.²⁴⁶ Such an approach hampers attempts to engage social scientific methods to determine what values really are deeply held by communities (or indeed sub-communities), as attempted for example in Australia in the wake of similar appeals to community values by prominent judges in the late 1980s and early 1990s.²⁴⁷ Instead, Thomas J recently reiterated the need to identify “the moral sentiment which is universal to all branches of the law”, but still emphasises case law and academic commentary.²⁴⁸ Further, although Thomas J seems to have become more circumspect about the role that courts should accord to Parliament,²⁴⁹ his views were recently criticised by Dugdale as “judicial supremacism”.²⁵⁰ In September 2001, Thomas J retired from the Court of Appeal.

does not inspire confidence. It rather provokes irritation”. See P Watts “The Role of Conscience: A Commentary on Bigwood *Conscience and the Liberal Conception of Contract*” (2000) 6 NZBLQ 64, 65.

²⁴¹ See generally A Adams “Competing conceptions of the Constitution: the New Zealand Bill of Rights Act 1990 and the Cooke Court of Appeal” [1996] NZ L Rev 368.

²⁴² Cooke “Introduction”, above n 237, 7.

²⁴³ E W Thomas “A Return to Principle in Legal Reasoning and an Acclamation of Judicial Autonomy” (1993) VUWLR Monograph 5.

²⁴⁴ D F Dugdale “A Polite Response to Mr Justice Thomas” (1993) 23 VUWLR 125.

²⁴⁵ Thomas, above n 16, 470. His Honour also goes on to suggest, like Sir Robin Cooke (above n 234, 422), that what is fair can readily be determined once concrete facts are presented.

²⁴⁶ J Allen “The Invisible Hand in Justice Thomas’ Philosophy of Law” [1999] NZ L Rev 213, 218-220 this is not disputed in E W Thomas “The ‘Invisible Hand’ Prompts a Response” [1999] NZ L Rev 227.

²⁴⁷ Compare J Braithwaite “Community Values and Australian Jurisprudence” (1995) 17 Syd L Rev 351.

²⁴⁸ E W Thomas “The Conscience of the Law” (2000) 8 Waikato L Rev 1, 21.

²⁴⁹ Compare E W Thomas “Parliamentary Supremacy and the Judicial Function” (1999) 112 LQR 177; E W Thomas “The Relationship of Parliament and the Courts: A Tentative Thought or Two for the New Millennium” (2000) 31 VUWLR 5; and especially “Judging in the Twenty-First Century” [2000] NZLJ 228, 231 (illustrating his position with *NZ Maori Council v A-G* [1987] 1 NZLR 641, yet noting that the statute in question had provided a reference to the Treaty of Waitangi, and that the Court as a third party was suited to resolving the dispute – this appears more significant than the fact that the Treaty was “a fundamental constitutional document”). More circumspection would be consistent with Thomas J’ longstanding insistence that the major constraint on judges is “the felt presence of all the factors which make up the discipline which binds the judiciary” (Thomas, above n 243, 56), if the Court of Appeal has become more conservative since the departure of Lord Cooke.

²⁵⁰ D Dugdale, above n 95. See also D Round, above n 108.

The philosophies or attitudes of judges in New Zealand, as elsewhere, have always differed significantly.²⁵¹ Partly this depends on personal background, and Peter Spiller has contrasted Thomas J with his decidedly more conservative contemporary McKay J. The latter came from a family of lawyers and commercial law practice, whereas the former came from a non-legal family and followed a more varied career. This also formed a contrast between Richmond J and Woodhouse J in an earlier period, and “the kinds of differences evident in the 1970s between the judgments of Richmond P and Woodhouse J were to be repeated in the 1990s when McKay and Thomas JJ sat alongside each other on the bench”.²⁵² Unfortunately, comprehensive empirical studies of the influences on judges remain sparse in New Zealand, compared to the US, Japan and even England.²⁵³ Nonetheless, it appears that the philosophy of Lord Cooke developed by Thomas J came under increasing pressure in the latter half of the 1990s.²⁵⁴ The latter also found himself frequently in dissent with his colleagues on the Court of Appeal, and indeed he appeared to take pride in this dissentient role.²⁵⁵ Yet there were few examples in which Thomas J’s views have definitively resulted in new substantive developments in New Zealand private law.²⁵⁶ There are parallels with a possible retrenchment recently from arguably more striking transformations in Australian law and judicial reasoning from the 1970s through to the mid-1990s.²⁵⁷ Overall, New Zealand’s Court of Appeal now appears decidedly more willing to defer to Parliament, and possibly its instrumentalities such as the Law Commission.²⁵⁸

It should also be stressed that even Lord Cooke and Thomas J limited their substantive reasoning to principles inherent in the legal system, narrowly defined. They may have gone beyond what Fisher J perceives as New Zealand’s mainstream “creative formalism”, judging based on “doctrinalism, extrapolation from literalist constructions,

²⁵¹ See for example P Spiller “Judges at Work: The New Zealand Court of Appeal (1958-1976)” (1993) 1 Waikato L Rev 73; Turner, above n 230; Finn, above n 228. Compare also for example Robertson, above n 198; and the seemingly incommensurable views expressed by various Law Lords, not always consistently, in recent judgments, described by Alder, above n 198.

²⁵² P Spiller “Realism in the Court of Appeal: The Value of the Oral Tradition” (1998) 2 Yearbook of New Zealand Jurisprudence 34, 36-37. See also McKay, above n 103.

²⁵³ Compare for example F Schauer “Incentives, Reputation, and the Inglorious Determinants of Judicial Behaviour” (2000) 68 U Cinn L Rev 615; Ramseyer and Rasmussen, above n 143; Robertson, above n 198; J Griffiths, *The Politics of the Judiciary* (5 ed Fontana, London, 1997).

²⁵⁴ See for example J Smillie “Certainty and Civil Obligation” (2000) 9 Otago L Rev 633, 635-636. Compare also J Hodder “Certainty, the Law and the Southern Perspective” (2000) 23/19 TCL 1; Evans, above n 195; Watts, above n 94.

²⁵⁵ See Smyth, above n 118, Table 10 (noting that Thomas J dissented in 19 of 155 judgments over 1995-2000). This appears particularly true of recent contract law cases. See for example *Electricity Corporation of NZ v Fletcher Challenge Energy Ltd* (10 October 2001) Court of Appeal, CA 132/00, Richardson P, Thomas, Keith, Blanchard and McGrath JJ. Generally, Thomas J seems to see himself as a modern-day Lord Denning for New Zealand: compare E W Thomas “Lord Denning: 1899-1999” [1999] NZLJ 92.

²⁵⁶ A rare exception may be Thomas J’s views, in *Dreux v A-G* (1996) 6 TCLR 617 (CA), on admissibility of subsequent conduct when construing contracts. Compare below Part Two Introduction Part IV.E.

²⁵⁷ Compare P Finn “Australia Compared” in R Bigwood (ed) *Legal Method in New Zealand: Essays and Commentaries* (Butterworths, Wellington, forthcoming 2001); Sutton & Bigwood, above n 219; J Edelman “Judicial Discretion in Australia” (2000) 19 Aust Bar Rev 285.

²⁵⁸ See for example *R v Hines* [1997] 3 NZLR 529.

and drawing factual analogies from non-binding precedents".²⁵⁹ Yet Thomas J would likely have agreed with recent remarks by Lord Cooke showing clearly that he is not a "creativist" judge, in the sense mentioned by Lord Bingham and not uncommon in the US.²⁶⁰

Roscoe Pound, the American jurist, was one who spoke of the judicial function as social engineering. That is a description carrying suggestions (perhaps unintended) which I would respectfully reject. It is not the role of the Judge to mould society. Other forces lie at the root of social change. In that regard, as in most others, the Judge has at best an identifying and balancing function.

Rather, therefore, both Lord Cooke and Thomas J appear to be attracted into a middle category mentioned by Fisher J recently, consisting of judges who "resort to first principles drawn from an overview of the common law but without regard to consequences".²⁶¹

Likewise, Hammond J has argued that most influential judges in New Zealand nowadays decide cases – especially the easier ones – by uncovering principles from precedents and applying them deductively, switching in hard cases to an anti-theoretical "pragmatism" wherein "knowledge is socially constructed: the truth is what a community believes at a particular time". This differs, he suggests, from seeking "a putative consensus as an objective basis for judicial policy-making", one grounded either in empirical investigations or contemporary philosophy.²⁶² It is submitted that the latter and "creative substantivism" distinguish US and Japanese judicial reasoning, based on high interpretive formality and thus reinforcing substantive reasoning generally, underscored by key institutional differences. The New Zealand judiciary may have moved towards more substantive reasoning; but there are counter-tendencies recently, similar movements earlier (and again recently) in England, and – most importantly – a significant contrast remains with both the US and Japan.²⁶³

The nature of judicial reasoning is a central aspect of legal reasoning in complex contemporary democracies, but it is difficult to pin down without closer examination of how judges decide cases in particular areas of law, like those discussed in Part Two of this thesis. More generally, however, Atiyah and Summers suggest that contrasting degrees of mandatory and interpretive formality add up to distinct patterns of usage and conceptions of rules. They argue that US law adopts more flexible rules, and interprets rules more readily in the light of substantive reasons, whereas English law prefers and sticks to more "hard and fast rules".²⁶⁴ The philosophies articulated by Lord Cooke and Thomas J move towards the US (and Japanese) end of the spectrum, but they need to be placed in the context just described. Similarly, despite enacting some legislation with

²⁵⁹ These categories, but not the relationships they may have to Lord Cooke and Thomas J, are defined by Fisher, above n 16.

²⁶⁰ Lord Cooke "The Judge in an Evolving Society" (1998) 28 VUWLR 467, 468. Compare Thomas, above n 243; Bingham, above n 94.

²⁶¹ Fisher, above n 16.

²⁶² Hammond, above n 112.

²⁶³ See also Sutton and Bigwood, above n 219, ending with a contrast between "pragmatic realism" and the US tradition centred on strong constitutionalism and rights jurisprudence, the possibility of a return to orthodoxy in New Zealand, and so on.

²⁶⁴ Atiyah and Summers, above n 2, 71.

broadly worded provisions after World War II,²⁶⁵ New Zealand's statute book appears to remain much closer to England in terms of hard and fast rules, compared to the US and Japan.

For instance, Atiyah and Summers' distinction helps explain the much stricter approach maintained by English compared to US courts in respect of "equity clauses", which parties add to allow arbitrators to decide contractual disputes without being strictly bound by legal rules.²⁶⁶ Likewise, a recent empirical study of attitudes towards broad principles characterising the new *lex mercatoria* demonstrated a significantly greater perception of greater risk, and fewer benefits in invoking it, among English compared to other respondents from around the world (comprised mainly of arbitrators, in-house counsel, lawyers, and academics). As a subset, US respondents did not demonstrate significant aversion to such broad principles.²⁶⁷

More generally, Sir Roy Goode recently has contrasted the conceptual approach maintained in English commercial law concerning personal property, and that preferred in the US.²⁶⁸

In many ways American lawyers are the most creative in the world in adapting their commercial law to changing commercial needs. We only have to look at Article 9 of the Uniform Commercial Code for its integrated approach to the treatment of security interests and its jettisoning of outmoded distinctions between one security form and another, and, more recently, at the latest revision of Article 8 dealing with interests in securities, to see the power of the creative thought devoted to ensuring the continued relevance of commercial law to changing business needs. The great strength of leading American commercial lawyers lies in their perception of commercial law as essentially a tool for providing sensible solutions to practical problems.

The difficulties and delays that New Zealand has experienced in enacting the Personal Property Security Act 1999, drawing on the UCC and Canadian progeny, indicate the enduring attraction of formal reasoning patterns.²⁶⁹ The new legislation may help move

²⁶⁵ Above n 185.

²⁶⁶ H Yu "Amiable Composition – A Learning Curve" (2000) J Int'l Arb 79, 89-98. The author notes that despite some English judges relaxing their stance over the 1980s, only the enactment of s 46(1)(b) of the Arbitration Act 1996 has – impliedly – made it clear that such clauses should be respected. Similar recognition is accorded now by art 28(3) of Schedule 1 of New Zealand's Arbitration Act 1996. Until this legislative intervention, New Zealand courts would have followed the more restrictive English law approach to equity clauses.

²⁶⁷ K Berger and others "The CENTRAL Enquiry on the Use of Transnational Law in International Contract Law and Arbitration – Background, Procedure and Selected Results" in K Berger (ed) *The Practice of Transnational Law* (Kluwer, The Hague, 2001) 91; L Nottage "Practical and Theoretical Implications of the *Lex Mercatoria* for the Asia-Pacific Region: CENTRAL's Empirical Study on the Use of Transnational Law" (2000) 4 Vindabona J Int'l Comm L & Arb 132.

²⁶⁸ Goode, above n 7, 26. For more detailed contrasts, see Goode, above n 7, 62-64, 67-68, and 78-79.

²⁶⁹ Compare R Buckley "*Commercial Law in the Next Millenium – A Review of the Hamlyn Lectures Delivered by Professor Roy Goode*" (2000) 12 Bond L Rev 115, 116:

... I had thought that the resistance in Australia to adopting the approach taken by Uniform Commercial Code Article 9 to personal property securities was simply the product of inertia and narrow-mindedness. With the benefit of this volume, I see our resistance as the result of a fundamentally different way of understanding how law works.

The rest of the book review makes it clear that the reviewer sees Australian law as still strongly attracted to formal reasoning, stressed by Goode in distinguishing contemporary English from US commercial law. On the background to New Zealand's Act, see R Dugan "PPSA – The Price of Certainty" [2000] NZLJ

New Zealand law towards a more substantive approach. However, the starting point will again have been prompted by statute, which by its nature tends to promote more formal reasoning than judge-made law. A key factor will therefore be whether the new statutory regime is seen to have a coherent underlying philosophy, promoting at least some aspects of substantive reasoning, to be used to interpret the new rules it lays down.²⁷⁰

Atiyah and Summers relate a preference for hard and fast rules, as opposed to flexible rules interpreted more readily in light of substantive reasons, to differing traditions in legal philosophy. In particular, they contrast the heavy infusion of natural law and more recently legal realism (or "legal instrumentalism") in the US, as opposed to the strong tradition of legal positivism in England even today.²⁷¹ They also contend that these different orientations are reflected in legal education in the two jurisdictions.²⁷² Already during the 1920s and early 1930s, the development of legal realism in the US led to curricular and intellectual innovation in leading law schools. Professors at Columbia Law School criticised the narrow case law method developed at Harvard by Langdell, for instance, and advocated reforms.²⁷³

... premised on the necessity of relating the teaching of legal principles to factual situations the students were likely to encounter in the course or practice. They turned to social science disciplines to supply context for and means of comprehension of those situations.

The realist tradition firmly established socio-legal studies in all top US law schools in the decades after World War II. Other law schools remained more black-letter in orientation; but policy-based arguments are common even there, and the top law schools still tend to set the ideal for legal scholarship and education.²⁷⁴

After a considerable time lag, a similar connection appears to have been significant in England, albeit less obviously. Some of the key figures in developing socio-legal studies in English law faculties from the 1970s, such as William Twining, were intensely interested in legal realism.²⁷⁵ Also important in promoting socio-legal

241. For longstanding pressures to abandon form for substance in this field, see McLauchlan, above n 224, 48-58.

²⁷⁰ Similar issues arise regarding New Zealand's Contract Statutes (below Part Two Introduction Part IV.C) and the Consumer Guarantees Act 1993 (below Part Two Chapter Three Part IV.C). Compare also generally Part Two Introduction Part I, contrasting the philosophy underpinning the Uniform Commercial Code in the US.

²⁷¹ Above n 2, 240-266; R Summers *Instrumentalism and American Legal Theory* (Cornell UP, Ithaca, 1982). See also Posner, above n 6, 2-37; M Horwitz "Why is Anglo-American Jurisprudence Unhistorical?" (1997) 17 OJLS 551. But see M Lobban "Was There a Nineteenth Century 'English School of Jurisprudence'?" (1998) 16 J Leg History 34; W Nelson "The Integrity of the Judiciary in Twentieth-Century New York" (1998) 30 Rutgers L Rev 1.

²⁷² Above n 2, 384-407. See also Carrington, above n 5.

²⁷³ C Tomlins "Framing the Field of Law's Disciplinary Encounters: A Historical Narrative" (2000) 34 L & Soc'y Rev 911, 920. See also below Part Two Introduction Part I.

²⁷⁴ The distinction between "leading" and "mainstream" US law schools is emphasised in L Nottage, T Ginsburg & H Sono, "The Worlds, Vicissitudes and Futures of Japan's Law" in T Ginsburg, L Nottage & H Sono (eds) *The Multiple Worlds of Japanese Law: Disjunctions and Conjunctions* (University of Victoria Centre for Asia-Pacific Initiatives, Victoria BC, 2001) 1. For a critique by a prominent US judge that legal scholarship and education in the US, generally, has gone too far away from practice-oriented concerns in favour of policy-based argumentation, see for example H Edwards "The Growing Disjunction Between Legal Education and the Legal Profession" (1993) 91 Mich L Rev 34.

²⁷⁵ See W Twining *Karl Llewellyn and the Realist Movement* (U Oklahoma Press, Norman, 1973);

theory was the critical legal studies movement, with deep roots in the US legal realist tradition.²⁷⁶

However, an overlapping but sometimes distinct influence was Marxism, which Anthony Ogus has criticised recently as having divorced England's "first wave" of legal interdisciplinary studies (from around 1972 to 1984) from more empirically based and policy-oriented studies. He argues that the latter have become much more prevalent since the mid-1980s, and that this "second wave" has significantly penetrated the mainstream of legal discourse in England. Important factors have been funding through the Economic and Social Research Council, the growing importance of the Research Assessment Exercise in English universities, and funding from 'more government departments (notably the Lord Chancellor's Department since 1996).²⁷⁷ Twining concurs regarding the growing impact of social science not only on contemporary legal education, but also on policy-making. However, he mentions concerns about the use made of empirical studies by reformers.²⁷⁸ Further, even recent major policy initiatives, such as those by Lord Woolf relating to large-scale civil justice reform, were erected on rather shaky empirical and theoretical foundations.²⁷⁹ The more methodical law reform of the Law Commission remains very black-letter law driven. It undertakes or promotes little empirical research,²⁸⁰ is reluctant to explore even the economic ramifications of particular doctrines or reform proposals,²⁸¹ and its reform proposals seem to have become increasingly narrow in focus.²⁸² More generally, much more research in England appears to be driven by "the pull of the policy audience", criticised in the US for ultimately favouring narrower conceptions of rules in socio-economic contexts.²⁸³

Nonetheless, socio-legal studies and a keen interest in jurisprudential enquiry are now a prominent feature of English legal education and, increasingly, its legal system as a whole. Ogus and others emphasise the continued importance of the Oxford Centre for Socio-Legal Studies, since its founding in 1972.²⁸⁴ The first issue of the

W Twining *Blackstone's Tower: The English Law School* (Sweet & Maxwell, London, 1994).

²⁷⁶ T Ginsburg "In Defence of Japanese Law" in T Ginsburg, L Nottage & H Sono (eds) *The Multiple Worlds of Japanese Law: Disjunctions and Conjunctions* (University of Victoria Centre for Asia-Pacific Initiatives, Victoria BC, 2001) 29.

²⁷⁷ A Ogus "Interdisciplinary Approaches to Law: Utility and Disutility" (2000) 50 N Ireland LQ 421, 429-430.

²⁷⁸ W Twining "Remembering 1972: The Oxford Centre in the Context of Developments in Higher Education and the Discipline of Law" (1995) 22 J L & Soc'y 35, 42 (for example in the Royal Commission on Criminal Justice, and studies of the Bar vocational course).

²⁷⁹ Important theoretical and empirical issues are raised by many contributions in A Zuckerman and R Cranston (eds) *Reform of Civil Procedure: Essays on 'Access to Justice'* (Clarendon Press, Oxford, 1995). However, they appeared late in the reform process. All the more so, in the case of the detailed empirical study only recently published by H Genn: *Paths to Justice: What People Think and Do About Going To Law* (Hart, Oxford, 1999).

²⁸⁰ See for example R Lewis "Contracts between Businessmen: Reform of the Law of Firm Offers and an Empirical Study of Tendering Practices in the Building Industry" (1982) 9 Brit J L & Soc'y 153.

²⁸¹ A I Ogus "Economics and Law Reform: Thirty Years of Law Commission Endeavour" (1995) 111 LQR 407.

²⁸² As shown by the demise of ambitious projects such as Harvey MacGregor's proposed codification of contract law: see generally F Reynolds "Codification, Law Reform, and Judicial Development" (1995) 9 JCL 200.

²⁸³ A Sarat and S Silbey "The Pull of the Policy Audience" (1988) 14 Law & Pol'y 765.

²⁸⁴ See generally the special issue of the Journal of Law and Society (Vol 22 No 1, 1995), "Socio-legal Studies in Context: The Oxford Centre Past and Present" (D J Gilligan, ed).

British Journal of Law in Society (now renamed the Journal of Law and Society) was published in 1974. The proportion of articles devoted to socio-legal studies and jurisprudence, appearing in major English law journals, appears to have grown steadily since the 1980s.²⁸⁵ In parallel, the Socio-Legal Studies Association established in 1990 has been extremely active in promoting conferences, workshops and networking among teachers and students, and its membership has increased dramatically.²⁸⁶ Socio-legal studies have also been bolstered by rapid expansion of exchanges of students among English and European law faculties, such as the SOCRATES scheme, which has also broadened the scope of enquiry in comparative legal research.²⁸⁷ Nonetheless, these developments appear less pervasive and are certainly more recent than in the US, at least in the education provided by the latter's leading law schools.²⁸⁸

By these measures, New Zealand does not appear to have shifted as far as England towards US-style legal theory and education, especially over the last two decades, despite early movements in that direction. A century ago, notable New Zealand jurist John Salmond made some important breaks with Austinian legal positivism, arguing for instance for recognition of the law-making role of courts along the lines of the behaviouralist critique by Oliver Wendell Holmes, which had a major impact on the development of legal realism in the US.²⁸⁹ Yet Salmond only met Holmes in 1921, and Salmond's death a few years later prevented the emergence of a more realist approach in his judicial reasoning and academic writing.²⁹⁰ Even today, articles dedicated to general legal theory are comparatively rarely found in New Zealand law journals, even the main university ones. While attention to "the law in action" began to characterise some academic writing from the 1970s, sustained empirical studies are still quite rare.²⁹¹ New

²⁸⁵ Compare generally Twining, above n 278; Ogus, above n 277. See also for example the *Modern Law Review*, especially over the 1990s, and the *Oxford Journal of Legal Studies*. A comprehensive empirical confirmation, compared to other jurisdictions, cannot be attempted in this thesis.

²⁸⁶ Ogus (above n 277, 427) observes that membership was over 500 in 1996. This compares to 1636 full-time law teachers in England and Wales over 1991-2 (882 in universities, 754 in polytechnics: Twining, above n 278, 38).

²⁸⁷ Compare J Bell "*Royaume-Uni* [United Kingdom]" [4-1999] *Rev int droit comp* 1024, 1028.

²⁸⁸ Compare for example the vigorous debates in comparative studies taking place in the US: G Berman "The Discipline of Comparative Law in the United States" [1999-4] *RIDC* 1040, 1044-1047. But see P Legrand "Against a European Civil Code" (1997) 60 *MLR* 44; G Teubner "Legal Irritants: Good Faith in British Law and How Unifying Law Ends Up in New Divergences" (1998) 61 *MLR* 11.

²⁸⁹ A Frame *Salmond: Southern Jurist* (Victoria UP, Wellington, 1995) 58.

²⁹⁰ Frame, above n 289, 210, 218-241, 236 n 85 (citing Denning's critical review of *Principles of the Law of Contracts*, published posthumously with Winfield as co-author).

²⁹¹ For instance, in the *New Zealand Universities Law Review* (which like the *Modern Law Review* in England attracts contributions from scholars from many universities), the first article extensively analysing a leading jurisprudential theory appears to be F Brookfield "Kelsen, the Constitution and the Treaty" (1992) 15 *NZULR* 163. A pathbreaking pioneering social-legal study was A Frame & P Harris "Formal Rules and Informal Practices: A Study of the New Zealand Rent Appeal Boards" (1977) 7 *NZULR* 213. However, further writing drawing on disciplines other than law seems to have centred on competition law and policy. See for example R Ahdar "Regulating Mergers upon Socio-Political Grounds in New Zealand" (1986) 12 *NZULR* 49.

More generally, the most sustained jurisprudential writing since the 1980s appears to be a monograph by Thomas J published through the *Victoria University of Wellington Law Review*: Thomas, above n 243. On the other hand, work in legal (and social) history appears to have grown, particularly in relation to Maori issues. See for example R Boast "F O V Acheson and Maori Customary Law" (1999) 30 *VUWLR* 661. A few articles incorporating original empirical research have also been published in recent years: see for example L Nottage "Economic Dislocation in New Zealand and Japan: A Preliminary

Zealand still has no journal dedicated to the advancement of socio-legal inquiry, despite the proliferation of specialist law journals particularly over the 1990s. Nor does it have any academic association, or even informal grouping of researchers, committed to promoting socio-legal studies.²⁹² Universities generally have been starved of funding over the 1990s, and there is very little outside funding available for socio-legal research, especially research not directly related to immediate policy concerns.²⁹³ Even allowing for New Zealand's much smaller population base, these developments stand in sharp contrast to the situation in England over recent decades.²⁹⁴

Some have perceived a growing influence of US law and legal institutions, citing for instance some early attempts at Victoria University to teach tort law in relation to social history.²⁹⁵ By the 1980s, however, instruction in this field had become more black-letter again.²⁹⁶ Waikato Law School has attempted to teach "law in context" since

Empirical Study" (1997) 26 VUWLR 59; L Nottage "Planning and Renegotiating Long-Term Contracts in New Zealand and Japan: An Interim Report on an Empirical Research Project" (1997) NZ L Rev 482; Smyth, above n 118. Finally, under the editorship of Bernard Robertson, a former academic from England, the *New Zealand Law Journal* began in the mid-1990s to publish a number of empirical studies or articles raising empirical questions. However, these have been shorter pieces directed primarily at pressing policy issues. See for example Fay and Bell, above n 135; Nottage & Wollschlaeger, above n 17; Dugan, above n 269; G Hannis "Credit Law Reform" [2001] NZLJ 121. As mentioned above, a more comprehensive comparison with developments in law journal writing in other jurisdictions would be helpful; but it represents a major undertaking, beyond the scope of this thesis.

²⁹² The New Zealand Society for Legal and Social Philosophy Inc does not focus on *social science* and its interaction with law. The New Zealand Association for Comparative Law, the first nation-wide body for those interested in comparative legal studies, was only formed in 1995: see A H Angelo "Some Reflections on Comparative Law in New Zealand" [4-1999] Rev int droit comp 1013, 1014. It has a distinguished but small membership. Its yearbooks so far have made valuable contributions to the corpus of writings in comparative legal studies in New Zealand. However, they have not included any programmatic statements on comparative law methodology, nor sustained analyses of the links between law and social science or jurisprudence. One limited exception is a short commentary, incorporating the outlines of a theory developed at length elsewhere, reproduced very recently as L Nottage "Comment on *Civil Law and Common Law: Two Different Paths Leading to the Same Goal*" (2001) 32 VUWLR 842 (also available at <<http://www.upf.pf/recherche/RJP7.htm>>). The only major work contributing to comparative law methodology, published in New Zealand over recent decades, emerges from a study by a Japanese law professor: I Kitamura (A Angelo trans) "Problems of the Translation of Law in Japan" (1993) VUWLR Monograph 7. Otherwise, promotion of socio-legal studies comes only indirectly through the Australian and New Zealand Society of Criminology (<<http://www.law.ecel.uwa.edu.au/anzsoc/>>).

²⁹³ L Nottage "Nyuji-rando no Hogaku Kyoiku ni okeru Hoshiteki na Kaikakushugi [Conservative Reformism in New Zealand's Legal Education]" (2000) 6 Shihokaikaku Zasshi 61. The Legal Research Foundation (<<http://legalresearch.auckland.ac.nz/>>) has a limited budget, mainly devoted to publications and the occasional conference. The New Zealand Law Foundation (<<http://www.lawfoundation.org.nz/grants/index.html>>) provides grants mainly for practical projects. For "research and/or publication with a legal focus", it provided grants over under NZ\$100,000 per annum on average over 1992-1999, with many for publications as opposed to research, and most research projects revealing the strong pull of the policy audience.

²⁹⁴ New Zealand also has no equivalent of the Australian Sociology of Law Association, the Australian Research Council (a very large funder of socio-legal studies), and journals dedicated to socio-legal studies such as *Law in Context* and the *Alternative Law Journal*. Compare also generally J Goldring "Law" in Academy of the Social Sciences in Australia (ed) *Challenges for the Social Sciences in Australia* Vol 2 (Canberra, 1998).

²⁹⁵ K Keith "The Impact of American Ideas on New Zealand's Educational Policy, Practice, and Theory: The Case of Law" (1985) 18 VUWLR 327.

²⁹⁶ The present author shares the experience related by his contemporary, G McLay "Towards A

its establishment in the early 1990s.²⁹⁷ Little original empirical research has emerged from this initiative, however,²⁹⁸ and its overall impact on the way law is taught in other New Zealand law schools appears to have remained limited. Consistent with the view that New Zealand's legal education system remains very black-letter law oriented, and indeed may have become more so over the 1990s, is Fisher J's experience that younger practitioners in New Zealand nowadays are *less* likely than their senior colleagues to advance policy arguments in court.²⁹⁹

Reflecting and reinforcing these trends, important law reform and policy decisions in New Zealand are still made largely in an empirical vacuum.³⁰⁰ The Law Commission still does not have a trained economist or social scientist as a Commissioner.³⁰¹ Nor has it commissioned any large empirical studies for its many reports, relying at most on public consultation.³⁰² In recent years, the Commission has focused increasingly on narrow law reform issues.³⁰³ All these factors reinforce a

Legal History of New Zealand" (1999) 30 VUWLR 333, 338-339.

²⁹⁷ P Haremann "Law in Context: Taking Context Seriously" (1995) 3 Waikato L Rev 137; N Seuffert and others "Developing and Teaching An Introduction to Law in Context: Surrogacy and Baby M" (1993) 1 Waikato L Rev 27.

²⁹⁸ A notable exception is the work of Peter Spiller, originally from South Africa. See for example P Spiller *The Disputes Tribunals of New Zealand* (Brookers, Wellington, 1997); P Spiller, above n 251, n 252.

²⁹⁹ Above n 16.

³⁰⁰ See for example Nottage & Wollschlaeger, above n 17 (not cited by Fisher, above n 16, when discussing allegedly greater litigiousness and the policy issue of appellate court structure reform); Dugan, above n 269 (noting the lack of assessment as to the direct and indirect costs involved in enacting the Personal Property Security Act 1999).

³⁰¹ A recent external review of New Zealand's Law Commission – in fact conducted by Sir Geoffrey Palmer, primarily responsible for establishing it in 1985 when he was Minister of Justice – included a recommendation that there be a more balanced make-up, "with one Commissioner and researchers to come from a discipline other than the law" (noted in (2000) 23/25 TCL 10). However, both of the full-time Law Commissioners appointed since then for five year terms are judges. One part-time Commissioner newly appointed for three years is a Queen's Counsel. The other new part-time Commissioner is Ngatata Love, a former Dean of Business Studies at Massey University, but it appears the primary attraction of engaging him was as a specialist in Maori issues.

³⁰² Sutton and Bigwood, above n 219 (noting criticism of New Zealand Law Commission *Insolvency Law Reform: Promoting Trust and Confidence*, Study Paper No 11, Wellington, 2001).

³⁰³ See for example New Zealand Law Commission *Aspects of Damages: The Award of Interest on Money Claims* (Report No 28, Wellington, 1994); New Zealand Law Commission *Repeal of the Contracts Enforcement Act 1956: A Discussion Paper* (Preliminary Paper No 30, Wellington, 1997); D F Dugdale "Law Commission Papers" [2000] NZLJ 90. A further illustration of a more conservative approach by the Commission in the late 1990s is that studies on access to legal services for women were published not as Preliminary Papers, but in a new category of Study Papers. To be sure, the Commission continues to produce some more wide-ranging studies, but the recommendations tend to be straightforward. One example is that electronic transactions can be readily regulated by traditional doctrines of contract formation: see *Electronic Commerce Part One: A Guide for the Legal and Business Community* (NZLC R50, Wellington, 1999) 20-21. Compare generally T Uchida "Saibakukan to Keiyaku [Cyberspace and Contract]" (1998) 312 UP 1; Nottage, above n 159.

The recent work of the English Law Commission also remains rather narrowly focused, part of a tendency towards "legislative microsurgery" (Beatson, above n 94, 252). But New Zealand certainly has not followed the bold and innovative approach taken by the Law Commission of Canada (<<http://www.lcc.gc.ca/en/>>), which now draws heavily on empirical and outside studies to make creative thematic connections across multiple areas of law. Compare generally R MacDonald "Recommissioning Law Reform" (1997) 35 Alberta L Rev 831.

black-letter law tradition in New Zealand, probably even more powerful than in England today, and certainly in strong contrast to the US.³⁰⁴

By contrast, Japan had early encounters with legal realism not only through the US before World War II, but also through parallel European developments. This found its way into both jurisprudential critiques of legal positivism and empirical research by leading private law scholars, such as Suehiro and Kawashima.³⁰⁵ The trend accelerated after World War II, with legal sociology and jurisprudential inquiry enjoying a boom among researchers and law schools since the late 1980s.³⁰⁶ It is not unusual to find private law scholarship addressing at a sophisticated theoretical level the relationship between social practices, legal norms, and political philosophy.³⁰⁷ That is so even though some of this may not be as thoroughly substantive in approach as in the US, and (as indeed there) the bulk of private law scholarship in Japan remains largely exegetical.³⁰⁸

II.D Enforcement Formality and Truth Formality: Two Varieties of Formality

Having set out these four main dimensions of legal reasoning and some of their sub-dimensions, and later tying these into some institutional features of the legal systems considered, Atiyah and Summers delve more deeply into the latter. They suggest that England also prefers two “varieties” of formality, being “general features of the style or vision of a legal system”.³⁰⁹

First, “enforcement formality” is defined as the degree to which legal rules and other norms are actually translated into practice, with more formal legal systems striving to ensure a higher degree of obedience to and enforcement of the law. Atiyah and Summers contrast here the relative speed and efficiency of English as opposed to American court practice. They tie this to the “English rule” of awarding lawyers’ costs to the winning party, the ability to award pre-judgment interest in damages claims, more scope for summary judgment proceedings, and so on. Enforcement of judgments is also enhanced by fewer exceptions to assets on which the creditor can levy execution, a

³⁰⁴ New Zealand scholars who have developed an interest in how the law operates in practice have tended to move overseas and make their careers there. A well-known example is Donald Harris, central in developing socio-legal studies at Oxford and in the UK generally. Perhaps less well known is Terence Halliday, until recently based at the American Bar Foundation in Chicago: see for example T C Halliday *Beyond Monopoly: Lawyers, State Crises, and Professional Empowerment* (U of Chicago Press, Chicago, 1987). One possible exception in New Zealand is the work of a few criminologists, such as the very recent empirical study into juries directed by Warren Young of Victoria University Law Faculty. That research comes very late indeed, however, compared to the many studies on juries which have been conducted in the US. A second possible exception is some growing interest in “law and economics” (see for example NZ Law Society (ed) *Economics and the Law* (New Zealand Law Society, Wellington, 1996)). But this has remained rudimentary and devoid of attempts at empirical testing (compare D Campbell “On What is Valuable in Law and Economics” (1996) 8 Otago L Rev 489; J Smillie “Formalism, Fairness and Efficiency: Civil Adjudication in New Zealand” (1996) NZ L Rev 254). See also generally G Crespi “Comparing United States and New Zealand Legal Education: Are US Law Schools Too Good?” (1997) 30 Vand J Trans L 31.

³⁰⁵ See above Part One Introduction; below Part Two Introduction Part II.

³⁰⁶ F Upham “What’s Happening in Japan, Sociolegal-wise” (1989) 23 L & Soc Rev 879.

³⁰⁷ See for example Uchida, above n 216; below Part Two Introduction Part II.

³⁰⁸ Nottage, above n 150; Sono, above n 216.

³⁰⁹ Atiyah and Summers, above n 2, 17-18.

unitary jurisdiction rather than a federal system, and so on.³¹⁰ Access to justice also has also been heightened due to much greater availability of legal aid, despite some retrenchment in the 1990s.³¹¹

A corollary of higher enforcement formality should be greater concern when access to the courts becomes problematic. This would help explain the remarkably radical proposals for civil justice reform contained in the Woolf Report,³¹² and the limited opposition they drew. The aims of drastically improving “expedition” and “economy” of court processes were almost unanimously accepted. A few stressed the need to value more highly “expertise” and “equality” as well.³¹³ A vigorous but rather lonely critic was Michael Zander.³¹⁴ His main objection was that little attempt was made to weigh costs and benefits, and he maintains that evidence after the first wave of reforms were implemented in 1999 has been mixed.³¹⁵ Ironically, some early scepticism about the Woolf reforms had come from commentators in the US.³¹⁶ Earlier amendments to civil procedure rules there were less ambitious, or have been rolled back significantly.³¹⁷ Bearing in mind the greater increases in civil litigation and at least a

³¹⁰ Above n 2, 185-215.

³¹¹ In 1994, for instance, legal aid (net of receipts) amounted to 590 million pounds or US\$900 million. This was more than twice that dispensed by the federal agency in the US, where there is also almost no non-federal public civil legal aid. See Posner, above n 6, 77-78. On the changes to streamline legal aid in England, see for example T Goriey “The Government’s Legal Aid Reforms” in A Zuckerman and R Cranston (eds) *Reform of Civil Procedure: Essays on ‘Access to Justice’* (Clarendon Press, Oxford, 1995) 346; M Zander “The Government’s Plans on Legal Aid and Conditional Fees” (1998) 61 MLR 538.

³¹² For a concise overview, see Lord Woolf “Civil Justice in the United Kingdom” (1997) 45 AJCL 709.

³¹³ J Lightman “Civil Litigation in the 21st Century” (1998) 17 CJQ 373.

³¹⁴ M Zander “The Woolf Report: Forward or Backwards for the New Lord Chancellor?” (1997) 16 Civil JQ 208. A response can be found in Lord Woolf “Medics, Lawyers and the Courts” (1997) 16 Civil JQ 302.

³¹⁵ M Zander *The State of Justice* (Sweet & Maxwell, London, 2000) 48-49. These include criticisms from England’s largest personal-injury firm about judicial case management being a disaster, generating higher costs and front-loading of work. Another objection was the reform effort’s focus on “the very top of the pyramid” of disputes. By contrast, the head of the Civil Justice Division in the Lord Chancellor’s Department suggests recently that cases are settling earlier, as issues are identified earlier; judges are taking seriously their expanded roles in case management; and solicitors are developing a more collaborative attitude, with more using ADR. He also notes work on extending the Woolf regime to all specialist civil jurisdictions, including the Commercial Court; and developing reforms especially for housing claims, representative actions, group litigation, and judicial review. Gladwell also mentions a major review of issues in enforcing judgments, remarking that “for far too long we believed that parties went to court for a judgment. Of course, what they actually go to court for is their money, and, as too many people learn the hard way, it doesn’t necessarily follow that having a judgment in your favour means you’ll get your money”: Gladwell (2000) 19 CLJ 16. This latter point goes some way to meet Zander’s concerns about a holistic approach; but it differs in the underlying premise, consistent with a preference for high “enforcement formality”, that ready access to the civil justice system is the ideal for citizens.

³¹⁶ S Flanders “Case Management: Failure in America? Success in England and Wales?” (1998) 17 Civil JQ 308.

³¹⁷ See for example R Marcus “Deja Vu All Over Again? An American Reaction to the Woolf Report” in A Zuckerman and R Cranston (eds) *Reform of Civil Procedure: Essays on ‘Access to Justice’* (Clarendon Press, Oxford, 1995) 219.

more general *perception* of a "litigation crisis",³¹⁸ this too suggests less concern with enforcement formality than in the UK.

Until recently, New Zealand had similar rules to England in facilitating access to the courts and enforcing judgments once rendered.³¹⁹ Occasional commentators saw little need for radical reforms along the lines of the Woolf Report proposals, arguing that New Zealand courts already had developed effective case management techniques.³²⁰ This does not appear to have been mere complacency, primarily on the part of judges, which might indicate less concern with adequate enforcement of legal norms and thus lower enforcement formality. Nor should we interpret in that way the lethargic response to proposals to allow more contingency fees in New Zealand, a noticeable trend in England (and Australia) over the 1990s.³²¹ Rather, despite a few complaints by practitioners and judges about delays in certain courts, New Zealand has been quite exceptional among industrialised economies in not experiencing steady increases in civil litigation rates since the early 1970s, as shown overleaf:³²²

³¹⁸ Posner, above n 6, 111 (noting strong increase in civil case filings in the UK, albeit not as much as in US federal courts, since 1960). But compare Jacob, above n 150, 48-50; M Galanter "Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society" (1983) 31 UCLA L Rev 4.

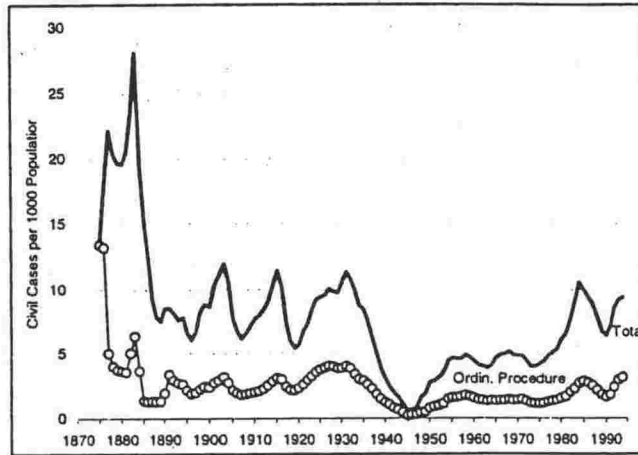
³¹⁹ See C Pidgeon "Civil Procedure: District Courts" in Sir Robin Cooke (gen ed) *The Laws of New Zealand* Vol 5 (Butterworths, Wellington, 1993) paras 36-37, 112-125, 320-329, 380, 428-450; C Pidgeon "Civil Procedure: High Court" in Sir Robin Cooke (gen ed) *The Laws of New Zealand* Vol 5 (Butterworths, Wellington, 1995) paras 21-22, 111-124, 392-401, 463-508, 519-520.

³²⁰ See for example J Hansen "Case Management in New Zealand Courts" (1998) 8 Otago L Rev 319; I Richardson "The Evolution of a Legal System: A Dialogue" (Paper presented at the Australasian Law Teachers Association conference, Wellington, 4-7 July 1999). From 1 January 2000, a Practice Note on Civil Case Management in the High Court came into effect, extending pilot schemes established in late 1997 in the High Court Registries in Auckland, Napier and Christchurch. Cases are now assigned by High Court Registrars to three or four tracks, and the rules generally aim to identify early the issues in dispute and encourage settlement by negotiation or ADR; early planning of proceedings, clarifying likely time and costs involved; reduce delays and expenses in interlocutory applications, through limited in depth conferences; and achieve a final hearing on a firm date within a reasonable time after commencement. Despite moving clearly in the direction of the Woolf reforms in England, these developments have attracted little detailed analysis. However, raising similar concerns to Zander (above n 215) without citing his work, Farmer (above n 92) has argued recently that more case management in New Zealand civil proceedings has instead lead to *greater* costs and delays.

³²¹ A few suggestions for change were made only in the latter half of the 1990s: see for example S Zindel "The Case for Contingency Fees" (1996) NZLJ 295; K Tokeley "Taking a Chance: A Proposal for Contingency Fees" (1998) 28 VUWLR 13. Finally, in May 2001, the New Zealand Law Commission has released a report recommending modest change, namely permitting remuneration dependent on outcome if (a) such remuneration is normal (already approved in *Sieveright v Ward & Ors* [1935] NZLR 43), or (b) it involves "a normal fee plus an amount ('a success uplift') to compensate the lawyer for the risk of not being paid at all and for the disadvantages of not having received payment on account": see New Zealand Law Commission *Subsidising Litigation* (Report No 72, Wellington, 2001) 23. The Commission adds that a "success uplift cannot be expressed as a proportion of an amount recovered", which is permitted (and common) in the US. It also does not specifically recommend any other limitation on the success uplift, an important issue in other Anglo-Commonwealth jurisdictions: currently set at 100% of the normal fee in England, for instance, and at 25 percent in Victoria. Compare Zander, above n 215; R White & R Atkinson "Personal Injury Litigation, Conditional Fees and After-the-Event Insurance" (2000) 19 CJQ 118, 119-121; Andrews, above n 60.

³²² Nottage and Wollschlaeger, above n 17, 272 ("Figure 3" therein). But see Fisher, above 16 (not including District Court data).

Figure 1: Civil Litigation Rates in New Zealand, 1882-1990



The reasons for this are not totally clear; but the comparatively stable civil litigation rate suggests that New Zealand's more measured moves towards greater case management may be consistent with retaining quite high enforcement formality even compared to England. It also helps explain the comparatively modest legal aid budget, despite its rise from NZ\$2 million to \$100 million over the last 20 years. Even that increase has prompted enactment of the Legal Services Act 2000, taking away responsibilities for legal aid from district sub-committees (which had involved practitioners in approving aid applications).³²³

Japan remains closer to the US. Both exhibit distinctly lower enforcement formality, although access to courts may have been even more problematic in Japan than in the US. One obstacle has been limited funding from the government and only slowly increasing numbers of judges, despite some reform proposals in 1998 from a LDP policy-making body.³²⁴ Another problem is lawyers' fees. The "American rule" is followed, although the winning party can claim its lawyers' fees from the losing party in some tort actions, and there are also now some discussions about possible reforms.³²⁵ This may exacerbate delays, and certainly can be a barrier to claims by a plaintiff of limited means. Another impediment is the prohibition on pure contingency fees. *Bengoshi* must charge a minimum up-front retainer fee set by Bar Association rules (although this was often honoured somewhat in the breach, perhaps underlying revisions in 1995 which reduced that component and boosted the fees which had to be charged upon success in court).³²⁶ Limited entry into the profession also means that

³²³ P Pepperell "Legal Services: Who Is Being Served?" (2000) 23/36 TCL 1. Compare Posner, above n 6, 120 (legal aid in the UK was already about NZ\$2 billion by 1994); New Zealand Law Commission, above n 321, 14 ("eligibility for legal aid is currently set so low (so low as even to exclude some social welfare beneficiaries) that those who are neither rich nor very poor are in practice denied access to legal services").

³²⁴ Nottage, "Cyberspace", above n 159. Japanese judges also do not have legally qualified clerks to assist in research and preparation of judgments, although District Court judges are assigned to assist Supreme Court justices with their enormous caseload. Compare generally P Jamieson "Of Judges, Judgments and Judicial Assistants" (1998) 17 Civil JQ 395.

³²⁵ But see for example K Sugii "*Bengoshi Hiyo no Haisosha Futan no Mondaiten* [Problems with the Principle that the Losing Party Bears Lawyers' Costs]" (1997) 1112 Juristo 41.

³²⁶ See D F Henderson "The Role of Lawyers in Japan" in H Baum (ed) *Japan: Economic Success*

high fees can be charged, although some competition from various "lawyer-substitutes" may dampen this somewhat,³²⁷ and in transnational matters *bengoshi* do not seem much more expensive than lawyers in other major jurisdictions.³²⁸ Legal aid is notoriously limited.³²⁹ Parties who persevere with court proceedings then meet the slow pace of "trial by colloquy".³³⁰ Reforms to the Code of Civil Procedure, in effect from 1 January 1998, were designed to speed up the process.³³¹ Compared to the Woolf proposals, however, these were rather narrow – driven primarily by the judiciary (in particular) trying to further improve efficiency without having to push for more funding for the courts, which might risk sending the wrong political signals.³³² On the other hand, delays may be offset by the regular award of pre-judgment interest in civil matters,³³³ and by effective and often used summary debt collection actions (*tokusoku*) in Summary Courts.³³⁴ But this is little consolation in light of the other difficulties just mentioned. Finally, despite amendments to legislation on execution of judgments, Japan still has several problems with the system under which its bailiffs seize debtor assets.³³⁵ Although statutory exceptions to the assets available for judgment execution are very limited, bringing Japanese law closer to English and New Zealand law, the limited markets for auctioned (second-hand) goods and high internal transport costs mean that in practice Japan probably lies closer to the US.

and Legal System (de Gruyter, Berlin/New York, 1997) 27.

³²⁷ See also J M Ramseyer "Lawyers, Foreign Lawyers, and Lawyer Substitutes: The Market for Regulation in Japan" (1986) 27 Harv J Int'l L 500; R Miller "Apples vs Persimmons: Let's Stop Drawing Inappropriate Comparisons between the Legal Profession in Japan and the United States" (1987) VUWLR 201.

³²⁸ See T Kitagawa and L Nottage "Globalization of Japanese Corporations and the Development of Corporate Legal Departments: Problems and Prospects" (Paper presented at the conference on "The Emergence of an Indigenous Legal Profession in the Pacific Basin" at Harvard Law School, 11-14 December, 1998).

³²⁹ In 1992, for instance, it amounted to Yen 207 million (about NZ\$3 million). Only 7.8% was government funded; most came from *bengoshi*. See (Zaidan Hojin) Horitsu Fujo Kyokai Kanagawa-ken Shibu (ed) *Nyujirando no Horitsu Fujo Seido: Shisatsu Hokokusho [New Zealand's Legal Aid System: Inquiry Report]* (Horitsu Fujo Kyokai Kanagawa-ken Shibu, Yokohama, 1995) 39-40.

³³⁰ Buehring-Uhle, above n-157.

³³¹ Law No 109, 1996 ("New CCP"). See generally Y Taniguchi "The 1996 Code of Civil Procedure of Japan: A Procedure for the Coming Century?" (1997) 45 AJCL 767.

³³² See Y Wada "Merging Formality and Informality in Dispute Resolution" (1997) 27 VUWLR 45, 53; Abe, above n 148.

³³³ Indeed, given the very low interest rate environment in Japan for the last few years (almost zero for deposits), awards at 5% for civil matters (Civil Code (Law No 89, 1897) art 404) or 6% for commercial matters (Commercial Code (Law No 48, 1900) may increase the pressure on a party, realising that it has a poor case, to settle or drop the case quickly. That pressure grows because Civil Code art 405 allows compounding of such interest after one year. This goes even further than English or New Zealand law (compare the still unimplemented proposal to allow more extensive compounding, recommended in New Zealand Law Commission *Aspects of Damages: The Award of Interest on Money Claims* (Report No 28, Wellington, 1994).

³³⁴ New CCP arts 392-396; M Kondo "Reform of Civil Litigation: Some Thoughts From Japan" (1997) 19 Liverpool L Rev 89, 105-106. For trends over the last century, see C Wollschlaeger "Historical Trends of Civil Litigation in Japan, Arizona, Sweden and Germany: Japanese Legal Culture in the Light of Judicial Statistics" in H Baum (ed) *Japan: Economic Success and Legal System* (de Gruyter, Berlin/New York, 1997) 89.

³³⁵ Davis, above n 157, 335-345; F G Bennett "Civil Execution in Japan: The Legal Economics of Perfect Honesty" (1999) 177 J of Law and Politics (Nagoya University) 1.

Many of these “institutional barriers” to litigation have long been criticised by US commentators, although perhaps overly so.³³⁶ Such critiques seem rather ironic from an English law perspective, which shows up significant problems with access to justice in the US. Further, greater enforcement formality is likely to result in Japan from the final report of the Judicial Reform Deliberative Council (*shiho kaikaku shingikai* or “Reform Council”), delivered to the Prime Minister on 12 June 2001. It includes wide-ranging proposals to expand access to civil justice. They include:³³⁷

- further boosting numbers of *bengoshi* and allowing for more “lawyer-substitutes”;
- introducing a partial “loser-pays” (or “English”) rule for attorney fees;
- reducing court filing fees;
- reducing by half the time needed for civil litigation;
- improving processes for enforcing judgments;
- more specialist procedures, including extending a new one-day procedure to larger claims;
- proposals for group litigation; and
- more deployment of information technology and ADR.

However, many key recommendations represent compromises or leave important points to be resolved, and prompt implementation of all these measures will no doubt prove difficult. Further, although Japanese law may still exhibit less enforcement formality than US law, both exhibit noticeably less again compared to English and New Zealand law.

As a second “variety” of formality differing between US and English law, Atiyah and Summers define “truth formality” as the degree to which a legal system identifies “true facts” to which legal rules and other legal phenomena are related.³³⁸ They suggest that all legal systems strive to recognise this to a degree, to implement rules of law embodying underlying substantive social policies for instance, and to allow

³³⁶ Famosly, J Haley “The Myth of the Reluctant Litigant” (1978) 4 J Japan Studies 359. J M Ramseyer and M Nakazoto *Japanese Law: An Economic Approach* (U Chicago Press, Chicago, 1998) 140-141 point out that delays in reaching judgment in contested cases in Japanese District Courts in 1994 are similar to those experienced in Second Circuit District Courts, and not much greater than in District Courts for all Circuits that year. However they acknowledge that it depends on what courts are compared. (One should add that the types of suits, and the rates and timing of settlements for instance, should be compared as well.) They also fault Haley for downplaying Japanese courts’ ability to impose monetary penalties for not complying with injunctions, and overlooking contempt powers (Ramseyer and Nakazoto, 147-150). However, those powers appear much less extensive than in Anglo-New Zealand law, at least. Compare also Y Watanabe, S Miyazawa, S Kisa, S Yoshino and T Sato *Tekisutobukko Gendai Shiho [Textbook on the Contemporary Judicial System]* (2 ed, Nihon Hyoronsha, Tokyo, 1994) 150-151; Davis, above n 157.

On the other hand, Haley (above n 43, 30) himself recently has argued that enforcement at least of competition law in Japan may not be as weak as some have suggested. See also J O Haley “Error, Irony, and Convergence: A Comparative Study of the Origins and Development of Competition Policy in Postwar Germany and Japan” in B Grossfeld and others (eds) *Festschrift fuer Wolfgang Fikentcher zum 70 Geburtstag* (JCB Mohr, Tuebingen, 1998) 876.

³³⁷ L Nottage “Japan’s Impending Reforms of the Administration of Justice: Far From Final” (2001) 48 CCH Asiawatch 5.

³³⁸ Atiyah and Summers, above n 2, 18.

(even in formally oriented systems) judges encountering concrete social realities to bring the law up to date. They argue, though, that overall the trial process in English law exhibits more truth formality.³³⁹ Two points they make relating to the legal profession, and five relating more to civil procedure per se, can be readily extended to New Zealand. At first glance, many of these also seem to apply to Japan, suggesting higher truth formality and thus a tension with its overall more substantive orientation. Closer consideration of the institutional and other realities of Japanese trial process, however, brings Japan closer to the US at least in some of those respects as well.

One factor perceived by Atiyah and Summers as contributing to greater truth formality in English law lies again in the nature of the legal profession.³⁴⁰

Most members of the English bar are of high quality, and most have to acquire extensive courtroom practice, if they are to remain in the profession at all. Although today some would say that there is a greater number of less competent barristers in England than there has ever been before, few of these less competent barristers would ever be entrusted with important litigation.

Despite the further changes to the English legal profession, mentioned above,³⁴¹ the contrast with the rather motley lot of trial lawyers in the US remains. A similar contrast can be made for New Zealand, where functional specialisation in litigation has emerged. So too for Japan, where a still restricted cohort of *bengoshi* specialise primarily in court work.³⁴² Yet greater time pressures on them due to their limited numbers, exacerbated by delays in crowded courts, must be considered too. In practice, then, truth formality seems less likely to be fostered than in England or even New Zealand. It will be further diminished following the Reform Council's proposal to boost *bengoshi* numbers, one key initiative which does seem virtually assured of being promptly phased in.³⁴³

Secondly, Atiyah and Summers argue that rules of practice and professional ethics greatly restrict the contacts English barristers may have with witnesses prior to trial. New Zealand does not have such strict rules; but it would not countenance the degree of "coaching" permitted in the US, encouraging witnesses or clients to fabricate or embellish facts.³⁴⁴ In Japan there are only limited restrictions, and some "coaching" is common in practice.³⁴⁵

Thirdly, Atiyah and Summers stress that the finder of fact in England is mostly a judge with extensive trial experience, rather than the jury empanelled on a one-off

³³⁹ Above n 2, 157-169.

³⁴⁰ Above n 2, 162.

³⁴¹ For example Zander, above n 124; Flood, above n 126.

³⁴² Hamano, above n 159.

³⁴³ Nottage, above n 237.

³⁴⁴ Atiyah and Summers, above n 2, 163-164. Compare D Webb *Ethics, Professional Responsibility and the Lawyer* (Butterworths, Wellington, 2000).

³⁴⁵ The only real limit is Art 54 of Japan's Code of Ethics for Practising Attorneys (2 March 1990, available in authoritative translation at <<http://www.nichibenren.or.jp/english/1att.htm>>). This states that a *bengoshi* "shall not entice a witness into committing perjury or making a false statement, nor ... submit false evidence". Yet this appears to be interpreted narrowly, in light of Japan's adoption of the adversary principle: see for example Nihon Bengoshi Rengokai (ed) *Chushaku Bengoshi Rinri [Commentary on Attorney Ethics]* (2 ed, Yuhikaku, Tokyo, 1996) 198-201. The practical effect of this proscription is further diminished because there is no reported judgment holding a witness guilty of perjury, under art 169 of the Penal Code (Law No 45, 1908), in a civil matter. Thanks are due to Shiro Kawashima for pointing this out.

basis even for much civil – including contract – litigation in the US.³⁴⁶ More recent proposals to abolish or reform the nature of jury trials in remaining fields of civil litigation in England, such as complex fraud cases, and in criminal trials in New Zealand, therefore may be driven by a greater concern for truth formality, although many of the arguments favouring reform focus on cost efficiencies.³⁴⁷ Conversely, attempts to revive jury trials in Japan,³⁴⁸ remarkable for a jurisdiction which has drawn heavily on the civil law tradition,³⁴⁹ can be seen as another emergent substantive element in Japanese law. At present, trained career judges do still make the findings of fact in Japan. Nonetheless, greater time pressures regarding hearings may mean that less truth formality emerges than in English and New Zealand trial processes. Further, the Council's recent report includes proposals to introduce "lay assessors" to assist judges in Japanese proceedings, although the respective numbers and roles have yet to be defined.³⁵⁰

The practical problem of time pressure on Japanese courts also impacts on the other considerations suggested by Atiyah and Summers in their comparative analysis. They argue that truth formality is also enhanced in England by comparatively few restrictions on admissibility of evidence, such as strict rules on hearsay, which are maintained in the US primarily because of the constitutional rights to jury trials.³⁵¹ New Zealand too has relaxed hearsay and other rules, especially in civil litigation.³⁵² But the scope of admissibility of evidence is broadest in Japan, at least in theory, for it follows a civil law approach in allowing "free evaluation of evidence".³⁵³

Fifthly, Atiyah and Summers argue that an English judge can interject questions and so on, unlike the jury in the US. This is relative, specifically in comparison with the jury trial in the US, for most judges in England – and New Zealand – use this power quite sparingly in civil trials. Nonetheless, in this respect too, Japanese trial process seems to involve more truth formality: again following a civil tradition, the judge has a right (indeed, sometimes a duty) of "clarification" (*shakumeiken*). The latter has been used particularly in pro se litigation, thus helping to uncover the relevant facts even when there is an imbalance in sophistication among the parties to the case. This trait of Japanese civil procedure developed out of criticism of judges' reluctance to clarify matters in the 1950s and early 1960s, itself a reaction to perceived excesses prior

³⁴⁶ Atiyah and Summers, above n 2, 164-165.

³⁴⁷ For example F Page "What is Fraud?" (1997) 147 NLJ 321. See also A M Pritchard "A Reform for Jury Trial" (1998) 148 NLJ 475.

³⁴⁸ R Lempert "A Jury for Japan?" (1992) 40 AJCL 37; M Dean "Trial by Jury: A Force for Change in Japan" (1995) 44 ICLQ 379.

³⁴⁹ Compare M Dubber "The German Jury and the Metaphysical *Volk*: From Romantic Idealism to Nazi Ideology" (1995) 43 AJCL 227.

³⁵⁰ Nottage, above n 237.

³⁵¹ Atiyah and Summers, above n 2, 165, 169-175. Compare N Demleitner "More than 'Just' Evidence" (1999) AJCL 516 (conflating American with English law).

³⁵² M Casey *Garrow & Casey's Principles of the Law of Evidence* (8 ed, Butterworths, Wellington, 1996) 43-46, 61-68; A Tompkins "Hearsay" in A Tompkins and J Gallen (eds) *Evidentiary Issues* (Wellington, New Zealand Law Society, 1996). See for example *Juken Nissho Ltd v Northland Regional Council* (15 May 2000, unreported, Court of Appeal, CA 68/00, Richardson P, Gault and Thomas JJ), noted in Appendix A to this thesis.

³⁵³ K Shindo *Shin Minji Soshoho [New Law of Civil Procedure]* (Kobundo, Tokyo, 1998) 475-479. Compare generally M Damaska "Free Proof and Its Detractors" (1995) 43 AJCL 343.

to World War II.³⁵⁴ A well-known judge has written that more use of *shakumeiken* may be expected as a result of the CCP reforms.³⁵⁵ Clearly this will depend in part on whether those reforms succeed in relieving pressure on congested court dockets, to allow judges more leeway to exercise this clarifying power. It is also unclear how *shakumeiken* will be affected by more *bengoshi* and greater availability of expert witnesses, recommended more recently by the Reform Council.

The qualification regarding court congestion also can be directed against a sixth point suggested by Atiyah and Summers as promoting more truth formality: appellate courts' powers to review lower courts' findings of fact as well as conclusions of law. They stress the restricted scope for this in the US as opposed to England, where courts are assisted by full written transcripts of the oral hearings.³⁵⁶ In Japan, as in England or New Zealand, the first appeal can be of both fact and law. There also have been very few restrictions placed on admissibility of new legal arguments upon appeal.³⁵⁷ In practice, however, the potential for careful appellate review of the evidence has been diminished because a verbatim transcript is not always kept. Partly this was due to limited numbers of court stenographers (*sokikan*). Following the CCP reforms, no new stenographers were to be appointed. Tape recordings have become valid evidence for review upon appeal,³⁵⁸ however, which may increase the scope for careful fact-finding at appellate levels.

To that end, seventhly, Atiyah and Summers emphasise that "an English judge is expected to give reasons for his findings of fact where the facts have been seriously controverted".³⁵⁹ This expectation has grown in recent years. It has been undermined somewhat in New Zealand, but one judge has suggested (extra-judicially) that the tide is about to turn.³⁶⁰ A related tendency is for English courts to set out the facts of the case in more detail, compared to US courts.³⁶¹ New Zealand courts remain similar to the former, while Japanese courts are closer to the latter, although perhaps even more succinct (especially in older judgments). Certainly it is uncommon for a Japanese judgment to state why someone's evidence is not preferred, especially when this turns on credibility of witnesses. This may be less necessary, however, due to the burden of proof in civil matters being set higher than the balance of probabilities standard in most common law jurisdictions.³⁶²

A further point mentioned briefly by Atiyah and Summers, in discussing truth

³⁵⁴ T Hattori and D Henderson *Civil Procedure in Japan* (Transnational Juris Publications, Dobbs Ferry (NY), 1985 looseleaf) §7.02[10][d].

³⁵⁵ J Nara "Shinminjisoshoho to Shakumeiken o meguru Jakkon no Mondai [Some Issues in the "Right to Clarify" Under the New Code of Civil Procedure]" (1997) 1613 Hanrei Jiho 3 (Part 1); 1614 Hanrei Jiho 3 (Part 2).

³⁵⁶ Atiyah and Summers, above n 2, 165.

³⁵⁷ Hattori and Henderson, above n 254, §8.02[1], [3].

³⁵⁸ Shindo, above n 253, 765.

³⁵⁹ Atiyah and Summers, above n 2, 165.

³⁶⁰ Hammond, above n 112 (contrasting *Glannery v Halifax Estate Agencies Ltd* [2000] 1 All ER 373 with *Rae v International Insurance Brokers (Nelson Marlborough) Ltd* [1998] 3 NZLR 190).

³⁶¹ See also generally J L Goutal "Characteristics of Judicial Style in France, Britain and the USA" (1976) 24 AJCL 43; and below Part Two Chapter Two.

³⁶² Hattori and Henderson, above n 254, §7.05[13][b].

formality, may provide a good test of comparative formality overall. They think that:³⁶³

a more formal system is likely to be more effective in inducing voluntary out-of-court settlements of disputes. All legal systems, whether more or less formal, must rely heavily on encouraging such settlements because their court systems will otherwise be in danger of being overwhelmed with trial work. But such settlements are less likely to be made where the alternative of authoritative coercive resolution in court is not itself highly truth oriented. Certainly, parties who have little or no confidence in the truth-finding capacities of the courts could not so easily be persuaded to settle their claims (or defences) on the basis of the facts as they actually are. Some settlements would doubtless still be made, but they would tend to reflect bargaining power to a much greater degree ...

They go on to contrast the highly predictable nature of English rules in relation to personal injury claims, and seemingly high settlement rates, compared to the US.³⁶⁴

Richard Posner has pursued these notions, attempting to develop further hypotheses and to test them empirically. He pointed out that the relatively smaller legal system in the UK, in terms of per capita lawyers and cases filed or tried, may be explained by greater legal certainty.³⁶⁵ Overall, certainty was said to be implied by longer average age of Court of Appeal citations to other courts, compared to US Federal Courts of Appeals' citations to other courts, both overall and in important sub-categories such as "tort and contract" cases. Further evidence offered included the lower rate of appeals in English courts, which Posner suggested might be even lower if England had a "loser-pays" rule (an additional incentive to appeal).³⁶⁶ He acknowledged that aggregate comparisons must be taken with a grain of salt, however, and therefore considered evidence of more certainty in specific areas.

One measure of certainty of contracts was given as an independent agency's ranking of the business risk of non-enforceability of contracts. In fact, both the UK and the US obtained 3.5 on a scale of 0 to 4 (with Switzerland getting the highest at 3.6, while "Japan, Singapore and the Western European countries are also in the 3's").³⁶⁷ That seems to go against Posner's hypothesis; but the question seems ambiguous anyway – it might be interpreted by respondents as asking how likely contracting parties are likely to breach their obligations, rather than how effectively contract claims can be pursued through the courts. Clearer questions were posed by Simon Deakin and others in their later survey research; but unfortunately the latter only compared British, German and Italian firms.³⁶⁸

³⁶³ Atiyah and Summers, above n 2, 159.

³⁶⁴ Above n 2, 175-176. This has been further expanded by the House of Lords approving the use of actuarial evidence in *Wells v Wells* [1998] 1 WLR 319. See generally D Kemp (assisted by P Mantle) *Damages for Personal Injury and Death* (7 ed, Sweet & Maxwell, London, 1999).

³⁶⁵ Above n 6, 80-84. A second possibility, to which he devotes much less attention perhaps because difficult to measure, is that English law (perhaps like Japanese law: see Henderson, above n 244) may provide for fewer justiciable rights compared to US law. A third is the continued prohibition of pure US-style contingency fees.

³⁶⁶ Above n 6, 84-89.

³⁶⁷ Above n 6, 94-95.

³⁶⁸ S Deakin, C Lane and F Wilkinson "Contract Law, Trust Relations, and Incentives for Co-Operation: A Comparative Study" in S Deakin and J Michie (eds) *Contracts, Cooperation and Competition* (Oxford UP, Oxford, 1997) 105, 125-127. British firms had a higher likelihood of "legal action against a customer or supplier committing a breach of contract" compared to German firms, but lower likelihood compared to Italian ones. British firms also thought "the outcome of legal action" was

Secondly, like Atiyah and Summers, Posner considered accident cases. He pointed to the quality of judges, lack of jury involvement, and the loser-pays rule (through discounting the filing of weak cases or interposing of weak defences in strong cases) as reducing the probability of legal error. He noted also the much lower rate of personal injury litigation in the UK, which could be seen as consistent with greater certainty of legal outcome. Yet Posner appeared more impressed by the possibility that UK accident victims do not sue because damages are comparatively low and because there are effective alternative means to compensation (for example national health cover).³⁶⁹

By abolishing almost all claims relating to personal injury by accident since 1974,³⁷⁰ New Zealand cannot be compared on this point. But Ramseyer and Nakazato have showed empirically that accident victims in Japan claim and obtain out of court very close to what the courts would award. They tie these patterns to the highly predictable rules which have developed in this area, compared precisely to the US.³⁷¹ As they point out, high predictability can overcome even high costs of litigation, in encouraging bargaining "in the shadow of the law".³⁷² The high predictability and settlement rates observed in this area of Japanese law, however, appear striking only relative to the US. English rules and processes may be even more predictable, although that is probably putting the case too strongly.³⁷³ Just as importantly, commentators have faulted Ramseyer and Nakazato for focusing on an exceptional area in Japanese law.³⁷⁴

not as clear, compared to their German counterparts; but clearer compared to Italian firms.

³⁶⁹ Posner, above n 6, 96-101. See also P S Atiyah "Tort Law and the Alternatives: Some Anglo-American Comparisons" (1987) *Duke LJ* 1002; compare B Markesinis "Litigation Mania in England, Germany and the USA: Are We So Very Different?" (1990) 49 *CLJ* 232. Later in his Clarendon Lectures, Posner (above n 6, 106-111) speculates that more deference to elites or authority in the UK constitutes a difference in "legal culture" compared to the US. Similarly, Kritzer (above n 61, 146-52) notes much certainty in quantum issues, but potential uncertainty with regard to liability given more restricted pre-trial discovery; and he focuses on alternative mechanisms (including also criminalisation) which he ties expressly to such cultural differences. Compare generally H Genn *Hard Bargaining: Out of Court Settlement in Personal Injury Actions* (Clarendon, Oxford, 1987).

³⁷⁰ See generally I Campbell *Compensation for Personal Injury in New Zealand: Its Rise and Fall* (Auckland UP, Auckland, 1996).

³⁷¹ J M Ramseyer and M Nakazato "The Rational Litigant: Settlement Amounts and Verdict Rates in Japan" (1989) 17 *J of Legal Studies* 262.

³⁷² This phrase is from the seminal article by R H Mnookin and L Kornhauser "Bargaining in the Shadow of the Law: The Case of Divorce" (1979) 88 *Yale LJ* 950, also cited by Atiyah and Summers (above n 2, 159 n 5). See also J M Ramseyer "Reluctant Litigant Revisited: Rationality and Disputes in Japan" (1988) *J Japan Stud* 111. Of course, even perfect predictability will not lead to settlement if litigation costs are greater than the plaintiff's expected value of litigated outcome, because no rational litigant would then sue.

³⁷³ Complaints about problems in pursuing personal injury claims were one impetus given for the proposals which emerged in the Woolf Report: see Woolf, above n 212.

³⁷⁴ Compare for example D H Foote "Resolution of Traffic Accident Disputes and Judicial Activism in Japan" (1995) 25 *Law in Japan* 19 (charting the active role of Japanese courts in the 1960s in developing these more predictable rules, on both liability and damages, in response to rapid increases in traffic accidents in the 1950s); T Tanase "The Management of Automobile Disputes: Automobile Accident Compensation in Japan" (1990) 24 *L & Soc Rev* 651 (stressing also the importance of insurance schemes, out of court dispute resolution forums, and information about all these mechanisms facilitating settlements). See also K Hamada "Explaining the Low Litigation Rate in Japan" in M Aoki & G Saxonhouse (eds) *Finance, Governance, and Competitiveness in Japan* (Oxford UP, Oxford, 2000) 179, 180 (generally criticising Ramseyer's frequent "extreme overgeneralisation").

Although predictability of outcome may be a factor in explaining litigation and settlement patterns in other areas of Japanese law, such as product liability, the data is far from conclusive.³⁷⁵ In comparison, English and New Zealand seem decidedly more predictable in their contract law, as detailed in Part Two of this thesis. Insurance and alternative dispute resolution mechanisms are also much less pervasive, so problems in obtaining and enforcing judgments become much more important. Thus, Japanese law may indeed be more predictable than US law, but both seem distinctly less so than English or New Zealand law. This suggests that the latter exhibit more truth formality.

III Conclusions

The foregoing analysis has been necessarily wide-ranging and selective. In itself, and even in conjunction with the more focused inquiries below in Part Two of this thesis, it cannot claim to be definitive. Nonetheless, the evidence mustered in this Chapter appears to confirm the usefulness of Atiyah and Summers' analytical framework (above Part I). First, it can be extended to compare jurisdictions other than England and the US, such as New Zealand and Japan. In particular, this helps systemically counter persistent assertions that Japanese law is unique or radically different from US.

A second attraction of the framework is that it invites consideration not just of the "law in books", but also the "law in action".³⁷⁶ Studying legal reasoning can often lead to focusing on the former; but the discussions above were able to readily bring in the latter, including the legal profession and court structure (Part II.A), legislative process (Parts II.B), judicial reasoning, and legal education (Part II.C). Atiyah and Summers' two varieties of formality, discussed above (Part II.D), further invited a focus on the law in action by readily allowing incorporation of more findings from social scientific research.

Thirdly, considerable coherence of legal systems emerges in New Zealand and Japanese law, not just US and English law. At first glance, Japanese law does appear to exhibit a surprisingly high degree of truth formality; but this tendency becomes less pronounced when some realities of Japanese judicial process are considered. Those realities, in turn, are related to low enforcement formality. Japan also reveals a more substantive approach consistently along all the dimensions of formal reasoning described above.

Admittedly, it remains difficult to say whether Japanese law is more or less substantive than US law in terms of each of these parameters. Overall, it probably is and will remain less so – that is, somewhat more formal – than US law. Japan's unitary and centralised constitutional system promotes more source-oriented standards of validity and greater rank formality, amounting to more authoritative formality. On the other hand, content formality may be less than in the US, although empirical research is particularly needed on this point. Mandatory and interpretive formality appears somewhat greater, although Japanese law also prefers substantive reasoning to "hard and fast rules". This is reflected in judicial reasoning patterns, and in the influence of disciplines other than

³⁷⁵ See for example L Nottage "The Present and Future of Product Liability Dispute Resolution in Japan" (2000) 27 *Wm Mitchell L Rev* 215; L Nottage "New Concerns and Challenges for Product Safety in Japan" (2000) 11/8 *Aust PL Reporter* 100.

³⁷⁶ Compare generally R Pound *Introduction to the Philosophy of Law* (rev ed, Yale UP, New Haven, 1955).

law in legal education and scholarship (especially in leading institutions), although substantive reasoning tendencies are probably less than among US counterparts. Enforcement formality is probably lower than in the US, but recent empirical comparisons indicate that this may be less so than perceived still by many US commentators, and the recent proposals to reform civil justice in Japan should significantly raise enforcement formality. They may also promote more truth formality; but some proposals (such as a new system for lay assessors and a possibly more diverse legal profession) may encourage more substantive tendencies, and current realities generate less truth formality than one would expect. As this summary indicates, however, the picture is complicated by existing or likely changes in Japan's legal system. There are also indications that US law has similarly moved towards greater formality over the last decade or so. Nonetheless, it is clear that the overall orientation of both legal systems remains highly substantive. It is also probable that the distance between the two is much less than the distance between this pair of legal systems on the one hand, and English and New Zealand law on the other.

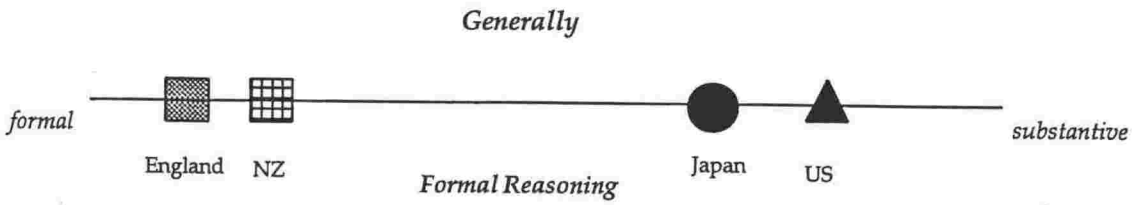
The latter pair maintains a distinctly more formal orientation. This overall conclusion retains its force, despite similar difficulties in "summing up" relative positions along multiple parameters, and especially the complications stemming from patterns of change over recent decades. On the one hand, New Zealand law developed less authoritative formality from the 1970s through to the early 1990s, as more attention was placed on human rights and biculturalism, perhaps supported by a somewhat more diverse legal profession than in England. This trend was also related to broader innovations in judicial reasoning, promoting less interpretive and mandatory formality, and a movement away from "hard and fast rules". Legislative interventions over this period reinforced a reduction in content formality. Enforcement and truth formality also were probably somewhat less than in England. However, there appears to be a distinct movement back towards more formal reasoning, especially in authoritative, content and mandatory formality, over the 1990s. This tendency is reinforced by pressures on New Zealand's legislature and appellate courts, an enduring black-letter law tradition in legal education, and other institutional factors. By contrast, England appears to have overcome a formalist reaction to earlier innovations in judicial reasoning, now moving back towards greater interpretive formality and generally towards a more substantive orientation. Particularly significant are the growing influence of EU law, devolution and constitutional reform, and more gradual transformations in the legal profession and the civil justice system. Nonetheless, the shift is slow and not always consistent. Most importantly for this thesis, it cannot be said that England has now drawn closer to the US than to the legal systems it spawned centuries ago, notably New Zealand. Instead, the distance between the contemporary English and New Zealand legal systems is very probably closer than the distance between them, on the one hand, and both US and Japanese law on the other. Diagrammatically, therefore, the four jurisdictions can be positioned approximately as in the top line of Figure 2 below.

To obtain a clearer picture, one strategy might be to extend the comparative compass to include more legal systems, especially those sharing common roots with Japan and the US (such as Germany),³⁷⁷ or with England and New Zealand (such as

³⁷⁷ See briefly for example L Nottage "Contract Law and Practice in Japan: An Antipodean Perspective" in H Baum (ed) *Japan: Economic Success and Legal System* (de Gruyter, Berlin, 1997) 197,

Australia). A more manageable alternative, adopted in Part Two of this thesis, is to examine in much greater detail some of the points mentioned by Atiyah and Summers, or those developed in Part II of this Chapter. After linking some of the discussion so far to the development of contract law theory generally, reviewed in the Introduction to Part Two, Chapters Two, Three and Four tighten the focus onto two dimensions of legal reasoning in three main areas of contract law, some narrower than others. The results are shown to be largely consistent with the conclusions just mentioned, based on a comparison of the four legal systems more generally, and therefore reinforce those conclusions. At the same time, the broader comparison in this Chapter provides, for the more focused analyses in Part Two, the following central working hypothesis: English and New Zealand law remain more formal, whereas US and Japanese law adopt distinctly more substantive approaches.

Figure 2: Positioning English, New Zealand, Japanese and US Law Generally



1. Authoritative Formality

1.1 Validity Formality: Source- vs Content-Oriented Standards



1.2 Rank Formality: Sources of Law and Ranking Rules



2. Content Formality: Under- and Over-Inclusiveness of Legal Rules Etc



3. Interpretative and Mandatory Formality: Hard and Fast Rules



Formal Orientation: Varieties of Formality

4. Enforcement Formality



5. Truth Formality



PART TWO: RETHINKING JAPANESE CONTRACT LAW AND PRACTICE

INTRODUCTION

- I The Pervasive Legacy of Legal Realism in the US
- II From the First to the Second "Legal Interpretation Debate" in Japan
- III Indigenous and Received Influences in England
- IV Legislative, Judicial & Scholarly Activism in New Zealand
 - IV.A The Seeds of Contract Law Theory Development in the Early 1970s
 - IV.B More Seeds in the Early 1980s
 - IV.C The Contract Statutes
 - IV.D The Birth of Contract Law Theory in the Late 1980s and Early 1990s
 - IV.E The Slow Development of Contract Law Theory Since the Mid-1990s
- V Implications

*Study of the history of opinion is the necessary preliminary to the emancipation of the mind.**

Part One extended the analytical distinctions proposed by Atiyah and Summers in order to compare Japanese and New Zealand law, as well as US and English law. One reviewer's comment on their work, however, might apply all the more so to that endeavour:¹

This was an enormously ambitious study which manfully struggled to establish its central thesis throughout. A more determined and unequivocal study of the form and substance dichotomy in the field of legal reasoning would perhaps have resulted in a generally more satisfying and normatively coherent book.

Accordingly, this Part focuses on contract law, and mainly on dimensions of formal reasoning, in the four jurisdictions examined. This more sustained and detailed analysis reinforces the primary thesis established Part One, namely that both English and New Zealand law retain a much more formal orientation compared to both US and Japanese law.

The analysis also contributes to ongoing contract law debates in all four jurisdictions. Both Atiyah and Summers are well-known for their work on contract law in their respective jurisdictions.² In their co-authored comparative study, however, they touch only briefly on some contract law rules and principles. One reason for this, no doubt, is that the study aimed to set out a general theory, requiring selectivity and inviting further research (see above Chapter One Part I). Another reason may have been that their thinking differed somewhat on how to apply or develop their theory in the context of contract law.³ This Part argues however that core distinctions set out in their

* J M Keynes "The End of Laissez Faire" in *Collected Works* Vol 9 (1973) 277, cited on the page before the preface in P S Atiyah *The Rise and Fall of Freedom of Contract* (Clarendon Press, Oxford, 1979).

¹ P J Cooke "Book Review" (1988) 8 *Leg Stud* 240, 240.

² See for example Atiyah, opening footnote above; P S Atiyah *An Introduction to the Law of Contract* (5 ed, Clarendon Press, Oxford, 1995); R Summers "'Good Faith' in General Contract Law and the Sales Provisions of the Uniform Commercial Code" (1968) 54 *Va L Rev* 195; J White and R Summers *Uniform Commercial Code* Vol 1, Chaps 1-12 [on Sales] (4 ed, West, St Paul (Minn), 1995).

³ Compare for example P S Atiyah "Form and Substance in Contract Law" in his *Essays on*

original theory can help identify and explain major differences in the contract law of the four jurisdictions examined in this thesis.

Chapter Two considers one aspect of the law governing contract formation, namely the role of formal requirements. In particular, it focuses on the issue of whether reference in negotiations to recording or memorialising an informal agreement means that this must occur before it can have binding contractual effect. Rules to that effect, like formal requirements for making wills, risk being under-inclusive with respect to the objective of giving effect to the intentions of the parties, thereby heightening “content formality” (above Chapter One Part II.B). Consistently with the general thesis advanced, New Zealand and (perhaps especially) English law are found to adopt stricter approaches, compared to US and (probably especially) Japanese law.

Chapter Three examines doctrines regulating unfairness in contracting. It develops Atiyah and Summers’ suggestion that many of the main doctrines in the US involve much more “content-oriented” standards of validity, thereby diminishing “authoritative formality” (above Chapter One Part II.A), in contrast to English law.⁴ Arguably, English law prefers the more “source-oriented” standard of the parties’ agreement. Japanese law is found to be closer to US law, although with perhaps more formal counter-tendencies. In dealing with a range of contractual unfairness problems, New Zealand law appears even more formal along this dimension than English law, particularly in light of the growing importance of European law in this field.

Part II of Chapter Four compares doctrines which can become relevant in the event of extreme supervening events affecting contractual performance, particularly the doctrines of frustration, impracticability, and changed circumstances. Atiyah and Summers mention that in US law “the entire subject of excuses for non-performance in contract ... is shaped by increasingly flexible or discretionary notions”,⁵ impliedly contrasting English law as adopting more “hard and fast rules” (above Chapter One Part II.C). Another way to conceptualise important distinctions in this area too is that English doctrine relies on the source-oriented standard of the parties’ agreement or intentions, while US law permits more content-oriented standards of validity. New Zealand law is shown to be at least as formal English law – and possibly even more so in light of some judgments, although the body of case law in New Zealand is much smaller than in England, making it risky to draw a firm conclusion on their relative positions. By contrast, Japanese law shares with US law a distinctly more substantive approach. The former is probably more substantive than the latter, but not by much.

The dichotomy between Anglo-New Zealand law versus US and Japanese law, particularly in this area, also suggests an important further refinement to the analytical framework devised by Atiyah and Summers. Drawing on empirical studies into attitudes and practices in regard to renegotiation and planning of long-term contracts, Part III of Chapter Four goes on to propose the notion of “didactic formality” as a third “variety” of formality — additional to Atiyah’s and Summers’ “truth formality” and “enforcement formality” (above Chapter One Part II.D). Didactic formality is defined as the tendency among judges and commentators to develop or apply contract law (the law in books) to

Contract (Clarendon Press, Oxford, 1990) 329, with R Summers “The Formal Character of Law - Criteria of Validity for Contracts” (1995) 9 JCL 29.

⁴ P S Atiyah and R S Summers *Form and Substance in Anglo-American Law: A Comparative Study of Legal Reasoning, Legal Theory, and Legal Institutions* (Clarendon Press, Oxford, 1987) 51-52.

⁵ Above n 4, 84.

influence actual contracting behaviour and expectations (the law in action), as opposed to adapting the former in the light of the latter. Contrary to the assertions of some judges and scholars in both jurisdictions, New Zealand and England retain a high degree of such didactic formality, at least compared to the US and (perhaps especially) Japan.

At the outset of this Part, it is important to stress that the differences which emerge in the three areas of contract law covered, in the following three Chapters, are very much differences in degree. None of the four legal systems examined will readily enforce informal agreements for the sale of land, for instance. Nor do they readily strike down contracts for unfairness. All of them are perhaps most reluctant in allowing relief from performance obligations due to supervening changes in circumstances. Nonetheless, important points of contrast and similarity can be brought by adopting various strategies in these Chapters, described in more detail below (Part V), in comparing legal reasoning in these three areas. In addition, as in the general comparison above (Chapter One), it is much more difficult to determine the positioning of US and Japanese law relative to each other, and that of English relative to New Zealand law, as opposed to establishing the significant gap between these two pairs of jurisdictions. However, bearing these caveats in mind, comparisons of contract law in this Part can be conceptualised diagrammatically as in Figure 3 overleaf. Because a more substantive tendency possibly emerging in New Zealand law regarding informal agreements still appears weak (Chapter Two Part II.B.2), it is positioned as only slightly less formal than English law on Line 2. In all other areas examined (Lines 3-5), New Zealand contract law appears somewhat more formal, so overall it is positioned as more formal than English contract law (Line 1). Japanese law is more difficult to position in relation to US law, since the former has exhibited noticeable formal counter-tendencies in one area, regulation of contractual unfairness (line 3, discussed in Chapter Three). Yet in all other respects examined, Japanese contract law appears even more substantive. Nonetheless, contrary to those who have stressed great differences between Japan and US,⁶ the analysis shows strong similarities between the two jurisdictions. Much more significant differences lie between Japan and the US on the one hand, and English and especially New Zealand law on the other. This Part therefore reinforces the need identified above (Part One Introduction) to reassess any lingering stereotypes about the uniqueness of Japan in regard to contract law, as well as law more generally.

⁶ See for example H Wagatsuma and A Rosett "Cultural Attitudes towards Contract Law: Japan and the United States Compared" (1983) 2 UCLA Pacific Basin LJ 76.

Figure 3: Positioning New Zealand, English, US and Japanese Contract Law

1. Contract Law Overall (including theory development)



2. Content Formality in Contract Formation



3. Authoritativeness Formality in Contractual Unfairness: The Contextual Dimension



4. Authoritativeness Formality in Frustration, Etc: The Time Dimension



5. "Didactic" Formality: Law in Books trying to lead Law in Action



Before embarking on the detailed analysis of these three topics in contract law, however, the rest of this Introduction outlines the development of contract law theory in each of these four jurisdictions. Of necessity, this must remain sketchy and tentative. Entire books could be written on the development of contract law theory in the US, for instance.⁷ Part I below begins by drawing out its main features, allowing a more succinct introduction to closely related Japanese developments, discussed in Part II. Part III draws parallels to show how contract law theory in England developed more substantive tendencies much later in the 20th century. This sets the stage for assessing New Zealand developments in Part IV. These are presented in the most detail, since there appears to have been no substantial publication offering a reasonably comprehensive survey of the historical evolution of contract law theory in that jurisdiction.⁸

The comparative analysis in this rest of this Introduction is designed to serve three main purposes. First, it introduces some aspects of the three topics discussed in ensuing Chapters in Part Two of this thesis, locating them in a much broader context, linked to the development of general legal theory and legal education outlined above (Chapter One Part II.C). Secondly, the comparison demonstrates a further contrast between the US and Japan, on the one hand; and England and Japan, on the other. To varying degrees, contract law commentators in all four jurisdictions have developed more interest in substantive reasoning, notably by showing greater readiness to replace rules by broad standards, thus directly reducing interpretive formality, and inviting reductions in authoritative and content formality. However, these transformations are shown to have been most consistent and prominent in the US and Japan, despite some recent counter-tendencies. In part, this result follows from well-articulated theory advancing this transformation, dating back to the early decades of the 20th century. Other supporting factors are significant sensitivity to related developments in other jurisdictions, overtly political and ideological overtones in theory-building and contract law scholarship, and a willingness to engage in philosophical and empirical inquiry. These elements were largely lacking in England until the 1970s, as discussed below. However, their confluence has brought forth a recent flowering in contract law theory, incorporating or promising a more strongly substantive orientation. The comparative paucity of these elements in New Zealand explains the persistent attraction of avowedly formalist or doctrinal scholarship in that jurisdiction. It also appears to have undermined the potential for statutory interventions around the 1970s, conferring some broad discretions on the courts, to move New Zealand law scholarship strongly and consistently towards a more substantive approach. If these conclusions have some merit – and contract law theory affects and reflects black-letter law, even if varying degrees in different legal systems⁹ – it should become more plausible to accept the primary thesis:

⁷ See for example R Hillman *The Richness of Contract Law: An Analysis and Critique of Contemporary Theories of Contract Law* (Kluwer, Dordrecht, 1997).

⁸ Compare for example J Burrows, J Finn and S Todd *Law of Contract in New Zealand* (Butterworths, Wellington, 1997) 14-20, 28-29.

⁹ In the US, theoretical and policy-oriented writings of legal academics in the leading law schools have long had a much greater influence on the legal profession, compared to England. See Atiyah and Summers, above n 4, 398-407. In addition, as they point out, there has been greater variety among US law schools, with the majority producing much scholarship adopting a more black-letter approach, directed mainly at immediate concerns of practitioners. See also L Nottage, T Ginsburg and H Sono "The Worlds, Vicissitudes and Futures of Japan's Law" in T Ginsburg, L Nottage and H Sono (eds) *The*

New Zealand and English law remain more formal in orientation, while US and Japanese law remain more substantive.

Thirdly, the analysis of contract law theory development in the rest of this Introduction provides an opportunity to justify the choice of the three topics considered in Part Two of this thesis, and the methodology for analysing them. The methodology includes a close analysis predominantly of case law trends in Chapter Two; a broader analysis of case law, doctrine and legislation in Chapter Three; and the incorporation of empirical research in Chapter Four. A rationalisation for these approaches is developed at the end of this Introduction, by way of conclusion in Part V.

I The Pervasive Legacy of Legal Realism in the US

A first striking feature of contract law theory development in the US is how early it got underway. Christopher Columbus Langdell, dean of Harvard Law School from 1870 to 1895, drew heavily on then prevalent methodology in the natural sciences to establish law as a worthy discipline within the academy.¹⁰ He argued that contract law cases could be systematically reviewed to uncover a few key principles, from which legal results could then be deduced, a methodology later developed by Samuel Williston in promoting the promulgation of the *Restatement of Contract* in 1932.¹¹ A central principle became the bargain theory of consideration: a promise would only be enforced if induced by consideration, in the form of a benefit to the promisor or detriment to the promisee. This theory, emphasised by Oliver Wendell Holmes, reflected his "individualist view that legal liability to others discourages socially useful activity and that promissory liability therefore should be as narrow as possible".¹² It also tended to stress the intention or will of contracting parties, albeit in the abstract, instead of the facts of a benefit being conferred or detriment being suffered, in establishing contractual liability. Another principle involved rendering liability absolute, within the confines of

Multiple Worlds of Japanese Law (University of Victoria, Victoria 2001) 1, 2. That literature resembles that which has been produced, in greater relative amounts, in England and New Zealand. Overall, however, it seems that superior courts in New Zealand cite less academic literature than US and even Australian counterparts. See R Smyth "Judicial Robes or Academic Gowns? Citation to Secondary Authority and Legal Method in the New Zealand Court of Appeal" in R Bigwood (ed) *Legal Method in New Zealand: Essays and Commentaries* (Butterworths, Wellington, forthcoming 2001). Further, it is open to debate how much influence different types of legal scholarship, such as more theoretical work, have had on Japanese courts. See for example H Sono "The Multiple Worlds of *Nihon-ho*" in T Ginsburg, L Nottage and H Sono (eds) *The Multiple Worlds of Japanese Law* (University of Victoria, Victoria 2001) 47.

¹⁰ C Tomlins "Framing the Field of Law's Disciplinary Encounters: A Historical Narrative" (2000) 34 *L & Soc'y Rev* 911.

¹¹ Langdell's preface to the first edition of *Cases on the Law of Contracts*, published in 1871, read as follows:

Law, considered as a science, consists of certain principles and doctrines ... [T]he number of fundamental legal doctrines is much less than is commonly supposed ... It seems to me, therefore, to be possible to take a branch of the law such as Contracts, for example, and, without exceeding comparatively moderate limits, to select, classify and arrange all the cases which had contributed in any important degree to the growth, development, or establishment of any of its essential doctrines.

Cited in G Gilmore *The Death of Contract* (Ohio State U Press, Columbus Ohio, 1974) 12.

¹² Hillman, above n 7, 20; citing Gilmore, above n 12, 14, and O W Holmes *The Common Law* (originally published in 1881).

the bargain theory of consideration, by narrowing grounds for excuse and promoting an objective approach to contract formation. This further reified the will or consent of the parties, by restricting factual inquiries into the parties' actual motives and other circumstances, thus reducing intervention by judges – and juries¹³ – as well as the costs and uncertainties of litigation.¹⁴

Consistent with this emerging “classical” paradigm of contract law was *Lochner v New York*, where the Supreme Court ruled unconstitutional a New York statute limiting the working hours of bakers.¹⁵ In 1909, Roscoe Pound vigorously denounced such court rulings, at both federal and state levels over previous decades, which had upheld “freedom of contract” on the unrealistic assumption that actual litigants had voluntarily entered into a social contract removing claims to protective legislation.¹⁶ Pound’s “sociological jurisprudence” dovetailed with the “progressive” movement, culminating in the triumph of New Deal state interventionism in the 1930s, and established a perennial debate about the role of judges which was rooted in concerns about the institution of contract.¹⁷

The judicial role became a particular focus for the “legal realists” who engaged with this new thinking. The core was a group of senior professors at Columbia Law School in the 1920s who were radically sceptical about classical legal analysis, whereby concepts and rules were applied deductively to facts. In particular, they questioned judges’ willingness and ability to give the real reasons for their decisions, and believed that legal rules applied were merely *ex post* rationalisations. These iconoclastic professors developed scientific and empirical approaches on the assumption that judges “responded predictably to certain stimuli ... found in the facts surrounding the controversy and perhaps in the judges’ own experience, but not at all in the ‘paper rules’, in prior decisions or in acts of the legislature”.¹⁸ Another group of legal realists included Jerome Frank and Arthur Corbin, both of whom later became judges; and Karl Llewellyn, a younger member of the Columbia Law School who had studied under Corbin at Yale. Llewellyn did not go as far in totally rejecting black-letter law rules, to focus solely on the behaviour of legal actors, but.¹⁹

... he was in greater disagreement with the legal conceptualists. It is the central tenet of the realist movement, embraced by Llewellyn, that judges’ decisions arise not merely from the rules that they state in their opinion, but at least as much from the facts before them, from the expectation of the parties in the trade, or from their own judgment about fairness.

Accordingly sceptical about the role of precedent and techniques of case analysis,²⁰ he

¹³ See for example C McCormick “The Parol Evidence Rule as a Procedural Device for Control of the Jury” (1932) 41 Yale LJ 365.

¹⁴ Compare Hillman, above n 7, 21-22.

¹⁵ (1905) 198 US 45. See generally J Boyarin “Law, Literature and the Resurrection of Contract” (1999) 24 L & Soc Inq 195.

¹⁶ R Pound “Liberty of Contract” (1909) 18 Yale LJ 454.

¹⁷ Compare for example G Rowe “*Lochner* Revisionism Revisited” (1999) 24 L & Soc Inq 221, 222-223.

¹⁸ J White “Promise Fulfilled and Principle Betrayed” [1988] Ann Survey Am L 7, 10.

¹⁹ White, above n 18, 13. See generally K Llewellyn “Realistic Jurisprudence – The Next Step” (1930) Colum L Rev 431.

²⁰ See for example K Llewellyn *The Bramble Bush* (Oceana, New York, 1951) 68-69, on how easily precedents can be read narrowly to avoid its application and vice versa.

devoted increasing attention to uncovering the actual practices and expectations of businesspeople. Llewellyn admired some contemporary English judges, like Lord Scrutton, for a professed willingness to decide cases based on personal experiences and insights into commercial practices.²¹ But Llewellyn went much further in advocating inquiry through legal sociology and anthropology, showing that a major inspiration came from Eugen Ehrlich's theories of "living law" and "sociology of law" along with other contemporary developments in Germany.²² Although far from systematic and methodologically convincing by today's standards of social science,²³ Llewellyn was able to draw on two years' experience as in-house counsel to a New York bank;²⁴ a revolutionary casebook published in 1931, breaking with the Langdellian black-letter law tradition by discussing "economic considerations, business practice, and other factors which affect the expectations and behaviour of commercial buyers";²⁵ pioneering research in legal anthropology;²⁶ and then (from 1942 until his death in 1962) a dominant role in the sometimes contentious tasks of developing and promoting a Uniform Commercial Code (UCC), turning on sensitivity to commercial practices and expectations.²⁷ Llewellyn was also able to build on the pragmatist philosophy applied to law by John Dewey in the 1920s. Dewey contended that classical jurisprudence had outlived its usefulness in liberating bourgeois interests from restrictions on trade, degenerating into a new set of rigid rules impeding the evolving tendency towards

²¹ J White "Good Faith and the Cooperative Antagonist" (2001) 54 SMU L Rev 679, 684-685 (discussing K Llewellyn "On Warranty of Quality, and Society" (1936) 36 Colum L Rev 677, 707, which had cited *Ronaasen & Son v Arcos Ltd* [1932] 43 Lloyds Rep 1 and Justice Scrutton "The Work of the Commercial Court" (1932) 1 CLJ 6).

²² See Note "Commercial Law and the American Volk: A Note on Llewellyn's German Sources for the Uniform Commercial Code" (1987) 97 Yale LJ 156; J Gedid "UCC Methodology" (1988) 29 Wm & Mary L Rev 341; M Ansaldi "The German Llewellyn" (1992) 58 Brooklyn L Rev 705; D Lind "Free Legal Decision and the Interpretive Turn in Modern Legal Theory" (1993) 38 Am J Juris 159. The impact of Ehrlich on Benjamin Cardozo, a judge whose writings in the 1920s exerted a powerful influence on Llewellyn and later generations of US jurists, is also apparent: N Insua "Dogma, Paradigm and the Uniform Commercial Code: *Sons of Thunder v Borden* Considered" (1999) 31 Rutgers LJ 249, 260-261. The consequentialist aspects of Holmes' work (above n 12), rather than the latter's individualist tendencies, would seem to explain his influence on Llewellyn as well: compare for example K Llewellyn "Holmes" (1935) 35 Colum L Rev 485; R Danzig "A Comment on the Jurisprudence of the Uniform Commercial Code" (1975) 27 Stan L Rev 621, 624.

²³ C Williams "The Search for Bases of Decision in Commercial Law: Llewellyn Redux" (1984) 97 Harv L Rev 1495, 1508; L Bernstein "The Questionable Empirical Basis of Article 2's Incorporation Strategy: A Preliminary Study" (1999) 66 Chi L Rev 710, 713.

²⁴ A Corbin "A Tribute to Karl Llewellyn" (1962) 71 Yale LJ 805; G Gilmore "In Memoriam: Karl Llewellyn" (1962) 71 Yale LJ 813, 814.

²⁵ W Twining "Two Works of Karl Llewellyn" (1967) 516, 520.

²⁶ D Papke "How the Cheyenne Indians Wrote Article 2 of the Uniform Commercial Code" (1999) 47 Buff L Rev 1457.

²⁷ G Maggs "Karl Llewellyn's Fading Imprint on the Jurisprudence of the Uniform Commercial Code" (2000) 71 U Colorado L Rev 541, 541-548; A Kamp "Uptown Act: A History of the Uniform Commercial Code: 1940-49" (1998) 51 SMU L Rev 275. Llewellyn was the Chief Reporter in drafting and re-drafting the UCC. His main collaborator was his wife, Soia Mentschikoff; other reporters, who readily acknowledged their deference to Llewellyn, included Grant Gilmore and Friedrich Kessler. Arthur Corbin, Llewellyn's teacher at Yale, was appointed an advisor. See I Hillinger "The Article 2 Merchant Rules: Karl Llewellyn's Attempt to Achieve the Good, the True, the Beautiful in Commercial Law" (1985) 73 Geo LJ 1141; S Mentschikoff "Highlights of the Uniform Commercial Code" (1964) 27 MLR 167.

welfare state interventions. Instead, he advocated legislation “conceived as tools to be adapted to the conditions in which they are employed rather than as absolute and intrinsic ‘principles’”, giving special attention “to the facts of social life”.²⁸ Echoing Dewey, and especially the German scholar Goldschmidt, Llewellyn stressed “situation-sense” in adjudication: “What judges need is ‘knowledge and experience and values’, and their job is to ‘see’ the ‘pressure’ of ‘type-facts’”.²⁹

These influences came together to result in the UCC largely breaking with earlier contract legislation, which had amended particular areas of law primarily under the guidance of Williston.³⁰ The Code comprehensively reformed all major areas of US commercial law, based on the following guiding principles:³¹

- (a) a preference for open-ended standards over firm rules;
- (b) the purposive interpretation of legislative provisions;
- (c) the minimisation of formal requirements;
- (d) the avoidance of a definitive statement of all aspects of the law, in favour of directions to the courts to supplement UCC rules with general legal and equitable principles, and the incorporation of rules established by prior dealings and usages of trade;
- (e) a related focus on remedies as providing ex post compensation to make parties whole rather than as incentives affecting future behaviour, thus reinforcing the philosophy that commercial law should follow behaviour and expectations as much as possible rather than forcing them to change.

Principles (a) and (b) imply a lowering of interpretive and mandatory formality; principle (c), a reduction in content formality; and principles (d) and (e), a reduction in authoritative and rank formality.³² In other words, drawing on decades of legal theory development within the US, in turn strongly influenced by contemporary trends in Germany, by the middle of the 20th century US commercial law had been pervasively

²⁸ J Dewey “Logical Method and Law” (1924) 10 Cornell LJ 17, 27.

²⁹ T Rakoff “Implied Terms: Of ‘Default Rules’ and ‘Situation Sense’” in J Beatson and D Friedmann (eds) *Good Faith and Fault in Contract Law* (Clarendon, Oxford, 1995) 191, 202.

³⁰ But see R Flores “Risk of Loss in Sales: A Missing Chapter in the History of the UCC: Through Llewellyn to Williston and a Bit Beyond” (1996) 27 Pac LJ 161 (showing that Williston’s recrafting of risk of loss rules in the Uniform Vendor and Purchaser Risk Act over the 1930s, moving away from ownership concepts towards more practical contract law rules, was initially objected to by Llewellyn but then taken up in the UCC).

³¹ Compare Maggs, above n 27, 543, n 11 (expressing some reservations regarding the originality of prior dealings and usages in (d); but see Rakoff, above n 29), and 579 (regarding (e), citing another UCC reporter, H Kripke “The Principles Underlying the Drafting of the Uniform Commercial Code” (1962) U Ill L Forum 321, 330).

³² See above Chapter One. Further lessening rank formality, Llewellyn argued that contract law interpretation need not proceed first by looking sequentially at express terms, then course of performance, course of dealing, and trade usages. Rather, he advocated a holistic approach, freely considering all four sources. However, he agreed that each source should trump the following ones in the event of inconsistency, and it was unclear how default rules and general reasonableness standards fitted into this scheme. Interestingly, it seems that contemporary contract interpretation principles maintain low levels of rank formality and considerably reduced interpretive formality, by giving primacy to reasonableness and good faith standards, default rules, and trade usages. See E Zamir “The Inverted Hierarchy of Contract Interpretation and Supplementation” (1997) 97 Colum L Rev 1710.

refocused on substantive reasoning at multiple levels.

However, such attempts to reform US contract law, particularly by stressing commercial and social context, attracted criticism from Lon Fuller from the late 1930s. He accused legal realism of failing to appreciate law's prescriptive character, in establishing norms of conduct for society. Fuller remained sympathetic to the call for judges to be more honest so as to increase their predictability and accountability.³³ Nonetheless, his influential work in contract law³⁴ was distinguished by attempts to reinstate "the principle of private autonomy" as central, "to be harmonised with, and occasionally balanced against, a small number of counter-principles", such as protection of reliance and prevention of unjust enrichment.³⁵ Fuller achieved this primacy of private autonomy by isolating areas not related to markets (such as the family) and those areas of "private heteronomy" (such as labour and insurance law) where terms were imposed by law. This left less scope for distributive justice to become problematic in the remaining field of general contract law, and put the private autonomy principle in a strong position relative to reliance and restitutionary principles premised on commutative justice (restoring the status quo ante), and the will of the state rather than of the parties. Duncan Kennedy therefore concludes that although Fuller's work helped move away from a "will theory of contract", derived completely or overwhelmingly from the principles of autonomy and consent, it involved an ideological response to more radical (even communist) proposals over the 1920s and 1930s for reformulating contract law to pursue distributive justice. Further, he suggests that:³⁶

The work which moves contract theory from Fuller's intermediate position to the fully developed modern conflicting considerations model has to do with deciding what else beside private autonomy is at stake, given that neither protecting reliance nor preventing unjust enrichment comes close to summarising the various considerations that in fact come into play against autonomy. This involved reintroducing the social, with its ideological baggage.

However, Kennedy argues that the ideological spectrum from World War II through to 1970 narrowed, to exclude communist or fascist extremes. This led to a new mainstream model of "conflicting considerations", involving:³⁷

an even more mildly ideologised debate between conservatives touting freedom of contract, on the one side, and liberals advocating policing bargains in the interests of weak parties, on the other. They carried on the debate using the full repertoire of formal arguments; substantive arguments, including rights, morality, and efficiency; and institutional competence arguments about the appropriate roles of judges, administrators, and legislatures.

The major links between Fuller and this post-War phase are considered to be Friedrich Kessler, in his articles on contracts of adhesion and on pre-contractual liability; Stewart Macaulay, discussing the liberal approach of Californian courts in the 1950s and under

³³ White, above n 18, 14. See L Fuller "American Legal Realism" (1934) 82 U Pa L Rev 429.

³⁴ See especially L Fuller and W Perdue "The Reliance Interest in Contract Damages" (1936) 46 Yale LJ 52; L Fuller "Consideration and Form" (1941) 41 Colum L Rev 799.

³⁵ D Kennedy "From the Will Theory to the Principle of Private Autonomy: Lon Fuller's 'Consideration and Form'" (2000) 100 Colum L Rev 94, 97, 167-172. Compare also T Rakoff "Fuller and Perdue's *The Reliance Interest* as a Work of Legal Scholarship" [1991] Wisc L Rev 203.

³⁶ Above n 35, 172-173.

³⁷ Above n 35, 173.

Justice Traynor, and liability for lost credit cards as large institutions came to dominate the industry; and Ian Macneil, with the first edition of his “radically anti-formalist contracts casebook”.³⁸

To Kennedy’s sketch should be added Grant Gilmore’s (in)famous proclamation of *The Death of Contract*, in lectures first delivered in 1970 but published in 1974.³⁹ This work further undermined the 19th century “will theory” or classical model of contract, which had led to an extreme reluctance to: (i) find that binding relations had been entered into, (ii) add obligations not sourced in the parties’ express agreement, and (iii) allow contractual relations to be altered over time. Truer to the legal realist tradition,⁴⁰ by suggesting that contract law might be in the process of being reabsorbed into tort law, it followed through on Fuller’s insight into modern contract law’s role in protecting detrimental reliance.⁴¹ Gilmore also stressed indications of more willingness by courts and commentators to allow enforcement of promises not supported by bargained-for consideration, when the promisor received a benefit and the other party had intended to make a gift or compel acceptance. Further undermining central tenets of classical contract law theory, he argued that the US law was increasingly willing to allow excuses for failure to perform due to unforeseen circumstances or mistakes of fact, bringing in broad principles of fairness.⁴² The first aspect of Gilmore’s provocative thesis may have been related to the dramatic decline in contract cases filed in US courts through to the 1960s, especially debt claims, at least relative to tort filings.⁴³ Further, even the latter aspect, suggesting the infusion of broad norms of fairness into US contract law by the 1970s, did not involve setting out a radical ideological commitment. Rather, Gilmore’s work was driven by a conviction that

³⁸ Kennedy, above n 35. See respectively F Kessler “Contracts of Adhesion – Some Thoughts on Freedom of Contract” (1943) 43 Colum L Rev 629, F Kessler and E Fine “Culpa in Contrahendo, Bargaining in Good Faith, and Freedom of Contract: A Comparative Study” (1964) 77 Harv L Rev 401; S Macaulay “Justice Traynor and the Law of Contracts” (1961) 13 Stan L Rev 812, S Macaulay “Private Legislation and the Duty to Read – Business Run by IBM Machine, the Law of Contracts, and Credit Cards” (1966) 19 Vand L Rev 1051; I Macneil *Cases and Materials on Contracts: Exchange Transactions and Relationships* (West, St Paul, 1971). Kessler’s work also appears to have drawn on critical German contract law theory prior to World War II, while eschewing variants adopting national socialism, and coming under the influence of the school of US legal realism which acknowledged law’s normative force (epitomised by Fuller and, to a lesser extent, Llewellyn). Compare C Joerges “Friedrich Kessler” (1994) 42 AJCL 170, 180-184.

³⁹ Above n 12.

⁴⁰ Compare White, above n 18, with E Peters “Symposium: Foreword” (1995) 90 Nw U L Rev 1, 1-2:

Grant Gilmore’s intellectual outlook reflected the Yale Law School’s pervasive commitment to legal realism from the 1930s onward. Jerome Frank was a visible and audible presence at Yale. All the faculty were expert at demonstrating the fragility of legal doctrine and the ambiguity of legal language. In the absence of fixed constellations in the legal firmament, attention necessarily focused on alternatives, on the critical dissection of inherently imperfect solutions to particular policy disputes framed by factual contexts. Lacking confidence in jurisprudential outcomes, the faculty valued a wide angle of vision that took account of traditional as well as nontraditional learning about the law. In such a legal climate, any intriguing idea was worth exploring, whether or not its hypothesis proved ultimately to be persuasive. The *Death of Contract* was one such intriguing idea.

⁴¹ Compare also S Henderson “Promissory Estoppel and Traditional Contract Doctrine” (1969) 78 Yale LJ 343.

⁴² Hillman, above n 7, 23-26, 32.

⁴³ Compare M Galanter “Contract in Court” [2001] Wisc L Rev 577, 578-583.

freedom of contract could still help guide the law in adapting to changing needs and practices.⁴⁴

Nonetheless, Gilmore's work also encouraged others drawing on the well-established realist tradition, such as Arthur Corbin and Allan Farnsworth, who contested classical theory's focus on literal interpretation of contract wording and a strict parol evidence rule. These theorists were primarily responsible for the American Law Institute's promulgation of the *Restatement (Second) of Contracts* in 1981, which Farnsworth has since promoted as the core of an influential reformulation of contract law.⁴⁵ Both the *Restatement* and his textbooks reveal the influence of Llewellyn, and especially the UCC, in seeking to recognise contemporary business norms and practices. Also pervasive, however, is the legacy of Fuller. Bargained-for promise premised on the principle of private autonomy is "first among equals", along with restitutionary and reliance based rationales for enforcing contractual obligations. This widely-accepted paradigm therefore remains "neoclassical", taking promise or "voluntary assumption of obligation" as the central focus in contract law (and, indeed, in perceptions of contractual behaviour, and broader conceptualisations or theories of contract).⁴⁶

The same approach is taken further by Charles Fried's *Contract As Promise*, an influential book published in the same year as the *Restatement (Second)*. He argued that the central organising principle of contract law is and ought to be the moral precepts involving in promise-making. Fried contended that promisors create a moral obligation by invoking a "convention of promising", allowing promisees moral grounds to expect the promised performance; but the key reason for enforcing such promises is to enable promisors to "determine their own values", permitting them free choice (and then moral and legal responsibility) in binding themselves to others.⁴⁷ This reformulation allowed him to criticise the bargain theory of consideration, arguing that situations such as those imposing liability for promissory estoppel (in which courts enforce promises given without consideration) demonstrate this morality of promise-making. Fried also retrieved the legitimacy of objective interpretation of contracts, by asserting that promises are made against "an unexpressed background of shared purposes, experiences, and even a shared view of the world", ensuring that objective interpretations coincide with promisors' actual intentions.⁴⁸ That could still leave problems of gaps in incomplete agreements, which courts had to fill with terms unrelated to the parties' promises. However, Fried argued that this role is supplementary, only applicable when

⁴⁴ See for example J Braucher "The Afterlife of Contract" (1995) 90 Nw U L Rev 49; P Linzer "Law's Unity - An Essay for the Master Contortionist" (1995) 90 Nw U L Rev 183.

⁴⁵ Compare A von Mehren "Preface" (1982) 67 Cornell L Rev 631; and for example E A Farnsworth *Farnsworth on Contracts* (3 ed, Aspen Publishers Inc, New York, 1999).

⁴⁶ See for example I Macneil "Relational Contract: What We Do and Do Not Know" [1985] Wisc L Rev 483, 496-498 (going on to criticise, as another example of this genre, J Levin and B McDowell "The Balance Theory of Contracts: Seeking Justice in Voluntary Obligations" (1983) 29 McGill LJ 24). See also J Feinman "The Significance of Contract Theory" (1990) 58 U Cinn L Rev 1283, 1285; J Esser "Institutionalising Industry: The Changing Forms of Contract" (1996) 21 L & Soc Inq 593. Compare Hillman, above n 7, 3 n 6 (arguing that his own attempted recognition of both promise and fairness concerns is not "neoclassical", because "it stresses both the importance of both freedom of contract and other principles, without finding that one set of principles dominates another).

⁴⁷ C Fried *Contract As Promise: A Theory of Contractual Obligation* (Harvard UP, Cambridge Mass, 1981) 7, 12-13, 20.

⁴⁸ Above n 47, 88.

“promise gives out”, because parties have decided not to include their own terms.⁴⁹ In short, even more so than the post-realist neoclassical mainstream, Fried reasserted the primacy of private autonomy. Unlike the realists, however, he proceeded deductively from moral philosophy, an approach later preferred by Randy Barnett.⁵⁰ Further, although this may be confusing cause with effect, Fried’s appointment as Solicitor-General in the Reagan administration points to the conservative ideological ramifications of his stance.⁵¹

This supports Kennedy’s point that ideological divides have re-emerged in US contract law theory since the 1970s, matching developments in legal scholarship and general political debate in the aftermath of the Vietnam War and other social upheaval in the US.⁵² Moreover, he suggests that the resultant proliferation of projects to reconstruct contract law, ostensibly to meet concerns that “conflicting considerations” models will simply reflect ideological choices, has ironically resulted in the projects revealing their ideological or political links. Promising further detail in a forthcoming publication, Kennedy provides already the following bird’s eye view:⁵³

I would place Alan Farnsworth ... in the center-right position that Fuller himself occupied in 1941. To his right are the conservative projects based on morals, rights, or efficiency, including those of Richard Epstein, Charles Fried, Randy Barnett, Farber and Mathieson, Richard Posner, and Alan Schwartz. To his left, there are, first, the Fuller loyalists of the center, including Melvin Eisenberg, Robert Summers, Stanley Henderson, and Richard Hillman. Then come the more progressive modernists in the Fuller tradition, including Patrick Atiyah, Todd Rakoff, and Charles Knapp, and liberal law and economics types, such as Guido Calabresi, Michael Schill, Jon Hanson, and Christine Jolls. Further to the left are left reconstructionists, for example Roberto Unger and Margaret Radin. Also on the left are the critical legal studies contract scholars who pushed for bringing the ideological out of the shadows: myself, Karl Klare, Frances Olsen, Clare Dalton, Mary Joe Frug, Jay Feinman, Elizabeth Mensch, Peter Gabel, and James Mooney, among others.

The broadening of the ideological spectrum since the 1970s is most obvious in the development, on the one hand, of the Critical Legal Studies (CLS) movement, a still influential movement in which Kennedy remains a leading figure; and the early economic analysis of law, articulated notably by Richard Posner.⁵⁴ From the 1970s, proponents of CLS drew on early realist insights as well as developments in European theory, such as post-structuralism and Marxism, to reiterate the considerable (but not

⁴⁹ Above n 47, 69. See also Hillman, above n 7, 14.

⁵⁰ See for example R Barnett “A Consent Theory of Contract” (1986) 86 Colum L Rev 269.

⁵¹ Compare for example K Norman-Major “The Solicitor-General: Executive Policy Agendas and the Court” (1994) 57 Albany L Rev 1081, 1100.

⁵² Kennedy claims, above n 35, 174:

After 1970, there emerged both a more radical left and a more radical right tendency in legal scholarship, patently tied to developments outside law. This is what creates the perennial sense of danger: that ad hoc, semiotized conflicting considerations analysis of legal problems will turn out to be no more than a vehicle for ideology - liberal or conservative, radical or hard right, not communist or fascist; and it is one of the things that motivates the reconstruction projects that characterize the period from 1970 to the present.

⁵³ Above n 35, 174 n 282. Compare generally D Kennedy *A Critique of Adjudication* (Harvard UP, Cambridge Mass, 1997).

⁵⁴ See generally for example M Kelman *A Guide to Critical Legal Studies* (Harvard UP, Cambridge Mass, 1987); J Paul “Introduction CLS 2001” (2001) 22 Cardozo L Rev 701; R Posner *The Economics of Justice* (Harvard UP, Cambridge Mass, 1981).

necessarily total) indeterminacy of contract law, criticising mainstream theorists and judges who stressed instead its coherence. They argued that the latter masked an individualist, liberal agenda; and advocated instead a reopening of contract law primarily towards redistributivist and communitarian concerns.⁵⁵ At the other extreme, economic analysis claimed a new coherent basis for understanding and evaluating contract law, namely the criterion of efficiency (especially Pareto superiority), underpinned by methodological individualism and utilitarianism.⁵⁶ It is hardly surprising that proponents such as Posner and Frank Easterbrook were appointed to the judiciary during the conservative Reagan era.⁵⁷

Thus, Kennedy's claims of more polarised ideological and political position-taking in contract law theory development, in the US since the 1970s, appear plausible. If they can be more fully substantiated, it follows that US contract law theory – and probably black-letter law, given the appointments during the Reagan era just mentioned, as well as the extensive influence of academic theory on US law⁵⁸ – will have become even more open to substantive reasoning than in Llewellyn's heyday from the mid-1930s through to the early 1960s, and possibly even more so than in the earlier realist era.

This tendency also follows from other elements ignored or downplayed in Kennedy's history of developments after World War II. In particular, while correctly highlighting the important political implications of the work of Stewart Macaulay,⁵⁹ he

⁵⁵ See for example M Horwitz "The Historical Foundations of Modern Contract Law" (1974) 87 Harv L Rev 917; D Kennedy "Form and Substance in Private Law Adjudication" (1976) 89 Harvard L Rev 1685; D Kennedy "Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power" (1982) Maryland L Rev 563; C Dalton "An Essay in the Deconstruction of Contract Doctrine" (1985) 94 Yale LJ 997. Kennedy (above n 35) includes the late Mary Joe Frug as a CLS scholar, but her main ideological attack was on patriarchal tendencies in mainstream and neoclassical economic accounts of contract: see for example M Frug "Re-Reading Contracts: A Feminist Analysis of a Contracts Casebook" (1985) 34 Am U L Rev 1065; M Frug "Rescuing Impossibility Doctrine: A Postmodern Feminist Analysis of Contract Law" (1992) 140 U Pa L Rev 1029.

⁵⁶ See generally Hillman, above n 7, 213-220. Pareto superiority involves trying to make at least one actor better off without making any others worse off. Other notions of efficiency are also proposed: compare J Coleman "Efficiency, Utility and Wealth Maximisation" (1980) 8 Hofstra L Rev 509. Other critiques of Posner's starting point, based on liberal theory, were also promptly pointed out by R Dworkin "Is Wealth a Value?" (1980) 9 J Leg Stud 191, and "Why Efficiency? A Reply to Professors Calabresi and Posner" (1980) 8 Hofstra L Rev 563. Posner has since toned down his stance, subsuming economic analysis within a broader pragmatist philosophy, from which basis he advocates classical liberalism: see R Posner *Overcoming Law* (Harvard UP, Cambridge Mass, 1995) 1-29.

⁵⁷ Compare also Note "Judge Frank H Easterbrook: A Faithful Adherent of the Law & Economics Approach Advocated by Professor Frank H Easterbrook" (1987) 50 L & Contemp Prob 265.

⁵⁸ Above n 9.

⁵⁹ Above n 38. Macaulay's center-left "Democratic" stance also shines through in much of his other work. See for example S Macaulay "Changing a Continuing Relationship Between a Large Corporation and Those Who Deal with It: Automobile Manufacturers, Their Dealers, and the Legal System" [1965] Wisc L Rev 483; S Macaulay *Law and the Balance of Power: The Automobile Manufacturers and Their Dealers* (Russell Sage, New York, 1966); S Macaulay "The Standardized Contracts of United States Automobile Manufacturers" in A von Mehren (ed) *The Impact of Large Scale Business Enterprise upon Contract* (Mohr, Tuebingen, 1974); "Long-Term Continuing Relations: The American Experience Regulating Dealerships and Franchises" in C Joerges (ed) *Franchising and the Law: Theoretical and Comparative Approaches in Europe and the US* (Nomos, Baden-Baden, 1991) 179; S Macaulay "Bambi Meets Godzilla" (1989) 26 Houston L Rev 575.

fails to mention the latter's renowned post-War empirical studies of "contract law in action". No doubt this reflects a strong tendency within the CLS movement to focus on "trashing" black-letter law, often related to a scepticism about social science, perceived as proclaiming objectivity while masking (mostly mainstream) ideology.⁶⁰ However, building on the insights and approach of Llewellyn and other realists, the empirical research pioneered by Macaulay appears to have had a much greater impact on the development of contract law theory in the US, compared to his other work.⁶¹ His most famous study, published in 1963 in the *American Sociological Review* yet one of the most frequently cited articles in US law journals over recent decades, found from extensive interviews of manufacturers in Wisconsin that:⁶²

- (1) many business exchanges reflect a high degree of planning about ... four categories – description [of performances], contingencies, defective performances and legal sanction – but
- (2) many, if not most, exchanges reflect no planning or only a minimal amount of it, especially concerning legal sanctions and the effect of defective performances.

Further, Macaulay found that "disputes are frequently settled without reference to the contract, or potential or actual legal sanctions".⁶³ He suggested that these patterns were related to reliance on industry customs; minimising risk, through techniques such as dealing with reputable or multiple companies; sanctions related to broader norms, such as honouring deals and supplying good quality products; and the desire to maintain ongoing business relationships (reinforced often by personal ties) and general reputation. Careful planning and references to contractual documents in dispute resolution were found in complex and high value transactions, but also simply as a tool to promote communication and organisation within a firm.

Gilmore promptly dubbed Macaulay the "Lord High Executioner of the Contract is Dead School", yet went on to profess disinterest in those engaging in "sociological analysis rather than in historical or philosophical synthesis", a surprising stance from someone working within the tradition of legal realism.⁶⁴ Further, Macaulay's article never proclaimed that contract was unimportant, only that practical realities meant that:⁶⁵

⁶⁰ Compare D Trubek "Where the Action Is: Critical Legal Studies and Empiricism" (1984) 36 *Stan L Rev* 575.

⁶¹ Compare the works by Macaulay cited above n 38; with Hillman, above n 7, 241-255.

⁶² S Macaulay "Non-Contractual Relations In Business: A Preliminary Study" (1963) 28 *Am Socio Rev* 55, 60. I Shapiro "The Most Cited Law Review Articles Revisited" (1996) 71 *Chicago-Kent L Rev* 751, 767.

⁶³ Macaulay, above n 62, 61.

⁶⁴ Gilmore, above n 12, 113 n 1; compare Peters, above n 40. See also R Speidel "The Characteristics and Challenges of Relational Contracts" (2000) 94 *Nw U L Rev* 823, 825-826:

[The modern UCC] model invites the parties, their lawyers, and the courts to become litigation empiricists as they confront issues of liability and remedy, and it suggests that norms immanent in trade usage and practice may become part of the bargain.

Other empiricists, such as Stewart Macaulay, accept the vital link between bargain and context. His research, however, tends to marginalize the importance of contract law by identifying other practices and norms that have a greater influence on behavior than either the bargain itself or contract doctrine. In short, there is an independent life of bargaining, reputation, repeat exchange, and adjustment and settlement that occurs in the shadow of, but not directly influenced by, contract doctrine.

⁶⁵ S Macaulay "Almost Everything I Did Want to Know about Contract Litigation: A Comment

... situations where legal sanctions seem to make sense are a limited subset of all contract disputes. Writing about contracts that assumes that litigation is the major, usual or typical way to resolve disputes rests on a false assumption.

Building on this research in the 1960s, and contemporaneous studies by his then colleague Lawrence Friedman which highlighted the gutting of general contract law by specialised statutes and contract law regimes,⁶⁶ the “Wisconsin school” of contract law scholarship has attempted to systematically investigate the realities facing contracting parties – not just through reported case judgments – and to reintegrate these findings with post-classical contract law theory.⁶⁷

One aspect of their new synthesis has involved re-engaging the interplay among principles of private autonomy, reliance and restitution, following the lead of Lon Fuller, but adding a more sustained analysis of social context and norms.⁶⁸ This has also been the approach of Ian Macneil, who has drawn on the work of the Wisconsin school (but also much other sociological and anthropological material), and in turn influenced it.⁶⁹ The key insight of his “relational contract theory” has been that classical law takes a highly discrete, one-off exchange as its paradigm case, focusing overly on contract law’s role in enhancing “discreteness” (abstracting from context) and “presentation” (bringing the future into the present, primarily through an initial agreement), whereas the more important contemporary exchanges involve complex long-term relationships and evolving normative frameworks.⁷⁰ Macneil incorporates as a set of “linking norms” the restitution, reliance and expectation interests, originally highlighted by Fuller.⁷¹ However, from a diverse range of sources not limited to reported case law, Macneil derives a much broader range of norms or values “internal” to the parties’ relationship.⁷² His colleague, Richard Speidel, has recently singled out “norms that are necessary to hold the relationship together, such as solidarity, reciprocity, and role integrity, and other norms that may be generated by the relationship over time,

on Galanter” [2001] *Wisc L Rev* 629, 633.

⁶⁶ See for example L Friedman *Contract Law in America: A Social and Economic Case Study* (U Chicago Press, Chicago, 1965).

⁶⁷ See for example L Friedman and S Macaulay “Contract Law and Contract Teaching: Past, Present and Future” [1967] *Wisc L Rev* 805; S Macaulay, J Kidwell, W Whitford and M Galanter *Contracts: Law in Action* 2 Vols (The Michie Company, Charlottesville, 1995). See generally W Woodward “Clearing the Underbrush for Real-Life Contracting” (1999) 24 *L & Soc Inq* 99.

⁶⁸ Macaulay and others, above n 67, Vol 1 Chapter 2.

⁶⁹ Macaulay and others, above n 67, Vol 1 Chapter 1. See also K Llewellyn “What Price Contract – An Essay in Perspective” (1931) 40 *Yale LJ* 704. Another probable, but rarely noted, influence on Macneil’s “bottom up” approach to contract law theory appears to have been a lengthy period spent teaching law in Tanzania in the 1960s. See I Macneil *Contracts, Instruments for Cooperation: East Africa* (F B Rothman, South Hackensack NJ, 1968). Compare generally Hillman, above n 7, 255-260.

⁷⁰ I Macneil “Contract: Adjustment of Long-Term Economic Relations under Classical, Neoclassical and Relational Contract Law” (1978) 72 *Northwest Univ L Rev* 854, 856-864 (classical law), 865-886 (neoclassical law).

⁷¹ I Macneil “Values in Contract: Internal and External” (1984) 78 *Northwest Univ L Rev* 340, 247. See also Note “Hegel and the Autonomy of Contract Law” (1999) 77 *Tex L Rev* 719 (arguing that Fuller and Macneil both attempt a mixed or soft reconstruction of contract law compatible with Hegel’s account).

⁷² I Macneil “Values in Contract: Internal and External” (1984) 78 *Northwest Univ L Rev* 340, 347-369.

such as those supporting cooperation, risk sharing, and preserving the relationship".⁷³ Macneil further distinguishes "external" norms or values, notably those imposed by "sovereign positive law", while recognising that his encompassing range of "internal" norms subsumes "external" norms so that their separation can never "be other than partially arbitrary".⁷⁴ Several contract law scholars sympathetic to this approach have accordingly attempted to gauge the suitability of external norms developed by courts or legislative bodies.⁷⁵ However, Macneil himself has consistently shown more interest in the broader normative context, drawing on a wide range of empirical and theoretical material.⁷⁶

Macneil also takes further the realist insight that every transaction is embedded in complex relations, asserting that: "A surer and more rapid understanding of any transaction is achieved by contemporaneous examination of those relations than by focusing initial inquiry on the transaction itself".⁷⁷ Thus, before assessing the events resulting in a judgment in which the Ohio Supreme Court remedied a failed pricing mechanism by insisting on negotiations between the parties and otherwise appointment of a mediator, Speidel checks for key relational features of the overall relationship: extended duration, open terms, expectations of future cooperative behaviour and risk sharing, transaction-specific investments, and close personal relations between the parties.⁷⁸

The importance of empirical research for both descriptive and normative theory-building has also been growing among those interested in the economic analysis of law. The neoclassical approach initially propounded by Posner and others focused on issues raised by case law and legislation, making strong assumptions to deduce optimal rules from the guiding principle of efficiency, such as the notion that the "superior risk bearer" should be determined when setting rules on remoteness of damage or excuse following changed circumstances. A "second generation" of economic analysis has accepted more realistic assumptions and taken a more dynamic approach to the interaction between legal rules and behaviour, often drawing on game theory, even at the expense of more qualified conclusions.⁷⁹ Intriguingly, what might be termed a

⁷³ Speidel, above n 64, 827.

⁷⁴ Macneil, above n 72, 367.

⁷⁵ See for example Speidel, above n 64; R Speidel "Article 2 and Relational Sales Contracts" (1993) 26 *Loyola of Los Angeles L Rev* 789; R Speidel "Court-Imposed Price Adjustments Under Long-Term Supply Contracts" (1981) 76 *Nw U L Rev* 369, 370-381; P Brown and J Feinman "Economic Loss, Commercial Practices and Legal Process: *Spring Motors Distributors Inc v Ford Motor Co*" (1991) 22 *Rutgers LJ* 301.

⁷⁶ See for example I Macneil *The New Social Contract* (Yale UP, Yale, 1980); I Macneil "Bureaucracy, Liberalism, and Community – American Style" (1984-1985) 79 *Nw U L Rev* 900; D Campbell "Ian Macneil and the Relational Theory of Contract" in I Macneil *The Relational Theory of Contract: Selected Papers of Ian Macneil* (Sweet & Maxwell, London, forthcoming). Thanks to David Campbell for making available the manuscript for the latter.

⁷⁷ I Macneil "Relational Contract Theory: Challenges and Queries" (2000) 94 *Nw U L Rev* 877, 877. Compare for example Llewellyn, above n 69.

⁷⁸ Speidel, above n 64, 827-833, 834-37 (discussing *Oglebay Norton Co v Armco Inc* (1990) 556 *NE 2d* 515). Compare the stricter approach in English and perhaps especially New Zealand law described in D McLauchlan "Rethinking Agreements to Agree" (1998) 18 *NZULR* 77.

⁷⁹ Compare Hillman, above n 7, 225-236; M Trebilcock *The Limits of Freedom of Contract* (Harvard UP, Cambridge Mass, 1993); G Hadfield and M Richardson (eds) *The Second Wave of Law and Economics* (Federation Press, Leichhardt NSW, 1999); R Korobkin and T Ulen "Law and the Behavioural

“third generation” has engaged in detailed empirical studies of contract law rules in action.

Lisa Bernstein, for instance, begins with a hypothesis (derived from game theory in economics) that although contracting parties may behave flexibly in seeking to preserve a relationship, they would expect written “end-game norms” to be applied by an adjudicator if the relationship broke down. Rather than leaving the argument at that, as earlier economic analysts had tended to do, she examines the practices of arbitrators in the US grain and feed industry, arguing that they do indeed adopt a strict approach and that courts should also act accordingly.⁸⁰ In more recent research into this and other industries, Bernstein argues that debates and ultimate failures to codify customs and practices show that they do not exist in a manner which can be readily subsumed into legislation or court judgments.⁸¹ Rather similarly, Eric Posner also has set out various reasons why commercial customs will tend to be inefficient, and then has drawn directly and indirectly on empirical research to support his conclusions.⁸² Other hypotheses about formal requirements under the Statute of Frauds, derived from game theory and more realistic assumptions about the costs and benefits of contract planning, have been confirmed by patterns in reported judgments. From an admittedly small sample, Jason Johnston shows that US courts recognise informality in established relationships, finding exceptions to the statutory requirements, but not in “stranger” relationships.⁸³ Finally, although driven by more general – perhaps too unfocused – concerns, Daniel Keating’s recent interview research into practices and expectations regarding the “battle of forms” addresses a suggestion by two proponents of “second generation” economic analysis that the UCC should abandon its innovative compromise solution and return to a strict (Anglo-New Zealand) “mirror image” rule.⁸⁴ All these recent studies can be

Sciences: Removing the Rationality Assumption from Law and Economics” (2000) 88 Calif L Rev 1051. The “transaction cost economics” of Oliver Williamson is of earlier and arguably separate vintage, although Posner (above n 56, 433-440) is keen to draw this within his neoclassical paradigm.

⁸⁰ L Bernstein “Merchant Law in a Merchant Court: Rethinking the Code’s Search for Immanent Business Norms” (1996) 144 U Pa L Rev 1765. Compare her earlier theoretical work in “Social Norms and Default Rules Analysis” (1993) 3 S Calif Interdisc LJ 59; and Speidel, above n 64.

⁸¹ L Bernstein “The Questionable Empirical Basis of Article 2’s Incorporation Strategy: A Preliminary Study” (1999) 66 U Chi L Rev 710.

⁸² Compare E Posner “Law, Economics, and Inefficient Norms” (1996) 144 U Pa L Rev 1687; with E Posner *Law and Social Norms* (Harvard UP, Cambridge Mass, 2000). Eric Posner is the son of Richard Posner, an apt symbol of the changing generations within law and economics.

⁸³ J Johnston “The Statute of Frauds and Business Norms: A Testable Game-Theoretic Model” (1996) 144 U Pa L Rev 1859.

⁸⁴ Compare D Baird and R Weisberg “Rules, Standards, and the Battle of the Forms: A Reassessment of 2-207” (1982) 68 Va L Rev 1217 with D Keating “Exploring the Battle of Forms in Action” (2000) 98 Mich L Rev 2678, 2706:

Professors Baird and Weisberg argue that because at least some parties will read the forms, the mirror-image rule encourages parties to draft provisions that advance the mutual interests of buyer and seller. If a party persists in writing one-sided terms on its form, it will risk losing business since the other side is more likely to read a form that it knows it might be bound by. The two authors stress that effectively it only takes a minority of parties reading their forms to encourage the form drafters not to be unfairly one-sided. The problem with a regime like section 2-207, in which UCC gap-fillers are more likely to control, is that parties have less of an incentive to read forms since the terms on those forms probably won’t bind them anyway. Drafting parties, in turn, will have less reason to draft forms with any thought of the other side’s interests in mind.

The Baird-Weisberg model is premised on two key factual assumptions about the behavior of

criticised on grounds of methodology, interpretation of data, and normative implications.⁸⁵ However, these criticisms in turn raise new empirical issues, further reinforcing the importance of substantive reasoning in contract law theory development in the US over recent decades.

This longstanding and seemingly growing tradition of empiricism needs to be appreciated when considering the debate about whether there is a “new formalism in contract” in the US. David Charny points out that Bernstein’s studies challenge the “modernist” anti-formal approach of Llewellyn and other realists, who had rejected classical theorists’ aspirations “to deduce the vast edifice of contractual rules from an essentialist understanding of promise and consent”, in favour of scepticism about abstraction and “guidance from the concrete, everyday perceptions and understandings of the transactors”.⁸⁶

We are now in the midst of a third phase, a phase of “anti-antiformalism” that seeks to discredit and displace Llewellyn’s claim to found commercial law in immanent commercial practice.

While the implications of research in this phase, at least so far, tend to favour more formal legal rules and institutions, the *process* and considerations involved – a highly contextual approach incorporating empirical research and insights from socio-legal theory – remains consonant with the substantive approach which has pervaded US contract law theory since the days of the early realists.⁸⁷

A similar point can be made about the ongoing debate on reforming the UCC, notably article 2 on Sales. Gregory Maggs claims that the guiding principles in its original drafting and promulgation, which arguably promote more substantive reasoning in US commercial law overall, have been undermined by successive amendments to various other Articles over recent decades. He also suggests that debate on reforming article 2 points towards a reinjection of formal reasoning. However, he concedes that the outcome is not clear regarding whether or how to incorporate contract practices.⁸⁸ Arguably, this follows from the controversies engendered by new empirical and theoretical research. These should also impact on other issues such as the role of formal requirements (impacting on content formality in contract law reasoning), and whether to prefer rules over standards (affecting interpretive formality).⁸⁹ Further, at least until the

parties in battle-of-the-forms scenarios: 1) That at least some parties will read the other side’s forms closely; and 2) That parties will change terms on their forms if less than a majority of those receiving the forms object to those terms. The interviews that I conducted suggest that the two authors are probably right on both counts; nevertheless, their general proposal was not especially popular with the subjects whom I asked.

⁸⁵ See for example D Snyder “Language and Formalities in Commercial Contracts: A Defense of Custom and Conduct” (2001) 54 SMU L Rev 617; D Charny “The New Formalism in Contract” (1999) 66 U Chi L Rev 842; E Posner “Norms, Formalities, and the Statute of Frauds: A Comment” (1996) 144 U Pa L Rev 1971; A Katz “On the Use of Practitioner Surveys in Commercial Law Research: Comments on Daniel Keating’s ‘Exploring the Battle of Forms in Action’” (2000) 98 Mich L Rev 2760; Macaulay, above n 65, 634 n 30 (“Social science results, including law and economics, are always suggestive at best. The game cannot be to produce the equivalent of the formula for water”).

⁸⁶ Charny, above n 85, 842.

⁸⁷ See also for example W Woodward “Neoformalism in a Real World of Forms” [2001] Wisc L Rev 971.

⁸⁸ Maggs, above n 27.

⁸⁹ Above n 31. Compare for example Johnston, above n 83; Charny, above n 85.

suspension of reform discussions in 1999, the debate about appropriate rules for a revised article 2 had also drawn on evidence of contemporary trade practices reflected in new international instruments, often adopting broad standards and consequently favouring less formal reasoning.⁹⁰

Empirical research also plays a significant part in a related debate which also emerged over the 1990s. Focusing on reported judgments, Ralph Mooney contended in 1995 that since the early 1980s – consistently with the conservative turn in US politics – there has been a striking return to “conceptualist” or formal reasoning by US judges, related to a revival in “freedom of contract” ideology favouring economically stronger parties.⁹¹ However, both views have been strongly contested by a prolific commentator and theorist, Richard Hillman:⁹²

I am unconvinced that 1990s' contract law has increasingly favored “economically privileged parties”. The claim appears to be based in part on a “trend” in recent decisions to favor “sellers, banks, insurers, and employers” over “buyers, borrowers, policyholders, and employees”. The problem is that, in the cases identified to support the claim or as an abstract matter, the former parties are not always “privileged” and the latter parties are not always “underdogs”. ... In addition, many contracts cases in the 1990s protect true underdogs, so it is difficult to establish any “trend”.

Similarly, recent contract cases do not appear to exemplify a genuine paradigm shift away from flexibility and egalitarianism toward “the abstract conceptualism of classical contract law”. It is true that some recent cases have, for example, applied the “indefiniteness” doctrine to dismiss claims and the parol evidence rule to bar the admissibility of evidence to interpret terms, while others balked at enforcing agreements-to-agree. This “trend” allegedly evidences a “resurrection” of formal rules that prevent enforcement of the true agreement between the parties. These rules have always existed in courts' arsenals, however, and I doubt that their recent use constitutes a major change in the direction of contract law. Moreover, many recent cases appear to buck this “trend”. I am more comfortable with the proposition that recent reported decisions demonstrate an incremental enhancement of rules that favor the enforcement of written contracts over alleged oral, less formal representations or agreements. My own study of promissory estoppel cases in the mid-1990s illustrates the dramatic lack of success of the promissory estoppel theory which, in part, stems from a preference for the enforcement of written contracts.

The last-mentioned study – which demonstrated a still central role for detrimental reliance, rather than promise as alleged by traditional theorists such as Daniel Farber and John Matheson, despite the overall lack of success in promissory estoppel claims⁹³ – is one example of the focused empirical and theoretical work which will need to be done to decide the issue raised by Mooney. As Hillman comments, moreover, the debate will need to be linked to theories of whether and why judges respond to shifts in public opinion. He argues that this is plausible, but suggests other possible theories: the power of the rhetoric of a particular judge (such as Richard Posner), or a “case-selection effect” resulting from plaintiffs (encouraged for instance by earlier tendencies for judges

⁹⁰ See for example L Rusch “The Relevance of Evolving Domestic and International Law on Contracts in the Classroom: Assumptions About Assent” (1998) 72 Tul L Rev 2043, 2062-2066.

⁹¹ R Mooney “The New Conceptualism in Contract Law” (1995) 74 Or L Rev 1131, 1133-1134.

⁹² R Hillman “The ‘New Conservatism’ in Contract Law and the Process of Legal Change” (1999) 50 Boston College L Rev 879, 880-881 (citations omitted).

⁹³ Compare R Hillman “Questioning the ‘New Consensus’ on Promissory Estoppel: An Empirical and Theoretical Study” (1998) 98 Colum L Rev 580 with D Farber and J Matheson “Beyond Promissory Estoppel: Contract Law and the ‘Invisible Handshake’” (1985) 52 U Chi L Rev 903.

to find obligations outside of written contracts) to bring increasingly weak cases.⁹⁴ Responding to the latter point in particular, Keith Hylton argues that judicial attitudes are unimportant compared to whether plaintiffs in civil disputes tend to have more or less information about relevant legal standards than defendants.⁹⁵ To a greater or lesser degree, all these issues are amenable to empirical inquiry. That will no doubt be undertaken, advancing the vision of Llewellyn and other realists,⁹⁶ and thus further promoting substantive reasoning in US contract law theory generally.

Finally, another important political backdrop to these recent discussions should also be noted. Confidence in the judiciary was a factor linking Llewellyn's variant of legal realism, reflected in the UCC, the "conflicting considerations" methodology through to the 1960s, and the neoclassical synthesis carried over to the *Restatement (Second) of Contracts*. Since the 1970s, this confidence has been shaken due to changes in the political arena and new schools of general legal theory, such as CLS. This, in turn, frames current debates about reformulating contract law. In particular, the process of promulgating new *Restatements* through the American Law Institute has become extremely contentious, and overtly political as the Institute has attempted to boost its legitimacy and transparency by encouraging interest group participation.⁹⁷ Similar tensions emerged in the attempts to reform article 2, contributing to the suspension of formal discussions in 1999. The tensions have also led to scholarly attempts to revisit the process leading to enactment of the original UCC, uncovering similar political controversy (not well-publicised at the time), with a view to deriving some guidance on how to ride out the present storm.⁹⁸

In sum, contract law theory development in the US has blossomed since the early 1970s, perhaps linked to a resurgence of contract litigation,⁹⁹ but drawing on stimulating developments dating back almost a century. The impact of legal realism has been pervasive in advancing substantive over formal reasoning. Despite attempts by Fuller and others to avert extremes of substantive reasoning, such reasoning has also been promoted by the political and ideological debate which intensified from around 1970, and a tradition of empirical inquiry which has steadily gained momentum from around the same time. Further, at key junctures, important theorists have borrowed from developments in legal and contract theory overseas, including Germany. These features, along perhaps with the resurgence of contract law litigation after a lull through to around 1960, provide an essential backdrop to the comparison of particular contract law

⁹⁴ Hillman, above n 7, 885; 885 n 29, citing R Hillman "'Instinct with an Obligation' and the 'Normative Ambiguity of Rhetorical Power'" (1995) 56 Ohio St J LJ 775.

⁹⁵ K Hylton "A Note on Trend-Spotting in the Case Law" (1999) 40 Boston College L Rev 891. If plaintiffs have less information, as in many product liability cases, they will tend to lose significantly less than half of cases. See also K Hylton "Asymmetric Information and the Selection of Disputes for Litigation" (1993) 22 J Leg Stud 187.

⁹⁶ Compare White, above n 88; E Warren "Comments on Professor White's Paper" [1988] Ann Survey Am L 49, 52-54 (complaining about the lack of empirical research into contract, at that stage).

⁹⁷ R Hyland "Perspectives on Private Law Codification in America in the 21st Century" (Paper presented at the Civil Code Centennial Conference, "Legislation in the 21st Century and Private Law", Tokyo, 12 November).

⁹⁸ See for example Kamp, above n 27.

⁹⁹ Galanter, above n 43. See also L Kenworthy, S Macaulay and J Rogers "'The More Things Change ...': Business Litigation and Governance in the American Automobile Industry" (1996) L & Soc Inq 631, 642-643.

topics later in Part Two of this thesis.

II From the First to the Second “Legal Interpretation Debate” in Japan

The foregoing detailed overview of contract law theory development in the US, and its relationship to patterns of substantive reasoning, permits a more succinct analysis of largely convergent developments in Japan. These too have deep roots, with a substantive approach characterising private law methodology following a move away from doctrinal scholarship since the 1920s. The shift drew heavily on developments in Germany and the US, especially legal realism.¹⁰⁰ A regular refrain has been the need to undertake sociological analysis to interpret private law doctrine, and an awareness of broader philosophical issues. Perhaps even more than in the US, politics and ideology have also figured prominently, especially during the “first legal interpretation debate” in the early 1950s (as the US encouraged Japan to adopt right-wing policies) and over the 1960s (as Marxists fought back in the legal arena). However, these methodological debates were often not directed specifically at contract law, and indeed laid the foundation for doctrinal reconstruction focusing primarily on tort law (especially new problems in environmental pollution, product liability and the like) over the 1970s and 1980s. By contrast, intense discussions centering on contract law theory emerged around 1990. Drawing especially on newer developments in US and German legal theory, these have generated a new wave of empirical research. However, several scholars associated with this debate turned their attention to doctrinal and law reform issues over the 1990s, as did many other academics who support a strong doctrinal tradition in Japanese contract law scholarship. Such counter-tendencies have been reinforced by a “second legal interpretation debate”, which also emerged around 1990 following attempts to reassert the importance of formal reasoning in private law more generally. They may also explain and reinforce a strong tendency to reform legal education by adding post-graduate “law schools” to the current under-graduate programmes. Supposedly drawing on US models, yet contrary to the pattern at least in the top law schools in that country, these proposals have been driven by a narrow vision of “legal practice” and concomitant attention to improving approaches to black-letter law analysis.

Following enactment of the Civil Code at the end of the 19th century, Japanese jurists turned increasingly to German doctrinal scholarship to flesh out Code provisions.¹⁰¹ Because the Code had drawn in places on French and other law (even some rules of English law), as well as the German Civil Code and its earlier drafts, this resulted in serious contradictions and a sense that such legal scholarship was increasingly irrelevant. New social problems were also increasingly brought before the courts, which started to accumulate precedents and to address social realities, such as the growing usage of standard form contracts. Over the 1920s and early 1930s, sharp criticisms were directed against “conceptual jurisprudence”. Eiichi Makino drew on the

¹⁰⁰ See generally K Yoshida “*Riarizumu Hogaku to Rieki Koryoron ni kansuru ‘Kisoriron’ teki Kosatsu* [Observations from ‘Fundamental Theory’ on Legal Realism and Balancing of Interests Theory]” in N Segawa *Shihogaku no Saikochiku [Reconstructing Private Law Theory]* (Hokkaido Daigaku Tosho Kankokai, Sapporo, 1999) 81, 101-113.

¹⁰¹ See generally Z Kitagawa *Rezeption und Fortildung des Europäischen Zivilrechts in Japan [Reception and Development of European Civil Law in Japan]* (Alfred Metzner Verlag, Frankfurt, 1970).

new “free law” movement in Germany to urge judges and commentators to decide private law issues based on “concrete appropriateness”, invoking broad standards such as abuse of rights, public order and good morals, and the principle of good faith (not yet incorporated in the Civil Code). Following the terrible destruction resulting from the Great Kanto Earthquake of 1923, for example, Makino argued that lessors had a duty to renegotiate with lessees who had erected new dwellings, without clear legal entitlements, based simply on their “survival rights”.¹⁰²

Another professor at Tokyo University, Izutaro Suehiro, reacted against the potential “dictatorship by judges” afforded by Makino’s free law theory. Developing insights of US pragmatists and legal realists, including Jerome Frank, Suehiro saw part of the answer in the evolution of case law and the nature of judicial reasoning. He was deeply impressed by the “case method” approach he witnessed in action at the University of Chicago in 1917, and later founded in Japan a still vibrant tradition of study groups centred on case law analysis. Suehiro valued such analysis for moving away from the mainstream German methodology of deducing legal principles and applying them to specific situations. Instead, case law analysis’ focus on facts was acclaimed as leading into a consideration of substantive reasons (such as consequences of deciding one way or another), capable of generating the articulation of more principled general standards. In addition, Suehiro met Eugen Ehrlich in France and Switzerland over 1918 and 1919, and later showed great interest in exploring Japan’s “living law” with a view to reforming Japan’s judge-made and statutory law.¹⁰³ This interest was shared by a younger Marxist colleague, Yoshitaro Hirano. He drew on studies of Japanese village practices to suggest parallels with “Germanic legal institutions”, opposing these communitarian tendencies to the “classical Roman law” allegedly reflected in the Civil Code.¹⁰⁴

A fourth professor active at Tokyo University over the 1920s, Hideo Hatoyama, largely renounced his work in a narrow German doctrinal style. Following a twenty-month leave of absence spent at the Japanese Legation in Berlin, in 1924 he published a comprehensive analysis of the various manifestations of the good faith principle in the law of obligations. Hatoyama perceived this principle as the leading social and ethical *leitmotiv* running through the law, but hemmed in by legislative provisions. He urged an analysis of its contents through the study of Japanese cultural norms, “living law”, and “social jurisprudence”.¹⁰⁵ Nonetheless, his monumental study itself focused on manifestations and tensions with the good faith principle found within legal doctrine and black letter law in Japan and Germany.

These influences, and the work of Roscoe Pound, led to a synthesis by Sakae Wagatsuma, successor to Hatoyama at Tokyo University from 1927 to 1957, and the undisputed doyen of civil law scholarship in Japan over most of the 20th century. As Rahn explains, Wagatsuma advocated the following approach, focusing especially on court judgments:¹⁰⁶

¹⁰² G Rahn *Rechtsdenken und Rechtsauffassung in Japan [Legal Thought and Conceptions of Law in Japan]* (CH Beck, Munich, 1990) 142.

¹⁰³ Rahn, above n 102, 143-147.

¹⁰⁴ Rahn, above n 102, 151.

¹⁰⁵ Rahn, above n 102, 149.

¹⁰⁶ Rahn, above n 102, 153.

To determine a measure for concrete value judgments for grounding a decision, it must first be clarified in what form and with what ideals private law *should* lead the regulation in some form of the relationships of life. Secondly, the changes in regulated relationships need to be determined based on connections to multiple social factors. And thirdly, the judgements for regulating individual cases based on ideal measures must be construed in the light of applicable law.

Unsurprisingly, against this backdrop going back to the 1920s, an even greater move towards substantive reasoning occurred during and after the “legal interpretation debate” in the early 1950s. The debate began with an emotional appeal by Saburo Kurusu, for jurists (scholars as well as judges) to be honest about what they were doing. He urged jurists to abandon the pretence of deciding legal issues based on “objectivity” and “one right answer”. Appealing to Austrian legal philosopher Hans Kelsen, Kurusu argued that the law provided a broad “framework” of possible answers. Selecting one, followed by “rationalisation” in terms of black letter law and doctrine, involved a subjective judgment. For this, in political cases, the interpreter had to take political responsibility.¹⁰⁷

These views, which generated extensive debate beyond the field of private law, were made in response to the change in political and legal climate in the early 1950s, especially the shift towards right-wing conservatism, away from the legal and socio-economic regime founded on left-liberal principles by key members of the US-led Occupation forces. Of particular concern was the willingness of politicians and the courts to disregard the plain meaning of article 9 of the new Constitution, prohibiting Japan’s right to wage war, and thus allow Japan to rebuild its armed forces. In the view of Kurusu and an increasing number of legal commentators at this time, appeals to formal reasoning were patently inadequate. By openly recognising the ideological dimensions of legal interpretation, Kurusu also suggested that “certainty” would be advanced, compared to decision-making advancing formal reasoning but hiding substantive considerations. Further certainty, and guidance in reaching value judgments, could be promoted by deriving legal norms through a sociological analysis of real social relationships.

These views were restated in even more influential form by Takeyoshi Kawashima, Kurusu’s colleague at Tokyo University after World War II. He advocated “law as a science”, empirically investigating systems of values (including their contents, relationships to each other, and interests supporting them). These investigations were to be relating to sociological analysis of underlying social relationships, to provide more guidance in making value judgments, which then were to be rationalised through “written techniques” in terms of black letter law and doctrine.¹⁰⁸ Inspired by the work of Ehrlich, Kawashima later promoted “practical jurisprudence” centred on empirical research. He drew on his earlier detailed studies of Japanese family and village life, was actively involved in establishing the Japanese Association of Sociology of Law in 1947, and went on to demonstrate a keen interest in law (especially contract law) in action.¹⁰⁹

¹⁰⁷ Rahn, above n 102, 203-215.

¹⁰⁸ Rahn, above n 102, 216-239.

¹⁰⁹ See for example T Kawashima (C Stevens trans) “The Legal Consciousness of Contract in Japan” (1974) 7 L in Japan 1. The noted deviations in practice from the provisions and ideals of the formal legal system have often been taken by non-Japanese commentators as proof that contract law is largely irrelevant in Japan. This is particularly ironic on the part of commentators from the US, since the work of Kawashima and his predecessors draws heavily on the tradition of US legal realism, which has

Compared to Kurusu, and even Suehiro (from whom he inherited a copy of Jerome Frank's *Law of the Modern Mind*), Kawashima also appears to have been driven by more cynicism about judges and case law development.

Another colleague, Ichiro Kato, drew on US legal realism as well, to suggest beginning with a focus on value judgments, only then turning to justification in terms of black letter law. However, while agreeing that an inter-disciplinary approach was called for by his "balancing of interests theory" of interpretation, Kato (later a Supreme Court Justice) preferred a freer evaluation and reposed greater confidence in judges' ability to reach "appropriate" value judgments and decisions.¹¹⁰ This broad-brush "multi-factor balancing" method, combined with largely pragmatic attempts to group fact situations and reported cases, became a widely used methodology from the 1960s.¹¹¹

By contrast, the Marxist "modern law" school, developed by Yozo Watanabe and Toshio Hironaka from the 1960s (an era giving primacy to rapid economic development), remained highly sceptical about judges. They advocated a highly normative vision of where civil and contract law should be heading, for instance in regulating standard form contracts, going much further than Kawashima in drawing (based primarily on Marxist theory) on universal rules of evolutionary progress.¹¹² Finally, from the mid-1960s at Tokyo University, Eiichi Hoshino also urged greater attention to normative structures in private law interpretation. However, his approach was more philosophical, reflecting interests in natural law and Catholic theology. Unlike the "modern law" school, moreover, Hoshino retained more interest in contract and tort law in action.¹¹³

These vigorous methodological debates, building on developments in private law theory dating back to the 1920s and maintaining a keen awareness in thinking overseas (especially the US and Germany), further entrenched substantive reasoning in Japan. The approach is reflected in articles on civil and contract law published from the 1950s, although textbooks have tended to remain more doctrinal.¹¹⁴ Although the methodological innovations revolved around figures at Tokyo University, the latter's pre-eminent role in Japan's legal education structure (and, indeed, its political order) ensured the consolidation of more substantive reasoning among private law theorists throughout the country. By tying the debate closely to theories about how to decide cases brought before the courts, it probably had a significant influence on judicial thinking, although this is difficult to substantiate since methodological approaches are rarely set out by judges in judgments and even in law journal literature.

However, the tradition of doctrinal private law scholarship remained strong, partly driven by the need for professors (and practitioners) to retain a conceptual understanding of how the Civil Code fits together. Doctrinal scholarship remained particularly strong at Kyoto University, Tokyo University's main rival, except in the writings of Zentaro Kitagawa, who combined a deep knowledge of German civil law

consistently made similar observations in the US. Compare above Part I.

¹¹⁰ Rahn, above n 102, 248-264; I Kato (C Stevens trans) "Logic and the Balancing of Interests in Legal Interpretation" (1968) 2 L in Japan 80.

¹¹¹ Kato, above n 110, 99; Yoshida, above n 100, 114-115.

¹¹² Rahn, above n 102, 265-277.

¹¹³ Rahn, above n 102, 277-297.

¹¹⁴ Compare for example T Uchida *Minpo I: Sosoku - Bukken Soron [Civil Code I: General Part & General Part on Real Property]* (U Tokyo Press, Tokyo, 1994).

theory with early exposure to US contract law, and maintained a strong interest in the interrelationship between law and changing business or social practices.¹¹⁵ Further, perhaps reflecting the greater overall preponderance of tort litigation, and certainly as a result of environmental pollution and product liability becoming increasingly pressing social problems from the late 1960s, the focus was less on contract law theory development. The practical need to address such social problems also contributed to a slowdown in theoretical debate over the 1970s and 1980s.

Nonetheless, firm foundations had been erected for further developments.¹¹⁶ A pathbreaking event was the publication in 1990 of a book proclaiming the "Resurrection of Contract", written by Takeshi Uchida.¹¹⁷ Like his mentor, Hoshino, he was interested in uncovering a new normative structure to guide the law. Like Hoshino, and other Tokyo University theorists such as Kato, Uchida showed much faith in judge-made law. He suggested that "preserving relationships" and "flexibility" were the main principles underlying a burgeoning number of cases since the 1960s which had applied the doctrine of good faith (added to the Code in 1947). Openly advocating communitarianism in doing so, he drew on Macneil's "relational contract law theory", but initially – also inspired by Ronald Dworkin – eschewing broader sociological inquiry.¹¹⁸ Now secure in a Chair at Tokyo University, however, since the mid-1990s Uchida has embarked on thought-provoking collaborative empirical studies into contract law and practice in Japan and the US.¹¹⁹

In parallel from around 1990, Kitagawa's student Kenji Yamamoto drew on a very different tradition – primarily the "new liberal" philosophy and social theory of Habermas in Germany – to advocate a reorientation of contract law away from a narrow focus on the parties' initial agreement, and indeed to propose a duty to renegotiate in certain circumstances.¹²⁰ He too has since been involved in a collaborative research

¹¹⁵ Compare Rahn, above n 102, 242-243, 246, 290, 296, 302; with for example Z Kitagawa "Unfair Contract Terms and Administrative Guidance" (1985) 16 *Rechtstheorie* 181.

¹¹⁶ Compare generally A Wang "Nihon Keiyakuho no Genjo to Kadai: Shiteki Jichi no Gensoku o Chushin ni [Topics and the Current Circumstances in Japanese Contract Law: Focusing on the Private Autonomy Principle]" (1995) 42 *Osaka Ichidai* 191; S Tanaka "Ho Shisutemu no Sogo Shutaiteki Dodoka o Mezashite [Aiming at Rendering the Legal System More Flexible through Intersubjectivity]" (1997) 200 *Hogaku Kyoshitsu* 6, 9-11.

¹¹⁷ T Uchida *Keiyaku no Saisei [The Rebirth of Contract]* (Kobundo, Tokyo, 1990). See also T Uchida "Gendai Keiyaku Ho no Aratana Tenkai to Ippanjoko [General Clauses and New Developments in Contemporary Contract Law]" (1993) 514 *NBL* 6; T Uchida "The New Development of Contract Law and General Clauses - A Japanese Perspective -" in ICCLP (ed) *Japanese and Dutch Laws Compared* (ICCLP, Tokyo, 1993) 119; T Uchida "Keiyaku Purosesu to Ho [Contract Process and Law]" in IwanamiKozza (ed) *Shakaikagaku no Hoko VI - Shakai Hendo no Naka no Ho [Directions in Social Sciences (6): Law Amidst Social Change]* (Iwanami, Tokyo, 1993) 129.

¹¹⁸ See generally L Nottage "Contract Law, Theory and Practice in Japan" in V Taylor (ed) *Asian Laws Through Australian Eyes* (Law Book Company, Sydney, 1997) 316.

¹¹⁹ See for example T Uchida *Keiyaku no Jidai: Nihon Shakai to Keiyakuho [The Contract Era: Japanese Society and Law]* (Iwanami Shoten, Tokyo, 2000) 280-304.

¹²⁰ A pioneering work was K Yamamoto "Keiyaku Kosho Kankei no Hoteki Kochiku ni tsuite no Ichi Kosatsu [A Perspective on the Legal Structure of Contract Negotiation Relationships]" (1989) 100 *Minsho Zasshi*. Compare also K Yamamoto "Saikoshō Gimuron ni Tsuite [On the Duty to Renegotiate] (Part One)" (1996) 63/1 *Hosei Kenkyū* 1. See also generally K Yamamoto Yamamoto "Aleatory View of Contract and Critical Contract Theory" (1995) 2 *Proceedings of the 1995 Annual Meeting of the RSCL (International Sociological Association)*, Tokyo, 1-4 August 1995, Meetings Supplement 143; K Yamamoto "Glocalisation, Contract and Community: Reflections on Contemporary Contract Law

project directed from Kyoto University, which straddled philosophy, sociology, and legal doctrine.¹²¹ A related project co-directed by Masanobu Kato has involved surveys of law and business students in Japan and over 20 other countries, gauging reactions to a hypothetical long-term contract renegotiation scenario, based on the "Japan-Australia Sugar Case" in the early 1970s.¹²² In addition, Hiroo Sono has recently introduced to a broad audience in Japan the US debate – based on new empirical research – on the proper relationship between commercial practices and expectations, and legislative or judge-made law.¹²³

Over the 1990s, moreover, civil law scholars such as Keizo Yamamoto (at Kyoto University) have sought to re-establish more mainstream liberal philosophical and constitutional foundations for contemporary contract law theory.¹²⁴ Such attempts have more ambivalent implications for the further expansion of substantive reasoning in Japanese law. Although they may encourage the elaboration of competing philosophical perspectives and proposals for broad new contract law principles, like those advanced by Uchida or Kenji Yamamoto, they may also result in a return to a more circumscribed neoclassical synthesis.¹²⁵ More supportive of the latter is a growing tendency to focus on connections between existing legal norms and concepts, rather than displacing these by focusing on value judgments as advocated over the 1960s and 1970s. These newer attempts have involved: (i) deriving new legal norms from existing ones, by extending the methodology of grouping new sets of cases together (following a suggestion advanced by Kato); (ii) creating horizontal links between different norms and concepts (for instance, to reformulate legal obligations involving services); and (iii) attempts to develop new conceptual structures encompassing the whole of the civil law (notably by Kitagawa). In addition, more direct critiques of broader forms of "balancing of interests" methodology have been developed by Toshio Hirai (also at Tokyo University) from the late 1980s and early 1990s. The thrust of his arguments has been that too much scope had been opened to "macro-level justification" based on substantive reasoning, but centred on subjective assessments; and that good legal reasoning required following different tenets such as sound deductive reasoning ("micro-level justification"), falsifiability, consistency with the terminology of the legal community, and the eschewal of consequentialist (as opposed to normative) reasoning. Various responses to Hirai, and wider discussions about methodology primarily in private law, have engendered Japan's "second legal interpretation debate".¹²⁶

Discourses" (Paper presented at the conference on "Legal Crisis? Japan and Asia", Melbourne, 12-14 August 1999). Compare below Chapter Five Part II.B.

¹²¹ Compare T Tanase (ed) *Keiyaku Hori to Keiyaku Kanko [Contract Law and Contract Practices]* (Kobundo, Tokyo, 1999). Yamamoto, who was on research leave at Harvard for much of the time this project was underway, does not add his own contribution. However, he was involved in studying the franchise dispute discussed by his post-modernist colleague, Yoshitaka Wada, in the volume.

¹²² See L Nottage "Economic Dislocation in New Zealand and Japan: A Preliminary Empirical Study" (1997) 26 VUWLR 59; and below Chapter Three Parts III.B and III.C.

¹²³ H Sono "*Shokanshuho to Nin'i Hoki [Commercial Customary Law and Default Rules]*" (1999) 1155 *Juristo* 85.

¹²⁴ See for example K Yamamoto "*Gendai Shakai ni okeru Riberarizumu to Shiteki Jichi [Private Autonomy and Liberalism in Contemporary Society]*" (1993) 133/4 *Hogaku Ronso* 1.

¹²⁵ For example, that developed in the US by Fuller, Fried, Barnett, and (albeit with few distinctive philosophical underpinnings) Farnsworth (above Part I); and likely to result from Bigwood's recent theory in New Zealand (below Part IV.E).

¹²⁶ See N Segawa in "*Minpo Kaishakuron no Konnichiteki Iso [Contemporary Tendencies in Civil*

The outcome may be to move Japanese civil law theory significantly towards a more formal reasoning based approach. This would link up with a longstanding doctrinal tradition.¹²⁷ The move is also likely to be supported by the need for Japanese scholars and policy-makers to address a series of practical contract law issues related to deregulation and recession in Japan over the 1990s.¹²⁸ A related tendency may be the prominence given, in establishing post-graduate "law schools", to promoting better understanding of black-letter law for a narrow band of "practitioners".¹²⁹ Yet the law schools have yet to get underway, and the "second legal interpretation debate" is ongoing.¹³⁰ The latter must also be located firmly in the context of the consistent pressures towards more substantive reasoning generated and largely maintained since the 1920s, including strong political and ideological overtones, interests in sociological and empirical research, and sensitivity to overseas developments. Overall, therefore, Japanese law contract law theory still appears strongly substantive in orientation, although perhaps less so than in the US.

III Indigenous and Received Influences in England

A first startling contrast between contract law theory development in England, compared to the US and (to a lesser extent) Japan, is its anti-theoretical nature. This stems from a lack of concern about what constituted a "contract" in the first place, because the case law developed around forms of action. As Ewan McKendrick points out, however:¹³¹

With the abolition of the forms of action by the Common Law Procedure Act 1852, the grip of procedural considerations over substantive law began to decline. At about the same time the practice of writing treatises on the law of contract began to increase and the authors of these texts sought to rationalise the existing mass of case law in principled terms, and in doing so they relied heavily on the works of continental jurists.

Pollock's work drew heavily on 19th century thinking in Germany and France, and continental "will theory" provided a general framework for Anson's influential textbooks first published in 1879.¹³² The impact of these works was heightened by publication in 1886 of Finch's casebook, inspired by their reformulations as well as

Law Interpretation Theory] in N Segawa *Shihogaku no Saikochiku [Reconstructing Private Law Theory]* (Hokkaido Daigaku Tosho Kankokai, Sapporo, 1999) 3, 13-25.

¹²⁷ Compare Sono, above n 9.

¹²⁸ See for example L Nottage "Top Ten Changes and Continuities in Japanese Law and Society - 1997" (1998) NZACL Yearbook 3: 1997 611.

¹²⁹ See generally N Kashiwagi "New Graduate Law Schools in Japan and Practical Legal Education" in T Ginsburg, L Nottage and H Sono (eds) *The Multiple Worlds of Japanese Law* (University of Victoria, Victoria 2001) 158.

¹³⁰ See for example T Hirai "*Uchida Takeshi Kyoju Cho 'Keiyakuhogaku no Saikochiku o meguru Oboegaki' o Yonde* [Reading Professor Takeshi Uchida's 'Thoughts on the Reconstruction of Contract Law']" (2000) 689 NBL 23.

¹³¹ E McKendrick "English Contract Law: A Rich Past, an Uncertain Future?" [1996] CLP 25, 27, citing A Simpson "Innovations in Nineteenth Century Contract Law" (1975) 91 LQR 247. The influence from the continent was also felt by some English judges around this time: see for example *Hadley v Baxendale* (1854) 9 Ex 341 (on remoteness of damages) and *Taylor v Caldwell* (1863) 3 B&S 826 (on supervening impossibility of performance).

¹³² McKendrick, above n 131, 27, 47-48; Burrows and others, above n 8, 11-12.

Langdell's case method developed in Harvard. Practitioner texts continued to disclaim interest in underlying theory, in favour of commentary on case law. The leading reference tool, first developed by Chitty, was only comprehensively reorganised by Morris in 1961.¹³³ The tradition of expository writing based on late 19th century reformulations was reinforced by publication of the first edition of Cheshire and Fifoot in 1945, their casebook published the year after, another traditional casebook published by Smith and Thomas in 1957, an update of Anson's textbook by Guest, and publication in 1962 of the first edition of a textbook by Guenter Treitel, whose family had immigrated Nazi Germany.¹³⁴ The prestige involved in writing treatises, systematically and succinctly deriving principles from case law to provide definite solutions to problems, remains a sharply distinctive feature of the legal world in England compared to that in the US.¹³⁵

McKendrick omits to mention a significant event over this post-War period: publication by Wolfgang Friedmann, another émigré, of a sharp critique of classical contract law. In 1951, Friedmann argued that contract's social functions – insuring against risks, and securing freedom of movement, individual will, and equality – could no longer be plausibly obtained by adhering to freedom of contract, in a world in which *laissez faire* had been displaced by contracts of adhesion, collective bargaining, expanding welfare provision, and socio-economic upheavals.¹³⁶ This theory presented intriguing parallels with German and US developments in contract law theory; but as David Campbell observes:¹³⁷

Despite the endorsement of Lord Denning [in a preface], Friedmann's work, though a tremendous personal success and generally accepted in 'the sociology of law', made little impression on contract law scholarship [in England]. The only work it appears to have provoked there was Atiyah's welfarist review of developments in contract on 'The Future of the Law of Contract' in the first two editions of his textbook [in 1961 and 1971].

Atiyah went on to publish in 1979 a revisionist history of *The Rise and Fall of Freedom of Contract*, detailing 19th century classical law's displacement of reliance and benefit based ascriptions of responsibility in favour of the primacy of consent and private autonomy, and positing a reversal of this trend in England over the 20th century. This monumental work was intended to pave the way for a thorough reconstruction of contract law theory.¹³⁸ This did not ensue, although Atiyah's later work served to

¹³³ McKendrick, above n 131, 48.

¹³⁴ McKendrick, above n 131, 49. Although carefully tailored to English jurists, Treitel's restatements appear to have been influenced by German legal theory, at least in certain areas. Compare for example G Treitel *Remedies for Breach of Contract: A Comparative Account* (Clarendon Press, Oxford, 1988); G Treitel *Unmöglichkeit Impracticability und Frustration im Anglo-Amerikanischen Recht* (Nomos, Baden-Baden, 1991). Even more so than Kessler (above n 38), however, Treitel's work stresses the normative force of law and especially its role in promoting certainty. See for example G Treitel *Doctrine and Discretion in the Law of Contract* (Clarendon Press, Oxford, 1981).

¹³⁵ A W B Simpson "Contract: The Twitching Corpse" (1981) 1 OJLS 265, 268-270.

¹³⁶ W Friedmann *Law and Social Change in Contemporary Britain* (Stevens & Son, London, 1951).

¹³⁷ D Campbell "Reflexivity and Welfarism in the Modern Law of Contract" (2000) 20 OJLS 477, 479 (footnotes omitted).

¹³⁸ P Atiyah *The Rise and Fall of Freedom of Contract* (Clarendon Press, Oxford, 1979); Simpson, above n 135, 272-277.

introduce the work of Fuller, and then Fried and the early Posner, to an English audience.¹³⁹

By contrast, the impact of CLS is readily apparent from the first edition of the textbook published in 1986 by Hugh Collins, following study at Harvard. Reviewing English, and indeed some US case law, he argued that contemporary contract law was thoroughly infused by welfarist values of paternalism, fairness and cooperation.¹⁴⁰ Also influential was his mentor in labour law, Sir Otto Kahn-Freund, another émigré who in 1949 translated from the German an influential study by Karl Renner on the socialisation of private law.¹⁴¹ Friedmann's work was also not lost on Collins. Further, it influenced Roger Brownsword's exposition in 1987 of the ideological tension between formalism versus and realist-inspired "market-individualism" and "consumer-welfarism", which developed into another popular student textbook.¹⁴² Collins work over the 1980s advanced stronger distributivist and Marxist arguments, however, adding a note of outright ideological dissensus and creating a parallel with polarisation of political, jurisprudential and contract law theory discourse noted in the US since the 1970s.¹⁴³

In parallel, there emerged a steady trickle of empirical studies into aspects of contract law in action, beginning with an analysis of practices and expectations among manufacturers in Bristol, carried out by Hugh Beale and Tony Dugdale over 1973-1974. Inspired by Macaulay's research, they found remarkably similar patterns: strong reluctance to plan many transactions through detailed and enforceable contract documents, and to refer to any such documents or contract law rules in the event of a disruption to contract performance (such as a delay) or other disputes.¹⁴⁴ Over 1974-1976, David Yates examined the usage of exemption clauses in 31 engineering, 8 insurance and 12 finance companies in Bristol and Manchester. He established that limitation and "procedural" clauses (such as arbitration clauses) were much more common than outright exclusion clauses, which were used mainly to prevent liability arising from narrow causes beyond suppliers' control, and were driven by a desire to avoid court proceedings, reduce liability for consequential loss, and to conform with common practice.¹⁴⁵ In 1982, Richard Lewis sharply criticised a Law Commission proposal to make "firm offers", showing that its concern for withdrawal of tender offers by a sub-contractor (after the main contractor had acted on them) was not generally a problem in the construction industry, according to his empirical research.¹⁴⁶ Other studies in England have included examinations of how commercial arbitration grew in

¹³⁹ See for example P Atiyah *Promises, Morals, and Law* (Clarendon Press, Oxford, 1981); *Essays on Contract* (Clarendon Press, Oxford, 1990).

¹⁴⁰ H Collins *The Law of Contract* (1 ed, Weidenfeld and Nicholson, London, 1986).

¹⁴¹ K Renner *The Institutions of Private Law and their Social Functions* (O Kahn-Freund trans, Routledge, London, 1949); Campbell, above n 137, 490 n 61.

¹⁴² R Brownsword "The Ideologies of Contract" (1987) 7 *Leg Stud* 207. See also the textbook by J Adams and R Brownsword *Understanding Contract Law* (1 ed, Fontana, London, 1987).

¹⁴³ See for example H Collins *Marxism and the Law* (Clarendon Press, Oxford, 1982). Compare Kennedy, above n 35.

¹⁴⁴ H Beale and T Dugdale "Contracts between Businessmen: Planning and the Use of Contractual Remedies" (1975) 2 *Brit J L & Soc* 45.

¹⁴⁵ D Yates *Exclusion Clauses in Contracts* (Sweet & Maxwell, London, 1978).

¹⁴⁶ R Lewis "Contracts Between Businessmen: Reform of the Law of Firm Offers and an Empirical Study of Tendering Practices in the Building Industry" (1982) 9 *J L & Soc'y* 153.

popularity as contract law theory and courts were reorganised from the 19th century;¹⁴⁷ how lawyers have struggled in vain to claim a more prominent position in construction contract disputes;¹⁴⁸ and patterns in contract litigation over 1975-1991.¹⁴⁹

More recently, a major empirical research bringing together lawyers and economists generated a rich collection of empirical data and conclusions.¹⁵⁰ One study suggests that (at least in comparison to German counterparts) English firms manufacturing mining equipment and kitchen furniture: (i) still not infrequently deal without written contracts, and perceive themselves not to have "binding contracts"; (ii) rely more on repeated individual contracts (but inchoate expectations of ongoing business) as opposed to detailed long-term contracts, not for instance including "hardship" clauses; and (c) are prepared to bring legal action for contract breach (correlated with more uncertain legal rules), but also demonstrate a significant attitude of "give-and-take".¹⁵¹ Another study based on twenty in-depth interviews of manufacturers concluded that while most firms dealt on the basis of written documentation *perceived* as legally enforceable (but not necessarily so):¹⁵²

Non-legal mechanisms exert a far more powerful discipline on the exchange arrangement than formal, legal mechanisms: "Fundamentally, it's a partnership. We have mutual interests: us to get the business; they recognise they've got a quality supplier who gives them a good deal. Trust and reputation are fundamental; you don't get to the starting block without them". Firms do not like to plan for failure in a written contract. Failure to deliver on time rarely occurs, but when it does it is dealt with by "giving them a sore ear down the phone", and many disputes are settled "over a beer at the pub", if necessary with a senior colleague who acts as an informal arbitrator. Ultimately, the effectiveness of non-legal mechanisms depends on the extent to which the firms have invested in building up personal relationships: successful exchange is not conducted by the autonomous, socially dislocated agents of neoclassical economic theory.

Such findings are consistent with those of Beale and Dugdale, highlighting a continuing

¹⁴⁷ R Ferguson "The Adjudication of Commercial Disputes and the Legal System in Modern England" (1980) 7 Brit J L & Soc 141.

¹⁴⁸ J Flood and A Caiger "Lawyers and Arbitration: The Juridification of Construction Disputes" (1993) 56 MLR 412.

¹⁴⁹ P Vincent-Jones "Contract Litigation in England and Wales 1975-1991: Transformation in Business Disputing?" (1993) 12 CJQ 337.

¹⁵⁰ S Deakin and J Michie (eds) *Contracts, Cooperation and Competition* (Oxford UP, Oxford, 1997). For more theoretical work, see also P Vincent-Jones "Contract and Business Transactions: A Socio-Legal Analysis" (1989) 16 J L & Soc'y 166; D Campbell and P Vincent-Jones *Contract and Economic Organisation: Socio-Legal Initiatives* (Dartmouth, Aldershot, 1996)..

¹⁵¹ Compare A Arrighetti, R Bachman and S Deakin "Contract Law, Social Norms, and Inter-firm Cooperation" (1997) 21 Cambridge J Econ 171, 181-189, 191; B Burchell and F Wilkinson "Trust, Business Relationships and the Contractual Environment" (1997) 21 Cambridge J Econ 217, 226-232. See also S Deakin, C Lane and F Wilkinson "Contract Law, Trust Relations, and Incentives for Co-Operation: A Comparative Study" in S Deakin and J Michie (eds) *Contracts, Cooperation and Competition* (Oxford UP, Oxford, 1997) 105.

¹⁵² B Lyons and J Mehta "Private Sector Business Contracts: The Text Between the Lines" in S Deakin and J Michie (eds) *Contracts, Cooperation and Competition* (Oxford UP, Oxford, 1997) 43, 58-59. But see M Maher "Transaction Cost Economics and Contractual Relations" (1997) 21 Cambridge J Econ 21 (suggesting that Oliver Williamson's governance theory, based on assumptions of opportunism and bounded rationality which may not be inconsistent with neoclassical economics in contemporary incarnations, helps explain most patterns of contract planning and dispute resolution mechanisms in six industry sectors).

gap between commercial practices and expectations, and comparatively strict legal rules regarding contract formation, terms, and relief from contractual obligations due to changed circumstances.¹⁵³ It seems likely that English law's strict approach is related to the preponderance of reported cases in the House of Lords dealing especially with charterparties, and to lesser extent carriage, insurance, sales of goods, construction and employment. As a small-scale empirical investigation by one commentator in Australia showed a decade ago, that country's contract law is based on a much higher preponderance of case law particularly regarding sales of land, possibly underpinning a more flexible approach at least in some areas of law.¹⁵⁴

The need for clear rules and certainty allegedly required in these transactional contexts may explain English law's continued reluctance to move sharply and consistently away from a classical model of contract law, for example by openly espousing a general duty of good faith.¹⁵⁵ However, others have questioned the empirical foundation of the claimed need for certainty. In 1991, promoting the notion of a good faith principle protecting "the reasonable expectations of honest men", Justice Steyn (now a Law Lord) pointed out that good faith was widely adopted in civil law jurisdictions; the law of the EEC (now the European Union or EU); and the United Nations Convention on Contracts for the International Sale of Goods (CISG), "for which the international market place is voting" by accession (unlike, still, England). He regarded "as unproven the assertion that the pragmatic approach of our law necessarily leads to greater certainty and predictability than the more general methods of the civil law".¹⁵⁶ McKendrick also criticises opposition to CISG based on the mere fact that English law is apparently still often selected in contracts which end up in the Commercial Court, pointing out that:¹⁵⁷

there is no empirical evidence one way or the other. It is probably safe to assume that businesses wish to avoid unnecessary upheaval and uncertainty in the law of contract, but are they really interested in the finer points of English contract law? The experience of the recent Arbitration Act 1996 suggests that they might not be. The thrust of this legislation is to give greater autonomy to the parties to arbitration and to free English arbitration law from some of its self-imposed limitations. One of these limitations was that English law did not recognise the validity of a clause giving the arbitrator the power to decide *ex aequo et bono* or to act as an *amiable compositeur*. The function of the arbitrator was to decide the case in accordance with the law and not simply according to any notions of equity and fairness.

More generally, this legislative intervention appears to have been driven by a belated awareness that London was losing its pre-eminent status as a venue for international commercial arbitration, in favour of the International Chamber of Commerce in Paris and venues in Switzerland since the 1960s, and the American

¹⁵³ See below especially Chapter Two Part II.A and Chapter Four Part II.B.

¹⁵⁴ M Ellinghaus "An Australian Contract Law?" (1989) 2 JCL 13, 20.

¹⁵⁵ See for example L Sealy "Ties that Bind: Security of Contract in England at the End of the 20th Century" (2000) 16 JCL 47. Compare below Chapter Four Part III.D.

¹⁵⁶ J Steyn "The Role of Good Faith and Fair Dealing in Contract Law: A Hair Shirt Philosophy?" (1991) Denning LJ 131, 135, 140. See also *First Energy (UK) Ltd v Hungarian International Bank Ltd* [1993] 2 Lloyd's Rep 194, 196 per Steyn J; J Steyn "Does Legal Formalism Hold Sway in England?" [1996] CLP 43, 45.

¹⁵⁷ McKendrick, above n 131, 59.

Arbitration Association since the 1980s.¹⁵⁸ The latter venues had also encouraged the evolution of a “new *lex mercatoria*”, applying broader standards of good faith and fair dealing, despite some indications of formalisation of arbitral procedures and perhaps substantive norms from the 1980s until at least the mid-1990s.¹⁵⁹ This implies that English arbitrators and judges failed to pick up, and react to, trends in the international arena. Indeed, a recent survey confirms that English arbitration specialists remain significantly more conscious of “risks” in invoking the *lex mercatoria* than their counterparts overseas (especially in continental Europe).¹⁶⁰ More generally, Collins points out that the English higher courts (including the Commercial Court) process only about 300 cases per year, a work load presumably dwarfed by arbitration and other means of resolving disputes out of court. He draws on studies suggesting that English arbitrators have remained consistently more sensitive to commercial context, rather than insisting on the formal application of strict contract law rules, to argue that English businesses wish for flexibility in adjudication as well as their everyday dealings.¹⁶¹ Further, a recent article by a Commercial Court judge indicates an awareness that the Court has been too strict, and should learn from businesses’ experiences with – and preferences for – alternative dispute resolution (ADR) and concomitant flexibility.¹⁶² This attitude presents a sharp contrast with the views expressed by Justice Devlin (later a Law Lord) in 1951, at an early stage of his judicial career. Based on his experiences as a barrister until then, he noted that English businesspeople did not expect strict application of the law; but concluded that the courts should ultimately undertake the latter, primarily to promote liberal ideals of the rule of law.¹⁶³

These works indicate the growing importance of empirical research into contracting, and the ability of contract law theorists to draw on pathbreaking studies going back many decades. In his inaugural lecture at the London School of Economics, delivered in 1995 and published in 1997, Collins clearly signalled his intention to move away from the more abstract exploration of “a new set of moral principles as the foundation of the systematic exposition of the law”, the approach he (and others like Brownsword and Atiyah) had adopted in the 1980s to undermine classical contract law theory. Collins declared his preference for a methodology more amenable to empirical

¹⁵⁸ See for example B Garth and Y Dezalay *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order* (Chicago, U Chicago Press, 1996).

¹⁵⁹ L Nottage “The Vicissitudes of Transnational Commercial Arbitration and the *Lex Mercatoria*: A View from the Periphery” (2000) 16 *Arb Int'l* 73.

¹⁶⁰ See K Berger and others “The CENTRAL Enquiry on the Use of Transnational Law in International Contract Law and Arbitration – Background, Procedure and Selected Results” in K Berger (ed) *The Practice of Transnational Law* (Kluwer, The Hague, 2001) 91.

¹⁶¹ H Collins “Formalism and Efficiency: Designing European Commercial Contract Law” (2000) 8 *European Rev Private Law* 211, 225-228. He cites for example Ferguson (above n 147) and Flood and Caiger (above n 148), suggesting that he is primarily interested in domestic arbitration. Note also that the posited sensitivity is only relative, to formal court adjudication, and that it could also manifest itself despite English law’s traditional reluctance to countenance “equity clauses” (below n 162). Collins also draws on Lyon and Mehta (above n 152), whose research accorded with that of Beale and Dugdale (above n 144) in showing that businesspeople did not place great importance on standard form contract terms.

¹⁶² J Thomas “The Courts of England and Wales, Commercial Education, and the Changing Business of the City of London” (2000) 16 *Arb Int'l* 321.

¹⁶³ P Devlin “The Relation between Commercial Law and Commercial Practice” (1951) 14 *MLR* 249, 250, 260.

inquiry.¹⁶⁴

Recalling the insight that law's objective is the governance of social, economic, and political relations, the research agenda commences with an examination of how particular relations are constructed and how they function. It then elucidates how the law both succeeds in helping to construct these relations, then regulates them, and yet at times stifles or obstructs them. The science of legal study aspires to the deeper understanding of the techniques and consequences of regulation of society for the purpose of serving more effective and targeted government through law. This method abandons the quest for foundations in moral principle as the framework for maps of the law. The task is rather to elucidate the channelling and constitution of social relations through law. The morality of law is assessed not in its principles, but in its consequences for human activity.

He went on to draw on work by Macaulay and others to argue that contract law does not contribute significantly to the creation of binding market commitments, by offering a credible threat against breach of contract. More important were self-help remedies (such as payment in advance, threat of future boycotts), transaction-specific investments, investments in reputation, "hostage-taking" (such as taking of security), provision for ADR, guarantees by third parties, and prevention of misleading advertising and the like. Contract law's main purposes, therefore, were seen to be the construction of "the facility for ex ante price-setting", essential for markets as institutions for enhancing wealth; and providing "one of several mechanisms for transfers of title to property".¹⁶⁵ Secondly, Collins proposed that legal support for the largely social practice of entering exchanges:

comes at the price of distorting the complexity of the underlying norms, for the sanctity attached to contracts insists upon a narrowing or oversimplification of the obligations. The controls on freedom of contract then enter the picture to counteract this distortion, in order to restore the variety and complexity of the normative expectations arising in the practice of entering exchanges.

Thirdly, however, Collins indicated that such a "recontextualisation" of contract law to pursue ideals of a "social market" faces challenges arising from the autonomous tendencies of legal doctrine relative to social and economic action. Collins suggested that the broader generalised standards such as good faith, driven by developments in EU law, will become an increasingly important part of this process; but that third-party vetting of contractual terms would be essential, perhaps by courts but also by arbitrators in particular cases, and by regulatory bodies (such as the Office of Fair Trading) for standard terms prevalent within an entire trade or industry.¹⁶⁶

These three themes have been extensively developed in Collins' richly theoretical and empirical work on *Regulating Contracts*, published in 1999 and hailed for providing hope that "British scholarship, so long laughably off the pace, might now give the lead to the development of the law of contract".¹⁶⁷ His renewed debt to US scholarship is apparent from the first and second themes, notably the insights of

¹⁶⁴ H Collins "The Sanctimony of Contract" in R Rawlings (ed) *Law, Society and Economy: Centenary Essays for the London School of Economics and Political Science* (Clarendon Press, Oxford, 1997) 60, 68-69.

¹⁶⁵ Collins, above n 164, 72-73.

¹⁶⁶ Collins, above n 164, 81-87.

¹⁶⁷ Campbell, above n 137, 498, reviewing H Collins *Regulating Contracts* (Oxford University Press, Oxford, 1999).

Macaulay and Macneil. Taking seriously the dictum of Justice Steyn that the central theme of contract law is the protection of “reasonable expectations”, Collins broadens the scope of inquiry as follows:¹⁶⁸

As well as expectations based upon the express commitments contained in the contractual undertakings (the contractual framework), the parties also form expectations with respect to both the norms of the “business deal” and the “business relation”. These expectations of the business relation derive from two dimensions of the “embeddedness” of economic transactions, that is the context of particular market conventions acknowledged by the parties, and the personal relations between the parties.

Macneil also now finds an even keener adherent in David Campbell.¹⁶⁹ However, Collins remains more interested than Macneil in the contemporary roles for markets and the potential for regulation, arguably reflecting the political climate ushered in by the Blair administration.¹⁷⁰ His third theme, and his recent book, also draw heavily on the work of Guenter Teubner, a German contract law theorist and legal sociologist who joined him at the London School of Economics around the same time. The latter’s theory of the relatively autonomous (“autopoietic”) nature of social sub-systems – including law – was driven by debates in his native Germany the 1980s about the potential for regulation in a post-welfare state, characterised by problematic tendencies towards and expectations regarding the “juridification” of socio-economic relations.¹⁷¹ Both influences – Macneil and Teubner – are also apparent in the recent studies by Peter Vincent-Jones, developing theory based on extensive empirical inquiries into contemporary contracting in England, especially the changing interface between public and private governance regimes.¹⁷²

Collins’s interest in autopoiesis appears to have cemented a move away from a strong version of the “transformation thesis”, the view that underlying socio-economic changes (away from a commitment to *laissez-faire* economics and rugged individualism) have generated a new set of basic values infusing and respecifying the English law of contract. Already, in 1994, he had admitted that new values were difficult to determine and weigh, new contract law doctrines did not necessarily evolve while old ones could be applied in new ways, and competing theoretical frameworks (notably economic analysis, reliance-based theories still rooted in liberal theory, and communitarianism) could be invoked to explain perceived transformations.¹⁷³ In

¹⁶⁸ Collins, above n 164, 217-219. Compare above Part I; Steyn, above n 156.

¹⁶⁹ Above n 76.

¹⁷⁰ The parallel is even more apparent in the work of his colleague, Anthony Giddens. See for example “Risk and Responsibility” (1998) 62 MLR 1; A Giddens *The Third Way and Its Critics* (Polity Press, Malden Mass, 2000).

¹⁷¹ See especially G Teubner “After Legal Instrumentalism? Strategic Models of Post-Regulatory Law” in G Teubner (ed) *Dilemmas of Law in the Welfare State* (De Gruyter, Berlin, 1988) 299; G Teubner *Law as an Autopoietic System* (London, Blackwell, 1993); G Teubner “Altera Pars Audiatur: Law in the Collision of Discourses” in R Rawlings (ed) *Law, Society and Economy: Centenary Essays for the London School of Economics and Political Science* (Clarendon Press, Oxford, 1997) 149. See also Chapter Five below.

¹⁷² See for example P Vincent-Jones “Contractual Governance: Institutional and Organisational Analysis” (2000) 20 OJLS 317.

¹⁷³ H Collins “The Transformation Thesis and the Ascription of Contractual Responsibility” in T Wilhelmsson (ed) *Perspectives of Critical Contract Law* (Dartmouth, Aldershot, 1993) 293, 294-295.

another innovative textbook published in 1996, John Wightman also stressed the pluralism in values and rules in contemporary English law, adding that 19th century developments (especially in hiving off new regimes for specialised contractual dealings) had already undermined the dominance of *laissez faire* and classical contract law.¹⁷⁴ In the third edition of his textbook, published in 1997, Collins maintained that “the modern law of contract differs from the classical tradition in its motivating ideals, in its methods of reasoning, and in its sources of law”, but there were already inklings of a change of tack derived from a growing interest in empirical inquiry.¹⁷⁵ Brownsword has also recently refined his posited dichotomy between consumer-welfarist and market-individualist ideologies, suggesting that “static market individualism” (imposing its view of contracting onto the regulated and “constituting” the market) is being displaced by “dynamic market-individualism” (“reflecting the practice and expectations especially of the business community”).¹⁷⁶ However, he retains more interest in a philosophical approach and case law developments.¹⁷⁷

The increasingly sophisticated discussion about the transformation thesis is matched by an escalating debate about the impact on English contract law from developments in the EU, including recent proposals for a European Civil Code. Going beyond the obvious, namely that such developments provide a contemporary instance of “the world elsewhere” affecting the path of English law, commentators now address fundamental issues in philosophy, ideology, empirical research, and comparative law methodology.¹⁷⁸ Boosted by concerns about England’s lethargic response to acceding to CISG, to provide a comprehensive set of modern rules on international sales reflecting sensible business practices,¹⁷⁹ this debate may revive more profound debate on the merits of codifying substantial areas of contract law in England.

Discussion about codifying commercial law in the Victorian era appears to

¹⁷⁴ J Wightman *Contract: A Critical Commentary* (Pluto Press, London/Chicago, 1996) 81-94.

¹⁷⁵ H Collins *The Law of Contract* (3 ed, Butterworths, London, 1997) 21. See also for example H Collins and C Scott “United Kingdom” in G Brueggermeier (ed) *Rechtsprobleme von Qualitätsmanagementvereinbarungen und EG-Binnenmarkt [Legal Problems of Quality Assurance Agreements and the EU Internal Market]* (Nomos, Baden-Baden, 1998) 239.

¹⁷⁶ R Brownsword “Contract Law, Co-operation, and Good Faith: The Movement from Static to Dynamic Market-Individualism” in S Deakin and J Michie (eds) *Contracts, Cooperation and Competition* (Oxford UP, Oxford, 1997) 255, 259. Compare Adams and Brownsword, above n 142

¹⁷⁷ R Brownsword “General Considerations” in M Furmston (ed) *The Law of Contract* (Butterworths, London, 1999) 1. Compare generally his early jurisprudential work: D Beyleveld and R Brownsword *Law As A Moral Judgment* (Sweet & Maxwell, London, 1986) 159-163, 382-409. See also for example C Riley “Designing Default Rules in Contract Law: Consent, Conventionalism, and Efficiency” (2000) 20 OJLS 367.

¹⁷⁸ Compare T Bingham “There is a World Elsewhere: The Changing Perspectives of English Law” (1992) 41 ICLQ 513 with P Legrand “Against a European Civil Code” (1997) 60 MLR 44; G Teubner “Legal Irritants: Good Faith in British Law and How Unifying Law Ends Up in New Divergences” (1998) 61 MLR 11; Collins, above n 161; S Whittaker “Unfair Contract Terms, Public Services and the Construction of a European Conception of Contract” (2000) 116 LQR 95; R Brownsword “Individualism, Cooperativism and an Ethic for European Contract Law” (2001) 64 MLR 628.

¹⁷⁹ Steyn, above n 156; McKendrick, above n 131; R Goode *Commercial Law in the Next Millennium* (Sweet & Maxwell, London, 1998) 32-38 (criticising English law’s persistent reluctance to countenance agreements to negotiate, suspension of performance, assurance of performance following anticipatory breach, and excuses for frustration), 87-96 (further discussing CISG and related harmonisation efforts).

have centred on a fairly crude calculus of costs and benefits, no doubt affected by the top-down utilitarian view of law-making advocated by Bentham in the 19th century. This led to some piecemeal local enactments, in contrast to the export of a full contract code to govern relationships in India.¹⁸⁰ Other issues in codification, such as the advancement of analogical reasoning and related substantive considerations,¹⁸¹ appear to have played a minor role in that debate over a century ago.

Similar obstacles seem to have promoted the demise of a project to codify contract law, launched in 1965 by the English Law Commission.¹⁸² A Law Commissioner's response to a South African professor's critique of codification, both published in May 1967, argued with admirable foresight that codification should advance harmonisation with the laws of continental countries and related international conventions, as well as with the civil law of Scotland (perceived as fundamentally different, in being founded on good faith). It also contended that rendering English contract law into more accessible form would make it more "exportable", especially to colonies gaining independence. The positive experience of the UCC was noted in these respects, and to counter the suggestion that codification would result in a great uncertainty. However, while suggesting that England's common law of contract had not "continued to display its customary ability to adapt itself to changing conditions" and that "legislative intervention [had] not tackled any of the fundamental principles", the Law Commissioner's response did not venture any possible new principles of law or methodology to guide codification.¹⁸³ Similarly, in a review published a year later, Aubrey Diamond noted that codification would need to be careful to encourage judges not to construe provisions narrowly, and should promote accessibility and improvement of contract law; but she did not venture any broad principles for such encouragement or improvement.¹⁸⁴ It seems not unreasonable to infer that even those sympathetic to codification around this time were wary of advocating Llewellyn's vision of a "Grand Style" of appellate judging (involving "overt recourse to situation-sense") and the "three most important general substantive concepts" of the UCC: "good faith, commercial reasonableness, including the current course of business and financing, and facilitation of continued expansion of commercial practices through custom, usage and agreement of the parties".¹⁸⁵ These had been specifically mentioned by Soia Mentschikoff, in an article also published in the *Modern Law Review* back in 1964. However, perhaps tailored to an English audience, the article had focused overwhelmingly on specific rules enacted in that Code; and Llewellyn's underlying philosophy and approach to commercial law had drawn almost no attention in England at that stage.¹⁸⁶

From this perspective, it is also disconcerting that one recent comparative work on good faith in European contract law, co-edited by Simon Whittaker, focuses overwhelmingly on rules applied in specific contexts and how these allegedly tend to

¹⁸⁰ Lord Irvine, "The Law: An Engine for Trade" (2001) 64 *MLR* 333, 335-336.

¹⁸¹ Compare above Chapter One Part II.A.

¹⁸² Compare F Reynolds "Contract: Codification, Legislation and Judicial Development" (1995) 9 *JCL* 11, 13-15; Mentschikoff, above n 27.

¹⁸³ E Gower "A Comment" (1967) 30 *MLR* 259, 259. Compare H Hahlo "Here Lies the Common Law: Rest in Peace" (1967) 30 *MLR* 241.

¹⁸⁴ A Diamond "Codification of the Law of Contract" (1968) 31 *MLR* 861.

¹⁸⁵ Mentschikoff, above n 27, 168.

¹⁸⁶ Twining, above n 25.

generate convergent results.¹⁸⁷ Recently, however, Brownsword has revealed the philosophical and other broader considerations glossed over by that study.¹⁸⁸ More generally, the ideological ramifications of a proposed European Civil Code, issues in comparative law methodology arising from this initiative, and their relationship to contract law theory, have been raised periodically over recent years.¹⁸⁹

In sum, McKendrick was probably too harsh when he wrote in 1996 that English contract law scholarship has exhibited more negative features – not being interdisciplinary or empirical, nor “rich in its theoretical content”, and unwilling to follow Pollock’s lead to draw on developments in Europe – than positive features, namely affecting some doctrines in the law (such as economic duress), and focusing still on “exposition of the law” (a “particular strength”).¹⁹⁰ In fact, the early studies by Friedmann and then Atiyah were given a stronger political flavour notably by Collins, who more recently has drawn on a growing number of empirical studies since the 1970s, to re-engage with European legal theory and EU law in a theoretically sophisticated manner. Although contract law theory in England appears to have been bypassed by US legal realism prior to World War II, impeding development of the more substantive reasoning long characteristic of US contract law theory,¹⁹¹ it has been able to draw on some of that tradition to grow from seeds planted over the last few decades. Contract law theory in England is now flowering, providing a more solid basis for the expansion of substantive reasoning in its contract law more generally, particularly now that theory appears to be reclaiming the place it struggled to obtain in relation to legal practice in the late 19th century.¹⁹²

IV Legislative, Judicial & Scholarly Activism in New Zealand

Legal realism and contract law theory from the US – and new contemporary theory from England – has had an even more troubled and belated reception in New Zealand. This has undermined the potential to develop more substantive approaches in its contract law, although there have been some moves in that direction over the 1990s.

Oddly, there seems to have been little public debate about contract law theory over the 1960s and 1970s, when the part-time Contract and Commercial Law Reform Committee (CCLRC) reviewed particular problems of contract law doctrine, prompting enactment of various Contract Statutes.¹⁹³ The first “New Zealand edition” of the Cheshire and Fifoot textbook was published only in 1961, largely reproducing

¹⁸⁷ R Zimmermann and S Whittaker (eds) *Good Faith in European Contract Law* (Cambridge UP, Cambridge, 2000).

¹⁸⁸ Brownsword, above n 178.

¹⁸⁹ Legrand, above n 178; Teubner, above n 178; Collins, above n 161.

¹⁹⁰ McKendrick, above n 131, 51-52.

¹⁹¹ Above Part I. See also above Chapter One Part II.C.

¹⁹² Campbell (above n 137) correctly emphasises the significance of the thought-provoking theoretical introduction to a new “practitioner text”: Brownsword, above n 177. For another substantive reasoning based approach, likely now to find a ready audience in England, see E Peden “Policy Concerns Behind Implication of Terms in Law” (2001) 117 LQR 459.

¹⁹³ See for example G Barton “The Effect of the Contract Statutes in New Zealand” (2000) 16 JCL 233. Compare generally R Sutton “Lord Cooke and the Academy: A View from the Law Schools” in P Rishworth (ed) *Struggle for Simplicity: Essays for Lord Cooke of Thorndon* (Butterworths, Wellington, 1997) 13, 16-18, discussed above Chapter One Part II.C.

introductory material focused on the historical evolution of contract from earlier causes of action.¹⁹⁴ Little writing on contract law theory, as opposed to doctrinal issues and detailed case law analysis,¹⁹⁵ appeared in monographs or law journals over the next two decades. Partly, this situation may have reflected a paucity of law journals until around 1980.¹⁹⁶ However, there were a number of venues potentially available, notably the Victoria University of Wellington Law Review and the New Zealand Law Journal, making it rather odd that very little writing on contract law theory was published over the 1970s, when debates were becoming more intense in the US and (to a lesser extent) England.¹⁹⁷ The lack of writing may have reflected low rates of contract compared to tort law litigation, as in the US from the 1930s through to the 1960s.¹⁹⁸ Unfortunately, the lack of a tradition of empirical inquiry into the New Zealand legal system means that no quantitative data is readily available.

The same problem afflicts the converse hypothesis, namely that the growing relative weight of contract litigation in New Zealand may have generated a gradual increase in writing on contract law from the mid-1970s. Even without quantitative data, however, a growing relative weight is virtually assured by the abolition of rights to sue for personal injury by accident inaugurated by a state-funded no-fault liability scheme, enacted in 1972 and brought into effect from 1974. As Colin Patterson, chairman of the CCLRC, remarked at the triannual New Zealand Law Conference held in 1972:¹⁹⁹

When [this scheme] comes into force I believe we will enter a golden age of development of all other branches of the law. This conference should help practitioners of the law of personal injury to survey the legal scene again and to choose the area of law to which their future attention can most usefully be applied. ... the law of contract, I suggest, will find a prominent place.

IV.A The Seeds of Contract Law Theory Development in the Early 1970s

Patterson's comments were directed at a paper at the 1972 Law Conference presented by Edward Somers (later a Court of Appeal judge). It had raised a fundamental issue of contract law theory: the nature and extent of "agreement" in the context of standard form contracts, especially those incorporating exemption clauses, and the possibility that giving priority to the latter might "defeat the reasonable expectations of the

¹⁹⁴ See *Cheshire & Fifoot's Law of Contract* (1st NZ ed, Butterworths, Wellington, 1961).

¹⁹⁵ See for example D McLauchlan *The Parol Evidence Rule* (Professional Publications, Wellington, 1976).

¹⁹⁶ The New Zealand Universities Law Review was inaugurated in 1967; the Auckland University Law Review, in 1968; the Canterbury Law Review, in 1980; the Otago Law Review, in 1965, although by 2001 only 10 volumes had been published; and the Waikato Law Review, in 1993. The New Zealand Recent Law Review was inaugurated in 1989, but focused on round-ups of case law in discrete areas of law. It changed its name to the New Zealand Law Review from 1995, and now publishes more general articles.

¹⁹⁷ The first issue of the Victoria University of Wellington Law Review was published in 1953, although it did not appear annually until 1979. The New Zealand Law Journal began as a bi-monthly periodical in 1928, albeit primarily for practitioners, and is now published monthly. For contemporaneous developments overseas, see above Part I (notably the UCC and *Restatement (Second)* discussions, Gilmore, early Posner, CLS, the Wisconsin school and early Macneil) and II (notably Friedmann, the early Atiyah, and the codification debate).

¹⁹⁸ Compare Galanter, above n 43.

¹⁹⁹ [1972] NZLJ 492.

consumer and perhaps even negative the very consensus which is the basis of the consent".²⁰⁰ In fronting up to such a key theoretical issue raised by contemporary practices, Somers' paper was quite unusual for this era, and certainly marked an important milestone in the evolution of contract law theory in New Zealand.²⁰¹

However, Patterson correctly chided Somers for failing to mention an influential reconceptualisation of exemption clauses developed in the early 1960s for a doctoral dissertation by a New Zealander, namely Brian Coote, and it should be added that the fundamental issues had been highlighted as long ago as 1943 by Kessler in the US.²⁰² Further, other comments on Somers' paper were hardly revolutionary. Patterson proposed simply to refocus attention away from contractual wording and onto the "real agreement", viewed "according to all the relevant evidence" – a solution perfectly consistent with mainstream contract law thinking at the US by the 1960s (at least), although this was not referred to.²⁰³ He also suggested that this development could be promoted by legislation, worded to encourage consideration of all the particular circumstances of the case at hand. Showing some appreciation of contemporary developments in England, he added that "possibly the Englishmen will beat us to it with their codification of the law of contract", although that project was already under fire by 1972 and some regulation of exemption clauses was only achieved through the Unfair Contract Terms Act 1977 (enacted, indeed, as a private member's bill).²⁰⁴ Don Dugdale, another member of the CCLRC (and later a Law Commissioner), agreed with the suggestion that problems raised by Somers, notably remedies for misrepresentation, should be achieved directly by legislative intervention focusing on "the balance of convenience" rather than historical precedent and judicial subterfuge – singling out Lord Denning as "one of the worst offenders".²⁰⁵ Legislative intervention was also approved in the penultimate comment by a certain P J McKinlay from Lower Hutt. On the other hand, the latter highlighted that the discussions had not:²⁰⁶

faced square on ... the change in social attitudes towards legal obligations since the rules of contract were first promulgated; the present situation seems to be one where there is wide recognition that weakness in bargaining power on the part of the one party to the contract is something to which should be given due recognition.

He went on to first advocate a legislative approach, able to "look at the social questions involved and the values which now seem to be broadly accepted", suggesting that this might make it appropriate to distinguish "consensual contracts" (freely negotiated) from "non-consensual contracts" in which the parties had not never agreed as to their exact nature; and that rules for the latter might "allow Courts, in effect, to create the bargain between the parties, the bargain which the parties themselves may never in fact actually

²⁰⁰ E Somers "Consensus and the Written Contract" [1972] NZLJ 485, 485.

²⁰¹ Indeed, as McKendrick observes (above n 131, 32 n 14), in England: "It was not until the publication of the 21st edition of Anson's *Law of Contract* in 1959 that there was distinct discussions of the subject of standard form contracts".

²⁰² C Patterson [1972] NZLJ 492, referring to B Coote *Exception Clauses* (Sweet & Maxwell, London, 1964); compare Kessler and Fine, above n 38.

²⁰³ Patterson, above n 202, 492-493. Compare for example Zamir, above n 32.

²⁰⁴ Patterson, above n 202, 493. Compare Reynolds, above n 182; McKendrick, above n 131, 32.

²⁰⁵ D Dugdale [1972] NZLJ 495.

²⁰⁶ P McKinlay [1972] NZLJ 497.

have made”.²⁰⁷

In a separate paper presented to the conference, however, Dugdale argued that care should be taken in conferring broad discretions on judges through legislation. This was particularly in appropriate, in his view, when the matter raised political issues. Dugdale insisted that “policy is for the Legislature and not the Courts”, echoing Sir Alexander Turner (a Court of Appeal judge); and more generally criticised a tendency for governments to refer politically contentious issues to committees and the like.²⁰⁸ He also stressed that “discretion should not be conferred where it introduces an unnecessary uncertainty into commercial practice”. Presenting the enactment of New Zealand’s Illegal Contracts Act 1970 as an unusual situation, Dugdale concluded:²⁰⁹

It is best if legislation is precise, and the conferment of judicial discretion is only ever justified *faute de mieux*, where the formulation of precise rules is impossible. But plainly there are circumstances where reform is needed and where the draftsman simply cannot foresee all possible circumstances. Then and only then is it proper for him to solve his problems by the conferment of a judicial discretion, and even then the policy must be made as plain and as many guidelines must be laid down as possible.

Unsurprisingly in view of his key role in the CCLRC, Patterson also approved of the Act. But his suggested rationale might have been intended to have broader application for other proposed legislative intervention: rather than legislating rules in a piecemeal fashion, “the whole process was [to be] started again, but this time on a new basis where the Courts would be enjoined to do justice between the parties”.²¹⁰ By contrast, Dugdale’s paper is pervaded by considerable cynicism about judges, suggesting that their moral assumptions should be studied empirically (as in the US). However, Austin Forbes (later President of the New Zealand Law Society) was dismissive of “the so-called American realist school of jurisprudence” and such studies.²¹¹ Similarly, George Barton (then a lecturer at Victoria University of Wellington) responded that “what we really need is a bench of Judges and Magistrates of broad sympathies, sensitive to community needs and aspirations – and I believe we have now, in larger measure than at any other time, [such] a bench ...”.²¹²

In sum, contained in these 1972 papers and comments – recorded, thankfully and unusually for New Zealand, verbatim – were the germs of a more substantive approach to contract law. Nonetheless, they revealed the power of formal reasoning in many ways, including a widespread preference for initial legislative intervention; Dugdale’s concerns to constrain the exercise of any judicial discretions conferred thereby, as well as the effect on certainty in commercial dealings; and a general view that a primary goal should be simplification of complex case law. The development of more substantive reasoning was also impeded by a reluctance to engage in empirical and more philosophical inquiry; and a lack of engagement with developments in other major common law countries, such as England and (especially) the US.

²⁰⁷ McKinlay, above n 206, 498.

²⁰⁸ D Dugdale “The Statutory Conferment of Judicial Discretion” [1972] NZLJ 556, 557. He appears to be referring to Sir Alexander Turner “Changing the Law” (1969) 3 NZULR 404.

²⁰⁹ Dugdale, above n 208, 560.

²¹⁰ C Patterson [1972] NZLJ 567.

²¹¹ A Forbes [1972] NZLJ 565.

²¹² G Barton [1972] NZLJ 562.

IV.B More Seeds in the Early 1980s

The potential for developing a distinctly more substantive approach remained virtually unexploited until the early 1980s. The major expansion of this potential – particularly in raising philosophical and (implicitly) empirical issues, drawing on contract law theory emerging in England – came from another New Zealand Law Conference, held in 1981. This is somewhat ironic given that such conferences were (and still are) focused on issues considered immediately relevant to the legal profession – even in England, contract law theory developed primarily in purely academic milieus. The milestone event in 1981 was a provocative paper presented by George Barton, who had by then left Victoria University to practise in Wellington.²¹³ He argued that there had been a shift away from the will theory of contract congenial to 19th century legal theorists, ranging from Benthamite utilitarians to Maine's "historical school". Barton argued that the decline of the jury trial and the merging of common law with equity led judges to articulate reasons applied to particular facts, resulting in more precedents to be discussed by counsel and practitioners in future cases, and hence more and more refined classifications and categories. On the other hand, he argued:²¹⁴

As you read the decisions, you become conscious that a new principle is at work. Agreement seems no longer to be the golden metewand, but reasonableness. Judges, some with greater perspicacity than others, can read terms into agreements that are not there; and can read down terms that are there, sometimes even ignoring them entirely. All in the interests of doing justice, of reaching a fair result as between the parties.

Barton identified Lord Denning as the "high priest of the modern approach", beginning with his undercutting of the common law doctrine of consideration by developing principles of equitable estoppel, founding liability on reasonable reliance.²¹⁵ He stressed Lord Denning's willingness to allow termination on reasonable notice of a long-term supply contract expressed to be for "all times hereafter".²¹⁶ Barton also discussed Lord Denning's view that exemption clauses should be enforced only if reliance thereon would be fair and reasonable, suggesting that the House of Lords' insistence that this could not be a rule of law still meant that "under the guise of interpretation there is still room for the notion of reasonableness to work".²¹⁷ This left

²¹³ G Barton "Whither Contract?" [1981] NZLJ 369.

²¹⁴ Above n 213, 371. See also C Rickett "Lord Denning – Sincere Man and Problematic Judge" (1982) 10 NZULR 91, 91 (suggesting that Lord Denning had "occupied a position of immense importance in British and New Zealand law for the last thirty-five years").

²¹⁵ Above n 213, 373, citing *Cental London Property Trust Ltd v High Trees House Ltd* [1947] KB 130.

²¹⁶ Above n 213, 372, discussing *Staffordshire Area Health Authority v South Staffordshire Waterworks Co* [1978] 1 WLR 1387, and noting that Lord Denning, in *The Discipline of the Law* (Butterworths, London, 1979) 48-50, viewed this judgment as the "epitome of reasonableness". Compare below Chapter Four Part II.B, especially *Gore District Council v The Power Co Ltd* [1997] 1 NZLR 537.

²¹⁷ Above n 213, 374, discussing *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827 (rejecting Lord Denning's doctrine of fundamental breach); *Reardon Smith Line Ltd v Yngvar Hansen Tangen* [1976] 1 WLR 989 (where Lord Wilberforce approved an objective view of contract interpretation), *FL Schuller AG v Wickman Machine Tool Sales Ltd* [1974] AC 235 (where Lord Reid suggested that unreasonableness of result indicates less probability that an interpretation was intended),

“a kind of judicial review of all the circumstances”, formulations familiar to administrative law, and the law of contract becoming “less private law and more public law”.²¹⁸ Further, conceding that reasonableness and the related lodestar of “reasonable expectations” were vague concepts, Barton suggested that:²¹⁹

It is, no doubt, reasonable to expect that promises will be kept, that conduct continued for some time in the past will be repeated in the future. But reasonableness of that kind is scarcely enough as a basis for a legal right to enforce the expectation. It is necessary to go further and to determine that the expectation should be based upon whether it is reasonable to rely on the conduct (including the words) of the defendant. If it is reasonable to treat the defendant as having intended the other party to place reliance on what he may have said or done to the extent that he will answer for his not having coming up to expectations, then the law will enforce the expectation or give compensation for the disappointed reliance. This is a long way from the law of contract. In many respects it is coming very close to tort, to a generalised duty with respect to one's words or conduct.

These suggestions of contract law drawing closer to public law and especially tort law, as well as the displacement of 19th century “principles” by “pragmatism”, suggest the inspiration of Patrick Atiyah's attempts around this time to redraw and expand the conceptual bases for contractual liability in English law.²²⁰

However, Barton expressed some concern about the broad discretion conferred on New Zealand judges by statutes like the Illegal Contracts Act 1970, the Contractual Mistakes Act 1977, and the Contractual Remedies Act 1979. He saw these statutes as paralleling the modern judicial approach (at least in England), in promoting individualised justice, but concluded: “... whose fairness? Whose reasonableness?”. Overall, Barton contended that:²²¹

the law of contract is clearly in a state of ferment; or, to change the metaphor, in an ‘extraordinary conceptual morass’, to use Professor Atiyah's language. It is too early to assess with any confidence how the New Zealand law of contract will develop. We are given to legal experiment. We are at the stage of improvisation. The most recent bold ventures into reform of the law contract may throw up more difficulties than they solve.

Pragmatic reformism, proceeding without much explicit ex ante theorising other than the need to simplify the law to generate fair outcomes, is consistent with the mentality of New Zealand's early modern law-makers described recently by Bassett, and the philosophy developed by Lord Cooke from the early 1980s (above Chapter One Part II.C).²²² Similarly, in the summary of the discussion which followed Barton's

and *Prenn v Simmonds* [1971] 1 WLR 1381 (allowing consideration of the factual matrix as well as language used). Compare below Chapter Three Parts III.B.1 and III.C.1.

²¹⁸ Above n 213, 375.

²¹⁹ Above n 213, 375.

²²⁰ Although not specifically on these points, Barton, above n 213, 374 n 9, cites Atiyah's “From Principles to Pragmatism” (1976) 92 LQR 174. See also Atiyah's inaugural lecture published under the same title in 1978 by Clarendon Press, Oxford. Compare above Part III.

²²¹ Above n 213, 378. This rhetorical question is posed at the end of discussion on the Contractual Remedies Act, but it is implicit in Barton's remarks on the other two statutes.

²²² Further, as Barton adds (above n 213, 372), this tendency may have been reinforced by:

... contemporary thinking in many spheres of human conduct. Rules of any kind cease to trouble many of our contemporaries: in religion, some Christians can speak of God as being dead –

conference presentation, Don Dugdale is recorded to have again defended the exercise of judicial discretion under the Illegal Contracts Act 1970, to validate sales in breach of the Land Settlement Promotion and Land Acquisition Act 1952. He contended that the exercise “now enabled Judges to reach a just solution honestly instead of by the circuitous approach for which Lord Denning is famous”.²²³ Moreover, as a Law Commissioner recently, Dugdale proposed abolition of the Contracts Enforcement Act 1956 partly to prevent circuitous attempts by judges to avoid formal requirements in that statutory context too.²²⁴ However, his comments on Barton’s paper need to be seen in the context of his concerns about judicial discretion, raised a decade earlier. Over the 1990s, he also remained a sharp critic of allowing broad discretion to judges.²²⁵

Similarly, although a comment on Barton’s presentation by John Burrows (another CCLRC member from the late 1970s) also perceived a trend to use contract “interpretation” to overcome doctrinal difficulties to do justice in individual cases, along with doctrines of unconscionability and economic duress, he observed that “the Courts still had somehow to fit all this into the traditional framework of contract law”.²²⁶ Noting that wide discretionary powers were likely to result in uncertainty and possibly inconsistency,²²⁷ he remarked that New Zealand might be getting to the stage of needing a comprehensive contract code – suggesting an awareness of the English Law Commission’s project of 1965 (but abandoned by 1981).²²⁸ Finally, John Wallace QC (later a High Court Judge and Law Commissioner) is also reported to have responded that: “if particularisation means abandonment of principle we are indeed on difficult ground ... We should achieve a clear definition of our principles. Failure to do this has meant recourse to statute to remedy manifest injustices”.²²⁹ Again in 1981, therefore, the seeds were planted for a reaction by those attracted towards more formal reasoning (especially “hard and fast rules”) against the substantive tendencies inherent in the contract law trends highlighted by Barton. The comparatively short history and weakly articulated theoretical basis of the latter trends, especially in enacting the Contract Statutes (discussed below Part IV.C), probably made such a reaction significantly easier to sustain.

Another contributing factor appears to be the unwillingness to pursue empirical inquiries into “reasonable expectations” in contractual settings.²³⁰ Barton implicitly

indeed the view is held in some sections of New Zealand society that “Christian” is synonymous with being a “good bloke”; in ethics, the rightness or wrongness of an act depends entirely on the circumstances, “situational ethics” it is called; in psychology, no one is really responsible for anything – we are all creatures of our environment.

²²³ [1981] NZLJ 380.

²²⁴ New Zealand Law Commission *Repeal of the Contracts Enforcement Act 1956: A Discussion Paper* (Preliminary Paper No 30, Wellington, 1997). See also D Dugdale “Do We Need the Contracts Enforcement Act?” [1993] NZLJ 239; below Chapter Two Part III.

²²⁵ See for example D Dugdale “A Polite Response to Mr Justice Thomas” (1993) 23 VUWLR 125; D Dugdale “Framing Statutes in an Age of Judicial Supremacism” (2000) 9 Otago L Rev 600.

²²⁶ [1981] NZLJ 379.

²²⁷ See also the concern in his Committee report, published in 1982 and reproduced in New Zealand Law Commission *Contracts Statutes Review* (Report No 25, Wellington, 1993) 275, 291, to delimit any court discretion to vary contractual obligations upon frustration. Compare also below Chapter Four Part II.A.

²²⁸ Above n 226.

²²⁹ [1981] NZLJ 380.

²³⁰ Compare for example the debates in the first half of the 20th century in the US, resulting in the

invited such inquiry when he suggested, following an acclamation of Lord Wilberforce's concern about the schematic character of English contract doctrine (particularly privity doctrines) not matching commercial realities (multi-party transactions):

The commercial character of contracts rests in many cases on the assumption that each of the parties will play his part in the relationship in accordance with the reasonable expectations of the others. That is why parties to continuing supply contracts, where price and supply are the subjects of written agreement, expect and usually receive a sympathetic response from their counterparts when the cost of performing their obligations is affected by a sudden rise in prices of raw materials or by a dramatic change in exchange rates. To the lawyer the written contractual formula ends all argument; to the businessman it merely provides the base for a further round of negotiation in the sure faith that he will not be bound by the letter of the agreement.

The same expectation is shared by the ordinary citizen who enters into a contract. When he signs a contractual document with columns of fine print he rarely reads beyond the first line. He certainly does not consult his lawyer ... Everyday experience shows that a vast number of contracts are signed without a proper appreciation of the nature and extent of the obligations imposed. How then is it possible to fit the theory into the reality of almost universal practice? It cannot be done. The notion of reasonable expectations is more in accordance with the attitudes both of the ordinary citizen and of the commercial man.

This drew a sharp reaction from a leading practitioner, Richard Craddock QC: "if we believe that this development is what the commercial community wants then we 'misread our market' ... The businessman expects performance and certainty, and to lose the latter diminishes the likelihood of the former".²³¹ Perhaps he had experienced different types of contractual relations and parties in his practice, compared to Barton. Such sharply different views in 1981 might have prompted some systematic empirical research in New Zealand – as in the US, Japan, and even England by the 1970s – but unfortunately it did not, until one project in the mid-1990s.²³² Further, a response to Barton's paper by R. G. Gallen QC (later a High Court judge) suggested that New Zealand parties might be better off seeking "individualised justice" from arbitrators, rather than judges learned in the law but lacking in specialist skills in the area of dispute; and that judicial inquiry into reasonableness would likely result in more cost, delay and risk of error, leading to increases in litigation.²³³ Again, these are empirical questions which have been pursued in other jurisdictions, but virtually ignored in New Zealand.²³⁴

IV.C The Contract Statutes

Not surprisingly, in the light of the foregoing, subsequent development of contract law

firm establishment of more substantive tendencies in the UCC and general contract law after World War II: above Part I.

²³¹ [1981] NZLJ 380.

²³² Above Parts I-III. Compare L Nottage "Economic Dislocation in New Zealand and Japan: A Preliminary Empirical Study" (1997) 26 VUWLR 59; L Nottage "Planning and Renegotiating Long-Term Contracts in New Zealand and Japan: An Interim Report on an Empirical Research Project" (1997) NZ L Rev 482; and below Chapter Four Part III.

²³³ [1981] NZLQ 380.

²³⁴ Above Parts I-III. Compare L Nottage and C Wollschlaeger "What Do Courts Do?" [1996] NZLJ 369.

theory in New Zealand has focused on refining more concrete principles in relation to existing black-letter law, especially the case law. The trend since the mid-1980s has been growing concern about the scope for judicial discretion provided in the Contract Statutes, a concern consistent with the general re-emergence of formal reasoning tendencies and corresponding institutional developments described above (Chapter One). On the whole, the courts appear to have been slow to exercise vigorously a number of broadly worded statutory discretions. Arguably, this has stemmed from insufficient clarification of the underlying purposes of the various statutes, as well as their piecemeal nature, making it more difficult to link them to a broader methodological and jurisprudential vision such as that developed to promote the UCC from the 1940s through to the 1960s.²³⁵

The most comprehensive statement of the broader considerations supposedly lying behind the enactment of the Contract Statutes came from John Burrows, a member of the CCLRC only in its later stages, in an article published in England as late as 1983. He argued that the various areas were chosen for reform because: (i) much of the case law was complex and technical, opening up the possibility of a more direct route to resolving issues; (ii) the law did not always reach a just result; and (iii) despite casuistry and attention to detail, the law did not always promote certainty. Burrows noted that a key feature of the resultant legislation was the conferral of broad discretionary powers on judges; and that it was "extraordinary ... how easily all these Acts [had] been passed, ... attract[ing] very little criticism or comment from lawyers, and little opposition from the commercial community".²³⁶ That becomes less surprising when one realises that the legislation – in contrast for instance with the UCC – seems to have emerged quite quickly from the activities of a circumscribed group, in a piecemeal fashion lacking a clear prior statement of underlying principles.²³⁷ Accordingly, enactment of each Act probably drew no reaction from businesspeople and their advisors simply because they did not appreciate what was involved, nor the cumulative effect of the enactments together with subsequent rationalisations of them. Burrows remarks that "by giving the courts powers to provide reasonable solutions, the New Zealand legislation may be no more than most contracting parties do for themselves in any event", mentioning the "excellent" studies by Macaulay and Beale in suggesting that "more research is necessary on just how far certainty is really a necessity to commerce".²³⁸ However, there is no indication that the CCLRC ever attempted systematically to ascertain real-life practices and expectations, and use these as a widely publicised basis for their reform efforts. The approach seems to have been to "give it go" in a number of discrete areas, laying confidence in the judiciary to start afresh and the legislature to make any necessary later adjustments, and avoiding (or at least not seeking out) broader public

²³⁵ Compare above Part I.

²³⁶ J Burrows "Contract Statutes: The New Zealand Experience" [1983] Stat L Rev 76, 83.

²³⁷ Sutton, above n 193.

²³⁸ Burrows, above n 236, 90, citing Macaulay (above n 68) and Beale and Dugdale (above n 144). These works get relegated to a footnote in Burrows and others (above n 8, 14 n 11), with Macaulay's study paraphrased as showing that "the *practice* of contracting parties often does not match the *law* of contract" (original emphasis). Bizarrely, this is then used to support the flat assertion in that textbook that: "The twentieth century has witnessed a move to a position where the law of contract more closely approximates the expectations of reasonable business people". Compare also J Burrows "Statutes and Judicial Discretion" (1976) 7 NZULR 1, 22 (echoing Dugdale, above n 208, by suggesting that "there are some parts of the law in which certainty is more important than others").

engagement. These attitudes are reflected in Burrows' concluding assessment:²³⁹

The new statutes are much better than the law they replaced. Perhaps some will believe it would have been better to take more time and produce a complete code of the whole law of contract. Not only was that not feasible, given New Zealand's law reform machinery; it simply would not have worked. It is much harder to have total codification accepted by Parliament and the profession; and if one is to engage in bold reform it is better to introduce it gradually and observe its operation. The New Zealand legislature has taken risks, and in due course some amendment may be necessary. But that is far better than the alternative, which was to do nothing.

Such views add up to a very different process and orientation than that which drove enactment of the UCC in the US, clearly designed to reduce formal reasoning at multiple levels. The New Zealand statutes did not boost substantive reasoning by openly reflecting and promoting business usages and expectations, by encouraging purposive interpretation based on underlying principles reflected in the new law, or by doing away with strict formal requirements. Most of New Zealand's Contract Statutes did reduce interpretive formality by replacing rules with broader open-ended standards. But these were primarily directed at relief – upon breakdown of contractual relationships, where “certainty” may be arguably less significant²⁴⁰ – rather than in their formation or interpretation. Further, these standards were often surrounded by extensive “guideline” factors.²⁴¹ Such factors provide the backdrop for the following analysis suggesting that the Contract Statutes have had a rather limited impact on advancing substantive reasoning in New Zealand contract law theory.

A related consideration is that although prominent New Zealand jurists appear to have enjoyed the sense that they are world leaders in reforming the common law in distinctive ways,²⁴² it is important to note contemporaneous developments in other Anglo-Commonwealth jurisdictions. Thus, New Zealand's tendency to legislate for judicial discretion had antecedents in English statutes, such as the war-time Law Reform (Frustrated Contracts) Act 1943. Largely adopted in the Frustrated Contracts Act 1944, sections 2(3) and 2(6) allowed the court discretion to adjust benefits received under a contract which had been held frustrated under the common law doctrine of frustration. More adventurous was New Zealand's Minors' Contracts Act 1969, which allowed court discretion to diminish the effects of certain minors' contracts if found unconscionable or oppressive (section 5(2)), as well as discretion to expand the effects of other contracts if “fair and reasonable” (section 6(2)). On the other hand, this legislation was partly prompted by the Lately Report of the Committee on the Age of Majority, published in England in 1967; and the Act has hardly ever been applied by New Zealand courts, with one judge finding it difficult to uncover its rationale.²⁴³

²³⁹ Burrows, above n 236, 97.

²⁴⁰ Burrows, above n 236, 90; Burrows and others, above n 8, 16.

²⁴¹ Compare Dugdale, above n 208.

²⁴² See generally J Bassett “The New Zealand Legal System: Early Historical Influences” in R. Bigwood (ed) *New Zealand Legal Method* (Butterworths, Wellington, forthcoming). Compare for example R Cooke “The New Zealand National Legal Identity” (1987) 3 *Cant L Rev* 171.

²⁴³ S Todd “Minors' Contracts Act 1969” in New Zealand Law Commission *Contracts Statutes Review* (Report No 25, Wellington, 1993) 229, 230; *Morrow & Benjamin Ltd v Whittington* [1989] 3 NZLR 122, 124 (although Thorp J concluded that the Act was “a uniquely New Zealand response [sic] to the age-old problem of preventing persons taking advantage of youthful inexperience without unduly interfering with the ordinary course of commerce and the rights of innocent adults”).

Legislation was also enacted in New South Wales soon after the Lately Report, adopting very similar discretions and broad standards.²⁴⁴ As one English commentator notes: "problems with minors' contracts are never going to be very common, and a discretionary power in the court is no surprise to anyone. It existed even in Roman law".²⁴⁵

More significant was the Illegal Contracts Act 1970, which did not attempt to clarify the complex common law on what constitutes an "illegal contract", but allowed for discretionary relief in section 7. A member of the CCLRC reports that the scheme initially intended was "restitution as the primary form of relief, compensation when restitution was impossible, and validation which presupposed a variation to make the contract conform to law, ... constructed on the assumption that the courts would continue to want to refuse enforcement to illegal contracts".²⁴⁶ However, this scheme was not well appreciated by the courts. Following a dictum of Cooke J, validation came to given primacy from the late 1970s, despite concerns about the courts usurping the pre-eminence of the legislature.²⁴⁷ A decade later, variation was granted in one case "not to correct procedural defects in illegal contracts, but for ulterior purposes"; Hammond J cured illegality under the Land Settlement Promotion legislation by validating the sale subject to a statutory consent being obtained, but then went on to increase the sale price.²⁴⁸ However, this approach has been sharply criticised;²⁴⁹ and it seems unlikely that it will prompt widespread interference with substantive terms when a breach of statutory requirements or other illegality occurs.

By contrast, the Contractual Mistakes Act 1977 appears to have been driven not only by a willingness to simplify complex case law; but also to expand the scope of operative mistake, at least in situations of "cross-purpose mistake" pursuant to section 6(1)(a)(iii), where parties "were each influenced in their respective decisions to enter the contract by a different mistake about the same matter of fact or law".²⁵⁰ Despite noting the general warnings of Arthur Corbin in this area of contract law, the CCLRC was prepared to risk reformulations of what constitutes mistake, although the legislation ultimately did not take up all these views. The Committee also envisaged a broad guiding principle, "a balance between avoiding the unfairness of holding a party to an inappropriate transaction which was not fully assented to, and protecting other parties ... who have a legitimate interest in seeing the contract performed", and the purposes of the Act were stated to include powers to "mitigate the arbitrary effects of mistakes on contracts" subject to not prejudicing "the general security of contractual relationships" (section 4).²⁵¹ A decision of the Court of Appeal in 1984 appeared to develop the

²⁴⁴ Minors (Property and Contracts) Act 1970 (NSW). See generally J Carter and D Harland *Contract Law in Australia* (3 ed, Butterworths, Sydney, 1996) 294-295, 297-299.

²⁴⁵ Reynolds, above n 182, 19.

²⁴⁶ B Coote "Security of Contract and the New Zealand Contract Statutes" (2000) 16 JCL 37, 41.

²⁴⁷ *Harding v Coburn* [1976] 2 NZLR 577, 584-585; Coote, above n 246, 42; Barton, above n 213.

²⁴⁸ Coote, above n 246, 42; *Busst v Bouma* (20 June 1996) unreported, High Court, Hamilton Registry, upheld in *Bouma v Busst* (1998) 6 NZBLC 102, 457 (CA).

²⁴⁹ B Coote "Variation Under the Contract Statutes" (1997) 3 NZBLQ 3; B Coote "More, or Perhaps Less, on Variation Under the Contract Statutes" (1998) 4 NZBLQ 181; Coote, above n 246, 42-43.

²⁵⁰ Reynolds, above n 182, 21; A Beck and R Sutton "Contractual Mistakes Act 1977" in New Zealand Law Commission *Contracts Statutes Review* (Report No 25, Wellington, 1993) 127, 143-153.

²⁵¹ Report on the Effect of Mistakes on Contracts, Wellington, May 1976, para 5; Barton, above n

notion of cross-purpose mistake so as to seriously challenge the objective theory of contract; but resultant controversy helps explain the retrenchment apparent five years later, emphasising that section 6(2)(a) precluded relief for a "mistake in [a contract's] interpretation".²⁵² In 1993, reporters for the Law Commission's review of the Act suggested that "section 6(2)(a) be made a discretionary factor within the ambit of section 7", which again confers broad powers for courts to provide relief (provided an operative mistake is established).²⁵³ However, the Commission noted that no majority agreement could be reached regarding reform in this area, and concluded that a stabilisation in decisions from the courts indicated that they should be able to continue striking an appropriate balance.

The most significant and consistent expansion of the judicial discretion has come instead from the Contractual Remedies Act 1979. It too aimed primarily at simplifying complex judge-made law by providing direct routes to resolving the main perceived problems.²⁵⁴ Reynolds succinctly observes that a major problem was:²⁵⁵

the weakness of remedies in respect of misrepresentations inducing the contract (including the difficulty of distinguishing such representations from contract terms) ... [This] was solved by the surprising method of equating pre-contractual misrepresentation and contractual promises for the purposes of damages, and amalgamating the remedies of rescission for misrepresentation and treating the contract as discharged for breach into one remedy of 'cancellation', the consequences of which (since the results of the two remedies were different, one operating *ex tunc* and the other *ex nunc*) had to be entrusted to the discretion of the court.

Some of this English commentator's surprise may have stemmed from the more limited statutory intervention in England, in the form of the Misrepresentations Act 1967. Be that as it may, since cancellation under the Contractual Remedies Act crystallised the position of the parties, section 9 broadly allowed courts to provide discretionary relief including transfers of property or payment of money for benefits already conferred. Yet it seems clear that the CCLRC did not intend these measures to affect rights to claim damages, and the Act reflects this in various provisions of sections 8-10. Nonetheless, judges began issuing a variety of orders under section 9. In 1992, Fisher J decided that the broad wording of section 9(2)(b), permitting the award of any sum "as the Court thinks just", allowed a holistic assessment overriding common law rules on damages.²⁵⁶ This approach was approved by the Court of Appeal in 1993, and seems likely to prevail, despite protests that it subverts the Act and risks unprincipled decision-making.²⁵⁷ But even these decisions indicated that common law doctrine would continue to be influential, and Reynolds indicates that the Act may not have been

193, 240-241.

²⁵² Compare *Conlon v Ozolins* [1984] 1 NZLR 489 with *Paulger v Butland* [1989] 3 NZLR 549; Barton, above n 193, 242-243.

²⁵³ Beck and Sutton, above n 250, 157.

²⁵⁴ J Burrows "The Contractual Remedies Act 1979" (1980) 1 Cant L Rev 82, 83.

²⁵⁵ Reynolds, above n 182, 22. See also Coote, above n 246, 44.

²⁵⁶ *Newmans Tours Ltd v Ranier Investments Ltd* [1992] 2 NZLR 68.

²⁵⁷ *Coxhead v Newman Tours Ltd* (1993) 6 TCLR 1; *Thomson v Rankin* [1993] 2 NZLR 68; Burrows and others, above n 7, 759-762. But see D Dugdale and C Walker "Harmonisation of the Sale of Goods Act 1908 and the Contractual Remedies Act 1979" in New Zealand Law Commission *Contracts Statutes Review* (Report No 25, Wellington, 1993) 111, 122; B Coote "Remedy and Relief under the Contractual Remedies Act 1979 (NZ)" (1993) 6 JCL 141; and Coote, above n 246.

necessary to encourage these events: “The rules of damages are a legitimate subject for development by caselaw, and they have been and are being developed in many countries”.²⁵⁸

A fourth important Contract Statute resulting from the deliberations of the CCLRC was the Contracts (Privity) Act 1982, providing a scheme for contracts for the benefit of third parties. Unlike earlier Statutes, and some earlier legislation in Australia covering this issue, it did not provide any discretionary powers to the Courts.²⁵⁹ This is understandable in view of the controversy engendered by a fifth statute promoted by the CCLRC, the Credit Contracts Act 1981. In particular, practitioners and interest groups (especially in the business sector) expressed concerns about section 10’s discretion to reopen terms which are “oppressive, harsh, unjustly burdensome, unconscionable or in contravention of reasonable standards of commercial practice”.²⁶⁰ Despite its ostensibly broad scope – criticised by Bob Dugan as “if anything, broader in scope than its United States counterpart”, namely unconscionability doctrine under the UCC and the *Restatement (Second)*²⁶¹ – R J Asher remarked in 1988 that concerns were largely misplaced: “Courts have shown robust commercial common sense in considering whether there has been oppressiveness [sic]”.²⁶²

In sum, Asher correctly concludes that although the Contract Statutes were “major pieces of reforming legislation”, none “could be fairly described as deliberately challenging the fundamentals of contractual doctrine”.²⁶³ The main reason for this was arguably that the reforms proceeded from the mid-1960s through to the 1980s largely in the absence of a new comprehensive theory of contract, firmly grounded in general legal theory, reinforced by political debate and empirical inquiry – as in the US, Japan, and even England (albeit still falteringly, over this period).²⁶⁴ Nonetheless, the Contract Statutes belatedly erected a somewhat precarious platform for attempts to reconstruct contract law theory in New Zealand.

IV.D The Birth of Contract Law Theory in the Late 1980s and Early 1990s

As Francis Dawson remarked perceptively in 1985, echoing – but not citing – a key insight of the legal realists in the US, secondary contract rights (such as damages or relief) are “inextricably linked” to primary rights.²⁶⁵ He added that enactment of the Contract Statutes had “dramatically altered the nature of contractual obligations of New Zealand”, with recent case law at that time suggesting that “it will soon be a truism in New Zealand that a contractual obligation will only be enforced to the extent that the

²⁵⁸ Reynolds, above n 182, 23.

²⁵⁹ Compare the Property Law Act 1974 (Queensland) s 55(3)(a) and (c).

²⁶⁰ R Asher “The Statutory Reforms of the Contracts and Commercial Law Reform Committee from a 1988 Perspective” (1988) 13 NZULR 190, 193.

²⁶¹ R Dugan “The New Zealand Credit Contracts Act: A United States Lawyer’s Perspective” (1984) 11 NZULR 20, 32-33.

²⁶² Asher, above n 260, 193. See also D Webb “A Proposed Decision-Making Process for Oppressive Credit Contracts” (1997) NZ L Rev 394; below Chapter Three Part IV.C.

²⁶³ Asher, above n 260, 197.

²⁶⁴ See above Parts I-III.

²⁶⁵ F Dawson “The New Zealand Contract Statutes” [1985] LMCLQ 42, 43. Compare for example Fuller, above n 34; Macaulay and others, above n 67.

court thinks just". To counter such rough justice, Dawson suggested that:²⁶⁶

New Zealand contract theorists will have to assemble (and fairly rapidly) a new theory of contract obligation which will not only explain what role should be accorded to contractual autonomy under the statutory regime, but which will also explain why it is appropriate for courts to interfere with the parties' own arrangements. One suspects that this will require the development of a fairly sophisticated notion of contractual justice, reconciling concepts of contractual autonomy, good faith bargaining and substantial equivalence of exchange, and careful working out the relationship between contract and tort obligations. This is a daunting task ...

Contrasting the tendency of French contract law commentators to begin expositions with "different philosophical conceptions of contract law", he also suggested that common lawyers' traditional aversions to articulating principles would need to be overcome, especially as "the courts struggle to interpret the language of the various statut[...]es".²⁶⁷ Unfortunately, Dawson left academia for private practice in the early 1990s. Perhaps from that vantage point he assisted in reining in tendencies by some judges to interfere too readily in parties' agreements, but this move deprived New Zealand of an influential academic commentator interested in broader contract law theory building.²⁶⁸

In 1988, Brian Coote reviewed the cases emphasised by Dawson, suggesting that they did not undermine a more classical understanding of contract, or at least should not encourage the emergence of "a new law of contract" centred on "reasonableness" as suggested by Barton in 1981.²⁶⁹ In a lengthy separate publication around the same time, Coote rose to the challenge of developing a general theory of contractual obligation, one which came down firmly on the side of insisting on the need for courts to respect party autonomy. In particular, he argued that contract law's function as an institution lay in allowing parties to credibly commit to the assumption of obligations, so that the focus should remain on the interests of the promisor rather than the promisee.²⁷⁰ This perspective attracted considerable attention in Australia,²⁷¹ as well as New Zealand, and Coote maintains it to this day. One corollary is that contractual obligations, taken on voluntarily by parties, are distinguished sharply from duties "like those in tort, imposed *ab extra* by force of law". A second is "the need for enforceability", which not only differentiates contractual obligations from "merely moral, social and religious ones", but also provides the "key to security of contract" by ensuring that "sanctions ... mirror the obligations assumed".²⁷² Such views have been developed in remarkable disregard of – or at least, disinterest in – the jurisprudential, political and empirical work by legal realists and their followers in contract law theory development overseas.²⁷³ Nonetheless, with a comprehensive conceptual framework in

²⁶⁶ Dawson, above n 265, 57.

²⁶⁷ Dawson, above n 265, 44.

²⁶⁸ For a rare contribution after his career move, see F Dawson "Reflections on Certain Aspects of the Law of Damages for Breach of Contract" (1995) 9 JCL 125.

²⁶⁹ B Coote "The Contracts and Commercial Law Reform Committee and the Contract Statutes" (1988) 13 NZULR 160, 170-171, citing Barton (above n 213).

²⁷⁰ B Coote "The Essence of Contract" Part One (1988) 1 JCL 91; Part Two (1989) 1 JCL 183.

²⁷¹ See for example J Carter and D Harland (eds) *Cases and Materials on Contract Law in Australia* (3 ed Butterworths, Sydney, 1998) 6-12.

²⁷² Coote, above n 246, 38

²⁷³ Compare above Parts I-III.

place, Coote has consistently criticised some judges for undermining the allegedly rather conservative original intentions of those responsible for New Zealand's Contract Statutes. He has castigated judgments perceived as contrary to this theory, premised on the primacy of party autonomy and supporting rules capable of predictable enforcement.²⁷⁴ In a valedictory lecture delivered in 1995 to a standing ovation, Coote declared himself an unabashed "formalist", and his writings in this vein have remained prolific.²⁷⁵

Coote's nemesis nowadays, in important respects, is David McLauchlan. In the latter's inaugural lecture at Victoria University of Wellington in 1983, he shared concerns about the Contracts Statutes promoted by the CCLRC, of which he had not been a member. McLauchlan criticised the Contractual Remedies Act 1979, in particular, for doing away with "a body of intricate case-law, developed by the courts over 200 years, ... replaced by a discretion for the exercise of which little meaningful guidance is given". This area was seen to be one in which "certain well-defined problems constantly recur", and McLauchlan argued that: "it would have been possible to enact *principles* to be applied by the courts. It simply required time and effort".²⁷⁶ He has since continued to expend much effort in relating trends and concepts particularly in Anglo-New Zealand contract law to the areas dealt with by the Contract Statutes.²⁷⁷ Also driven by respect for the elaborate common law and equitable rules developed by the courts to regulate unfairness in contractual terms and negotiations, McLauchlan launched a scathing attack on a Preliminary Paper published in 1990 by the Law Commission, which had proposed a succinct set of general standards.²⁷⁸ However, a clear tension with Coote's endorsement of a formal approach to contract law emerged in 1992, when McLauchlan reviewed developments in the Contract Statutes – and especially judge-made contract law – to proclaim the advent of "the 'New' Law of Contract in New Zealand".²⁷⁹

Those elements of the so-called classical law of contract that survived the judicial and legislative inroads of the first 70 years of this century are gradually being supplemented and overtaken by a body of law which, *inter alia*, enforces some previously unenforceable promises and grants relief from some previously enforceable promises, often in accordance with a variety of broad standards such as reasonable expectations, legitimate commercial expectations, unconscionability, good faith, and even "the confident assumptions of commercial parties".

²⁷⁴ See for example Coote, above n 246; n 249.

²⁷⁵ B Coote "Contract - An Underview" in B Brown (ed) *Contract - An Underview: A Souvenir of a Valedictory Lecture* (Legal Research Foundation, Auckland, 1995) 13. See for example Coote, 246.

²⁷⁶ D McLauchlan "Contract and Commercial Law Reform in New Zealand" (1984) 11 NZULR 36, 44. See also D McLauchlan "Contract Law Reform in New Zealand: The Contractual Remedies Act 1979" (1981) 1 OJLS 284.

²⁷⁷ See for example D McLauchlan "Merger and Acknowledgement Clauses under the Contractual Remedies Act" (1988) 18 VUWLR 311; D McLauchlan "The Demise of *Conlon v Ozolins*" (1991) 14 NZULR 229.

²⁷⁸ D McLauchlan "Unfair Contracts - The Law Commission's Draft Scheme" [1991] NZ Recent L Rev 311. Compare New Zealand Law Commission "*Unfair Contracts* (Preliminary Paper No 11, Wellington, 1990); and below Chapter Three Part IV.C. See also A Angelo and E Ellinger "Unconscionable Contracts: A Comparative Study of the Approaches in England, France, Germany, and the United States" (1992) 14 Loyola of Los Angeles Int'l and Comp LJ 455.

²⁷⁹ D McLauchlan "The 'New' Law of Contract in New Zealand" (1992) NZ Recent L Rev 436, 436.

The last-mentioned phrase was taken from a judgment of Lord Justice Bingham (as he was then), in a case in 1990 finding a collateral contract in a tendering process.²⁸⁰ McLauchlan concluded by disagreeing with some critics and acclaiming this decision as an illustration of “the trend towards the imposition of just solutions which can be ascribed to reasonable persons in the position of the parties”.²⁸¹ He added:²⁸²

My judgment is that commercial men and women would welcome the imposition of the kind of limited legal obligation imposed by the court in the ... case. Such a result tends to enhance, not undermine, the utility of the tendering process. Of course, this disagreement goes to show once again that the reasonable outcome will often be a matter on which careful minds, weighing all relevant considerations, may differ. One’s judgment as to what is reasonable is dependent on one’s life experience, philosophical starting-points, and moral values.

Notably absent from this list of relevant determinants was an interest in a systematic investigation of the actual experiences, practices and norms of commercial parties – a problem already uncovered when Barton’s hypothesis that agreement was being displaced by “reasonableness”, as the lodestone for contractual liability, drew such strong reactions a decade earlier.²⁸³ The omission is also surprising in light of McLauchlan’s appeal to a prominent US legal realist and the mentor to Llewellyn, Arthur Corbin, for the proposition that contract law revolves around “the realisation of reasonable expectations that have been induced by the making of a promise”.²⁸⁴ Further, contesting the ascription by Adams and Brownsword of ideological schizophrenia to Lord Wilberforce, McLauchlan suggested that:²⁸⁵

the pursuit of fair and reasonable results, “just solutions which can be ascribed to reasonable men in the position of the parties”, necessarily involves giving due weight, sometimes perhaps decisive weight, to commercial convenience. Justice in contractual disputes requires a balancing of the values which constitute the so-called “market-individualist” and “consumer-welfarist” philosophies, in so far as they point in different directions.

This represents basically the “conflicting considerations” model which emerged from the 1940s through to the 1960s in the US, only to be seriously challenged since 1970 by ideological tension and new contract law theory based notably on liberal rights-based philosophy, economic analysis, and a renewed commitment to empirical inquiry.²⁸⁶ McLauchlan also downplayed the profoundly historical and philosophical arguments developed by Atiyah, and more importantly Collins’ communitarian studies in the 1980s, as well as pioneering empirical studies in England. Instead, he left the assertion

²⁸⁰ *Blackpool and Fylde Aero Club v Blackpool Borough Council* [1990] 1 WLR 1195, 1201, per Bingham LJ.

²⁸¹ McLauchlan, above n 279, 460.

²⁸² McLauchlan, above n 279, 461.

²⁸³ Barton, above n 213.

²⁸⁴ McLauchlan, above n 279, 440 n 33, citing *Corbin on Contracts* (1963) Vol 1, 3. Compare above Part I.

²⁸⁵ McLauchlan, above n 279, 446. The first citation, repeated from the opening paragraph of the article, is from Lord Wilberforce’s speech in *National Carriers Ltd v Panalpina (Northern) Ltd* [1981] AC 675, 696. It should be added that the House of Lords in that case extended the doctrine of frustration to leases of land, but decided that it could not be applied in the case at hand. See below Chapter Four Part II.A. For the other phrases cited by McLauchlan, see Adams and Brownsword, above n 142.

²⁸⁶ See above Part I.

that “there has been a perceptible change in judicial attitudes and, in partnership with the legislature, in the values which should determine the resolution of contract cases”. This was supported by “some general remarks concerning the underlying attitudes and values of judges when resolving contract cases today”: “a more liberated and adventurous judiciary” less bound to precedent, exhibiting “a greater recognition of the realities of the contracting process and willingness to adapt and change the law accordingly; more awareness of that people do not read standard-form contracts and often do not reduce the whole of their agreement to writing”,²⁸⁷ more concern to achieve individualised justice, and a willingness to blur the distinctions between contractual and tortious liability.

IV.E The Slow Development of Contract Law Theory Since the Mid-1990s

McLauchlan’s subsequent work has not attempted to develop these points, but rather to propound a new set of “principles” to guide the courts. To be fair, it has only been in very recent years – especially after the retirement of Lord Cooke from the Court of Appeal – that robust debate has emerged in New Zealand about the attitudes and roles of the judiciary.²⁸⁸ Further, as President of the Court in 1990, Lord Cooke had claimed that “fairness” and “reasonable expectations” were new lodestones in New Zealand law.²⁸⁹ Taking this lead, in 1993 Thomas J published his monograph outlining a jurisprudential framework for judge-made law reflective of community expectations and not hidebound by precedent.²⁹⁰ Yet two swallows never make a summer. Moreover, Lord Cooke’s claims were not centred on developments in contract law;²⁹¹ he generated relatively few lasting innovations in New Zealand contract law doctrine,²⁹² and his tendency to adopt a strict approach in commercial settings, as opposed to transactions involving consumers or individuals, has been noted by a leading practitioner.²⁹³ Likewise, Justice Hammond’s imposition of punitive damages in contract has not generated momentum.²⁹⁴ His writings as a law professor, carried over into a judgment

²⁸⁷ McLauchlan, above n 279, 447.

²⁸⁸ See above Chapter One, especially Part III.

²⁸⁹ R Cooke “Fairness” (1989) 19 VUWLR 421. See also above Chapter One Part II.C.

²⁹⁰ E W Thomas “A Return to Principle in Legal Reasoning and an Acclamation of Judicial Autonomy” (1993) VUWLR Monograph 5.

²⁹¹ Above n 289. Contract law also did not figure prominently in his review of the constituents of “The New Zealand National Legal Identity” (1987) 3 Cant L Rev 171, 176-178. But see R Cooke “Introduction” (1995) 9 JCL 3, 6 (commenting that “reasonable expectations” should be a guiding principle concept “in contract as in other fields”).

²⁹² Compare *McElroy Milne v Commercial Electronics Ltd* [1993] 1 NZLR 39 with R Cooke “Remoteness of Damage and Judicial Discretion” (1978) 37 CLJ 289. Compare recently *BNZ v NZ Guardian Trust Co Ltd* [1999] 1 NZLR 664 (CA); *JB Caldwell Ltd v Logan House Retirement Home Ltd* [1999] 2 NZLR 99 (HC). See also the presumption against enforceability of certain informal commercial agreements, arguably created by Cooke P in *Concorde v Anthony Motors (Hutt) Ltd* [1981] 2 NZLR 385, discussed below Chapter Two Part II.B.1.

²⁹³ J Farmer “Lord Cooke and Judicial Decision-making: A Perspective from the Commercial Bar” in P Rishworth (ed) *Struggle for Simplicity: Essays for Lord Cooke of Thorndon* (Butterworths, Wellington, 1997) 53, 57-58. Compare also Lord Cooke “Party Autonomy” (1999) 30 VUWLR 257.

²⁹⁴ *Tak & Co Inc v AEL Corporation Ltd & Anor* (1995) 5 NZBLC 103,887. The Court of Appeal left the issue unresolved in *State Insurance Ltd v Cedenco Foods Ltd* (6 August 1997) unreported, Court of Appeal, CA 216/97.

in 1993, have recently encouraged Thomas J to follow suggestions by Lord Cooke and develop a “dualistic” or “substantive interest-based” model under which breach of a civil obligation allows the judge to choose any remedy deemed most appropriate, irrespective of its historical or conceptual baggage.²⁹⁵ However, reviewing developments mainly since the mid-1990s against the backdrop of a rising caseload pressures on New Zealand courts since 1977, John Smillie has argued recently that:²⁹⁶

There are signs that an increasing number of judges are coming to the view that an independent law of contract offering a minimum level of certainty and predictability is essential in order to provide a meaningful guide to conduct and permit efficient resolution of disputes. The Court of Appeal is now more likely to give literal effect to the plain words of a contractual document, and less inclined to read down exclusion clauses and imply protective terms. The court has made some attempt to halt the progressive intrusion of the tort of negligence into the contractual world of economic affairs, and to differentiate fiduciary duties of loyalty from ordinary contractual obligations. In what is perhaps the most significant recent development, a majority of a five-judge court held that expectation damages for loss of future benefits cannot be recovered in an action for breach of the Fair Trading Act 1986, reasoning that only a binding contractual contract can generate an expectation will be fulfilled.

Unsurprisingly, Thomas J has often dissented in these respects.²⁹⁷ Occasionally, he has achieved some success in turning other judges to his more substantive reasoning. The most prominent example in recent years is the attempt to recant from a literal interpretation of contracts, preferring consideration of a wide array of extrinsic evidence. In *Attorney-General v Dreux Holdings Ltd*, Thomas J advocated reference to subsequent conduct.²⁹⁸ The propriety of this was left open by the Court of Appeal in *Airwork (NZ) Ltd v Vertical Flight Management Ltd*, but later approved in *Valentines Properties Ltd v Huntco Corporation*.²⁹⁹ In *Yoshimoto v Canterbury Golf Int'l Ltd*, however, Thomas J himself accepted that *stare decisis* compelled him to the conclusion that:³⁰⁰

For the moment, therefore, this Court must accept that, until the rule is reviewed by the Privy Council (or, possibly, the House of Lords) the extrinsic evidence relating to the draft agreement must be disregarded as part of the negotiations. The cautious flexibility in the application of the rule [of contract interpretation] which would seem sensible to ensure effect is given to the reasonable expectations of commercial men and women is lacking.

The pre-eminent role of Privy Council precedent in this area had been emphasised in an article published by a partner in a nation-wide law firm, Don Holborow, a month or so

²⁹⁵ E W Thomas “An Endorsement of a More Flexible Law of Civil Remedies” (1999) 7 *Waikato L Rev* 23, 25-26, 33, 44 (following *Butler v Countrywide Finance Ltd* [1993] 3 NZLR 623).

²⁹⁶ J Smillie “Is Security of Contract Worth Pursuing? – Reflections on the Function of Contract Law” (2000) 16 *JCL* 148, 152 (citations omitted). See also J Smillie “Certainty and Civil Obligation” (2000) 9 *Otago L Rev* 633.

²⁹⁷ See also for example the decision by Henry and Keith JJ reiterating the primacy of the contractual matrix in tort claims brought among businesses: *R M Turton & Co Ltd (in liq) v Kerslake & Partners* (6 July 2000) CA 169/99 (Thomas J dissenting).

²⁹⁸ (1996) 7 *TCLR* 617.

²⁹⁹ Respectively, [1999] 1 NZLR 641; [2000] 3 NZLR 16. But see *Ingram & Anor v Patcroft Properties Ltd* (18 April 2000) unreported, High Court, Auckland Registry, CP 387/SW99, Smellie J (following an earlier Court of Appeal ruling).

³⁰⁰ [2001] 1 NZLR 523, 549. Thanks are due to Don Holborow for providing a copy of this judgment.

prior to the *Yoshimoto* judgment. He went on to castigate the general move away from literal interpretation, as signalled by the House of Lords in *Investors Compensation Scheme Ltd v West Bromwich Building Society* and followed by the New Zealand Court of Appeal in *Boat Park Ltd v Huntco*,³⁰¹ adding indications that some High Court judges in New Zealand were still attracted to a more literal analysis.³⁰² There is also evidence of a move back to more literal interpretation in England.³⁰³ Such developments have been acclaimed by Jack Hodder, a partner in another large firm and editor of New Zealand's most widely read weekly law newsletter (as well as a former Law Commissioner), as part of regular entreaties to maintain bright-line rules. In a very recent editorial, he acclaimed the Court of Appeal's refusal to find an informal agreement to be a binding contract, but expressed disappointment that the Court did not specifically "disapprove of Professor David McLauchlan's more or less heretical modern writings on contract".³⁰⁴

McLauchlan therefore seems to have overstated the situation in proclaiming "the new law of contract interpretation" in 2000.³⁰⁵ Nonetheless, having found a ready ally in Thomas J, he appears committed to waging a crusade to encourage New Zealand courts to move away from a literal approach.³⁰⁶ Similarly, McLauchlan criticises judges who take an overly objective approach to contract formation.³⁰⁷ He also proposes a multi-factor balancing test, rather than a bright-line rule, to determine whether parties in contractual negotiations intended to be bound despite referring to a formal contract having to be later executed.³⁰⁸ an approach which could encourage more promises to be enforced. McLauchlan also chastises New Zealand courts for their reluctance to recognise agreements to agree, even compared to English and Scottish courts,³⁰⁹

³⁰¹ Respectively, [1998] 1 All ER 98 (HL); and [1999] 2 NZLR 74.

³⁰² D Holborow "Contract Interpretation" [2000] NZLJ 374, 375-376 (discussing judgments by McGechan J and by Fisher J). Compare also *Findlay & Anor v Carey & Anor* (5 May 2000) unreported, High Court, Hamilton Registry, A 146/99, where Hammond J felt obliged to apply *Boat Park* but held reservations about the approach outlined in that case.

³⁰³ See for example Sir Christopher Staughton "How Do the Courts Interpret Commercial Contracts" [1999] CLJ 303; M Clarke "Interpreting Contracts – The Price of Perspective" [2000] CLJ 18; *Bank of Credit and Commerce International SA v Ali & Ors* [2001] 1 All ER 901; S Gee "Interpretation of Commercial Contracts" (2001) 117 LQR 358.

³⁰⁴ J Hodder "Contracts: To Fill or Not to Fill Gaps" (2001) 24/41 TCL 1, discussing *Electricity Corporation of NZ v Fletcher Challenge Energy Ltd* (10 October 2001) Court of Appeal, CA 132/00, Richardson P, Thomas, Keith, Blanchard and McGrath JJ. For further stout advocacy of more bright-line rules, see for example J Hodder "Contract Law: Construction Problems" (2001) 24/8 TCL 1; "Contract and Tort, Again ..." (2001) 23/25 TCL 1; "Certainty: The Law and the Southern Perspective" (2000) 23/19 TCL 1.

³⁰⁵ D McLauchlan "The New Law of Contract Interpretation" (2000) 19 NZLJ 147. This was also the title of a seminar he presented at the University of Auckland's Research Centre for Business Law on 28 November 2000, further billed as describing "a quiet revolution" in recent years.

³⁰⁶ In *Yoshimoto* (above n 300), Thomas J cites D McLauchlan "A Contract Contradiction" (1999) 30 VUWLJ 175. See also for example D McLauchlan "Subsequent Conduct and Contract Interpretation: An Update" (1997) 3 NZBLQ 147; D McLauchlan "The Plain Meaning Rule of Contract Interpretation" (1996) 2 NZBLQ 60 ["Plain Meaning"].

³⁰⁷ See for example D McLauchlan "Actual Consensus Ad Idem: Unnecessary But Surely Sufficient?" [1995] NZLJ 45.

³⁰⁸ See D McLauchlan "Informal Agreements for the Sale or Lease of Land: When Are They Contracts?" (1993) NZ Recent L Rev 442; D McLauchlan "'We Have a Deal' - Mere Consensus or Concluded Bargain?" (1996) 2 NZBLQ 206.

³⁰⁹ See D McLauchlan "Rethinking Agreements to Agree" (1998) 18 NZLJ 77.

thereby undercutting more flexibility in long-term relationships. These areas – formation, terms, and performance – touch on key aspects of the classical law of contract.³¹⁰ Ray Mulholland has also joined in surveying some developments in areas in or related to contract law, albeit in much more broad-brush fashion and ending with the concession that: “Despite the massive pressure that has been exerted on contract, in recent years, in the name of fair dealing, the substance of classical contract remains intact”.³¹¹

Further, a regular feature of McLauchlan’s writings over the 1990s are appeals to Fuller, Corbin, the UCC, the *Restatement (Second)*, or Farnsworth.³¹² Thus, the new body of “principle” being proposed for New Zealand contract law, especially judge-made law, appears to be the neoclassical synthesis which rose to dominance in the US over the 1960s and 1970s, despite that jurisdiction’s very different history and institutional backdrop in relation to contract law (including, for example, extensive use of jury trials).³¹³

McLauchlan also faces formidable opponents in academia, in addition to Coote, as well as within the legal profession. Peter Watts, the successor to the Chair held by Coote at the University of Auckland, has argued recently that.³¹⁴

... like others, I doubt whether the evidence [McLauchlan] relies on, principally a series of discursions of Lord Hoffmann, really supports the degree of change he is hailing, nor do I think the world would be a happier place for a fresh start. I think the conventional view in New Zealand has been against the use of post-contract evidence, if only because of the fairly consistent stance of the House of Lords on this issue.

More generally, he argues that “there has been a very substantial degree of continuity at the core and in the detail of our private law, and in the reasoning used in settling it”.³¹⁵ Likewise, his younger colleague Rick Bigwood observes that.³¹⁶

Care must inevitably be taken to avoid any suggestions that the law of contracts has undergone a greater transformation than in reality it has, the more so when one’s historical conclusions about that subject are founded primarily on judicial opinions expressed at particular times. Still, even caricatures gesture in the direction of truth. It cannot be denied that modern contract law looms as a “mutation” of some earlier, “more pure” strain.

Bigwood notes that one manifestation of this is the appeal by judges to broad concepts such as “fairness” and “reasonableness”. However, he insists that the underlying “idea

³¹⁰ Compare Mooney, above n 91.

³¹¹ R Mulholland “Freedom From Contract?” [2000] NZLJ 195, 197.

³¹² See for example D McLauchlan “Damages for Misrepresentation under the Fair Trading Act: Expectation or Reliance” (1999) 5 NZBLQ 133, 148; McLauchlan, above n 306, 84 (Plain Meaning); McLauchlan, above n 309, 97 (Agreements); McLauchlan, above n 307 (Consensus).

³¹³ Compare above Part I; above Chapter One; Galanter, above n 43; and for example W Whitford “The Role of the Jury (and the Fact/Law Distinction) in the Interpretation of Written Contracts” [2001] Wisc L Rev 931.

³¹⁴ P Watts “The Judge as Casual Law-Maker” in R Bigwood (ed) *Legal Method in New Zealand: Essays and Commentaries* (Butterworths, Wellington, forthcoming 2001), under “3. The Impact of the Legislative Thesis”.

³¹⁵ Watts, above n 314, under “The Need for a New Zealand Methodology”.

³¹⁶ R Bigwood “Conscience and the Liberal Conception of Contract: Observing Basic Distinctions” Part One (2000) 16 JCL 1, 2.

of 'conscience' is not wholly external to the liberal notion of contract but rather is a requirement of its own internal logic".³¹⁷ Opening a new chapter in contract law theory development in New Zealand law faculties,³¹⁸ Bigwood draws primarily on philosophical arguments to develop this argument in four main steps. He first follows Aristotle in differentiating forms of justice, namely (multilateral) "corrective" justice and (bilateral) "distributive justice". Bigwood next adopts John Rawls' theory that distributive justice principles should be applied in determining "the basic structure of society", but not to the rules governing "particular transactions" entered into by individuals. Thirdly, this allows him to draw the following distinction:³¹⁹

"Contract as Institution" ("Contract-1") is the publicly announced system of rules that defines the form of activity by which private individuals may take upon themselves legal contractual liability, thereby giving that activity its structure (a normative significance it would not otherwise have). As such, Contract-1 is synonymous with "the free market"....

"Contract as instrument", in contrast, corresponds to the law of contract as the normative device employed to regulate *particular* actions falling under Contract-1, that is, the formation, performance and enforcement of *particular* transactions.

Bigwood then argues that while distributive justice concerns may mean that a society does not permit distribution of available resources solely on the basis of Contract-1, once the latter has been committed to, "Contract-2" must be allowed to operate in a largely unqualified and *non-distributive* manner, free from excessive governmental interference and collective conceptions of the good".³²⁰ The final step in the argument is to contend that:³²¹

adherence to the values of individualism implies that the justice of private transactions between particular individuals must depend at least on the *actual* consent of the parties. Ultimately, however, our conclusions about the conditions of such consent must be able to accommodate our understanding of corrective justice (and not distributive justice) as the primary mode of legal ordering in this context. Absence of consent on the part of one contracting party (P) is not, per se, positive justification for disappointing the contractual expectations of the party on the other side of the transaction (D). All things being equal, D must somehow be responsible for P's failure to bring a proper consent to the transaction; the absence of a true, full, and free consent must somehow be linked to a form of *wrongdoing* on the part of that other party (in procuring or receiving that consent). In the final analysis, Contract-2 is rendered just by implying into the interactional structure of particular transactions duties of good faith and fair dealing that monitor and control the conditions under which personal contractual consent is procured and received. The idea of "conscience" in connection with the formation of contracts simply contributes content to that implication.

This view generates implications such as a focus on wrongdoing by D ("the

³¹⁷ Bigwood, above n 316, 12.

³¹⁸ At least one theorist interested in contract law is presently active in a Philosophy department, at the University of Auckland: Tim Dare. However, he has not published in New Zealand law journals, and his work does not seem to be widely known among legal academics in New Zealand, let alone its legal profession. Compare for example T Dare "Kronman on Contract: A Study in the Relation Between Substance and Procedure in Normative and Legal Theory" (1994) 7 Can J of Law and Jurisprudence 331.

³¹⁹ Bigwood, above n 316, 33.

³²⁰ Bigwood, above n 316, 34.

³²¹ R Bigwood "Conscience and the Liberal Conception of Contract: Observing Basic Distinctions" Part Two (2000) 16 JCL 191, 192.

Defendant”) rather than the effect on P (the “Plaintiff”), in rethinking the doctrine of undue influence; and the primacy of procedural over substantive unfairness.³²² The former challenges a doctrine of classical contract law; but the relegation of distributivist concerns to the “Contract-1” stage, and the pre-eminence given to voluntary assumption of consent in “Contract-2”, place this theory within the neoclassical tradition in the US.³²³

Those sympathetic to that tradition but who have not explored philosophical underpinnings, like McLauchlan, might fill this lacuna by adopting Bigwood’s theory and arguing that his perception of “conscience” equates to the “reasonable expectations” principle allegedly guiding New Zealand judges. However, this would involve showing that Bigwood’s implications in the law of undue influence fit with the case law, and that the theory works in other areas of private law.³²⁴

Such endeavours may also deflect from the exciting possibility of developing philosophical and sociological critiques of the first three steps of Bigwood’s argument, as well as the primacy given to voluntary consent in the fourth, suggested by other strands of contract law theory since the 1970s in the US, as well as Japan and the US.³²⁵ A recent lecture by Thomas J is disappointing in this respect, but at least highlights an important area for future debate. On the one hand, he praises Bigwood’s “outstanding contribution to legal theory in elaborating the law’s antithesis [sic] to exploitation in contract law”, recognising the need to focus on exploitation rather than coerced consent and on the autonomy of the individual rather than paternalistic intervention by judges.³²⁶ On the other hand, drawing on Fuller for the notion that values develop from a homogenous society, Thomas J concludes with indications that he wishes to retain a communitarianism infused by altruism, distinguished from liberalism.³²⁷

... the law ... developed so as to reflect the underlying precept that a person may not use his or her superior strength or power to take or obtain an unfair advantage at another’s expense. Judges reflect this sense of fairness which is immanent in the community.

While liberal individualism may hold sway, our society is sufficiently homogenous to be underpinned by some common mores and enduring values, and the precept of non-exploitation is an integral part of those mores and values. ... It is for this reason that the notion of an altruistic premise underlying the law cannot be debunked. It stems from the community itself.

Nonetheless, by firmly placing philosophical debate on the agenda, Bigwood’s recent

³²² Bigwood, above n 321, 198-202, 209-210. See also R Bigwood “Undue Influence: ‘Impaired Consent’ or ‘Wicked Exploitation?’” (1996) 16 OJLS 503, 505-507.

³²³ Above n 46.

³²⁴ Compare P Watts “The Role of Conscience – A Commentary on ‘Conscience and the Liberal Conscience of Contract’” (2000) 16 JCL 223, 227-232.

³²⁵ See for example Part I above (especially CLS, Macneil, and possibly even Posner’s current neo-pragmatic liberalism), Part II (especially Collins), Part III (especially Yamamoto and Uchida). Compare also below Chapter Five Part II.B.2 (Habermas).

³²⁶ E Thomas “The Conscience of the Law” (2000) 8 Waikato L Rev 1, 15. See also his lengthy dissent in *Electricity Corporation of NZ v Fletcher Challenge Energy Ltd* (10 October 2001) Court of Appeal, CA 132/00, in which he argues (at para 128) that contract law should “give effect to the reasonable expectations of commercial men and women”, to respect “the autonomy of the will of the parties”.

³²⁷ Thomas, above n 326, 22. Bigwood’s philosophy is fundamentally at variance with these apparent remnants of “moral realism” (on which see J Allen “The Invisible Hand in Justice Thomas’ Philosophy of Law” [1999] NZ L Rev 213; and above Chapter Three Part II.C).

forays may finally open New Zealand contract law theory and doctrine to more substantive reasoning processes. This potential was highlighted by the newly appointed Chief Justice at the opening of a Journal of Contract Law conference in 1999 at which Bigwood presented his latest thesis, when she remarked:

Thirty years ago there were doubts that contract would see out the 20th Century, without being subsumed into a general law of obligations. Such pessimism failed to anticipate the libertarian revival. It affirms, as did the cases which established contract law as we know it, the economic and social efficiency of freeing competent parties to strike their own bargains. There is social benefit in the enforcement of such bargains.

The debate has centred on whether contracts should be enforced by Courts according to their formal content or according to substantive fairness or good faith. The libertarian tradition is in tension with the natural law tradition which views law as a substantive principle which confers wider responsibilities upon the Judge. Fairness and good faith are important considerations in identifying the bargain the parties have made and in its enforcement. This view of contract is buttressed by modern legislation under which broad discretion is conferred upon Judges to go beyond the formal reasons for the transaction and look to the substance of what is achieved.

The tension between the two views is nothing new and is one found in all areas of law. Professor Tony Honore compared the contest between natural lawyers and legal positivists to an international soccer match: "Decade after decade Positivists and Natural Lawyers face one another in the final of the World Cup (the Sociologists have never learned the rules). Victory goes now to one side, now to the other, but the enthusiasm of the players and spectators alike ensures that the losing side will take its revenge.

Hopefully, such matches will now become regular fixtures in New Zealand, engaging not only positivists and natural lawyers but also sociologists (under new rules), with an awareness that taking any side may have political or ideological implications. Only such transformations seem likely to secure the overall expansion of more substantive reasoning in contract law in New Zealand, particularly in view of the comparatively late expansion in debates about contract law theory.

V Implications

The foregoing has outlined the development of contract law theory in all four jurisdictions, suggesting that that Japan and (perhaps especially) the US promote highly substantive reasoning, despite a strong doctrinal tradition particularly in Japan, and debates in both jurisdictions over the 1990s which may reinforce more formal approaches. By contrast, contract law theory development in England, and especially New Zealand, displays distinctly more formal tendencies, although seeds planted in the late 1970s have contributed to a flowering of theory and empirical research in England in recent years, thus expanding the scope for a more substantive approach.

Of necessity, the survey has been quite broad-brush and selective. No doubt one could spend much more time and energy examining the oeuvre of individual theorists discussed so far, and that of others not introduced here (at all, or in any detail). One might also question whether it makes sense, in an increasingly globalised academic environment, to derive even a broad overview of developments from geographical origins of writers. However, it still seems plausible to link the emergence of distinctive approaches in contract law theory to the jurisdictions in which individual theorists were most active for most of their careers. Even nowadays, practical limits to mobility mean that an academic's perceptions of what it is important to research and write about, and in

what style and for whom, are likely to be determined by his or her main work environment.³²⁸ This was probably even truer for the older generations of contract law theorists discussed above. The academic milieu they and their successors inhabited, and sustained, seems to have coloured important strands of contract law theory, in different jurisdictions in different ways. In turn, these seem to have affected – albeit no doubt to varying degrees – the development of judge-made law and statutory interventions, as well as doctrinal reformulations.

With these caveats in mind, it is submitted that the following advantages can be derived from the sustained comparison attempted above. As mentioned at the outset to this Introduction, the analysis mentions some of the more specific problems and contract law doctrines, such as issues surrounding the pervasive use of standard form contracts and the development of a generalised principle of good faith, which are discussed in more detail in the rest of this Part. More importantly, the conclusion that a dichotomy remains between the US and Japan, and between England and New Zealand, should make more plausible the argument that there still remain significant differences between both pairs of jurisdictions in a number of areas of contract law: the role of formal requirements in contract formation (below Chapter Two), contractual unfairness (Chapter Three), and doctrines of frustration or the like (Chapter Four). The first area invites exploration of content formality in legal reasoning. The other two invite exploration into authoritative formality, notably whether the applicable norms should be reduced to the parties' initial agreement, divorced from broader socio-economic context (especially in deciding claims of unfairness) and subsequent developments affecting the contractual relationship (in particular, extreme changes of circumstances). All three areas also touch on the tension between standards and "hard and fast rules", primarily the dimension of interpretive formality, although exploring this will not be the main focus in the following three Chapters. Lastly, as mentioned at the outset of this Introduction, the problem of changed circumstances identified in the last area (Chapter Four) leads to the positing of another variety of formality, didactic formality. Thus, by further applying and refining the analytical framework proposed by Atiyah and Summers over a decade ago, Part Two aims to further contribute to the discipline of comparative law.

Another advantage of the comparative sketch of contract law theory development, attempted above, is that it raises broader issues regarding the choice of contract law fields discussed in the rest of this Part, and the ways in which they will be analysed. The areas have been chosen because they straddle various key stages of the typical contracting process: formation, determining the scope of obligations assumed (or imposed), and performance (or relief). More importantly, they encompass central concerns of the "classical" model of contract law: limiting the scope for entering into an enforceable contract, for implying obligations beyond the clearly expressed agreement of the parties, and for allowing excuses or relief from performance obligations.³²⁹ Thus, investigating these three contract law fields, in the following Chapters, adds to the debate about whether this classical model, or indeed a neoclassical model,³³⁰ has been or is being displaced in these four jurisdictions.

³²⁸ See generally Ginsburg and others, above n 9, especially 2-8. Thanks to Rick Bigwood for raising this point.

³²⁹ Gilmore, above n 12; Mooney, above n 91.

³³⁰ Macneil, above n 70.

Like other New Zealand contract law scholars who have examined recent case law, sometimes grappling with philosophical issues to interpret trends,³³¹ but also taking into account the broader institutional framework described above (especially in Chapter One, and in this Introduction) and developments in the specific contract law areas reviewed below, this writer is sceptical about claims that there has been a decisive move away from a classical model in New Zealand.³³² Normatively, the writer would prefer to see a move towards more substantive reasoning in the form of a neoclassical model – and, indeed, “neo-procedural” models such as those drawing on the Habermas’ socio-legal theory, discussed below (Part Three).³³³ Objectively, however, a decisive break from formal reasoning and a classical model in contract law does not seem to have occurred in New Zealand, at least in the light of events in recent years, and even allowing for the difficulty of separating objective observation from normative reconstruction.³³⁴ Moreover, because US contract law and theory had largely abandoned the classical model for a substantive reasoning based neoclassical synthesis by the 1970s (above Part I), the writer is sceptical about suggestions that New Zealand law is converging or could converge rapidly on US law.³³⁵ At a more abstract level, this aligns him with other comparative private law theorists recently, notably in an ongoing debate about harmonisation of private law in Europe, who reject the proposition that there is or can be rapid convergence there. These theorists also tend to adopt an expansive view of “law in context”, whereas “convergence theorists” adopt a narrower “rules-plus” approach to law and comparative analysis.³³⁶ As will become apparent from the general legal theories discussed in Part Three below, and should be so already from the comparisons undertaken in Chapter One above, this writer prefers an expansive view of law. Although there is no necessary or logical correlation between such a view, and the tendency to perceive and value difference and divergence, the debate in Europe and the present thesis show that it (and its converse) often does occur.³³⁷

Thus, contract law areas chosen for the following Chapters address key concerns of contemporary contract law theory canvassed in this Introduction, such as the “transformation thesis”, and they raise questions about the appropriate methodology for addressing such issues.³³⁸ One traditional approach has been to focus on a single narrow area of law, especially trends in case law.³³⁹ However, while suggestive, conclusions risk being controverted by new court judgments – quite likely to occur, since the area is probably selected because the commentator believes it to be unsettled

³³¹ Bigwood, above n 316; Watts, above n 324; Smillie, above n 296.

³³² Compare McLauchlan, above n 279; Mulholland, above n 311.

³³³ See also Yamamoto, above n 120.

³³⁴ J Habermas (W Rehg trans) *Between Facts and Norms* (MIT Press, Cambridge Mass, 1996); R Cotterrell “Law and Community: A New Relationship?” (1998) 51 CLP 367.

³³⁵ Compare McLauchlan, above n 279.

³³⁶ See further L Nottage “Convergence, Divergence and the Middle Way in Unifying or Harmonising Private Law”, EUI Working Paper in Law No 2001/1 (European University Institute, Florence, 2001, available freely through <www.iue.it/LAW/publicat.htm>).

³³⁷ See also for example Bigwood, above n 316 (adding philosophical dimensions to at least implicit comparisons, and suggesting that there is no great transformation – as opposed to a liberal reformulation – in New Zealand contract law).

³³⁸ Collins, above n 173; Wightman, above n 174.

³³⁹ See for example McLauchlan, above n 308; above n 78.

or in need of change. Further, this approach is always open to the criticism that directions established in that particular area cannot be generalised, or do not mesh with developments in others. Most importantly, one does not need to be card-carrying legal realist to understand that reported and even unreported judgments form only the tip of the "dispute resolution pyramid", let alone an entire legal system.³⁴⁰ A second approach is a broad-brush survey of developments in judge-made and statutory law.³⁴¹ However, this still leaves doubts about selectivity, and missing the wood (key underlying normative structures or empirical realities) for the trees (black letter law or the law in books). A third approach involves engaging explicitly with those structures and realities. One variant might involve detailed case studies of "contract law in action".³⁴² By itself, however, a case study also invites the charge of selectivity. Another variant could involve broader-based interview or survey research, such as a recent survey of barristers in New South Wales which established that they disagreed with pronouncements of profound shifts away from a classical model.³⁴³ However, research based on surveys, and especially interviews,³⁴⁴ must be conducted with care. Further, if the interest lies in the broader relationship between law and society, such as whether contract law reflects the "expectations" or sense of "fairness" of a community,³⁴⁵ then that community (or parts thereof) will need to be investigated empirically too. Finally, a philosophical approach has its uses as well, but it must directly engage with empirical realities.³⁴⁶

This thesis and the rest of this Part adopt an eclectic approach, trying to draw on the strengths of these different approaches, to persuade readers of the *overall* plausibility of the argument. Specifically, the detailed comparison in Chapter One focuses primarily on case law developments. It draws on a rather formal methodology still characteristic of legal education and scholarship in New Zealand.³⁴⁷ It may not appeal to scholars from jurisdictions like Japan and especially the US (above Parts I and II). But the approach has its strengths, including a respect for the normative constraints involved in developing law through the judicial process.³⁴⁸ However, it follows the realist tradition by not seeing the doctrine of *stare decisis* as a rigid constraint, and by adopting some scepticism about judges.³⁴⁹ Rather than focusing on the latest judgments of the highest courts and pronouncements of high-profile judges, therefore, the analysis attempts to uncover general trends over time and in particular categories of cases, especially those likely to play a defining role in the differing jurisdictions.³⁵⁰ The analysis attempts to cover reported and unreported case law as comprehensively as

³⁴⁰ See for example Friedman and Macaulay, above n 67; and generally Parts I and II above. Compare also the recent observations by an English legal historian: J H Baker "Why the History of English Law Has Not Been Finished" (2000) 59 CLJ 62, 78 ("there is whole world of law which never sees c courtroom), 79 ("Trying to glean law from the year books is trying to learn the rules of chess or cricket merely by watching video-recorded highlights of matches").

³⁴¹ See for example McLauchlan, above n 279.

³⁴² See for example Wada, above n 121.

³⁴³ J Gava and P Kincaid "Contract and Conventionalism: Professional Attitudes to Changes in Contract Law in Australia" (1996) 10 JCL 140, 154.

³⁴⁴ See for example Katz, above n 85.

³⁴⁵ Compare Barton, above n 213; McLauchlan, above n 279; Thomas, above n 290, n 326.

³⁴⁶ Compare Bigwood, above n 316; with Habermas, above n 334; Cotterrell, above n 334.

³⁴⁷ Sutton, above n 193, 37.

³⁴⁸ Compare for example Johnston, above n 83.

³⁴⁹ See above Parts I and II, and Chapter One Part II.C.

³⁵⁰ Compare Ellinghaus, above n 154.

possible. It also gives due weight to the facts discussed (sometimes elliptically) in the cases, but with the overriding objective of unveiling the type of reasoning adopted by the judiciary.³⁵¹ By contrast, Chapter Three examines in more general fashion some core developments in legislation and academic theory, as well as in the case law. Chapter Four then attempts to relate such developments to the practices and expectations of real-life contracting parties, by undertaking empirical inquiries.

The latter may be the most controversial aspect of the thesis for readers in New Zealand, because empirical research has never formed a significant part of contract law theory development in that jurisdiction (above Part IV). However, any concern that the investigations into practices and expectations do not constitute "law" can be met quite easily. The simplest response is that terminology does not matter anyway: the thesis can be justified as an investigation of black letter law, simply ignoring the actual practices and expectations in the latter part of Chapter Four. A related response comes from a commonplace of comparative law methodology: the scope of "black letter law" often differs somewhat among the jurisdictions considered. Case law, for instance, is not technically a source of law under Japan's civil law system.³⁵² Yet it has immense significance throughout the contemporary legal system. If only for practical reasons in making comparisons, therefore, it cannot be ignored when comparing legal developments in common law jurisdictions. By the same logic, an examination of practices and expectations should not be dismissed because it appears not to constitute "law" under prevailing conceptions in New Zealand, if they may more readily form part of the "law" in other jurisdictions such as the US and Japan (above Parts I and II). Most fundamentally, however, the analysis of the evolution of contract law theory (in this Introduction) and the general legal theory introduced below (Part Three) suggest that narrow, legal positivist conceptions of law (as, simply, legislation and judge-made law) are the ones which need the most defending.

Thus, this thesis maintains an admittedly expansive view of law, but one consistent with trends apparent in the development of contract law theory in all four jurisdictions, as well as influential general legal theory developed in recent decades. Nonetheless, it is prepared to accept that other possible approaches to analysing contract law can never be dismissed as simply wrong, and thus aims to contribute to an ongoing debate in contract law theory and methodology.³⁵³

³⁵¹ Compare for example K Lane-Scheppelle *Legal Secrets* (U Chicago Press, Chicago, 1988) 103: In order for the positive account of what happened to blend into the normative account of what should happen next, the facts in the positive part must be selected to make certain normative answers follow without difficulty. The choice of which facts to emphasise determines how the story line will pull. ... The process of matching legal texts against social texts, matching by demonstrating the similarity of one set of facts to another, determines which pull is stronger in any particular case.

³⁵² Above Chapter One Part II.C.

³⁵³ Compare Hillman, above n 7.

CHAPTER TWO: FORMAL REQUIREMENTS FOR CONTRACT FORMATION

- I Content Formality: The Under- and Over-Inclusiveness of Rules
- II Formal Requirements in General Contract Law: An Overview
 - II.A English Law: Gradual Consolidation of More Formal Reasoning
 - 1 Land Sales and Leases, Especially Negotiations "Subject to Contract"
 - 2 Settlement Negotiations: A New Presumption?
 - 3 Other Commercial Contexts
 - 4 Negotiations "Subject to Details" in Recent Maritime Law Cases
 - II.B New Zealand Law: Extensive Development of Formal Reasoning – Now Being Reined In?
 - 1 The Legacy of *Carruthers* and *Concorde*
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 - II.C US Law: Prevalence of Substantive Reasoning
 - 1 The Approach of Second Circuit Courts
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 - II.D Japanese Law: Even More Entrenched Substantive Reasoning
 - 1 Land Sales and Leases: A Presumption via "Custom"?
 - 2 Other Contexts: Sales of Goods and Ships, and Services
- III Correlations with Greater Content Formality in Specific Statutory Requirements
- IV Conclusions

I Content Formality: The Under- and Over-Inclusiveness of Rules

The dimension of content formality, in its sub-dimension of under- or over-inclusiveness of rules in relation to their objective,¹ can be explored by comparing the degree of strictness of formal requirements for contract formation. Those can include specific legislative prescriptions, like the Statute of Frauds 1677 (UK), which required a signed writing for the enforceability of certain contracts, such as those disposing of interests in land. Formal requirements also can emerge from general contract law, notably rules developed by courts to decide whether reference in negotiations to executing a contract document means that its formal execution is a prerequisite to forming a binding contract.

An important objective for both types of rules – under classical, neo-classical, and even relational contract law² – is to give effect to the contracting parties' true intentions. Yet formal requirements may be "over-inclusive", for instance, in the sense that they do not give full legal effect to agreements even when there exists ample evidence, other than compliance with formalities, that the parties intended them to be binding. Legal systems oriented towards formal reasoning can be expected to have stricter rules concerning formal requirements, and to be less concerned about such

¹ P S Atiyah and R S Summers *Form and Substance in Anglo-American Law: A Comparative Study of Legal Reasoning, Legal Theory, and Legal Institutions* (Clarendon Press, Oxford, 1987) 13. See generally above Chapter One Part II.B.

² Compare I Macneil "Values in Contract: Internal and External" (1984) 78 *Northwest Univ L Rev* 340, 347, 372-374 (discussing the "common contract norm" of "effectuation of consent"). See also generally above Part Two Introduction Part I. Other possible objectives for rules establishing formal requirements are mentioned below (Part III).

instances of over-inclusiveness. Substantive legal systems will have less strict rules, focusing instead on the underlying objective of giving effect to the parties' intentions in all the circumstances of the particular case. This Chapter demonstrates, consistently with the general thesis advanced, that England and New Zealand law tend markedly towards the more formal approach, whereas US and Japanese law tend towards substantive reasoning.

The overall extent of content formality in this sense can be gauged in at least three ways. One aspect is the scope of formal rules. If they encompass many types of transactions, for instance, formality is heightened. A second aspect is the nature of prerequisites for applying the rule. The most formal rule would be to make requirements absolute. A presumption of fact or related inference, even if rebuttable, is still quite formal.³ Further, laying down such a presumption may create among judges a broader "predisposition" towards extending the rule to less borderline cases.⁴ By contrast, the most substantive approach involves simply weighing all the evidence arising from the particular circumstances. Generally, tailor-made results following from this approach should better approximate the parties' intentions.⁵ A third aspect determining the degree of content formality, which becomes more relevant usually in formal requirements laid down in specific legislation, turns on the effects which follow when prerequisites for applying a rule are met. Total invalidity, for instance, is more formal than non-enforceability.⁶ This Chapter compares the four jurisdictions focusing on the first two aspects.

The next Part considers in detail rules under general contract law, contrasting the more formal approach of English and New Zealand law with the more substantive approach of US and Japanese law. Part III suggests, much more briefly and tentatively, that those patterns are largely consistent with rules laid down under specific statutes. Part IV concludes by pointing to promising avenues for further research, which leads into the discussion of contractual unfairness in Chapter Three.

³ A presumption of fact is an inference logically drawn from one fact as to the existence of others. It may affect the incidence of the burden of proof as the case proceeds. See generally *Halsbury's Laws of England* (4 ed reissue, Butterworths, London, 1976) vol 17, Evidence, 13, 111.

⁴ Compare *Tallangalook Pty Ltd & Ors v Duketon Goldfields NL* (3 February 1997) unreported, Supreme Court of Victoria, Commercial List, No 2061 of 1995, 1997 VIC LEXIS 24 para 90 [*Tallangalook*].

⁵ However, complications in the application of the law may interfere with this approximation. Judges (and, in the US, juries) may not be able to readily ascertain true intentions through the normal trial process. Such considerations may make it more attractive to adopt a mandatory or prima facie rule, based on a best guess at what parties usually intend in the circumstances. In addition, judges may wish to signal to future contracting parties (and their advisors) that parties' practices or expectations should change (see below Chapter Four Part III, defining this as "didactic formality"). Similar debates have arisen, and continue, concerning the design of "default rules" in contract law more generally. Compare for example T Rakoff "Implied Terms: Of 'Default Rules' and 'Situation Sense'" in J Beatson & D Friedmann (eds) *Good Faith and Fault in Contract Law* (Clarendon, Oxford, 1995) 191.

⁶ Although not the main focus in this Chapter, mandatory formality is also affected by the last two aspects. Compare Atiyah and Summers, above n 1, 16-17; above Chapter One Part II.C.

II Formal Requirements in General Contract Law: An Overview

As shown in some detail below (Part II.A), many English courts and judges have held that the effect of a reference to executing a formal contract document, during negotiations, depends on what the parties intended in all the circumstances. However, that substantive approach is undermined by several more formal tendencies. Some seem to have gained in strength over this century, in several significant fields of case law and economic activity.

A relatively early formal tendency has involved singling out situations involving negotiations for the sale of land, and then determining the issue by whether or not the parties have happened to interpose the phrase "subject to contract" or the like (below Part II.A.1). If that wording has been used, several courts and commentators have argued that no contract is intended until both parties have signed and exchanged their copies of the formal contract documentation. Some even mention a "prima facie" effect for such wording, perhaps generating a presumption, against immediate binding effect in such circumstances.⁷ On the other hand, other judgments have continued to focus on inferring the parties' actual intentions from the wording used and other objective circumstances. Several have stressed that phraseology should not be definitive. A number of commentators have pointed to those cases, or others where such formal requirements have been mitigated, in advocating the more substantive approach of simply determining the parties' intentions in all the circumstances.⁸ Nonetheless, the more formal approach has been consolidated in a second, less often noted tendency. Some courts have indicated recently that the use of wording like "subject to lease", during negotiations, also determines the issue. If such wording has been used, it is very likely indeed that an immediately binding contract will not be recognised.⁹ On the other hand, recent cases on granting of consents by lessors to their lessees indicate a reluctance to give priority to specific words used in negotiations, such as "subject to licence". In this contractual setting, so far the courts have refused to extend "magic" effect to such words, in contrast to the primacy accorded to phrases such as "subject to contract" or "subject to lease" in other circumstances.¹⁰

However, a third very significant formal tendency has involved Commercial Bench judges developing the rule that no binding agreement arises when parties have interjected the phrase "subject to details" when negotiating a carriage contract, ship sale, or charterparty (Part II.A.4).¹¹ It may still be possible to avoid this result, but great care will be needed to do so. Perhaps the only safe course would be to use express wording like "subject to details, but with a contract intended to be immediately binding", even

⁷ See for example *Chillingworth & Anor v Escher* [1924] 1 Ch 97, 99 per Sarjant LJ [*Chillingworth*].

⁸ See for example G H Treitel *The Law of Contract* (10 ed, Sweet & Maxwell, London, 1999) 50-51.

⁹ See for example *Longman v Viscount Chelsea & Ors* (1989) 58 P&G 189 [*Longman*].

¹⁰ See for example *Prudential Assurance Co Ltd v Mount Eden Land Ltd* [1997] 14 EGLR 37 (CA) per Morritt LJ (upholding the judgment of Judge Rich, who spoke of "magic" effect) [*Prudential*].

¹¹ See for example *Star Steamship Society v Beogradska Plovidra* [1988] 2 Lloyd's LR 583 (*The Junior K*).

though this is a phrase not currently used in the shipping trade. This recent trend indicates a quite rapid consolidation of more formal reasoning over the last 15 years in this field, contrary to the approach adopted by English courts in other commercial contexts (Part II.A.3), and indeed in some of the cases (especially earlier cases) involving land sales or leases.

Cases dealing with maritime law, and (to a much lesser extent) contracts involving land, make up a very significant part of English contract case law.¹² Hence a consolidation of these three formal tendencies has significant implications for English contract law generally with regard to this issue. Also noteworthy is the possibility that a fourth formal tendency may emerge. One trial court has suggested recently that there may be a “presumption” against the binding force of an informal agreement to settle a dispute, reached between lawyers negotiating out of court, at least when this is oriented to obtaining a consent order (Part II.A.2).¹³

In New Zealand (Part II.B.1), a leading judgment of the Court of Appeal also suggests that an “inference” arises against being bound, until contracts are executed, when parties undertake negotiations for the sale of land.¹⁴ Commentators have sharply criticised this reading of the judgment, but it has found favour with many judges. Some of the latter have even talked of a presumption in negotiations for leases.¹⁵ Another influential Court of Appeal precedent also can be read as laying down a presumption for commercial contracts more generally, if they involve some complexity.¹⁶ Both tendencies suggest even greater formality than in English law. That is because, first, they arise from a broader range of negotiating situations: not limited to negotiations involving land sales or leases which are expressly termed “subject to contract” or the like, or commercial shipping deals negotiated “subject to details”. Secondly, the rule more frequently has been stated or interpreted as a rebuttable presumption.

Very recently, however, there are signs that the more substantive approach may be gaining favour (Part II.B.2). The fact that the negotiations involve a complex commercial deal, lease, or even sale of land, has simply been considered along with other factors relevant to deciding whether or not the parties intended to be bound in the particular case. However, this focus has only been clearly adopted up to High Court level, and some courts persist in laying down the more formal rule.¹⁷ The Court of Appeal has still not clearly stated that it did not intend to lay down a rebuttable presumption in its earlier precedents.¹⁸ Until it does so, especially by way of a judgment

¹² Compare M Ellinghaus “An Australian Contract Law?” (1989) 2 JCL 13, 20 (although only reporting on their predominance in reported House of Lords’ decisions).

¹³ *Dalgety Foods Holland BV v Deb-Its Limited* [1994] FSR 125.

¹⁴ *Carruthers v Whitaker & Anor* [1975] 2 NZLR 667 [Carruthers].

¹⁵ See especially D McLauchlan “Informal Agreements for the Sale or Lease of Land: When Are They Contracts?” (1993) NZ Recent L Rev 442.

¹⁶ *Concorde v Anthony Motors (Hutt) Ltd* [1981] 2 NZLR 385 [Concorde].

¹⁷ See for example *Van Der Hulst v Tainui Corporation Ltd* [1998] 2 NZLR 359.

¹⁸ See for example *Isbey v Heberger & Mayhew* (1 December 1998) unreported, Court of Appeal, CA 265/97, Tipping, Gallen, Doogue JJ; *Electricity Corporation of NZ v Fletcher Challenge Energy Ltd* (10 October 2001) Court of Appeal, CA 132/00, Richardson P, Thomas, Keith, Blanchard and McGrath JJ. The Court did not cite *Carruthers* or *Concorde* in either case. Compare also *Man O’War Station Ltd v Auckland City Council* [2000] 2 NZLR 267, 279. Blanchard J (writing for the Court) mentioned

which is widely reported, it seems likely to remain difficult for New Zealand law to move decisively towards a more substantive approach.

The latter has long characterised the case law in the US (Part II.C). It constitutes a noticeably different world, reflecting the vision of Karl Llewellyn and others following the realist tradition (above Part Two Introduction Part I). The judges have engaged with academic commentary to develop a test clearly identifying a broad range of factors, including common practices in defined areas, to be openly weighed to determine objectively the parties' intentions in the particular case. Perhaps for this reason, judgments are usually significantly shorter than New Zealand and especially English counterparts, although the US cases identify and deal with a wide range of considerations arising from the particular context.¹⁹ Interestingly, the test has evolved in the context of the general right for a jury to decide this and other issues of fact.²⁰ Decision-making powers on the part of juries reinforce the potential for substantive, instead of formal, reasoning.²¹

However, in a 1979 judgment of the Court of Appeals for the Second Circuit, Friendly J cautioned against too readily enforcing informal agreements. Although concurring in the decision to uphold the informal settlement agreement in that case, he even talked of requiring "clear and convincing evidence".²² Several influential commentators and numerous courts have taken this judgment seriously. That opens the way towards a more formal approach, if not necessarily the notion of a rebuttable presumption in that or other types of negotiations. Part II.C.1 therefore analyses that decision carefully, and its impact on other courts in the Second Circuit, which includes New York and remains very influential in contract law development throughout the US. It contends, however, that Second Circuit case law has largely retained a substantive approach explicitly balancing a very wide range of factors.²³

Part II.C.2 uncovers a similar approach in other Circuits and States, although the balancing test is not always so clearly expressed. Even in cases involving land sales and leases, for instance, no presumption against binding force has been developed. Nor is wording like "subject to contract" given decisive effect. As mentioned recently by commentators from England and Japan, although the phrase:²⁴

Carruthers simply as a case "in which the parties were taken to be intending to follow standard conveyancing practices", but distinguished it as involving "vastly different" factual situations compared to this case, involving an "implied dedication" of land allowing a Council to build roads thereon.

¹⁹ See for example *Adjustrite Systems Inc & Ors v GAB Services Inc & Anor* (1998) 145 F 3d 543 (2d Cir). This thesis adopts the citation style for US court judgments recommended in K Evans, G McLay & H Schwartz *Victoria University of Wellington Law Review Style Guide* (Victoria University of Wellington, Wellington, 1999) 30. This includes placing the year before the volume reference.

²⁰ See for example *International Minerals and Resources SA & Ors v Pappas & Ors* (1996) 96 F 3d 586.

²¹ Atiyah and Summers, above n 1, 169-177.

²² *International Telemeter Corp v Teleprompter Corp* (1979) 592 F2d 49, 57-58 (2d Cir) [*Telemeter*].

²³ See for example *Consarc Corp v Marine Midland Bank NA* (1993) 996 F 2d 568 (2d Cir) [*Consarc*].

²⁴ M Furmston, T Norisada and J Poole *Contract Formation and Letters of Consent* (J Wiley, Chichester, 1998) 192-193.

normally means that the formal document is to be the only binding expression of agreement, ... the American courts do tend to inquire into intention despite the inclusion of "subject to contract" whereas the English courts generally accept that this expression has a particular effect without embarking on this investigation of intention.

Consistently with this different approach, Second Circuit and other courts have not awarded primacy to wording like "subject to details" in maritime law cases (Part II.C.3). This has remained so despite criticism of this more substantive approach, from courts and commentators in England.²⁵

Japanese law also inhabits a more substantive world (below Part II.D). Although it may influence their decisions, Japanese courts do not cite academic commentary, which might otherwise promote more substantive reasoning. However, despite the de facto importance of precedents by the higher courts (especially the Supreme Court), they are not bound by a strict doctrine of stare decisis.²⁶ Japanese courts have also maintained a focus on determining the intentions of the parties in all the circumstances of the particular case. They identify and discuss facts, to an extent closer to US than Anglo-New Zealand court practice, from which a similarly broad range of influential factors can be derived and weighed, albeit less openly than in the US.

In Japan, there are fewer cases in which formally executing contract documentation is explicitly mentioned during negotiations. Informal agreements have given rise to well-known cases, however. In *Marubeni Iida KK v Ajinomoto KK*,²⁷ the Tokyo District Court enforced an offer made and accepted orally between very large Japanese corporations, for a major sale and purchase of imported soyabeans. Takeyoshi Kawashima made this case famous as an example of "Japanese" informality in contract negotiations, and it is still cited to that effect to this day.²⁸ In *Fawlty & Co [sic] v Matsui KK*,²⁹ involving what must have been one of New Zealand's first beef exports to

²⁵ See, respectively, *The Junior K* above n 11, 588; L Gorton, R Ihre and A Sandervson *Shipbroking and Chartering Practice* (5 ed, Lloyd's of London Press, London, 1999) 187:

In the case of the common phrase "subject to details" we also feel that American Courts in some cases have gone far in establishing that there is a binding contract if the parties have made a fixture "subject to details". The impression one gets is that US Courts may hold that the parties "fixing subject to details" have thereby declared that there is a meeting of minds between them and that the details will not mean any change in this. Did they intend to leave the Court or arbitration panel to fill in what they cannot themselves agree on? Cases seem to indicate that a particular term may by a US Court very well be regarded as a "detail" in one case and a "main term" in another one. This is not a very satisfactory situation.

²⁶ Above Chapter One Part II.C.

²⁷ 31 July 1957, Tokyo District Court (8 Kaminshu 1366) [*Marubeni*].

²⁸ T Kawashima (C Stevens trans) "The Legal Consciousness of Contract in Japan" (1974) 7 L in Japan 1. See also R M March *The Japanese Negotiator: Subtlety and Strategy Beyond Western Logic* 111 (Kodansha, Tokyo, 1988); H Yamada *Different Games, Different Rules: Why Americans and Japanese Misunderstand Each Other* (Oxford UP, Oxford, 1997) 67-68. The latter cites S Michida *Keiyaku Shakai - Amerika to Nihon no Chigai o Miru [Contract Societies: Looking at Differences between America and Japan]* (Yuhikaku, Tokyo, 1987), ironically since this book argues that informality in contracting is not common at least in sales for real property: see below Part II.D.2. Another irony is that much contracting in the US appears to be conducted on an informal basis, at least compared to Germany: see T Lundmark "Verbose Contracts" (2001) 49 AJCL 121, 124-126.

²⁹ 10 December 1962, Kobe District Court (13/11 Kaminshu 2293) [*Fawlty*]. This writer's partial

Japan, the Kobe District Court also upheld the New Zealand exporter's claim that a contract had been formed by exchange of telexes and letters. It rejected the Japanese importer's defence to the effect that the parties only intended to be legally bound by a formal "confirmation note". Shinichiro Michida approves the Court's decision in *Marubeni* for upholding a bargain which the parties probably intended as binding,³⁰ and would probably have done the same for *Fawltly*.

He and Veronica Taylor have stressed, however, that Japanese courts have been reluctant to find agreements for the sale of land to be legally binding until formalisation of documentation.³¹ Michida and the anonymous author of the Headnote in *Suehiro Shoji KK v Seisho Gakuen KK* further suggest that this follows from a "custom" (*kanshu*) as to such formalisation.³² Pursuant to article 92 of the Civil Code, that would create a sort of rebuttable presumption similar to that which ostensibly has emerged in English and New Zealand case law. Part II.D.1 argues, however, that this decision does not go that far. Nor do any relevant judgments over at least the last seventy years. "Practices" (*kanko*) of formalising land sales, for instance, instead constitute one factor among many in determining the intentions of the parties in all the particular circumstance of each case. The same very substantive approach is apparent in case law regarding informal leases.³³ Part II.D.2 argues that it is even more so for cases in other types of contracts, including even a ship sale "subject to details".³⁴ Consistently with the general thesis advanced, therefore, these aspects of Japanese law represent an approach close to that of US courts, one which is possibly even more substantive. This contrasts with the more formal approach presently adopted by the courts in New Zealand and (perhaps especially) in England.

The divergence between the two pairs of jurisdictions, and especially the relative positioning of the US versus Japan and of New Zealand versus England, is not obvious. However, it emerges from a close analysis of the case law in the various jurisdictions, including that dealing with major categories of litigated transactions (not necessarily the same categories in each jurisdiction). The key is to focus on the type of *reasoning* used, not so much the *result* reached in a particular case.³⁵ If the reasoning adopted can be shown to differ, especially in the extent of content formality, then it is not particularly relevant that courts in the different countries might happen to reach the

translation of the case can be found at <<http://www.law.kyushu-u.ac.jp/~luke/kobedc.html>>; see also L Nottage "Contract Law and Practice in Japan: An Antipodean Perspective" in H Baum (ed) *Japan: Economic Success and Legal System* (de Gruyter, Berlin, 1997) 197, 203-205.

³⁰ S Michida (V Taylor trans) "Contract Societies: Japan and the United States Compared" (1992) 1 Pacific Rim Law and Policy LJ 199, 200-204, 207-208.

³¹ Michida, above n 30, 213-224; V Taylor "Continuing Transactions and Persistent Myths: Contracts in Contemporary Japan" (1993) 19 MULR 352, 359-361.

³² 30 June 1975, Tokyo High Court (790 Hanrei Jiho 63) [*Suehiro*].

³³ See for example *Saita KK v Chiba Kosan KK*, 23 April 1981, Tokyo High Court (452 Hanrei Taimuzu 106).

³⁴ *Leonhardt & Blumberg [sic] v Iino Kaiun KK*, Tokyo District Court, 30 May 1986 (1234 Hanrei Jiho 100).

³⁵ Compare also R Brownsword "Individualism, Cooperativism and an Ethic for European Contract Law" (2001) 64 MLR 628 (arguing that asking what outcomes would be reached in hypothetical cases, under differing domestic contract law, implicates and requires a consideration of underlying philosophy).

same result when faced with identical material facts.

Anyway, it is very rare to find cases raises the same material facts,³⁶ especially in all four jurisdictions. This is true even in the case of shipping transactions “subject to details”, where there is an undeniable difference in reasoning *and* outcome in the US (below Part II.C.3) and England (Part II.A.4). Japan is closer to the US on this point, albeit in a case involving a ship sale rather than a charterparty (Part II.D), but there appears to have been no reported or unreported case in New Zealand contesting the enforceability of a maritime transaction negotiated “subject to details”. Even assuming a case involving identical facts could be uncovered in each of the four jurisdictions, if the interest lies in how the result relates to the parties’ true intentions – and, in particular, if the more formal rule (such as presumption) did not correlate with those intentions – one would need to determine what those intentions were in each of the differing jurisdictions. It cannot be assumed that the latter will be identical in each, so ultimately the question would require empirical research. One approach would be to interview the particular parties, their lawyers and others, to get a better sense of their intentions. This could follow from the researcher being able to draw on more material than had been available to the court, after the dispute had died down.³⁷ In addition, a researcher could conduct systematic survey and/or interview research into the usual practices and norms in the trade.³⁸ This could help to decide what the intentions of the particular parties were, or even to guess more abstractly what they likely to have been (drawing on more systematic evidence than available to a judge). Clearly, however, such research would be very time-consuming and costly, particularly if undertaken simultaneously in four jurisdictions. It is beyond the scope of this thesis, although comparative empirical research is undertaken below (Chapter Four) regarding an aspect of contract performance, to develop a point about a different aspect of formality in legal reasoning. This Chapter must limit itself to focusing on the reasoning used in court judgments, and the point that the more substantive approach (deriving a tailor-made solution based on open evaluation of a broad range of factors in particular contexts, as opposed to presumptions based on contract wording or very broad categories of dealing) is more likely to result in giving effects to the actual intentions of contracting parties.³⁹

It can be added that in categories of cases discussed below in which the more formal approach is followed, for instance by referring to a presumption against enforceability, cases (not surprisingly) tend to find that a contract is not formed, whereas there appears to be more variance in outcome in the general categories of cases in which the more substantive approach is followed. If we assume that parties’ intentions vary significantly, even in situations involving common transactions (like charterparties), then this suggests that the substantive approach better meets the parties’

³⁶ See generally K Llewellyn *The Bramble Bush* (Oceana, New York, 1951) 68-69.

³⁷ For examples of this approach, see R Danzig *The Capability Problem in Contract Law* (Foundation Press, Mineola NY, 1978).

³⁸ See for example S Macaulay “Non-Contractual Relations In Business: A Preliminary Study” (1963) 28 *Am Socio Rev* 55; H Beale and T Dugdale “Contracts between Businessmen: Planning and the Use of Contractual Remedies” (1975) 2 *Brit J L & Soc* 45; T Uchida *Keiyaku no Jidai* [The Age of Contract] (Kobundo, Tokyo, 2000) 280-304.

³⁹ Above n 5.

intentions. However, such assumptions would need to be tested empirically in the ways just mentioned, and correlated to an analysis of case law which is even more exhaustive than that attempted below. Thus, like this entire thesis, the Chapter is primarily directed at uncovering patterns of legal reasoning, although this often demands a careful analysis of the facts (emphasised or not) in particular cases.⁴⁰

II.A English Law: Gradual Consolidation of More Formal Reasoning

Halsbury's Laws of England proposes the following general principles:⁴¹

Where there is an informal agreement which expressly requires or envisages the subsequent execution of a formal contract, the legal effect of that prior informal agreement at common law depends on the intentions of the parties, as with letter of intent. They may have entered into a binding provisional agreement, whilst envisaging its subsequent replacement by a more formal one; or they may evince an intention only to be bound on the execution of a formal contract, the prior informal agreement being of no legal effect.

Later, in discussing contracts for the sale of an interest in land:⁴²

apart from contracts made by auction, it is the almost invariable practice for the parties to a bargain to make it clear that they do not intend to enter into a binding contract until a formal agreement has been drawn up by their solicitors and contracts have been "exchanged". [This is only a matter of intention, and it is quite competent for them to enter into a binding provisional agreement ...] Such an intention is commonly indicated by the parties expressly making their agreement "subject to contract".

This suggests that English law adopts a more substantive approach by seeking to ascertain the parties' intentions in all the circumstances, even in the case of land sales. However, some of the most important and relevant authorities cited in support of these and related propositions should be examined more closely (below Part II.A.1). This reveals some gradual but significant consolidation of more formal reasoning in English courts (especially Parts II.A.3 and Parts II.A.4).

1 Land Sales and Leases, Especially Negotiations "Subject to Contract"

In the early but still sometimes cited case of *Winn v Bull*,⁴³ Jessel MR held that a written agreement for lease "made subject to the preparation and approval of a formal contract" did not give rise to an immediately binding contract. He stressed that in

⁴⁰ Compare for example K Lane-Scheppele *Legal Secrets* (U Chicago Press, Chicago, 1988) 103: In order for the positive account of what happened to blend into the normative account of what should happen next, the facts in the positive part must be selected to make certain normative answers follow without difficulty. The choice of which facts to emphasise determines how the story line will pull. ... The process of matching legal texts against social texts, matching by demonstrating the similarity of one set of facts to another, determines which pull is stronger in any particular case.

⁴¹ 4 ed reissue, Butterworths, London, 1996, vol 9(1), Contracts, 415 (citations omitted).

⁴² Halsbury, above n 41, 420 (citations omitted, except for partial insert in text quoted above).

⁴³ (1877) 7 Ch D 31.

negotiations for the sale of land, and especially for leases, additional clauses would usually be included in a written document in addition to the usual or main terms. Having “always thought that the authorities are too favourable” towards enforcing earlier informal agreements, he drew support for his own view from the then recent decision of the Court of Appeal in *Rossiter v Miller*.⁴⁴

The latter judgment, as it turns out, was unanimously reversed soon thereafter.⁴⁵ All the Law Lords found that a binding agreement for sale of land had been reached after the buyer made an oral offer, confirmed in writing by the sellers (real estate speculators, it seems) “subject to conditions and stipulations on the plan” of the property development initially made available. Those included the condition that “each purchaser will be required to sign a contract embodying the foregoing conditions”, and to pay a deposit and so on. Lord Cairns LC held however that a binding sale arose upon the sellers’ letter to Miller, observing (with all respect to the Court of Appeal judges who had reached a contrary conclusion!) that he had seldom seen “a clearer and simpler case of an offer made and accepted by correspondence”.⁴⁶ Lord Blackburn stressed that the wording used by the parties was important, but that it was a matter of determining their intentions in all the circumstances.⁴⁷

But the mere fact that the parties have expressly stipulated that there shall afterwards be a formal agreement prepared, embodying the terms, which shall be signed by the parties does not, by itself, [show] that they continue merely in negotiation. It is a matter to be taken into account in construing the evidence and determining whether the parties have really come to a final agreement or not. But as soon as the fact is established of the final mutual assent of the parties so that those who draw up the formal agreement have not the power to vary the terms already settled, I think the contract is completed.

To like effect, in *Von Hatzfeldt-Wildenburg v Alexander*, Parker J held:⁴⁸

it is a question of construction whether the execution of the further contract is a condition or term of the bargain or whether it is mere expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact go through. In the former case there is no enforceable contract either because the condition is unfilled or because the law does not recognise a contract to enter into a contract. In the latter a case there is a binding contract and the reference to the more formal document may be ignored. The fact that the reference to the more formal document is in words which according to their natural construction import a condition is generally, if not invariably, conclusive against the reference being treated as an expression of a mere desire.

Parker J decided that no immediately binding agreement had been reached in this case. In response to a written offer to sell from the defendant’s land agents, the plaintiff’s agent’s letter had included several “conditions”, especially one stating that “Her Serene Highness’s solicitors approve the title to, and covenants contained in the lease [over the

⁴⁴ (1875) 5 Ch D 648.

⁴⁵ *Rossiter & Ors v Miller* (1878) 3 App Cases 1124.

⁴⁶ Above n 45, 1138.

⁴⁷ Above n 45, 1151 (emphasis added).

⁴⁸ [1911] 1 Ch 284, 289 (emphasis added).

property sought to be purchased], the title from the freeholder, and the form of contract". Parker J appeared particularly impressed by the requirement for the solicitors to agree not only to the formal contract document but also as to freehold title, "which cannot be called for on an open contract for the sale of a lease[d property]. ... It does not in terms compel the vendor to [show] the freehold title, but unless he does so to the satisfaction of the purchaser's solicitors he cannot hold the purchaser to her bargain".⁴⁹

Thirteen years later, however, a different approach began to emerge. The Court of Appeal held that no immediately binding contract for the sale of land had been concluded when negotiations had been expressed to be simply "subject to proper contract to be prepared by the vendor's solicitors". Importantly, Sarjant LJ argued that:⁵⁰

the words "subject to contract" have by this time acquired a definite legal meaning. ... it would require a very strong and exceptional case for the clear prima facie meaning to be displaced.

This implies that use of this wording creates a legal presumption against the binding force of any informal agreement, indeed one which will be very difficult to rebut. However, other judgments in this case, notably that of Pollock MR, did not go this far.

Later cases continued to pay close attention to the wording used, but also the surrounding circumstances, with the overall objective being to determine the parties' intentions. In *Branca v Cobarro*,⁵¹ the Court of Appeal upheld an agreement for Cobarro to sell to Branca the lease and goodwill of certain mushroom farms, along with specified farm machinery. The written agreement had stated that "this is a provisional agreement until a fully legalised agreement, drawn up by a solicitor and embodying all the conditions herewith stated, is signed". Lord Greene MR held that these stipulations were:⁵²

not words expressive of a condition or stipulation to [the] effect [that they wished that there should be "a fully legalised agreement"]. The familiar words "subject to contract", and many other forms of words that one has come across in this class of case are words of conditions. The word "until" in this context to my mind clearly means that that what is called a "provisional agreement" is going to have some efficacy until a certain event happens.

Lord Greene MR was also impressed by the parties terming their arrangement an "agreement". Yet he accepted that such wording is "by no means conclusive", only that "in the particular context of this document they were not without importance". Another indication shedding "some little light on the intention of the parties" was that the agreement required not only an immediate deposit of 10%, but another 50% three days later.⁵³ Tucker LJ also noted some other circumstances suggesting that the parties had intended to be immediately bound: "these foreign gentlemen drawing up this agreement had it witnessed by a third party".⁵⁴

⁴⁹ Above n 48, 290.

⁵⁰ *Chillingworth*, above n 7.

⁵¹ [1947] 1 KB 854.

⁵² Above n 51, 856-857.

⁵³ Above n 51, 856.

⁵⁴ Above n 51, 859.

Negotiations in *Branca* had not been conducted specifically “subject to contract”, however, leaving it unclear whether a different approach was warranted in such situations. The Court of Appeal faced precisely that issue a year later, in *Eccles v Bryant and Pollock*.⁵⁵ The Court held that the parties did not intend a land sale to become legally binding until the copy of the contract document signed by each party had been exchanged by the solicitors. Solicitors for the defendants, who had offered to sell the property, had written to the plaintiff’s solicitors stating “our clients have now signed their part of the contract herein and we are ready to exchange”. The latter solicitors had replied enclosing “herewith the contract signed by our client, and [we] shall be glad to receive in exchange the part signed by your clients”, but the defendants decided not to proceed. Lord Greene MR found that to be justified because “on the facts of this case”, including the language used by both sides’ solicitors in these letters:⁵⁶

When they were instructed to carry this matter through by their respective clients, [they] contemplated and *intended from the beginning to end to do so in the customary way* which is familiar to every firm of solicitors in the country, namely by preparing the engrossment of the draft contract when agreed in duplicate, the intention being to do what I have no doubt at this very moment is happening in dozens of solicitors’ offices all over the country, namely to exchange the two parts when signed by their respective clients.

Thus, customary practice was considered primarily to decide what the parties reasonably or actually intended in the particular circumstances. His Lordship did not go as far as Sarjant LJ in *Chillingworth*, namely to elevate this into a “prima facie” rule.⁵⁷ However, implying that it would be difficult to establish a contrary intention, Lord Greene did add that upholding that customary practice in the circumstances before him was important to promote certainty.⁵⁸

These principles should be upheld. The inconvenience and chaos into which these matters would be thrown by the adoption of other rules appear to me very great; but ultimately the matter comes down to this: Parties become bound by contract when, and in the manner in which, they intend and contemplate becoming bound. That is a question of the facts of each case, but in this case the manner of becoming bound which the parties and their solicitors must have contemplated from the very beginning was the ordinary, customary and convenient method of exchange.

Nonetheless, Lord Greene did not determine the issue based solely on the use of the phrase “subject to contract” when the terms of the sale were being negotiated. Thus, an English treatise appears to over-generalise somewhat when proposing, in a discussion of land sales, that:⁵⁹

If an offer is accepted not finally but conditionally, for example with the common formula

⁵⁵ [1948] 1 Ch 93.

⁵⁶ Above n 55, 97 (emphasis added).

⁵⁷ Above n 55, 102.

⁵⁸ Above n 55, 104.

⁵⁹ R E Megarry and W Wade *The Law of Real Property* (5 ed, Sweet & Maxwell, London, 1984) 568-569.

“subject to contract” ..., the effect is that until the necessary contract arrangements have been made, there is no contract and either party can withdraw.

That may be so in many such cases, but the abovementioned authorities suggest that this ultimately will depend on the intentions of the parties in all the circumstances. In a recent review of the case law, Sir Guenter Treitel has summarised the position as follows:⁶⁰

- (i) Requirement of exchange of contracts. Even when the terms of the formal contract have been agreed, there is, where the agreement is subject to contract, no binding contract until there has been an “exchange of contracts” ... Before the “exchange”, there is no uncertainty as to the terms of the agreement, but there is no contract because neither party intends to be legally bound until the “exchange of contracts” takes place.
- (ii) Mitigations of the requirement. The above state of law, which enables either party with impunity to go back on a concluded agreement, has been described as “a social and moral blot on the law”; and there have been indications the former strictness of the requirement of “exchange of contracts”. Thus, it has been held that the exchange may be effected by telephone or telex; that certain technical slips in the process may be disregarded; that exchange is not necessary when the parties use the same solicitor ... The parties may also create a binding contract by a subsequent agreement to remove the effect of the words “subject to contract”, thus indicating their intention henceforth to be legally bound. Subsequent conduct may also give rise to liability on other grounds: where one party to an agreement encourages the other to believe that he will not withdraw, and the other acts to his detriment in reliance on that belief, the former may be liable on the basis of “proprietary estoppel”. In “a very strong and exceptional context” the court may even infer that the parties intended to be legally bound when executing the original document, even though it is expressed to be “subject to contract”.

Authority cited for the last mentioned proposition, *Alpenstow Ltd v Regalian Properties*,⁶¹ involved a document containing an elaborate timetable. The purchaser was also required to approve the draft sale contract subject only to “reasonable amendments”, and then to exchange contracts. Another commentator concurs that the case shows how exceptionally difficult it has become to persuade an English court that the parties intended to be immediately bound when they have negotiated “subject to contract”.⁶² However, these developments have recently been criticised, and a suggestion made that:⁶³

The law should be reformed to abolish the practice of making agreements “subject to contract”

⁶⁰ Treitel, above n 8, 50-51 (citations omitted). In the fifth edition of this work, published in 1995, the first sentence had read (at page 50, emphasis added): “Even when a formal contract has been approved, it is *usually* not binding until there has been an exchange of the contractual documents”.

⁶¹ [1985] 1 WLR 721.

⁶² M Fisher *Contract Law in Hong Kong: Cases and Materials* 37 (London, Sweet & Maxwell, 1996); contrasting also the Hong Kong case, *Wong Lai Ha v Chung San Wala & Anor* [1994] 2 HKC 646. See also *Michael Richards Properties Ltd v Corpn of Wardens of St Saviour's Parish, Southwark* [1975] 3 All ER 118, described in *Munton v Greater London Council* [1976] 2 All ER 815 as a very special case on its own facts: see M Furmston (gen ed) *The Law of Contract* (Butterworths, London, 1999) 331.

⁶³ Furmston, above n 62, 332. Authority given for the latter proposition is *Walford v Miles* [1992] 1 AC 128. Compare also the reluctance to allow an obligation to act in good faith, in shipping negotiations “subject to details”, below Part II.A.4.

so that both parties would be bound from the time a sale is agreed. In the absence of such reform there is little a party can do to protect himself. An agreement to negotiate in good faith, or to enter into a contract at a later date, will not be enforceable.

Further, in the context of land sales, English judges – some more than others – do mention usually that the key issue remains what the parties intended in the particular case. By contrast, a number of recent decisions have held that no binding obligations arose from negotiations “subject to contract” and “subject to lease” or “subject to the completion of a formal lease”. The last-mentioned qualification was used in *Longman v Viscount Chelsea & Ors*, decided in 1989. Nourse LJ began by citing *Eccles* in support of the proposition that:⁶⁴

it is axiomatic amongst conveyancers that negotiations for the sale of land which are expressed to be “subject to contract” cannot mature into a concluded agreement unless and until there is an exchange of contracts in accordance with ordinary conveyancing practice, before which either party can withdraw ...

Later, however, he does suggest that the key is still what the parties intended or agreed:⁶⁵

By analogy with negotiations for the sale of land, it cannot be doubted that such a qualification [as used in this case], having once been imposed on the negotiations, cannot be thrown off unless and until both parties expressly and impliedly agree that it should be ...

...

Wherever parties intend to enter into the relationship of landlord and tenant without a preliminary contract for the grant and acceptance of lease, and their negotiations are expressed to be “subject to the completion of a lease”, “subject to lease”, “subject to contract” or the like, then, so long as the qualification remains in force, the relationship does not become binding on them unless and until there is an exchange of lease and counterpart, before which either party can withdraw.

Yet the tenor of the judgment suggests that the courts do and should start with the assumption that the parties do not intend to be immediately bound, given the usual practices in negotiating leases. Indeed this tendency was reinforced by the Court’s observation (echoing that in *Eccles*⁶⁶), in holding unanimously that *Viscount Chelsea* was entitled to withdraw from negotiations to renew a lease with Mrs Longman, that:⁶⁷

However much we may fear that their conduct in this case fell below the gentlemanly standards which we would otherwise have assumed to them, we must recognise that the negotiations did not differ in substance from those which are conducted between solicitors all around the country every day of the week. In an area where there has already been some tendency to allow hard cases to make bad law we must recognise that our decision will have equal effect on everyday transactions of varying and unpredictable merits, in respect of which

⁶⁴ *Longman*, above n 9, 191. See *Eccles*, above n 55.

⁶⁵ *Longman*, above n 9, 192 (emphasis added).

⁶⁶ *Eccles*, above n 55.

⁶⁷ *Longman*, above n 9, 193. Interestingly, the Court appears to have shamed *Viscount Chelsea*, during the hearings, into the more “gentlemanly” undertaking to pay Mrs Longman’s legal expenses in bringing this suit.

settled and expedient practices ought to be more highly regarded than the merits of individual cases.

This approach proved influential in the holdings by Dillon and Steyn LLJ in *Akiens v Salomon*.⁶⁸ Their Lordships decided that no enforceable obligations arose out of negotiations through solicitors which had been phrased “subject to lease” and “subject to contract”. Evans LJ dissented, however. Some earlier judgments likewise had found that binding obligations did arise from negotiations on leases qualified by such terms, and Nourse LJ in *Longman*⁶⁹ had had to struggle to distinguish them. The issue may therefore remain, even in this category of cases, what the parties did or should be taken to intend in the particular circumstances.

It should be noted, moreover, that *Akiens* was argued primarily on the basis of estoppel. The majority’s holding that no obligations were assumed also may have been underpinned by the fact that this case involved negotiations for a new lease after the lessor had given statutory notice to quit, whereupon the lessee had served counter-notice. Where negotiations occur in the shadow of a dispute, as seems to have been the situation here (and that discussed below, Part II.A.2), it seems more justifiable for courts to be wary of holding that legal obligations were entailed.

Further, in a series of recent cases involving informal consents under pre-existing leases, English courts have been unwilling to extend more formal tendencies in other categories of cases involving land. In *Prudential Assurance Co Ltd v Mount Eden Land Ltd*, the Court of Appeal held that a lessor had granted written consent, as required under a long-term lease, to allow the lessee to have construction work undertaken, even though the lessor’s letter indicating consent had been headed “subject to licence [sic]” and later repeated that one condition was “a formal licence being entered into” by the lessee. The trial Judge had stated the issue as centring on whether to allow “the expression ‘subject to licence’ ... a similar magic to the expression ‘subject to contract’ such that it may contradict the effect which would otherwise arise from the words of the letter”.⁷⁰ Judge Rich had followed an earlier decision of Harman J, who had drawn a distinction between situations involving an existing set of obligations and “relations between strangers in law, as between prospective purchaser and prospective vendor, where there is no present tie and the parties are in mere negotiation”. Judge Rich had agreed that:⁷¹

the words “subject to contract” do have what [counsel for the lessor] very reasonably describes as a magic, but that magic arises from the particular incantation in the particular context of particular transactions. Because the words “subject to contract” create magic, it does not mean that similar magic is created by different words in different contexts.

On appeal, Morritt LJ gave a unanimous judgment agreeing that the test involved “construction of the letter in the light of all the surrounding circumstances”, and that the term “subject to licence” added little to the otherwise clearly expressed consent. The

⁶⁸ (1996) 65 P&G 364, 368.

⁶⁹ Above n 9.

⁷⁰ Above n 10.

⁷¹ Above n 10, discussing *Venetian Glass Gallery Ltd v Next Properties Ltd* [1989] 2 EGLR 42.

Court noted the argument that giving the term absolute force might promote certainty in these transactions; and read *Longman* as holding that in negotiations conducted “subject to lease” or “subject to contract”, contrary evidence was required “to dispense with the common intention that the parties shall become bound at one ascertainable point of time” (“conventionally at a completion meeting”, but hinting that a physical encounter might not be necessary in light of advances in modern technology). Morritt LJ also noted and approved of the fact that the expression “subject to details” had come to serve as “the maritime variant of the well-known ‘subject to contract’” (see below Part II.A.4). However, accepting Harman J’s distinction, the Court concluded that it was not “legitimate to extend the principle illustrated in these cases from the field of bilateral negotiations to that of a unilateral act”.⁷²

Very recently, in *Mahmood v Lola*, Aldous LJ has made it clearer that the test is simply to focus on all aspects of the negotiations between both parties, to determine what the lessee objectively could have taken to be the intention of the lessor in granting a consent.⁷³ His Lordship rejected an application for leave to appeal from a County Court judgment holding that negotiations and the lessor’s letter issued “subject to licence” did not establish consent to having a lease assigned to a third party. The trial Judge had mentioned that the clear intention of “all the parties to the transaction, the Landlord, the claimant, the defendant, and their respective solicitors,” was for the licence to take the form of deed. The applicant lessee pointed out that this was not required under the long-term lease, and argued that attempting to ascertain the intentions of all the parties was inappropriate in the case of a unilateral act such as the grant of a consent. However, Aldous LJ considered that the evidence had established that the intention of the lessor had not been to grant the consent until a deed had been executed establishing a new contractual relationship with the new third party lessee, incorporating for instance a guarantee. His Lordship saw this a key difference from the situation in *Prudential*, where only two parties were really involved.

This may lead to more reluctance to finding an enforceable obligation on the part of lessors in cases involving assignments. Two High Court judgments, one rendered just before *Mahmood* and the other in 1999, had found that the lessor had intended to give consent to assignments. In the latter, Neuberger J thought that *Prudential* was only slightly dissimilar, later remarking that:⁷⁴

it would be undesirable if, in relation to a frequently encountered course of conduct in the conveyancing world, courts were to adopt inconsistent approaches or reach decisions which turn on nice distinctions, save where it was necessary to do so. Landlords and tenants and their respective advisors have a right, in the absence of good reason to the contrary, to expect the courts to give clear and consistent guidance.

⁷² Above n 10.

⁷³ (30 March 2001) unreported, English Court of Appeal (Civil Division), Aldous LJ. It is still unclear whether proof of a subjective intention would be enough. At least in bilateral contracts, it can be argued that a concurrence of subjective intentions is sufficient: D McLauchlan “Actual Consensus Ad Idem: Unnecessary But Surely Sufficient?” (1995) 1995 NZLJ 45.

⁷⁴ *Rose v Stavrou*, Chancery Division, The Times, 23 June 1999. The second case is *Aubergine Enterprises Ltd v Lakewood International Ltd* (21 February 2001) unreported, Chancery Division.

However, that case had involved the lessor initially consenting (subject to a deed of variation) to the lessee using the premises as a restaurant, instead of as a retail shop as provided in the lease. It was only three years later that the lessee requested consent to assign the lease, allowing the new use; and the lessor's objection related to this new use by a third party (as opposed to the original lessee), not to the third party or the need for a deed or guarantee with that person. The other case also involved communications pointing to a clear intention to consent to assignment. Most importantly for present purposes, all four cases send the clear message that wording like "subject to licence" is not to be given the decisive role that similar phrases have often achieved in other transactions involving land, notably sales and initial leases. Instead, the courts consider and weigh all the circumstances, including the nature of the relationship between the parties.

2 Settlement Negotiations: A New Presumption?

The significance of an informal agreement being reached in the context of an earlier dispute between the parties, as in *Akiens*, was stressed in *Dalgety Foods Holland BV v Deb-Its Limited*.⁷⁵ No binding settlement was found to arise from agreement on terms reached by telephone between lawyers during court proceedings involving a trademark dispute. Those negotiations apparently had not be qualified by wording like "subject to contract" or the like, but Edward Nugee QC held that:⁷⁶

The parties are not negotiating the terms of a fresh commercial contract ... They were negotiating with a view to agreeing a form of order which the court is going to be asked to make. It is not impossible for them to enter into a binding contract before the wording of the order is agreed; but since the whole object of their negotiations is to arrive at a form of order which can be presented to the court as agreed, *the onus is in my judgment on the person who contends that a contract has been concluded before the wording of the order is agreed to show that the parties really intended this result. In such a case there is in my judgment a presumption that the "meeting of minds" [referred to in case law being discussed] is a meeting of minds on the precise wording of the order*, because neither party will be in a position to bring the matter before the court for a consent order to be made until he can show that what is the form of consent order that the court is being asked to make.

Arguably, Edward Nugee QC goes too far in this holding. Putting the onus on the party alleging an immediately binding contract is acceptable, since that is the general legal principle anyway. But tying this to a legal *presumption* that informal settlement negotiations between lawyers in court proceedings are not intended to be immediately binding, or directly attempting to lay down that presumption in this context, appears contrary to English authority. Not even cases like *Eccles*, *Longman*, or *Akiens*⁷⁷ go so far as to lay down any presumption against enforceability. The better view is that expressed by several judges and commentators in the context of sales and leases, and by

⁷⁵ [1994] FSR 125. Compare *Akiens*, above n 68.

⁷⁶ Above n 75, 129 (emphasis added).

⁷⁷ Compare above n 55 (where Lord Greene remarked that the parties had "intended from the beginning" to follow the custom); n 9; n 68.

all courts recently in relation to informal consents under long-term leases.⁷⁸ That is, a perceived customary practice, as a very important part of all the circumstances, should guide the decision that an immediately binding agreement was not be intended by the particular parties.

Nonetheless, the holding in *Dalgety Foods* may have planted the seeds for a further more formal tendency in English law, in a new category of cases involving informal settlement negotiations. Albeit perhaps to a lesser extent, that tendency can also be perceived as emerging from judgments which place great importance on whether or not phrases like “subject to contract” had been used at some stage in negotiations, as in the majority in *Longman* or in *Akiens*.⁷⁹ Both tendencies also are consistent with other recent case law involving maritime contracts, especially the judgment of Steyn J in *The Junior K*,⁸⁰ where the courts have increasingly focused on whether or not phrases like “subject to details” were used during negotiations (below Part II.A.4).

3 Other Commercial Contexts

The more substantive approach, simply determining the intentions of the parties in all the circumstances of each case, nonetheless has been a quite deeply rooted principle in English case law covering a range of other contractual settings. In *Sociedade Portuguesa de Navios Tanques Ltda v Hvaisisk Polaris A/S*,⁸¹ for instance, the Court of Appeal upheld McNair J’s decision that a legally binding charterparty had not been formed by a lengthy exchange of correspondence, amidst complicated background circumstances. Somervell LJ focused primarily on the argument that the parties were not “ad idem” in the sense of having agreed on all essential terms. He used his conclusion on that point, however, to hold also that the parties intended the negotiations to be subject to signature of a charterparty form before resulting in a legally binding agreement. Somervell LJ noted that various expressions had been used, like “subject to arrangements for conditions of charterparty”, although not the precise words “subject to contract”; but concluded:⁸²

In a case of this kind, where the intention is to be found in words such as those which we have to deal, this matter, like others, remains fluid. It remains more fluid, if I may use the simile, than if the whole negotiations had started off with an express provision “subject to contract”. That is one of the reasons why I have dealt with the *ad idem* [uncertainty on essential terms] point first, because it logically seems to me to come first. If in a complicated commercial transaction of this kind parties do finally become *ad idem*, their intentions on this [formal requirements] point may well take a new turn. One can imagine, for example, a case in which parties had contemplated signature of a document up to the time when they were *ad idem*, but, when all points were finally agreed, an exchange of telegrams might make it clear that they were at that stage agreeing to be bound in advance of the formal document. I have ventured to say that because [counsel] submitted, I think rightly, that one certainly wants to avoid anything

⁷⁸ See for example *Chillingsworth*, above n 7 per Pollock MR; *Alpenstow*, above n 61; Treitel, above n 8; *Prudential*, above n 10.

⁷⁹ Above n 9; n 68.

⁸⁰ Above n 11. See below Part II.A.4.

⁸¹ [1952] 1 Lloyd’s Rep 407.

⁸² Above n 81, 417.

in the nature of what might be called a technical rule being imported into commercial contracts being negotiated by letters of this kind.

Adopting a similar approach, in *Saphir Merchants Ltd v Zissimos & Anor*,⁸³ Pearson J held that an export sale for potatoes had not been concluded as a result of a telephone conversation between the defendant seller's agent and the plaintiffs in London. Although that had followed less lengthy or complicated negotiations by telex, again several essential terms (such as letter of credit details) had not been agreed upon. This reinforced the conclusion that there was also no intention to be bound until a written contract had been drawn up, since the Pearson J preferred testimony that the defendant seller had said "I am sending you the contract" and anyway the parties had drawn up a contract in previous dealings.

In *Okura & Co Ltd v Navara Shipping Corp SA*, the Court of Appeal also held that the Japanese and Panamanian companies had not intended to conclude a binding ship sale contract as a result of telephone conversations and a telex. Although all three Judges focused on the wording used, Lord Denning MR also referred to the conduct of the parties, which included some tough negotiating behaviour on the part of the Panamanian buyer. The test laid down was what the parties had contemplated or intended in the circumstances.⁸⁴

After listing cases other than those involving wording such as "subject to details", some of which have held that an immediately binding agreement was intended but many of which have not, Treitel comments:⁸⁵

⁸³ [1960] 1 Lloyd's Rep 490, 494.

⁸⁴ [1982] 2 Lloyd's Rep 537. In September 1976, plaintiffs Navara (the Panamanian company) entered into a lengthy written agreement to purchase a vessel from Okura (a long established Japanese trading company which had maintained an office in London for over 100 years). Okura had subcontracted with a Hiroshima shipyard for construction of the vessel, but the shipyard got into financial difficulties and construction was delayed. The Okura-Navara contract provided for delivery by September 1977, but allowed Okura 150 days' leeway before allowing Navara to cancel. After many defects were found at sea trials in February 1977, Navara cancelled at the earliest opportunity and claimed back its advances of almost Yen 1 billion (out of the contracted price of Yen 2.4 billion). Soon afterwards, however, the parties began to negotiate a new contract, Navara seemingly driving a hard deal on a new price (offering just Yen 1.28 billion in total) in mid-April 1977. Immediately after the telephone conversations on 4 May 1977, a telex was sent reporting "text of agreement reached today between Navara/Okura", and setting out various clauses. In reversing Neill J and holding that no immediately binding agreement was reached, Lord Denning MR stressed paragraph 10 which stated that "all other terms and conditions" were to be as under their 1976 contract. Lord Denning pointed out that that contract had stated it was to become effective upon "signing". May and Shaw LLJ (the latter "reluctantly") concurred, stressing paragraph 11 which required "items 1-10 above to be incorporated in memorandum of agreement in mutually acceptable manner". Perhaps most significantly, although only Lord Denning mentioned it, was "the conduct of the parties". Tellingly, on 5 June 1978 Navara had issued an "ultimatum" insisting on a delivery term allowing for no (force majeure) exceptions; and, when Okura refused, Navara had insisted on refunds of its funds advanced under the 1976 contract for the vessel. Okura obliged, also treating the negotiations as at an end. Yet on 22 June 1977 Navara suddenly brought suit for specific performance of the alleged 4 May 1977 agreement. In short, although the Court of Appeal focused on the wording used, it seems very probable that this conduct by Navara (perhaps trying, until the end, to negotiate a very low new price with Okura) explains the holding that no binding renegotiated agreement was reached then.

⁸⁵ Above n 8, 52.

The question of whether an agreement which expressly requires the execution of a formal document is incomplete depends on the purpose of the requirement in each case; and there is no point in multiplying examples.

Certainly, as is evident from the cases reviewed above, much depends on the facts in individual cases. However, the suggestion recently in *Dalgety Foods*⁸⁶ that there may be a presumption against binding effect in certain categories of settlement negotiations, at least, shows that it is worthwhile to try to uncover any emergent patterns. Further investigation of maritime law cases reveals an even more significant area in which, since the early 1980s, more formal reasoning has been consolidated in English contract law.

4 Negotiations “Subject to Details” in Recent Maritime Law Cases

Over the last two decades, a limited number of Commercial Bench and Court of Appeal Judges have developed the rule that negotiations in the shipping trade, expressed to be “subject to details”, mean that informal agreements are not intended to be legally binding until the details have been recorded in formal written documentation. This rule appears even more rigorous than the deference towards the phrase “subject to contract” shown by some judges in cases involving land or lease negotiations, described above,⁸⁷ perhaps because the latter cases were spread over more than a century and had involved a broader range of courts and judges (Part II.A.1). The emergence of new rule in shipping cases is also very important because it constitutes a major proportion of reported appellate case law in England.⁸⁸ Further, the Judges specialising in these cases often become Law Lords. An example is Lord Steyn who, as a Commercial Bench Judge, wrote the judgment in *The Junior K* which has proven central in establishing the primacy given to the phrase “subject to details”.⁸⁹ The expansion of formal reasoning in this area may therefore have broader repercussions than tendencies in those directions in the other areas already discussed.

The origins of the rule that negotiations in the shipping trade, expressed to be “subject to details”, mean that informal agreements are not intended to be legally binding until the details have been formalised, can be traced back to obiter dicta in a case decided in 1981 by a Judge clearly quite confident about his understanding of the shipping trade.⁹⁰ In *The Solholt*,⁹¹ Staughton J had to decide simply whether sellers’

⁸⁶ Above n 75.

⁸⁷ See for example *Akiens* (above n 68) and *Longworth* (above n 9).

⁸⁸ Above n 12.

⁸⁹ *The Junior K*, above n 11: *Star Steamship Society v Beogradska Plovidra* [1988] 2 Lloyd’s LR 583.

⁹⁰ Compare also generally C Staughton “Good Faith and Fairness in Commercial Contract Law” (1994) 7 JCL 193, 194, querying whether “good faith and fairness naturally are to be found in the commercial habitat”. Now a Justice of the Court of Appeal, he has also written extra-judicially advocating a more formal approach to interpretation of agreed contractual terms: see Sir Christopher Staughton “How Do the Courts Interpret Commercial Contracts” (1999) 58 CLJ 303.

⁹¹ *Sotiros Shipping Inc & Aeco Maritime SA v Sameiet Solholt* [1981] 2 Lloyd’s Rep 574.

failure to tender a vessel on time entitled buyers to certain remedies. There was no dispute about formation of the contract, which had incorporated the well-known Norwegian Sale Form. In summarising the negotiations, however, Staughton J stated that the phrase "fixed subject to details" used at an earlier stage signified that "the main terms were agreed, but until the subsidiary terms and the details had also been agreed no contract existed".⁹²

In *The Blankenstein*,⁹³ the issue was instead precisely whether a contract to sell three ships had been formed by an exchange of correspondence, without signature of a contemplated Memorandum. The Court of Appeal and the trial Judge, Leggatt J, upheld the arbitrator's finding that a binding sale had been intended because the negotiations and the agreement reached had been *without* any expressed "subjects", such as "subject to details". In reaching this conclusion, however, they also found that brokers for both sides were convinced that they had concluded a valid contract for their principals and that "the agreement would be regarded in the shipping market as a binding contract not requiring a signed memorandum to validate it". They also approved the general contention of counsel for the seller, following McNair J in *Rugg & Co Ltd v Street*,⁹⁴ that "in each case the court has got to make up its mind on the construction of the documents and on the general surrounding circumstances whether the negotiations were not to have contractual force until a formal document was signed".⁹⁵

Leggatt J adopted a similar approach in *The Intra Transporter*,⁹⁶ to hold that a charterparty to transport steel to Dubai had *not* been concluded in the circumstances. Various terms had been agreed by 28 February 1983 between plaintiff Hofflinghouse and the owner's broker, although the latter also proposed to draw up a Gencon charterparty for Hofflinghouse to sign. That was done a few days later, and an amendment requested by Hofflinghouse was agreed to on 7 March. More communications were exchanged until the deal eventually fell through, however, and Leggatt J held that an agreement had not been reached even by 7 March. The main reason was that Hofflinghouse needed to arrange for provisions to be included in the charterparty which would match requirements in a letter of credit to be furnished by a steel buyer in Dubai, and that was apparent even from the wording used in communications (indeed, including communications by the owner's broker, eg when on 9 March he requested reconfirmation of authority to sign the charterparty). Not surprisingly, moreover, Leggatt J rejected as making "no commercial sense" the alternative contention that a binding agreement had been reached on 1 March or on 28 February. He added however a more general comment:⁹⁷

Although the negotiation had not been expressed to be "subject to details", it obviously was so treated by both parties. Although it is theoretically possible to agree the main terms of a

⁹² Above n 91, 577.

⁹³ *Damon Compania Naveira SA v Hapag-Lloyd International SA* [1985] 1 Lloyd's Rep 93 (CA), [1983] 2 Lloyd's Rep 522.

⁹⁴ [1962] 1 Lloyd's Rep 364.

⁹⁵ Above n 93, 527.

⁹⁶ *Hofflinghouse & Co Ltd v C-Trade SA* [1985] 2 Lloyd's Rep 158 (upheld unanimously by the Court of Appeal, [1986] 2 Lloyd's Rep 132).

⁹⁷ Above n 96, 163.

charterparty without agreeing the details, such as course would be a fruitful source of dissension and would be very unusual.

By contrast, unlike in *The Intra Transporter* and the *The Blankenstein*, in *The Nisson Samos*⁹⁸ the phrase “subject to details” had been expressly used in the negotiations; and, unlike in *The Solholt*, the issue was whether a valid contract had been formed. The broker for a German buyer had offered by telex on 22 April 1981 to purchase a reefer vessel for scrap “subject details; otherwise normal contract terms to be mutually agreed”. This condition was repeated in a recap telex he sent on 23 April, after negotiations to establish the deadweight of the vessel. The next day he also telexed the full contract based, as agreed between them, upon an earlier memorandum of agreement. One clause referred to some documentation to be provided to establish deadweight. On 28 April the buyer’s agent requested confirmation that this had been sent and stressed that the deal was still “sub[ject] to adequate proof of LDT”, whereupon the seller’s agent sent the documentation. Some matters were renegotiated, and on 30 April the buyer’s agent confirmed these and said it was retyping the contract documentation accordingly. He then reported, however, that the buyer was unhappy with the deadweight documentation which had arrived. Leggatt J held that this was too late, the contract having already been formed on 30 April, with the deadweight documentation as agreed on 23 April. He held that:⁹⁹

even when on 23 April agreement in principle was reached as to the principal terms, no binding contract was yet effected between the parties. ... “Subject details” is a well-known expression in broking practice which is intended to entitle either party to resile from the contract if in good faith either party is not satisfied with any of the details as discussed between them. Neither broker thought that there was a binding contract by 23 April, but it is equally plain that when on 30 April, all the details having been agreed, both parties regarded the agreement as having been concluded.

This holding implies that both parties were legally free either to withdraw from negotiations between 23-30 April, or for the buyer to clearly require a new term such as making any contract subject to proof of deadweight to its full satisfaction. In this case, however, the buyer failed to do so adequately, instead binding itself through its agent on 30 April.

The latter complication was not present in the factual circumstances of *The Junior K*.¹⁰⁰ This was a key case in establishing the rule that interposing the phrase “subject to details” in shipping negotiations has the effect that there is no binding contract. Steyn J held that the plaintiff Lebanese shipowner could not even show an arguable case, sufficient to justify service on the Yugoslavian defendant, that a binding charterparty had been concluded. There had been various negotiations through telexes and telephone conversations on 4 October 1985, resulting in the plaintiff’s London brokers sending a recap telex to the defendant’s Rotterdam brokers which ended “sub[ject to] details [as per the] Gencon [charterparty]”. Steyn J accepted that agreement

⁹⁸ *Samos Shipping Enterprises Ltd v Eckhardt & Co KG* [1985] 1 Lloyd’s Rep 378.

⁹⁹ Above n 98, 385.

¹⁰⁰ *Star Steamship Society v Beogradska Plovidra* [1988] 2 Lloyd’s Rep 583.

had been reached on all essential terms, and no matter raised in the negotiations remained unresolved, but held that “a reasonable man, versed in the chartering business, would have construed” the telex’s concluding words as indicating no intention to be legally bound.¹⁰¹

if there has been a complete and unqualified acceptance of an offer, prima facie a contract comes into existence even if the parties intend to reduce the agreement to writing. On the other hand, in negotiations parties are free to stipulate that no binding contract is reached on yet unmentioned and unconsidered detailed provisions. And the law should respect such a stipulation in commercial negotiations. That seems to me to be exactly what happened in this case. The Gencon charterparty is, of course, a detailed and well-known standard form. It is plain that the parties had in mind a contract on the Gencon form but that they had not yet considered the details of it. By the expression “subject to details of the Gencon charterparty” the owners made it clear that they did not wish to commit themselves contractually until negotiations had taken place about the details of the charterparty. Such discussions might have covered a number of clauses. It does not follow that the owners were willing to accept all the detailed provisions of the standard form document. After all, it is a common occurrence for some of the detailed provisions of the Gencon form to be amended during the process of negotiation. In any event, the Gencon standard form contains within it alternative provisions which require a positive selection of the desired alternative.

Steyn J referred to the Gencon form options as to laytime, for instance, remarking that the parties had not negotiated on this matter. In response to the plaintiff’s argument that no delays would have taken place in the loading port, he argued that “factually, that may or may not be correct but no port is immune from delays, and I am satisfied that an agreement on laytime, although not essential, is a most desirable provision and one which in practice is almost invariably insisted upon”. To support this interpretation of the phrase “subject to details”, he pointed also to the dicta in *The Solholt* and *The Nissos Samos*.¹⁰² In response to the plaintiff’s argument that Leggatt J in the latter case suggested at least an obligation to negotiate “in good faith” after main terms have been fixed, Steyn J held that this was meant to state “a broking view of the matter and not a strict legal position” or “a new principle of law” along the lines of “the civilian doctrine of culpa in contrahendo”.¹⁰³

In a note on *The Junior K*, Debattista criticises Steyn J for rejecting this attempt to rephrase the matter as estoppel and argues that, to provide a clearer conceptual framework, the analysis should have addressed the basic policy question: “ought there be a remedy for the unjustified breaking off of negotiations and if so, how to achieve it and to what extent?”. Debattista concludes, moreover: “as it is, we now have a judgment clearly denying a remedy for withdrawal from negotiations, a position arguably as rigid and insensitive as the American view which Steyn J so effectively and rightly eschews”.¹⁰⁴ In fact, as discussed below (Part II.C.3), the US approach is less rigid than Debattista believes; but it certainly forms a marked contrast to that developed by the English courts since the 1980s.

¹⁰¹ Above n 11, 585-586.

¹⁰² Above n 91; n 98.

¹⁰³ Above n 11, 586.

¹⁰⁴ C Debattista “Charterparties Sub Details” [1988] LCMLQ 439, 441.

In *The Junior K*, Steyn J specifically rejected the suggestion of the US Court of Appeals for the Second Circuit in *Great Circle Lines v Matheson*,¹⁰⁵ namely that:¹⁰⁶

details are unimportant and that one can simply go back to the printed form[. This] does not always work. That is classically illustrated by the present case, where one cannot solve the problem by simply going back to the printed form because the printed form contains alternatives.

Citing English academic commentary,¹⁰⁷ Steyn J also argued that the Second Circuit's understanding had not been followed in some arbitral awards of the Society of Maritime Arbitrators of New York, and had been reportedly criticised in a Bulletin of the Federation of National Associations of Shipbrokers and Agents (FONASBA).¹⁰⁸ Hence, his other major objection to the approach adopted in *Great Circle* was to the suggestion therein that "the English approach" should be reconsidered. Instead, Steyn J asserted confidently:¹⁰⁹

it is the United States Courts rather than the English Courts which are out of step with the way in which the shipping trade works. And ... it is in the interests of the chartering business that the Courts should recognise the efficacy of the maritime variant of the well-known "subject to contract". The expression "subject to details" enables owners and charterers to know where they are in negotiations and to regulate their business accordingly. It is a device which tends to avoid disputes and the assumption of those in the shipping trade that it is effective to make clear that there is no binding agreement at that stage ought to be respected.

As described below (Part II.C.3), Second Circuit courts have not been converted to this view. It still is not clear which approach is better in tune with shipping industry practices.¹¹⁰ It is not inconceivable that there is still considerable variety in practices and expectations. Further, companies adopting the stricter English approach may have centred their business operations in London, or have done so increasingly since Steyn J's judgment in *The Junior K*. More importantly, they may have maintained or changed the choice of law and jurisdiction clauses in their contracts, to ensure charterparty cases are brought before English courts to be judged under the stricter English law on this point. By contrast, those preferring a less dogmatic approach might have preferred to remain in or gravitate to New York. However, this seems very unlikely. The shipping

¹⁰⁵ (1982) 681 F 2d 121 (2d Cir) [*Great Circle*]. This case is sometimes referred to as *The Cluden*.

¹⁰⁶ Above n 11, 587.

¹⁰⁷ Debattista – ironically enough, in view of the latter's critique of *The Junior K* (above n 11).

¹⁰⁸ FONASBA is a federation of associations from all over the world, including England, the US and Japan (but not New Zealand), with a website at <<http://www.fonasba.com/>>. The Society of Maritime Arbitrators is a professional non-profit organisation established in 1963, which does not participate in the administration of individual arbitrations: see its website at <<http://www.smany.org/sma/about2.html>>.

¹⁰⁹ Above n 11, 588.

¹¹⁰ Gorton and others, above n 25. Compare also H Collins *The Law of Contract* (3 ed, Butterworths, London, 1997) 16:

In the chartering of vessels through shipbrokers in London, for instance, the "fix" is arranged by phone, the ship sails, and the 'paperwork' follows in the shape of a standard form charterparty, a practice sustained by the rules and standards established by membership of the Baltic Exchange.

industry has long operated on a global scale, generating many common customs and expectations which have underpinned extensive harmonisation of maritime law.¹¹¹ In the light of empirical studies in both England and the US, moreover, it seems unlikely that businesspeople adjust their activities to accord with the latest pronouncements of different courts.¹¹² Their legal advisors, who might have more knowledge about developments in case law, would probably be influenced by such attitudes too. Even if they did manage to obtain the (re)insertion of choice of law or forum clauses favouring the legal system either the more formal or substantive approach, their selection is likely to be at least partly coloured by the legal reasoning patterns and institutions with which they are most familiar. The contrasting approaches of English and US courts seem even more likely to be linked to differing orientations towards legal reasoning in this area of law, and more generally.¹¹³

In particular, Steyn J's approach is more formal in that it encourages lawyers and other judges to hunt out and give great weight to particular phraseology used. Consistently with this, in *The CPC Gallia*,¹¹⁴ Potter J followed *The Junior K* and *The Solholt*¹¹⁵ to hold that a contract to carry a jet foil from Japan to Spain was not intended to be binding because negotiations had been "subject to details/logical amendments". Also, albeit obiter, in *The Pina Atlantic Marine Transport Corporation v Coscol Petroleum Corporation*¹¹⁶ Tudor Evans J remarked that no charterparty had been concluded when the parties had been negotiating "sub C/P details" and "sub minor details". By reverse implication, moreover, English courts since *The Junior K* appear increasingly willing to find that the parties intended to be immediately bound when they have negotiated *without* interposing phrases like "subject to details".¹¹⁷

¹¹¹ See for example W Tetley "The General Maritime Law: The *Lex Maritima*" (1994) 20 *Syracuse J Int'l L & Comm* 105.

¹¹² Compare for example the following studies in the manufacturing sector: S Macaulay "Non-Contractual Relations In Business: A Preliminary Study" (1963) 28 *Am Socio Rev* 55; J Esser "Institutionalising Industry: The Changing Forms of Contract" (1996) 21 *L & Soc Inq* 593; H Beale and T Dugdale "Contracts between Businessmen: Planning and the Use of Contractual Remedies" (1975) 2 *Brit J L & Soc* 45; R Lewis "Contracts Between Businessmen: Reform of the Law of Firm Offers and an Empirical Study of Tendering Practices in the Building Industry" (1982) 9 *J L & Soc'y* 153. For a more general study of the use of exclusion clauses among engineering, finance and insurance companies, see also D Yates *Exclusion Clauses in Contracts* (Sweet & Maxwell, London, 1980) 16-33. The disdain for strict rules applied by courts, in England, may also explain the popularity of arbitration: see H Collins "Formalism and Efficiency: Designing European Commercial Contract Law" (2000) 8 *European Rev Private Law* 211. Unfortunately, however, there have not yet been any systematic empirical studies of shipping industry practices and expectations (compare Collins, above n 110). See also generally above Part Two Introduction Parts II.A and II.C; and below Chapter Four Part III.

¹¹³ Above Chapter One, especially Part II.A

¹¹⁴ *CPC Consolidated Pool Carriers GmbH v CTM Cia Transmediterranea SA* [1994] 1 *Lloyd's Rep* 68.

¹¹⁵ Above n 11; n 91.

¹¹⁶ [1991] 1 *Lloyd's Rep* 246 (upheld by Leggatt LJ, for the Court of Appeal, [1992] 2 *Lloyd's Rep* 103).

¹¹⁷ See for example *Brookes v Khalidia Marine Ltd & Anor* (4 March 1988, unreported, Queen's Bench, Tudor Evans J); *Granit SA v Banship International Inc* [1994] 1 *Lloyd's Rep* 526; *Ateni Maritime Corporation v Great Marine Ltd* [1990] 2 *Lloyd's Rep* 250 (*The Great Marine, No 2*) (although Leggatt J did not mention specifically that no such phrase had been invoked in the ship sale negotiations). Compare

In other words, the approach of Steyn J has generated, at least in an important realm of English contract law, a more “hard and fast rule” (injecting more mandatory and interpretive formality):¹¹⁸ parties will not be bound if negotiating “subject to details”, but probably bound otherwise. This is the sort of “technical rule”¹¹⁹ which even some English Judges in other contractual settings have specifically warned against. So far, it has not carried over into new areas such as informal consents given under long-term leases of land (above Part II.A.1). However, the following (obiter) remark by the Court of Appeal in one such case indicates the attraction that more formal reasoning holds in this general area of the English law of contract formation.¹²⁰

I would respectfully suggest that it is in the interests of the chartering business that Courts should recognise the efficacy of the maritime variant of the well-known “subject to contract”. The expression “subject to details” enables owners and charterers to know where they are in negotiations and regulate their business accordingly.

Developing a more formal rule like this runs contrary to the more broad-based inquiry involved in balancing a range of considerations with the important objective of giving effect to the intentions of the parties. The increasing strictness of the rule thus heightens content formality, by increasing the likelihood that it will prove under- or over-inclusive with respect to that objective.

II.B New Zealand Law: Extensive Development of Formal Reasoning – Now Being Reined In?

A more formal approach has also characterised New Zealand law. This has been particularly true regarding sales of land, and transactions involving land (as in Australia) probably generate the largest category of litigated cases in New Zealand.¹²¹ However, a more formal approach has also been suggested for informal agreements involving major commercial transactions exhibiting significant complexity. It gathered momentum from the mid-1970s, based on interpretations of several important Court of Appeal judgments (below Part II.B.1). Following academic criticism of these interpretations, notably by David McLauchlan in 1993,¹²² there have been indications that at least some courts are

Metal Scrap Trade Corporation v Kate Shipping Co Ltd [1994] 2 Lloyd’s Rep 402 (*The Gladys, No 2*), where no sale was found although the parties had not used the phrase “subject to details”; they had however used phrases pointing to that conclusion, such as “subject terms to be mutually agreed”, “subject to the terms to be mutually agreed upon” or “otherwise usual MSTC terms/to be mutually agreed”. Similarly, in *Ignazio Messina & Co v Polskie Linie Oceaniczne* [1995] 2 Lloyd’s Rep 566, the phrase “subject to appropriate amendments” had been used.

¹¹⁸ Above n 6.

¹¹⁹ *Sociedade Portuguesa*, above n 81 per Somervell LJ.

¹²⁰ *Prudential*, above n 10.

¹²¹ See D McMorland “In Defence of ‘a Certain Ludic Charm’” (1999) 14 JCL 108, 110 (noting the absence of empirical work, but venturing a similar opinion based on “a reading of the law reports over the years”). Compare Ellinghaus, above n 12.

¹²² McLauchlan, above n 15. See also D McLauchlan “‘We Have a Deal’ - Mere Consensus or Concluded Bargain?” (1996) 2 NZBLQ 206. His criticisms in this area are consistent with an overall attempt to move New Zealand law towards the more substantive orientation of US law: see above Part

now reverting to the more substantive approach of ascertaining the parties' intentions in all the circumstances. However, an objective assessment must acknowledge that the transition has been neither dramatic, nor uniform (Part II.B.2). Thus, in somewhat different areas and with somewhat different techniques for promoting content formality, New Zealand law still shows affinities with English law. Prevalent *reasoning* patterns also differ significantly from the more substantive approach maintained in the US (below Part II.C) and Japan (Part II.D), although *results* reached in some individual cases might well have been the same in some or all of these jurisdictions.

1 The Legacy of *Carruthers* and *Concorde*

The tendency towards more formal reasoning can be traced back to *Carruthers v Whitaker & Anor*.¹²³ The unanimous judgment of the Court of Appeal came to be interpreted as laying down a presumption that no legally binding agreement arises for the sale of land until execution of the formal contract, when the negotiations follow usual practices in finalising such contract documentation. A careful reading of the judgment belies this as an over-generalisation, however.

In *Carruthers*, the defendant agreed orally on 2 February 1973 on essential terms for the sale of his farm to the plaintiff couple. The parties expected solicitors to be involved in drafting a formal contract agreement, and solicitors were then instructed by each side. On 15 February 1973 the plaintiff buyers' solicitor wrote to the seller informing him that his clients would have no difficulty in arranging finance and that they would like to buy the farm, and concluded: "Accordingly, if you are still interested in selling your farm would you please see your solicitor and ask him to let us have an agreement for sale".¹²⁴ The next day, one of the buyers telephoned the seller from Whakatane to ask if the sale was still going ahead, and allegedly was told that everything was fine and that the seller had been to his solicitor to have the contract prepared. The buyers' solicitor telephoned the defendant's solicitor on 22 February. He incorporated the terms discussed into a standard form contract, had them checked by the defendant, and on 23 February sent two copies to the plaintiff's solicitor for the couple to sign. They did so, and in early March their solicitor returned the agreed deposit along with both copies for the defendant to sign, but he decided not to proceed.

The trial Judge held that the parties had already concluded a binding contract on 2 February, but the Court of Appeal reversed the decision. Richmond J highlighted testimony showing the both parties expected to sign the formal agreement, and the Judge's impression that all from the start were "aware that there were legal technicalities involved in the deal and that neither was making a firm commitment at that stage, though both expected the sale to proceed". Later, in a key and often cited passage, he continued:¹²⁵

It is established by the evidence to which I have earlier referred that at the time when the

Two Introduction Part IV.E.

¹²³ Above n 14: [1975] 2 NZLR 667.

¹²⁴ Above n 14, 668.

¹²⁵ Above n 14, 671 (emphasis added).

parties instructed their solicitors they all had in mind only one form of contract which would govern the sale and purchase of the farm, namely, a formal agreement in writing to be prepared and approved by the solicitors. When parties in negotiation for the sale and purchase of property act *in this way* then the *ordinary inference* from their conduct is that they have in mind and intend to contract by a document which each will be required to sign. It is unreasonable to suppose that either party would contemplate that anything short of the signing of the document by both parties would bring finality to their negotiations. Furthermore both parties would expect their solicitors to handle the transaction in a way which would give them proper protection from the legal point of view. There is no evidence whatever in the present case to rebut this prima facie inference. On the contrary, and as found by Wilson J, the parties expected that the contract would eventually be signed by both vendor and purchasers. The Judge then observed that this expectation was "merely a reflection of common practice". With respect, I would prefer to put it that the parties intended to contract in accordance with common practice, which in New Zealand is to obtain the signatures of both vendor and purchaser to both copies of the agreement ...

This passage shows that the process involves determining the parties' intentions from the circumstances, drawing inferences where necessary (more in the sense that intention should usually be determined objectively, rather than subjectively). It does not involve beginning with an inference in the sense of a presumption against the binding force of informal agreements in negotiations even for the sale of land. This reasoning is also apparent later in Richmond J's judgment:¹²⁶

In *Eccles v Bryant* [1948] Ch 93 the fact that the parties intended to be bound only by formal contract emerged from the use of the words "subject to contract" and from the circumstance that the transaction was in the hands of solicitors. In the present case the same *inference arises* from the conversations between the parties and [buyers' solicitor]'s letter of 15 February. Once that point is reached then the further inference must be that the manner of becoming bound which the parties and their solicitors contemplated from the very beginning was the ordinary and customary method of obtaining an agreement signed by both parties, and thereby giving protection to both parties, as well as providing certainty as to terms. As in the *Eccles* case so in the present case I can find no evidence that the parties or their solicitors ever resiled from that contemplation ...

The events around 15 February, along with evidence that the parties were following usual practices in having a formal contract prepared, showed that they had not intended to be immediately bound on 2 February. Yet even the Headnote for *Carruthers* in the New Zealand Law Reports seems to overstate the principle, although the opening sentence is unobjectionable:¹²⁷

Where parties are proposing to enter into a contract the manner in which it is to become binding must be gathered from the intentions of the parties express or implied. *In a contract for the sale of land there is a well-known common and customary method of dealing, viz a document signed by both vendor and purchaser. Normally in such contracts the inference is that the above method is contemplated by the parties ...*

The potential for a more formal rule to emerge was extended by a second important

¹²⁶ Above n 14, 673 (emphasis added).

¹²⁷ [1975] 2 NZLR 667 (emphasis added).

Court of Appeal precedent, *Concorde v Anthony Motors (Hutt) Ltd.*¹²⁸ In 1982, the Court held unanimously that no immediately binding distributorship agreement had been concluded as the result of agreement on terms reached partly in face-to-face negotiations, followed by various exchanges of draft agreements between the respective solicitors. Cooke J concluded:¹²⁹

The purpose of the negotiations was to have prepared by the manufacturer's solicitors and executed by both parties *an important commercial agreement of some complexity. In such circumstances we think the normal inference in New Zealand is that the parties do not intend to be bound* before the agreement has been drawn up and signed.

After quoting the first four sentences of the first quotation above from Richmond J's judgment in *Carruthers*,¹³⁰ Cooke J continued:¹³¹

This case is in the different field of commercial contracts, where there is not by law the same need for signed writing as evidence, but in our opinion *the natural inference is the same* in the absence of factors to the contrary.

Unless that inference is displaced the result is that, even although all terms to be included in the document have been agreed, there is no contract and each party has a locus poenitentiae until at least execution on both sides. ... we can see nothing sufficient to displace the natural inference as to the date when negotiations began.

Repeating this passage, Cooke P held in *Shell Oil NZ Ltd v Wordcom Investments Ltd*¹³² that "the natural inference, supported by the terms of the correspondence, is that the parties were not to be bound" by informal agreement reached as to Shell purchasing a Wordcom property. In terms redolent of some of the English judgments mentioned above,¹³³ the Court of Appeal also emphasised the importance of such an inference in providing "a prima facie rule of some certainty in this field of commercial or vendor and purchaser law".¹³⁴

This takes matters too far, as McLauchlan contended vigorously in 1993, because it perverts what was held in *Carruthers* and threatens to undo bargains intended to be binding.¹³⁵ In *Holmes v Australasian Holdings Ltd*,¹³⁶ for instance, although the experienced businesspeople in question had ended their discussion with the words "we have a deal" and provided other indicia of consent, the High Court still refused to find an immediately binding agreement:¹³⁷

In *Carruthers* the presumption arose out of the fact that there was no oral contract, whereas in *Holmes* the presumption is used to negate the existence of an oral contract. One can only

¹²⁸ Above n 16: *Concorde v Anthony Motors (Hutt) Ltd* [1981] 2 NZLR 385.

¹²⁹ Above n 16, 388 (emphasis added).

¹³⁰ Above n 125.

¹³¹ Above n 16, 389 (emphasis added).

¹³² [1992] 1 NZLR 129, 131.

¹³³ For example *Eccles* (above n 55, per Lord Greene MR), *The Junior K* (above n 11).

¹³⁴ Above n 132, 132.

¹³⁵ McLauchlan, above n 15, 443-444.

¹³⁶ [1988] 2 NZLR 303.

¹³⁷ McLauchlan, above n 15, 453.

speculate on what impact the Judge's approach had on the eventual outcome, but it appears that the presumption proved decisive. Certainly there was ample evidence for justifying a conclusion that the parties did intend to be bound by their informal agreement.

McLauchlan emphasises that this uncertainty as to the principles leads to unpredictable results. These may reflect judges' idiosyncratic views on, or experiences of, particular types of transactions. He contrasts for instance the approach of McGechan J in *NZ Master Builders Federation v Data Management Ltd*, basically extending the notion of a presumption against binding force to the case of commercial leases,¹³⁸ with that of Thomas J in *Kooky Garments Ltd v Charlton v Genet*,¹³⁹ which proposed the opposite presumption in upholding an informal lease. McLauchlan advocates jettisoning any notion of presumptions, which then may or must be rebutted. Instead, he favours determining whether or not it is "reasonable to infer that the parties intended to be immediately bound", considering informality as only one factor (and one of degree) but weighing also other surrounding circumstances such as the importance and complexity of the transaction, the amount of details settled in the informal agreement, and the conduct of the parties at the time of and after the informal agreement.¹⁴⁰ As will be seen below (Part II.C), this broad-based inquiry into parties' intentions is certainly the approach preferred by US courts. It is even that adopted by some English judges, although there are some tendencies in England to adopt more hard and fast rules, at least in certain areas (above Part II.A). McLauchlan appears most concerned about unpredictability of individual outcomes, echoing suggestions by some New Zealand judges that explicitly applying a multi-factor balancing test may actually promote certainty.¹⁴¹ But a more substantive approach, generating more individualised results, should also entail greater likelihood of giving effect to the intentions of the particular parties in each case, thus reducing content formality.¹⁴²

New Zealand courts have occasionally adopted the more substantive approach, as McLauchlan noted, for instance in *France v Hight*.¹⁴³ The Court of Appeal enforced an oral agreement for a commercial lease stressing that the question ultimately turns on intention. Yet the Court also noted that there was no common practice established as to signing a formal lease document, whereas the experienced businessman negotiating the lease had not involved lawyers before reaching the oral agreement. Arguably, therefore, this left open the possibility that a presumption might be developed in this field if lawyers had been involved.¹⁴⁴

¹³⁸ (19 March 1993), unreported, High Court, Wellington Registry, CP 1408/90. For another instance of a judgment seemingly influenced by his view of customary practice in the Wellington area but with respect to land sales, see *Gathergood v Mudgway & Anor* (Unreported 18 May 1987, High Court, Wellington Registry, A 156/85, McGechan J).

¹³⁹ (23 September 1993), unreported, High Court, New Plymouth Registry, AP 21/92.

¹⁴⁰ McLauchlan, above n 15, 460.

¹⁴¹ See for example E W Thomas "A Return to Principle in Legal Reasoning and an Acclamation of Judicial Autonomy" (1993) VUWLR Monograph 5; R Cooke "Remoteness of Damage and Judicial Discretion" (1978) 37 CLJ 289. The latter's suggestion, extra-judicially, appears inconsistent with his advocacy of bright-line rules in *Concorde* (above n 16) and *Shell Oil* (above n 132).

¹⁴² Above n 5.

¹⁴³ [1990] 1 NZLR 345.

¹⁴⁴ Compare for example *Tallangalook* (above n 4, para 93), where this was mentioned by Hansen

The meaning of “inference” and its grammatical derivatives has not been consistent in the New Zealand case law and commentary. Many courts and writers have continued to equate it with a rebuttable “presumption”, supposedly laid down by the Court of Appeal both in *Carruthers* and *Concorde*.¹⁴⁵ “Presumptions of fact” do generally involve drawing an “inference” from certain other facts, in common law jurisdictions, and are occasionally used in other areas of contract law.¹⁴⁶ To prevent the decision-maker drawing the inference from what might be termed “secondary facts” (for example, that negotiations were for the sale of land or a commercial transaction of considerable complexity) and thus establishing the “primary” fact (for example, that the parties did not intend to be contractually bound), the other party will have to adduce contrary evidence (showing they did so intend). In theory, the presumption or inference should not create much difficulty for the other party, since it will usually present some such evidence. In practice, it may become decidedly more difficult because secondary facts such as the subject matter of negotiations will almost always emerge quickly from the evidence, creating a broader “predisposition” against the other party,¹⁴⁷ exacerbated by the (largely inevitably) opaque nature of the processes by which adjudicators weigh all the evidence. This broader “chilling effect” of adopting a more formal approach, in the form of a rebuttable presumption or inference, may explain an apparent tendency in the pre-1993 New Zealand case law compendiously reviewed by McLauchlan,¹⁴⁸ as well as the later judgments described below (Part II.B.2), for New Zealand courts to decline to hold that informal agreements were intended to be binding.

By contrast, some New Zealand judges have read *Carruthers* and *Concorde* as not laying down a presumption, but instead as inviting a balanced consideration of a wide range of factors, including the subject matter of the negotiations, and then drawing the correct “inference” from all these objective facts as to the parties’ intentions in the particular case. Further, this more substantive approach appears to result in broader

J as one of many relevant factors (listed by Kirby P in *Geebung Investments Pty Ltd v Vange Group Investments No 8 Pty Ltd* (1995) Aus Contract Reports 90-059, 90,328): “Depending on the subject matter, where the parties have not used solicitors but intended to do so for the drawing up of their formal agreement, that may also be a factor which will point to the non-existence of the binding agreement ...”. However, Hansen J declined to apply a test based on a “natural inference”, perceived to have been laid down in *Carruthers*, *Concorde* and *Shell Oil*. Noting that the Court of Appeal in Queensland had also rejected such a suggestion in *Sheehan v Zaszlos* [1995] 2 Qd R 210, he thought the more formal approach indicated by these cases in New Zealand was inconsistent with the focus on parties’ intentions in all the circumstances, evident in the High Court of Australia’s judgment in *Masters v Cameron* (1954) 91 CLR 353. It seems therefore that Australian law prefers a more substantive approach in this area, as perhaps in others, such as upholding contractual duties to negotiate in good faith (see generally E Peden “Incorporating Terms of Good Faith in Contract Law in Australia” (2001) 23 Syd L Rev 221; compare below Part II.C.1 and 3, Chapter Three Part III.C.1).

¹⁴⁵ See for example *TA Dellaca Ltd v PDL Industries Ltd* [1992] 3 NZLR 88. Ironically, Tipping J also referred to *Masters v Cameron* (above n 144) in deciding that there was a “prima facie inference” against enforcing informal agreements for sale of land.

¹⁴⁶ Above n 3. In Anglo-Commonwealth contract law, see for example J W Carter and D Harland *Contract Law in Australia* (3 ed, Butterworths, Sydney, 1996) 154-157 (there is a rebuttable presumption of fact that domestic arrangements are not intended to be binding, but a converse presumption for commercial agreements).

¹⁴⁷ Compare *Tallangalook*, above n 4.

¹⁴⁸ Compare McLauchlan, above n 15, 453-459.

variance in outcome, as in the US (below Part II.C) and Japan (Part II.D). However, proving this proposition would require even more comprehensive analysis of the reported and unreported case law in all the jurisdictions, and careful determination of what approach is being determined. In addition, as mentioned above (Part II), to ultimately determine what relation each type of rule bears to parties' intentions, extensive comparative empirical research would be needed. For present purposes, it is sufficient that the more tailor-made results following from a substantive approach are more likely to better approximate the intentions of contracting parties, thus reducing content formality.¹⁴⁹ This makes it important to examine below whether this approach has now displaced more formal reasoning in New Zealand, in case law covering significant areas of litigation and economic activity.

2 Recent Cases: A Return to More Substantive Reasoning?

Since 1993, some courts have maintained a more formal approach, referring to an inference or presumption which needs to be displaced or rebutted before an informal agreement can be held immediately binding, especially in land sales. Oddly, in *Spengler Management Ltd v Tan*,¹⁵⁰ Barker J referred to McLauchlan's views, beginning with the citation from Richmond J's judgment in *Carruthers* cited above.¹⁵¹ Yet the Judge still interpreted the latter case as laying down "a presumption that the parties were not to be bound".¹⁵² Nonetheless, Barker J did list a range of considerations in *Spengler* which supported the conclusion that Tan's informal agreement to purchase a resort was not intended to be immediately binding. The letter Tan had sent was styled an "initial agreement"; it was for \$1.2 million; it included an option to purchase shares in Spengler rather than purchasing the land, Barker J inferring that the parties were not yet satisfied as to the mode in which the transaction was to take place; and there was no reference to important statutory requirements. However, he stated that the Court of Appeal had described *Carruthers* (in *Concorde*, although this was not cited) as "providing a prima facie rule to give some certainty in the field of sale and purchase law; there is a rebuttable presumption that the parties do not intend to be bound until the customary formal agreement for sale and purchase is signed by both sides".¹⁵³ Thus, Barker J "in the circumstances ... [felt] not able to say that the presumption in *Carruthers v Whitaker* has been rebutted".¹⁵⁴

Another commentator has criticised Barker J's approach in *Tan*, noting:¹⁵⁵

all these factors are clearly relevant, but there is no need to have any regard to a "presumption" in order to decide the matter. It can simply be left to the plaintiff to prove its contract on the balance of probabilities.

¹⁴⁹

Above n 5.

¹⁵⁰

[1995] 1 NZLR 121, 124-125.

¹⁵¹

McLauchlan, above n 15; *Carruthers*, above n 14.

¹⁵²

Spengler, above n 150, 125

¹⁵³

Above n 150, 126.

¹⁵⁴

Above, n 150, 127.

¹⁵⁵

A Beck "Contract" [1996] NZ L Rev 15, 16.

In judgments rendered after this case, however, the Court of Appeal has declined to rule clearly on whether, and in what circumstances, a presumption may arise. In *Orams Marine (Auckland) Ltd v Ports of Auckland Ltd & Ors*,¹⁵⁶ Ellis J (writing for the Court) upheld Hillyer J's finding that no final agreement to purchase commercial property was reached in telephone conversations. The Court highlighted wording used which suggested that several matters were still to be agreed. For example, after discussion regarding a deposit, it was said: "well let's have a look at the contract which the solicitor prepares and then you can have a look at that from there". Then the Court simply cited from Richmond J's judgment in *Carruthers*.¹⁵⁷

Again writing for a unanimous Court of Appeal, Ellis J cited the same passage in *Leeston Property Ltd & Anor v BNZ and Everard Films*,¹⁵⁸ to hold that no informal agreement had been reached for Leeston to purchase commercial property owned by BNZ as mortgagee in possession. It was surely rather easy to uphold the trial judge's judgment in that case, however, since from the start it was clear to all involved that BNZ had to get consent from the lessee in possession (Everard) and that the latter wanted a commitment to develop a certain type of cinema complex on the property.

In what appears to be the most recent judgment in this area, *Isbey v Herberger & Mayhew*,¹⁵⁹ the Court of Appeal did not cite any case law authority at all. Tipping J (writing for the Court) simply held that the parties had not intended to be bound by an informal settlement agreement, reached in the context of a dispute (including arbitration proceedings) arising from late delivery of a yacht that the appellant had promised to build. The Court noting that the respondents had suggested that the appellant's solicitors prepare a formal settlement document, remarking that this "was obviously designed to leave less room for him to argue about its terms". Later reviewing evidence such as the lack of response by the appellant and his solicitors, the Court concluded that "the respondents were at all times reserving their position until they had considered and signed a comprehensive written agreement, and, more importantly, in view of past history, so had [the appellant]", and therefore decided in respondents' favour "the crucial question [of] whether, in spite of the respondents never having subjectively abandoned this approach, they behaved objectively so as to justify a finding that they must be taken to have abandoned their original stance".¹⁶⁰ By focusing primarily on how objectively to ascertain the parties' intentions, without referring to a "presumption" (nor, indeed, "inference") and without citing *Carruthers* or *Concorde*, this judgment might be read as evincing a move away from a more formal reading of those cases. But the Court did not suggest that such readings are incorrect, and it did not go on to lay out clearly a more substantive, multi-factor balancing test, as proposed by McLauchlan and expressly adopted in the US (below Part II.C).¹⁶¹

¹⁵⁶ (27 July 1994) unreported, Court of Appeal, CA 128/94, Richardson, McKay and Ellis JJ.

¹⁵⁷ Above n 14.

¹⁵⁸ (29 July 1994) unreported, Court of Appeal, CA 13/94, Casey, McKay, Ellis JJ.

¹⁵⁹ Above n 18. Thanks to Don Holborow for making available a copy of this judgment.

¹⁶⁰ Above n 159, 4.

¹⁶¹ Compare McLauchlan, above n 15, 460. For example, the Court appeared to see as separate from the "question for the need for writing" (above n 159, 10) the evidence suggesting that important terms were left open.

At High Court level, other judges have continued to read *Carruthers* or *Concorde* as laying down an inference against enforceability before formalisation, which must then be rebutted. Tompkins J adopted this approach in two cases decided in 1995. In *Lipanovic v Bayly*,¹⁶² the Judge was able nonetheless to find that “the inference” had been “displaced”, thus upholding an informal agreement regarding a joint venture development of property owned by the Lipanovics, with whom Bayly (living in the same suburb) “was friendly”. Tompkins J stressed subsequent performance demonstrating “a willingness to take over the project in accordance with the agreement”,¹⁶³ including Bayly taking over the project. Yet it seems more likely that this result would have been reached if there had been no talk of an inference or presumption.¹⁶⁴

Indeed, in *Dryden v Hemingway & Natrass*,¹⁶⁵ Tompkins J refused to hold legally binding an oral agreement for the defendants to buy out the Sydney-based plaintiff's shares in joint venture company they had set up in Australia but which had got into financial difficulties. The parties had reached agreement on at least some of the main terms through correspondence, but clearly had not intended to be bound at that stage. They continued negotiations, partly among themselves but also involving solicitors on both sides, to settle on a final contract. The plaintiff's solicitor in Sydney then sent a contract to the defendant's solicitor in Auckland, which the latter returned signed but with some amendments. The plaintiff's solicitor said those were unacceptable, and proposed alternative amendments. The defendants' solicitor agreed to these, but with some different phraseology. When those changes were relayed by telephone to the plaintiff, by then in Auckland, she was happy to accept them. She then met with the defendants in person in Auckland, saying “we have a deal”, and a bottle of wine was opened to celebrate. They could not sign then the written contract (requiring amendment, initialling by the defendants and signature still by the plaintiff), however, since it was still with the defendants' solicitor. A few hours later, they decided not to sign. The Court of Appeal¹⁶⁶ upheld Tompkins J's holding that this was justified because they had not agreed to be immediately bound at their final meeting.

McLauchlan argues that this conclusion was too harsh, pointing out the parties had enjoyed a close and friendly business relationship of trust and that there was considerable urgency involved due to their joint venture's financial difficulties. Suggestions by the trial judge and the Court of Appeal that they could have formalised the deal at their final meeting in various ways, he argues compellingly, are possible “with the benefit of hindsight”, but miss “the critical question of whether [the defendants] were reasonably entitled to believe that [such additional formalities] were

¹⁶² (5 May 1995) unreported, High Court, Auckland Registry, CP 190/94.

¹⁶³ Above n 162, 14

¹⁶⁴ Compare also *Sheehan*, above n 144, where the Queensland Court of Appeal readily upheld an informal agreement for a property joint venture where there had also been partial performance subsequently. In doing so, the Court specifically rejected the proposition advanced, based on *Carruthers* and *Concorde* in New Zealand, that there should be a “natural inference” that the parties do not intend to be bound “in commercial contracts or contracts for the sale and purchase of land for commercial purposes”.

¹⁶⁵ (30 March 1995) unreported, High Court, Auckland Registry, CP 1087/92.

¹⁶⁶ (5 November 1995) unreported, Court of Appeal, CA 70/95.

necessary".¹⁶⁷ The plaintiff, McLauchlan concludes, "was another victim of fluctuating judicial perceptions of what reasonable lay persons would regard as binding commitments".¹⁶⁸

However, the case holds further interest. The problem identified appears to have been exacerbated by the trial judge's adoption of the "rebuttable presumption" approach. This is suggested, in fact, by the Court of Appeal's remark that it was unnecessary in the particular circumstances to rely on any prima facie rule.¹⁶⁹ Another commentator has welcomed this observation.¹⁷⁰ However, it was made in the context of a concession by counsel for the plaintiff (appellant), and the Court did not state expressly that Tompkins J's approach was misconceived. This means that the damage was done in that case: an agreement probably intended to be binding was held not to be.¹⁷¹ An opportunity was also passed up to steer future lower courts in the direction of adopting the more substantive approach of simply weighing up all the circumstances in individual cases, to decide whether or not they intended to be immediately bound. Instead, the more formal "presumption" test has not been decisively abandoned.

On the other hand, in *TV3 Network Services Ltd v News Corporation Ltd & Ors*,¹⁷² Tompkins J referred again to *Carruthers* as laying down an "ordinary inference" in land sale negotiations; and to *Concorde* as developing a "natural inference" in commercial contracts. However, that inference applied "in the absence of factors to the contrary",¹⁷³ and the Judge did not go on to suggest that there should be a rebuttable presumption. Rather, he considered several factors which "can be advanced in support of the contention that the parties did not intend to be bound", such as wording used early on such as "subject to normal contract" (although noting the argument that "normal" could mean that normal industry terms were to apply); correspondence from the defendant using the phrase "in principle"; and the number of matters that had to be, and were, discussed at a later meeting (although noting that "most if not all were resolved without difficulty). Tompkins J also weighed several "factors supporting a contention that the parties intended to be bound" immediately by informal negotiations regarding rights for TV3 to televise Rugby League matches. Those included the urgency involved, News Corp's fax headed "to formally confirm" a key telephone conversation, press releases made on both sides soon thereafter, and considerable expert witness evidence that it was "the usual practice in the television industry to finalise a binding contract swiftly, leaving it for the formal documentation to be drawn up later".¹⁷⁴ On the last point, Tompkins J suggested if it were to be established at a main hearing:¹⁷⁵

¹⁶⁷ McLauchlan, above n 122, 207.

¹⁶⁸ Above n 122, 208.

¹⁶⁹ Above n 166, 7.

¹⁷⁰ A Beck "Contract" [1997] NZ L Rev 1, 16.

¹⁷¹ Compare *Tallangalook* (above n 4), where the Supreme Court of Victoria followed *Sheehan* (above n 144) and rejected the "natural inference" approach, perceived as prevailing in New Zealand pursuant to both *Carruthers* and *Concorde*, in order to uphold an informal agreement for sale of shares worth considerably more than in *Dryden*.

¹⁷² (1996) 7 TCLR 60.

¹⁷³ Above n 172, 70 (emphasis added).

¹⁷⁴ Above n 172, 71.

¹⁷⁵ Above n 172, 71 (emphasis added).

That there was a practice in this industry to conclude a binding agreement prior to the formal contract, that would be a basis for distinguishing *the approach adopted* in [*Carruthers v Whitaker* and *Concorde*. Conversely, if [contrary views of defendant's representative as to industry practice] were to prevail, then that would *a ground* for concluding that, unless there was *clear evidence* to the contrary, the parties would not be bound until the signing of the formal contract.

On balance, Tompkins J formed a "preliminary view" that TV3 had "made out a serious question to be tried on the issue of whether there was a binding agreement" reached informally, although he stressed that this was only an interlocutory proceeding and that a later Court would be able to hear evidence in more detail.¹⁷⁶

This more recent judgment of Tompkins J, particularly the indented passage above, therefore leaves some ambivalence as to whether the approach adopted in this case (and the correct one to be followed in future cases) is to generate first a presumption or inference based on common practices and then seek to rebut that with other evidence; or rather just to weigh common practice as one factor, along with many others supporting or going against intention to be bound. The latter represents a more substantive approach, while the former represents the more formal. As well as demonstrating and perhaps reinforcing formal reasoning and a formal orientation in New Zealand law more generally, the former approach may tend to strike down more readily the bargains intended by particular parties to be immediately legally binding. Disappointing parties' expectations in this way will occur especially if judges tend to generalise too readily from inferences or presumptions favouring formalities for certain categories of transactions (land sales, possibly leases, "complex" commercial deals).¹⁷⁷

In even more recent judgments, the trend seems to be finally moving back towards the latter, more substantive test. However the Court of Appeal still has not enunciated what the correct principles are or should be. Not surprisingly, some trial judges decide the issue without discussing – or sometimes even citing – precedents. Of greater concern, occasionally there is still talk of a rebuttable presumption.

*Mercurius Ventures Ltd v Waitakere City Council*¹⁷⁸ is one example of the High Court not even citing any authority on the issue raised: whether or not the parties to an informal agreement for two years' management services agreed to be immediately bound. Anderson J concluded simply that the parties did not so intend, having found that several matters were still under negotiation (early termination, confidentiality obligations, and so on), and that the plaintiff's attitude subsequently "was not that such a document was unexpected but that some of the terms were".¹⁷⁹ The holding may also

¹⁷⁶ Above n 172, 72-73. The case seems to have been later settled, for there appear to be no subsequent reported or unreported judgments.

¹⁷⁷ Compare for example *Viacom Int'l Inc v Tandem Prods Inc* (1974) 368 F Supp 1264 (SD NY) (upholding an agreement after weighing several factors, including evidence that in that particular broadcasting industry it was common for agreements to be reduced to writing only after performance had occurred in part or in whole); with *Miller v Tawil* (13 April 2001) unreported, US District Court for the Southern District of New York, 2001 US Dist LEXIS 4510 (refusing to extend this to an employment context).

¹⁷⁸ [1996] 2 NZLR 495.

¹⁷⁹ Above n 178, 501.

have been influenced by the fact that the Council was bound by certain formal requirements set out in section 3 of the Public Bodies Contract Act 1959, although Anderson J went on to grant relief under the Illegal Contracts Act 1970 to require the Council nonetheless to give the plaintiff one month's notice pursuant to an interim and temporary month-by-month contract.

Sidestepping the authorities in this way – and simply deciding the issue based on an evaluation of all the circumstances – may allow courts to begin moving away from the more formal reading of *Carruthers* and *Concorde*.¹⁸⁰ The more substantive approach may also displace a broader predisposition towards not giving contractual effect to informal agreements.¹⁸¹ But it can still lead, as in *Mercurius*, to the conclusion that a binding contract was not yet intended.¹⁸² A recent example of express adoption of a more substantive approach, but instead holding that no agreement was intended to be immediately binding in the particular circumstances, was *Wasaca Ltd & Anor v Simpson Grierson Law*.¹⁸³ After reviewing the complicated negotiations, partly oral and partly in writing, Temm J held:¹⁸⁴

Having regard to the nature of the relationship between the parties [including one of New Zealand's largest law firms] and the services that were to be provided and the complexity of the new system being implemented [nation-wide management of legal documents], it seems to be perfectly obvious that the parties intended from an early stage that their contract would be reduced to writing so that as many possible contingencies were covered as it was possible to do. It seems to me that *where the parties are so determined, and that is a fair conclusion to reach from the evidence [in this case], that a written contract was intended by both sides, the normal inference is that the parties did not intend to be bound until the agreement had been drafted, drawn up to their mutual satisfaction and executed by both sides ...*

Temm J went on to quote *Concorde*, thus suggesting a preference for McLauchlan's reading rather than the "rebuttable presumption" interpretation of that case (and, by implication, *Carruthers*).¹⁸⁵

A similar tendency appears to be emerging recently even in cases involving

¹⁸⁰ Compare *Isbey*, above n 18.

¹⁸¹ Above n 4.

¹⁸² Compare also *Pacrim Forest Products (NZ) Ltd v Mitsui & Co Ltd* (17 December 1997) unreported, High Court, Christchurch Registry, CP 16-96. Hansen J found in Mitsui's favour that no agreement was intended for the sale of logs to Japan. However, this was based primarily on the first defense, namely that there was simply no agreement on key terms being negotiated, in particular an alleged "red clause letter of credit".

¹⁸³ (5 February 1997) unreported, High Court, Auckland Registry, CP 211/95, Temm J. Compare also *Stirling & Ors v Maxwell* (23 March 1995) unreported, High Court, Hamilton Registry, CP 48/97, 33, where the parties agreed not to have a formal contract completed and Hammond J observed that *Carruthers* "does not appear to me to go any further than a holding that where parties reach a consensus but have refrained from making a firm a commitment until a written contract is drawn, the usual inferences will be that there is no contract until such has been executed by both parties".

¹⁸⁴ Above n 183, 22 (emphasis added).

¹⁸⁵ McLauchlan, above n 15. Compare *Tan v Spengler* (above n 118), where Barker J ran together both *Concorde* and *Carruthers* in adopting the rebuttable presumption approach; and *Dellaca v PDL* (above n 145), where Tipping J did the same. Temm J also cites the Court of Appeal's judgment in *Dryden*, although without quoting its remark about there being no need for a prima facie rule (above n 134).

negotiations for the sale of land. In *Busst v Bouma*,¹⁸⁶ for instance, the trial judge upheld an informal agreement reached between neighbouring farmers, for the sale of 130 acres of the Boumas' land for \$250,000. This was despite their having earlier, also without solicitors, prepared and signed an agreement for just 100 acres for the same price. Hammond J mentioned testimony by Mrs Bouma that "the whole transaction was subject to a 'legal' agreement", but held that this and other testimony "really had the appearance of ex-post justifications being raised for a party having resiled from an agreement".¹⁸⁷ This issue was raised more strongly by their counsel on appeal; but the Court of Appeal rejected the argument at more length, given the particular circumstances.¹⁸⁸

We do not think that this is a case which can be properly described as one where the parties had arrived at a preliminary agreement which was not to be regarded as a contract or enforceable until such time as a formal contract was entered into. There is nothing in the document or the evidence of the negotiations that that was the case. At most the appellants' argument depends upon *inference*. The fact that subsequently the [Bussts] instructed their solicitors to prepare a formal document does not controvert this. Any solicitor being confronted with the arrangement into which these parties had entered would have at that time, immediately appreciated that there was a contravention of the Land Settlement Promotion and Acquisition Act 1952 and further, that there were aspects of the transaction which to avoid dispute, would be better couched in more conventional terms. At the time too it must have been apparent that disagreements were developing.

Thus, the Court of Appeal did refer to an "inference"; but seemingly only in the sense of how to interpret the parties' intentions based on the objective fact of their later getting a solicitor involved. In the particular circumstances, that was held not to indicate that the original informal agreement was not intended to be a binding contract. That conclusion was also justified by other circumstances, including part performance (the Bussts paying money into their solicitor's trust account, where it was held for the Boumas, for instance). All this was held to amply justify the trial judge's finding that: "not only was there an intention to contract, but that the parties had entered into an agreement which could properly be regarded as contractual".¹⁸⁹

Both Courts reached this conclusion, like Anderson J in *Mercurius*,¹⁹⁰ without even referring to authorities like *Carruthers*, *Concorde* or *Shell Oil*. In *Prasad v Keith Hay Homes Ltd*, by contrast, Master Kennedy-Grant considered all three carefully and rejected the notion that they raise some general rebuttable presumption against enforceability in commercial sale negotiations:¹⁹¹

¹⁸⁶ (20 June 1996) unreported, High Court, Hamilton Registry, CP 6/93, Hammond J.

¹⁸⁷ Above n 186, 22. The Judge adjusted the contract price under the Illegal Contracts Act 1970, which has drawn some sharp criticism by a self-professed formalist (Coote, above n 7): B Coote "Variation Under the Contract Statutes" (1997) 3 NZBLQ 3; B Coote "More, or Perhaps Less, on Variation Under the Contract Statutes" (1998) 4 NZBLQ 181.

¹⁸⁸ *Bouma v Busst* (1998) 8 TCLR 168, 173, per Gallen J for the Court (emphasis added).

¹⁸⁹ Above n 188, 173.

¹⁹⁰ Above n 178.

¹⁹¹ [1997] 1 NZLR 363, 366.

the key to the understanding of the three cases is that in each of those cases it was the intention and the expectation of the parties from the outset that a formal document would be drawn up and signed by both parties.

On the facts, the Master held that an informal agreement for the sale of a section had been reached. A subdivision plan with the lot for sale at \$40,000 had been shown to Prasad and his name had been written across it, with a note on the back saying "\$750.00 – Payments will be made in stages according to the progress of the building as advised and approved by the Bank". Keith Hay Homes had also issued a receipt for \$750 saying "Lot 61 Glengarry" and "House to be delivered ex-yard". The Master rejected however the defence that the developer had only entered into a package deal to sell the section together with a home to be constructed thereon. Andrew Beck queries this finding because "it must be acknowledged that it would be extremely unusual for a developer to enter into an oral contract for the sale of land [so] it is more likely that some other type of deal was intended", and "deposit of \$750 in respect of a \$40,000 sale would be extremely unusual [too, so] the most likely conclusion is that no binding deal was ever reached".¹⁹² On the other hand, Tipping J in *TA Dellaca v PDL Industries Ltd* had been able to find a binding contract for sale of property worth considerably more, arising from partly oral and partly written communications, even despite deriving the more formal "rebuttable presumption" approach from both *Carruthers* and *Concorde*.¹⁹³ Most importantly, Beck argues that "the Court's fact-based approach to the requirement of formalities is to be applauded", suggesting he favours the more substantive approach of simply weighing all the circumstances in the particular case.¹⁹⁴

A similar approach was adopted by Master Faire in *Mercantile Construction Ltd v Barbara Banks*,¹⁹⁵ upholding Mercantile's application that a caveat placed on Mrs Banks' property not lapse. The company had agreed with her to purchase two adjoining properties, but a dispute arose leading to a meeting with her and her solicitor shortly before the originally agreed settlement date. An oral agreement was reached whereby Mercantile would instead buy one property and part of the other. The solicitor faxed a summary to Mercantile the next day. Mercantile telephoned him to amend three points, which were agreed, and it made the amendments on the copy and signed it. When Mrs Banks' solicitor returned from holiday, he sent a settlement statement and a formal contract document, which Mercantile signed and returned, attaching a plan for subdivision of the properties. Mrs Banks objected to the subdivision; but the Master decided it was consistent with the binding commitment reached earlier, by her solicitor's letter and subsequent telephone conversations.

Again, one might query this conclusion given that the parties were in dispute, making it more likely that they intended to be bound only upon finalisation of all relevant documentation (above Part II.A.2). In *American Cigarette Co (Overseas) Ltd &*

¹⁹² A Beck "Contract" [1998] NZ L Rev 25, 26.

¹⁹³ Above n 145. The negotiated price in that case was \$55,000, but in adjustment must be made for subsequent inflation in New Zealand. Subsequent conduct and the more extensive written communications in that case, compared to *Prasad*, support Tipping J's holding.

¹⁹⁴ Above n 192, 25. See also Beck, above n 192.

¹⁹⁵ (24 April 1997) unreported, High Court, Auckland Registry, M 186/97.

Anor v Phillip Morris (NZ) Ltd & Anor,¹⁹⁶ for instance, the Court of Appeal stressed the fact that solicitors had exchanged correspondence “without prejudice”, in holding that no immediately binding settlement had been reached in a trademark dispute. That was a much more substantial and complex dispute, conducted solely through solicitors without the meeting in person which took place in *Mercantile v Banks*.¹⁹⁷ In the latter case, moreover, the meeting and telephone discussions occurred in the context of considerable urgency. The finding that an immediately binding agreement was reached, therefore, appears justified. More importantly for present purposes, as in *Prasad*,¹⁹⁸ Master Faire interpreted the mention of “inference” in Carruthers as nonetheless not detracting from the basic point in *Eccles*,¹⁹⁹ that the central test is the objective determination of the parties’ intention in all the circumstances.

Both *Prasad* and *Mercantile* (like *TV3* for that matter) were interlocutory proceedings, however. The parties in such proceedings often do not have the opportunity (or inclination) to present all their evidence, which may have to wait until a final hearing. So not too much should be read into the indications therein of a more substantive approach. On the other hand, an interlocutory judgment often resolves the matter.²⁰⁰

The strongest indication of the emergence of a more substantive approach therefore comes from the recent judgment of Wild J in the High Court. In *Fletcher Challenge Energy Ltd v Electricity Corporation of New Zealand Ltd*, a three and a half Heads of Agreement (“HoA”) for the supply of gas worth between NZ\$1.2 and 1.8 billion over a 17-year term was held to constitute a binding contract. Wild J adopted the view expressed by the Court of Appeal in *France v Hight*, and English and Australian case law, that the key focus should be the intentions of the parties based on construction of the documents and the general surrounding circumstances, and approved of the like approach emphasised by McLauchlan in his 1993 article.²⁰¹ He also noted that the latter set out “a number of factors as useful in determining whether the parties intended to be bound ... endorsed by Barker J in *Spengler Management Ltd v Tan* [1995] 1 NZLR 120”, and restated Barker J’s list as follows:²⁰²

- The importance and complexity of the transaction;
- The degree of formality/informality and the terminology of the agreement (for example was there a signed agreement, an exchange of correspondence or only an oral exchange?);
- The amount of detail settled by the agreement;

¹⁹⁶ (21 August 1979) unreported, Court of Appeal, CA 18/79, Woodhouse, Richardson, Somers JJ.

¹⁹⁷ Above n 195.

¹⁹⁸ Above n 191.

¹⁹⁹ Above n 55.

²⁰⁰ Indeed, from a further unreported judgment of Master Faire (M 187/97, 26 May 1997), it seems that Mrs Banks may well have given up after his first judgment against her. See also the *TV3* litigation (above n 172), where the parties do not seem to have gone on to a full hearing.

²⁰¹ [2001] 2 NZLR 219, 229; citing McLauchlan (above n 15), *France* (above n 143), *Masters v Cameron* (above n 144), and other English authorities.

²⁰² Above n 201, 229.

- The parties' previous dealings and their conduct at the time of and following the agreement;
- Any actions taken in reliance upon or part performance of the agreement; and
- The fact that the agreement is one of a series of interrelated agreements between the parties.

Wild J then adopted these factors and applied them to the case at hand. More important than the detailed analysis of the evidence is the following statement, further indicating that the Judge did not wish to adopt the "rebuttable presumption" approach which other courts had derived from the main Court of Appeal precedents:²⁰³

I accept [the defendant's] point that the HoA is toward the top end of formality on "an imagined continuum of various documents". Statements in cases such as *Carruthers v Whitaker* [1975] 2 NZLR 667 (CA), *Concorde Enterprises Ltd v Anthony Motors (Hutt) Ltd* [1981] 2 NZLR 385 (CA) and *Shell Oil New Zealand Ltd v Wordcom Investments Ltd* [1992] 1 NZLR 129 (CA) are not particularly relevant, since they concern documents lying lower on that continuum. In the cases of *Carruthers* and *Shell Oil*, solicitors were also involved, whereas the parties deliberately excluded them here.

Thus, this case presents perhaps the strongest move so far towards a more substantive approach in New Zealand law, at least in commercial transactions other than the sale of land. However, Wild J did not comment on the inconsistency of Barker J having derived the above-mentioned list of factors from McLauchlan's article (which favours the more substantive approach), while maintaining the notion of a presumption (the more formal approach).²⁰⁴

The matter was also not clarified by the judgment of the Court of Appeal rendered on 10 October 2001, which overturned Wild J's decision and held that the HoA did not constitute a binding contract. Blanchard J (writing for the majority of four out of the five judges assembled to hear this important case) did not refer to *Carruthers* or *Concorde* at all. Nor did Thomas J, in his very lengthy dissent. However, Blanchard J indicated that the Court should adopt "an entirely neutral approach when determining whether the parties intended to enter into a contract", and later rejected "criticism made of [Wild J] that he approached the question of contractual intent with a pre-disposition to find that there was a contract".²⁰⁵ This may encourage other courts to abandon the "rebuttable presumption" reading of *Carruthers* and *Concorde*, instead weighing all the facts without a disposition against – or, indeed, in favour of – finding an informal agreement to be intended as binding. However, the Court of Appeal has again missed an opportunity to clarify this issue.

In this connection, it should also be noted that in *Van Der Hulst v Tainui*

²⁰³ Above n 201, 232.

²⁰⁴ Compare above n 150.

²⁰⁵ *Electricity Corporation of NZ v Fletcher Challenge Energy Ltd* (10 October 2001) Court of Appeal, CA 132/00, Richardson P, Thomas, Keith, Blanchard and McGrath JJ (Thomas J dissenting) paras 58 and 83. Thanks to Don Holborow for providing a copy of this judgment. The decision to refuse to give contractual effect to the informal agreement has already been acclaimed by J Hodder "Contracts: To Fill or Not to Fill Gaps" (2001) 24/41 TCL 1. Thanks to Jonathan Crawford for faxing this editorial, and Don Holborow for providing a copy of the judgment.

Corporation Ltd, while deciding against the purchaser seeking to enforce a land sale primarily because there was insufficient writing to comply with the formal requirements of the Contracts Enforcement Act 1956, Barker J had remarked:²⁰⁶

It does seem reasonably clear from [the plaintiff's solicitor's] file note, that the parties had intended that their oral bargain, it that is what there was, should have been recorded in an agreement for sale and purchase. *There is a presumption to that effect*, as is shown by such cases as *Carruthers ...* and *Concorde ...*

Again, this may have meant only that a presumption in the sense of an inference to be drawn from, or can support, the intention not to be bound viewed in all the circumstances. However, in view of the cursory analysis of the circumstances compared even to that in *Spengler v Tan*,²⁰⁷ it seems more likely that Barker J remained wedded to the "rebuttable presumption" approach and reading of cases like *Carruthers*.

Indeed, citing *Spengler* as well as (ironically) McLauchlan's article, a Law Commission Preliminary Paper published in December 1997 stated:²⁰⁸

In relation to sales of land, a line of cases starting with the Court of the Appeal decision in *Carruthers ...* has laid down *the presumption that parties do not intend to be bound until the customary formal agreement for sale and purchase is signed by both sides*.

Likewise, in opposing this proposal by the Law Commission to abolish the formal requirements under the Contracts Enforcement Act 1956 (discussed below, Part III), a leading commentator on land law in New Zealand seemed to accept the Law Commission's view of this case as requiring a presumption.²⁰⁹ Similarly, this commentator's widely read textbook on the sale of land also refers to an inference that parties do not to be bound until the contract document is executed, an inference supposedly arising out of the requirements of the Act but reflecting standard practice and the common understanding of ordinary people, and one only able to be rebutted by clear evidence of a contrary intention to be bound.²¹⁰

Thus, it seems premature to conclude that a more formal approach has given way to a more substantive one in this important area of contract formation law in New Zealand. However, New Zealand does appear to be gradually moving away from a more formal approach, whereas England may be moving in the opposite direction. Nonetheless, both differ from the overtly substantive approach adopted in US law, discussed next, and less openly so in Japanese law (Part II.D).

²⁰⁶ [1998] 2 NZLR 359, 364.

²⁰⁷ Above n 150.

²⁰⁸ NZ Law Commission *Repeal of the Contracts Enforcement Act 1956: A Discussion Paper* (Preliminary Paper No 30, Wellington, 1997) 9 (emphasis added). Similarly, see J Gallen, J Finn and C French "Contract" in Lord Cooke of Thorndon and others (eds) *The Laws of New Zealand* (Butterworths, Wellington, 1997) para 22.

²⁰⁹ McMorland, above n 121, 112.

²¹⁰ D McMorland *Sale of Land* (McMorland, Auckland, 1994) 66-68.

II.C US Law: Prevalence of Substantive Reasoning

A leading commentator on US contract law, Allan Farnsworth of Columbia Law School, argues that the US courts have long seen the question in this area as being simply “to determine when the parties intended to be bound”. He also asserts that “in doubtful cases, courts have looked to many factors in deciding whether the parties intended their agreement to be binding, but no single factor is decisive”, presenting “a list of factors that has been popular for a century”:²¹¹

Whether the contract is of that class which are usually found to be in writing; whether it is of such nature as to need a formal writing for its full expression; whether it has few or many details; whether the amount involved is large or small; whether it is a common or unusual contract; whether the negotiations themselves indicate that a written draft is contemplated as the final conclusion of the negotiations.

The *Restatement (Second) of Contract*, for which Farnsworth ended up being the main Reporter, largely reproduces these factors in Comment c to para 27 that states, moreover:

Manifestations of assent that are in themselves sufficient to conclude a contract will not be prevented from so operating by the fact that the parties also manifest an intention to prepare and adopt a written memorial thereof; but the circumstances may show that the agreements are preliminary negotiations.

Focusing simply on the intentions of the parties, to be determined case by case through an open consideration of a broad range of circumstances, reflects and encourages a much more substantive approach to legal reasoning in this area of contract law, compared to that in England and New Zealand.

There have been suggestions of some counter-tendencies, however, which this Part (II.C) will explore in detail. Von Mehren, for instance, cites para 27 of the *Restatement (Second)* to argue that US legal practice “falls somewhere between” German practice (providing in BGB article 154(2) for a presumption against valid formation, when the intentions are unclear with respect to references to later memorialisation) and French practice (which in the 20th century has arguably developed “a strong presumption or rule of construction” favouring validity), although he quotes an early study by Farnsworth suggesting that “it would be difficult to find a less predictable area of law”.²¹² Yet von Mehren cites also a concurring judgment of Friendly J in *International Telemeter Corp v Teleprompter Corp*,²¹³ to develop a suggestion which may indicate a more formal tendency in US law:²¹⁴

²¹¹ E A Farnsworth *Farnsworth on Contracts* (3 ed, Aspen Publishers Inc, New York, 1999) 203, 209-210 (citing the Supreme Judicial Court of Maine in *Mississippi & Dominion SS Co v Swift* (1894) 29 A 1063 (Me)). Thanks are due to Allan Farnsworth for airmailing a copy of the relevant portions of his third edition soon after publication.

²¹² A von Mehren “The Formation of Contracts” in A von Mehren (ed) *Contracts in General* Vol 7 Int Ency Comp L (Mohr, Tuebingen, 1990) 30-31.

²¹³ Above n 22: *International Telemeter Corp v Teleprompter Corp* (1979) 592 F2d 49, 57-58 (2d Cir) [*Telemeter*].

²¹⁴ Above n 212, 28.

The significance of provision for such documentation depends, at least in part, on whether the agreement to be memorialised was worked out by the principals or by others, eg the principals' lawyers. In the latter case, the likelihood may be greater that the parties do not intend to be bound until the memorial is completed and accepted. Thus, in large and complex deals, where the agreement is prepared by lawyers for the parties, it is said that "conforming to the realities of business life, there would be no contract ... until the document is signed and delivered ...; until then the parties would be free to bring up new points of form or substance, or even to withdraw altogether.

Of course, von Mehren only cites Friendly J to develop a general hypothesis at the start of his brief comparative analysis, so this is not tied specifically to US law. Nor does he propose – or suggest that Friendly J proposed – a "presumption" against validity even in these types of cases, as Cooke J seemed to do for instance in *Concorde* (at least as interpreted by some other courts in New Zealand).²¹⁵

Additionally, however, Farnsworth cites the same passage from Friendly J's concurring judgment to point out that Friendly J "favoured a rule requiring at least "clear and convincing proof" that the parties meant to be bound before the document was signed".²¹⁶ Yet, Farnsworth argues, "most courts have not shared this reluctance to find a binding agreement", and Friendly J himself "admitted that this was not the view of the New York courts or the *Restatement (Second)*".²¹⁷ He lists, nonetheless, some cases which seem to indicate not only a reluctance to find a binding contract to have been formed, but even a presumption or inference in that direction.²¹⁸ If this is so, and widespread, it would suggest at least a significant formal counter-tendency in this area of US law, contrary to the thesis advanced in this Chapter.

Part II.C.1 therefore begins by examining *Telemeter*, including Friendly J's concurring judgment. It then details the subsequent developments in the Court of Appeals and other Second Circuit courts, the Second Circuit being one of the most important jurisdictions for contract law jurisprudence in the US. The analysis reveals that although Friendly J's comments may have encouraged the courts to render more judgments holding that no immediately binding contract was formed, this has been so primarily in the rather special category of informal settlement agreements (at issue in *Telemeter* itself). Yet some courts have upheld informal settlements as binding. Unlike the very recent suggestion in English law (above Part II.B.3),²¹⁹ neither this category nor others generates a presumption against validity. Rather, Second Circuit courts continue to consider case by case a range of factors, along the lines proposed in the *Restatement (Second)*. They pay close to the words used by the parties, but also a broad range of other factors. The same appears to hold for other Circuit and State courts, even in cases involving leases and sales of land, reviewed in Part II.C.2. Finally, consistently with this more substantive approach and in sharp contrast to the recent developments in English maritime contract case law (above Part II.B.4), Second Circuit and other courts

²¹⁵ Above n 16. Compare for example *Dellaca*, above n 145.

²¹⁶ Above n 211, 204 (citing from *Telemeter*, above n 22, 57-58).

²¹⁷ Above n 211, 204.

²¹⁸ Above n 211, 204 n 3.

²¹⁹ *Dalgety Foods*, above n 76.

still do not let parties' use of wording like "subject to details" determine the issue of whether the parties intended to be bound. In such cases, also, they consider and weigh up all the circumstances (below Part II.C.3).

1 The Approach of Second Circuit Courts

In the *Telemeter* case, it is important first to note that all judges in the Court of Appeals upheld the trial judge's decision that an immediately binding agreement had been reached to settle a patent infringement dispute. The parties had had two meetings in person, followed by hiatus, leading to agreement that a three-party settlement would be transformed into a two-party one. The majority of the Court agreed that this only involved "scrivener's work", and stressed for instance that the party not contesting the binding force of the settlement did not take exception to it at the time. The majority cited from the then draft *Restatement (Second)*, which adopted similar wording to that used finally in para 27, and then summarised authorities in arguing that "the district court's decision is consistent with New York case law dealing with similar situations".²²⁰

In his concurring judgment, Friendly J argued that the difficulty in this case arose from "the gap between the realities of complex business agreement and traditional contract formation".²²¹ Specifically, Friendly J was impressed by the notion that in large deals involving corporations and individuals of substance, rather than exchanging offer and acceptance or counter-offer, the parties and later their lawyers usually negotiate trying to avoid committing themselves. The Judge followed this with his pronouncement on the "realities of business life" allowing parties to withdraw freely before formalising the agreement, cited above by Farnsworth; but continued:²²²

I cannot contentiously assert that the courts of New York or, to the extent that they have not spoken, the Restatement of Contracts 2d §26 and comment C (Tent[ative] Drafts 1-7 Revised and Edited) have gone that far, nor can I find a fair basis for predicting that the New York Court of Appeals is yet prepared to do so.

On the other hand, it does seem to me that the New York cases cited by the majority can be read as holding, or at least affording a fair basis for predicting a holding, that *when the parties have an intention that their relations should be embodied in an elaborate signed contract, clear and convincing proof is needed* to show that they meant to be bound before the contract is signed and delivered. Such a principle would accord with what I believe is the intention of most such potential contractors; they view the signed written instrument as "the contract", not as a memorialisation of an oral agreement previously reached. Also, from an instrumental standpoint, such a rule would save the courts from a certain amount of vexing litigation. The clear and convincing proof could consist in one party's allowing the other to begin performance, as in [two earlier Second Court cases], or in unequivocal statements by the principals or authorised agents that a complete agreement had been reached and the writing was considered to be merely of evidentiary significance.

²²⁰ Above n 22, 55-56. Para 27 is quoted above n 211.

²²¹ Above n 22, 57. He quoted extensively from a compendious comparative analysis of contract formation co-directed by another Columbia Law School professor, P G Bonassies and R B Schlesinger (eds) *Formation of Contracts: A Study of the Common Core of Legal Systems* Vol 2 (Oceana, Dobbs Ferry (NY), 1968) 1584-1586.

²²² Above n 221; *Telemeter*, above n 22, 58 (emphasis added).

The facts forcefully marshalled by Judge Lumbard make a strong case for finding that the latter condition has been satisfied here.

It is important to note that Friendly J therefore retains a general focus on the intentions on the parties; only suggests that “clear and convincing” counter-evidence will be needed if shown that they intended an “elaborate” contract; and that he seems to have been set quite a low standard for such counter-evidence. Nonetheless, he concluded his concurring judgment:

upon the understanding that our decision rests on the unique facts here presented and that we are not entering a brave new world where lawyers can commit their clients simply by communicating boldly with each other.

These passages therefore sounded a clear warning not to too readily enforce informal agreements, a warning heeded in other cases decided by trial courts and Courts of Appeals in the Second Circuit; but not surprisingly they did lead to the sort of rebuttable presumption approach developed by some New Zealand courts and commentators (above Part II.B.1).

A second important decision handed down by the Court of Appeals in this area of law was *Reprosystem BV and N Norman v SCM Corporation*.²²³ SCM had negotiated with Reprosystem to sell its European photocopier operations (while exploring a possible supply contract with Mita in Japan). Muller, Reprosystem’s owner, wrote in May 1976 offering to purchase the operations subject to his accountant’s approval and “execution of a formal agreement, satisfactory to both SCM and Muller”. In mid-September, an “agreement in principle” was reached. Lawyers for both sides then prepared and reviewed many drafts of a “Global Agreement”. Over 15 and 16 December, the parties and their lawyers met to resolve all outstanding issues. At the end of the meetings, according to the trial Judge:²²⁴

The assembled group were asked by Rodich [a senior officer of SCM] whether there were any open terms, and none were advanced. [SCM lawyers] was to provide agreements embodying the discussions. The negotiators were released, and adieus, seasons’ greetings and congratulations were exchanged. Rodich escorted Muller to Demaio’s [another SCM officer’s] office, and advised the latter that the meetings had been successfully completed. Whether or not Rodich stated, as recalled by Muller and DeMaio, “Frank, shake hands with your new boss, the deal is done”, the import of the meeting was to acknowledge in an informal manner the transfer of power. In addition, Rodich took Muller to Egli’s office and advised Muller that Egli [another SCM officer] would finish up the transaction. He also informed [Muller] that his fee could be expected around Christmas or shortly thereafter.

The trial Judge was impressed by this turn of events. So too, by the prior cooperation of SCM in its dealings with Muller and subsequent actions by SCM, such as recording the deal as a “sale” in Board minutes on 16 December, SCM application on behalf of Muller to the French government for approval, and SCM further contacting Mita in Japan to confirm a letter of intent to purchase copiers and noting agreement “on

²²³ (1984) 727 F2d 257 (2d Cir).

²²⁴ (1981) 522 F Supp 1257, 1266 (SD NY).

December 15, 1976, to the final terms and conditions pertaining to the sale of the six European companies ...".²²⁵ The Judge held that a binding contract to sell had been concluded, although damages were not awarded because the buyer had failed to establish it was ready, willing and able to perform the bargain. By contrast, Pratt J (writing for the Court of Appeals) found no agreement at all, noting:²²⁶

Muller's initial purchase offer was made on the expressed condition that "a formal agreement, which is satisfactory to SCM and [Reprosystem] be entered into". Muller testified that Rodich "had no problem with that". Additionally, the [28] September press release, prepared by SCM and reviewed by Muller, stated: "The proposed sale of the European copier business is subject to a definitive agreement to be reached soon". SMC's 10-K report, filed with the SEC [two days later], also stated: "[SCM] makes no assurance that this transaction will be completed". Finally, the numerous drafts of the "Global Agreement" conditioned the parties' obligations on the receipt of opinions from counsel of both buyer and seller confirming that the "[Global] Agreement and each of the Purchase Agreements have been duly authorised, executed and delivered. Additionally, the drafts of the Global Agreement provided "when executed and delivered, this Agreement and each of the Purchase Agreements will be a valid and binding agreement in accordance with its terms". Despite their many other differences over the proposed contracts, neither party took exception to these provisions that conditioned their binding effect on formal execution and delivery. Thus, the contract drafts, combined with the parties' other written communications, conclusively establish a mutual intent not to be bound prior to execution of the formal documents.

The Court concluded by arguing that this result was consistent with prior decisions applying New York law, and:²²⁷

of equal importance, the result we reach is consistent with the realities of the complex transaction at issue. The proposed deal involved a \$4 million sale of six companies which were incorporated under the laws of five different countries and which had assets of over \$17 million, sales of \$40 million, and profits of \$4 million. Completing the transaction would require approvals of foreign governments, sales of both securities and assets, and the transfer of almost one thousand foreign employees, not to mention the myriad details attendant upon the sale of any business. Thus, the magnitude and complexity of the deal as reflected in the numerous written contract drafts not only reinforce the parties' stated intent not to be bound until written contracts were signed, but also reflect a practical business need to record the parties' commitments in definitive documents.

On that last point, "describing the realities of modern corporate deals", the Court not surprisingly cited Friendly J's concurring judgment in *Telemeter*.²²⁸ Yet nowhere did this Court lay down any inference or presumption against validity, in such situations of complex cross-border commercial transactions involving lawyers, along the lines suggested for instance by Cooke J in *Concorde* or Tompkins J in *Dryden*.²²⁹ Further,

²²⁵ Above n 224, 1266.

²²⁶ Above n 223, 262.

²²⁷ Above n 223, 262-263.

²²⁸ Above n 223, 263.

²²⁹ Above n 16; 165. Nor is this possibility suggested in a detailed analysis of *Reprosystem* contained in S Michida *Keiyaku Shakai - Amerika to Nihon no Chigai o Miru [Contract Societies: Looking at Differences between America and Japan]* (Yuhikaku, Tokyo, 1987) 231-247.

although the Court did stress the wording used in the draft documentation, it relied also for instance on the subsequent press release which had been reviewed by Muller himself, as well as the particularly high level of complexity and amount at stake in this case. Similarly, in a later case which also held that a binding contract had not been reached for a corporate acquisition, key considerations were the precise involvement expected by the lawyers on each side and the existence of some unresolved matters, as well as the consideration that acquisition agreements through stock transfer were usually completed in writing.²³⁰

A third important decision of the Court of Appeals was rendered shortly after that in *Reprosystem*. In *RG Group Inc v Horn & Hardart Co*,²³¹ Pratt J again wrote the unanimous judgment of the Court of Appeal (albeit sitting with two different judges). The Court rejected a claim that a franchise contract had been concluded informally, upholding the trial Judge's summary judgment in favour of the alleged franchisor. The Court set out in more detail the principles to be applied, thus going well beyond *Reprosystem*. Although also evincing a reluctance to bind parties at least to large deals, and stressing the importance of looking to the words used, Pratt J made it clear that several factors needed to be weighed case by case. First, though, the Court laid down the general policy factors and principles to be kept in mind:²³²

Under our law of contracts parties are free, within certain limits, to set the conditions under which their agreements will become binding. *Sometimes an oral agreement or handshake is all that is needed, but when substantial sums of money are at stake it is neither unreasonable nor unusual for parties to require that their contract be entirely in writing and signed before binding obligations will attach. In the present case the parties set exactly that requirement, and they did so in such a forthright and plain manner that there is no issue left to be tried.* The

²³⁰ *Chariot Group v American Acquisition Partners* (1990) 751 F Supp 1144 (SD NY). The draft Purchase Agreement initially sent by plaintiff seller to the buyer had included clauses requiring an opinion to be provided by the other side's lawyers representing that the Agreement had been "duly executed by, and constitutes a valid and binding agreement of", that other party. At the end of negotiations at the meeting at the plaintiff's offices, a remaining officer of the plaintiff officer telephoned his attorney to give agreed variations to the contract. Two officers of the defendant remained to await retyping, but due to logistical and other delays caused in part by the need to identify defendant entities which were to sign the contract, the revised contract did not arrive that day. They therefore signed several copies of the execution page only and gave them to a secretary of the plaintiff. However, as stressed by the District Court, the defendant's officers had these pages sent to their own lawyer, not to the plaintiff's lawyer who were retyping a revised agreement. The court noted (at page 1151):

Thus their objective manifestation was that they did not consider the attachment of the signature pages to the balance of the contract to be purely ministerial. All the parties involved understood, or should have understood, that delivery of the signature pages to the plaintiff was contingent on the defendant's attorney's satisfaction with the draft of the Agreement, and that until the signature pages were given to the plaintiff, the defendants were not bound.

It is not clear from the reported judgment how much money was at stake. However, the Court went on to suggest first that some complexities remained (such as tax issues). It also suggested (at page 1150) that "the sale and transfer of control of a business through the sale of all the stock is the type of agreement that is generally put in writing".

²³¹ (1984) 751 F 2d 69 (2d Cir).

²³² Above n 231, 71-72 (emphasis added).

case does not even present much of a cautionary tale: its lesson is simply that when experienced businessmen and lawyers are told explicitly and clearly that a major and complex agreement will be binding only when put in writing, then they should be rather cautious about assuming anything different.

...
It is important to commerce that the law make clear what force will be given to various expressions of intent, for otherwise parties could never be assured that they were, in fact, channelling their negotiations towards an oral contract or a written one. *Hard and fast requirements of form are out of place, of course. ... But when a party gives forthright, reasonable signals that it means to be bound only by a written agreement, courts should not frustrate that intent.*

Freedom to avoid oral agreements is especially important when business entrepreneurs and corporations engage in substantial and complex dealings. In these circumstances there are often forceful reasons for refusing to make a binding contract unless it is put in writing. The actual drafting of a written instrument will frequently reveal ambiguity or omission, which must be worked out prior to execution. Details that are unnoticed or passed by in oral discussion will be pinned down when the understanding is reduced to writing. These considerations are not minor, indeed, above a certain level of investment and complexity, requiring written contracts may be the norm in the business world, rather than the exception. ...

These general concerns are reflected in the list of factors courts have looked to in deciding whether the parties' words and deeds, within a given bargaining process, show an intent to be bound only by a written agreement. No single factor is decisive, but each provides significant guidance.

After citing the venerable judgment in *Mississippi & Dominion SS Co v Swift*²³³ for the last-mentioned proposition, the Court listed and closely considered four factors which have been cited often by subsequent Second Circuit judgments and commentators.²³⁴ First, the Court of Appeals held that "it is not surprising that considerable weight is put on a party's explicit statement that it reserves the right to be bound only when a written agreement is signed". *Reprosystem* is cited, perhaps somewhat misleadingly by not mentioning the other circumstances just mentioned, as deciding that "a mutual intent not to be bound prior to execution of formal documents was "conclusively establish[ed] when neither party took exception, over the course of bargaining, to provisions in the drafts of the proposed contracts which stated "when executed and agreed".²³⁵ A second factor proposed in *RG Group*, "of major significance ... is whether one party has partially performed, and that performance has been accepted by the party disclaiming the contract" (as Muller did with respect to the press release in *Reprosystem*, although not given by the Court here as an example). Two other factors are "whether there was literally nothing left to negotiate or settle" and "whether the agreement concerns those complex and substantial business matters where requirements that contracts be in writing are the norm rather than the exception" (citing *Reprosystem* and Friendly J's concurring judgment in *Telemeter*).²³⁶

The Court of Appeals then examined first the explicit wording of the development franchise agreement itself, provided to franchisees on their first meeting.

²³³ Above n 211.

²³⁴ See for example *Winston*, below n 242; *Sears*, below n 245. Compare also Farnsworth, above n 211.

²³⁵ Above n 231, 75.

²³⁶ Above n 231, 75.

That declared on its face that “when duly executed” it would set forth the parties’ rights and obligations, and went on to include “entire agreement” and “no oral variations” clauses.²³⁷ (Although not stressed by the Court, the franchisor also had told the franchisees that “only slight modifications in it could be made”.) The Court suggested next that the franchisees’ own subsequent conduct tended to indicate they continued to intend any agreement to become binding only when formalised. One example cited of this was their own private placement memorandum, distributed to potential investor associates subsequently to the meeting. That had stated that any partnership would be subsequent to execution of the franchise agreement. The only possible contrary indication was a later telephone call from the franchisees to franchisor’s lawyer, which recapitulated agreed matters and concluded by acknowledging a “handshake deal”.²³⁸ That wording had to be kept in context, said the Court.²³⁹

... that statement made no explicit reference to a waiver of the requirement that the contract be in writing, and it occurred at the end of months of bargaining where there were repeated references to the need for a signed and written document, and where neither party had ever, as far as the record before us shows, even discussed dropping the writing requirements.

Secondly, there had been no performance, partial or otherwise, by either party.²⁴⁰ Thirdly, no agreement had ever been reached on the territory for the franchise (a crucial matter one would have thought, if not for the test of legal certainty, then definitely for business purposes. Fourthly, the Court pointed out that the alleged franchise agreements were to run for twenty years and had twenty pages of clauses; and.²⁴¹

Perhaps most telling is the fact that the parties were talking about an initial investment of some two million dollars, and that the plaintiff’s [franchisees’] complaint alleges lost income, profits and injuries of ‘at least’ eighty million dollars. With this amount of money at stake, a requirement that the agreement be in writing and signed simply cannot be a surprise to anyone.

A fourth decision of the Court of Appeals, also often cited subsequently, consolidated the principles developed in *Reprosystems* and especially in *RG Group*. In *Winston v Mediafare Entertainment Corp et al*,²⁴² the Court applied the four *RG Group* factors to overturn the trial Judge’s decision that an immediately binding settlement agreement had been reached regarding a dispute over a “finder’s fee”. Sounding a note of caution at least in this category of cases, similar to that of Friendly J in *Telemeter*, the Court of Appeals suggested that where (as here) the negotiations had been protracted

²³⁷ Above n 231, 71.

²³⁸ Above n 231, 73. Compare the stronger wording used in *Dryden* (above n 165) and other circumstances suggesting that a binding contract was intended at that stage, but which Tompkins J held were not enough to rebut a “presumption” against legal effect.

²³⁹ Above n 231, 76.

²⁴⁰ Perhaps rather unusually: compare for instance *Hoffman v Red Owl Stores Inc* (1965) 133 NW 2d 267 (Wisc) and many other litigated franchise cases reviewed in S Macaulay, J Kidwell, W Whitford and M Galanter *Contracts: Law in Action* (The Michie Company, Charlottesville, 1995) Vol 1, 401-440.

²⁴¹ Above n 231, 77.

²⁴² (1985) 777 F 2d 78 (2d Cir).

and contentious, “prudence strongly suggests that [the] agreement be written in order to make it readily enforceable and to avoid still further litigation”.²⁴³

Subsequent trial courts have taken these warnings to heart, but they too have not developed any presumption against binding legal effect based on specific phraseology or perceptions of what is customary in broad categories of dealings. Informal settlement agreements, for instance, were held not be binding in *Stetson v Duncan and Diamond Productions Inc*²⁴⁴ and in *Sears, Roebuck & Co v Sears Realty Co Ltd*.²⁴⁵ However, these decisions were reached on strong facts strongly pointing in

²⁴³ Above n 242, 83.

²⁴⁴ (1988) 707 F Supp 657 (SD NY). Walker J adopted in its entirety the “report and recommendation” of the US Magistrate (similar to a Master in New Zealand civil proceedings). The latter had accepted the plaintiff’s argument that no oral settlement had been reached in telephone negotiations between respective lawyers in a trademark dispute between a singer and other performers. After citing the similar facts and reasoning in *Winston* (above n 242), the Magistrate had stressed that the defendant’s lawyer had drafted immediately a written agreement and sent it to the plaintiff’s lawyer with a cover letter stating “I think we should pursue signatures at the earliest possible date ...”, with respect to which the plaintiff’s lawyer had later testified that “as an attorney” she understood “that this agreement would be signed before it was binding” (page 667). Other evidence pointing to this conclusion was that the defendant’s lawyer himself soon thereafter wrote to the Magistrate stating the case had settled “in principle”, wording also used by the plaintiff’s lawyer in correspondence with the Magistrate. She also testified that “knowing that people invariably can and do change their minds, it was important to preserve the client’s right to come in and review the document before he signed it”. Part of the background to this was that tensions had developed between her and the plaintiff about lawyers’ fees, leading him eventually to change counsel. This may have influenced in turn the defendant’s lawyer’s understanding, but in any event he stated in a conference before the Magistrate: “We are very concerned. We do not wish to let the matter go on more than a few more days if that is appropriate and we would urge that if the agreement is not signed in its present form or the most minor variations are appropriate, that we get back on the trial calendar ...” (page 668). All this indicated reservations of intentions not to be bound before signature, on the defendant’s side as well as on the plaintiff’s, although the Magistrate focused on the former. He also considered the other factors laid down in *RG Group*, however. The one stressed was that: “Parties to a hotly contested trademark dispute generally do not settle it without a formal agreement. Indeed, defendants here acknowledge the necessity for a written agreement, merely arguing that the last draft should be enforced as if executed” (page 669). *Telemeter* was distinguished primarily because in that case the lawyer for the party seeking to disavow the settlement had actually signed the stipulation and order of dismissal sent to the other side.

²⁴⁵ (1996) 832 F Supp 392 (ND NY). The allegedly binding settlement regarding a trademark dispute had been reached at a “principals-only” meeting, that is, with none of the lawyers present who had been involved in negotiations until then. The defendant’s president had earlier requested that the plaintiff’s officer in attendance have authority to settle, but the response did not unequivocally indicate that he would be able to settle then and there. Indeed, at the meeting he told the defendant’s president that his practice was to have agreements reviewed by counsel. Plaintiff’s counsel had also previously stated expressly, and the Defendant had accepted, that the meeting was to be “without prejudice”. In this respect then, and generally this far into the judgment, the decision bears similarities with *Rothmans*. However, the Court went on to focus on the other *RG Group* factors. Partial performance, specifically evidence that the defendant subsequently sold cans bearing the Sears mark, was held insignificant in the context of the negotiations taken as a whole. (In any event, there was consistent action on the part of the defendant; inconsistent actions by the party instead disavowing an informal agreement is arguably more significant.) Much more telling were several important unresolved matters, especially the question of the market survey which the plaintiff’s officer insisted should be conducted to determine the factual parameters of their dispute by this time, and the lack of discussions as to the defendant’s counterclaims about plaintiff’s sales of Sears oil in the defendant’s own traditional market area. In addition, the District Court noted (at

that direction, only after applying the various factors indicated by the Court of Appeals, and the judges did not lay down a blanket presumption as suggested recently in England (above Part II.A.2). In some situations, however, Second Circuit courts still uphold informal settlement agreements as intended to be legally binding. Examples cited (but distinguished) in *Stetson*, involve primarily situations where counsel have reached settlement in open court.²⁴⁶ A more recent example is *Reich v Best Built Homes Inc*,²⁴⁷ where counsel for the Secretary of Labour reached agreement with the defendant's lawyer regarding a labour standards dispute, and later dictated the terms in a conference call to the Court. This appears a robust approach given that negotiations involving government parties often involve more formality, if not due to specific statutory requirements, then at least to leave clear written records for broader public audit requirements.²⁴⁸ The results in these cases, and indeed *Telemeter* as well as the reasoning adopted in all the abovementioned cases involving settlement agreements, show that courts in the Second Circuit generally have not gone as far as suggesting that informal settlement negotiations even in quite complex disputes should invariably not be binding, nor even subject to a presumption pointing in that direction. Rather, they still examine all the circumstances to determine the parties' intentions, explicitly considering a range of factors, especially those encapsulated by the Court of Appeal in *RG Group*.

The same approach emerges in a second category of cases, involving joint enterprises. Here too, the facts have often led to the conclusion that no binding agreement was intended, although they generally do not point so strongly in this direction as in settlement cases like *Stetson* or *Sears*.²⁴⁹ In *Precision Testing Laboratories Ltd v Kenyon Corp of America*²⁵⁰ and *US for Use of Cortolano & Barone*

page 405):

The alleged settlement agreement was substantially complex. It covered a wide variety of commercial activities, called for significant limitations on the geographical areas in which those activities could be conducted, and in all likelihood affected a substantial amount of sales revenue for both parties.

In any event, the Court held that any oral agreement would be contrary to New York statutory requirements that settlements during litigation be in writing, despite liberal rules construing what might constitute sufficient writing.

²⁴⁶ *Hallock v State* (1984) 474 NE 2d 1178 (7 Cir); *Janus Films Inc v Miller* (1986) 801 F 2d 578 (2d Cir); both cited in *Stetson*, above n 244, 670-671.

²⁴⁷ (1995) 895 F Supp 47 (WD NY).

²⁴⁸ Compare generally F White and K Hollingsworth *Audit, Accountability and Government* (Clarendon Press, Oxford, 1999).

²⁴⁹ Above n 244; n 245.

²⁵⁰ (1986) 644 F Supp 1327 (SD NY). The claim by business partners Ellis and Hiesinger that an oral agreement had been reached with Kenyon, to import and convert European cars for the US market, was denied after applying the factors laid down in *Winston* (above n 242) and *RG Group* (above n 231). First, Kenyon's lawyer was telephoned during the meeting at which final oral agreement was allegedly been reached. Kenyon had been concerned that plaintiff Hiesinger was also qualified as a lawyer. During was also made of the possibility of a deadlock arising under the proposed joint venture. Secondly, Cooper J held that this and two other major issues remained outstanding, namely how profits were to be shared, and whether the plaintiffs intended to take on the risks and liabilities of Kenyon's company. Thirdly, although only a total \$40,000 was involved – compared to at least US\$4 million in *Reprosystem* (above n 223), an initial \$2 million investment planned in *RG Group*, and even \$62,500 in *Winston* (albeit a

v Morano Construction,²⁵¹ for instance, the District Court noted policy considerations like those raised by Friendly J in *Telemeter*, holding that no contractual relationship had been established. But the test involved an explicit and careful weighing of multiple factors derived from *RG Group*, and both allowed restitutionary claims for work done. Further, applying the balancing test, informal joint venture agreements have been upheld without much difficulty, as in *Canet v Gooch Ware Travelstead*.²⁵²

settlement agreement) – the alleged joint venture agreement, probably would have continued long-term, and involved many and varied terms (including at least 15 discussed at the alleged final meeting, followed by Kenyon’s lawyer subsequently preparing six different documents totalling over twenty-five pages). Fourthly, Cooper J found insufficient evidence as to administrative resources, accommodation and funds (anyway, limited) allegedly provided to Kenyon pursuant to the agreement.

²⁵¹ (1989) 724 F Supp 88 (SD NY). Cortolano and Barone were subcontractors to general contractor Morano in work on a US government construction project. The Court held that no binding contract was concluded for Phase III work, where all parties knew a written subcontract would eventually be required due to “the nature of the parties and government contracting” (at page 97).

²⁵² (1996) 917 F Supp 969 (ED NY). The District Court upheld Canet’s claims for breach of a contract of employment under which he assisted Travelstead for many years to develop properties, including a claim for equity participation. Some properties were overseas, including the very large Canary Wharf development in London, and a Barcelona Olympics development in which a Japanese investor eventually became involved. Applying the *Winston* restatement of *RG Group* factors (above n 242; n 231), Trager J noted first that there was no *express* reservation of right not to be bound in the absence of a writing, either when the employment contract was made orally or when modifications were mutually agreed as to the amount of Canet’s equity participation in individual projects. The court rejected Travelstead’s argument that Canet’s repeated insistence on obtaining documentation indicated the latter’s understanding that it was *impliedly* required to create a legally binding agreement, holding (at page 991):

Canet wanted the agreements in writing because, as a business person and, not insignificantly, knowing Travelstead’s personality and litigious history, he did not want to be put in the position of having to engage in a “swearing contest”, but rather wanted documentation to confirm the oral agreements and maximise tax benefits. Indicative of his belief in the validity of the agreements was his continued work for Travelstead ...

In addition, Trager J noted how Travelstead had demonstrated his expectation by being bound by several of his oral commitments of equity participation. These included getting Canet’s consent before combining two property interests into a third; honouring at least in part oral commitments with regard to another New York property and Canary Wharf; and renegotiating “the Barcelona percentages as though Canet’s share was not mere fiat on his part”. These aspects overlap with the court’s discussion of the second factor, partial performance. Thirdly, the court stressed that “although the agreed-upon project participations might have been subjected to complex conditions, particularly to take advantage of tax provisions available prior to 1987 they are sufficient to permit a court to fill in the remaining terms”. In all except the Barcelona development, Travelstead had specified the percentages and Canet had agreed. Finally, the court considered whether the agreement is the type of contract normally committed to writing (at page 93):

Although employment contracts may be in writing, they often are not. No evidence was presented that Travelstead made a practice of putting employment contracts in writing. Indeed, [his] brother testified that he had been unable to obtain a letter from his brother specifying his salary when he returned to work for him on the Barcelona project.

Focusing, as Travelstead would have us, on the agreements to grant percentage interests in Travelstead’s interest in real property developments, it is true that such agreements are more likely to be written. [Yet] Although interests in real property require a writings to effectuate transfer, interests in a partnership or corporation holding an interest in real property may be transferred without a writing. ... Travelstead, in fact, granted Canet interests in his profits from [various profits] without a writing.

A third category of cases where several Second Circuit courts have applied a broad-based balancing approach involve commercial loans. In *Teachers Ins & Annuity Association v Tribune Co*,²⁵³ Leval J held Tribune to an informal commitment agreement to borrow a total of US\$80 million from Teachers. Farnsworth cites this case as mentioning a presumption against binding force,²⁵⁴ so the judgment should be examined closely. Indeed the Judge uses this term, but that needs to be kept in context. In discussing general principles at the outset, Leval J stated:²⁵⁵

In seeking to determine whether such a preliminary commitment should be considered binding, a court's task is, once again, to determine the intentions of the parties at the time of their entry into the understanding, as well as their manifestations to one another by which the understanding was reached. Courts must be particularly careful to avoid imposing liability where binding obligation was not intended. *There is a strong presumption against finding binding obligations in agreements which include open terms, calls for future approvals, and expressly anticipate future preparation and execution of contract documentation. Nonetheless, if that is what the parties intended, courts should not frustrate their achieving that objective or disappoint legitimately bargained contract expectations.*

These were arguably obiter dicta. With respect to open terms, for instance, the Court later found that the “two page term sheet attached to the commitment letter [which was signed and returned by Tribune] covered the important economic terms of a loan”, while references therein to a mortgage were understood by both parties to mean a mortgage term sheet previously supplied to Tribune.²⁵⁶ In any event, with respect to this factor – as the others developed in *RG Group* and in *Winston* – Leval J adopted a broad balancing approach, stressing for instance that “although the existence of open terms may always be a factor that suggests intention not to be bound, it is by no means conclusive”.²⁵⁷ The Judge also downplayed Tribune’s argument that in returning the signed commitment letter it had stated that “our acceptance and agreement is subject to approval by the Company’s Board of Directors and the preparation and execution of legal documentation satisfactory to the Company”. “Such terms”, said Leval J, “are not to be considered in isolation but in the context of the overall agreement”.²⁵⁸ Here, the Commitment Letter stated that a “binding agreement” came into effect upon return of the signed counterpart, and Tribune also added to its signature “accepted and agreed to”.²⁵⁹ Tribune’s lawyers, “recognising that the form of agreement committed Tribune to a ‘binding obligation’”, warned about the consequences of signing the Letter. Another important part of “the context of the negotiations” was that Tribune also was keen for a firm commitment so it could conclude the transaction by the end of the year, having been turned down by five other lenders.²⁶⁰ There had also been some partial performance, in that Teachers had then budgeted some of the funds, albeit informally,

²⁵³ (1987) 670 F Supp 491 (SD NY).

²⁵⁴ Above n 210.

²⁵⁵ Above n 253, 499 (emphasis added).

²⁵⁶ Above n 253, 501.

²⁵⁷ Above n 253, 502.

²⁵⁸ Above n 253, 500.

²⁵⁹ Above n 253, 499.

²⁶⁰ Above n 253, 500.

reducing the sum available for other borrowers. Indeed, it told Tribune that only \$25 million out of the \$80 million would be made available that year, with the rest the following year. In addition, the Court held that evidence favoured Teachers on the point of “whether in the relevant business community, it is customary to accord binding force to the type of informal agreement at issue”.²⁶¹ Leval J accepted Teachers’ expert evidence showing that preliminary commitments *could* be binding – not necessarily all of them.²⁶²

the point is that the practices of the marketplace are not rigid or uniform. They encompass a considerable variety of transactions negotiated to suit the needs of the parties, including mutually binding preliminary commitments. Each transaction must be examined carefully to determine its characteristics. Tribune has failed to show to the court’s satisfaction that such binding commitments are outside the usages of the marketplace.

Leval J’s also approved of *Canet* for emphasising “the importance of honouring contract expectations”.²⁶³ However, despite robustly upholding of the bargain reached, the obligation imposed (and breached by later turning to a lower cost lender) was for Tribune only to negotiate in good faith to complete the borrowing, rather than an absolute obligation. This less extensive agreement made it easier for Leval J to hold that it was within the bounds of possible market practice, and to read down the wording added to Tribune’s acceptance.

The latter aspect of the judgment in *Teachers* was approved two years later by the Court of Appeals in *Arcadian Phosphates Inc v Arcadian Corp*,²⁶⁴ and in much other case law in the Second Circuit. In an already frequently cited recent judgment, *Adjustrite Systems & Ors v GAB Business Services Inc & Anor*, Chin J (writing for the Court) approved the distinction between two categories of preliminary agreements: (i) a “fully binding preliminary agreement”, subject only to later memorialisation but binding the parties to their contractual objective; and (ii) a “binding preliminary commitment”, created when the parties agree on major terms, but leaving other terms open for further negotiation in good faith towards obtaining the objective. Chin J also agreed with the competing policy considerations identified in *Teachers*, and approved in *Arcadian*: the need to be wary of “trapping parties in surprise contractual obligations that they never intended”; but also to “enforce and preserve agreements that were intended [to be] binding, further to “the aim of contract law to gratify, not to defeat expectations”. Most importantly, Chin J stressed that the “key, of course, is the intent of the parties”, determined objectively in the circumstances.²⁶⁵ To assist in that determination, he then listed the four factors laid down in *Winston*²⁶⁶ – language of the agreement, partial performance, detail of terms, and usual form for the transactions – adding that a fifth factor in category (ii) cases was the broader context of the negotiations. Chin J decided that all factors, except partial performance, favoured the defendant seller’s contention

²⁶¹ Above n 253, 503.

²⁶² Above n 253, 503.

²⁶³ Above n 253, 500 (citing *Canet*, above n 252, 992-993).

²⁶⁴ (1989) 884 F 2d 69 (2d Cir).

²⁶⁵ *Adjustrite Systems Inc & Ors v GAB Services Inc & Anor* (1998) 145 F 3d 543, 548 (2d Cir).

²⁶⁶ Above n 242.

that no contract had been formed, pursuant to an informal agreement for a million-dollar corporate acquisition involving intellectual property rights and long-term employment contracts. He noted that *Arcadian* had held that the language of the agreement had been held to be “the most important”, but examined all factors.

So have all other subsequent courts, with only one District Court judgment refusing to give much consideration to the other factors upon having decided that the language showed an intention not to be bound.²⁶⁷ As in the cases mentioned above in which a broad balancing test has been applied, judgments in recent years have shown considerable diversity in outcome: relatively few have found category (i) agreements,²⁶⁸ but a significant number have upheld category (ii) agreements,²⁶⁹ while many find no contract whatsoever.²⁷⁰ Although much more detailed case analysis would be required, such variance appears seems more likely to follow from a more substantive approach.²⁷¹ Further, very few cases mention *Tribune*’s reference to a presumption against binding force – and then only in its delimited context cited above²⁷² – and none in recent years have referred to Friendly J’s suggestion that “clear and convincing proof” is required to uphold agreements in at least some broad categories of commercial transactions.

The substantive approach, inviting extensive examination of a very broad range of considerations, was further advanced in *Consarc Corp v Marine Midland Bank NA*.²⁷³ The Court of Appeals remanded the case back to the District Court, which had granted summary judgment on Marine’s claim that any oral agreement to lend to Consarc was not intended to be immediately binding. To remand, it only had to hold that genuine issues of material fact had been overlooked. However, the Court of Appeals hinted strongly that a binding agreement had been reached, indeed one whereby the bank was immediately obliged to lend rather than just to negotiate in good faith towards that end. It was unimpressed by an affidavit from Marine’s attorney which stated “only that the agreements would be reduced to writing, without mentioning any intent not to be bound

²⁶⁷ *Miller v Tawil* (13 April 2001) unreported, US District Court for the Southern District of New York, 2001 US Dist LEXIS 4510. Even then, the Judge went on to examine the other three factors in a footnote.

²⁶⁸ See for example *Personalised Media Communs LLC v Starsight Telecast Inc* (27 December 2000) unreported, 99 Civ 0441 (DAB) (SD NY) (upholding an agreement to arbitrate).

²⁶⁹ See for example *Missigman v USI Northeast Inc* (2000) 131 F Supp 2d 495 (SD NY) (long-term employment contract); *Liberty Env’tl Sys v County of Westchester* (28 November 2000) unreported, 94 Civ 7431 (WK) (SD NY) (upholding jury’s determination regarding public works construction); *Rappaport v Buske* (24 August 2000) unreported, 98 Civ 5255 (BSJ) (SD NY) (mentioning *RG Group* cautions, but upholding entertainer’s employment contract).

²⁷⁰ *Farago Adver Inc v Hollinger Int’l Inc* (15 August 2001) unreported, 00 Civ 8730 (VM) (SD NY) (advertising project contract); *Miller*, above n 267 (employment); *Kimball Assocs PA v Homer Cent Sch Dist* (9 November 2000) unreported, 00-CV-897 (HGM) (GJD) (SD NY) (architectural services for school); *Gorodensky v Mitsubishi Pulp Sales Inc* (2000) 92 F Supp 2d 249 (SD NY) (long-term contract for output of proposed new plant); *Spencer Trask Sec Inc v Financialweb.com Inc* (28 August 2000) unreported, 99 Civ 9197 (RCC) (SD NY) (observing that no factor is decisive, in the test laid down by *Adjustrite* (above n 265), but finding a settlement agreement not to be binding).

²⁷¹ Above n 5.

²⁷² Above n 255. Compare for example *Gorodensky v Mitsubishi*, above n 269. But see *Miller*, above n 267.

²⁷³ (1993) 996 F 2d 568 (2d Cir).

without such a written contract”, arguing also that it “fails to support conclusively an expressed intention not to be bound” because it was sworn 7 1/2 years following the meeting at which the oral agreement was reached.²⁷⁴ Secondly, there had been some partial performance by Marine. Thirdly, the Court pointed out that at trial no evidence had been adduced to support the trial judge’s finding that “direct payment of loan proceeds to a third party would be the sort [of contract] normally committed to writing”. The only other factor taken from the *RG Group* framework which ran against finding a contract was that “concededly there were some unagreed open terms”.²⁷⁵ Further, the Court pointed out that the loan:²⁷⁶

was a simple arrangement, without many details, though concededly for a large amount of money, where speed was of some importance due to modernisation plans, and both parties had all they needed [at the time of the meeting] to decide whether to agree.

The judgment concluded with an “extensive laundry list of factors that might help the factfinder in making its decision” as to what represented the intentions of the parties at the relevant time.²⁷⁷

- number of terms agreed on compared to the total number to be included;
- relationship of the parties;
- degree of formality attending particular contracts;
- acts of partial performance by one party accepted by the other;
- usage and custom of the industry;
- subsequent conduct and interpretation by the parties themselves;
- whether writing is contemplated merely as a “memorial”;
- whether contract needs a formal writing for its full expression;
- whether any terms remain to be negotiated;
- whether contract has few or many details;
- whether amount involved is large or small;
- whether a standard form is widely used in similar transactions or whether the this is an unusual type of contract;
- the speed with which the transaction must be completed;
- the simplicity or complexity of the transaction;
- the availability of information necessary to decide whether to enter into a contract; and
- the time when the contract was entered into.

Consarc has been followed in several subsequent cases, in connection with this laundry list,²⁷⁸ and is very widely known and cited for its statement on the principles to be applied generally to summary judgment applications. Nonetheless, it remains to be seen whether the Court of Appeals and trial courts in the Second Circuit will build expressly on this even broader framework, gradually superseding that laid down in *RG Group* and

²⁷⁴ Above n 273, 576.

²⁷⁵ Above n 273, 577.

²⁷⁶ Above n 273, 577.

²⁷⁷ Above n 273, 575-576.

²⁷⁸ See for example *Int'l Minerals & Resources SA v Int'l Shipping Co SA* (1996) 96 F 3d 586. Compare also *Totalplan Corp v Colborne & Ors* (1994) 14 F 3d 824 (2d Cir).

refined by subsequent judgments like *Teachers* and *Adjustrite*.²⁷⁹ Either framework demonstrates, however, the broad-based substantive reasoning preferred in a very important jurisdiction in the US. This approach, moreover, emerges in courts in several other Circuits or States, even in cases involved real property.

2 Other Circuit and State Courts

In a few parts of the US, such as Maryland, the multi-factor balancing test developed in *Teachers* has been largely adopted over the course of the 1990s.²⁸⁰ However, courts in most other areas simply focus on the intentions of the parties in all the circumstances, without laying out and applying factors as systematically as in many Second Circuit courts nowadays.

In Massachusetts, for instance, in 1988 the Appellate Court upheld as immediately binding an oral agreement alleged by Wexler, a general contractor in a property development project.²⁸¹ It drew on *Rosenfield v US Trust Co*²⁸² and other local case law to lay down the following “well established” legal principles:²⁸³

Where, as here, parties negotiate orally as to the terms of an agreement while intending to execute a written contract, the parties generally are not bound until the contract is signed. If, however, the parties orally agree to the essential terms of the transaction, it may be *inferred* that they intended to bind themselves at that time and that the “writing to be drafted and delivered is a mere memorial of the contract, which is already final by the mutual assent of the parties to those terms. *Each case turns on its own facts.* The parties were well beyond “imperfect negotiations” and working out the “rudiments of ... [their] deal”. ... The preliminaries had been completed, the essential terms of the agreement had been reached, and the parties thereafter engaged in activities consistent with their agreement.

The Appellate Court considered factors similar to those applied by Second Circuit courts, without giving primacy to contract wording or attempting to lay down a presumption against binding force in this type of economic activity.²⁸⁴

By contrast, in affirming in 1990 a Massachusetts District Court judgment that

²⁷⁹ Above n 253; n 265. Compare for example *Durable Inc v Twin County Grocers Corp* (1993) 839 F Supp 257 (SD NY); and cases cited above nn 267-270.

²⁸⁰ See for example *Phoenix Mutual Life Ins Co v Shady Grove Plaza Ltd Partnership* (1990) 734 F Supp 1181 (D Md); *ABT Assocs v JHPIEGO Corp* (2000) 104 F Supp 2d 523 (D Md). However, the latter makes clear that Maryland law does not recognise a separate cause of action for the breach of a duty to negotiate in good faith.

²⁸¹ *Novel Iron Works Inc v Wexler Construction Co Inc et al* (1988) 528 NE 2nd 142 (Mass App Ct).

²⁸² (1935) 195 NE 323, 325 (Jud SC Mass).

²⁸³ Above n 281, 147 (emphasis added).

²⁸⁴ Novel Iron had originally sent to Wexler a letter offer subject to “our arriving at a mutually agreeable contract, a mutually agreeable contract price, and our obtaining construction finance”. After many months of meetings, a meeting was held where agreement was reached on price and completion times, whereupon “all parties shook hands in token of their acceptance of that agreement” (above n 281, 144), which was to be memorialised by a formal contract to be drafted by their attorneys. Considerable activity followed which suggested an immediately binding agreement had been reached, including Novel Iron asking Wexler to order materials.

parties had not intended to enter into a immediately binding agreement for Gel Systems to supply Hyundai ten language laboratories for a client in Saudi Arabia, the Court of Appeals for the First Circuit indicated that a “strong inference” against binding force could be derived from *Rosenfield*.²⁸⁵ However, in the latter case regarding an informal lease, the Judicial Supreme Court of Massachusetts had made this remark when discussing evidence showing that the parties had not agreed on all material terms, as a ground for holding the agreement void for uncertainty. Only later in the judgment did the Court deal with the intentions of the parties with respect to formalising the lease. It made no reference at all to an inference or presumption against binding force for leases generally, but rather focused on particular facts such as the negotiation process and terms still left open.²⁸⁶ Thus, the Court of Appeals in *Gel Systems* would have been justified in simply applying a broad balancing test, with no predisposition against binding force. In fact, it is submitted that the language used by the Gel Systems and Hyundai was sufficient that no binding agreement was intended by the parties in that particular case.²⁸⁷

The broader approach appears to have been adopted in *Video Central Inc v Data Translation Inc*.²⁸⁸ The Massachusetts District Court distinguished *Gel Systems* on the facts without referring to any notion of a “strong inference” against the binding force of informal agreements in international commercial agreements of some complexity, as was suggested by the New Zealand Court of Appeal in *Concorde* (above Part II.C.2). Lasker J did hold against Video’s claim that an informal international distributorship agreement had been formed by a two-page “Letter of Intent” sent by DTI on 10 November 1993, which included paragraph 14 stating that “the parties agree to sign a contract formalising these points no later than 60 days after the signature of this Letter of Intent”. That claim was for summary judgment, however, and Lasker J hinted that at full trial Video might be able to prove an immediately enforceable agreement. He

²⁸⁵ *Gel Sys v Hyundai Engineering & Construction Co* (1990) 902 F2d 1024, 1024 (1st Cir), citing *Rosenfield*, above n 282.

²⁸⁶ *Rosenfield*, above n 282, 326 (emphasis added):

A second answer to the plaintiff’s contention is that, *in the light of all the circumstances*, the parties were not bound by a contract on April 20 for lack of an attention to be bound except upon the execution of a formal written instrument. It is to be remembered that [lessor] on April 20 specifically refused to enter into a “short form of agreement” but instead insisted on having a lease drawn, to which the plaintiff’s acquiesced. This fact is significant in showing that the parties did not intend to be bound until the perfected lease was executed. The circumstances show that the bargain in part made was to be ineffective until there were further agreements. ... There is nothing in the record which discloses that at any time after April 20 and before the withdrawal of the defendants from the negotiations any writing in final form had been executed by the parties. Two draft leases had been discussed by attorneys for the parties but in each case the terms were still being changed and added to when the negotiations were broken off by the defendants. It follows that the defendants at the time they withdrew were not prohibited by any contract in so doing ...

²⁸⁷ Above n 284. When Hyundai issued a requested letter of intent, this stated its “intention to purchase Gel’s equipment subject to our job site client’s approval on your system proposed”, noting that a “formal contract will be made between Hyundai Saudi and [Gel’s Saudi agent]”, and “terms and conditions in detail will be further discussed when formal contract is made”.

²⁸⁸ (1996) 925 F Supp 867 (D Mass).

rejected DTI's suggestion that too many issues remained unresolved, for instance. The Letter "included sufficient material terms such that the transaction [could], if necessary and finally determined to be appropriate, be consummated solely on the basis of the [letter]", and DTI had "not alleged that there were any sticking points in the negotiations over the Letter". This was one ground to distinguish this case from *Gel Systems*, where the Lasker J thought that "room existed for further negotiations and disagreement".²⁸⁹ The Judge also stressed the ambiguity of paragraph 14, and that "the parties could have included a clause specifying [more exactly] that they did not intend to be bound until a more detailed, formal agreement was signed".²⁹⁰

Courts for other jurisdictions in the US have adopted a similar approach, examining all the circumstances to determine the parties' intentions without developing presumptions or inferences against binding force even in particular categories of transactions. This is so even in cases involving leases of real property, as shown by the judgment of the Court of Appeals for the 11th Circuit in *Doll v Grand Union Co.* That focus, suggested the Court, "is not without support elsewhere in the nation",²⁹¹ although in this case – as in *Rosenfield*, for that matter – the Court held that no immediately binding lease was intended largely because Grand Union never signed and returned a letter from Doll specifically requesting this to indicate consent to the terms contained therein. In this case, moreover, there was evidence on the record suggesting that the plaintiffs themselves had realised that Grand Union had not committed itself.²⁹²

Similarly, in *UXB Sand and Gravel v Rosenfeld Concrete*,²⁹³ the Supreme

²⁸⁹ Above n 288, 871.

²⁹⁰ Above n 288, 872.

²⁹¹ (1991) 925 F 2d 1363, 1368 (11 Cir).

²⁹² Above n 291, 1370.

²⁹³ (1994) 641 A 2d 75 (RI). The Parkers had agreed orally in August 1984 to sell gravel from one deposit on their property, over four years, to UXB. This agreement was recorded in writing in December 1984, when a side letter was added in which UXB was given an option or right of first refusal over a second deposit. Almost four years later, the Parkers decided to sell their property outright, so they wrote to UXB offering to sell it or giving them the opportunity to purchase gravel from the second deposit. Eventually UXB offered \$1.2 million for the property, then \$1.25 million. On 1 March 1989, under cover letter from their lawyer, the Parkers sent UXB two proposed sale agreements referring to different portions of the property, and calling for a deposit of \$62,500. They did so again on 13 March. After further negotiations, they agreed to reduce the deposit to \$30,000. As with the 1 March documents, UXB refused to sign for "there were additional terms that [it] felt warranted some discussion". In a 30 March meeting, UXB alleged these were resolved; but the Parkers felt that no agreement had been reached, particularly as to the deposit. Lederberg J rejected UXB's claim that an immediately binding agreement had been reached. The cover letter on 13 March from the Parkers' lawyer had indicated (page 70, emphasis added):

instead of accepting the terms of the 1 March proposed agreements, UXB had "suggested revisions", most of which the Parkers "acknowledged" in their March 13 proposed agreements. The letter also manifested disagreement over what cash deposit, if any, was required. ... Furthermore, the letter indicated that as of March 13, the Parkers looked forward to consummating the purchase and sale of the property at some future date and that although they viewed the proposed contract as reasonable, they contemplated execution of a formal written contract in the future.

In addition, the Parkers had not signed the agreements sent on 13 March. Although not mentioned by the trial Judge, the finding that no immediately binding agreement had been reached may also have been justified in light of the amount at stake, and the fact that the parties had memorialised a previous

Court of Rhode Island held that no sale of real property had been concluded as a result of an exchange of correspondence; but the focus was simply on the intentions of the parties in the particular circumstances, rather than developing a presumption against enforceability derived simply from negotiations towards a sale coupled with indications that the agreement was to be formalised.

A similar approach was adopted by the District Court for the Northern District of Illinois in *Evans Inc v Tiffany & Co.*²⁹⁴ The Judge held that an informal commercial sublease was intended to be immediately binding, arguing that the letter agreement had recorded all the essential terms, and was couched in language reflecting:²⁹⁵

a positive intent to be bound – the letter starts with the phrase “the purpose of this letter is to cover [Tiffany’s] intent to lease” (meaning present intent) and the operative clauses affirmatively state that the sublessee “shall” perform the obligations of the sublease.

Other circumstances pointing to this conclusion included time pressure on both parties to consummate a firm and binding agreement; insistence by an officer of Tiffany, before signing the letter agreement, that Tiffany’s chairman approve the document; subsequent conduct such as its press release indicating that a binding contract existed; and:²⁹⁶

custom and usage in the real estate business ... If the letter was intended to describe the state of non-binding preliminary negotiations, it would customarily contain an express disclaimer stating that the parties do not intend to be bound until a more formal document is completed and executed. Since the document here has no such clause, it appears that the parties intended that the letter have substantive legal effect.

Thus, perceived custom in real estate leasing was only one factor among many considered by the court; no “presumption” against immediate binding effect is derived from this, as suggested in some New Zealand case law (above Part II.A.).²⁹⁷ Further, not including a “subject to lease” or similar clause only makes it *appear* that the parties intended the agreement to be immediately binding, suggesting that other evidence could easily lead to a different conclusion. Conversely, this approach suggests that even including such a clause should not be definitive, nor even always raise a presumption against immediately binding force, as suggested by some English cases (above Part II.A.1).

A more recent judgment from Illinois, *Empro Mfg Co Inc v Ball-Co Mfg Inc*,²⁹⁸ seems to give more weight to wording such as “subject to contract”. However, other wording used and surrounding circumstances justify the conclusion that no agreement was intended. That was given as the overall issue, moreover, with no suggestions of a presumption or inference required in the context of negotiations for a corporate

agreement some four years earlier. Thus, even for a sale of real property, the judgment shows that the test in Rhode Island is simply what the parties intended in the particular circumstances.

²⁹⁴ (1976) 416 F Supp 224 (ND Ill).

²⁹⁵ Above n 294, 239.

²⁹⁶ Above n 294, 239.

²⁹⁷ See *NZ Master Builders Federation*, above n 138.

²⁹⁸ (1989) 870 F 2d 423 (7 Cir).

acquisition. Indeed, Easterbrook J, writing for the unanimous Court, stated at the outset:²⁹⁹

Because letters of intent are written without the care that will be lavished on the definitive agreement, it may be a bit much to put dispositive weight on "subject to" in every case, and we do not read *Interway* [*Inc v Alagna* 407 NE 2d 615] as giving these the status of magic words. They might have been used carelessly, and if the full agreement showed that the formal contract was to be nothing but a memorial of an agreement already reached, the letter of intent would be enforceable. *Borg-Warner Corp v Anchor Coupling Co* 156 NE 2d 513 (1958). Conversely, Empro cannot claim comfort from the fact that the letter of intent does not contain a flat disclaimer, such as the one in *Feldman* [*v Allegheny International Inc* 850 F 2d 1217 (7th Cir 1987)] pronouncing that the letter creates no obligations at all. The text and structure of the letter - the objective manifestations of intent - might show that the parties agreed to bind themselves to some extent immediately.

On the facts, the Court held that the parties had not intended to be bound, mainly on the grounds of the various communications between the parties and their advisors.³⁰⁰ Furthermore, the amount at stake was US\$2.4 million. Such matters are better addressed by focusing on determining the overall intentions of the parties, preferably based on explicit consideration of a broad range of factors as in the Second Circuit, rather than trying to turn phraseology "magic words" as in some categories of English case law (above Part II.A.1, Part II.A.4).

Albeit without the explicit factor-weighting characteristic of the Second Circuit, the more substantive approach is evident in other parts of the US. An example is *Arnold Palmer Golf Co v Fuqua Industries Inc.*³⁰¹ The Court of Appeals for the Sixth Circuit

²⁹⁹ Above n 298, 425.

³⁰⁰ Ball-Co had been floated and negotiations ensued, resulting in Empro sending a three-page letter of intent to purchase Ball-Co assets. This offered \$2.4 million with \$650,000 to be paid on closing and a 10-year promissory note for the remainder secured by the "inventory and equipment of Ball-Co", but stated: "the general terms and conditions of such proposal (which will be subject to and incorporated in a formal, definitive Asset Purchase Agreement signed by both parties)". The letter also stated that "Empro's purchase shall be subject to the satisfaction of certain conditions precedent to closing including, but not limited to" the definitive Agreement and, among five other conditions, "the approval of the shareholders and board of directors of Empro". Ball-Co signed and returned the letter; but later insisted that the land under the plant form part of the proposed security interest, leading to stalemate, and Empro claiming a order temporarily restraining Ball-Co from negotiating with anyone else. The Court noted that Empro had used the words "subject to" twice; it had twice stated that the letter contained "general" terms and conditions, implying that each side could still make additional demands; it had been careful to make any deal subject to both board and shareholder approval; and that it even had required the return of \$5000 in earnest money "without set off, in the event this transaction is not closed", although (the court noted) that the seller usually gets to keep earnest money if the buyer changes its mind. Ball-Co's lawyer, returning the signed letter of intent, also had written that "the terms and conditions are generally acceptable" but that "some clarifications are needed" with respect to the nature of Ball-Co's security interest.

Compare also for example *A/S Apothekernes Laboratorier v IMC Chemical Group* (1989) 873 F2d 155, where an agreement was not upheld on the particular facts.

³⁰¹ (1976) 541 F 2d 584 (6 Cir). One express condition of the Memorandum of Understanding had been "preparation of the definitive agreement for the proposed combination in form and content satisfactory to both parties and their respective counsel". The Court of Appeals pointed out that the Memorandum recited that a "general understanding had been reached"; it was "an extensive document

stressed that primary issue was to determine the parties' intentions in light of all the facts, and remanded the case back to the trial Court which had given summary judgment holding against a binding joint venture contract.

Further, in *Field v Golden Triangle Broadcasting Inc.*,³⁰² the Supreme Court of Pennsylvania upheld the trial Judge's ruling that a binding contract to sell a radio station was concluded by a signed letter agreement. That was in spite of it beginning "subject to agreement on a formal contract containing the provisions hereinafter set forth", and making three other references to a formal contract. The Court stressed that the buyer's officer, having made three previous offers which had been rejected, had agreed to meet "on the basis that they would either make a deal or have no further discussions", to which the seller's officer had replied: "That's fine. I would like to get it over with or not. I would like to wind it up tonight".³⁰³ At the meeting, moreover, they discussed the proposed terms, and the buyer's agent wrote in certain agreed changes and additions. After inspecting the radio station facilities, the parties signed the amended letter, initialling every change. The Court also accepted that the document contained all terms essential to concluding a binding contract: price, down payment, security to be given, and many other terms common for the type of transaction. It is possible that the New Zealand Court of Appeal would have reached a similar result in these circumstances. In a rather similar situation in *Dryden*, when the parties met personally (following negotiations involving drafts passing between solicitors) to celebrate conclusion of their "deal" with a bottle of wine, one of the reasons given by the Court for not finding a binding contract was that "they might well have signed a short memorandum recording what they agreed to be immediately bound on the terms negotiated".³⁰⁴ However, it is possible that the Supreme Court of Pennsylvania in *Field* would not have required signature and initialling of the letter, given the other circumstances. The key point is that the Court (and the trial Judge) approached the question without referring to a "presumption" against binding force in this category of transactions, unlike the trial Judge in *Dryden*.³⁰⁵

These two cases from the Sixth Circuit and Pennsylvania certainly support Farnsworth's conclusion that under US law, wording such as "subject to formal contract" is "not dispositive".³⁰⁶ The *Empro* case from the 7th Circuit,³⁰⁷ which he also cites as counter to his proposition, appears less so when examined more closely and in the context of other Illinois case law. A final case cited to support his proposition, noting however that the issue was raised there in somewhat different form, is *Great Circle*.³⁰⁸ The wording "subject to details", it will be recalled (above Part II.A.4), was held by the Court of Appeals for the Second Circuit not to create a "condition

that appears to reflect all essential terms"; it used wording like "will", "shall" and "agrees"; and, very significantly, that Fuqua (now denying binding force) had issued a rather contradictory press release stating that it and Arnold Palmer had agreed to cooperate in an enterprise to serve the golfing industry.

³⁰² (1973) 305 A 2d 689 (Pa).

³⁰³ Above n 302, 692.

³⁰⁴ *Dryden*, above n 166, 8.

³⁰⁵ Above n 165.

³⁰⁶ Above n 211, 210. See also Furmston and others, above n 24.

³⁰⁷ Above n 298.

³⁰⁸ Above n 105: 681 F 2d 121 (2d Cir 1982) [*Great Circle*].

subsequent” that terminated a charterparty. As will be apparent from the extensive case law analysis so far, that approach is perfectly consistent with the broad-based balancing approach adopted both in New York courts and in other US jurisdictions, one which refuses both to give absolute priority to particular wording used (or otherwise), and to develop presumptions to apply dogmatically to broad categories of transactions.

3 Maritime Law Cases: The Resilience of *Great Circle*

The rest of this Part (II.C.3) considers *Great Circle* in more detail, and other US maritime law cases, examining how they have retained this approach over the 1980s and 1990s despite the sharp criticism by Steyn J in *The Junior K* in 1988,³⁰⁹ and the more formal approach preferred by English courts in this important category of transactions in both jurisdictions (above Part II.A.4). Close attention must be given to this line of US case law, because of the sharp contrast it presents with the English case law giving primacy to “magic words” like “subject to details” in maritime law transactions, and because of the affinities US law shows with a Japanese case where these words seem to have been used (below Part II.D.2).

The Court of Appeals in *Great Circle* found a breach of an informal agreement resulting from negotiations for Great Circle Lines to charter a vessel owned by London-based Matheson (to transport clay to Japan). Communications were directed largely through “end brokers” in the respective cities, being agents the owner and charterer deal with directly as opposed to “intermediary brokers” who deal with the owner’s or charterer’s brokers. In that respect, then, matters were less complicated than in some negotiations in the chartering business, perhaps making it easier to find that an immediately binding agreement had been reached. Moreover, there was considerable time pressure on the parties, with only five days until the vessel was to come onto the market, from the initial inquiry. That came from Great Circle Tuesday 23 October 1979, to which Matheson counter-offered the next day, resulting in agreement on all main terms by the end of business hours: hire rate, names of parties and guarantor, vessel description, delivery, duration and redelivery, forbidden cargoes, commissions, and NYPE46 as the printed form on which details would be based.³¹⁰ Great Circle noted “\$7150 [the hire rate agreed] sub[ject to] details”. Great Circle’s brokers sent their New York branch a telex mentioning “we fixed [subject to] details”, and on Thursday sent to Great Circle a “fixture recap[itulation]” at the latter’s request. On the same day, Matheson sent a telex stating “Owners suggest if charterers require a hire survey, that it is undertaken at this shipyard on Saturday morning”. The Court held this was “in conformity with the custom of the industry not to permit an on hire survey until a ship has been chartered”,³¹¹ implying that partial performance or subsequent conduct by

³⁰⁹ Above n 11.

³¹⁰ Unlike the Gencon charterparty, which requires an election between multiple alternatives regarding some terms, the NYPE46 form just contains blanks. The Court of Appeals was prepared to fill or ignore such blanks, so it seems likely that it would have simply selected one alternative for the parties had it been faced instead by a Gencon charterparty “subject to details” (compare Steyn J in *The Junior K*, above n 11).

³¹¹ *Great Circle*, above n 105, 124.

Matheson also pointed to an immediately binding agreement having been reached the previous day, despite being “subject to details”. Also on Thursday, however, Great Circle sent Matheson a lengthy telex suggesting numerous changes to the NYPE’s standard printed clauses and requesting that 33 new paragraphs be added, and even offering to renegotiate some of the main terms on which the parties had agreed. Matheson accepted some on Friday, but rejected others and proposed arbitration in London rather than New York. When Great Circle failed to meet a deadline set for Saturday 27 October, Matheson advised that the charterer was in default and chartered the vessel to a third party instead. Great Circle sued successfully in the District Court.

Matheson appealed basically on two grounds: that the District Court had not ruled on whether there had been agreement on all essential terms, and that the phrase “subject to details” created a condition subsequent which failed. Presumably Matheson could not argue that the phrase created a condition precedent, giving rise to no obligations whatsoever, because it had notified Great Circle that the latter was “in default” – implying some form of legal agreement had been reached. The Court of Appeals rejected the appeal. There had been agreement on the essential terms because a fixture had been confirmed. The latter concludes a first stage of negotiations in chartering whereby agreement is reached on main terms, to be followed by a second stage in which parties agree to negotiate on remaining details. The Court also rejected Matheson’s second argument, that if no agreement could be reached during this second stage (as happened in this case) “all contractual duties were extinguished”. Focusing on “the keystone of all contract law, which is, of course, the intent of the parties when viewed in a fair and reasonable manner under all the circumstances”, the Court held that the parties intended that “if the continuing negotiations resulted in agreement over changes in the NYPE46, the amendments would of course govern. If the negotiations failed, however, the terms of the printed form would continue in force”. It also rejected an additional point raised by Matheson, namely that “owing to its London situs its understanding of the terminology of use in the industry was different than that found by the trial court”, arguing that a London treatise discusses the functions of chartering brokers in a similar way with “fixing letters” serving to summarise principal terms.³¹²

This approach is consistent with some earlier jurisprudence of the Court of Appeal, although the analysis and discussion in those cases was much less extensive. In *Interocean Shipping Co v National Shipping and Trading Corporation et al*,³¹³ the Court found insufficient grounds to question the trial Court’s rejection of National’s argument that negotiations “subject to details” in the Mobiltime charterparty meant that agreement had to be reached on that form’s terms before a binding agreement arose at all (including a reference to New York arbitration). This appears to have been an argument that the “subject to details” imposed a condition precedent. Anyway, it deferred to the trial Court’s preference for the evidence of a New York broker who

³¹² Above n 105, 125. Under general contract law principles, Great Circle anyway should only be bound by an idiosyncratic understanding by Matheson, one based on norms or practices in London, if Great Circle actually shared that in this case, which was never alleged and presumably could not be proven. Compare generally D W McLauchlan “A Contract Contradiction” (1999) 30 VUWLR 175.

³¹³ (1975) 523 F 2d 527 (2d Cir).

testified that “sub details” meant.³¹⁴

Placing the agreed terms of the fixture in the form and eliminating the inapplicable ones. ... the phrase contemplated filling in the form with the various technical specifications of the vessel ... filling in the blanks -- not reviewing the whole negotiations again.

A similar understanding is evident in *Atlantic and Great Lakes Steamship Corp.*,³¹⁵ where the fixture was termed “o[ther]wise Genjapscrap [vessel charter form] sub[ject to] details”, although the only argument made – quickly rejected by the Court – was that this indicated that no agreement had been reached on all essential terms. That was also the issue focused on in *re Pollux Marine Agencies Inc.*³¹⁶ Pollux had sent the respondent Dreyfus a fixture recap telex on 30 July, stating “we confirm having fixed the foll[owing] with you today subject details of Eldece Time”. The latter was understood to mean the respondent’s pro forma time charter which incorporated terms from the NYPE standard form, which included a clause providing for arbitration in New York. Based on witness testimony, including that of staff of Dreyfus’ own agent, the Court held that a binding charterparty had been concluded because all main terms had been agreed upon sufficiently by 30 July. Those included a “boycott clause” negotiated between 27-30 July, but which later led to Dreyfus withdrawing from the deal.

In several subsequent cases, New York district courts have favoured the *Great Circle* two-stage analysis of charterparty negotiations to uphold fixtures agreed to be “subject details”. Admittedly, the cases often have involved primarily other issues. One example is *Maritime Ventures International Inc v Caribbean Trading and Fidelity Ltd.*,³¹⁷ in which Maritime successfully claimed demurrage under a charterparty. Potter J held that a binding agreement is reached when a fixture is negotiating embodying main terms. He held that the plaintiff did not need to rely on that in this case, however, because “subsequent events further confirmed the existence of the charterparty”.³¹⁸ Brokers had subsequently drafted a formal document and sent it to Maritime for signing, and even before Caribbean had seen that they had arranged for payments to be made to Maritime pursuant to the charterparty. The main issue was instead whether it bound certain third parties.

Likewise, in *Keystone Shipping Co v Companie Marocaine de Navigation*,³¹⁹ the binding force of fixtures was not even disputed. This was so even though for one shipment, for instance, a fixture had provided that “all offers and subsequent contracts be subject to PA No Mo 3009”, incorporating by reference a North American Grain Charterparty form. Performance under these fixtures presumably made it futile to argue that no binding agreement had been entered into, a main issue therefore becoming one of agency law. A similar situation arose in *In re Arbitration between Herlofson Management A/S v Ministry of Supply, Kingdom of Jordan*.³²⁰ That case turned on the

³¹⁴ Above n 313, 535.

³¹⁵ (1977) 565 F 2d 848 (2d Cir).

³¹⁶ (1978) 455 F Supp 211 (SD NY).

³¹⁷ (1988) 689 F Supp 1340 (SD NY).

³¹⁸ Above n 317, 1346.

³¹⁹ [1990] AMC 2971 (SD NY).

³²⁰ (1991) 765 F Supp 78 (SD NY).

scope of authority of the Ministry's agent, with no attempt to argue the lack of binding force for a fixture expressed to be "subject [charterparty] pro forma details which owners will review in the am". In *US Titan Inc v Guangzhou Zhen Hua Shipping Co Ltd*,³²¹ Conner J only mentioned that a fixture recap telex created an agreement "based on" the Shell Time 4 Charterparty, leaving it unclear if the agreement had been made "subject to" that form. In any event, there was no argument that formalising that form was a prerequisite to liability.

*Samsun Corporation v Khozestan Mashine Kar Co*³²² was also not directly on point. Negotiations about a charterparty were originally qualified as "after fixing main terms other Gencon". Then, however, Samsun's London agent proposed "otherwise [Samsun's Charterparty] details". Haight J held that "as the vehicle for a binding agreement to arbitrate, this phrase is too indefinite to be enforceable", since Samsun could readily have chosen either New York or London as the arbitral venue (and in fact had done so recently, selecting the former for one fixture and the latter for a second). This was also "of foreseeable interest" to Khozestan, an Iranian company, which "given the present political climate, expresses an understandable preference not to arbitrate disputes in the United States".³²³ All other cases discussed above were distinguished in that the arbitral venue was understood or identifiable, either expressly or by reference to one specific standard charterparty. Yet this point can be seen as analytically distinct, going to uncertainty of contractual obligation, rather than the notion that binding contractual obligations were not intended until fully formalised. Indeed, the latter point was not specifically argued in this case. Probably such an argument would have met with little success anyway, as some general comments by Haight J (followed by extensive citations to *Great Circle*) seem to show:³²⁴

The custom pertinent to this case is that of "fixing 'sub details'". Translated into a landsman's language, the phrase means entering into a binding charter of a vessel ("fixing") subject to details which, while to be agreed to later, do not prevent the prior creation of a binding contract. "Sub details" means "filling in the blanks -- not reviewing the whole negotiations again" (*Interocean Shipping Co v National Shipping and Trading Corp* 523 F 2d 527, 535 (2d Cir 1975). Wilford, Coghlin, Kimball, *Time Charters* (3rd ed) describes the practice at page 30:

"The widespread practice of fixing 'sub details' ordinarily will not be construed as requiring agreement on each and every charter term before a binding contract is created. Once there has been agreement on essential terms, a contract is deemed to exist and the negotiation of remaining details becomes a ministerial task."

Thus, while there have been few cases directly on point in Second Circuit Courts since *Great Circle*, its approach clearly has remained influential despite the sharp criticism from Steyn J in *The Junior K*.³²⁵ Just as Steyn J in 1988 was aware of legal developments in the major shipping centre of New York, it seems likely that New

³²¹ (1998) 16 F Supp 3d 326 (SD NY).

³²² (1996) 926 F Supp 436 (SD NY).

³²³ Above n 322, 441.

³²⁴ Above n 322, 439.

³²⁵ Above n 11.

York courts were aware of the evolving line of cases decided in London. If so, they may have perceived the custom to be different in New York, but the global reach of the shipping trade makes this unlikely to be true (above Part II.A.4). Rather, maintaining a more substantive approach – not giving primacy to words like “subject to details” – is more likely to be related to a similar tendency maintained by the Second Circuit over many decades (above Part II.C.1) and indeed other parts of the US (Part II.C.2), as well as the more overall substantive orientation which has long prevailed in contract law theory (above Part Two Introduction) and the legal system more generally in the US (above Chapter One).

Indeed, the influence of *Great Circle* on this point seems to have been so influential in New York that counsel seem no longer even to advance the argument that phrasing such as “subject to details” should mean that no binding obligations were intended. In some cases, such wording may not have been used; but the lack of clarity on that point may also be an indication that these arguments are either not being made, or make little or no impression on judges in the Second Circuit. What, then, of other jurisdictions in the US?

Again, there are few cases directly on point, but *Great Circle* and subsequent case law appear to have remained influential further afield. In *EAST Inc v M/V Alaia etc.*,³²⁶ for instance, EAST successfully applied for a maritime lien over the *M/V Alaia*, owned by Advance, based on a binding charterparty fixture. The key facts are helpfully summarised by Schwartz J:³²⁷

EAST through its broker Estero in Rotterdam, and Advance through Matheson in London, had agreed to the main terms of a time charter on Friday 16 October 1987, and agreed to remaining details the next morning [with an charterparty, exhibited by EAST and Estero, following the 1946 New York Produce Exchange Form]. ... The next business day, Monday 19 October, EAST's broker sent a fixture recap of all the negotiations.

Perhaps negotiations had not been phrased as “subject to details”, for then it would have been predictable for Advance to raise the defence that this indicated a lack of intention to be bound – especially bearing in mind that its agent was the same English firm, Matheson, which had tried a similar defence in the *Great Circle* case. Instead, Advance argued that it could not be bound because it had not signed EAST's exhibits of the original charterparty and the fixture recap. Schwartz J quickly rejected this, stressing that charterparties could and were concluded informally, citing *Interocean* for the proposition that they “come into existence when the parties have a meeting of the minds on the essential terms of the contract”.³²⁸

In *PEP Shipping Scandinavia APS v Noramco Shipping Corp.*,³²⁹ Brown Clement J cited *EAST* for the propositions just mentioned, *Great Circle* for the two-stage analysis of charterparty negotiations, and *Herlofson* for the proposition that:³³⁰

³²⁶ (1987) 673 F Supp 796 (ED La).

³²⁷ Above n 326, 798.

³²⁸ Above n 326, 799 (citing *Interocean*, above n 313).

³²⁹ [1997] AMC 2933 (ED La).

³³⁰ Respectively, above n 326; n 115; n 320.

the fixture is considered binding when it is 'subject to details', that is, even when the less important terms of the agreement are unresolved ... Even if the parties do not reach a further agreement on the details, the pro forma still governs.

In this case, an independent broker had sent PEP, the owner's agent, a fax to all involved which confirmed all the main terms of the charter. (Again, it is unclear whether or not the negotiations thus far had been expressed to be "subject to details".) A few days later, PEP sent another fax enclosing a copy of a charterparty it had used previously with the owner, stating that Noramco (the charterers) had "accepted as pro forma w[ith] logical alterations", except for the arbitration clause which was to be changed from London to New York. The next day PEP faxed back that it was "pleased to accept with logical and natural alterations and with main terms as already agreed always to apply". It suggested a number of additions, however, which Noramco later claimed gave it the right to back out of the deal. Applying the abovementioned principles, Clement Brown J held that this disagreement arose too late, at the second stage of negotiations, when Noramco was already bound. She distinguished *Samsun*³³¹ on the grounds that here the parties had been put on enough notice as to arbitration.

One important case, which does grapple precisely with the issue of whether the parties to an informal agreement intended to be immediately bound, at appellate level, is *Magallenes Investment Inc v Circuit Systems Inc.*³³² The Court of Appeals for the Seventh Circuit held binding a ship sale from a Hong Kong based company, via its London broker, to an Illinois company using a Florida based broker. This was despite the buyer's first telex offer including paragraph 11 stating "otherwise subject mutual agreement contract format which to incorporate arbitration London with English law to apply". Distinguishing other Seventh Circuit cases like *Empro*, Cummings J held that:³³³

paragraph 11's "subject" clause is far less specific than clauses in other agreements where courts found that a binding contract was conditioned on some later event. Paragraph 11's "subject" clause has no subject. It leaves only the contract's "format" unresolved, and says nothing about whether the telexes or the MOA will be the binding agreement. ... *Lambert Corp v Evans* 575 F 2d 132 [136] (7th Cir 1978) shows that the word "subject" does not have unvarying, talismanic significance in contracts analysis. There we found that the term was "nothing more than an inartful phrasing of the parties' understanding that their agreement would be formalised by attorneys.

The Court of Appeals also considered expert evidence submitted by a broker for the seller, which argued that "brokers negotiate ship sales in two stages: telexes are used to bind the main terms of the sale and the remaining details are drawn up in a memorandum of agreement. ... The usual and customary practice in the [shipping] trade is that a sale/purchase becomes binding upon the broker's agreement to the essential terms as expressed in this case in [the telexes of August 24]".³³⁴ This was held to be "corroborated by a line of cases which recognise that the ship chartering business agrees

³³¹ Above n 322.

³³² (1993) 994 F 2d 1214 (7 Cir).

³³³ Above n 332, 1218 (*Empro*, above n 298).

³³⁴ Above n 332, 1220.

on the essential terms of a charter in a binding telex and reserves the details for later negotiation”, citing *Great Circle*. The later cases of *Keystone* and *Herlofson* are then cited as well, in response to the buyer’s contention that the ship sale and ship charter business are different trades, to “suggest that sales and charters share certain terminology”.³³⁵ The Court repeatedly goes beyond a narrow focus on phraseology, however. Other important evidence suggesting that an immediately binding agreement was intended included that fact that closing telexes did not say when a MOA was to be signed, suggesting that this was just an administrative matter, particularly when all earlier telexes had specified deadlines for actions. The correspondence also traversed many matters, “not just price and weight but detailed terms of delivery such as the ship’s engine type and the metal content of its propeller”.³³⁶ Finally, the Court noted that the buyer’s own broker had tried to get it to go through with the agreed deal when it heard that the buyer was trying to withdraw.

In short, then, although the Court of Appeals for the Seventh Circuit did not cite *RG Group* or related case law from the Second Circuit, it covered very carefully the sorts of factors laid down therein and discussed extensively above (Part II.C.1). Those include the wording used; common contracting patterns and formalities in the trade; the level of detailed agreement reached; and subsequent conduct. That broad-based balancing approach, aimed at determining the parties’ intentions in all the circumstances of the particular case, is also consistent with that developed in courts in Illinois and other Circuits with respect to a range of other contract types. It reinforces a sharp difference with the more formal approach evident in English law, in maritime cases like *The Junior K*³³⁷ but also more generally. The US approach also contrasts with that preferred by many courts and commentators in New Zealand law, in areas such as land sales and complex commercial transactions.

II.D Japanese Law: Even More Entrenched Substantive Reasoning

In a study on contract law and practice in Japan, published in 1967 and widely read in an English translation done in 1974, Takeyoshi Kawashima argued that even “among businesses ... there are many occasions where there is no way to clarify whether or when a contract for a business transaction has been formed”.³³⁸ He followed this pronouncement with the now well-known example of a case decided in 1957 involving two of Japan’s largest companies, *Marubeni Iida KK v Ajinomoto KK*.³³⁹ Therein the Tokyo District Court upheld an informal agreement for the sale and purchase of about Yen 1.8 billion’s worth of imported soyabeans, rejecting Ajinomoto’s argument that it was only intended to become legally binding upon completion of contract documentation in Japanese. Kawashima viewed such informality in contracting as evidence of weak contract consciousness in Japan, consistent with Japanese parties who

³³⁵ Above n 332, 1220-1221 (*Keystone*, above n 319; *Herlofson*, above n 220).

³³⁶ Above n 332, 1219.

³³⁷ Above n 11.

³³⁸ T Kawashima (C Stevens trans) “The Legal Consciousness of Contract in Japan” (1974) 7 L in Japan 1, 5.

³³⁹ Above n 27: 31 July 1957, Tokyo District Court (8 Kaminshu 1366) [*Marubeni*].

do conclude written contracts not “stipulat[ing] in a detailed manner the rights and duties under the contract”.³⁴⁰ Moreover, he cited a lengthy extract from the Court’s judgment, including the following:³⁴¹

generally the existence is well-known of a well-known custom [sic] in our country’s society that the drawing up of a contract document incorporating the agreement is disliked. We acknowledge that Honen Oil Refinery KK, which is one of our country’s foremost oil refiners, does not demand written contracts ... we hold that in the purchase and sale of imported freight, a contract has been formed when there has been a concurrence of intentions of the parties; that the commercial custom asserted by the defendant does not exist; and that although ... it is normal for a written contract to exist, such a written contract is considered only as an instrument for verifying the existence of an agreement.

Hiroyuki Ota argued compellingly against Kawashima’s notion that informality in contracting was widespread even among large firms, at least by the mid-1980s when he was writing. For very many transactions, Ota pointed out first, the use of contract documentation is required directly or indirectly.³⁴² Written contracts are express prerequisites for labour contracts of various types, for instance, and the majority of contracts involving central or local government. Other laws (covering railway business, fair trading, real property developments, and so on) allow parties to conclude rules or arrangements, implying written documentation. Much legislation has required one contracting party or an intermediary (involved in utilities, travel or accommodation, insurance and guarantees) or forestry or agricultural cooperatives to create a standard form contract or rules, whose contents are checked by administrative bodies. Some civil courts have said these will bind businesses unless they expressly exclude them. Legislation on land and fishing rights, or involving consumer protection or subcontracting, require writings to be delivered within certain periods setting out certain key terms. This encourages written documentation in dealings, with only 10% of 101 construction contracts in his 1980 survey having been concluded orally, for instance.³⁴³ Even without legislative requirements or indirect pressure, Ota argued secondly, written contracts are usually prepared by one party in many types of transactions (such as leases of movables, franchises, banking and some guarantees for loans³⁴⁴), and often in many

³⁴⁰ Above n 338, 17. See also above Part One Introduction.

³⁴¹ Above n 338, 6 (translation by Stevens, emphasis by Kawashima).

³⁴² H Ota “*Kosho Katei ni okeru Keiyaku no Yakuwari - Nichibei no Hikaku wo Chushin ni shite* [Functions of Contract in Negotiation Processes: Focusing on Comparisons of Japan with the US]” in K Fujikura and R Nakao (eds) *Kokusai Masatsu - Sono Hobunkateki Haikei [International Friction: Its Legal Culture Background]* (Nihon Hyoronsha, Tokyo, 1987) 203, 227-242.

³⁴³ H Ota “*Horitsu Mondai to Shimin - Sendaishi ni okeru Jittai Chosa* [Citizens and Legal Problems: An Empirical Study in Sendai City] (2)” (1983) 46 *Hogaku* 41.

³⁴⁴ Specifically, those by the *Shinyo Hosho Kyokai* (Association for Loan Securities): Ota, above n 342, 229. For a case involving its Kyoto entity, see below at the end of Part II.D.2 (*Kyoto Shinyo*, n 400).

The use of written documentation relating to financing or refinancing agreements also is encouraged significantly by various procedural advantages in having relevant contracts notarised. In 1993, for instance, around three-quarters of the 0.67 million notarised contracts were for this field. See T Matsumoto “*Kinsen Saimu to Kosei Shosho* [Monetary Obligations and Notorised Documents]” (1994) 479 *Hogaku Seminar* 76, 76-77.

others (distributorships, publishing, broadcast performances, and so on). Thirdly, he noted that in some areas written contracts are not used (as in the advertising business), and that they often may not be used widely for low-value exchanges or repeated commercial dealings (although written orders and so on may be exchanged). Ota argued, however, that these patterns can be explained by merits and demerits of written contract documentation, similar to those proposed to explain instances of informality even in dealings among US companies.³⁴⁵ Ota also pointed out that in nation-wide surveys carried out in 1973 and 1978, less than 10% of respondents agreed with the proposition that “exchanging contract documentation and so on is a sign that one is not trusting the other; it is not needed when there is mutual trust”.³⁴⁶ Although not noted, that attitude runs directly against another of Kawashima’s assertions in his book chapter and its 1974 translation.³⁴⁷ Ota concluded with a very different view, but also a more careful and qualified one:³⁴⁸

Sealing [like signing] is a sort of ceremony, and I think many Japanese in many types of transactions would feel that the deal is completed with that, and thereby responsibility must be taken for the contents of that to which one has agreed. Of course, there is no small number of areas in which the deal is thought to be completed orally (such as stock trading, merchants ordering from one another in repeated dealings), and even in other areas many Japanese may feel responsibility even for oral agreements (although there may be differences in degree). Yet, “to affix one’s seal” is one important distinguishing line in contract negotiations. Its function, of forcing the party doing so to realise that he or she can no longer prevaricate, cannot be denied. Conversely, therefore, it can be inferred that the ceremony of affixing one’s seal on contract negotiations is frequently used to ensure that the agreement is performed smoothly in the future.

Without more detailed empirical studies in various areas of contracting, preferably comparing Japan with several other countries, no generalisations can be drawn about the extent to which “the Japanese” prefer more informality in contractual relationships.³⁴⁹ Of more interest for this Chapter, comparing approaches to legal reasoning, is the response of Japanese courts and legal commentators to disputes involving informal agreements. The key question is whether (as in the US) they adopt

³⁴⁵ Ota, above n 342, 229-230, 231-233 (illustrating this with the advertising business, stressing for instance the need for flexibility given tight time constraints), citing S Macaulay “Non-Contractual Relations In Business: A Preliminary Study” (1963) 28 Am Socio Rev 55.

³⁴⁶ Above n 342, 230 (translation by the present writer). About 90 percent agreed with the further proposition that “no much how much one trusts the other, for contract as a contract [*keiyaku wa keiyaku to shite*] it is better to exchange documentation”. As Ota correctly notes, however, it is difficult to know what respondents made of the word “contract” [*keiyaku*] in this context. (Generally on the difficulties with the nation-wide surveys, see also S Miyazawa “Taking Kawashima Seriously: A Review of Japanese Research on Japanese Legal Consciousness and Disputing Behavior” (1987) 21 L & Soc Rev 219.) Compare the responses from Japanese students, nonetheless, to Question A of the Kato/Young survey, discussed below Chapter Four Parts III.B and III.C).

³⁴⁷ Kawashima, above n 338, 4: “Ascertaining ... points [at which a contract was formed] between the parties who made the contract or adopting certain means to accomplish this (such as writing or a deposit) can be regarded as an expression of one form of mistrust towards the other party. Instead, it is thought better not to worry about such matters”.

³⁴⁸ Ota, above n 342, 231.

³⁴⁹ See also M Young “Japanese Attitudes Towards Contracts: An Empirical Wrinkle in the Debate” (Paper presented at “Japanese Law Online: A Symposium”, Nagoya, 9 March 1999).

the more substantive approach of examining a range of factors and particular circumstances in each case to determine the parties' intentions, or whether (as in New Zealand or England) they develop presumptions. The following analysis shows that the approach in Japan decidedly favours the former approach, consistently with the general thesis advanced.

Cases involving sales and leases of land (Part II.D.1) are distinguished from other cases, including sales of goods, ships, timber, and some services (Part II.D.2). This facilitates comparisons with developments in other jurisdictions (above Parts II.A, B and C). It is also in line with the need for categorisation suggested by Ota and other Japanese commentators. For instance, in a recent comprehensive study of contract formation generally – covering sales of land, sales of goods, and leases of land – Seiji Ikeda has criticised the Tokyo District Court's argument in *Marubeni Iida v Ajinomoto* as to the Japanese disliking formal contract documentation. He suggests that "considering land sales, [that] rather oversteps the mark [*isamiashi de aro*]"³⁵⁰ Earlier, too, Shinichiro Michida had praised the Tokyo District Court's holding, arguing that such instances showed a *strong* contract consciousness in Japan, bringing the law in line with the moral expectation in Japan that one should keep one's promises.³⁵¹ On the other hand, Michida noted a "new formalism" in Japanese contract law and practice created by the various legislative regimes discussed also by Ota.³⁵² Further, analysing the 1975 judgment of the Tokyo High Court in *Suehiro v Seisho Gakuen*,³⁵³ Michida suggests that this is reflected in informal agreements during negotiations for the sale of land being less likely to be found to entail an immediately binding contract.³⁵⁴

³⁵⁰ S Ikeda *Keiyaku Kosho no Haki to Sono Sekinin [Liability for Breaking Off Contractual Negotiations]* (Yuhikaku, Tokyo, 1997) 220. This is a stronger criticism that it may seem in this English translation, for the term *isamiashi* comes from *sumo* wrestling, in which putting one's foot out of the ring means losing the bout outright.

³⁵¹ Michida, above n 30, 203-208 (even contrasting Anglo-American law in these respects). This morality of keeping one's promises in Japan appears to be quite engrained. Kawashima himself (above n 338, 3) begins with the example of his friend's wife who reached a second oral agreement to purchase potatoes from a farmer during World War II, and protested vigorously when the farmer did not deliver after she came to get them.

³⁵² Michida, above n 30, 209-214. See also Ota, above n 342.

³⁵³ *Suehiro*, above n 32: 30 June 1975, Tokyo High Court (790 Hanrei Jiho 63).

³⁵⁴ This stress on formalities in transactions involving land appears also be a longstanding one. Kawashima's example (above n 338, 7) of Meiji Era reformist Yukichi Fukuzawa's sense that he was legally bound to purchase land, based solely on an oral agreement, appears to be an aberration. Compare T Kagawa "*Dakusei Keiyaku no Konnichiteki Igi [Contemporary Significance of Consensual Contracts]*" (1999) 77 *Kyudai Hogaku* 135 163-164 (n 20); and the Taisho Era cases mentioned below (n 360; n 361).

Although not directed specifically at land sales, moreover, in declining to discuss the doctrine of consideration in his textbook on English law published before World War II, R Masujima *English Law of Contract* (Yuhikaku, Tokyo, 1935) 2 (emphasis added) echoes both Michida and Ota (above n 312): "The idea of consideration would hardly have arisen if contracts had been mostly written as in Japan, where people had long been familiar with the solemnity of writing. The doctrine would never have originated if the habit of writing had been common centuries before the Statute of Frauds". Similarly, H Ooms *Tokugawa Village Practice: Class, Status, Power, Law* (University of California Press, Berkeley et al, 1996) 70 has stressed the importance placed on written documentation in the Edo Period (1600-1868), in the context of persistent claiming through legal processes available at the time. This contrasts with

1 Land Sales and Leases: A Presumption via “Custom”?

In the *Suehiro* case, the Court declined to award real estate broker Suehiro commission of Yen 4 million based on an agreement allegedly reached between him and defendant Seisho Gakuen for the sale of its property to a third party for Yen 3.6 billion. The parties had met at the bank financing both sides to the alleged deal, to conclude an informal agreement on those terms and including a 30% immediate down-payment, and the parties had even paid a courtesy call on the bank manager to announce their deal. They also agreed that a formal contract would be drafted, however, and this was never done because Seisho Gakuen sold the property to a fourth party first. The Court held.³⁵⁵

in a sale of property for a considerably high price, it is clear that in reality the well-settled practice [*soto teichaku shita kanko*] is to prepare a contract in writing which incorporates standard form conditions [on liquidated damages] and the [major terms] of the transaction, and make a payment of earnest money or part of the sale price. This practice must be given due weight; if one adopts this position and [to the extent that] parties in a real estate sale transaction are regarded as following the practice, then it is appropriate to view preparation of a contract in writing and payment of part of the sale price as essential elements in the formation of the sale. In this case there is no clear manifestation of an intent not to follow the practice [*kanko*] outlined above. Because the parties agreed, in line with usual practice [*kanko*], to prepare a contract in writing and pay part of the sale price, failure to do so must result in failure to form a contract of sale.

Michida argues, as does the anonymous comment at the start of the case report, that “if a ‘well-settled practice’ is ‘clear in reality’, then a general provision of the Civil Code regulating juristic acts [including contract formation] applies”.³⁵⁶

Article 92. If, in cases where there exists a custom [*kanshu*] which differs from any provisions of laws or ordinances which are not concerned with public policy, it is to be considered that the parties to a juristic act have intended to conform to such custom, and that custom shall prevail.

Michida later cites a 1982 edition of an annotated compilation of legislation, which derived from two Taisho Period (1912-1926) Great Court of Judicature decisions the proposition, in respect of article 92, that.³⁵⁷

In relation to the practice of raising land rents (*chidai neage*) in metropolitan Tokyo, a person in the position of expressing an intention to transact in this way must be taken to have such an intention unless they make a particular objection ... The party asserting the existence of an

earlier research suggesting that there was no sense of justiciable rights during this period, nor of written “contracts” as part of that sense (see for example D F Henderson and P M Torbett “Contract in the Far East: China and Japan” in A von Mehren (ed) *Contracts in General* (Mohr, Tuebingen, 1992)). Clearly, Japanese legal history should be reexamined carefully on these points; but that cannot be pursued any further in this thesis.

³⁵⁵ Above n 32 (as translated by Taylor in Michida, above n 30, 219-220; but with the present writer’s insertions or substitutions in square brackets).

³⁵⁶ Michida, above n 30, 219 (translation of art 92 by Taylor; but with the present writer’s insertion).

³⁵⁷ Michida, above n 30, 222.

intention to follow [such] practice is not required to show special proof of this.

Applying these principles, Michida argues that Suehiro Gakuen did not have to prove the practice of drawing up a contract in writing, and approves of the Tokyo High Court presuming that Suehiro followed that practice.

If this interpretation is correct, it means that Japanese law is adopting a distinctly formal approach to this issue, similar to that in *Carruthers*³⁵⁸ – at least as interpreted by some courts and commentators in New Zealand (above Part II.B.1). That is, a practice is elevated into presumption or prima facie rule which strikes down informal agreements unless evidence is adduced to rebut such a presumption and to show that the parties instead intended to be bound immediately, rather than only upon execution of the formal contract documentation.

In fact, a close analysis of earlier and later case law relating to informal agreements shows that this interpretation of the *Suehiro* judgment should not be generalised in that way. None of that case law talks of a *kanshu* or “custom”, as does article 92; and no judgments even refer to that article. Instead, they mention only “practices” (*kanko*) which are general, usual or normal – as did the Tokyo High Court in *Suehiro*, it should be stressed – and sometimes practices in the sense of a course of dealing between the particular parties. These references, furthermore, are almost invariably presented as only one factor to weigh in all the circumstances, in deciding what the parties truly intended in the particular case. Although the factors are not set out and applied as clearly as in Second Circuit courts, for instance, as in the US the approach in Japan in cases involving land sales and leases, therefore, is the more substantive one.

This approach is longstanding, dating from at least the Taisho Period (1912-1925), an era during which the Japanese courts were more vigorous in expressly invoking customs under article 92 to decide certain other contract law points (for instance, land lease rent increases or termination issues).³⁵⁹ In *Arakawa v Matsuhira*, for instance, the Tokyo Court of Appeals ruled that no informal contract was formed for the sale of real property for Yen 4,000, holding that:³⁶⁰

in the first place, there is practice [*kanko*] generally observed in such transactions, of the parties receiving earnest money or drafting a transfer agreement [*joshō*], to avoid later differences in views [*igi*] and to secure formation or performance.

Since it was admitted that neither money nor a written agreement had been provided, the Court refused to accept Matsuhira’s contention that a binding informal contract had been concluded. However, it also examined quite closely the testimony of all witnesses and the surrounding circumstances. For instance, Arakawa was a small-scale dealer in

³⁵⁸ Above n 14. Indeed, it could be even more formal, because not limited to situations in which parties negotiate land sales with lawyers or real estate agents.

³⁵⁹ See for example J O Haley *The Spirit of Japanese Law* (U Georgia Press, Athens (Georgia), 1998) 145. Compare T Awaji “*Jijitsutaru Kanshu [Custom as Fact]*” in T Kawashima (ed) *Chushaku Minpo* Vol 3 (Yuhikaku, Tokyo, 1973) 98. Awaji’s summary of the case law also suggests that generally Japanese Courts generally have applied art 92 sparingly, and increasingly so during the 20th century.

³⁶⁰ 25 December 1914, Tokyo Court of Appeals (925 Shimbun 11) 11.

wood products, arguably with insufficient funds to purchase Matsuhira's expensive property and insufficient income to pay interest on advances for the purchase price, and Arakawa had not even inspected the property. The Court therefore seemed to use general practice only as one factor revealing the intentions of the parties, in this particular case, not to conclude an immediately binding contract. Certainly, it does not cite article 92. Nor does the Court use the latter's term of art for "custom", *kanshu*; instead, it uses the neutral term *kanko*. Consistently with this interpretation, the Headnote to the reported judgment changes the Court's phrase *kanko* to *kanrei*, also signifying "practice"; it too does not use the term *kanshu*.

Six years' later, the Chiba District Court similarly declined to uphold an alleged informal agreement for the sale of real property for Yen 5,000. In *Otsuka v Asami*, it observed that:³⁶¹

in sales of such expensive property, the parties ordinarily [*futsu*] draft a sale and purchase contract [*baibai keiyakusho*] in order to secure formation at least, or to take an earnest money or part payment. Yet in this case, with no special circumstances to be recognised, no such money was received, of course; nor was a contract drafted.

These precedents appear to have provided considerable guidance as to the principles to be applied on this issue, for no further relevant cases are reported until some fifteen years ago.³⁶² In *Takemoto Kensetsu KK & Ors v Hanayome Senta KK*, the Kyoto District Court rejected a claim that a binding option contract to purchase land was formed upon execution of a "Real Estate Agreement (*fudosan baibai kyotei*)". It noted that "in the real estate business it is normal [*tsujo*] to use a Sales Option Contract document (*baibai yoyaku keiyakusho*)" and "to pay earnest money" (rather than the defendant paying Yen 60 million into the a bank account designated by the plaintiff, claiming as seller, as *misekin* or "show money").³⁶³ Moreover, consistently with the approach in *Arakawa* and *Otsuka* (which found an "ordinary" practice),³⁶⁴ the Court also considered other matters. It found that both parties considered that a full sales agreement and liquidated damages would breach the National Land Use Planning Law; that the more limited Agreement executed in this case was needed to overcome legal and bureaucratic obstacles involved in building a wedding banquet hall on the premises

³⁶¹ 27 May 1921, Chiba District Court (1761 Shimbun 15) 16.

³⁶² *Honda v Omiya* (Urawa District Court, 4 March 1964, 15/3 Kaminshu 477, 487) was not directly on point. It is a rare instance of *kanshu* being directly claimed in the context of sales of land, however, and the rejection of the claim also illustrates the increasing difficulty of proving custom under art 92 (compare Awaji, above n 319). Agricultural land had been compulsorily acquired by the government and then sold the defendant, who had on-sold it with usage rights (*tenyotenbai*) to a third party. The plaintiff, as original owner, claimed "consent money (*doiryō*)" with respect to the this last transaction, based on established custom (*kanshu*). The Court acknowledged that in such transactions in the region in question, the new owner gets a prior "consent" agreement in writing (*doisho* or *shodakusho*) from the old owner that the latter will not make any future claims with respect to the property, and that many such situations the former pays the latter money in the form of consent money (*doiryō*). However it held that "there was no evidence that this behaviour is customary [*kanshu*], and indeed there is insufficient evidence that it had reached the degree of certitude required by the law".

³⁶³ 20 February 1986 (742 Kinyu Shoji Hanrei 25, 29).

³⁶⁴ Above n 360; n 361.

in question; that it lacked provisions and agreements on purchase price payment method and timing.³⁶⁵

A few years later, the same Court again denied that an informal agreement had been reached, adopting a similar approach. *Momojiro KK v Kinrosha Jutaku Sabisu KK & Fureru KK*³⁶⁶ involved a chain of transactions. Fureru had offered first to buy real estate from Kinrosha. The latter then offered to buy the property from plaintiff Momojiro, who agreed (forming “the first contract” dated 26 March 1986) after buying some extra land from a third party in order to make up the parcel. The dispute arose because Fureru later told Kinrosha it would not take the parcel after all, so Kinrosha in turn refused to complete under the first contract. Momojiro successfully claimed liquidated damages from Kinrosha under this first contract. It was unsuccessful in a claim directly against Fureru, however, based on an informal “second contract” alleged to have been concluded between Kinrosha and Fureru. The Kyoto District Court held:³⁶⁷

where the agreement involves a contract for the transfer of high value real property, like that priced at almost Yen 200 million in this case, we think it is normal [*tsujo*] for appropriately constructed contract documentation to be exchanged. ... in this case there was just a Purchase Confirmation [*kaisuke shomeisho*] with the seal of Fureru alone.

The practice of more formal documenting of such sales was only one factor considered by the Court, however. It also stressed that the Confirmation document stipulated a contract date of 21 January 1986 (five days *after* that in the “first contract”) and other circumstances leading to conclusion of the alleged second agreement. When the plaintiff had contacted both defendants to report it had bought land to make up the required parcel, for instance, Fureru had told Kinrosha that it was too busy to do anything about this because of the end of year rush, so that Kinrosha should “bring things together [*hanashi o matomeru*]”.³⁶⁸

A few weeks later, in *Baba v Toifuji*, the Tokyo High Court also refused to uphold an informal agreement, using similar language and reasoning. Although this involved an alleged agreement to transfer land with associated rights to draw hot water [*hikiyuken*] for a price of only Yen 85,000, the High Court argued that “generally in sales contracts for land it is normal to draft a Sale Agreement [*hanbai keiyakusho*] or like documentation”.³⁶⁹ Reversing the Tokyo District Court, which had found the informal agreement to be binding in the circumstances, it was unpersuaded by evidence

³⁶⁵ *Takemoto*, above n 366, 29-30. It did rule that the Agreement reached was intended to require the parties to negotiate in good faith towards concluding a final sales contract based on the parameters set out in the Agreement, and that the defendants were liable for damages for breaching this obligation (including not attempting to negotiate more with local government “administrative guidance”: see above Chapter One Part II.A). See also below Part IV.

³⁶⁶ 26 January 1989, Kyoto District Court (1320 Hanrei Jiho 123).

³⁶⁷ Above n 366, 129.

³⁶⁸ Above n 366, 128. However, the Court also awarded liquidated damages against Fureru based on the doctrine of good faith, art 1(2) of the Civil Code, because Kinrosha had stepped in as intermediary at Fureru’s request and had relied on Fureru performing its undertaking with respect to the parcel. On control of liquidated damages clauses by Japanese courts, compare generally below Chapter Three Part II.D.

³⁶⁹ 1 February 1989, Tokyo High Court Court (717 Hanrei Taimuzu 155, 156).

that the alleged buyer was very friendly with the seller and her husband, and that talk of the deal had come very suddenly. The High Court also refused to believe the alleged buyer's evidence that it had agreed on boundary matters with the seller's husband and representative at their home in Kyoto, more than a month after the oral agreement was allegedly reached. This was also contrary to ordinary practice, it stated: "it is normal for there to be preparatory work to clarify dimensions of the purchased property and put in boundary markers, as well as recording its surface area, before concluding the contract".³⁷⁰ Thus, the Court used normal practice in evaluating evidence as to whose evidence was to be preferred; not to establish any legal presumption against immediate binding force, for instance under article 92 of the Civil Code.

This reasoning therefore seems very different from that laid down by the same Tokyo High Court fourteen years earlier in the *Suehiro* case.³⁷¹ However, perhaps because *Baba* was only reported on 21 October 1989,³⁷² in a judgment of 12 December 1989 in *Fujisawa KK v Honso KK* the Tokyo District Court used wording almost identical to that of the High Court in *Suehiro*.³⁷³

in a sale of land and buildings for a considerably high price, like the property in this case, it is clear that in reality the well-settled practice [*soto teichaku shita kanko*] is to at least make a payment of earnest money or part of the sale price, and to prepare a contract in writing which incorporates standard form conditions [on liquidated damages] as well as details including the timing and means for recording the transfer of property rights, the transfer and recording, the delivery, and the purchase price payment.

In this case too, however, the Court did not expressly or impliedly refer to a custom or to article 92. Instead, it discussed many other factors pointing to the conclusion that the parties had not intended to be immediately bound in the circumstances. Perhaps most tellingly, the same two parties had formally sealed a "Real Property Sales Contract" (*Fudosan Hanbai Keiyakusho*) recording their agreement to purchase adjacent prime real estate in Shibuya (central Tokyo) for Yen 3.2 billion, with the purchase price seemingly paid in full at the meeting in April 1986; but the agreement in dispute was simply headed "Memorandum" and recorded only that Honso would sell to Fujisawa (apparently, the well-known Yodoyabashi Camera store chain) the adjacent property for Yen 150 million "within two years", with no down payment made. The Memorandum was also not talked about at the meeting. Fujisawa's director had previously been advised by their lawyer, involved quite early on in the negotiations, that the director should sign the Memorandum. It may have been a significant admission on the part of the lawyer that he had "thought the terms [of the Memorandum] were concise [*kanryaku*]"³⁷⁴ Fujisawa also knew that the property at issue had a Toyota dealership as a long-term tenant, requiring negotiations as to its rights; but, the Court stressed, Honso had been careful not to disclose specific details about that lease. Finally, the Court noted that nothing further was done after the meeting until a surveyor, who had worked for

³⁷⁰ Above n 369, 156.

³⁷¹ Above n 32.

³⁷² Above n 369.

³⁷³ *Fujisawa*, 731 Hanrei Taimuzu 196, 199. Compare *Suehiro*, as quoted above n 355.

³⁷⁴ *Fujisawa*, above n 373, 198.

both parties, was appointed about 18 months later.³⁷⁵

In *Shananko KK v Hoteru Nyu Jyapan KK*, decided less than two years' later (with *Baba* reported), the same District Court just referred to what was "normal" (as in *Takemoto Kensetsu*) rather than any "well-established custom" (referred to in *Fujisawa*):³⁷⁶

No formal contract document was drafted regarding the agreement in this case. It is normally unthinkable [*tsujo kangaerarenai*] that plaintiffs and defendants would conclude a final agreement without a formal and detailed contract document, because for a deal like that involved in this agreement to be formed would mean expectations that contract terms naturally would have to become complex, in such a large-scale transaction for a very expensive property.

Yet again, no reference was made to *kanshu* or custom in the sense of article 92. Again, moreover, many factors were then weighed in concluding that Shananko (incorporated in Japan but owned and operated by Hong Kong tycoon, Mr Wai) had not concluded an immediately binding agreement in 1986 for the lease of prime real estate in Tokyo involving a huge Yen 200 billion loan from Hoteru Nyu Jyapan. This was originally planned as a purchase but was changed to a lease for tax reasons; the property also had a lessee, requiring negotiations to its rights; Hoteru's director who agreed to the deal was being prosecuted for other matters, so it was not surprising that later Hoteru's board turned out to be hesitant in proceeding; and when he then asked Mr Wai to defer the transaction for a year, both parties started to negotiate through lawyers, who drafted formal contract drafts. Finally, in 1994, the Tokyo High Court confirmed this approach in *Kono & Ors v Shitani Kenko KK*:³⁷⁷

In contracts for the sale of land, contracts in writing are normally drafted [*tsujo*]. It is clear that a contract is usually [*tsune ni*] not formed if and when the contract in writing is drawn up, unless the parties intended it to be formed by means of a contract in writing being drafted. In the present case too, it can be inferred [*suinin*] that a contract in writing was expected to be drawn up; but there is insufficient evidence to show that the trial Court plaintiffs (and present respondent) intended a contract to be formed only upon and by means of a contract being drafted.

Many factors, considered in earlier and subsequent cases in Japan, to deduce the parties' intentions, supported the conclusion that the informal agreement was intended to be immediately binding.³⁷⁸ Admittedly, many of these factors are present in land sale cases

³⁷⁵ It did find that the Memorandum created a valid option agreement (*yoyaku*) to purchase the property within the two years, holding that this was exercised by bringing suit in February 1988. Oddly, Honso did not argue that an option agreement was not intended either, but only that the option had not been validly exercised. Perhaps it thought it had a strong defense based on the doctrine of changed circumstances, because by the end of the two-year period the market value of the property had almost quadrupled. However the Court rejected this defense, finding that Honso had set the original option price having anticipated an increase in market prices. As the anonymous Headnote commentator notes (*Fujisawa*, above n 333, 196), this reinforces views that Japanese courts "are in fact very cautious to apply [this doctrine] to excuse promisors". See also below Chapter Four Part II.C.

³⁷⁶ 30 August 1991, Tokyo District Court (783 Hanrei Taimuzu 142, 145). Compare *Baba* (above n 369) with *Fujisawa* (above n 373).

³⁷⁷ 23 February 1994, Tokyo High Court (1492 Hanrei Jiho 93, 97).

³⁷⁸ This was a dispute among six heirs to the property in question, including the four plaintiffs,

in other jurisdictions; but the Court here (and in other cases in Japan) did not begin with a presumption, as many came to do in New Zealand (above Part II.B), or focus on specific phraseology as in English cases involving the sale of land (Part II.A.1).

Likewise, for instance in *Kyoshin Soko KK v Kyotofu Shinyo Nogyo Kyodokumiai Rengokai*,³⁷⁹ the Kyoto District Court enforced a Memorandum (*oboegaki*) concluded on 25 March 1965 when Kyoshin was under pressure for preferential tax treatment to sell the property by 31 March. In that case, moreover, the Memorandum provisions had ended with a Clause 7 stipulating that “the parties shall negotiate on any other necessary matters and provide for them in a formal contract document”.³⁸⁰

Thus, Michida and the anonymous case note editor for the *Suehiro* case³⁸¹ seem to have gone too far in suggesting that the Tokyo High Court in that judgment were attempting to lay down a general legal presumption against immediate binding force of informal agreements for the sale of high priced land. This survey of almost seventy years of informal agreements for the sale of land shows that some courts have

who engaged a lawyer and eventually took the matter to Family Court mediation. The mediation did not proceed smoothly. Concerned about the accrual of penalty inheritance taxes, the four plaintiffs thought a sale of the land and some other property might speed up the mediation process. On 30 March 1990, they and their lawyer met with Shitani's senior executive director (*senmu*), Kanno. A few days later he offered them a slightly better price than that he had earlier floated with the eldest of the heirs. A “Memorandum (*oboegaki*)” was agreed and exchanged on 17 April, whereby they agreed to sell the land at that price if and when it became theirs to transfer, subject to requirements of the National Land Use Planning Law requirements (*Kokudo Riyo Keikakuho*, Law No 92, 1974); boundaries to be surveyed and calculated at the completion, by the end of July; and with “all other terms to be decided by negotiations” between the parties. On 12 June, sure enough, a mediated agreement was reached among the heirs whereby the four plaintiffs each took a quarter share in the land. When their lawyer visited Kanno to inform him of this and request performance under the Memorandum, on 7 June, the latter agreed that his company would make the National Land Use Planning Law notification as soon as the plaintiffs had completed the registration from their father's estate, and then pay as part of the price the equivalent of their inheritance taxes. The plaintiffs had trouble with an existing lessee, which was resolved by settlement out of court in eviction proceedings on 24 October, whereupon they sent Kanno the documents needed for him to make the National Land Use Planning Law notification. After many hurry-up requests, however, he reported that his company was having difficulty arranging finance and therefore requested an extension until the following year. This resulted in an “Agreement (*kyoteisho*)” dated 19 February 1991. That agreed on the same price but within that set by the National Land Use Planning Law and subject to renegotiation if adjustment was needed due to “economic or other conditions”; completion “aiming at” the end of March 1991; plaintiff's assistance in negotiations with bureaucrats and so forth in order to develop the land into an apartment block complex; and again ending, with “all other terms to be decided by negotiations” between the parties. Although the latter provision in this Agreement and the same one in the Memorandum did not expressly state that it entailed a written agreement, as mentioned above this was “inferred” by the Court. The judgment did not spell out why it made this inference; but it was likely based on factors similar to those mentioned later in holding that the Memorandum was intended to be binding despite this meaning a contravention of the National Land Use Planning Law. Specifically, the Memorandum was held to be sufficiently certain; and the defendant company were experienced property developers while the plaintiffs were represented by a lawyer in the negotiations. There also appears to have been considerable time pressure due to accumulation of inheritance taxes, although this factor was not expressly weighed by the Court.

³⁷⁹ 27 March 1969, Kyoto District Court (236 Hanrei Taimuzu 151).

³⁸⁰ Above n 379, 152.

³⁸¹ Above n 30; n 355.

referred to a practice of formalising such sales; but as *kanko*,³⁸² and not as *kanshu* or custom in the sense of article 92 of the Civil Code. Many other courts, including Tokyo courts, just consider this to be normal, ordinary or usual.³⁸³ The approach is always to combine this with an evaluation of a broad range of factors relevant to determining whether the parties intended to be immediately bound by an informal agreement. Mostly the courts conclude that they did not; but *Kono v Shitani*³⁸⁴ provides an excellent example of how this approach can lead to upholding the informal agreement. Consistently with the general thesis advanced, therefore, the approach in Japan is a very substantive one similar to that in the US (see especially above Part II.C.2), although the factors considered are not laid out and discussed as rigorously as in Second Circuit courts (above Part II.C.1). Wording similar to “subject to contract” is not given the primacy it has been accorded by several English courts (above Part II.A.1), nor has a “rebuttable presumption” emerged as preferred by some courts and commentators in New Zealand (above Part II.B.1).

The substantive approach taken by Japanese courts is also found with respect to leases of land. This is not surprising, in that sometimes a land sale can be structured as a long-term lease simply for tax purposes, as the *Shananko* case shows.³⁸⁵ A similar close inquiry into all the circumstances is also evident in situations where a lease was negotiated from the outset, however, involving much smaller (although still substantial) sums of money. In *Saita KK v Chiba Kosan KK*,³⁸⁶ for instance, the Tokyo High Court upheld an informal agreement reached for an eleven-year lease of a commercial building to be constructed. Representatives of the defendant lessor (Chiba Kosan) and plaintiff lessee (Saita) had met in person to negotiate quite detailed terms recorded in a first “memorandum (*oboegaki*)”, including a provision whereby a formal lease contract would be concluded by the end of the month. After Chiba Kosan declared early the next month that it wanted to rethink some matters, Saita’s representative came from Sapporo to Tokyo again for a second long meeting. This resulted in a further memorandum, in which the premises agreed to be leased were reduced somewhat, but other terms were to be as in the earlier memorandum. Pursuant to one of those terms, moreover, Chiba Kosan consented to Saita’s election of a sub-lessee, and reassured Saita’s representative that building consents would be obtained on time. When leaving the meeting, Mrs Chiba “expressed good feelings towards him and gave him gifts of local produce [*omiyage*]”.³⁸⁷ In these circumstances, the Court held that the parties had intended to be immediately bound, without requiring any further formal documentation. It rejected a defence based on a record by an intermediary who helped introduce the parties to each other, which had noted that there was to be a “notarised document” for the lease. That was dated before even the first meeting, and anyway “there is room to interpret the

³⁸² See *Fujisawa* (above n 373); *Suehiro* (above n 32); *Arakawa* (above n 360). See also *Adachi v Tochiue KK*, 28 October 1992, Nagoya District Court (918 Kinyu Shoji Hanrei 35).

³⁸³ See for example *Baba* (above n 369). See also *Kiyotate Jisho KK v Sakamoto & Ors* (30 May 1991, Tokyo District Court (889 Kinyu Shoji Hanrei 42).

³⁸⁴ Above n 377. In less detail, see also *Kyoshin Soko* (above n 379).

³⁸⁵ Above n 376.

³⁸⁶ 23 April 1981, Tokyo High Court (452 Hanrei Taimuzu 106).

³⁸⁷ Above n 386, 108.

drafting of a notarised document as intended to make clear the formation and contents of the agreement in order to avoid any disputes arising in the future"³⁸⁸ – functions presumably filled by the two later memoranda resulting from lengthy meetings in person.

Nowhere in this judgment, or any other reported judgment regarding an informal lease, is there any mention even of what is normal or usual or the practice (*kanko* or like wording) with regard to formalisation of such deals. Certainly, no court has suggested that there is a custom (*kanshu*) in the sense of article 92, which might give rise to a legal presumption as to immediate binding effect or otherwise. Even more so than for informal agreements for the sale of land, moreover, the case law reveals no discernible patterns with respect to when courts will enforce informal leases.³⁸⁹ Their close examination of all the circumstances, including the presence or lack of formal contract documentation, leads instead to diverse results. Such variance suggests that this substantive approach better approximates to the true intentions of the parties in particular cases, although ultimately this point requires further empirical study.³⁹⁰

2 Other Contexts: Sales of Goods and Ships, and Services

What, then, of informal agreements not involving land? Recall that Stevens' translation of Kawashima's quotation from the *Ajinomoto* judgment, which upheld an informal agreement for a very large purchase of imported soyabeans, read as follows.³⁹¹

generally the existence is well-known of a well-known custom [sic] in our country's society that the drawing up of a contract document incorporating the agreement is disliked.

The word in the judgment translated here as "custom", however, is not *kanshu* but rather *fushu* (not a legal term, and perhaps better translated as "sense" or "feeling"). Thus, this judgment should not be taken as implying a legal presumption *in favour of* immediate binding effect. On the other hand, in another judgment rendered soon thereafter which also upheld an informal agreement for the sale of soyabeans between the same parties, the Tokyo District Court expressly rejected that there was a "commercial custom (*shokanshu*) whereby a contract is formed only upon executing a contract in writing".³⁹² None of the judgments regarding alleged informal sales of goods discussed by Ikeda,³⁹³ nor that of the Kobe District Court regarding the export sale of New Zealand beef,³⁹⁴ refer to what is normal or usual or "the practice" generally. Instead, Japanese courts examine closely all the circumstances to determine what the parties intended in the particular circumstances.³⁹⁵ More noticeably than in informal lease cases, and in quite

³⁸⁸ Above n 386, 109.

³⁸⁹ See generally Ikeda, above n 350, 226-235.

³⁹⁰ Above n 5.

³⁹¹ Above n 341 (Kawashima's emphasis).

³⁹² *Marubeni Iida KK v Ajinomoto KK*, 26 March 1959, Tokyo District Court (10/3 Kaminshu 594, 606).

³⁹³ Above n 350, 216-223.

³⁹⁴ Above n 29: 10 December 1962, Kobe District Court (13/11 Kaminshu 2293) [*Fawlty*].

³⁹⁵ Those circumstances can include a course of dealing between the particular parties, for

sharp contrast to alleged informal agreements for the sale of land, the courts do tend to uphold informal agreements for the sale of movable goods. There are exceptions, however. One was very protracted litigation which finally confirmed that no binding contract for the sale of standing timber in Tohoku was intended, immediately upon oral agreement reached in 1950.³⁹⁶

Another more recent example is a rare reported case in which parties to negotiations may have at least impliedly referred to later drawing up contract documentation – with regard to a ship sale, thus allowing some comparison with some of the US and English maritime case law discussed above (Parts II.A.4 and II.C.3). In its 1986 judgment in *Leonhardt & Blumberg [sic] v Iino Kaiun KK*,³⁹⁷ the Tokyo District Court held against the foreign firm alleging that an immediately binding informal agreement had been reached. Five conditions had been recorded over the course of extensive negotiations: (i) “pre-launch inspection”, (ii) “approval of specifications, blueprints and manufacturers’ list”, (iii) “drafting of a construction/sale contract”, (iv) “Japanese government approval”, and (v) “agreement on details”. The Court held that “at least” (ii) and (iii) had not been satisfied, showing insufficient intention to be legally bound. Condition (v) was probably the phrase “subject to details” in English, which seems to have been the language originally used in written communications during negotiations, so it may have influenced the result. But the Court did not expressly rely on this condition in concluding that no binding informal agreement had been reached. It also weighed very carefully a range of facts and arguments, stemming particularly from this being quite a complex deal involving a ship not yet completed and a shipbuilder in financial difficulties. Thus, no general rule giving high priority to the phrase “subject to details” can be extracted from this judgment or from Japanese case law or reported arbitral awards involving ship sales, let alone charterparties. Rather, Japanese courts seem to apply in maritime law cases the sort of close examination of the facts and broad weighing of factors which underpins their decisions in the other contexts just mentioned.

Similar factors seem to have been balanced, on a close examination of all the facts, in cases involving oral agreements for services. In *Moriwaki v Fyuchazu Futtoboru Kurabu KK*,³⁹⁸ the Tokyo District Court upheld a soccer player’s claim that

instance with respect to fixing the purchase price for *soba* (buckwheat) in *Fuji Seifun v Nomura*, Tokyo High Court, 22 December 1969 (10/12Tosai Minjiho, 310).

³⁹⁶ The final case in this saga is *Takase v Urabandai Sanrin Kumiai*, 22 June 1967, Supreme Court (488 Hanrei Jiho 63).

³⁹⁷ Above n 34: Tokyo District Court, 30 May 1986 (1234 Hanrei Jiho 100). Although condition (v) was termed “agreement on details”, agreement in writing may have been inferrable from the fact that most correspondence was in writing, the parties were experienced commercial entities and so on (compare *Shananko KK*, above n 336).

³⁹⁸ 25 October 1996, Tokyo District Court (740 Rodo Hanrei 91). See also the case note by K Kawai “*Puro Sakka Senshu Keiyaku o Mitome, Chimu ni yoru Togai Keiyaku Kaijo o Muko to shite Kyuyo Shiharai Seikyū o Ninyo shita Jiken* [Case Upholding Claim for Wages Payment, Holding Void Team’s Contract Termination after Finding a Contract for a Pro Soccer Player]” (1998) 49 *Doshisha Hogaku* 216. Compare March, above n 25, 112-113 (telling a story of a baseball player in the 1970s getting away with breaking his contract of employment). Professional sports may be a rather special area of law and practice in any jurisdiction, however. In England, for example, see S Greenfield and Guy Osborn *Contract and Control in the Entertainment Industry* (Ashgate, Dartmouth, 1998) especially 23-60

an agreement had been reached to play for the defendant club for one year. Key considerations were timing, detail of terms used, and subsequent conduct.³⁹⁹

Other cases in which Japanese courts have carefully reviewed all the facts, drawing on factors similar to those developed by courts in the US or elsewhere yet without suggesting any presumptions or prima facie rules, involve alleged oral contracts of guarantee. In *Kyoto Shinyo Hosho Kyokai v Terada*,⁴⁰⁰ the Kyoto District Court refused to uphold an alleged oral agreement for Terada to become surety (*rentai hoshonin*) for a loan of Yen 500,000 advanced by a Kyoto financial institution in favour of Terada's acquaintance, Kitagawa. Terada had accepted to secure the loan of Yen 250,000 provided for Kitagawa to buy a truck, and this was originally recorded on a "Introduction Note (*shokaisho*)" sent by Kyoto Shinyo to him. Later a Kyoto Shinyo official increased the amount to Yen 500,000 as part of a refinancing agreement: Kitagawa wanted another outstanding obligation for some Yen 360,000 owed to Kyoto Shinyo by his parents as sureties under a separate loan. The official had telephoned Terada allegedly to confirm him become surety for Yen 500,000. However the Court held that Kyoto Shinyo could not prove that agreement had been reached as the increased amount; Terada contested the official's view, and the latter's file note "30 October 10.30am – confirmed guarantor's intentions" was held not to be enough. The Court also held that there was "inadequate evidence to find that there was a close enough relationship between Terada and Kitagawa and his father to justify Terada

(entitled "Rough Trade: Contract and Control in Football").

³⁹⁹ At the request of the manager for the club's forwards, in December 1993 the then eighteen year-old player had returned from Brazil where he had been training. The manager told him that selection would take place in the early New Year. On 29 December 1993, though, he telephoned the player to say he wanted to employ him, and would send documentation and details such as the money involved. The "Notification (*tsuchisho*)" which arrived on 31 December stated that it "hereby notifies you that the Club wishes to conclude a 'Standard Form Pro Athlete Contract' with you on the following terms", recording details on salary (base salary, match premiums and so on) and a contract term from the date of execution until 31 January 1995, and stating that further explanations would be provided as to hostel accommodation. On 15 January 1994 the manager met with the player and went through the standard form. He offered a longer term contract, but the player preferred one year. The latter then signed and sealed two copies of the form, which already contained the manager's name and the Club's representative's seal. The player then got his mother as guardian to sign and seal the contract forms, and sent them to the Club. On 8 February 1994, however, the manager told him he wanted to terminate the contract because the player allegedly could not keep up in practices.

When sued, the Club argued that it had intended to conclude a contract only after seeing the player play, not on 15 January; that it got the player to sign the contract forms only for convenience; and that no contract was formed due to blanks remaining on the form. The Court held that it was not unnatural for the Club to conclude an immediately binding agreement without having seen him play, in the light of his career and in anticipation of his further potential. It rejected too the Club's argument that further agreement with the coach was necessary, saying that this was a matter internal to the Club and that the manager (legally empowered to conclude contracts with players) had to take responsibility for his actions in this case. The Court also noted that the Club's letter used the language ordinarily used to express an offer, and that the contract form was a detailed one. Remaining blanks were held to be unimportant in the circumstances. Finally, the Court stressed many acts of subsequent performance by the Club, including a salary payment (termed as such) paid on 25 January, enrolling the player in National Health Insurance, and letting him into the dormitory accommodation.

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11 April 1986, Kyoto District Court (603 Hanrei Taimuzu 60).

assuming a liability of Yen 500,000".⁴⁰¹ The Court also suggested that telephone confirmation had its merits, just not in these particular circumstances involving increasing a surety amount, thus not laying down even a prima facie rule against enforceability of oral surety agreements.

Recently, in *Kuramoto v Mitsubishi Oto Kureditto Risue KK* decided in 1997,⁴⁰² the Sapporo High Court also refused to uphold an alleged oral surety agreement; but based on particular facts. A man (A) agreed to buy a car from the Hokkaido Mitsubishi Automobile Sales Co. A also agreed to the Mitsubishi Automobile Credit and Leasing Co (the Plaintiff) paying the sales price in one instalment in his place, and then claiming repayment in 60 monthly instalments under a credit contract. Further to the latter contract, A asked a friend working at a small bar to ask the woman managing the bar (the Defendant) to become his surety (*rentai hoshonin*). On 28 April 1994 the Defendant received a telephone call from an employee of the Plaintiff, explaining that (i) that he had nominated her as surety for the purchase price and (ii) the total price and the instalment payment amounts and timing, and asking "whether there was no mistake in proceeding, given these contents". She replied that there was "no mistake". When A defaulted on the second instalment, the Plaintiff sued the Defendant alleging a binding oral agreement had been reached on this day. She argued that she did not intend to be bound then. Rather, she thought she would be able to check with A that this was correct, and then make a final decision when a written contract was sent to her.

The trial Court held for the Plaintiff; but the High Court reversed. It held that the Defendant's response was a mere precursor to possible intention to become a surety, and did not express her intention to be immediately bound by a suretyship contract. The High Court noted that there was also a written contract on the Plaintiff's standard form between A and the Plaintiff, with the Defendant's name written in but not in her handwriting; with a stamp affixed containing her surname, but that it was not her stamp; and that this document was executed on 26 April, two days' before the phone call. Although not completely certain, these additions to the contract were found probably to have been made by A. Given the sequence of events, it could not be argued that the Defendant had authorised A to make them in her stead. The Court also noted that the Defendant had agreed to become surety for Yen 600-700,000, not the final amount of almost Yen 3,000,000. In these circumstances, it held that the Defendant thought that it would still have an opportunity to see and stamp a written contract document, and that there was no final agreement reached on 28 April.

One commentator has suggested that the High Court's approach accords with peoples' expectations and "legal consciousness" in Japan, suggesting that no reported decision has ever upheld a purely oral contract of guarantee. However, it has not been suggested that this pattern has been elevated into a prima facie rule or legal presumption against enforceability, for instance by invoking *kanshu* under article 92.⁴⁰³ Rather, as in *Kyoto Shinyo Hoshu Kyokai*, the particular facts in this case strongly suggested that an immediately binding informal contract was not intended. There was a strong possibility

⁴⁰¹ Above n 400, 61.

⁴⁰² 24 April 1997, Sapporo High Court (1029 Kinyu Shoji Homu 23).

⁴⁰³ K Noguchi "Denwa ni yoru Hoshu Ishi no Kakunin to Hoshu Keiyaku no Seihi [Formation of Guarantee Contracts and Telephone Confirmation of Intentions to Guarantee]" (1998) 633 NBL 72 75

of fraud by the Plaintiff; possible misunderstanding by the Defendant, complicated by the intermediation of her bar's employee; and the type of suretyship alleged was a *rentai hoshō* contract, under which the surety is jointly liable rather than liable only on the default of the primary obligor.

To further indicate the importance of a writing in the circumstances of *Kuramoto v Mitsubishi Oto Kureditto Risue KK*, however, the Court cited provisions in the Instalment Sales Law 1961.⁴⁰⁴ These require the financier to provide a written record of certain matters promptly upon conclusion of an instalment credit contract. Such provisions in special legislation may contain fines for breach and are usually construed as giving only private law remedies expressly provided, and hence not as invalidating any contracts where there has been no writing delivered.⁴⁰⁵ This case shows, however, that such specific legislation can still encourage Japanese courts in a particular direction, as can also happen in French law but appears much more difficult in the English law tradition. Arguably, this too may encourage the emergence of more substantive reasoning in Japanese law.⁴⁰⁶

III Correlations with Greater Content Formality in Specific Statutory Requirements

The contrasting approaches identified for the four jurisdictions in terms of *general contract law* rules – at least between the US and (probably especially) Japan at the substantive end of the spectrum, and New Zealand (and perhaps especially) England at the formal end, and at least in some important areas (such as land sales or maritime cases) – appear to be largely paralleled by the major *statutory* proscriptions as to formal requirements for contract validity or enforceability. In both England and New Zealand, the requirement of a signed writing for most sales of goods was abolished only in the mid-1950s. That could have been within the memories of judges in the 1970s and 1980s, when they began to develop inferences or presumptions against the binding force of informal agreements in certain other contexts (above Parts II.A and II.B). A signed writing also is still required both for contracts of guarantee and for sales or dispositions of interests in land. Indeed, for the latter category, the legislative requirements in England were made *more* restrictive by an amendment in 1989, and English commentators have tended to welcome the strict interpretations adopted by English courts.⁴⁰⁷

By contrast, in late 1997 the New Zealand Law Commission issued a Preliminary Paper recommending immediate abolition of statutory writing requirements for contracts of guarantee. It also invited discussion on the advantages and

⁴⁰⁴ *Kappu Hanbai Ho*, Law No 159, 1961.

⁴⁰⁵ See for example Michida, above n 30, 209-212.

⁴⁰⁶ See generally D Harris and D Tallon *Contract Law Today: Anglo-French Comparisons* (Clarendon Press, Oxford, 1989) 189-191. See also above Chapter One Part II.A; Part Two Introduction Parts I and III (on the difficulties of codifying English law).

⁴⁰⁷ Compare for instance A J Oakley "The Signature of Contracts for the Sale of Land" (1996) *Cambridge Law Journal* 192 with M Haley "Land Contracts: Injudicial Facts and Judicial Fictions?" (1993) 22 *Anglo-Am L Rev* 475.

disadvantages of abolishing those for sales and dispositions of interests in land, while phrasing the arguments to reveal a distinct preference for abolition.⁴⁰⁸ But these proposals have met with general indifference – usually fatal for a law reform proposal, since if there is no constituency favouring repeal the status quo will probably prevail – along with significant opposition. The Auckland District Law Society objected to the proposal to abolish formal requirements for guarantees, and arguments were also made that they should be *extended* to cover indemnities.⁴⁰⁹ McMorland, a leading commentator on land law, came out strongly against the suggestion that requirements should be abolished for transactions involving land. One criticism was directed towards the Law Commission's view that courts would still act on "the presumption [sic] that there is no intention to contract until there is a signed contract in writing", pointing out that such a tendency would likely be weakened by repeal of the Act, at least over the longer term.⁴¹⁰ Another objection was that there is no empirical evidence about the "cautionary" or "protective" function possibly served by present statutory requirements.⁴¹¹ Most importantly for present purposes, a third criticism counters the suggestion that "the requirement of signed written evidence is irrational if the factual position can be established by some other means", arguing that other means may create extra costs and uncertainty.⁴¹² The former suggestion involves reducing content formality, in favour of more individualised determinations of the parties' true intentions. McMorland's counter-argument evinced a willingness to countenance the preservation of content formality, albeit to pursue different objectives, including the pursuit of certainty even if this conflicts with giving effect to true intentions. As seen from the case law analysis above, openly focusing on promoting certainty has also been stressed in England and New Zealand, only to a much lesser extent in the US, and rarely in Japan.⁴¹³ This relates to the notion of "didactic formality" discussed below (Chapter Four Part III.D), namely the degree to which courts try to steer the "law in action" rather than (systematically and openly) trying to learn from it. For present purposes, the key point is that retention of statutory form requirements is strongly urged by prominent commentators in New Zealand, opposing a reduction in content formality in its legal system. As of October 2001, the Law Commission's reform initiative had apparently stalled. Although indifference may be part of the reason, the fact that the proposal ran counter to formal reasoning patterns is likely to have played a significant role.⁴¹⁴

⁴⁰⁸ Above n 208: NZ Law Commission *Repeal of the Contracts Enforcement Act 1956: A Discussion Paper* (Preliminary Paper No 30, Wellington, 1997). See also D F Dugdale "Do We Need the Contracts Enforcement Act?" [1993] NZLJ 239.

⁴⁰⁹ McMorland, above n 121: D McMorland "In Defence of 'a Certain Ludic Charm'" (1999) 14 JCL 108, 108.

⁴¹⁰ McMorland, above n 121, 112.

⁴¹¹ McMorland, above n 121, 113-114. It appears that other opponents have also insisted that consumers need to be protected against overly hasty decision-making: Personal communication from Don Dugdale (Law Commissioner in charge of the project, at the time), 14 December 1998.

⁴¹² McMorland, above n 121, 110.

⁴¹³ See for example *Chillingworth* (above n 7) and *The Junior K* (above n 11); *Concorde* (above n 16) and *Shell Oil* (above n 132); compare *Friendly J* in *Telemeter* (above n 22) with *Teachers* (above n 253).

⁴¹⁴ Similar preferences for formal reasoning in England and Australia have been suggested for the

A broad correspondence is also evident in Japan between the legislative framework and the courts' approach to interpreting the significance of formalities in contract negotiations. Paralleling the more substantive approach to the latter described above (Part II.D), the Civil Code lays down no formal requirements at all for validity or enforceability of contracts, of whatever type. This is remarkable in that otherwise the Code drew heavily on French law and German law when it was enacted in 1896.⁴¹⁵ German law, in particular, requires writing for gift promises, and to form contracts for the sale of land, or for suretyship (unless this is a commercial transaction from the guarantor's point of view). Except for gifts, French law does not impose such strict requirements for contract validity. However, it excludes the testimony of witnesses in certain significant transactions in the absence of specified writings, and this strongly encourages the use of written contract documentation in practice.⁴¹⁶ A French law professor engaged by the Japanese government in the late 19th century to help draft the Civil Code, de Boissonade, suggested provisions along similar lines in Japan, which also had a strong tradition of documenting transactions by writing. In the end, though, no trace remained of his suggestions in the Civil Code.⁴¹⁷ This blank slate at the level of the Civil Code, then, parallels and may help explain the more substantive approach taken by Japanese courts even today, in the general law on contract formation. However, as in the US, that approach also allows for courts in some cases to require formalisation before finding that the parties intended to be legally bound. Further, judgments refusing to enforce oral suretyship contracts⁴¹⁸ may represent the slow emergence of a more formal tendency, linked to the "new formalism" in specific legislative initiatives noted already by Ota and Michida in the late 1980s.⁴¹⁹

The US does not fit this pattern so readily. Despite its substantive approach to the latter issue under general contract law (above Part II.C), and its overall substantive orientation along other dimensions of formal reasoning and in its institutional framework (above Chapter One), almost all US states retain writing requirements for both land sales and contracts of suretyship. Indeed, under the Uniform Commercial Code (UCC) or its incarnations at the State level, sales of goods for more than US\$500 also require a signed writing.⁴²⁰ Ironically, then, at the legislative level US law appears more formal than England or New Zealand.

difficulty in enacting commercial and contract law reforms adopting more substantive approaches. See, respectively, R Goode *Commercial Law in the Next Millennium* (Sweet & Maxwell, London, 1998) 26; R Buckley "Commercial Law in the Next Millennium – A Review of the Hamlyn Lectures Delivered by Professor Roy Goode" (2000) 12 *Bond L Rev* 115, 116.

⁴¹⁵ See generally K Mukai and N Toshitani "The Progress and Problems of Compiling the Civil Code in the Early Meiji Era" (1967) 1 *Law in Japan* 25; Z Kitagawa *Rezeption und Fortildung des Europaischen Zivilrechts in Japan [Reception and Development of European Civil Law in Japan]* (Alfred Metzner Verlag, Frankfurt, 1970).

⁴¹⁶ K Zweigert and H Koetz (T Weir trans) *Introduction to Comparative Law* (3 ed, Clarendon Press, Oxford, 1998) 368-373.

⁴¹⁷ Kagawa, *supra* n 344. On Boissonade generally, see E Hoshino "L'heritage de G Boissonade dans le Code Civil et dans la doctrine du droit civil au Japon" (1991) *RIDC* 407.

⁴¹⁸ Kuramoto, *above* n 402.

⁴¹⁹ *Above* n 342. See also the *Kyoto Shinyo* case (*above* n 400).

⁴²⁰ Farnsworth, *supra* n 211.

However, even more so than in those jurisdictions – with their vestiges of the Statute of Frauds for land and guarantee contracts – the UCC’s rules requiring signed writings for such sales of goods have been subject to very extensive exceptions and qualifications.⁴²¹ Thus, their contribution to more content formality is offset by their low mandatory and interpretive formality (above Chapter One Part II.C). Further, a longstanding and clearly expressed guiding principle of commercial law reform in the US, driven especially by Karl Llewellyn from the 1940s and resulting in successful implementation of the UCC in the 1960s, was to replace formal requirements with substantive reasoning based approaches (above Part Two Introduction Part I). In discussions over the 1990s about large-scale revision of the UCC, there were powerful calls for the writing requirements to be abolished.⁴²² However, in one of the last drafts published before reform discussions were suspended, due to broader political controversy, it was suggested that a formal requirement be retained, but for contracts of US\$5000 or more.⁴²³ It seems that US lawyers vigorously opposed outright abolition, although there was also some opposition from scholars, suggesting for instance that courts have been adept in getting around statutory form requirements to uphold bargains involving relatively simple deals or parties in continuing relations.⁴²⁴ Lawyers’ opposition is understandable in view of their financial interest in having rules requiring writings (which they will often draft or check); and, indeed, in having complicated exceptions or qualifications (that will continue to generate disputes and court cases, on which lawyers will also advise). Such self-serving tendencies may yet be overcome, however, due to the robustly substantive approach of US courts in interpreting the parties’ intentions anyway, and the substantive orientation of US law generally (above Chapter One Part II.C).

IV Conclusions

In view of its more formal tendency at the level of general contract law legislation such as the UCC, US law probably should be located closer to the formal end of the spectrum compared to Japanese law. That is also reinforced by the warning note sounded by Friendly J in *Telemeter*.⁴²⁵ While now infrequently cited in Second Circuit judgments, it may underlie the tendency mentioned above (Part II.C.1 of this Chapter) for courts to expressly state and apply a range of specific factors to be considered in determining the

⁴²¹ Farnsworth, *supra* n 211.

⁴²² R Speidel “The Revision of UCC Article 2, Sales in Light of the United Nations Convention on Contracts for the International Sale of Goods” (1995) 16 J Int’l L Bus 165.

⁴²³ See Section 2-201 in the Proposed Revisions of UCC art 2, presented at the Annual Meeting of the National Conference of Commissioners on Uniform State Laws (Denver, 23-30 July 1999), available through the Commissioners’ website maintained by the University of Pennsylvania Law School, at <<http://www.law.upenn.edu/ulc/ucc2/ucc299am.htm>>. The revision process itself was already called into jeopardy at that Meeting: see below Chapter Three Part IV.A.

⁴²⁴ See for example J S Johnston “The Statute of Frauds and Business Norms: A Testable Game-Theoretical Model” (1996) 144 U Pa L Rev 1859. Compare E Posner “Norms, Formalities and the Statute of Frauds: A Comment” (1996) 144 U Pa L Rev 1971.

⁴²⁵ Above n 22.

general issue of what the parties intended in the circumstances.⁴²⁶ Yet the latter remains the overall test, demonstrating the very substantive approach of US law as well. Neither US nor Japanese law has developed notions like “presumptions”, mostly favouring – but very occasionally favouring – the immediate binding force of informal agreements, as proposed by some English and New Zealand courts and commentators.⁴²⁷

Deciding whether English law is more or less formal than New Zealand law, along this dimension of formal reasoning, is also quite difficult. In view of the English legislative reform in 1989 and its aftermath, along with various formal tendencies recently (above Parts II.A.1, A.2. and A.4), compared to a possible move away from the more formal reading of earlier Court of Appeal precedents in New Zealand (Part II.B.2), English law arguably should lie closest to the formal end of the spectrum.

Hence the four legal systems can be positioned as in Line 2 in Figure 3 at the outset of the Introduction of Part Two of this thesis (above). Most importantly, at least it can be concluded that both English and New Zealand prefer distinctly more formal reasoning compared to both US and Japanese law. This is consistent with the central thesis advanced, as well as the differing orientations as to legal reasoning and institutional structure in each of the four jurisdictions, discussed above both generally (Chapter One) and in relation to contract law theory development (Part Two Introduction).

In this Chapter, uncovering sometimes subtle differences in reasoning regarding rules for formal requirements in contract formation, particularly in general contract law, has required quite exhaustive examination of trends in case law and judicial or academic reasoning, in several broad sub-categories. The task was rendered more difficult by the fact that no case has arisen in all four jurisdictions which is precisely or even substantially identical. In any event, differing or identical results in such a case would not necessarily reveal much in general about the nature of reasoning preferred, which is the main focus of this thesis.⁴²⁸ Another difficulty is that certain categories of cases, such as those involving land, may have different relevant significance in the body of litigated case law (and in broader socio-economic context)

⁴²⁶ See especially *Consarc*, above n 23. Thanks are due to Geoff McLay for pointing out in another context that elaborating a “shopping list” of specific factors to be applied, to determine specific cases, might promote a more formal tendency. However, this depends on the nature and scope of the factors, and how much they invite consideration of a broad range of evidence, as well as the process by which the evidence is weighed. In the US, the latter includes decision-making by juries, which allows for significantly more substantive reasoning.

A related point is how case law evolves. US law appears more formal than Japanese law because of a greater willingness to expressly follow precedent (especially in the Second Circuit subsequent to *Telemeter*). This tends to heighten and reflect greater “authoritativeness formality” (above Chapter One Part II.A). Consistently with the theory that Japanese courts are not bound by a doctrine of *stare decisis*, they do not cite prior relevant judgments of superior courts. Yet a careful reading of some judgments shows that in fact some (especially) lower Courts are following such precedents. See for example *Fujisawa* (above n 373), in which the Tokyo District Court used almost identical wording to that used in *Suehiro* (above n 355).

⁴²⁷ For a rare suggestion of a presumption in favour of the binding force of informal leases, see *Thomas J in Kooky*, above n 139.

⁴²⁸ Compare *Brownsword*, above n 35.

within each jurisdiction.⁴²⁹ A final difficulty is that the law never stays still, in each of these jurisdictions. However, the analysis above has revealed quite enduring divergences in reasoning patterns in these various jurisdictions. It thus finds affinities with the work of contract law theorists who are sceptical about rapid transformations in contract law within particular jurisdictions; and, frequently, about existing or readily attainable convergence among them – especially towards the neoclassical model in US law (above Part Two Introduction).⁴³⁰ Such results are also largely consistent with patterns uncovered in many other areas of law and legal institutions generally (above Chapter One), and may be related to differences in the development of contract law theory in the various jurisdictions (above Part Two Introduction). Further, the analysis and conclusions in this Chapter, focused on the dimension of content formality, need to be assessed in conjunction with those directed to other dimensions, especially authoritative formality in relation to context (Chapter Three) and to time (Chapter Four Part II) in contractual relationships, as well as the notion of “didactic formality” (explained in Chapter Four Part III.D).

In passing, this analysis has also noted how courts in all these jurisdictions manage to award some partial remedy even when they hold that no contract was intended to be immediately binding. Sometimes this is achieved by providing a remedy in restitution.⁴³¹ Promissory estoppel has provided another avenue particularly in the US.⁴³² Perhaps even more so, many Japanese courts achieve similar results by drawing on the general principle of good faith set out in article 1(2) of the Civil Code.⁴³³ By contrast, the possibility of a legal duty to negotiate in good faith was decisively rejected by Steyn J in *The Junior K*,⁴³⁴ along with the possibility of estoppel.⁴³⁵ A further hypothesis, therefore, is that even extending the analysis to examine in what ways and how frequently other private law remedies and doctrines are applied to provide a partial remedy, in cases of informal agreement, would reveal a similar pattern to the contract

⁴²⁹ Compare Ellinghaus, above n 12.

⁴³⁰ See for example R Bigwood “Conscience and the Liberal Conception of Contract: Observing Basic Distinctions” Part One (2000) 16 JCL 1, 2; J Wightman *Contract: A Critical Commentary* (Pluto Press, London/Chicago, 1996) 81-94; R Hillman “The ‘New Conservatism’ in Contract Law and the Process of Legal Change” (1999) 50 Boston College L Rev 879. See generally above Part Two Introduction.

⁴³¹ Compare for example *US for Use of Cortolano & Barone* (above n 251) with *Dickson Elliott Lonergan Ltd v Plumbing World Ltd* [1988] 2 NZLR 608, very cursorily discussed in J F Burrows, J Finn and S Todd *Law of Contract in New Zealand* (Butterworths, Wellington, 1997) 139.

⁴³² See for example *EAST* (above n 326). See generally E A Farnsworth “Precontractual Liability and Preliminary Agreements: Fair Dealing and Failed Negotiations” (1987) 87 Colum L Rev 217

⁴³³ See for example *Suehiro* (above n 32); *Takemoto Kensetsu KK*, above n 323); *Momojiro KK*, above n 326. See generally S Kawakami “*Keiyaku Junbi Dankai de no Shingizoku ni Motozoku Chui Gimu Ihan to Baisho Sekinin* [Liability in Damages for Breach of a Duty of Care in the Contract Formation Stage based on the Doctrine of Good Faith]” (1995) 10 *Shiho Hanrei Rimakusu* 48; S Kawakami “Japan” in E Hondius (ed) *Pre-Contractual Liability: Reports to the 13th Congress, International Academy of Comparative Law* (Kluwer, Deventer, 1991) 207.

⁴³⁴ Above n 11.

⁴³⁵ Debattista, above n 104. Compare J Steyn “The Role of Good Faith and Fair Dealing in Contract Law: A Hair Shirt Philosophy?” [1991] Denning LJ 131. See also *Akiens*, above n 68, and more generally R Halson “The Offensive Limits of Promissory Estoppel” [1999] LMCLQ 256.

law rules discussed in this Chapter. That is, one would expect restraint on the part of English and New Zealand courts and commentators, compared to more active use of those other remedies and doctrines in the US and Japan. Further research in this direction would necessitate additional exhaustive analysis. More productive and relevant to this thesis is to examine some relevant contract law principles in broader context while comparing next the four jurisdictions' approaches in another major area of contract law, contractual unfairness (Chapter Three).

CHAPTER THREE: UNFAIRNESS IN CONTRACTING

- I Introduction: Authoritative Formality and Source-Oriented Standards of Validity
- II The "Fine Print" Doctrine
- III Good Faith, Unconscionability and Undue Influence
 - III.A US Law
 - 1 Consolidation of Good Faith Doctrine
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 - III.B English Law
 - 1 Denial of a Generalised Duty of Good Faith
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 - III.C New Zealand Law
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 - 1 Consolidation of Good Faith Doctrine: Civil Code Article 1(2)
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- IV Specific Legislative Intervention to Control Unfairness in Contracting
 - IV.A The US
 - IV.B England
 - IV.C New Zealand
 - IV.D Japan
- V Conclusions: Authoritative Formality and The Contextual Dimension

I Introduction: Authoritative Formality and Source-Oriented Standards of Validity

As mentioned above (Chapter One Part II.A), Atiyah and Summers argue that an indispensable dimension of formality in legal reasoning is "authoritative formality": rules or other legal phenomena, such as contracts, must be recognised as legally authoritative. One subdimension of this is validity formality, which is higher when the validity of legal rules or phenomena are source-oriented, and lower when content-oriented. Later they remark that "private contract, the largest body of governing norms in the American system, is also subject to wide-ranging content-oriented standards of validity".¹ Some examples given briefly, examined in detail in this Chapter as attempts to control "contractual unfairness" more generally, include: (i) the "fine print" doctrine, (ii) the general duty of good faith and fair dealing, and (iii) the doctrine of unconscionability.

Atiyah and Summers impliedly contrast the position in English contract law, which still adopts a more classical (and, indeed, neoclassical) approach centred on the agreement or intentions of the parties to determine the validity of contracts.² Hence the focus is more on source-oriented standards of validity, generating higher validity

¹ P S Atiyah and R S Summers *Form and Substance in Anglo-American Law: A Comparative Study of Legal Reasoning, Legal Theory, and Legal Institutions* (Clarendon Press, Oxford, 1987) 51.

² Compare for example P S Atiyah *An Introduction to the Law of Contract* (5 ed, Clarendon Press, Oxford, 1995) 7-15. I Macneil "The Many Futures of Contract" (1974) 60 S Calif L Rev 691 argues that one feature of both classical and neoclassical contract law is a shared fixation on divorcing contractual relations from their socio-economic context, rendering them more "discrete". See also generally above Part Two Introduction.

formality and therefore authoritative formality in legal reasoning in contractual settings. That therefore reinforces the more formal orientation of English law generally along this dimension (above Chapter One Part II.A), and along the others set out above (Chapter One Part II); conversely, that more formal overall orientation underpins formal reasoning in dealing with problems of contractual unfairness. Similar mutual reinforcement can be expected in New Zealand, while Japanese law takes a more substantive approach closer to that in US law.

In fact, Part II of this Chapter finds that courts in all four jurisdictions have tried to control contractual unfairness by applying principles similar to the “fine print” doctrine. That holds that if a term is unusually onerous, it must be brought reasonably to the parties’ notice. The doctrine can be seen as simply reinforcing the notion of the parties’ agreement as the source of authority for contractual norms and obligations: merely requiring that that agreement be reached upon a consideration of all relevant factors or aspects of the transaction. The same can be said for the canon of *contra proferentem* interpretation, parallels to which can be found in some of these court judgments, since in most variants that doctrine requires an ambiguity in the parties’ agreement or expressions of intention. Contrary to the suggestion by Atiyah and Summers, therefore, the “fine print” doctrine may not reveal very sharp contrasts between English and US law, nor between New Zealand and Japanese law.

However, closer examination of cases discussing or related to that doctrine, such as *Livingstone v Roskilly*³ in New Zealand and those involving information provided by telephone (“Dial Q2”) in Japan,⁴ reveals other legal principles potentially presenting sharper differences in approach. These cases suggest that there are certain minimal obligations which will be imposed by the courts, even if the parties’ agreement is unambiguously to the contrary. That implies more content-oriented standards of validity, and hence more substantive reasoning. However, New Zealand law has adopted a comparatively formal orientation in developing contract law theory (above Part Two Introduction Part IV), formal requirements for contract formation (above Chapter Three Parts II.A and III), and in its doctrine of frustration (below Chapter Four Part II.B). Hence, attempts to push New Zealand law regulating contractual unfairness towards more substantive reasoning can be expected to generate distinctly less resonance in other New Zealand case law and in academic commentary, compared with Japan and the US). Part II suggests that this is so.

Part of the reason for such differences can be found in the scope of the two other examples suggested by Atiyah and Summers, discussed in considerable detail below (Part III). One is the notion of a generalised duty of good faith. As in English law, most New Zealand courts and commentators have been unwilling to bring together disparate strands of law into such a generalised duty, which might then introduce or reinforce more substantive reasoning in other areas. By contrast, drawing primarily on German law and legal theory, from the early 20th century Japanese courts and scholars began to recognise a broad duty of good faith. It was eventually enshrined by a rather rare legislative amendment to the Civil Code in 1947: article 1(2).⁵ The UCC, finalised in

³ [1992] 3 NZLR 230.

⁴ See generally T Matsumoto “*Nyubijinesu to sono Kisei - Denki Tsushin Riyo Bijinesu o Chushin ni shite* [Regulating New Businesses: Businesses Using Electric Transmissions]” in Iwanami Koza (eds) *Shohi Seikatsu to Ho [Law and Consumer Life]* (Iwanami, Tokyo, 1996) 131,133-143.

⁵ See generally J O Haley *The Spirit of Japanese Law* (University of Georgia Press,

1952, also included a generalised duty of good faith at least in contract performance (§1-203). It was approved in the *Restatement (Second) of Contract* promulgated by the American Law Institute in 1981 (§205). In general, moreover, the duty of good faith has been developed by the courts in similar categories of cases in both Japan and the US, such as breakdown in contract negotiations (*culpa in contrahendo*)⁶ and termination of long-term contractual relationships (such as distributorships or franchise contracts).

In some sub-categories, Japanese courts instead have invoked the Civil Code's older proscription of contracts "contrary to public order or good morals" (article 90).⁷ That has been used to strike down or limit liquidated damages clauses perceived as excessive, and to control certain types of guarantees of another's debts given by potentially vulnerable parties (such as bar hostesses). Courts in the US, England and New Zealand instead have addressed these issues instead through venerable but tightly circumscribed doctrines derived from Equity: those against "penalty clauses",⁸ and doctrines of unconscionability or undue influence.

The doctrine of unconscionability, the third main example of content-oriented standards of validity in US contract law given by Atiyah and Summers, appears particularly apposite for highlighting the more formal approach of English contract law. The English courts of Equity founded the doctrine in cases relieving "expectant heirs" of unconscionable bargains; but drastically narrowed its scope in *Fry v Lane*.⁹ Almost a century later, in *Lloyd's Bank v Bundy*,¹⁰ Lord Denning attempted to revive the doctrine. Combining it with other categories of legal and equitable relief including undue influence, he proposed an overarching principle of "inequality of bargaining power". The latter principle, like the rare attempts to develop a generalised duty of good faith, has come to nought. Even other judges in *Bundy* who struck down contracts preferred to adopt other reasoning; Lord Denning's principle met with scepticism from conventional commentators in England; and it was firmly rejected by the House of Lords in *National Westminster Bank Plc v Morgan*.¹¹

Nor has the doctrine of unconscionability really re-emerged in English courts, despite the House of Lords generally becoming less conservative since the mid-1990s,¹² and the attempt to expand the equitable doctrine of undue influence in *O'Brien* and

Athens/London, 1998) 162-166; B Jazulot *La bonne foi dans les contrats: étude comparative de droit français, allemand et japonais* [Good Faith in Contract: A Comparative Study of French, German and Japanese Law] (Daloz, Paris, 2001) 50-57.

⁶ See generally above Chapter Two Parts II.D and IV. For a concise overview of conflicting scholarly approaches to good faith doctrine in the US, see E A Farnsworth *The Concept of Good Faith in American Law* (Centro di studi e ricerche di diritto comparato e straniero, Rome, 1993). For a comprehensive study from one of those perspectives, see S Burton and E Anderson *Contractual Good Faith: Formation, Performance, Breach, Enforcement* (Little Brown, Boston, 1995).

⁷ See generally A Omura *Kojo Ryojoku to Keiyaku Seigi* [Public Order and Good Morals, and Contractual Justice] (Yuhikaku, Tokyo, 1995).

⁸ Atiyah and Summers (above n 1, 51) also mention the regulation of penalty clauses as an example of a more content-oriented standard of validity in US contract law. Japanese law appears quite similar, whereas the English law tradition remains more formal; but this is major topic for future more detailed comparative study, as mentioned below in Part IV.

⁹ (1888) 40 Ch D 312. See generally S Enman "Doctrines of Unconscionability" (1987) 16 *Anglo-Am L Rev* 191.

¹⁰ [1975] QB 326, 337.

¹¹ [1985] AC 686.

¹² See above Chapter One Part II.A.

Pitt.¹³ Those cases laid down new principles to deal especially with the problem of a potentially vulnerable party (such as one spouse) agreeing to secure another's debts owed to a financial institution. Even in those two judgments, however, the House of Lords tried to draw some narrow bright-line rules, such as the institution having constructive notice of undue influence between the spouses only if "the transaction is *on its face* not to the *financial* advantage" of the spouse seeking to set it aside. More content-oriented rules, for example that the financial institution take "reasonable steps" to avoid such constructive notice, were interpreted by subsequent courts restrictively and in a "creditor-sympathetic" way,¹⁴ by reducing the duty to one primarily of *urging* the surety to take independent legal advice. Admittedly, the English Court of Appeal was so shocked by the circumstances of one more recent case that it held such urging not to be enough.¹⁵ To set aside an unlimited guarantee by a junior employee given to secure her company's debts, however, the Court had to revert to arguing that the situation fell within the narrow window of the more general equitable jurisdiction to strike down unconscionable bargains, left ajar in *Fry v Lane*.¹⁶ Further, despite the view of some commentators that this judgment might mark the revival of a broader doctrine of unconscionability in English law,¹⁷ more recent cases such as *Royal Bank of Scotland v Etridge (No 2)* have indicated that this remains very improbable.¹⁸

Similar reticence in expanding the doctrine of undue influence became apparent in New Zealand too. In *ASB Bank v Harlick*,¹⁹ the Court of Appeal overturned the High Court's ruling and enforced the mortgage given to the bank by elderly parents to secure their son's loan, by finding that theirs was just a normal family relationship so there was not even any undue influence. In *Wilkinson v ASB Bank Ltd*,²⁰ where the bank conceded the possibility of undue influence, the Court upheld the securities provided by an elderly woman for her husband's accountancy practice and family firm (in which she had no financial interest), finding that the bank was justified in relying on a solicitor to give "independent" advice. Many English judgments along similar lines were referred to; but not *Burch*.²¹ Tellingly, unconscionability was not even argued. The doctrine of unconscionability survived in New Zealand, despite its virtual demise in England in the late 19th century, but New Zealand courts nowadays apply it cautiously.²² They stress

¹³ *Barclays Bank Plc v O'Brien* [1993] 3 WLR 786, *CIBC Mortgages Plc v Pitt & Anor* [1993] 3 WLR 802.

¹⁴ B Fehlberg "The Husband, the Bank, the Wife and Her Signature - The Sequel" (1996) 59 MLR 675. See also N S Price "Undue Influence: *Finis Litem?*" (1999) 8 LQR 8.

¹⁵ *Credit Lyonnais Bank Nederland NV v Burch* [1997] 1 All ER 144. The Court held that although a bank can usually presume that a solicitor will perform their professional duties and give independent advice (even if retained by the bank), it cannot when it knows or *ought to know* that this presumption is false because the transaction is exceptionally onerous or inappropriate. See M Haley "Mees and the *O'Brien* Defence" (1998) JBL 355, 368-369.

¹⁶ *Fry*, above n 9.

¹⁷ M Chen-Wishart "The *O'Brien* Principle and Substantive Fairness" (1997) 56 CLJ 60; A Mason "The Impact of Equitable Doctrine on the Law of Contract" (1998) 27 Anglo-Am L Rev 1, 7. See also H Tjio "*O'Brien* and Unconscionability" (1997) 113 LQR 10.

¹⁸ [1998] 4 All ER 705. See P Giliker "*Barclays Bank v O'Brien* Revisited: What A Difference Five Years Can Make" (1999) 62 MLR 609.

¹⁹ [1996] 1 NZLR 655. See also *Dungey v ANZ Banking Group (NZ) Ltd* (1997) 6 NZBLC 102, 194; *Low v Swanson* (9 June 1997, unreported, High Court, Auckland Registry, CP 191/96, Robertson J).

²⁰ [1998] 1 NZLR 674.

²¹ Above n 15.

²² See for example *Low v Swanson* (above n 19), where the plea of unconscionability failed along

anyway the procedural prerequisites for the doctrine (such as lack of independent advice), rather than the substantive aspects (especially inequality of the bargain reached) which arguably open the way more readily to broader consideration of more content-oriented standards of validity.

The preference for undue influence doctrine in both jurisdictions, moreover, may be related to the conceptual distinction maintained by most courts and commentators. That is that undue influence goes to the consent of the vulnerable party (which can be seen as the more source-oriented approach), rather than wrongdoing or victimisation by a party in a superior bargaining position (a potentially more content-oriented approach).²³

US law has retained both doctrines, undue influence and unconscionability. It is the latter, however, which has become increasingly prominent over the last half century. The doctrine of unconscionability was enshrined in the UCC (§2-302) and then the *Restatement (Second)*, and has generated extensive academic commentary.²⁴ Much more so than New Zealand courts, US courts have also impugned as unconscionable contracts in certain commercial settings, particularly involving distributorships and franchises. Substantive inequality in the bargain reached also can play a more direct role. In these respects, Japanese law exhibits a more substantive approach as well, albeit by applying doctrines of good faith and (more rarely) article 90 on public order.

Over the last few decades, all four legal systems increasingly have enacted legislation aiming to control unfairness in contracting. Turning general principles (often developed through the courts) into specific statutory rules, however, tends to heighten formal reasoning.²⁵ This occurs especially if they are enacted in specific legislation rather than codifications like the UCC and especially the Japanese Civil Code. Formal reasoning also can be heightened if rules are tightly drafted and limited in sphere of application, and if courts and commentators interpret them narrowly.²⁶ All these tendencies are apparent in England (Part IV.B), with older specific legislation such as the Unfair Contract Terms Act 1977 and the Consumer Credit Act 1974 having been little used to strike down or reform unfair or extortionate contract terms. They also shield English contract law generally from the power now given under the Unfair Terms in Consumer Contracts Regulations²⁷ to regulate certain consumer contracts under the rubric of "good faith", although there are signs that this manifestation of European Union (EU) law is now beginning to have a wider influence.²⁸ Similar problems are apparent in New Zealand, perhaps even more so given the absence of direct influence from other systems of law (Part IV.C).

with that of undue influence. The development of unconscionability doctrine may also have been impeded by the caution shown in the Privy Council's decision in *O'Connor v Hart* [1985] 1 NZLR 159.

²³ See for example N Chin and P Birks "On the Nature of Undue Influence" in J Beatson and D Friedman (eds) *Good Faith and Fault in Contract Law* (Clarendon Press, Oxford, 1995) 123. But see R Bigwood "Undue Influence: 'Impaired Consent' or 'Wicked Exploitation'?" (1996) 16 OJLS 503.

²⁴ See generally L A DiMatteo "Equity's Modification of Contract: An Analysis of the Twentieth Century's Equitable Reformation of Contract Law" (1999) 33 *New England L Rev* 265, 288-294.

²⁵ Atiyah and Summers (above n 1, 96-97) that by its very nature, legislation tends to have higher "rank formality", "content formality" and "mandatory formality".

²⁶ Atiyah and Summers, above n 1, 96-98.

²⁷ SI 1999 No 2083, amended by SI 1994 No 3159 (1 July 1995), to incorporate EC Directive 93/13/EEC. See generally N Lockert and M Egan *Unfair Terms in Consumer Agreements: The New Rules Explained* (John Wiley, Chichester, 1995).

²⁸ Compare for example J Beatson "Has the Common Law a Future?" (1997) 56 *CLJ* 291, 292.

By contrast, a burgeoning array of legislative initiatives over the last few decades in the US, designed to protect small businesses as well as consumers per se, has not put any noticeable dent in the willingness of courts and commentators to develop for instance general doctrines of unconscionability. Rather, developments have proceeded in tandem (Part IV.A).²⁹ The same can be said for Japan (Part IV.D). Although it has enacted fewer specific statutes, it can now draw on those as well as a rich variety – if not a great amount – of reported case law policing unfairness in contracting. Lateral pressure from bar associations and from administrative guidance add to the picture.³⁰ All this supported powerful calls for new consumer contract legislation, enacted in 2000. The Consumer Contracts Act goes beyond the EC Directive approach in controlling not only specific unfair terms, but also the process leading up to the conclusion of the contract.³¹ Even if legislation is not enacted in such ambitious terms, and even with very recent stalling in proposals to revise article 2 of the UCC, the intense politically charged debate and strong involvement of legal academics seems likely to encourage further substantive tendencies in case law and theory development in both Japanese and US law regulating contractual unfairness.

II The “Fine Print” Doctrine

The first example given by Atiyah and Summers of content-oriented standards of validity in US law is the so-called “fine print” doctrine. A contract term can be refused effect because:³²

although the writing may plainly have been an offer, the term was not one that an uninitiated reader ought reasonably to have understood to be part of that offer. This result is particularly easy to reach if the term is on the reverse side of the form and the reference, if any, to terms on the reverse side is itself in fine print or otherwise inadequate.

Further, for instance in sales of goods, the §2-316(2) of the UCC requires that written disclaimers of the implied warranty of merchantability be reasonably “conspicuous”.³³

Similarly, in the English law tradition, the “ticket cases” established that reasonable notice is required of unusual and onerous terms.³⁴ More generally, in *Interfoto Library Ltd v Stiletto Ltd*,³⁵ the plaintiff supplier was denied payment pursuant to a clause imposing a high daily charge for hired transparencies not returned after a certain period. The English Court of Appeal held that the defendant had no obligation to make such payments, because the plaintiff had not given sufficient notice that such an onerous term was included in the contract document.

²⁹ See generally K Teeven “A History of Legislative Reform of the Common Law of Contract” (1994) 26 U Tol L Rev 35.

³⁰ V Taylor “Consumer Contract Governance in a Deregulating Japan” (1997) 27 VUWLR 99.

³¹ See B Fujioka “‘Shohisha Keiyakuho (Kasho)’ no Gutaiteki Naiyo ni tsuite’ no Gaiyo [Overview of the Concrete Contents of the Tentatively-Entitled Consumer Contracts Law]” (1998) 636 NBL 16; and L Nottage “Bridging the Gaps in Japan’s Regulatory Framework” (August 2000).43 CCH Asiawatch 6.

³² E A Farnsworth *Contracts* (2 ed, Little Brown, Boston, 1990) 314.

³³ As defined in UCC §1-201(1).

³⁴ J F Burrows, J Finn and S Todd *Law of Contract in New Zealand* (Butterworths, Wellington, 1997) 189-192.

³⁵ [1989] QB 433.

Likewise, in *Livingstone v Roskilly*, Thomas J drew on the “ticket cases” to ask: “did the notice on the wall [of the bailee’s premises] impose an onerous condition [on one reading, excluding the bailee’s liability even for negligence] that should have been specifically drawn to the plaintiff’s attention?”³⁶ In this case, notice was held to have been inadequate, and the exclusion was not allowed.

Japanese courts have used similar techniques in the “Dial Q2” (or “Dial 0900”) cases.³⁷ Typically, one issue was whether the defendant, party to a telephone contract with Nippon Telegraph and Telephone Company (NTT), had to pay NTT charges for information supplied over NTT lines from an information provider to a third party (such as the defendant’s child). NTT’s argument was that it had amended its standard form telephone contract to record that the party agreed to its collecting such charges on behalf of the information provider. However, in the first major decision on this point, the Osaka District Court held for the defendant.³⁸ The Court reasoned that it was “exceptional” for one party (the defendant) to bear an obligation towards another (NTT) for the acts of yet another (the information provider); and that when the amendment was made, the general public was unaware that the charges for such services could easily escalate. Thus the Court held that the amendment had not been made sufficiently clear; the defendant could not be said to have agreed to such an unusual and onerous amendment. Other judgments have generally following this reasoning.³⁹

Thus, on the one hand, the general concern and approach in Japanese law bears some similarities to that of US, English and New Zealand law. The issue is whether an unusual term was reasonably brought to the other party’s notice. “Reasonableness” is clearly a content-oriented standard of validity, pointing to a more substantive approach. On the other hand, these cases can be fitted within a classical framework, reducing this particular aspect of contract formation to the question of whether the parties have agreed, as analysed through the conceptual structure of offer and acceptance.⁴⁰

Japanese law reveals a similar ambivalence in the overlapping but more general area of doctrines of contract interpretation. For instance, in a broad sense, the Osaka District Court judgment might be seen as interpreting the contract *contra proferentem*.⁴¹ But this doctrine, which first insists on finding an “ambiguity” in the parties’ agreement, still stresses the latter as a source-oriented standard and thus remains a more formal approach.

³⁶ [1992] 3 NZLR 230, 238.

³⁷ Matsumoto, above n 4.

³⁸ 22 March 1993 (820 Hanrei Taimuzu 108).

³⁹ Compare for example the Supreme Court judgment of 27 March 2001, unreported, Case Ju 766 of 1999, Petty Bench. However, the Court exhibited tendencies towards more substantive reasoning to bolster the conclusion that NTT could not enforce a claim for Dial Q2 services included pursuant to its standard form telephone contract. The majority judgment noted that the US had enacted legislation to regulate such services as long ago as 1988, and that telephone services were widely used and indeed indispensable to everyday life. Concurring judgments added that disclosure requirements were especially needed and expected in Japan’s deregulating telecommunications market, and that analogies could be drawn from Commercial Code provisions requiring disclosure in the course of performance of insurance contracts.

⁴⁰ Atiyah, above n 2.

⁴¹ Thanks are due to Tsuneo Matsumoto for this suggestion. If this is so, it may represent a significant development in the Japanese caselaw. Japanese courts have rarely attempted to develop this doctrine, at least in the form proposed by Japanese scholars (A Omura “*Keiyaku Naiyo no Shihoteki Kisei* [Private Law Regulation of Contract Content] (1)” (1991) 473 NBL 34, 39).

More forthrightly, most noticeably in a recent series of insurance contract cases, Japanese courts have developed principles of “reasonable interpretation” (*goriteki kaishaku*) and “restrictive interpretation” (*seigenteki kaishaku*). A clause can be interpreted “restrictively” where a literal reading would lead to “unreasonable results”.⁴² Unlike the pure version of the *contra proferentem* doctrine, this may not require Japanese courts to first strain to find some ambiguity. For instance, in another Dial Q2 case, the Okayama District Court declared the same clause to be unenforceable, arguing that it must be so interpreted because its content was unreasonably onerous, *even if* the clause could be said to be as unambiguous as NTT had asserted.⁴³ Once again, this may represent a tendency in Japanese courts towards applying more directly content-oriented standards of validity, and thus a more substantive approach. On the other hand, this still occurs under the guise of interpretation of the parties’ agreement, and the precise implications of these cases have been vigorously debated.⁴⁴ These counter-tendencies indicate the resiliency of a formal approach.

Rather similarly, in *Livingstone* Thomas J argued that the notice in question did not unambiguously exclude liability for negligence, so it could be construed *contra proferentem* against the negligent bailee.⁴⁵ However the Judge also suggested that looking for ambiguity could result in “artificial or strained interpretation”.⁴⁶ Thomas J asserted that another key issue was whether the parties “intended” such a clause to be the subject of proper and reasonable performance, rather than providing an exclusion even for negligence.⁴⁷ This, however, seems very close to reviving the doctrine of fundamental breach: the notion that a court will impose minimal obligations in certain contracts, overriding the parties’ intentions as evidenced even by the clearest of exemption clauses to the contrary.⁴⁸ Other New Zealand courts have not been quick to pursue this alternative line of reasoning, beginning with the Court of Appeal in *Shipbuilders Ltd v Benson*.⁴⁹ In any event, Thomas J’s own insistence that maintaining

⁴² Omura, above n 23, 39. Omura cites for instance a Supreme Court decision of 20 February 1987, limiting the effect of a clause requiring “60 days’ notice” of claims to the insurer, given its supposed purpose and legal character. Also, in a case quite similar to *Interfoto* (above n 35), a judgment of the Yamaguchi High Court (12 May, 1987) only allowed partial enforcement of a clause providing for high liquidated damages on termination, arguing that it was difficult to foresee that such a clause would have been included in the written contract, and that its content was unreasonable (Omura, above n 7, 37, n 6). See also Y Yamamoto “*Futo Joko to Kojo Ryojoku* [Unfair Terms, and Public Order and Good Morals]” (1994) 66 *Horitsu Jiho* 101, 103 (n 9).

⁴³ Unreported, 19 May 1994. See also T Matsumoto “EC Directive on Unfair Terms in Consumer Contracts and Japan: Does Japanese Law Meet the Standards Set by the Directive?” (1994) 2 *Consumer LJ* 141, 143.

⁴⁴ See for example S Yasunaga, “*Hokenkeiyaku no kaishaku to yakkan kisei* [The Interpretation of Insurance Contracts and the Control of Standard Terms]” (1994) 56 *Shiho* 109.

⁴⁵ *Livingstone*, above n 3, 234-235.

⁴⁶ *Livingstone*, above n 3, 235.

⁴⁷ *Livingstone*, above n 3, 235 and 239.

⁴⁸ C Nicholson “Excluding Liability for Negligence: ‘All Care and No Responsibility’ in *Livingstone v Roskilly*” (1994) 24 *VUWLR* 289, 308-312.

⁴⁹ [1992] 3 *NZLR* 549, 561 (CA). Although a sign worded “all care no responsibility” was perceived as ambiguous by Thomas J in *Livingstone*, in *Shipbuilders* the Court of Appeal found unambiguous the declaration that the storage was “at owner’s own risk” given that there was separate reference to insurance responsibility. See also *Richmond Ltd v DHL International (NZ) Ltd* (1991) 3 *NZBLC* 102,118 (CA), further stressing that words should be given their natural plain meaning in the light of the contract as a whole; and *Victor Hydraulics Ltd v Engineering Dynamics Ltd* [1996] 2 *NZLR*

minimal obligations still involved interpretation of the parties' agreement – however strained – was an indication of the continued importance of appeals to “source-oriented” standards in New Zealand contract law.

In sum, the Dial Q2 cases and *Livingstone* can be seen as developing a test similar to the “fine print” doctrine. Alternatively they can be seen as promoting an expanded canon of *contra proferentem* interpretation – or, indeed, of “restrictive” interpretation or some version of the doctrine of fundamental breach. Even on that last view, however, these developments are ambiguous: they can be viewed as representing either a more substantive approach, or as reconcilable with a formal approach to contract law. Hence a closer comparative analysis of more wide-ranging controls of unfair contract terms is called for.

III Good Faith, Unconscionability and Undue Influence

III.A US Law

1 Consolidation of Good Faith Doctrine

Atiyah and Summers' second example of substantive, content-oriented standards of validity in US contract law is “the general obligation of good faith and fair dealing”.⁵⁰ A brief survey of the scope of this duty indeed provides significant contrasts with the English law tradition. It also uncovers close parallels between US and Japanese law.

The Uniform Commercial Code (§1-203) and the *Restatement (2nd) of Contract* (§205) state that every contract imposes a duty of good faith and fair dealing in its performance and enforcement. As in Japan, this duty has acted as a lodestone in defining and refining performance obligations. It determines what incidental performance is required, such as reasonable cooperation so as to satisfy contractual conditions, or what are reasonable demands in requirements and outputs contracts.⁵¹ The duty has also helped to refine rights of enforcement. It softened the rigour of the “perfect tender” rule, preventing rejection despite minimal deviations in contract performance. Generally, the duty is associated with the rule that only a “material” breach can justify the other side exercising a right not to perform.⁵²

More ambitiously, but equally familiar to a Japanese lawyer, the duty has become a focus for discussion as to whether there is or can be an obligation to negotiate

235 (HC), following *DHL* to give the exclusion clause its plain meaning and refusing consider the doctrine of fundamental breach. Compare also *Westpac Banking Corporation v M M Kembla New Zealand Ltd* [2001] 2 NZLR 298 (HC), where *Livingstone* was argued only for its statement that clauses could be read *contra proferentem*; and *Rogers v HIH Casualty & General Insurance (NZ) Ltd* (11 April 2000) unreported, CA 281/99, Blanchard, McGechan and Young JJ, where the words of an insurance policy were read objectively and *eiusdem generis*, and (upon ambiguity) *contra proferentem*, to allow the claim.

⁵⁰ Above n 1, 51.

⁵¹ H Hunter “The Duty of Good Faith and Security of Performance” (1993) 6 JCL 19, 23.

⁵² Hunter, above n 51, 23-24. Compare the recent decision of the Privy Council, on appeal from Hong Kong, refusing to allow equitable relief where purchaser was a few minutes late in settling a land sale transaction, because time had been agreed to be of the essence: *Union Eagle Ltd v Golden Achievement Ltd* [1997] 2 WLR 341.

in good faith towards conclusion of a full contract.⁵³ More surprising is the way case law can emerge, in a sudden and highly visible manner, drawing on this broad notion of good faith. For instance, the duty of good faith has played an important role in setting standards and regulating the interests of contracting parties in automobile or gasoline distributorships, and in franchising. Typical problems, such as the enforcement of the right to terminate, attracted wide public interest. In the 1970s, in particular, specific federal and state legislation was enacted. Yet the enactments have retained standards of a similar level of generality as the duty of good faith and fair dealing. By heightening the overtly political background to the legislation, the development of this area of the law remained notably substantive.⁵⁴

Also beginning in the 1970s, some US courts began to overturn the longstanding doctrine that an employer could terminate the contract with an employee "at will". They created various public policy exceptions to this doctrine, controlling termination, for instance where it had followed from an employee's refusal to perform an illegal act. Some went further and read in a duty of good faith to control the employer's right to terminate at will, as where the employer's motive was to deny the employee an agreed bonus despite years of satisfactory service. These developments also attracted widespread public interest, because many courts then went on to allow large claims for punitive damages.⁵⁵ However, in the 1980s, these developments slowed. In 1988, a more conservative Supreme Court of California stressed the limits of the public policy exception, and decided that the breach of an implied duty of good faith should only give rise to a contract claim, thus limiting the scope for claiming punitive damages.⁵⁶ Nonetheless, even the possibility of a claim in contract for compensatory damages for breach of the implied duty remains a serious consideration for Californian employers, particularly as it is unclear whether such a duty can be avoided even by the clearest of language excluding it.⁵⁷ Furthermore, as of 1993, seventeen out of thirty-six states recognised a cause of action based on a duty of good faith.⁵⁸ Thus, in the area of employment contracts, the duty of good faith has played a highly visible role in developing the law. Also, although proposals to restate or clarify standards by statute have not met yet with the results evident in the area of distributorships and franchises,

⁵³ Courts in the US have adopted various techniques to promote such a duty, although they still tend to require a recognisable preliminary agreement, or some form of a contractual agreement to negotiate in good faith. See E A Farnsworth "Developments in Contract Law During the 1980's: The Top Ten" (1990) 41 Case West Res L Rev 203, 212). Compare for example *Consarc Corp v Midland Bank NA* (1993) 996 F 2d 568 (2d Cir), discussed above Chapter Two Part II.B.1.

⁵⁴ S Macaulay "Long-Term Continuing Relations: The American Experience Regulating Dealerships and Franchises" in C Joerges (ed) *Franchising and the Law: Theoretical and Comparative Approaches in Europe and the United States* 179 (Nomos, Baden-Baden, 1991). Thanks are due to Richard Boast for suggesting the possibility that legal reasoning in a particular area can become overall more substantive in nature as a result of a highly politicised law-making process. Compare Atiyah and Summers, above n 1.

⁵⁵ S Macaulay, J Kidwell, W Whitford and M Galanter *Contracts: Law in Action* (The Michie Company, Charlottesville, 1995) Vol 1, 471-481. Compare also J W Parker "At-Will Employment and the Common Law: A Modest Proposal to De-Marginalize Employment Law" (1995) Iowa L Rev 347.

⁵⁶ (1988) *Foley v Interactive Data Corp* 47 Cal. 3d 654 (Cal). See also J Peterson, "The Duty of Good Faith in Insurance Relationships: The Decision in *Gibson v Parkes District Hospital*" (1994) 24 VUWLR 189, 198-199. Compare also R C Henderson "The Tort of Bad Faith in First-Party Insurance Transactions after Two Decades" (1995) 37 Arizona L Rev 1153.

⁵⁷ Macaulay and others, above n 55, 501.

⁵⁸ Macaulay and others, above n 55, 487.

the discussion remains highly political.⁵⁹ Overall, this area also remains characterised by distinctly substantive reasoning.

Also in the 1980s, the duty of good faith was applied to cases involving an aspect of "lender liability". For instance, a bank was held liable when it refused to advance further funds to a borrower, despite the agreement permitting the bank to do so if it felt insecure.⁶⁰ An American commentator notes that such limitations on enforcement of rights may operate under other principles such as estoppel or waiver; but he is generally comfortable with this additional control mechanism open to US courts.⁶¹ Hunter implies that in deciding where to draw the line, the courts do and must have a mechanism to undertake sufficient inquiry into the details of the parties' relationship.⁶²

Contrary to the Objectivists who held sway around the turn of the century, the most important determinant in contract performance – and in the security of performance – is the relationship of the parties to each other.

Similarly, the Court of Appeals for the 9th Circuit reinstated a jury verdict holding an oil company liable to an asphaltic paving contractor for failing to give adequate notice of its decision to raise prices, despite the former's standard form expressly reserving the right to set prices, given the pervasive practices on Oahu Island of giving notice in similar circumstances.⁶³ Macaulay and others suggest that the court was impressed by the close links which had developed between the contractor and local staff of the multinational oil company over the course of the eleven-year requirements contract: "The Court looked to the relationship rather than the abstractions of formal contract law."⁶⁴ Thus, on occasion, the duty of good faith can provide another useful mechanism allowing US courts to search out and give due weight to the "real deal", not just the "paper deal".⁶⁵

Several of these applications of the duty of good faith, as in distributorships or employment, can be seen more generally as controlling unfairness in contractual relationships where standard forms are particularly common. The same may be inferred from its application to the control of disclaimer clauses in written contracts. Adams

⁵⁹ Macaulay and others, above n 55, 488-490.

⁶⁰ (1985) *KMC Corp v Irving Trust Co* 757 F 2d 752 (6th Cir). Compare generally J M Paterson "Limits on a Lender's Right to Repayment on Demand: Construction, Implication and Good Faith?" (1998) 26 Aust Bus L Rev 258.

⁶¹ H Hunter "The Duty of Good Faith and Security of Performance" (1993) 6 JCL 19, 23-25. See also DiMatteo, above n 24.

⁶² Hunter, above n 61, 25-26.

⁶³ (1981) *Nanakuli v Shell Oil* 664 F 2nd 772 (9th Cir).

⁶⁴ S Macaulay, J Kidwell, W Whitford and M Galanter *Contracts: Law in Action* (The Michie Company, Charlottesville, 1995) Vol 2, 367. The Court stressed "the close, almost symbiotic relations between Shell and Nanakuli on the island of Oahu, where the expansion of Shell on the island was intimately connected to the business growth of Nanakuli" (above n 63, 773). The Court also held for Nanakuli on the basis of trade usage, superseding the contract wording, approving of commentary suggesting that obsolete wording should be ignored in when at variance with actual trade practices.

⁶⁵ Macaulay and others, above n 55, 366. See also above Part Two Introduction Part I. Compare J White "Good Faith and the Cooperative Antagonist" (2001) 54 SMU L Rev 679 (agreeing that good faith should be used to determine the broad context of parties' relationships, but arguing that that this often involves "cooperative antagonism" rather than outright cooperation).

asserts that the duty has been used to control clauses limiting buyers' remedies to repair or replacement, and limiting liability for consequential losses.⁶⁶

2 Expansion of Unconscionability Doctrine

In fact, to strike down the offending clauses, the two cases respectively cited by Adams relied primarily on the third example given by Atiyah and Summers: the doctrine of unconscionability.⁶⁷ US cases involving distributorships and franchises have also relied more on this other broad and "content-oriented" standard, set out primarily in UCC §2-302.⁶⁸ Furthermore, the noticeable growth of the doctrine of unconscionability has been underpinned precisely by perceived inadequacies of classical doctrines, such as the "fine print" doctrine (above Part II), in controlling unfairness in standard form contracts. Specifically, it was appreciated that an inquiry into whether the clause was sufficiently brought to one's attention, and therefore agreed upon, would offer insufficient protection to a party who happened to have read and understand a particular clause, but who had proceeded to contract on the basis of that form. Instead, the main problem was seen to be whether that party really had any real freedom to negotiate standard contract terms – the more substantive problem of inequality of bargaining power.⁶⁹

UCC §2-302, epitomising this new concern, was soon criticised as "the Emperor's new clause", for failing to give clear guidance to US courts.⁷⁰ In fact, the courts have generally applied it with care.⁷¹ This has been so particularly in disputes between businesses.⁷² However, even within that category, sufficient cases do apply the doctrine of unconscionability to ensure it remains another important residual technique for controlling unfairness in contractual relationships.⁷³ On occasion, the broad wording of the doctrine of unconscionability has allowed some US courts to strike down contracts on the basis of severe contractual imbalance, even without some procedural impropriety in the bargaining process.⁷⁴ Generally, it has bolstered the resolve of US courts to embark, where necessary, on a wide-ranging investigation of the contracting parties' relationship.

⁶⁶ J Adams "The Economics of Good Faith in Contract" (1995) JCL 126, 135-136 (n 39).

⁶⁷ See *Eckstein v Cumming* (1974) 321 NE 2nd 897, 902-903 (Ohio Ct App); and *Select Pork v Babcock Swine* (1981) 640 F 2d 147, 149 (8 Cir). The former involved the Ohio equivalents of UCC §2-719(1)(a) and §2-302; the latter involved the Iowa equivalent of UCC §2-719(3).

⁶⁸ See for example E Jordan "Unconscionability at the Gas Station" (1978) 62 Minn L Rev 813, 830.

⁶⁹ Farnsworth, above n 32, 316-319.

⁷⁰ A Leff "Unconscionability and the Code - The Emperor's New Clause" (1967) 115 U Pa L Rev 485.

⁷¹ A Angelo and E Ellinger "Unconscionable Contracts: A Comparative Study of the Approaches in England, France, Germany, and the United States" (1992) 14 Loyola LA Intl & Comp L J 455, 504-505. Leff's fatalistic prediction thus has proved correct (above n 70, 558): "The courts will most likely adjust, encrusting the irritating aspects of the section with a smoothing nacre of more or less reasonable applications".

⁷² Farnsworth, above n 32, 331-332.

⁷³ See for example Macaulay and others, above n 55, 798-799.

⁷⁴ DiMatteo, above n 24, 292; Farnsworth, above n 32, 334. Both point to exceptions, but note that the more frequent approach is for US courts to require a mixture of both aspects. See also for example *NEC Technologies Inc v Nelson* (1996) SE 2d 769 (Ga); *American Software Inc v ALI* (1996) 54 Cal Rptr 477 (Cal App).

Thus, as Atiyah and Summers suggested briefly over a decade ago,⁷⁵ doctrines of good faith and of unconscionability indeed remain prominent examples of “content-oriented” standards of validity in US contract law.

III.B English Law

1 Denial of a Generalised Duty of Good Faith

By contrast, English law remains noticeably reluctant to develop a broad duty of good faith. Certainly, in *Interfoto*, Bingham LJ did suggest that cases such as the “ticket cases” went beyond “a question of pure contractual analysis, whether one party has done enough to give the other notice of the incorporation of a term in the contract”.⁷⁶ The Judge argued that they were also concerned with the broader question of “whether in all the circumstances it would be fair (or reasonable) to hold a party bound”. Bingham LJ linked this latter question to “an overriding principle that in making and carrying out contracts parties should act in good faith”, noting the principle’s existence in many legal systems. He noted however that “English law has, characteristically, committed itself to no such overriding principle, but has developed piecemeal solutions in response to demonstrated problems of unfairness”.⁷⁷ A number of such solutions were then listed, such as Equity’s control of penalty clauses.

These comments need to be kept in context. Already in 1956, an English jurist had cleverly attempted to bring together various strands that might amount to, or overlap with, a general principle of good faith.⁷⁸ Yet no momentum was generated in England until the 1990s, primarily in response to the new Unfair Terms Regulations being passed due to obligations under EU law.⁷⁹ Two examples should suffice to show how difficult it will be to develop rapidly a generalised duty of good faith in English law.⁸⁰

⁷⁵ Above n 1.

⁷⁶ Above n 35, 439.

⁷⁷ Above n 35, 439.

⁷⁸ See the pioneering study by R Powell “Good Faith in Contracts” (1956) 9 CLP 16.

⁷⁹ Above n 27. In Australia, there was some revival of interest in the late 1980s: see H Lücke “Good Faith and Contractual Performance” in P Finn (ed) *Essays on Contract* (Law Book Co, Sydney, 1987). Publication of that fine study was quickly followed by R Goode’s admonition (“The Codification of Commercial Law” (1988) 14 Mon LR 135, 151): “It is surely high time that English law adopted a general principle of good faith and cast off its historical shackles”. In England, this led to a more comprehensive overview (J O’Connor, *Good Faith in English Law*, Dartmouth, Aldershot, 1990), and then more attention from J Steyn (“The Role of Good Faith and Fair Dealing in Contract Law: A Hair Shirt Philosophy?” [1991] Denning LJ 131). However a significant upsurge in interest has only become evident since it became clearer that developments in EC law would impact on domestic law (see for example P Duffy “Unfair Contract Terms and the draft EC Directive” (1993) JBL 67; R Goode *The Concept of Good Faith in English Law* (Centro di studi e ricerche di diritto comparato e straniero, Rome, 1992)).

⁸⁰ See also R Brownsword “General Considerations” in M Furmston (ed) *The Law of Contract* (Butterworths, London, 1999) 1, 67-85. He suggests that Bingham LJ evinced a “neutral” approach to a general doctrine of good faith, seeing it as (a) equivalent to the sum of various specific doctrines and (b) a matter of indifference which approach is chosen. He contrasts the “half-committed neutral” who rejects (b) in favour of the specific rules, often including familiar terminology, as well as many outright sceptics. However, Brownsword favours what he sees as Lord Steyn’s preference for a general doctrine of good faith, rejecting both (a) and (b).

One way of improving the acceptability of such a duty may be to give it quite detailed contents or conceptual structure, to avoiding the criticism that applying the duty will become a matter of unfettered judicial discretion.⁸¹ However, this runs a risk of overly restricting the opportunity to reconsider the broader contours of the law of contract. For instance, it is now common to begin by stressing that conceptually a duty of good faith is (or should be) more limited than a fiduciary duty. Specifically, the duty of good faith is seen as a duty to “act honestly” and “have regard to the legitimate interests of the other party”, whereas the duty on the fiduciary is to place the interests of the beneficiary above its own.⁸² A sharp distinction is then drawn between contract – supposedly centred on self-interest, even if attenuated in exceptional circumstances by the imposition of a duty of good faith – and fiduciary duty.⁸³

Certainly, fiduciary obligations have differed historically from contractual obligations as to burden of proof, remedies, and so on.⁸⁴ For practical purposes, those distinctions often remain important. But there is a risk in then reasoning backwards, defining or redefining new rights after identifying differing legal consequences, as English private law has often tended to do.⁸⁵ Such an approach can obscure areas of actual and potential overlap. It can lead to an overly schematic view of the conceptual bases for each area of law, and thus limit the opportunity for more wide-ranging reconceptualisations.

Thus, when confronting English law, one versed in Japanese law (below Part III.D.1) might well ask whether it might not be simpler to dispense with – or at least tone down – some of the traditional incidents of a fiduciary relationship. Instead, some of those incidents could be absorbed by a broadened duty of good faith. The overall nature of that duty would then be likely to change, and the resources available to pursue new directions to expand, with more wide-ranging implications for the development of contract law as a whole.⁸⁶ In the US, even those who wish to retain certain distinctions recognise more blurring of the edges between contractual and fiduciary duty.⁸⁷ No doubt this has encouraged supporters of the “economic analysis of contract law”, who argue that fiduciary duties should be absorbed into a contractual framework.⁸⁸

⁸¹ J Carter and M Furmston “Good Faith and Fairness in the Negotiations of Contracts (Part 1)” (1994) 8 JCL 1, 5-6. See also H Koetz “Towards A European Civil Code: The Duty of Good Faith” in P Cane and J Stapleton (eds) *The Law of Obligations: Essays in Celebration of John Fleming* (Oxford, Clarendon Press, 1998) 243, 246 (noting this sort of objection from various English jurists), 250-251 (arguing that German experience shows that judges, even within a civil law tradition, have been careful to develop categories in which good faith doctrine applies).

⁸² Carter and Furmston, above n 81.

⁸³ J Maxton “Contract and Fiduciary Obligations” (1997) 11 JCL 222, 224.

⁸⁴ Above n 83, 226. See also L Sealy “Commentary on ‘Good Faith and Fairness in Negotiated Contracts’” (1995) 8 JCL 142, 144.

⁸⁵ F Lawson *A Common Lawyer Looks at the Civil Law* (Ann Arbor, U Michigan Press, 1955) 141.

⁸⁶ As mentioned below (text at n 114 and 115), art 1(2) has developed a function that is broadly seen as “equitable”, prompting wider jurisprudential debate. Of course, there are also more classical Japanese contract law theorists who dislike such attempts at broader based reformulations: compare for example N Higuchi “Contemporary Concepts of Contract in Japan” (Paper presented at the conference on “Legal Crisis? Japan and Asia”, Melbourne, 12-14 August 1999).

⁸⁷ D DeMott “Beyond Metaphor: An Analysis of Fiduciary Obligation” [1988] Duke LJ 879, 896-897, 901, 906-911.

⁸⁸ F Easterbrook and D Fischel, “Contract and Fiduciary Duty” (1993) 36 J L & Econ 425, 427.

Alternatively, it could underpin an extension of “relational contract law”.⁸⁹ By contrast, when considering the principle of good faith in English law, the present preference for a clear taxonomy of fiduciary and contractual duty stifles more expansive reformulations of what is, or should be, seen as central to contractual relationships. All this appears symptomatic of a wider uneasiness in the formal English law tradition towards more substantive legal reasoning.

A second difficulty is apparent from another recent review of areas where the notion of good faith may be immanent within the English law tradition. Waddams argues that there is inadequate justification for a wider duty of good faith.⁹⁰ His main criticism is that its ordinary meaning would seem to lead English courts into excessive consideration of a party’s subjective intentions or motives. This criticism can also be seen as a reaction, representative of a formal approach, against a more content-oriented standard, whose contours would have to be fleshed out, and which might require the English legal system to undertake more substantive reasoning – even on occasion inquiring into matters subjective to the parties.

Waddams instead proposes that the areas reviewed are, and should be, controlled merely by two principles: protection of reasonable expectations, and unconscionability. Hence he criticises Bingham LJ’s suggestion, in the *Interfoto* case, that the doctrine of unconscionability might be built up into a wider notion equivalent to a duty of good faith.⁹¹ But this advocacy of a broadened doctrine of unconscionability is premised on a rejection of what might be an even broader content-oriented standard, a general duty of good faith.⁹² Furthermore, the availability of other means of protecting

⁸⁹ C Dickerson (“From Behind the Looking Glass: Good Faith, Fiduciary Duty, and Permitted Harm” (1995) 22 Fla State Uni L Rev 955, 958-959) argues that “good faith and fiduciary duty represent application of the same parameters to facts at opposite ends of a single continuum”, criticising the tendency to stress discontinuity. Furthermore, she suggests that one key parameter is the extent to which the structure of the relationship creates power and conflict of interest in the actor (subject to one of these duties) compared to the other party. The other parameter which she believes has been somewhat lost from view is the harm perceived and imposed on that other party. This theory arguably opens the way to a “relational contract” analysis of the structure of the relationship and its inherent norms. See for example I Macneil, “Values in Contract: Internal and External” (1984) 78 Northwest Univ L Rev 340. See also R Gordon “Macaulay, Macneil, and the Discovery of Solidarity and Power in Contract Law” (1985) Wisc L Rev 565. However, as noted by J Carter and M Furmston (“Good Faith and Fairness in the Negotiations of Contracts (Part 2)” (1995) 9 JCL 93, 119) “the relational feature of contract is not well developed in either Australia or England”. Even less so, in New Zealand. See for example L Nottage “Planning and Renegotiating Long-Term Contracts in New Zealand and Japan: An Interim Report on an Empirical Research Project” (1997) NZ L Rev 482, 485-486 (discussing *Pizza Restaurants (NZ) Ltd v Pepsico Australia Pty Ltd*, unreported, High Court, Auckland Registry, CL 35/92, Robertson J); *Bilgola Enterprises Ltd & Ors v Dymocks Franchise Systems (NSW) Pty Ltd* (6 July 2000) unreported, Court of Appeal, CA 69/99 and 81/99, Richardson P, Henry and Keith JJ (disapproving of Hammond J’s application of New South Wales law to suggest that a franchise relationship or clauses in the contract imposed duties of good faith – even though the Judge found these had been breached). Compare also above Part Two Introduction Parts I-III with Part IV.

⁹⁰ S Waddams “Good faith, Unconscionability and Reasonable Expectations” (1995) 9 JCL 55.

⁹¹ Waddams, above n 90, 61. To very similar effect, see J Steyn “Contract Law and the Reasonable Expectations of Honest Men” (1997) 113 LQR 433, 438-439. However, as shown by his judgment in *The Junior K* (above Chapter Two Part II.A.4), by rejecting the sophisticated comparative jurisprudence on good faith doctrine, there is a great risk that more specific doctrines such as estoppel will not be applied and developed.

⁹² Compare for example R Brownsword “Good Faith in Contracts Revisited” (1996) 54 CLP 111, arguing that a regime systematically promoting good faith requires an underlying ethic of cooperation. He

reasonable expectations has not prevented the development of such a duty in US law (above Part III.A.1).

2 Denial of Unconscionable Bargains Doctrine and Faltering Growth in Undue Influence Doctrine

Waddams' alternative proposal, that unconscionability be expanded into a new broader principle,⁹³ meets with the difficulty that its English law variant has been characterised by piecemeal and limited development.⁹⁴ English courts may retain the doctrine to apply in particularly egregious cases, like *Burch*.⁹⁵ Yet it has hardly ever been applied to disputes between companies.⁹⁶ This contrast to the role, albeit residual, that unconscionability or good faith can play in such contexts in the US.

Any consideration of unconscionability under English law therefore needs to consider the doctrine of undue influence.⁹⁷ In practice, some cases in England bring arguments based on both doctrines.⁹⁸ Characteristically, however, English law has again respected the historical development of undue influence as a doctrine separate from unconscionability and other equitable doctrines, again with historically separate remedies. This helps explain the rejection by the House of Lords of Lord Denning MR's suggestion in *Bundy*, that all these doctrines be drawn together by "a single thread ... 'inequality of bargaining power'".⁹⁹

Further, part of the relative appeal of undue influence doctrine appears to be its conceptual basis, said to focus on the plaintiff's vitiated consent or impaired agreement – a more source-oriented standard of validity – compared to unconscionability, directed towards the defendant's overreaching or exploitation of the plaintiff.¹⁰⁰ Unwillingness to transcend or at least reformulate such conceptual foundations explains the retrenchment of the doctrine of undue influence since 1993, when in *Pitt and O'Brien*

goes on give philosophical and institutional reasons for rooting this ethic in the promotion of individual autonomy. However, one could add other normative and empirical considerations. See below Part Three Chapter Five. Compare also R Brownsword, above n 80, 145-158.

⁹³ Waddams, above n 90.

⁹⁴ Enman, above n 9.

⁹⁵ Above n 15.

⁹⁶ A rare exception is *Alec Lobb (Garages) Ltd v Total Oil (GB) Ltd* [1985] 1 All ER 303, where the Court of Appeal upheld the decision that a renegotiated contract, including a covenant tying the plaintiff to purchase petrol exclusively from the defendant, was not unconscionable, nor a restraint of trade. This judgment has not been cited in any later reported case law involving claims of unconscionability raised between two or more companies. Nor has this writer been able to find any cases raising such claims, let alone one where the bargain has been set aside as unconscionable.

⁹⁷ In US law, the expansion of a very broad notion of unconscionability, and the early emergence of the doctrine of economic duress (Farnsworth, above n 32, 286), work to reduce the scope of application – and theoretical and practical relevance – of undue influence.

⁹⁸ See for example *Bundy*, above n 10, 337.

⁹⁹ Above n 10, 337. Interestingly, his Lordship had adverted to US law during argument (above n 10, 333). Compare *Morgan*, above n 11, 708 (also cited by Atiyah and Summers, above n 9, 51). See also J Beatson "The Common Law Today" [1991] JBL 78, 80. Recently, however, some scholars at least have expressed renewed interest in the possibility of drawing together threads in the English law of Equity: see for example M Halliwell *Equity and Good Conscience in a Contemporary Context* (Old Bailey Press, London, 1997); A Dunn "Equity is Dead: Long Live Equity!" (1999) 62 MLR 140.

¹⁰⁰ Chin and Birks, above n 23; J Beatson "Innovations in Contract: An English Perspective" in P Birks (ed) *The Frontiers of Liability* (Oxford University Press, Oxford, 1994) Vol 2, 128, 139.

the House of Lords attempted to extend it to cases involving third parties (mainly banks).¹⁰¹ Interestingly, however, in *Smith v Bank of Scotland*,¹⁰² the House of Lords sitting as Scotland's ultimate appellate court held that the bank in question had to take certain steps in situations similar to those addressed in *Pitt* and *O'Brien*, but without imposing such obligations on the basis of undue influence. As Lord Clyde observed:

It seems to me preferable to recognise the element of good faith which is required of the [bank] on the constitution of the contract of [guarantee] and find there a proper basis for decision. The law already requires ... that there may arise a duty of disclosure to a potential [guarantor] in certain circumstances. As part of that same duty of good faith which lies behind that duty it seems to me reasonable to accept that there should also be a duty in particular circumstances to give the potential [guarantor] certain advice. Thus in circumstances where the [bank] should reasonably suspect that there may be factors bearing on the relationship with the debtor the duty would arise and would have to be fulfilled if the [bank] is not to be prevented from later enforcing the contract. ... This is simply a duty arising out of the good faith of the contract to give advice. It is unnecessary on [this] approach ... to deem the [bank, under Equity,] a potential participant in any misrepresentation by the debtor.

This clearly points the way towards a much broader, content-oriented approach; but it draws on the civil law tradition in the separate jurisdiction of Scotland.¹⁰³ A similar reformulation in English law seems improbable for several reasons. One is its more formal orientation towards contract law generally and in this particular area.¹⁰⁴ Another is the existence already of a large corpus of case law and commentary which has refined the contours of undue influence doctrine in the wake of *Pitt* and *O'Brien*.¹⁰⁵ Most of this proceeds on the basis of a reluctance to revive and expand a doctrine of unconscionable bargains, which might then be merged with a doctrine of undue influence.¹⁰⁶

More formal reasoning is also reinforced by *Pitt* abolishing the requirement that the defendant establish "manifest disadvantage".¹⁰⁷ While this helps the defendant and potentially broadens the scope of application of undue influence doctrine, it means that the focus is directed on the process leading up to the bargain concluded, rather than the

¹⁰¹ Above n 13.

¹⁰² 1997 SLT 1061, 1068 (followed by Lords Goff, Lloyd and Hoffmann).

¹⁰³ See above Part One Introduction. Compare also R Evans-Jones "Receptions of Law, Mixed Legal Systems and the Myth of the Genius of Scots Private Law" (1998) 114 LQR 228.

¹⁰⁴ Also, in its legal system overall, for instance in the lack of constitutional review (above Chapter One Part II.A). In Germany, for instance, the latter has played an important role in developing the doctrine of good faith to apply to these sorts of third-party situations. See N Horn (L Nottage trans) "German Banks' Duties to Inform and Give Advice" [November/December 1998] *European Bus L Rev* 376.

¹⁰⁵ S Goo "Enforceability of Securities and Guarantee after *O'Brien*" (1995) 45 OJLS 125, 131; A Lawson "*O'Brien* and its Legacy: Principle, Equity and Certainty?" (1995) 54 CLJ 280, 286 and 288; Fehlberg above n 14; Tjio, above n 17; Giliker, above n 18.

¹⁰⁶ See for example *Jones v Morgan & Anor* (28 June 2001) unreported, English Court of Appeal Civil Division, Lord Phillips MR, Pill and Chadwick LJJ; *Portman Building Society v Dusangh & Ors* (19 April 2000) unreported, English Court of Appeal Civil Division, Simon Brown, Ward and Sedley LJJ. But see D Capper "Undue Influence and Unconscionability: A Rationalisation" (1998) 14 LQR 479 (arguing the two doctrines can be merged).

¹⁰⁷ Certainly if actual undue influence is established, and perhaps even in cases where undue influence can be presumed (*Pitt* above n 13, 807-9). See A Berg, "Wives, Guarantees – Constructive Knowledge and Undue Influence" [1994] LMCLQ 34, 38.

its substantive justice.¹⁰⁸ Arguably, the latter invites more substantive reasoning, by requiring for instance an analysis of how markets are constituted.¹⁰⁹ Further, by allowing banks simply to urge independent advice from solicitors, English courts narrowed the scope of application of undue influence doctrine as reformulated in *Pitt* and *O'Brien*.¹¹⁰ As also mentioned above (Part I), several rules laid down in those judgments were “bright-line” ones anyway. By limiting the inquiry into whether the bargain was to the “financial” benefit to the defendant, for instance,¹¹¹ the courts (and banks) need not investigate the more intangible – even “subjective” – aspects of her relationship with the primary debtor thought to have unduly influenced her or misrepresented matters. A much more content-oriented test, still anathema to most English jurists, might have been: “whether the transaction is unreasonable to the defendant in the light of the particular benefits she obtained from her relationship, and wider community interests”. Or, more simply, “whether enforcing the transaction would be contrary to good faith”.

III.C New Zealand Law

1 Denial of a Generalised Duty of Good Faith

Many of the fears of English lawyers about introducing the notion of a general duty of good faith would be shared by their New Zealand counterparts. Admittedly, in a short reaction to Waddams’ critique, Sir Robin Cooke remarked extra-judicially that:¹¹²

A distinct possibility is that the common law of contract, at least in some of its national versions, would unhesitatingly accept the proposition in the *Restatement (2nd) of Contract* [§205, on good faith], embodying as that does an elementary human notion.

Further, he seems to have implied that Waddams’ particular fears, of thereby making contract law too subjective, were overstated. However one cannot make too much of either suggestion.¹¹³

Similarly, in *Livingstone*,¹¹⁴ Thomas J supported Bingham LJ’s attempt to unearth from disparate strands of the law controlling unfair contracts something

¹⁰⁸ A rare exception in the English literature, one which does not appear to have garnered much support, is S Smith “In Defence of Substantive Fairness” (1996) 112 LQR 138.

¹⁰⁹ Compare for example P Atiyah “Contract and Fair Exchange” (1985) 35 U Toronto LJ 1; H Collins *Regulating Contracts* (Oxford University Press, Oxford, 1999).

¹¹⁰ Fehlberg, above n 14; Jones, above n 106; Portman, above n 106.

¹¹¹ *O'Brien*, above n 13, 798.

¹¹² R Cooke “Introduction” (1995) 9 JCL 3, 9. Cooke pointed out that “the difficulty of peering into the human mind leads to something close to an objective standard of good faith”, and later that “in default of reliable evidence of actual motive, objective standards would be applied”. This might be interpreted as leaving open the possibility of establishing and arguing a party’s subjective intentions, in appropriate cases.

¹¹³ The former merely involves a “distinct possibility”. The latter may require too much reading between the lines, particularly given New Zealand courts’ noticeable reluctance recently to look into subjective factors even when clearly established or at least strongly arguable. See generally for example D McLauchlan “Actual Consensus Ad Idem: Unnecessary But Surely Sufficient?” (1995) 1995 NZLJ 45; D McLauchlan “The Plain Meaning Rule of Contract Interpretation” (1996) 2 NZBLQ; D McLauchlan “A Contract Contradiction” (1999) 30 VUWLR 175. Compare above Part Two Introduction Part IV.E.

¹¹⁴ *Livingstone*, above n 3, 237.

amounting to a general duty of good faith. Indeed, Thomas J was prepared to go further, arguing that:¹¹⁵

I would not exclude from our [New Zealand] common law the concept that, in general, the parties to a contract must act in good faith in making and carrying out the contract ... [Lord Mansfield's] tradition was never swamped in the United States as it was in England by the formalism of the 19th and 20th centuries. But the principle has survived, I suggest, as the latent premise of much of our law relating to formation and performance of contracts.

After presenting examples from New Zealand contract law, the Judge concluded that either his or Bingham LJ's "... principle is influential in deciding the question of whether it would in all the circumstances be fair (or reasonable) to hold a party bound by any conditions, or by a particular condition, of an unusual and stringent nature".¹¹⁶

However, Thomas J added these "general considerations", as he termed them, to the main reasoning he adopted to decide the case.¹¹⁷ That reasoning itself contained an alternative argument that has been criticised as reintroducing into the doctrine of fundamental breach. Consequently, although this case is unlikely now to be directly overruled, its effect as precedent is likely to be restricted to its more traditional analysis: interpreting the term in question as ambiguous and thus to be construed *contra proferentem*.¹¹⁸ Other courts have been reluctant to draw together various doctrines in support of a general duty of good faith, as attempted by Thomas J.¹¹⁹ In his valedictory lecture in 1995, Brian Coote was critical of tendencies towards "unjustified generalisations" in New Zealand contract law, giving as one example the very "generalisation from the defences of fraud and unconscionability to a positive requirement of good faith, particularly in negotiation, which some academics maintain despite denial by the courts".¹²⁰ The thrust of this criticism might well extend to Thomas J's attempt at generalisation.

Consistently with this sort of criticism, New Zealand commentators are only beginning to consider the possibilities – and still, at this stage, mostly the perceived limits – in developing a general duty of good faith in relation to the law of fiduciary obligations or equitable principles.¹²¹ Thus, the germ of a general duty of good faith

¹¹⁵ Livingstone, above n 3, 237-238 (citing *Interfoto*, above n 35).

¹¹⁶ Livingstone, above n 3, 238.

¹¹⁷ Thomas J therefore may be considered a "pragmatic neutral", like Bingham LJ, or perhaps a "half-committed neutral" who prefers broad standards over detailed rules; but hardly as robust as Lord Steyn in promoting a general doctrine of good faith. Compare Brownsword, above n 80, n 92. Thanks to Rick Bigwood for suggesting an argument along these lines.

¹¹⁸ Above, n 49.

¹¹⁹ Although not in the context of exemption clauses, Tompkins J has suggested that the trend of authorities does not support Thomas J's obiter dicta regarding a general good faith obligation in New Zealand contract law: see *Isis (Europe) Ltd v Lateral Nominees Ltd & Ors* (17 November 1995) unreported, High Court, Auckland Registry. Compare the earlier more optimistic tone of M Whincup "Lessons from New Zealand" (1993) 90/35 Law Society Gazette 22; and a tentative attempt by Master Kennedy-Grant to deal with a claim of an implied term of good faith, in *Allen v Southland Building and Investment Society* [1995] 2 NZLR 304.

¹²⁰ B Coote, "Contract – An Underview" in B Brown (ed) *Contract – An Underview: Souvenir at a Valedictory Lecture* 13 (Legal Research Foundation, Auckland, 1995) 13. But compare R Sutton "Commentary on 'Codification, Law Reform, and Judicial Development'" (1995) 9 JCL 200.

¹²¹ For example C Rickett *Equity in Commerce* (NZ Law Society Seminar Paper, Wellington, 1993) 4-6. But see D McLauchlan "The 'New' Law of Contract in New Zealand" (1992) NZ Recent L Rev

may have now been planted and some shoots may be emerging.¹²² But the creation of such a broadly content-oriented standard in New Zealand contract law appears to face similar obstacles to those encountered in English law.

2 Decline in Practice of Unconscionable Bargains Doctrine and Faltering Growth in Undue Influence Doctrine

The doctrine of unconscionability in New Zealand also faces difficulties in developing a more substantive orientation. Courts do continue to stress that a finding of unconscionability involves balancing a range of considerations, which might be conducive to such reasoning depending on their scope and the processes by which they are applied.¹²³ However, lower courts have recently latched on to the set of factors and weightings conveniently presented by Tipping J in *Bowkett v Action Finance Ltd.*¹²⁴ These parallel those culled by Chen-Wishart from a compendious review of Commonwealth case law on unconscionability.¹²⁵ However, some of her bolder observations have not been developed by New Zealand courts. For instance, although her work has been instrumental in reinstating “contractual imbalance” or “substantive unfairness” as a factor whose importance tends to be hidden from view, that factor remains limited. At most, it acts as a presumption of overall unconscionability, or (more often) diminishes the degree of other “procedural” elements needed (the so-called “sliding scale”).¹²⁶ Yet Chen-Wishart also pointed out that a truly exceptional contractual imbalance may be *conclusive* in finding unconscionability.¹²⁷ That point was not taken up even in the Law Commission’s draft scheme, proposed in 1990; and that scheme itself was perceived as going too far in stressing the role of contractual imbalance.¹²⁸ Nor have the courts been keen on the notion of looking into non-financial

436); the more extensive investigation by Maxton (above n 83); and (partly inspired by *Smith*, above n 102) C Rickett “Banks and Their Securities: More on the Three Party Cases” (1998) 8/5 Conv Bulletin 56, 58-59; C Rickett “The Financier’s Duty of Care to a Surety” (1998) 114 LQR 17.

¹²² See for instance the dicta in *Eldamos Investments Ltd v Force Location Ltd and Ors* (1995) 17 NZTC 12,196. His Honour appeared to have no difficulty in the concept of having to “negotiate in good faith” stemming from an agreed right either to first negotiations, or to last refusal. As in the US, it may be that the notion of a general duty of good faith imposed by law may come to be more acceptable once NZ courts have developed experience and confidence in defining the contours of duties of good faith agreed on by the parties: see Farnsworth, above n 53, 210-212. See also Carter and Furnston, above n 68, 117; G K Flint “‘Enforce Them All’: A Battle Cry for the Beleaguered Agreement to Negotiate” (1995) 13 Aust Bar Rev 262; J M Paterson “The Contract to Negotiate in Good Faith: Recognition and Enforcement” (1996) 10 JCL 120.

¹²³ *Contractors Bonding Ltd v Snee* [1992] 2 NZLR 157, 174 (per Richardson J). Compare for example the broad approach adopted by Second Circuit Courts, and especially other US Courts, in the area of contract formation described above (Chapter Three Part II.C).

¹²⁴ [1992] 1 NZLR 449, 460-461. For instance, this restatement was invoked – if not necessarily rigorously applied – in *Harlick v ASB Bank Ltd* [1995] 5 NZBLC 103,675 (HC).

¹²⁵ M Chen-Wishart *Unconscionable Bargains* (Butterworths, Wellington, 1989).

¹²⁶ See for example *Bowkett*, above n 124, 461.

¹²⁷ Chen-Wishart, above n 125, 106-107. Admittedly, mostly Canadian or older English authority is cited. But this still contrasts with the more forthright recognition of this possibility in the US (DiMatteo, above n 72) and particularly in Japan, drawing on European law (below Part II.D.2).

¹²⁸ New Zealand Law Commission “*Unfair Contracts*” (Law Commission Preliminary Paper No 11, Wellington, 1990). D McLauchlan “Unfair Contracts - The Law Commission’s Draft Scheme” [1991] NZ Recent L Rev 311, 321-322. See generally above Part Two Introduction Part IV.E.

or subjective factors in determining the degree of contractual imbalance.¹²⁹ Lastly, it seems very unlikely that New Zealand courts will find unconscionability in disputes between two commercial parties. In the rare reported or unreported cases involving such disputes, relief has not been granted.¹³⁰ It seems likely that very unlikelihood of succeeding in a defence of unconscionability in a commercial setting deters parties from raising the matter in court in New Zealand, as opposed to the US (below Parts III.A.2, IV.2), where there is a sufficient smattering of cases and certainly enough statute law and commentary to present an unconscionability defence with a minimum degree of credibility.

Similarly, the contours of undue influence remain quite restricted. New Zealand courts have adopted the framework set out by the House of Lords in *Pitt and O'Brien*; but they have usually managed to dismiss pleas of undue influence raised against financiers.¹³¹ Part of the reason is that, as in later English case law, the courts have allowed financiers to avoid being fixed with notice of wrongdoing simply by recommending that prior independent legal advice be taken.¹³² Arguably, by focusing on the financier's improper conduct, the High Court's decision in *ASB Bank v Harlick* pointed to the possibility of unconscionable bargains doctrine subsuming that of undue influence. But critics have argued against this tendency to develop an overarching concept in this way, somewhat bemused by a more explicit and ambitious attempt to do so in the New South Wales Court of Appeal recently.¹³³ Often, undue influence doctrine's orthodox focus on voluntariness of the complainant's consent has been used

¹²⁹ Compare Chen-Wishart, above n 125, 54-56. For instance, see *Bowkett* (above n 124, 461). But see Richardson J in *Snee*, above n 123, 174. Note, however, the ambivalence of allowing this broader inquiry. It promotes more substantive reasoning, by allowing an examination of subjective motives and the like (compare Brownsword, above n 92). Yet it usually restricts the scope of application of the doctrine, because more bargains are likely to be found substantively fair.

¹³⁰ Compare Chen-Wishart, above n 125, 35. See for example *Walmsley v Christchurch City Council* [1990] 1 NZLR 199; *Forthwith Shelf Co No 95 Ltd v Alexander & Ors*, 4 August 1995, unreported, High Court, Wellington Registry, Ellis J. (Thanks are due to Justice Wild for mentioning the latter case.)

¹³¹ See *Tiliato v Contractors Bonding Ltd* (15 April 1994, unreported, Court of Appeal, CA 50/93), and the reversal of *Harlick* (above n 124) in *ASB Bank Ltd v Harlick & Anor* (above n 19). Furthermore, the Court of Appeal remains on record as requiring manifest disadvantage even in cases of actual undue influence (*Snee*, above n 123, 166). This has attracted some criticism, but primarily for the way it narrows the scope of equitable relief (C Callaghan, "Manifest Disadvantage in Undue Influence: An Analysis of its Role and Necessity" (1995) 25 VUWLR 289). If this requirement is abandoned, however, another irony arises (compare above n 19): more pleas of undue influence may succeed, but the inquiry will involve even more formal reasoning because courts will not examine the substantive fairness of the resultant bargains.

¹³² D Webb "Legal Advice in Surety Transactions: A Duty-Based Approach" (2001) 19 NZULR 264, 287:

In formulating rules to protect sureties the courts have sought to meet the exigencies of finance. As required, clear guidelines have been provided that can be followed more or less mechanically in most cases. ... The duty to exercise discretion has been shifted to a group of professionals more adept in the area – lawyers.

¹³³ C Rickett and D McLauchlan "Undue Influence, Financiers and Third Parties: A Doctrine in Transition or the Emergence of a New Doctrine?" [1995] NZ L Rev 328, 332-336. Compare A Phang and H Tjio "From Mythical Equities to Substantive Doctrines – Yerkey in the Shadow of Notice and Unconscionability" (1999) 14 JCL 72.

to distinguish it from the law of unconscionable bargains.¹³⁴ Rick Bigwood has repeatedly argued that the former doctrine should be redirected towards the alleged wrongdoing or exploitation on the part of the party seeking to uphold the promise made, in three-party situations such as *Harlick* as well as situations in which the claim is simply whether one party unduly influenced another.¹³⁵ Especially in situations involving multiple parties, this may promote more substantive reasoning by shifting the focus towards the broader social and institutional context of promising. However, Bigwood's argument is ultimately rooted in a liberal theory of contract which gives primacy to the autonomy of promisors. Policing exploitation by promisees is aimed at expanding the ability of promisors to bind themselves through voluntary agreement, thus advancing their autonomy.¹³⁶ Further, he wishes to retain distinct doctrines of undue influence and unconscionability, rather than merging them into an overarching standard, which might further promote substantive reasoning by allowing new considerations to emerge more freely than is possible under the rules and precedents established by discrete sets of rules.¹³⁷ Albeit without any significant philosophical underpinnings, the same is true of Matthew Conaglen's recent suggestion that doctrines like undue influence (redirected towards a focus on exploitation, as Bigwood urges) and unconscionability should be repositioned on a "continuum which represents the different power relationships which are possible between contracting parties".¹³⁸ Refusing to follow the suggestion by Lord Denning in *Bundy*, Conaglen insists that his thesis is:¹³⁹

aimed more at a classification and understanding of the legal doctrine as it currently stands, rather than a normative developmental discussion. [His] discussion of the concept of duties of good faith is not intended to replace the distinctions among the doctrines of duress, undue influence, and unconscionable bargains with a single principle, but rather to recognise a general principle which encompasses and encapsulates the theoretical explanation of the inter-relationship among the individual doctrines as they currently exist.

Thus, as with suggestions of an overriding duty of good faith, New Zealand lawyers appear cautious about releasing a new standard, broad and content-oriented as in the US

¹³⁴ See for example Chen-Wishart, above n 125, 336-337 and 349-350. In *ASB Bank Ltd v Harlick & Anor* (above n 104), the Court of Appeal re-emphasised this distinction, referring also to Birks and Chin (above n 77). Callaghan (above n 131, 302-312) also argues advocates victimisation and inadequate consent as being the proper underlying principles of the doctrine of undue influence.

¹³⁵ R Bigwood "Conscience and the Liberal Conception of Contract: Observing Basic Distinctions" Part Two (2000) 16 JCL 191. Compare P Watts "The Role of Conscience – A Commentary on 'Conscience and the Liberal Conscience of Contract'" (2000) 16 JCL 223, 227-232; Chen-Wishart, above n 125, 91-93, 35-44.

¹³⁶ R Bigwood "Conscience and the Liberal Conception of Contract: Observing Basic Distinctions" Part One (2000) 16 JCL 1. Compare for example C Fried *Contract As Promise: A Theory of Contractual Obligation* (Harvard UP, Cambridge Mass, 1981); B Coote "The Essence of Contract" Part One (1988) 1 JCL 91; and above Part Two Introduction.

¹³⁷ Compare for example Phang and Tjio, above n 133, 104-107. These scholars from Singapore argue that abandoning the extension of undue influence as suggested by *O'Brien*, in favour of a broader unconscionability doctrine as preferred in *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447, may allow a more direct focus on community standards as well as substantive fairness, although they are disturbed that even unconscionability doctrine has tended to give primacy to procedural fairness.

¹³⁸ M Conaglen "Duress, Undue Influence, and Unconscionable Bargains – The Theoretical Mesh" (1999) 18 NZULR 509.

¹³⁹ Above n 138; 543. Compare *Bundy*, above n 10.

and Japan, into the ordered realm comprised of the main contract law doctrines regulating contractual unfairness.¹⁴⁰ That is another hallmark of a more formal system.

III.D Japanese Law

By contrast, at least at first sight, Japanese contract law appears distinctly open to content-oriented standards of validity in this field. Closer analysis shows that Japanese law has been slow to develop – and especially to apply – such standards, particularly in regulating unfair contracts on standard forms. Hence there are noticeable formal counter-tendencies, despite an overall more substantive orientation compared to both English and New Zealand law.

As mentioned above (Part II), some of the Dial Q2 cases found ways to strike down an onerous clause. One view of the Okayama District Court case, in particular, is that it opens the way to more direct consideration of its “unreasonableness”. Although still mentioning “interpretation” of the parties’ intentions, the Court was apparently prepared to read the clause down to the point of declaring it unenforceable, even if it could be held to be as clear as NTT had asserted.¹⁴¹ However, particularly from a US perspective, one might have expected a more direct challenge to such onerous clauses in standard form contracts, relying expressly on a general standard similar to good faith or “unconscionability”, rather than the more classical technique of “interpretation”.

1 Consolidation of Good Faith Doctrine: Civil Code Article 1(2)

The broad duty of good faith set out in article 1(2) of the Civil Code has been invoked to justify techniques of contract “interpretation” which sometimes seem to derogate from even the most clearly expressed intentions of the parties. However, the focus is still ostensibly on intentions, and such derogation is often criticised.¹⁴² This suggests a formal reaction. It also makes it less surprising that article 1(2) was not expressly relied on in the Dial Q2 cases, to strike down the clause in question.

On the other hand, article 1(2) was specifically – and successfully – argued on a further point, namely the effect of a second clause in the NTT standard form contract. That clause provided for NTT to claim a charge *itself*, for the use of the telephone in accessing the information provider. The Osaka District Court expressly decided that it would be contrary to “good faith” to allow NTT to rely on it. Once again, a major reason was that the public was not aware of how charges might easily escalate. But the Court also called on article 1(2) as further grounds to justify the extra step of tying the second clause to the first, which provided for the new service in association with the

¹⁴⁰ But see McLauchlan and Rickett (above n 133), exploring the potential for imposing an equitable duty of care on banks in these situations. See also C Rickett “Banks and Their Securities: More on the Three Party Cases” (1998) 8/5 Conv Bulletin 56, 59):

because if [Tipping J’s] comments [in a concurring judgment in *Wilkinson* (above n 19)] are read alongside *Smith* [above n 102], the jump from notice in Equity to a contractual requirement of good faith is not a particularly large one. Indeed, it may be so appealing as to become irresistible.

See also C Rickett “The Financier’s Duty of Care to a Surety” (1998) 114 LQR 17.

¹⁴¹ Above n 43.

¹⁴² See for example Yasunaga, above n 44. See also K Yamamoto in H Endo, H Mizumoto, Z Kitagawa and S Ito (eds) *Minpo Chukai* [Commentary on the Civil Code] (Seirin Shoin, Tokyo, 1989) 37, 52.

information provider and which had already been “interpreted” as unenforceable. Thus, the invocation of article 1(2) to bolster the court’s interpretation of onerous contract terms can still be seen as requiring a focus on “interpretation” of the parties’ intentions – again, a formal approach. Alternatively, it may indicate a more substantive approach, but one limited by more formal reasoning in first “interpreting” another closely related clause as not to be strictly enforced.

More important uses to which article 1(2) has been put, in controlling unfair terms particularly on standard forms, should therefore be surveyed to determine the extent to which it acts as a content-oriented standard introducing significantly more substantive reasoning into Japanese contract law. At first sight, article 1(2) appears highly content-oriented. It simply provides:

The exercise of rights and the performance of duties shall be done in faith [*shingi*] and in accordance with the principles of trust [*seijitsu*].

This seems dangerously broad to a common lawyer, particularly an English or New Zealand lawyer. In fact, ironically, article 1(2) was an amendment made to the Civil Code in 1947, under the Occupation’s pro-democracy reforms. However it has roots in Roman law and has been shaped by the civil law tradition; the provision itself is closest to article 2(1) of the Swiss Civil Code.¹⁴³ Nonetheless, article 1(2) might seem particularly open to moral reasoning. The requirement of “trust” (*bonne foi*) in article 1134 of the French Civil Code is similar (albeit theoretically applying only to performance of agreements), and aimed at reinforcing the moral principle of *pacta sunt servanda*.¹⁴⁴ Furthermore, even set out in the corresponding broad duty of *Treu und Glauben* in performance of obligations articles 242 and 157 of the German Civil Code – the original “emperor’s clauses”¹⁴⁵ – requires consideration of “trade practices” (*Verkehrssitten*). Yet in Japan, from its inception in pre-1947 case law and academic writing, the duty of good faith has been taken beyond the individual’s moral imperative faithfully to perform assumed obligations. The duty has been extended to faithful enforcement of rights, and thence into more general consideration of socio-political factors and how private law relations should be developed.¹⁴⁶ Nevertheless, whether as a window into individual morality or wider socio-political considerations, the wording of article 1(2), its pre-1947 antecedents – and indeed some significant doctrinal developments towards the end of, and immediately after, World War II – all presented a comparatively wide avenue for more substantive reasoning in Japanese contract law.

On the one hand, some connection between the duty of good faith and individual morality remains apparent. One of the duty’s generally accepted functions is an equitable one, covering cases that overlap with Anglo-American law’s equitable

¹⁴³ M Yasunaga in T Taniguchi and K Ishida (eds) *Chushaku Minpo* [Commentary on the Civil Code] Vol 1 (Yuhikaku, Tokyo, rev’d ed 1988) 71, 71-74. Compare also Horn, above n 104.

¹⁴⁴ Above n 143, 71. But compare J Gordley *The Philosophical Origins of Modern Contract Law* (Clarendon Press, Oxford, 1991) 217-227, arguing that the Code was not founded on natural law concepts, nor on any other coherent philosophical principles.

¹⁴⁵ So dubbed (“*königliche Paragraphen*”) by W Hedemann in 1910, because the duty rapidly came to be applied not just in performance of obligations, but also in enforcement of rights (above n 143, 72). Compare Leff, above n 70.

¹⁴⁶ K Yamamoto “*Shingizoku, Kojoryozoku* [The Duty of Good Faith, and Public Order and Good Morals]” (1992) 144 *Hogaku Kyoshitsu* 42, 43.

principles of “clean hands”, laches, and estoppel – the duty not to act so as to contradict one’s earlier acts.¹⁴⁷ This leads to fruitful jurisprudential discussion even among civil law professors in Japan as to the proper role of this equitable function in these cases, in the context of an overarching duty of good faith.¹⁴⁸ Furthermore, for instance in the estoppel cases, it leads to interesting attempts to reconcile the more subjective focus on one party’s prior and subsequent conduct per se, as opposed to the more objective approach of protecting the other party’s reasonable expectations stemming from the first party’s prior acts.¹⁴⁹

On the other hand, although the duty of good faith is broadly worded, it is hardly boundless. In fact, a second function of the duty of good faith in Japanese law has been simply to expand on the often rather sparse provisions and concepts of the Civil Code.¹⁵⁰ This function is particularly evident as regards performance of obligations. Similarly to US law, for instance, it applies a type of *de minimus* doctrine to performance,¹⁵¹ and supports the notion of *exemptio*.¹⁵² The function is also evident regarding the exercise of rights, as when the duty of good faith takes into account the obligee’s (right-holder’s) duty to cooperate in the obligor’s performance, to cure a minor defect in the latter’s notification of readiness to perform.¹⁵³

More ambitious, perhaps, is a willingness at times to invoke the duty of good faith to develop new conceptual categories, such as the notion of “duties incidental to the obligation of performance” (*fuzuigimu*) or even wider “duties of protection” of life and property (*hogogimu*).¹⁵⁴ But these still stem from a fleshing out of the nature of performance obligations, and have been met in turn by complex conceptual reformulations by Japanese academics. Also noteworthy is the recent emergence in the case law of a pre-contractual duty of *culpa in contrahendo* (*keiyaku teiketsujo no kashitsu*), even though – as in the UCC – article 1(2) refers only to performance of obligations.¹⁵⁵ But again the contours of this doctrine have now been thoroughly discussed and reconceptualised.¹⁵⁶

¹⁴⁷ Yamamoto, above n 146, 44-50.

¹⁴⁸ Yamamoto, above n 146, 39-41. This contrasts with the tendency of English and New Zealand lawyers to delimit equitable principles vis-a-vis any suggested duty of good faith, without embarking on wider jurisprudential inquiry. Compare for example Dickerson, above n 89.

¹⁴⁹ For instance, in some intended cases the issue can turn solely on the former question, with strong criticism directed at the first party’s subjective behaviour. However, in other cases, a type of “sliding scale” may be adopted: less strongly objectionable behaviour may be supplemented by some lesser reliance by the other party, to make out a breach of this aspect of the duty of good faith (Yamamoto, above n 146, 45). Both lines of reasoning may well be found in other cases involving the duty of good faith. This might allay Waddams’ fears (above n 90) that recognising such a general duty in the English law tradition would involve particular difficulties and risks for courts having to deal with one party’s subjective motivations.

¹⁵⁰ Yamamoto, above n 142, 57-62. More generally, see Z Kitagawa *Minpo Koyo (I)– Minpo Sosoku* [Civil Code Lectures (1): General Part] (Yuhikaku, Tokyo, 1993) 18.

¹⁵¹ This restricts what constitutes a breach, in terms of art 415 requiring performance “in accordance with the tenor and purport of the obligation”; and the grounds for termination under art 541.

¹⁵² Art 533. Compare the concept of “concurrent conditions” in Anglo-American law: G Treitel *Remedies for Breach of Contract: A Comparative Account* (Clarendon Press, Oxford, 1988) 276-285.

¹⁵³ Compare art 493 proviso.

¹⁵⁴ Yamamoto, above n 142, 54-55.

¹⁵⁵ Yamamoto, above n 142, 56-57.

¹⁵⁶ S Kawakami “Japan” in E Hondius (ed) *Precontractual Liability* 205 (Kluwer, Deventer, 1991).

It is also widely acknowledged that the duty of good faith can have broader functions, namely in “correcting” and “creating” law beyond that provided for in the Code. An example of the latter is the development of the “doctrine of changed circumstances” (*jijo henko no gensoku*), discussed in more detail below (Chapter Four Part II.C).¹⁵⁷ This doctrine was created to cover situations perceived as going beyond the notion of “non-imputable impossibility” provided for by the Civil Code framework. But the various requirements for invoking the doctrine, and to a lesser extent its effect as relief from obligations, were conceptualised well before 1947.¹⁵⁸ Further, instances of application of the doctrine peaked during the economic and social turmoil immediately following World War II. Overall, it has found little favour in Japanese courts.¹⁵⁹ This pattern supports the general observation that the more overtly “creative” function of the duty of good faith has been developed rather restrictively in Japanese law.¹⁶⁰

Similarly, a doctrine which developed to limit termination of leases to “breakdown in the trust relationship” (*shinraikankei hakai no hori*), served a more wide-ranging “correcting”, perhaps even “creative” function.¹⁶¹ But the doctrine quite quickly prompted some important legislation.¹⁶² This whole area of law also has attracted much academic comment, attempting to clarify the relevant principles and requisites for their application in specific types of cases.¹⁶³

Admittedly, this latter doctrine has witnessed somewhat of a revival in recent decades. Courts developed similar notions to apply to new types of contractual relationships, particularly distributorships and franchise contracts.¹⁶⁴ In this run of cases, often drawing on the duty of good faith, termination has generally come to be permitted – mostly subject to an obligation to give reasonable notice and, often, to pay some compensation – if there has been a “transactional breakdown”.¹⁶⁵ Furthermore, the inquiry of the Japanese courts into this source-oriented standard can be extensive. For instance, in 1977 the Tokyo District Court held against a wholesaler who attempted to terminate a retailer’s contract, unilaterally and without notice, despite its having no fixed term. The Court held that:¹⁶⁶

where there is no relevant serious reason, a wholesaler who requests termination merely for his own benefit, or who stops delivery of food, is in fact forcing the collapse of the retailer. The request for termination in effect damages the retailer’s right to operate, and violates the wholesaler’s obligations to act in good faith [article 1(2)] and in accordance with public welfare and good morals.

¹⁵⁷ Yamamoto, above n 142, 51-52.

¹⁵⁸ H Kubo “A Comparative Study of the Basic Concept of Impossibility under Japanese, American and Uniform Law” [1991] *Sandai Hogaku* 567.

¹⁵⁹ L Nottage “Economic Dislocation in New Zealand and Japan: A Preliminary Empirical Study” (1997) 26 *VUWLR* 59. See also below Chapter Four, Part II.C.

¹⁶⁰ Yamamoto, above n 142, 42.

¹⁶¹ Compare the basic right to terminate “at will” for non-performance (art 541); Yamamoto, above n 113, 50.

¹⁶² Haley, above n 5, 146.

¹⁶³ Yamamoto, above n 142, 50-51, 62-64.

¹⁶⁴ V Taylor “Continuing Transactions and Persistent Myths: Contracts in Contemporary Japan” (1993) 19 *MULR* 352-398, 380-383. Compare Haley, above n 5, 147-155.

¹⁶⁵ Taylor, above n 164, 383-384.

¹⁶⁶ Taylor, above n 164, 383.

Veronica Taylor cites this passage and this case as indicating the scope that Japanese courts have to "... scan the agreement for its impact on the weaker party - the fairness principle at work", giving the courts "... a basis for examining the actual nature of the parties' relationship".¹⁶⁷ Of particular comparative interest is that the court signalled a desire to temper the terminating party's pursuit of self-interest. It thus indicates a Japanese courts' willingness to occasionally take into consideration subjective motivation as well as more objective factors. Yet there are many instances in which the courts adopt a more classical, formal approach.¹⁶⁸ Overall, as with its precursor doctrine of "breakdown in the trust relationship", this manifestation of the duty of good faith may well have lost much of its primary impetus in injecting significantly more substantive reasoning into contemporary Japanese contract law.

The same might be said of a further set of cases that have been dealt with under the principle of good faith, involving a guarantee given by a third party to the creditor for the benefit of the primary debtor. Underlying these cases is not only an awareness that the relationship between guarantor and principal debtor can be emotionally charged and therefore risky for the guarantor, an awareness which also underlies recent English undue influence cases such as *O'Brien and Pitt*.¹⁶⁹ Japanese courts are also more willing to inquire into, and directly police, the actions of the guarantor. Thus, for instance, in 1932 it was held that the guarantor's obligations under a guarantee for an indefinite term ceased when notice of termination had been given after a reasonable period, even if the creditor continued to supply credit to the primary debtor. However, this sort of case is seen either as illustrating another creative use of article 1(2) or, in more traditional terms, as raising a problem of interpretation of the contract.¹⁷⁰ A similar ambiguity is apparent in another type of case where a right of immediate termination was recognised due to an extreme change in circumstances in the primary debtor's financial situation that the guarantor was unable to foresee. The Court in question relied on the duty of good faith; but other courts have taken the more traditional route of interpreting the parties' intentions.¹⁷¹ Furthermore, although a similar result was reached in cases of guarantees of a lease contract,¹⁷² the difficulty of successfully claiming change of circumstances more generally in Japanese law (below Chapter Four Part II.C) must be remembered.

Uchida sees these types of cases as good examples of Japanese law's willingness to develop new concepts to recognise underlying social concerns, such as protection of the guarantor.¹⁷³ As just mentioned, however, they can be viewed from a more formal perspective. Also, as Uchida notes, a significant proportion of these cases – certain guarantees given by employees – quickly came to be regulated by special legislation.¹⁷⁴ Uchida argues that this legislation was distinctive in allowing for wide judicial

¹⁶⁷ Taylor, above n 164, 383.

¹⁶⁸ Compare for example V Taylor "The 'New' Japanese Contract: Law and Practice in the 1990s" in Attorney General's Department and Law Council (eds) *Twentieth International Trade Law Conference* (Attorney General's Department, Canberra, 1993) 37.

¹⁶⁹ Above n 13.

¹⁷⁰ Yamamoto, above n 142, 60.

¹⁷¹ Or of interpreting Art 589. Yamamoto, above n 142, 60.

¹⁷² See the cases cited in Yamamoto, Yamamoto, above n 142, 61.

¹⁷³ T Uchida *Keiyaku no Saisei* [The Rebirth of Contract] (Kobundo, Tokyo, 1990) 230-231.

¹⁷⁴ Employee Guarantees Act (*Mimoto Hoshō Ho*), Law No 42, 1933.

discretion.¹⁷⁵ Yet the very fact of shifting control of potential contractual unfairness to the legislative arena tends to impart more “formality” to the system (see below Part IV).¹⁷⁶ At the very least, it works to restrict more vigorous growth of the broader doctrine of good faith. In fact, such a restrictive tendency continues to be evident.¹⁷⁷ Lastly, all these types of cases involve third parties. The duty of good faith has not played the major role in directly regulating unfair contract terms between two parties, at least not unambiguously in the direction of the highly substantive approach advocated by scholars such as Uchida.

In sum, the duty of good faith in Japanese law has largely developed incrementally, generating reasonably distinct groups of cases, in a way that – like the “fine print” doctrine – can often be quite readily encompassed within a formal approach. Nonetheless, it allows courts and commentators an important foothold for developing a more substantive approach in contract law theory generally (above Part Two Introduction Part II).¹⁷⁸ This builds on the broad wording of article 1(2), its history as both moral principle and window into socio-political factors, and the sheer quantity of case law referring to the duty – however much in passing.¹⁷⁹ Furthermore, in some of its manifestations, the duty of good faith has been refined in commercial settings. This makes it easier for Japanese courts to invoke it in other manifestations to police contractual relationships between businesses, as well as those between individuals. Nevertheless, this review suggests that Japanese law has tended to impart less substantive reasoning than its counterpart in the US. Further evidence of significant “substantive” regulation of unfair terms in Japanese contract law must be sought elsewhere.

2 Public Order and Good Morals: Civil Code Article 90

Article 90 is an obvious candidate.¹⁸⁰ As with article 1(2), it potentially amounts to a highly content-oriented standard, and hence another mechanism opening Japanese contract law to more substantive reasoning. Article 90 provides that:

¹⁷⁵ Above n 173, 233-235.

¹⁷⁶ Atiyah and Summers, above n 1.

¹⁷⁷ These tend to be consumer contracts, where a “creative” function is apparent as the social goal of promoting of consumer protection. Once again, moreover, some important issues soon came to be covered by legislation. Yamamoto, above n 142, 64-65.

¹⁷⁸ Hence for example Uchida’s argument that the duty of good faith calls for a version of “relational” contract theory, underpinned by communitarian moral philosophy: T Uchida “The New Development of Contract Law and General Clauses - A Japanese Perspective -” in ICCLP (ed) *Japanese and Dutch Laws Compared* (ICCLP, Tokyo, 1992) 119. Compare generally L Nottage “Contract Law, Theory and Practice in Japan: Plus ça Change, Plus c’est la Môme Chôse?” in V Taylor (ed) *Asian Laws Through Australian Eyes* (Law Book Company, Sydney, 1997) 316; and see above Part Two Introduction and below Chapter Five Parts II.B.3 and III.

¹⁷⁹ Z Kitagawa “Contract Law in General” in Z Kitagawa (ed) *Doing Business in Japan* (Matthew Bender, NY, looseleaf) §95, §1.07[2][d].

¹⁸⁰ So is art 1(3), restricting “abuse of rights” (*kenri no ranyo*). In practice, however, this has exercised even less control over unfairness in contractual relationships. One exception is its role in limiting employers’ rights to terminate employment contracts, presenting interesting parallels with the use of the good faith principle in US law to regulate “at will” employment (above Part III.A.1). Yet this use of abuse of rights doctrine in Japan seems to have arisen out of a concatenation of historical circumstances, peculiar to the post-War Occupation: see D H Foote “Judicial Creation of Norms in Japanese Labor Law: Activism in the Service of - Stability?” (1996) 43 UCLA L Rev 635. Generally,

A juristic act which has for its object such matters as are contrary to public order [*oyake no chitsujo*] or good morals [*zenryo no fuzoku*] is null and void.

It too has solid roots in the civil law tradition. However, a comparison with the corresponding article 138 of the German Civil Code (BGB), for instance, suggests that article 90 is a more content-oriented standard. First, a component common to both article 90 and BGB article 138(1), the standard of “good morals” (*zenryo no fuzoku* or *gute Sitten*), opens the path to consideration of moral questions. Indeed, its German proponents spoke of *gute Sitten* as promoting “moral interests”, while critics in Japan argued that what became article 90 would dangerously conflate morality and law.¹⁸¹

Article 90 adds a second component, however: “public order” (*oyake no chitsujo*). This component was deleted from the first draft for BGB article 138. The draft had been criticised for its perceived lack of clarity, particularly in the light of its short history.¹⁸² But supporters responded that this component could be used to identify “general interests of the state”, relating to fundamental rights inherent in the legal order.¹⁸³ In fact, this is how it was seen by its proponents when included in article 90 of the Japanese Civil Code.¹⁸⁴ Thus, although inviting a consideration of more objective factors than in the case of “good morals”, the inclusion of the still quite novel component of “public order” also opened article 90 to more substantive reasoning.

Thirdly, article 90 does not list specific requirements, such as those now contained in BGB article 138(2): “exploitation of the distressed situation, inexperience, lack of judgmental ability, or grave weakness of will of another”.¹⁸⁵ This has led to broader application of this article, compared to article BGB 138. On the one hand, legal theory and case law development in Japan has interpreted article 90 widely, so as to cover the “usurious” transactions that BGB article 138(2) had been specifically drafted to cover. On the other hand, by not listing more specific requirements as in article 138(2), article 90 has been able to avoid the German law’s tendency to interpret those requirements restrictively. Thus, as with some US unconscionability cases, Japanese courts have allowed relief where there is no obvious weakness exploited, but a grossly disproportionate bargain.¹⁸⁶ In sum, even a brief comparison with a similar civil law

abuse of rights doctrine has been more prominent in regulating real property rights: see for example K Sono and Y Fujioka “The Role of the Abuse of Right Doctrine in Japan” (1975) 35 *La L Rev* 1037; Haley, above n 5, 156-161.

¹⁸¹ K Hayashi “*Doitsuho ni okeru Ryojokuron to Nihonho no Kojoryozoku* [Public Order and Good Morals in Japanese Law, and the Theory of Good Morals in German Law]” (1992) 64 *Horitsu Jiho* 244, 245.

¹⁸² Dating back only to the French Civil Code of 1804: Hayashi, above n 165, 246.

¹⁸³ Hayashi, above n 181, 247-248.

¹⁸⁴ Yamamoto, above n 142, 42.

¹⁸⁵ Translation by M Bonell *An International Restatement of Contract Law: The UNIDROIT Principles of International Commercial Contracts* (Transnational Juris Publications, Irvington, NY, 1994) 102. These requirements were in fact broadened by an amendment to the German Civil Code, following the enactment of the Law on the Regulation of Standardised Contract Terms (*AGBGe*) on 9 December 1976. Previously, requirements were defined as exploitation of “the need, carelessness or inexperience of another” (translation by Angelo and Ellinger, above n 52, 483). Note that the latter translation and ensuing discussion relates to art 138(2) prior to this amendment. However their main point holds. Despite the amendment, the listing of specific requirements continues to undermine the development of art 138(2) (see Hayashi, above n 181, 247).

¹⁸⁶ Hayashi, above n 181, 247.

system generally supports the initial impression of article 90 as a highly content-oriented standard in Japanese contract law.

This may not have been the framers' original intent. They appear to have taken a restrictive view of the scope of article 90, seeing it as an exceptional restriction on the primary principle of party autonomy.¹⁸⁷ However, academic commentary soon began to view article 90 more expansively, as an overriding principle constraining party autonomy. Similarly, case law soon went beyond questions primarily of individual morality, such as contracts harming family life, and beyond questions regarding the minimal interests of the state, such as contracts to further criminal activities. Article 90 began to be invoked as a means of policing fairness in a wider range of transactions, commonly grouped as usurious. That category included not just excessive interest charges, but also cases involving certain employee guarantees (*mimoto hoshō*) and one-sided contract terms. Overall, commentators largely contented themselves with grouping these cases into such broader categories. As a common thread, article 90 was seen to turn simply on "social appropriateness" (*shakaiteki datosei*), sometimes linked to the even broader standard of "natural reason" (*jori*).¹⁸⁸

However, as with article 1(2), a closer analysis of reported article 90 cases reveals the extent to which the potential for broad application, unleashed by the form it took in the Civil Code, has been circumscribed in practice. A useful illustration is provided by the cases that came to be grouped under the usurious category, as they can be assumed to have often involved standard forms and particular unfair contract terms. First, a few employee guarantee cases emerged prior to World War II; but all but one were unsuccessful. These early issues would have been largely resolved by legislation in 1932.¹⁸⁹ Second, a similar pattern is evident in pre-War cases involving usurious interest rates or excessive liquidated damages clauses. Only 5 out of 26 were successful, and problems of usurious interest rates were later reduced by enacting the Interest Rate Regulation Law.¹⁹⁰ Challenges to excessive liquidated damages clauses were no doubt limited by an initially strict approach to the remedy under article 90, namely total invalidity.¹⁹¹ Third, only two out of 18 pre-War cases successfully invoked article 90 to strike down "one-sided clauses". Overall, legislative intervention and a rather strict approach to article 90 seem to have stunted its initial expansion within this category.

However, even after the introduction of the Interest Rate Regulation Law in 1954, Nakaya reports that there remained a total of some 185 cases in a roughly similar category (covering "Indiscretion and Exploitation") through to 1990. These had a success rate of over 50%.¹⁹² Many have involved more challenges to excessive liquidated damages clauses or "one-sided clauses".¹⁹³ Matching this development,

¹⁸⁷ Yamamoto, above n 142, 42.

¹⁸⁸ H Orita "Senzen Hanrei ni okeru Kojoryozoku [Public Order and Good Morals in Pre-War Caselaw]" (1992) 64 Horitsu Jiho 61. On *jori*, see above Part One (n 43).

¹⁸⁹ Employee Guarantees Act, above n 174.

¹⁹⁰ *Risoku Seigen Ho*, Law No 100, 1954.

¹⁹¹ H Nakaya "Sengo Hanrei ni okeru Kajo Ryojoku [Public Order and Good Morals in Post-War Caselaw]" (1992) 64 Horitsu Jiho 73, 79.

¹⁹² For the period 1955-89, 101 of the 185 successfully invoked art 90. Above n 191, 75.

¹⁹³ However Nakaya's category appears broader than the pre-War category of "Usurious Acts" discussed by Orita (above n 191). It probably includes the cases like the Tokyo District Court decision cited above (n 132), and almost certainly the "hostess guarantee" cases, as Nakaya's remaining category ("Others") contains so few cases for the relevant period.

article 90 has increasingly been interpreted as allowing for partial invalidation, namely of the offending clause (or part thereof) rather than the entire contract. This underpins continued attempts to use article 90 to challenge excessive liquidated damages clauses,¹⁹⁴ which US and English law have had to regulate more indirectly by invoking the venerable power in Equity to strike down penalty clauses (below Part IV). Nonetheless, one should not overlook the initially restrictive approach of Japanese courts to this sort of challenge, nor underestimate the strength of the criticism that they are acting arbitrarily when drawing the line of partial invalidity. Consequently, the courts may still be reluctant to support direct challenges to liquidated damages clauses, unless the task is made easier by other legal grounds or by particular facts.¹⁹⁵

Another development of comparative interest in this category, after World War II, has been the “bar hostess guarantee” cases. At least 11 cases have successfully challenged guarantees of clients’ food and drink bills, given by bar hostesses to their managers. The courts have been critical of managers abusing their superior position, and transferring the risk of non-payment by clients to their employees, a risk that is perceived as inherently falling on the managers themselves.¹⁹⁶ This in itself is a more substantive approach. But so was the approach of the Supreme Court in 1986, when it refused to invalidate the contract in question.¹⁹⁷ That decision is seen as justified by the close and special relationship that existed between the particular hostess and client. This contrasts sharply with the undue influence cases in the House of Lords (above Part III.B.2), and the unconscionability cases in New Zealand (Part III.C.2). The judgment suggests a greater willingness of Japanese courts to delve into the entire relationship – including its non-financial elements – to determine the actual benefits intended or enjoyed by the parties in each particular case. Lastly, a flexible approach to achieving more substantive justice in such cases is evident in other decisions that have allowed the hostess to claim money back from the manager, despite having invalidated the underlying guarantee.¹⁹⁸ However, since 1985 the bar hostess cases hardly figure among reported court cases.

A final important development in the post-War case law is the increased challenge to particular “one-sided clauses”, especially exemption clauses in standardised agreements. In 1982, an influential commentator urged Japanese courts to invoke article 90 more vigorously to strike these down. The reasoning was highly substantive: article 90 was a flexible standard that should move with the times and give more weight to consumer protection values.¹⁹⁹ However, critics pointed out that this

¹⁹⁴ See for example the agency case discussed by Taylor (above n 164, 389-390), where only 25% of the liquidated damages amount claimed was awarded.

¹⁹⁵ For instance, the task of drawing the line and finding a term to be only partially invalid was made easier in a recent case in the Kobe District Court (judgment of 20 July 1992). The court allowed enforcement of only one half of the lump sum liquidated damages claimed by a franchisor. The court stressed the fact that the franchisor had subsequently varied an identical contract with another franchisee, agreeing to reduce the liquidated damages by exactly one half.

¹⁹⁶ Nakaya, above n 191, 75.

¹⁹⁷ Judgment of 20 November 1986.

¹⁹⁸ Nakaya, above n 191, 79-80.

¹⁹⁹ I Kato *Minpogaku no Rekishi to Kadai* [Civil Code History and Issues] (Yuhikaku, Tokyo, 1982). Professor Kato was a leading exponent of the “balancing of interests” methodology in Japanese civil law theory, which is open to more substantive reasoning. See Rahn *Rechtsdenken und Rechtsauffassung in Japan* [Legal Thought and the Conception of Law in Japan] (C H Beck, München, 1990), 248-264. See also Omura, above n 7.

proposal ran counter to the reticence of the courts to invoke article 90 in this area, and reemphasised its traditional conceptual limits.²⁰⁰

Among those cases that continue to challenge exemption clauses, many have applied either or both article 90 and the duty of good faith.²⁰¹ The post-War development of partial invalidation as a possible remedy under article 90, and its application in more commercial cases, have encouraged the courts to more actively promote fair dealing between particular parties.²⁰² This has traditionally been the preserve of the duty of good faith. However, such crossovers have attracted considerable concern from commentators, who generally have attempted to reinstate the original conceptual differences between the two articles.²⁰³ Furthermore, courts seem careful to respect the fundamentally different legal consequences provided for in the two articles: article 90 provides for invalidation, whereas article 1(2) merely limits rights. In particular, for instance, when the consequences of applying the former later prove to be unpalatable, they have switched to applying the latter.²⁰⁴

Finally, the courts have often dealt with problem areas with potentially widespread repercussions, such as insurance contract standard forms, with techniques of contract "interpretation".²⁰⁵ Commentators do note that even "restrictive interpretation" runs into difficulties when an agreed clause is absolutely clear; but there is a concern lest application of article 90 be taken as widespread opprobrium of practices in an industry.²⁰⁶ Overall, the trend in these areas also indicates a formal tendency.

Further, Nakaya points out that the difficulty in drawing a line between article 90 and article 1(2) is reduced in practice, by problem areas being "siphoned off" to be addressed through legislation as well as techniques of contract interpretation. Such tendencies invite a more formal approach, particularly in Japan where the law-making process in the areas under review does not seem to have been as politicised as in the US. This strengthens the conclusion that article 90, like article 1(2), has not led to quite the degree of substantive reasoning that might be anticipated from an initial reading. The resultant more formal aspect to the development of article 90 may help explain why it has apparently never been invoked in the Dial Q2 cases. It could be seen as too "aggressive"²⁰⁷ – or, put more theoretically, as too direct an application of a content-oriented standard. Nonetheless, over the 1990s, contract law theorists have attempted to broaden the conceptual basis of the public order doctrine, in light of new sets of cases in which article 90 has been applied by the Courts. Keizo Yamamoto, for instance, has focused on liberal philosophy reflected in Japan's post-War constitutional order.²⁰⁸

²⁰⁰ Yamamoto, above n 142, 104.

²⁰¹ Such as contracts of carriage: Nakaya, above n 191, 77-78.

²⁰² Nakaya, above n 191, 74. Also recall the 1977 termination case (above, n 160) which applies both articles.

²⁰³ See also Yasunaga, above n 44, 103 and 106-107.

²⁰⁴ Nakaya, above n 191, 87.

²⁰⁵ Yasunaga, above n 44, 103.

²⁰⁶ Yasunaga, above n 44, 107, 103.

²⁰⁷ Thanks are due to Tsuneo Matsumoto for this phrase. See also his general criticism of insufficient judicial activism and consumer protection measures in Japan: "Consumer's Rights and their Enforcement in Japan: Case Studies of Unfair Practices and Product Liability" in H Kroeschell (ed) *Recht und Verfahren [Law and Procedure]* (Freiburg, 1993) 93. Compare generally above Chapter One Parts II.C and II.D.

²⁰⁸ K Yamamoto *Kojo Ryojoku no Saikosei [The Reconstruction of Public Order and Good Morals]* (Yuhikaku, Tokyo, 2000).

Others attempt to bring into private law adjudication some considerations found in competition law, such as market share, yet focusing on doing justice in the particular case rather than the effects of the impugned transactions on the relevant market.²⁰⁹ The latter theories, in particular, may add a more strongly substantive dimension to the development of article 90 jurisprudence; but they may be dampened by further legislative developments.

IV Specific Legislative Intervention to Control Unfairness in Contracting

An overall pattern therefore begins to emerge, particularly from the analysis of the comparative development of doctrines of good faith and unconscionability. US law prefers a highly substantive approach. Japanese law takes a substantive approach, tempered by formal dimensions evident from a closer analysis of actual developments. New Zealand and English law tend to retain a resolutely formal approach, although the latter is increasingly challenged by the broad standards and political dimensions involved in the influx of EU law in this field. The dichotomy seems to be reinforced by each legal system's approach to the question of legislative intervention to control unfair contracts.

IV.A US Law

The development of US law in this field remains largely driven by general doctrines of good faith and unconscionability. Certainly, as mentioned above (Part III.A.2), legislation has been enacted at both state and federal levels to regulate particularly acute problems with specific types of contracts, commonly in standard form, such as distributorships and employment contracts. But that legislation retained noticeably content-oriented standards, built on earlier case law developments, and is itself the result of and part of a visibly political process.²¹⁰ Otherwise, there is general satisfaction with what remains, on the whole, a comparatively broad and substantive approach. This can also be seen in aspects of the attempts to revise UCC article 2 (Sales), suspended in 1999.

A major step in the revision process was the publication of the Executive Report of the Study Group of the "Permanent Editorial Board" (PEB) in 1990. First, it did not recommend any significant changes to the present §2-316(2), which requires that written disclaimers be "conspicuous". Its interim report had tried to dilute this requirement, by adding that even if the disclaimer could not be said to be conspicuous, it would be valid if the buyer knew of it.²¹¹ It is not surprising that this proposition was deleted in the Executive Report. US commentators' early appreciation of the problem of how to deal with such an alert – but "weaker" – contracting party underpinned the later

²⁰⁹ S Kozuka "Competition Law, Deregulation, and Juridification" in T Ginsburg, L Nottage and H Sono (eds) *The Multiple Worlds of Japanese Law* (University of Victoria, Victoria 2001) 101.

²¹⁰ Macaulay, above n 54; Macaulay and others, above n 55. But see J P Nehf "Textualism in the Lower Courts: Lessons from Judges Interpreting Consumer Legislation" (1994) 26 Rutgers LJ 1.

²¹¹ H Sono "UCC Dai Ni Hen (*Hanbai*) no Kaisei Sagyo ni miru Gendai Keiyaku Ho no Ichi-Doko [The Revision of UCC Article 2: PEB Study Group Reports, Llewellyn's Rich Legacy, and Modern Contract Law] (1)" (1994) 44 Hokudai Hogaku Ronshu 837, 886.

emergence of more direct regulation of unfair terms under broad standards of unconscionability, not just by focusing on the parties' agreement.²¹²

Secondly, there was little momentum on the part of the PEB Study Group to overhaul the broad standards of unconscionability laid down in the UCC.²¹³ Indeed, its Preliminary Report proposed that §2-308 be transferred to the more general article 1, as a guiding principle for the whole of the UCC, not just for article 2 on sales.²¹⁴ Furthermore, the majority rejected the proposition that the provision differentiate between consumer sales and sales between merchants.²¹⁵ This tends to confirm the impression that unconscionability in US law remains available as a residual technique for controlling unfairness, even in commercial situations.²¹⁶

Finally, the importance of principles of good faith was also largely confirmed. The Executive Summary confirmed that rejection of goods (under §2-601) must be in good faith, in derogation of the strict "perfect tender rule", for instance.²¹⁷ A minority even suggested more generally that the revised UCC adopt a type of "material breach" framework.²¹⁸ Furthermore, the majority insisted that termination of continuing supply contracts "at will", under §2-309, be done in good faith.²¹⁹ There is some attempt to reemphasise the objective aspects of the inquiry;²²⁰ but that itself can be substantive in orientation as well.

From 23 to 30 July 1999, the National Conference of Commissioners on Uniform State Laws (NCCUSL) met in Denver to try to reach final agreement on revisions to UCC article 2. The attempt foundered, ostensibly because priority had to be given to enactment of new legislation on licensing contracts,²²¹ which was achieved after altering the original timetable. Equally important appears to have been vehement objection from industry representatives to certain proposed provisions, particularly a draft art 2-207 relating to the binding force of contract terms disclosed only after

²¹² Above Part III.A.2.

²¹³ Compare J Murray "The Revision of Article 2: Romancing the Prism" (1994) 35 William and Mary L Rev 1447, 1496-1497.

²¹⁴ The effect of §2-719, as a basis for invalidating exemption clauses regarding personal injury, is also largely retained in the Executive Report: H Sono "*UCC Dai Ni Hen (Hanbai) no Kaisei Sagyo ni miru Gendai Keiyaku Ho no Ichi-Doko* [The Revision of UCC Article 2: PEB Study Group Reports, Llewellyn's Rich Legacy, and Modern Contract Law] (2)" (1994) 44 *Hokudai Hogaku Ronshu* 1293, 1299-1300.

²¹⁵ Above n 213, 1307.

²¹⁶ Above Part III.A.2.

²¹⁷ However it proposed to retain the rule in consumer sales, as a protective measure (above n 211, 885-886).

²¹⁸ Proponents alluded to the similar "fundamental breach" concept in art 25 of the Vienna Sales Convention

²¹⁹ Also, notice must be given or the bargain may be held unconscionable under §2-309(3) (above n 213, 1330).

²²⁰ The Preliminary Report proposes to expand §2-103 (referring to the more "objective" indicators of fair dealing in the trade) to encompass non-merchants as well as merchants, and to introduce more objective indicators into §1-201 (presently referring to the more "subjective" indicator of "honesty"). Above n 213, 1335-6. See also S Burton "Good Faith in Articles 1 and 2 of the UCC: The Practice View" (1994) 35 William & Mary L Rev 1533, 1561-1563.

²²¹ Rules for contracting in the new trading environment created by rapid developments in information technology (IT) is another heavily politicised area of debate, although industry interests were able to steer the debate towards less stringent rules, thus reducing the scope for more substantive reasoning. See for example G Evans and B Fitzgerald "Information Transactions under UCC Article 2B: The Ascendancy of Freedom of Contract in the Digital Millennium?" (1998) 21 UNSWLJ 404, 431-432.

payment, which was seen as too favourable to consumer buyers.²²² There was also concern over draft article 2-105(b), a new provision which had proposed that:

In a consumer contract, a nonnegotiated term in a standard form record is unconscionable and is not enforceable if it:

- (1) eliminates the essential purpose of the contract;
- (2) subject to [article 2-202 (parol evidence rule)], conflicts with any other material terms to which the parties have expressly agreed; or
- (3) imposes manifestly unreasonable risk or cost on the consumer in the circumstances.

The wording was novel and very broad, compared even to draft article 2-105(a) which basically restated for non-consumer transactions the present UCC prohibition against unconscionability. Further, the commentary to the draft had noted that although US courts had tended to interpret the latter as requiring “a certain quantum” of both procedural and substantive unconscionability, implying that this would continue to be so under paragraph (a),²²³ “so-called procedural unconscionability is not required” for paragraph (b) consumer contracts. Perhaps this invitation for courts to directly address substantive inequality of the bargain, at least in consumer transactions, was seen as *too* substantive in approach at least for a sizeable contingent of US jurists.²²⁴ However, the commentary went on to note a number of other draft provisions in which consumers and consumer contracts were treated differently (usually more favourably than in business dealings). Industry objection to these may have been more important in derailing the enactment process at the meeting.

Certainly, Jean Braucher’s remarks more than two years’ earlier therefore proved true in 1999: “Treatment of consumer transactions is a contested and potentially consensus-breaking question in all ... projects [underway to reform the UCC]. Much could change in the final months of drafting and the enactment phase may also produce surprises and controversy”.²²⁵ Indeed, the Reporter in charge of revising article 2, Richard Speidel, resigned in protest along with the Associate Reporter, Linda Rusch. The project is presently suspended, and enactment of a new article 2 within the next few years seems highly improbable. This process therefore illustrates the difficulty of enacting legislation in the US. However, this situation may also prompt courts and commentators to continue developing the law related to contractual unfairness in a highly substantive manner, as they have done in other areas of US law (above Chapter One Part II.C). It also shows the highly politicised nature of the process leading to legislation which is enacted in this field, arguably reducing the heightening of various

²²² See for example NCCUSL (ed) “Proposed Revisions of Uniform Commercial Code Article 2 – Sales” (28 June 1998) (available, along with all other Conference drafts and official communications, at the University of Pennsylvania Law Library website: <<http://www.law.upenn.edu/library/ulc/ucc2/ucc299am.htm>>). Thanks are due to Hiroo Sono, who attended the meeting, for providing this information.

²²³ Citing *NEC Technologies and American Software* (above n 74).

²²⁴ The draft also included many other proposals promoting more substantive reasoning, such as material breach concepts in draft art 2-701.

²²⁵ J Braucher “Foreword: Consumer Protection and the Uniform Commercial Code” (1997) 75 Wash U LQ 1, 2. See also J Braucher “Politics and Principle in the Drafting of the UCC Consumer Protection Provisions” (1996) 29 UCC L J 68.

dimensions of formal reasoning usually associated with transforming legal norms into statutory form.²²⁶

IV.B English Law

Atiyah and Summers admit that in English law the enactment of the Unfair Contracts Terms Act 1977 (the UCTA) does import more content-oriented standards of validity into this area, in particular through its test of "reasonableness" for exemption clauses.²²⁷ However they suggest that the UCTA will continue to be interpreted in the narrow, formal fashion preferred in the English law tradition. It is certainly important not to over-estimate the role of the UCTA in changing the tenor of English contract law in this field.

As Adams and Brownsword conceded in 1988, the scope (or "sweep") of the UCTA remained restricted by requiring "reasonableness" of the clause to be tested when the contract was concluded.²²⁸ By directing the focus of inquiry to that point of time, to a more specific source, this can be seen as a formal restriction. Furthermore, they noted that the UCTA implies a restriction in "pitch":²²⁹

judges should try to infuse some degree of consistency and generality into their rulings and, in particular, should avoid a one-off approach to the regulation of commercial standard form exemptions.

This can be seen as restricting the scope for inquiry into more subjective considerations, an additional avenue for more substantive reasoning. Lastly, Adams and Brownsword pointed out that one strand of the case law may be taking a more expansive view. But they indicated that this development may leave too much judicial discretion, and noted a more restrictive strand in the case law as well.²³⁰

The restrictions of the UCTA can be further brought out by a brief comparison with the EC Directive on Unfair Terms in Consumer Contracts.²³¹ The UCTA is largely limited to the regulation of exemption clauses, not the broad spectrum of clauses covering agreed remedies. Nor does it extend to insurance contracts, a major category of consumer contract.²³² Although there have been a few judgments rendered in recently relating to the problems under the UCTA, their impact is circumscribed.²³³

²²⁶ Compare Atiyah and Summers, above n 1, with Macaulay, above n 54.

²²⁷ Above n 1, 52. Foreign observers have tended to see the UCTA in this light: see for example H Koetz "Taking Civil Codes Less Seriously" (1987) 50 MLR 1, 4-5. Also, in *Interfoto* (above n 35, 439), Bingham LJ alludes to the UCTA as another "piecemeal solution" to the general problem of unfairness in English law.

²²⁸ J Adams and R Brownsword "The Unfair Contract Terms Act: A Decade of Discretion" (1988) 104 LQR 94, 116.

²²⁹ Adams and Brownsword, above n 228, 116.

²³⁰ Adams and Brownsword, above n 228, 97-99, 104-105. The restrictive approach is associated with *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827, discouraging judicial intervention, compared to *George Mitchell (Chesterhill) Ltd v Finney Lock Seeds Ltd* [1983] 2 AC 803. Compare also *Smith v Eric S Bush* [1990] 1 AC 831, where the House of Lords held to be reasonable a term excluding liability for negligence of surveyors (engaged by a building society) to home buyers.

²³¹ Lockert and Egan, above n 27.

²³² H Collins, "Good Faith in European Contract Law" (1994) 14 OJLS 229, 241-242. See also D Yates "Commentary on 'Two Concepts of Good Faith'" (1995) 8 JCL 145, 149, 151.

²³³ See for example *Thomas Witter Ltd v TBP Industries Ltd* (1994) Tr L R 145); and S Males

The Directive has its limitations too. First, article 5 requires terms to be “plain” and “intelligible”, and construed *contra proferentem*. But Collins argues that this can be justified by the more limited notion of “market failure”, and sees article 5 as “the formal test” required by the Directive. This parallels the point developed above (Part II), namely that the “fine print” doctrine and certain techniques of contract interpretation can be quite readily reconciled with a “formal” approach to contract law anyway.

Collins also argues that article 3(1) sets “the substantive test”, but then notes limits. First, although it challenges terms that cause a “significant imbalance” in the parties’ rights and obligations under the contract, the focus is only on the subsidiary and collateral obligations (warranties, exemption clauses and agreed remedies), and whether they are balanced in some way in the consumer’s favour. Pursuant to article 4(2), the Directive does not cover the principal obligations, such as the nature of the goods or the price. Thus, Collins suggests that its motivation in promoting “substantive fairness” in exchange is limited, and certainly does not extend to “social market” objectives aiming to raise overall minimum standards in the market for goods. However, he suggests that the latter objectives might be read into the second requirement of article 3(1), the requirement of good faith. The Preamble suggests an underlying principle promoting broader “solidarity” in contracting in consumer markets. But he acknowledges that a more “formal” reading of good faith is also possible, limiting the requirement to procedural fairness in the bargaining process, and perhaps to the regulation of “fine print” problems - again seen in terms of “market failure”. This main tension justifies the view expressed by another English commentator in the mid-1990s, arguing that it was “arguable [whether the direct reference to good faith in the Directive] will have profound effects on the English law of contracts”.²³⁴

Generally, there may be a particular risk of conflicting readings when an English lawyer approaches a Directive, the product of European law and mainly Continental conceptions, using English techniques of statutory interpretation.²³⁵ This problem is compounded when those in England do not follow developments at the European level, despite the growing overall number of “references” made to the European Court of Justice (ECJ) by national courts in EU member states for assistance in interpreting Directives affecting private law.²³⁶ An example of this indifference is the lack of attention shown to an important decision from the ECJ referred by a German court, extending protections of a 1985 EC Directive on Doorstep Selling to guarantees by a parent to secure a loan made to a son, provided the loan was not for business purposes.²³⁷ An English commentator acknowledges that one reason why this decision

“Notice of Contract Terms - A Common Law Requirement of Reasonableness” (1996) LQR 130 (discussing *AEG (UK) Ltd v Logic Resource Ltd*, 20 October 1995, unreported, English Court of Appeal). The latter case may represent an example of English law developing common law principles in the shadow of statute law (compare P S Atiyah “Common Law and Statute Law” (1985) 48 MLR 1). However, it remains a rare instance, and tellingly the Judge makes no explicit reference to UCTA.

²³⁴ Beatson, above n 99, 143.

²³⁵ See S Bright and C Bright “Unfair Terms in Land Contracts: Copy Out or Cop Out?” (1995) 111 LQR 655; and M Attew “Teleological Interpretation and Land Law” (1995) 58 MLR 696.

²³⁶ See I Klauer “General Clauses in European Private Law and ‘Stricter’ National Standards: The Unfair Terms Directive” (2000) European Rev Private Law 187, 189 n 5.

²³⁷ *Bayerische Hypotheken- und Wechselbank AG v Edgar Dietzinger* [1998] ECR I-1199. See C Joerges “Interactive Adjudication in the Europeanisation Process? A Demanding Perspective and a Modest Example” (2000) European Rev Private Law 1.

has received virtually no attention in the UK, despite the interest in these types of cases evidenced by the burgeoning case law on undue influence since the mid-1990s, may simply be that “lawyers in the UK [may not have been] aware of the uses to which their German counterparts were putting the Doorstep Selling Directive”.²³⁸ Another explanation advanced is the potential deterrent effect of s 2 of the implementing Regulations, which specifically excludes contracts for business purposes from their scope, possibly due to the English language version of the Directive reading as applying to contracts between consumers and service or goods suppliers whereas the German version reads as applying to the provision of goods and services to consumers.²³⁹ A further consideration is left open, namely that “disinterest or even scepticism about European regulation” may be related to what Ian Ramsay has perceived in English law as:²⁴⁰

a hesitancy to view the details of consumer protection law, including statutes, regulations and codes of practice, as sources of general principle. Consumer protection is often viewed as representing ad hoc political and representative compromises to be contrasted with the neutral and rational principles of the common law.

Even for English jurists aware of and open to developments at the European level, they may find little guidance from ECJ jurisprudence on the pivotal provision of “good faith” in the Unfair Terms Directive, for instance, first because it remains unclear whether the Court has jurisdiction to provide its autonomous interpretation of such a general clause. Irene Klauer makes a convincing case that it does; but then points out that, due to the broadness of the standards laid down in the Directive, this still leaves open the question of what sort of interpretation the ECJ might and should take. She argues that the Court:²⁴¹

has developed a fairly consistent consumer model in its case law on the free movement of goods and unfair competition over the last two decades, which could serve as a precedent for the UTD. This consumer model is one of a reasonable and enlightened consumer. The Court assumes that the first right of the European consumer is to be sufficiently informed to be in a position to make reasonable choices. Once sufficient information is provided, the Court requires the consumer to read and understand this information. When making his or her decision, the European consumer must not rely on traditional national consumer habits ...

On the other hand, Klauer notes that recent decisions of the ECJ seem to have lowered somewhat these high expectations, setting the standard as that of an “averagely informed, considerate, and reasonable consumer”.²⁴² Nonetheless, she agrees with Collins that even this standard would stress consumer choice over protection, and clarity over substantive fairness. She concludes that although there are fewer grounds

²³⁸ D Geary “Notes on Family Guarantees in English and Scottish Law – A Comment” (2000) *European Rev Private Law* 25, 29.

²³⁹ Above n 238. This relates to the broader problem of multiple language versions of legislative and ECJ pronouncements under EU law, in particular the ascendance of English and French as the dominant languages in practice in European institutions: see N Urban “One Legal Language and the Maintenance of Cultural and Linguistic Diversity” (2000) *European Rev Private Law* 51.

²⁴⁰ Above n 238, citing I Ramsay “Consumer Credit Law, Distributive Justice and the Welfare State” (1995) *OJLS* 177, 196.

²⁴¹ Ramsay, above n 240, 200.

²⁴² Above n 240, 201.

for transposing this “consumer model” into ECJ interpretation of the Unfair Terms Directive, because it is less arguable that trade will be impeded by higher levels of consumer protection (as opposed eg to advertising restrictions), it is “very unlikely that the Court will apply the strictest and most protective standard currently found in the Member States”.²⁴³ This becomes particularly important if, as she advocates primarily in order to promote harmonisation, the ECJ further rules that member states and their courts cannot ignore the standards of interpretation which it develops, because national law is supposedly more protective.

In short, these studies of the ongoing elaboration of EU law affecting consumer protection suggest firstly that English law may not adapt quickly due to lack of awareness or language difficulties. Secondly, even if EU law does have a major impact, it may encourage more formal reasoning due to the “consumer model” likely to be applied by the ECJ. Thirdly, even if more substantive reasoning is encouraged by a more protective model, pushing English courts away from focusing primarily on what information was provided at the time of parties reaching an agreement, this may be limited to defined areas of consumer protection law and not generalised to reorient contract law doctrine and thinking as a whole. These patterns would support the retention of more formal reasoning.

However, extensive discussions about good faith under EU law (and more generally in contract law) have recently been included in leading texts aimed also at practitioners,²⁴⁴ and more philosophical and contextual studies now feature regularly in major English law journals.²⁴⁵ The Court of Appeal also drew recently on academic commentary and EU law principles to impugn an acceleration clause in a mortgage agreement. It emphasised the “procedural” aspects of acting in good faith (and the need in this case to bring the unusual clause to the consumer’s attention), but also noted that substantive imbalance in obligations and detriment to the consumer were important considerations.²⁴⁶ A recent ECJ decision, on referral from Spain, is also likely to force English courts to take a more pro-active role in scrutinising contracts for possible breaches of the Directive.²⁴⁷ Further, more cases are expected to be brought before

²⁴³ Above n 240, 202.

²⁴⁴ Brownsword, above n 80, 101-106.

²⁴⁵ See for example S Whittaker “Unfair Contract Terms, Public Services and the Construction of a European Conception of Contract” (2000) 116 LQR 95; R Brownsword “Individualism, Cooperativism and an Ethic for European Contract Law” (2001) 64 MLR 628. See also R Brownsword, N Hird and G Howells (eds) *Good Faith in Contract: Concept and Context* (Dartmouth, Aldershot, 1999).

²⁴⁶ *Director General of Fair Trading v First National Bank PLC* [2000] 1 All ER 371. However, as observed by N Beresford “Improving the Law on Unfairness” [2000] CLJ 242, 244, the Court could have gone further especially in examining significant imbalance:

It is a generalising concept, requiring an examination of the typical transaction here (here, a typical Consumer Credit Act loan agreement) to see whether the disputed agreement fits the norm. Imbalance is central to the civilian approach to unfairness, and of particular importance in England, where the common law method tends to focus attention on precedent and argument by analogy. “Unfairness” involves the recognition of broader considerations.

²⁴⁷ *Oceano Grupo Editorial SA v Rocio Murciano Quintero etc*, 27 June 2000. Plaintiff firms sold encyclopedias to consumers, including a contract clause giving exclusive jurisdiction to the courts in Barcelona, the plaintiffs’ main place of business. They brought suit there for non-payment, but the consumers did not appear. The Supreme Court in Spain had held such jurisdiction clauses to be unfair, but the first-instance Court in Barcelona was unsure whether domestic law allowed it to determine unfairness on its own motion. It referred to the ECJ the question of whether the Directive implies that courts should be able to make determinations of unfairness on its own motion. Although the Directive had

English courts following 1999 amendments to the Regulations, enacted in 1994 to implement the Directive in English law, because they widen the enforcement provisions (extending standing to listed consumer organisations and allowing injunctive relief to be sought in the County Court as well as the High Court), and expand the scope to include contracts relating to employment, family law and the internal constitutions of companies.²⁴⁸

Already, implementation of the Directive in England appears to be having a major impact on business practices, primarily through the vigorous activities of a rejuvenated Office of Fair Trading (OFT), holding prime responsibility for its implementation.²⁴⁹ In 1999, it was noted that:²⁵⁰

The OFT has investigated about 3,000 complaints under the Regulations since they have come into force. About 75% have required action of some sort. No trader has yet forced a case to Court, but over 1,200 terms have been dropped or revised.

Particularly notable are pro-active investigations into specific sectors, such as the mobile phone industry, resulting in widespread amendments to standard terms.²⁵¹ Recently, moreover, OFT activities encouraged one County Court judge to strike down certain mortgage terms as contrary to the Directive. This is significant because of the limited number of judgments which have struck down such terms as "extortionate" under the Consumer Credit Act 1974.²⁵²

Such developments exhibit parallels with "soft" regulation of contractual unfairness in Japanese law,²⁵³ until recently (Part IV.B below). They may also indicate a "neo-proceduralist" tendency which some theorists perceive as common to complex contemporary economies with sophisticated legal systems (see below Chapter Five Part II.B).²⁵⁴

not yet been incorporated into Spanish law, the ECJ followed its case law to argue that the aim of such Directives should be followed "as far as possible" (presumably, not where this would contradict clear domestic rules). It decided that the Directive did imply that a court should be able to rule on unfairness on its own motion. Presumably, the Spanish Court will now strike down the jurisdiction clause, and domestic private law may adapt more generally to this European law principle. Nevertheless, this ECJ ruling challenges a fundamental principle of Anglo-American civil procedure: the adversary principle.

At least one English commentator has welcomed the decision as consistent with a perceived move in England recently, away from the traditional role of judges as "neutral arbiters of private disputes delineated as well as submitted by the parties for their resolution" towards more active involvement as "public authorities under obligations to give effect to legally recognised policies": S Whittaker "Judicial Interventionism and Consumer Contracts" (2001) 117 LQR 215, 220.

²⁴⁸ S Bright "Winning the Battle Against Unfair Contract Terms" (2000) 20 Legal Studies 331, 337. The 1999 Regulations also abolish a schedule which had attempted to paraphrase what was meant by good faith, in favour of the Directive's wording on this, thus allowing English law to draw more directly on EU and continental law.

²⁴⁹ See generally R Colbey "Unfair Terms and the OFT" (1998) New L J 46 (16/1/98).

²⁵⁰ L Santin "Unfair Contract Terms in the Mobile Phone Industry" (1999) 19 ACCC Journal 36, 38. See also R Brownsword, N Hird and G Howells (eds) *Good Faith in Contract: Concept and Context* (Dartmouth, Aldershot, 1999) 105-110; Bright, above n 248, 332 n 2 (4140 complaints between 1 July 1995 and June 1999), 334 n 12 (average of 100 complaints monthly during 1998).

²⁵¹ Bright, above n 248, 334-335.

²⁵² See S Bright "Attacking Unfair Mortgage Terms" (1999) 115 LQR 360.

²⁵³ Taylor, above n 164, 168..

²⁵⁴ G Teubner "Legal Irritants: Good Faith in British Law and How Unifying Law Ends Up in New Divergences" (1998) 61 MLR 11.

IV.C New Zealand Law

In New Zealand, by contrast, impetus towards a more substantive approach in the wider legislative reform process seems, if anything, even weaker. Discussion about the possible contours of a duty of good faith is circumscribed, lacking the stimulation of a major outside development like the EC Directive in England.²⁵⁵

The criticism of the Law Commission's draft scheme for regulating Unfair Contracts, which had drawn on developments in Europe and Australia, has already been mentioned.²⁵⁶ Its demise is now seen as resulting in part from its attempt to propose a reconsideration of philosophical underpinnings in contract law.²⁵⁷ That such a tentative attempt to do so elicited such a response marks a strong contrast to the Japanese experience, where a similar opportunity has been taken in its stride and has eventually led to some revival – now perhaps with sounder jurisprudential grounding – at the practical level of impetus for legislative reform (below Part IV.D). Thus, as in the case of the stalled reform of formal writing requirements (above Chapter Two Part III), New Zealand's experience is consistent with a more formal approach.

One noticeable recent change in this part of the contract law landscape in New Zealand is the enactment of the Consumer Guarantees Act 1993. By insisting that certain guarantees cannot be contracted out of in consumer sales, the Act imposes new norms of contract validity.²⁵⁸ But, compared to the EC Directive, it has emerged with little debate on possible underlying rationales.²⁵⁹ Those also do not inform commentary

²⁵⁵ Art 7(1) of the Vienna Sales Convention ("CISG", in force in New Zealand from 1 October 1995) requires the *Convention* – not necessarily the parties' sales *contract* – to be interpreted so as to promote "the observance in good faith in international trade". However as the New Zealand Law Commission has noted (*The United Nations Convention on Contracts for the International Sale of Goods: New Zealand's Proposed Acceptance* (Wellington, 1992) §100), the confusing wording represents a compromise. (See also E A Farnsworth "Duties of Good Faith and Fair Dealing under the Unidroit Principles, Relevant International Conventions and National Laws" (1995) 3 Tul J Int'l and Comp L 47, 56-57.) Other than the Commission's report, and the article on which Parts III and IV of this Chapter draw (L Nottage "Form and Substance in US, English, New Zealand and Japanese Law: A Framework for Better Comparisons of Developments in the Law of Unfair Contracts" (1996) 26 VUWLR 247) there has been almost no published discussion in New Zealand regarding this concept of "good faith", now incorporated into New Zealand law. The only serious attempt to grapple with CISG, more generally, is in the narrow context of possible law reform for Tokelau: see A Angelo "Contract Codes, Coral Atolls, and the Kiwi Connection" in H-J Ahrens and others (eds) *Festschrift fuer Erwin Deutsch zum 70. Geburtstag [70th Anniversary Essays for Erwin Deutsch]* (Carl Heymanns Verlag, Cologne, 1998) 877.

²⁵⁶ Above n 128. Compare for example T Carlin "The *Contracts Review Act 1980 (NSW)* – 20 Years On" (2001) 23 Syd L Rev 125. He notes how from the late 1980s Australian Courts began using quite actively the Act to strike down "unjust" clauses in consumer contracts, especially in cases involving mortgages and lending, but notes that it is being supplanted by unconscionability provisions added to the Trade Practices Act 1974 (Cth) in 1992 (s 51AA) and 1998 (s 51AC). The latter extends relief to small businesses. It appears to have received little attention in New Zealand.

²⁵⁷ Sutton, above n 120.

²⁵⁸ Furthermore, it is of potentially greater effect than an English counterpart, as it allows direct actions against manufacturers: compare G Howells "The Modernisation of Sales Law?" [1995] LMCLQ 192.

²⁵⁹ An exceptional early attempt to locate the debate in broader context was provided by an Australian academic: D Harland "Post-Sale Consumer Legislation for New Zealand" (1988) 3 Cant L Rev 410.

on the new Act, even for example on the extent to which it should apply to agents,²⁶⁰ which should after all raise a fundamental policy issue since agencies often arise in non-consumer settings. This hampers its potential for injecting more substantive reasoning into New Zealand law. Further, given the Act's limited scope and occasionally complex drafting,²⁶¹ it too is likely to be interpreted in a technical or formal manner, at least initially.²⁶²

This has been the pattern in interpreting section 4 of the Contractual Remedies Act 1979, on merger and acknowledgement clauses. It has generated a significant amount of case law, but a literal reading of the section narrows the scope of its application.²⁶³ Similarly, only recently has it been suggested that a firmer conceptual foundation is needed to interpret the powers of relief from credit contracts which are "oppressive, harsh, unconscionable, unjustly burdensome, or in contravention of the reasonable standards of commercial practice", given to courts under section 9 of the Credit Contracts Act.²⁶⁴ However, rather than looking to general legal theory (compare Chapter Five Part II.B below) or even to how similar concepts have been applied in other areas of law,²⁶⁵ the only significant attempt to meet this challenge has been to attempt to list broad factors (mostly from reported cases) which may provide further guidance to courts and practitioners.²⁶⁶ Further, the Court of Appeal has recently

²⁶⁰ C Hawes "Agents and Consumer Guarantees" (1995) 6 Cant L Rev 164.

²⁶¹ Some of its complexity is noted by T Telfer "The Consumer Guarantees Act 1993" (1995) 1 NZBLQ 46.

²⁶² See for example the following commentaries on a rare court judgment applying the Act: R Nield "The Consumer Guarantees Act: (1) Strike One for the Consumer" [1996] NZLJ 131; U Jagose "The Consumer Guarantees Act: (2) Rejection of Goods" [1996] NZLJ 133.

²⁶³ See D McLauchlan "Merger and Acknowledgement Clauses under the Contractual Remedies Act" (1988) 18 VUWLR 311. Compare Burrows and others, above n 34, 212-213. Even on the broader approach, many exclusion clauses are often upheld as reasonable. See also for example *Hall v Warwick Todd Ltd & Ors* (4 April 2000) unreported, High Court, Christchurch Registry, CP 89/99, John Hansen J.

²⁶⁴ *Prudential Building & Investment Society of Canterbury v Hawkins & Ors* [1997] 1 NZLR 114. Interestingly, and as he does quite often (unlike almost all other New Zealand judges), Hammond J urged New Zealand jurists to look to North American discussions on this broader jurisprudential issue.

²⁶⁵ As in family law, such as the provisions of s 21 of the Matrimonial Property Act. For a recent case showing the willingness of New Zealand courts nowadays to upset agreed bargains in this area, see *Wood v Wood* [1998] 3 NZLR 234. (Thanks are due to Bill Atkin for pointing out this judgment.) Compare the substantive approach even of English courts with respect to matrimonial property agreements: P Pavlou "Pre-Nuptial Contracts" (1998) 11/12/98 New LJ 1857. Compare also S M Chetney "Contract Not Apt in Divorce Deal" (1999) 115 LQR 356 (noting *Xydhias v Xydhias* [1999] 1 FLR 683, in which the English Court of Appeal decided that normal principles of commercial contract law should not be applied unmodified at least in the context of agreements reached between spouses upon divorce).

²⁶⁶ D Webb "A Proposed Decision-Making Process for Oppressive Credit Contracts" (1997) NZ L Rev 394. See also D Webb "When Will Silence Be Oppressive Under the Credit Contracts Act?" (1997) NZBLQ 154, 158 (commenting on Hammond J's unusual attempt, in *Prudential Building and Investment Soc of Canterbury v Hankins* [[1997] 1 NZLR 114, to draw on North American legal theory in upholding a claim of oppression]:

the borrower was intelligent, experienced, advised and persistent. The writer has nothing but sympathy for the exasperated financier who declined to correct a convenient misapprehension which was at odds with the clear words of the contract which the borrower could reasonably be expected to read and understand.

Compare also the early warnings about interpreting the Act too broadly, in R Dugan "The New Zealand Credit Contracts Act: A United States Lawyer's Perspective" (1984) 11 NZULR 20.

highlighted the difficulties faced by individuals in obtaining relief on the basis of oppression, at least where credit has been obtained to finance investments.²⁶⁷

More generally, such “commercial borrowing” makes up a large proportion of the case law (98 of the 244 reported and unreported judgments in the decade ending May 2000), with most (71 out of 98) involving a borrower defending rather than bringing an action, and claims of oppression involving a borrower in default (36 out of 41 cases). These patterns were mirrored in cases of consumer borrowing (101 cases, 69 involving a borrower defending an action; 37 out of 44 cases involving a borrower in default). This is seen as an indication that “the law is being used not so much to protect consumers from unscrupulous lenders, but rather as a last ditch effort by some borrowers to escape repaying their loans”.²⁶⁸ If this view is shared by the judiciary and practitioners, it may explain the limited numbers of cases alleging oppression (an average of 8.5 judgments per annum), and especially a reluctance until recently to relate principles in this area of law to broader developments in theories of contractual unfairness.

Unless such linkages can be expanded significantly, it is unrealistic to expect the Ministry of Consumer Affairs’ current review of consumer credit law to propel New Zealand’s contract law generally towards more substantive reasoning. A recent review paper noted rapid increases in consumer indebtedness, and sought views on whether (i) distressed debtors should be allowed to apply to lenders to change contract terms or apply to Courts for variation if the transaction is “unjust”, and (ii) whether a lender should appropriately ascertain the consumer’s ability to repay. Both suggestions, drawing on Australian models, have been opposed, and are unlikely to be included in legislation which is planned for 2002.²⁶⁹ Again, while this reluctance to allow reform in this direction may be due partly to indifference or (more likely) interest group politics, it is likely to be related to a preference for more formal reasoning focused on an objective determination of the parties’ original agreement.

IV.D Japanese Law

In Japan, despite its distinctly more substantive approach in this area of contract law, the tendency for important categories of unfair contract cases to be “siphoned off” – to be directly regulated by statute – has already been noted (above Part II.D.2). Kitagawa lists a total of 16 statutes directly controlling aspects of contractual validity, often in transactions on standard forms.²⁷⁰ Each statute’s area of coverage has been limited, and even in areas where attempts to expand its scope might have been anticipated, the tendency has been to wait for legislative amendment. To a lesser degree, this pattern holds for an emerging tendency to regulate unfairness in contracting through local government ordinances.²⁷¹ Combined with potential for and actual tendencies

²⁶⁷ *Greenbank NZ Ltd v Haas* (27 July 2000) unreported, Court of Appeal, CA 306/99, Tipping, John Hansen and Baragwanath JJ.

²⁶⁸ G Hannis “Credit Law Reform” [2001] NZLJ 121.

²⁶⁹ Ministry of Consumer Affairs *Consumer Credit Law Review Part 4: Overindebtedness, Insurance and E-Credit* (August 2000, Wellington) Part 3; Personal communication, Bob Hillier (Ministry of Consumer Affairs), 29 August 2001.

²⁷⁰ Kitagawa, above n 179, §1.07[4][b].

²⁷¹ The approach of the Tokyo City Ordinance for Consumer Living (*Tokyo-to Shohi Seikatsu Jorei*), for instance, is rather ambiguous. It dates back to 1975, but has been periodically amended, most recently

towards formal reasoning within the case law and commentary involving article 1(2), and especially article 90, piecemeal legislative reform – as in England and New Zealand – has reinforced a more formal orientation in this whole area of law.

Recently, there has been considerable academic discussion about regulating unfair contracts as part of a more general scheme. The discussion has roots in studies in the early 1980s of overseas reforms, such as the UCTA and early initiatives at the EC level. At the time, regulation of standard form contracts also was being investigated by a government advisory body, the National Life Council. But introduction of general legislation containing new content-oriented standards, drawing on some of those overseas reforms, did not eventuate. First, Japanese commentators increasingly realised the extent – and sometimes usefulness – of “administrative guidance” in regulating various standard forms used in particular industries.²⁷² In some cases, as in life insurance, the standard form had to be approved by the responsible Ministry, which was therefore in a position to threaten *de facto*, if not clearly legal, sanctions to control excesses. Such control was heightened by a National Life Council Committee report in 1984, which identified problems in particular areas after widespread public discussion and research.²⁷³ The awareness of such mechanisms, and changes that followed in some of the standard forms reviewed in that report, took some urgency out of the subsequent discussion. Secondly, the focus of inquiry was broadened, to include discussion not only of particular unfair contract terms, but also improper behaviour in inducing the contract. This raised more general issues, calling for more consideration of how various private law techniques did or might deal with this problem. Predictably, it resulted in

in 1994 (Tokyo City Ordinance No 110, 6 October 1994, in force since 1 January 1995). On the one hand, art 25 of the Ordinance establishes broad, generally worded categories of “improper dealings”, including those largely covered by doctrines of unconscionability or undue influence (para 2), and those condemning “contracts containing terms which are excessively unfair and disadvantageous, violating the requirement of good faith (*shingizoku*) in dealings” (para 3). Further, even after the latest amendment, the Ordinance, and Regulations thereunder (*kisoku*), are still largely hortatory in nature. In particular, the sanctions for infringing the rights set out pursuant to art 1 and the Regulations are that the governor may issue guidance (*shido*) against, or warn infringers (*kankoku*), and may publicise details of those who refuse to follow warnings (see S Ito “*Futekisei na Torihiki Koi Kisei ni kansuru To-jorei oyobi Kisei Kaisei no Gaiyo* [Overview of the Amendment to the Capital’s Ordinance and Regulations relating to the Control of ‘Improper Dealings’]” (1995) 1065 *Juristo* 14). This may also indicate a more substantive approach, for example lower “enforcement formality” (above Chapter One Part II.D). On the other hand, the Regulations are extremely detailed, now attempting to cover up to 40 categories of unfair dealings. Commentators called for attention both to unfair dealings which are arguably still not covered, and to the need for a continuous process of amendment to meet other specific dealings as they arise. This more formal dimension was also apparent in calls for more specific statutory regulation in other regions. See Note “*Chumoku sareru Shohisha higai boshi oyobi Higai kyusai ni kansuru Chiho jichitai no Shohisha gyosei to Shohi seikatsu jorei no doko* [Noticeable Directions in Local Government Consumer Ordinances and Administration relating to Prevention and Compensation of Damage to Consumers]” (1996) 586 *NBL* 5. It is unclear what will happen to municipal initiatives in the light of enactment of the Consumer Contracts Act 2000. Compare for example Nottage, above n 31.

²⁷² As described above (Chapter One, Part II.A), in general “administrative guidance occurs where administrators take action of no coercive legal effect that encourages regulated parties to act in a specific way in order to achieve some administrative aim”: M Young “Judicial Review of Administrative Guidance: Governmentally Encouraged Consensual Dispute Resolution in Japan” (1984) 84 *Colum L Rev* 924, 926.

²⁷³ Z Kitagawa “Unfair Contract Terms in Administrative Guidance” (1985) 16 *Rechtstheorie* 181.

more general jurisprudential arguments.²⁷⁴ The resultant hiatus left the Japanese law on unfair contracts with substantive roots, but formal counter-tendencies.

Considerable momentum has recently re-emerged. Concern had grown about the inability of administrative guidance adequately to control the broad range of cases involving claims of contractual unfairness, particularly those involving consumers. The Economic Planning Agency (EPA), the government entity responsible for coordinating consumer policy at the time, formed a working group which reported on the EC Directive in 1994.²⁷⁵ Following an interim report in January 1998,²⁷⁶ a final report from the relevant National Life Council committee was published in January 1999, proposing draft legislation. As with the current UCC article 2 amendment proposals (above Part IV.A), this attracted considerable opposition mainly from industry interests. However, the key players involved in the Japanese reform initiative, and the head of the EPA, remained confident that draft legislation would be presented to the Diet in early 2000.²⁷⁷ The Consumer Contract Law was duly enacted, and came into effect on 1 April 2001.²⁷⁸ Some “deals” appear to have been made among differing interest groups. On the one hand, the grounds for impugning the negotiation process and hence cancelling the contract (Articles 4 to 7) are relatively tightly circumscribed. On the other hand, as well as nullifying specified types of contract terms (under Articles 8 and 9), the Act allows – potentially very broadly – for nullification of any term which expands “one-sidedly”, and contrary to the Civil Code’s doctrine of good faith, the obligations of consumers compared to the default rules provided by the Code (Art 10).²⁷⁹ As in the case of product liability legislation enacted in 1994,²⁸⁰ this may further encourage Japanese courts to adapt old principles to new types of problems involving consumer fairness. The current debate and the new legislation also interrelate with “lateral pressure” from bureaucratic agencies, and attempts at “self-regulation” within various industries.²⁸¹ This complex continues to draw on and further stimulate vigorous and wide-ranging academic reformulations and new theory-building, already

²⁷⁴ E Hoshino “*Gendai Keiyaku Ho Ron - Yakkan, Shohisha Keiyaku wo Kien to shite* [Contemporary Contract Law Theory - Reconsidered in the Light of Standard Form and Consumer Contracts]” (1991) 469 NBL 1; T Isomura “*Verbraucherschutz und neue Aufgaben des Vertragsrechts in Japan* [Consumer Protection and New Tasks for Contract Law in Japan]” (1993) 27 Kobe U L Rev 35.

²⁷⁵ Matsumoto, above n 43. Furthermore, foreign observers have been persistently critical of administrative guidance’s lack of transparency (see for example M Dean “Administrative Guidance in Japanese Law: A Threat to the Rule of Law” [1991] JBL 398).

²⁷⁶ Fujioka, above n 31.

²⁷⁷ “*Shohishakeiyakuho’ Hoan Teishutsu Miokuri* [Presenting a Draft Law on Consumer Contracts Set Back]”, Nihon Keizai Shimbun, 10 March 1999, 7.

²⁷⁸ Law No 61, 2001. An English translation is available in Keizai Kikakucho (ed) *Shohisha Keiyakuho [Consumer Contract Law Commentary]* (Shoji Homu Kenkyukai, Tokyo, 2000) 226-232.

²⁷⁹ Nottage, above n 31.

²⁸⁰ See generally L Nottage “The Still-birth and Re-birth of Product Liability in Japan” in D Nelken and J Feest (eds) *Adapting Legal Cultures* (Hart, Oxford, 2001) 147.

²⁸¹ Taylor, above n 30. The role of the bureaucracy is complicated now by enactment of the Financial Product Sales Act, also in effect from 1 April 2001). As well as expanding the possibility of claims for damages for non-disclosure by financial institutions, this law allows for administrative sanctions. See generally L Nottage, “Japan” in *Doing Business in Asia* (looseleaf, CCH Asia Pte Ltd, update 42, 2000) para JPN 45-301.

Similar processes have been at work in improving Japan’s product safety regime over the 1990s. See for example L Nottage and Y Wada “Japan’s New Product Liability ADR Centers: Bureaucratic, Industry, or Consumer Informalism?” (1998) 6 ZJapanR 40.

generating repercussions beyond the area of contractual unfairness and into contract law theory more generally.²⁸²

V Conclusions: Authoritative Formality and the Contextual Dimension

To test the thesis of Atiyah and Summers along another dimension, that of authoritative formality, this Chapter has considered the extent to which content-oriented, rather than source-oriented standards are used to determine the validity of contract law norms. The fine print doctrine or similar approaches are found in all the legal systems, but this might be indicative of either a substantive or a more formal orientation (Part II). By contrast, consideration of other doctrines such as good faith and unconscionability (Part III) suggests a pattern with US law and Japanese law at the substantive end of the spectrum, and New Zealand and English law at the formal end. Considering also specific legislative initiatives related to these doctrines, and more generally to the whole area of contract law dealing with unfairness (Part IV), reinforces this pattern. This therefore supports the tentative conclusions reached in Chapters One and Two, and should at least provide another ground for rejecting any lingering stereotypical views of Japanese law as very different from US law (Part One Introduction).

As with the dimension of “content formality” explored in one aspect of contract formation doctrine above (Chapter Two), and all the more so with the overall comparison of these four legal systems attempted in Chapter One, it is more difficult to locate US law in relation to Japanese law, and New Zealand law in relation to English law. Nonetheless, because of the much more politicised process of legislative reform in the US (above Parts III.A.1 and IV.A) – arguably related to its more substantive orientation overall (see especially above Chapter One Part II.A) – and some formal tendencies noted in Japanese contract law (mentioned especially in Parts III.D and IV.D of this Chapter), US law seems even more substantive than Japanese law in the area of contractual unfairness. By contrast, because of the infiltration of more substantive reasoning into English law primarily by means of EU initiatives²⁸³ – albeit a gradual and difficult process – English law appears somewhat less formal than New Zealand law, or at least more likely to become more substantive in the foreseeable future. This is so despite New Zealand law theoretically retaining more scope to apply unconscionable bargains doctrine (Part II.C.2), for the latter is applied quite sparingly and in a more formal manner than comparable doctrines in the US and Japan. Accordingly, in regard to the overall approach to contractual unfairness, the four legal systems are positioned as in Figure 3 above (Part Two Introduction). The relative positioning differs somewhat from that posited in Chapter Two, where it was concluded that Japanese contract formation law was *more* substantive than US law, and English law was *more* formal than New Zealand law. Nonetheless, as in that analysis, the key point emerging from this Chapter is that each pair differs significantly from the other. This supports the other indications of quite enduring contrasts in contract law reasoning presented in this thesis

²⁸² See for example Y Yamamoto “*Keiyaku no Naiyo Kisei* [Control of Contract Contents]” in *Saikenho Kaisei no Kadai to Hoko - Minpo Hyakunen o Keiki to shite [Directions and Issues in Reforming the Law of Obligations: On the Occasion of the Centennial of the Civil Code]* (NBL Bessatsu No51, Shojihomu Kenkyukai, Tokyo 1998) 57.

²⁸³ See also H Beale “The “Europeanisation” of Contract Law” in R Halson (ed) *Exploring the Boundaries of Contract* (Dartmouth, Aldershot, 1997) 23; and below n 248.

(Part Two), in turn paralleling a dichotomy in legal reasoning and legal institutions more generally (Chapter One). Once again, such results counsel caution on the part of theorists proclaiming significant transformations in contract law, whether towards a sharply more substantive approach in England or New Zealand (above Part Two Introduction Parts III and IV) or a reaction favouring more formal reasoning in the US and Japan (Parts I and II). Nonetheless, the picture may change if other significant parts of the puzzle – particularly principles of contract interpretation²⁸⁴ – undergo major change.

To reinforce these conclusions – especially the relative positioning of English and New Zealand law, on the one hand, and US and Japanese law on the other – further research could be undertaken into other areas of law related to contractual unfairness. Even more so than in Chapter Two above, however, the greater breadth of the inquiry so far affords more confidence in predicting that this pattern will hold in further areas. Many promising avenues of inquiry follow on quite naturally, nonetheless, from the analysis in this Chapter. In part that is because this Chapter necessarily has been more broad-brush than the preceding one, by focusing on three examples mentioned in passing by Atiyah and Summers in their study and then concentrating on points of particular comparative interest. Another reason is that there is not a precise overlap between the areas considered, primarily because English and New Zealand law refuse to recognise a generalised duty of good faith and have a narrower doctrine of public policy compared to Japanese law. One interesting topic for further comparative analysis, which seems to suggest results consistent with the more general conclusions reached in this Chapter, is the law in those two legal systems relating to liquidated damages or penalty clauses. The quite substantive approach of Japanese courts has been noted above (Part III.D.2) and Atiyah and Summers also suggested briefly that the US law has adopted more content-oriented standards in this area as well.²⁸⁵ Certainly this seems another example of a relatively restricted doctrine in Anglo-New Zealand law, unable to develop a broader jurisprudential basis due to the prevalence of formal reasoning.²⁸⁶ A

²⁸⁴ Compare for example above Part Two Introduction Part IV.E.

²⁸⁵ Above n 8.

²⁸⁶ For example, H Collins “Fairness in Agreed Remedies” in C Willett (ed) *Aspects of Fairness in Contracts* (Butterworths, London, 1996) 98 argues that the unarticulated rationale so far has been the principle of corrective justice, whereby the remedies for breach of a contract should only be compensatory; but tolerating the possibility that in a particular case the agreed remedy may provide either lower or (more often impugned) higher compensation than actual loss for breach in a particular case. He suggests English courts allow this to permit “risk averaging” over many similar contracts concluded by the firm seeking to enforce the liquidated damages clause, to encourage parties to save costs by planning remedies. Instead of this “forward looking” approach, he advocates a retrospective test along the lines of art 7.4.14 of the UNIDROIT Principles (on which see generally Bonell, above n 185), whereby the court can reduce the agreed sum to a reasonable amount where it is grossly excessive in relation to the harm resulting from particular non-performance and the other circumstances. Collins notes that the English Law Commission recently rejected such an approach as too uncertain, but argues that uncertainty is illusory under the present rules and that the Commission’s argument anyway may be another “cloak for a different rationale of protecting freedom of contract combined with an intolerance of any change in the law”. Reluctance to move in the direction he advocates, however, also is consistent with a more formal approach to legal reasoning more generally. Compare another recent but rare attempt at theoretical reformulation: M Chen-Wishart “Controlling the Power to Agree Damages” in P Birks (ed) *Wrongs and Remedies in the Twenty-First Century* (Clarendon Press, Oxford, 1996) 271. There remains little consideration of these issues in New Zealand. In Japan, a retrospective test may evolve from Art 9(1) of the Consumer Contracts Act 2000 (above n 278).

second good example appears to be the slowness of English and New Zealand courts in developing a doctrine of economic duress, and its narrow conceptual underpinnings.²⁸⁷

This thesis will not examine further these doctrines, or others,²⁸⁸ dealing with or touching on problems of contractual unfairness. Nor will it address neighbouring areas of private law, which can be highly relevant.²⁸⁹ Instead, Chapter Four turns to the four jurisdictions' approaches in their main legal doctrines dealing with supervening

²⁸⁷ These traits are noticeable compared to the US: compare E Farnsworth, *Farnsworth on Contracts* (Little Brown, Boston, 1990-1993) Vol I, 430-444, 448-454. Since the 1970s, moreover, a strong focus in Anglo-New Zealand law has been on "coercion of the will" rather than direct consideration of factors other than the coerced party's agreement (compare S Smith "Contracting Under Pressure: A Theory of Pressure" (1997) 57 CLJ 343, 358-359). Further, in New Zealand, very few cases appear to have upheld the defence (compare for example *Walmsley*, above n 130; *Haines v Carter* [2001] 2 NZLR 167). Finally, compared to the US, the doctrine of economic duress has not displaced as much the "pre-existing duty rule", a more bright-line rule for policing renegotiations, concentrating even more on the original agreement. In *Williams v Roffey* [1991] 1 QB 1, the English Court of Appeal finally undermined the rule in situations where a contracting party agrees to pay *more* for performance of a pre-existing duty, a development which received cautious support in the New Zealand Court of Appeal in *United Food and Chemical Workers Union of NZ v Talley* [1993] 2 ERNZ 360, 376 (per Hardie Boys J). However, following the venerable House of Lords precedent in *Foakes v Beer* (1884) 9 App Cas 605, the English courts still refused to enforce a renegotiated agreement to pay *less*, of a debt (see for example *Re Selectmove* [1995] 2 All ER 531). By contrast, in *Machirus Properties v Power Sports World (1987) Ltd* (26 May 1998, unreported, High Court Wellington Registry) Heron and Gendall JJ followed *Williams v Roffey* in finding that the defaulting lessee had provided sufficient "practical consideration" in exchange for a promise by the lessor to accept half the original rent plus arrears. Consideration consisted in sparing the lessor from finding new tenants, having to mitigate its loss, and the hope of a renewed lease with the lessee. Their Honours held that *Foakes v Beer* did not apply because there was more than just an obligation to pay a debt, and the lessee's occupation constituted a benefit in itself. See B Coote "Common Forms, Consideration and Contract Doctrine" (1999) 14 JCL 116 at 123. It remains to be seen whether this development will find favour in other New Zealand courts; and, if so, whether it will prompt a significant expansion in economic duress doctrine to control possible exploitation in contract renegotiations, as consideration doctrine is dismantled. More formal reasoning may also be promoted by the argument that one party's breach or proposed breach of contract should always be declared "illegitimate", before focusing on whether the other voluntarily agreed to a renegotiation: compare R Bigwood "Economic Duress by (Threatened) Breach of Contract" (2001) 117 LQR 376.

²⁸⁸ A third issue, following on naturally from the discussion above (especially Part III.D.2), would be the scope of application and conceptual basis for the doctrine of restraint of trade in Anglo-New Zealand law compared to US law and Japanese law (see also M Ogawa "Noncompete Covenants in Japanese Employment Contracts: Recent Developments" (1999) 22 Hastings Int & Comp L Rev 341). The picture is complicated by the heavy encroachment of related statute law in these jurisdictions. In England, that includes art 81 of the European Community Treat (formerly art 85), although English courts more bold in impugning agreements: see generally for example A Coulthard "*George Michael v Sony Music - A Challenge for to Artistic Freedom?*" (1995) 58 MLR 731. The common law of restraint of trade is even more moribund in New Zealand: see generally S Judd "The Unruly Horse Put Out to Pasture: The Doctrine of Public Policy in the Modern Law of Contract" (1998) 8 Auck L Rev 686. Compare generally the complex development of judge-made law in the US summarised by E Farnsworth, *Farnsworth on Contracts* (Little Brown, Boston, 1990-1993) Vol II, 16-39; and, in Australia recently, by A Buti "Salary Caps in Professional Team Sports: An Unreasonable Restraint of Trade" (1994) 14 JCL 130.

²⁸⁹ Possibly in line with declining scope for impugning bargains under undue influence or unconscionable bargains doctrine in recent years, for example (above Parts III.B.1, III.C.1), several commentators are now pointing to the possibility of suing solicitors advising parties in such situations. See for example Giliker, above n 18; Rickett, above n 121; Webb, above n 132. See also B Collier "Independent Solicitor's Certificates: How 'Independent' Must the Solicitor Be?" Proceedings of the Australasian Law Teachers Association conference, Wellington, 4-7 July 1999, Vol 1.

changed circumstances affecting contract performance. That does raise an issue more broadly related to the second example just given, for it can also be considered in terms of differing approaches with respect to "authoritative formality". It turns more on the "time dimension", however, whereas economic duress also involves a "contextual dimension".²⁹⁰ The latter also is the sole or main dimension to the other examples of contractual unfairness given in this Chapter.²⁹¹ Combined, Chapters Three and Four therefore provide insights into the strength of classical and neo-classical contract law more generally in both English and New Zealand law, compared to Japanese and US law (above Part Two Introduction). This important topic of debate in contemporary contract law theory can then be related to recent sociological and jurisprudential theory more generally, in Part Three of this thesis. That, in turn, begins to set out a broader framework within which to evaluate developments in neighbouring areas of private law,²⁹² such as product liability (related to the problem of unfair contract terms),²⁹³ and broader developments such as the emergence of new procedures or forums for resolving legal problems in these arenas.²⁹⁴

²⁹⁰ Compare N Nassar *Sanctity of Contracts Revisited: A Study in the Theory and Practice of Long-Term International Commercial Contracts* (Martinus Nijhoff, Dordrecht, 1995).

²⁹¹ See however the discussion of termination of employment and other contractual relationships under US and Japanese law, and the introduction to the Japanese doctrine of changed circumstances, above Parts III.A.2 and III.D.1.

²⁹² The importance of which is stressed for example by H Collins "The Transformation Thesis and the Ascription of Contractual Responsibility" in T Wilhelmsson (ed) *Perspectives of Critical Contract Law* (Dartmouth, Aldershot, 1993) 293. See also above Chapter Two Part IV.

²⁹³ See for example J Feinman "Implied Warranty, Products Liability, and the Boundary Between Contract and Tort" (1997) 75 Wash U LQ 469.

²⁹⁴ Such as the OFT in England (above Part III.B) or lateral administrative pressure in Japan (Part III.D).

CHAPTER FOUR: FRUSTRATION, IMPRACTICABILITY, CHANGED CIRCUMSTANCES, AND RENEGOTIATION OF LONG-TERM CONTRACTS

- I Further "Authoritative Formality" – The Time Dimension – and "Didactic Formality"
- II Frustration, Impracticability and Changed Circumstances
 - II.A Additional Authoritative Formality: Versus the Time Dimension
 - II.B English and New Zealand Law: Frustration of Contract
 - II.C US Law: Impracticability
 - II.D Japanese Law: Non-Imputable Impossibility and the Doctrine of Changed Circumstances
- III Renegotiating and Planning Long-Term Contracts: Preliminary Empirical Studies
 - III.A Contract Law in Books and Contract Law in Action: A Tentative Hypothesis
 - III.B The Student Survey: The Main Kato/Young Hypothetical
 - III.C The Company Survey
 - 1 The Main Kato-Young Hypothetical Revisited
 - 2 A Weintraub Hypothetical
 - 3 Weintraub Questions on Contract Planning and Dispute Resolution
 - 4 Follow-Up Interviews
 - III.D Revising the Hypothesis – "Didactic Formality": The "Law in Books" Trying to Lead the "Law in Action"
- IV Conclusions

I Further "Authoritative Formality" – The Time Dimension – and "Didactic Formality"

To reinforce the thesis developed in Part One above, a close analysis of case law developments and judicial reasoning in one issue of contract formation (above Chapter Two) showed how New Zealand and (possibly especially) English law tended towards more "content formality", whereas US and (probably especially) Japanese law adopted a distinctly more substantive approach. Surveying more briefly a broad variety of doctrines developed to regulate contractual unfairness, Chapter Three revealed a similar dichotomy among the four legal systems along the dimension of "Authoritative formality", except that New Zealand law may be somewhat more formal than English law (especially as the latter comes increasingly under the influence of EU law), while Japanese law appears somewhat less substantive than US law. The more formal approach of English and New Zealand law can also be seen as consistent with a classical or neoclassical model of contract law, attempting to define the scope of contractual obligations with reference to what was agreed by the parties, rather than examining the "contextual dimension" to contractual relationships.¹

Part II of this Chapter argues that English and (tentatively) especially New Zealand law likewise exhibit distinctly greater authoritative formality in a core doctrine developed to address supervening impediments to contractual performance in the event of extreme changes of circumstances, namely the law of frustration (below Part II.A). US and especially Japanese law adopt more substantive reasoning (Parts II.B and II.C).

¹ I Macneil "The Many Futures of Contract" (1974) 60 S Calif L Rev 691 argues that one feature of both classical and neoclassical contract law is a shared fixation on divorcing contractual relations from their socio-economic context, rendering them more "discrete". Compare also N Nassar *Sanctity of Contracts Revisited: A Study in the Theory and Practice of Long-Term International Commercial Contracts* (Martinus Nijhoff, Dordrecht, 1995), examining how international arbitrators have worked instead to recognise the "contextual dimension". See also above Part Two Introduction.

Again, the contrast reveals the deep-rootedness of the classical or at least neoclassical model in Anglo-New Zealand law, under which the scope of contractual obligations is cemented closely to the original agreement of the parties, not giving sufficient due to the "time dimension" in contractual relationships.²

This can create particular tensions in the context of long-term contracts. Part III of this Chapter summarises results from recent empirical studies comparing attitudes and practices in long-term contracting with regard to changed circumstances, and especially renegotiation, in New Zealand, Japan and the US. This suggests important differences between the normative framework maintained by New Zealand courts, and the practices and norms followed or preferred by New Zealanders. That gap between contract "law in books" and "law in action", seemingly greater than that in the US and even Japan, at first glance appears to run counter to the thrust of Atiyah and Summers' thesis in regard to differences in "enforcement formality" and "truth formality" (above Chapter One Part II.D). After all, high degrees of those two varieties of formality, which arguably exist in New Zealand overall, should help generally in bringing the "law in books" closer to the "law in action". To resolve this apparent incongruity, and to bring out a further dimension for comparing legal systems, Part III.D proposes a new variety of formality: "didactic formality". This refers to the preference or tendency to resolve any gaps by encouraging the law in action to adapt to the law in books (the approach of most English and especially New Zealand judges and commentators), rather than vice versa (more common in the US and especially Japan). Arguably, this contrast reinforces the differing attitudes not only with regard to doctrines dealing with supervening changes in circumstances, but also with regard to contractual unfairness (above Chapter Three) and contract formation (Chapter Two).

In addition, however, the follow-up interviews in the empirical research (below Part III.C) suggest the possibility of a new dimension of legal reasoning, or rationality more generally, emerging in the context of long-term contractual relationships. This invites broader reflection on recent sociological and jurisprudential theories of the "proceduralisation" of contemporary law, and their possible relationship to the "form-substance" distinctions discussed hitherto (below Part Three).

II Frustration, Impracticability, and Changed Circumstances

In discussing the preference for "hard and fast rules" in English as opposed to US law (above Chapter One Part II.D), Atiyah and Summers argue that the contrast is vivid in private and especially contract law. They remark, for instance, that in US law:³

The entire subject of excuses for non-performance of contracts, and the related subject of justified termination of contractual relations, are shaped by increasingly flexible or discretionary notions.

² Macneil (above n 1) also stresses the tendency of classical and neoclassical contract law to "presentiate" contractual relations, that is, to bring them into the present. Nassar (above n 1) refers to this as the "time dimension".

³ P S Atiyah and R S Summers *Form and Substance in Anglo-American Law: A Comparative Study of Legal Reasoning, Legal Theory, and Legal Institutions* (Clarendon Press, Oxford, 1987), 84. On termination of contracts, compare also above Chapter Three Parts III.A.1 and III.D.1; and below Part II.A.

As well as thus revealing and heightening interpretive and mandatory formality in US law, relief provided by the doctrine of impracticability can be seen as reducing authoritative formality. The latter follows from a willingness to go beyond the parties' initial agreement as a "source oriented" standard of validity, to allowing instead more "content oriented" standards (below Part II.B). Corresponding doctrines in Japanese law arguably adopt an orientation similar to US law, particularly in the "doctrine of changed circumstances" (*jijo henko no gensoku*: Part II.C), in contrast to the more formal rules in the doctrine of frustration in English and (possibly especially) New Zealand law (Part II.A).

II.A English and New Zealand Law: Frustration of Contract

The doctrine of frustration in English law focuses on narrow sources for the validity of the applicable rules. Early cases, such as *Taylor v Caldwell* and *Krell v Henry*,⁴ allowed an excuse from performance obligations by reading into the parties' initial agreement an "implied condition" or term as to the continued existence or future occurrence of a state of affairs (non-destruction of the music hall or the coronation procession, respectively).

Admittedly, as the doctrine of frustration continued to expand in the first half of the 20th century, this basis came to be criticised as a mere fiction.⁵ The true rationale for excuse was seen by some as lying in the justice or equity of the case:⁶ the archetypal content-oriented source of validity. Traces of this view can be detected even quite recently. In *National Carriers Ltd v Panalpina (Northern) Ltd*, for instance, Lord Wilberforce proclaimed that: "the movement of the law of contract is away from a rigid theory of autonomy towards the discovery, or I do not hesitate to say imposition, by the courts of just solutions, which can be ascribed to reasonable men in the position of the parties".⁷ However, earlier in his speech he reviewed ... theories underlying the doctrine of frustration, including that the theory that saw it as simply a special exception which justice demands; but concluded that it was unnecessary to single out one: "they shade into one another and ... a choice between them is a choice between what is most appropriate in the particular contract under consideration". In deciding to extend in principle the doctrine to leases of land, moreover, his Lordship was of the provisional view that it could be appropriate to refer to an "implied term" (concerning a right of way to the premises, impeded by a council order preventing street access) or to "removal of the foundation of the contract" (namely the use of the premises as a warehouse).⁸ Lord Hailsham LC also reviewed the various bases which had been advanced, preferred the "construction theory", involving determining the true meaning of the particular contract used.⁹ In *The Super Servant Two*, Bingham LJ stated that the

⁴ (1863) 3 B & S 826; [1903] 2 KB 740.

⁵ See for example *Ocean Tramp Tankers Corp v V/O Sorfracht (The Eugenia)* [1964] 2 QB 226, 238 (per Denning LJ). See also generally L E Trakman "Frustrated Contracts and Legal Fictions" (1983) 46 MLR 39.

⁶ See for example *Denny, Mott* [1944] AC 265, 273 (per Lord Wright); *Davis Contractors Ltd v Fareham Urban District Council* [1956] AC 696, 728 (per Lord Radcliffe).

⁷ [1981] AC 675, 696.

⁸ Above n 7, 693.

⁹ Above n 7, 688. He quoted approvingly from *Davis Contractors Ltd v Fareham UDC* [1956] AC 696, 729, where Lord Radcliffe stated that:

“object of the doctrine [of frustration] was to give effect to the demands of justice”.¹⁰ In the same breath, however, his Lordship referred to the “true construction” of the contract.¹¹ This is also the rationale preferred by at least one leading English commentator nowadays.¹² It brings English law back towards more source-oriented standards of validity, and therefore more formal reasoning.

Another factor contributing to this turn is the retrenchment in actual application of the doctrine, evident in the latter half of the 20th century.¹³ This began with some important cases arising from World War II, took root in cases (especially on appeal) prompted by closure of the Suez Canal, and is epitomised by the actual results in more recent cases like *Palapina* and *The Super Servant Two*. The seemingly growing reluctance to allow discharge by frustration reinforces the argument that commercial “impracticability” of performance due to extreme changes in market conditions, as opposed to changed circumstances following from some physical impossibility or other circumscribed situations, is not available as an excuse under English law.¹⁴

Even if such high hurdles can be cleared, a party pleading frustration may not prevail. One difficulty stems from many cases arguing that a contract cannot be frustrated by foreseen or foreseeable events. This can lead to the conclusion that the party seeking frustration should have provided against those events.¹⁵

Another difficulty is the strict view still as to frustration not being available when “self-induced”. When *The Super Servant Two* sank, for instance, the defendant’s contract to transport the plaintiff’s drilling rig in that or another ship of the defendant

frustration occurs whenever the law recognises that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract. ... It is not this which I promised to do.

Lord Radcliffe went on to stress that the parties must compare the terms and construction of the contract, in the original circumstances, with the supervening events.

¹⁰ *J Lauritzen AS v Wijsmuller BV* [1990] 1 Lloyd’s LR 1, 8.

¹¹ Above n 10. See also *Denny, Mott* (above n 6), 269 per Lord Wright.

¹² G Treitel *The Law of Contract* (10 ed, Sweet & Maxwell, London, 1999) 860. See also A Morris “Practical Reasoning and Contract As Promise: Extending Contract-Based Criteria to Decide Excuse Cases” (1997) 56 CLJ 147, 153.

¹³ Treitel, above n 12, 820-821. See also generally G Treitel *Frustration and Force Majeure* (Sweet & Maxwell, London, 1994) 255-265; F Liu “The Doctrine of Frustration: An Overview of English Law” (1988) 19 J of Maritime L & Comm 262. But see J McInnis “Frustration and Force Majeure in Building Contracts” in E McKendrick (ed) *Force Majeure and Frustration of Contract* (Lloyd’s of London Press, London, 1991) 139; J Beatson “Increased Expense and Frustration” in F D Rose (ed) *Consensus Ad Idem* (Sweet & Maxwell, London, 1996) 121. Both argue, drawing on US or earlier English case law, that commercial impracticability should be recognised in some situations.

¹⁴ Treitel, above n 12, 792-797.

¹⁵ Treitel, above n 12, 840. After noting many dicta supporting the view that a contract cannot be frustrated by foreseen or foreseeable events, ranging from *Baily v De Crespigny* (1869) LR 4 QB 180, 185 to *Gamerco SA v ICM (Fair Warning) Agency Ltd* [1995] 1 WLR 1126, 1231, he notes:

There is no English case in which this was the sole ground for rejecting the plea; but it has been held that a party cannot rely, as ground of frustration, on an event which was, or should have been, foreseen by him but not by the other party. In *Walton Harvey Ltd v Homfrays Ltd* [[1931] 1 Ch 274] the defendants granted the claimants the right to display an advertising sign on the defendants’ hotel for seven years. Within this period the hotel was compulsorily acquired, and demolished, by a local authority acting under statutory powers. The defendants were held liable in damages. The contract was not frustrated because the defendants knew, and the claimants did not, of the risk of compulsory acquisition. “They could have provided against the risk, but they did not”.

was not frustrated. Using the other ship under another contract with a third party was held to be an "election", which amounted to "self-induced" frustration. This rule prevents parties faced with unexpected supervening events affecting a contract's performance from allocating their remaining resources, choosing among several contracts, even on an objectively rational basis.¹⁶

Overall, such strict attitudes by the English courts seem to be related to the restricted and extreme effects which follow if frustration is found, namely automatic termination at the time of the frustrating event. There is no obligation for the party affected by a drastic change of circumstances to give notice to the other party; the latter can also invoke the doctrine (even to make a windfall gain¹⁷); and the courts are not permitted to adjust the parties' contractual obligations instead of terminating them.¹⁸ Legislation to cover some effects of termination becomes of little practical importance.¹⁹ In short, the English law of frustration developed out of distinct categories of mainly physical impossibility of performance; it was justified originally, and again more recently, on what the parties putatively intend; and its scope of application is very limited – reinforced by the extreme nature of the consequences of finding a contract to be frustrated.

The same can be said for New Zealand law, perhaps all the more so, although there is much less case law and commentary to draw on. A standard textbook rejects the implied condition theory as a basis for the doctrine, preferring Lord Radcliffe's "just solution" approach premised on performance "radically different from that which was undertaken by the contract".²⁰ But it concludes immediately:²¹

Nonetheless it would be wrong to say that frustration operates entirely independently of the parties' intentions. For one thing, the "thing which was undertaken by the contract" depends on its *true construction*. For another, a contract cannot be held frustrated if that would be contrary to the contract's express terms.

¹⁶ Treitel, above n 12, 843-846. See also A Hudson "Prorating and Frustration" (1979) 123 *Solicitors' J* 137. This strict view in maritime law is likely to carry over into English contract law generally, given the importance of the former for the latter (see above Chapter Two Part I). Compare for example *Luton BC v Triumph Ovens Ltd & Anor* (17 October 1997) unreported, Court of Appeal, Hirst, Swinton Thomas and Pill JJ (declining to find frustration when one of two means of proceeding with a land development contract had failed).

¹⁷ Treitel (above n 12, 847-848) notes that, because frustration operates automatically, it can be invoked by either party, and not only by the party likely to suffer the frustrating event. Thus where a ship under charter is requisitioned, frustration is sometimes, paradoxically, claimed by the shipowner, even though the charterer is perfectly willing to pay the agreed hire, for if the compensation paid by the Government for the requisition exceeds the hire, the shipowner will actually profit from the frustration.

¹⁸ Treitel, above n 12, 847-858.

¹⁹ Law Reform (Frustrated Contracts) Act 1943. See generally E McKendrick "The Consequences of Frustration" in E McKendrick (ed) *Force Majeure and Frustration of Contract* (Lloyds of London Press, London, 1991) 51. For discussion of a rare case recently, see J Carter and G Tolhurst "Gigs N' Restitution: Frustration and Statutory Adjustment of Payments and Expenses" (1996) 10 *JCL* 264.

²⁰ *Davis*, above n 6, 729. Compare also *Oldfield Asphalts v Grovedale Coolstores (1994) Ltd* [1998] 3 *NZLR* 479.

²¹ J F Burrows, J Finn and S Todd *Law of Contract in New Zealand* (Butterworths, Wellington, 1997) 670 (emphasis added). See *Davis*, above n 6.

This more restrictive approach was reflected recently in *Gore District Council v The Power Co Ltd*.²² A unanimous Court of Appeal did not allow frustration pleaded on the grounds of commercial impracticability, for a contract concluded in 1927 “for all time hereafter”, to supply electricity at 1 penny per unit as opposed to the market price of 10.2 cents per unit at the time of the litigation, resulting in the Council paying only \$16,639 for electricity worth \$204,529 by then. The Court agreed with Viscount Simon’s rejection of the notion that the doctrine of frustration was rooted in what was “just and reasonable”, in favour of a “proper interpretation of the contract, having regard to the circumstances” at its formation.²³ Quoting from Lord Radcliffe in *Davis*, as approved by Lord Hailsham in *Palapina*, the Court also stated that the test was whether the parties’ agreement:²⁴

should not be treated as applying in a fundamentally different situation. The starting point, however, must still be the contract. The limited scope of the principle of frustration, as has been pointed out by Viscount Simonds in *Tsakiroglou & Co Ltd v Noble Thorl GmbH* [1962] AC 93 at p 115, is emphasised by such phrases such as “fundamentally different” and radically different used in the earlier cases by Viscount Simon, Lord Reid and Lord Radcliffe.

The Court then focused on the negotiations and wording used in concluding the contract in 1927, unimpressed by the power company’s argument that the deregulation of public utilities in recent decades had created a very different environment. It also indicated that government action might be a better solution to this type of problem than the private law doctrine of frustration, a further illustration of the comparative deference of New Zealand judges to the legislature, reinforcing higher authoritative formality generally.²⁵ Further showing the formal nature of the reasoning adopted, the Court of Appeal declined to allow this contract for an indefinite term to be terminated on reasonable notice. It stressed that the words used were clear and unqualified, and the uncertainty involved in formulating a reasonable notice term.²⁶ By contrast, neither factor was sufficient to prevent the majority of the English Court of Appeal terminating on reasonable notice a contract concluded in 1929, imposing an obligation to supply water which was expressed to apply “at all times hereafter”.²⁷ Further, because the price fixed in 1929 was 2.9 pence (equivalent) per 1000 gallons whereas the normal rate was 45 pence by 1975, Lord Denning MR simply discharged the supplier under the doctrine of

²² [1997] 1 NZLR 537.

²³ Above n 22, 552, referring to *British Movietonews Ltd v London and District Cinemas Ltd* [1952] AC 166, 181-186.

²⁴ Above n 22, 553-554. Compare *Davis*, above n 6; *Panalpina*, above n 9.

²⁵ See generally above Chapter One Part II.C. See also *Lumber Specialities v Hodgson* [2000] 2 NZLR 347 and *Westco Lagan Ltd v Attorney-General* [2001] 2 NZLR 219 (permitting more freedom for the government to unilaterally abrogate long-term logging contracts, by holding that the government’s actions were lawful and did not include any rights to compensate for “takings”). Compare *US v Winstar* (1996) 518 US 839 (declining to apply sovereign acts doctrine, and then refusing to excuse the government under its private law obligations).

²⁶ Reticence in the latter respect appears consistent with the unwillingness of the Court of Appeal to uphold “agreements to agree”, compared to several leading English and Scottish authorities. Compare D M McLauchlan “Rethinking Agreements to Agree” (1998) 18 NZULR 77; and, very recently, *Electricity Corporation of NZ v Fletcher Challenge Energy Ltd* (10 October 2001) Court of Appeal, CA 132/00, Richardson P, Thomas, Keith, Blanchard and McGrath JJ.

²⁷ *Staffordshire Area Health Authority v South Staffordshire Waterworks Co* [1978] 1 WLR 1387.

frustration. This approach was not expressly disapproved by the other Judges. Further, as one commentator has observed from the perspective of German law, terminating the contract on either basis could be achieved by applying a general duty to act in good faith,²⁸ and the same functional equivalence of the doctrines is achievable in this way under Japanese law (below Part III). By refusing to apply either to relieve the supplier under a fixed-term long-term contract in *Gore*, the New Zealand Court of Appeal demonstrates a more formal approach than that adopted by the Court of Appeal in *Staffordshire*.²⁹

More generally, in denying frustration, New Zealand courts seem to place considerable weight on the clauses used by the parties in the contract documentation. In *Maori Trustee v Prentice*,³⁰ for example, a sixteen-fold rent increase did not discharge the lessee, primarily because there had been contractual provision for rent review (resulting in the increase). Extreme changes in circumstances not (or not adequately) covered by a clause can readily be held to have been foreseen or foreseeable, and the risk thereof assumed. Thus, in *Hawkes Bay Electric Power Board v Thomas Borthwick & Sons (Australia) Ltd*, the defendants were held to a contract to take electricity from the plaintiff even after the former's works were destroyed by an earthquake. Blair J noted that a clause provided for contingencies such as government closure, but not earthquakes, and added that "in a place like New Zealand where earthquakes are not by any means unknown it cannot be said that the fact that there is such a risk is not present in the minds of most business men".³¹ In *Des Forges v Wright*, Elias J (now the Chief Justice) held that a contract for the assignment of a distributorship agreement was not frustrated by the subsequent closure of the original manufacturer's plant, resulting in a significant decrease (20 to 50 percent by value) of the business generated by the distributorship. She remarked:³²

the [distribution] contract specifically permits [the manufacturer] to vary the products for

²⁸ N Horn "Changes in Circumstances and the Revisions of Contracts in Some European Laws and in International Law" in N Horn (ed) *Adaptation and Renegotiation of Contracts in International Trade and Finance* (Kluwer, Deventer, 1985) 15.

²⁹ Above n 27; n 22.

³⁰ [1992] 3 NZLR 344, 354-355. Conversely, see *Kirkland v Jaco's Timber Co Ltd* (5 November 1997) unreported, High Court, Dunedin Registry, CP 45/97, Master Venning. The Master found that the purchaser had an arguable defense of frustration due to a change in local authority zoning rules, subsequent to concluding a sale contract which specifically required the purchaser to enter into a covenant with the vendor, to be entered by memorandum of encumbrance on the certificate of title, that land would be used precisely for residential purposes. Compare *Ford & Sons (Oldham) Ltd v Henry Leatham & Sons Ltd* (1915) 21 Com Cas 55, where the Court was willing to extend an excuse to the seller of wheat pursuant to a clause operating "in case of prohibition of export, blockade or hostilities preventing delivery of wheat to this country", despite only some countries (not the main suppliers, the US and Canada) having imposed bans on exports to England.

³¹ [1933] NZLR 873. Compare generally the unexpectedly drastic nature of the Napier earthquake described in R McGregor *The Great Quake: The Story of the 1931 Hawke's Bay Earthquake* (Regional Publications, Napier, 1989).

³² [1996] 2 NZLR 758, 762. See also *Pacific Energy Ltd v Electricity Corporation of New Zealand* (1999) 9 TCLR 227, 234-235. The defendant stressed clauses providing for certain events, and the contemplation of the break-up of the defendant at the time a hedge contract for electricity was concluded, and Master Thomson held (in interlocutory proceedings) that the plaintiff did not have an arguable defence of frustration of this contract due to changes in the electricity market. Compare generally Treitel, above n 13.

distribution, and sets up its own mechanism by which the parties can deal with each other over variations which affect the distributor. That mechanism envisages alteration of the commission structure or termination "on mutually agreed terms". It is not clear to me why the contractual mechanism was not invoked by the appellants [assignees] after 22 January [following completion of the assignment]. I consider that risk of the type which has eventuated was foreseen and accepted by the appellants [assignees] on the basis of the rights available against the distributor and that the loss of the Tenderkist product [from the manufacturer's plant] was not a frustrating event.

Some commentators have submitted that frustration should be allowed despite an event having been foreseen or foreseeable, depending on the inference to be drawn from not having included a clause specifically covering its occurrence. In a particular case, that may be that they intended the law of frustration to provide relief.³³ No such argument has been accepted in recent cases, however. This may not be surprising, in that evidence of such an intention would be rare and difficult to prove to the court. Even then, it focuses the argument only slightly less narrowly on the parties' intentions.

More substantive reasoning, invoking content-oriented standards of validity, seems more likely to succeed in persuading a court to recognise frustration of a contract.³⁴ Yet this is precluded by the more formal approach to this area of law, and in other areas of both New Zealand and English law (above Chapters Two and Three).

II.B US Law: Impracticability

By contrast, US law:³⁵

candidly recognises that the judicial function is to determine whether, in the light of exceptional circumstances, *justice* requires a departure from the general rule that a promisor bears the risk of increased difficulty of performance.

This follows from the synthesis of the law which emerged in 1952 with the UCC (especially §2-615) for the sale of goods, reinforced more generally two decades later in the *Restatement (Second) of Contracts* (especially §261).³⁶ Commercial impracticability is a well-recognised category. Even Williston, a textbook writer in the classical vein, had recognised that an excuse should be available when performance was "not obtainable except by means and with an expense impracticable in a business sense".³⁷ The first *Restatement*, promulgated in 1931, accordingly laid down that "impossibility means not only strict impossibility but impracticability" (§454).

In fact, US courts have only infrequently allowed an excuse on the ground of mere increase in cost of performing contractual obligations. But these have included some very well-known instances, often involving large corporations otherwise faced with the possibility of financial ruin, such as the *ALCOA* case.³⁸ Rather similarly, by

³³ Burrows and others, above n 21, 680. See also J Burrows "Frustration" in *New Zealand Law Commission Contracts Statutes Review* (Law Commission, Wellington, 1993).

³⁴ Compare generally Burrows, above n 33.

³⁵ E A Farnsworth *Farnsworth on Contracts* Vol II (2 ed, Little, Brown & Co, Boston, 1990) 543 (emphasis added).

³⁶ Comment a to the latter, for instance, refers to "a just allocation of risk".

³⁷ S Williston *The Law of Contracts* (Baker Voorhis, New York, 1920) §1963.

³⁸ *Aluminium Co of America v Essex Group* (1980) 499 F Supp 53 (WD Pa). Farnsworth, above n

subsuming distinct categories of physical impossibility (such as continued existence of a thing necessary for performance) under the general rubric of a "basic assumption on which the contract has been made", US law seems to have encouraged courts to sometimes recognise others (such as strikes). That too, therefore, is "in line with the tendency towards liberality in excusing promisors on the occurrence of extraordinary events".³⁹ Post-War reticence in English and New Zealand law therefore stands in marked contrast.⁴⁰

Further, many US cases do hold against the party seeking excuse, on the grounds that it assumed a greater obligation than the law imposes; that is, that the party has assumed the risk. Often this is reinforced by the argument that the risk was foreseen or foreseeable. Drawing on other compelling case law and the *Restatement (Second)*, however, commentators argue powerfully that the latter should only be one factor suggesting that the risk was assumed.⁴¹ As Comment c to §261 puts it:

If a supervening event was not reasonably foreseeable when the contract was made, the party claiming discharge can hardly be expected to have provided against its occurrence. However, if it was foreseeable, or even foreseen, the opposite conclusion does not necessarily follow. Factors such as the practical difficulty of reaching agreement on the myriad of conceivable terms of a complex agreement may excuse a failure to deal with improbable contingencies.

This invites a broad-ranging inquiry on this point, with Comment c mentioning "the extent to which the agreement was standardised, ... the degree to which the other party supplied the terms, ... and, in the case of a particular trade or other group, the frequency with which language so allocating the risk is used in that trade or group ...", as well as commercial practices as to insurance and whether the person was an intermediary. US courts have expressly adopted similar reasoning, unlike courts in England and (perhaps especially) New Zealand.⁴²

Finally, there is less scope under US law for excuse to be denied on a strict view of what is "self-inducing", because the UCC (§2-615(b)) simply allows the seller to allocate remaining supplies "in any manner which is fair and reasonable". White and Summers note that this is "descended from more than 100 years of American cases on contract allocation", with the courts generally ratifying the seller's choice of pro rata allocation methods but allowing considerable flexibility.⁴³ This approach is reinforced by the generalised duty of good faith in the UCC (§1-103), paralleled in the *Restatement (Second)* (§205).

The greater liberality and more substantive reasoning in the US law with respect to the prerequisites for excuse, overall, is matched by a less strict approach to

23, 547-549. See also J White and R Summers *Uniform Commercial Code (Vol 1, Chaps 1-12)* (4 ed, West, St Paul (Minn), 1995), 171-174; S Macaulay, J Kidwell, W Whitford and M Galanter *Contracts: Law in Action Vol 2* (The Michie Company, Charlottesville, 1995) 702-741.

³⁹ Farnsworth, above n 35, 550. White and Summers, above n 38, 176-177. This may have reflected the extreme economic dislocation which accompanied the American Civil War: compare S Renner *Inflation and the Enforcement of Contracts* (Edward Elgar, Cheltenham (UK), 1999) 22.

⁴⁰ See Treitel, above n 13, 242-255.

⁴¹ Farnsworth, above n 35, 554-556. White & Summers, above n 38, 166-70.

⁴² Compare for example *Opera Company of Boston v Wolf Trap Foundation for the Performing Arts* (1984) 817 F 2d 1094 (Mass) with *Hawkes Bay*, above n 31, and authorities cited above n 15.

⁴³ White & Summers, above n 38, 180-181. See also J White "Contract Law in Modern Commercial Transactions: An Artifact of Twentieth Century Business Life?" (1982) 22 Washburn LJ 1.

their effects. On the one hand, impracticability does not automatically terminate the contract. The affected party must give the other reasonable notice, before being excused of any remaining obligations to perform, and of any obligation to pay damages. This excused failure to perform then affects the other party's duties of performance *as if* the excused party had broken the contract. Hence, if the failure is material, the other party can first suspend its own performance, and terminate after giving an opportunity for the excused party to "cure". Prospective failure of performance due to impracticability has a similar effect.⁴⁴ This conceptual structure tends to keep the contractual relationship alive, meaning that the duty of good faith potentially applies.

Some commentators have even proposed a duty of good faith modification, at least with regard to long-term contracts.⁴⁵ They can draw on some instances of even more content-oriented standards of validity, such as the price adjustment imposed in the *ALCOA* case; and on §272 of the *Restatement (Second)* giving courts the power to "grant relief on such terms as justice requires, including protection of the parties' reliance interests", if this is necessary to "avoid injustice". Very few US judgments have gone this far.⁴⁶ However, the *ALCOA* case drew on a brief prepared by Allan Farnsworth, the eminent Chief Reporter for the *Restatement*; and has since generated a deluge of commentary helping to keep it in the minds of judges and lawyers, generating a small but steady stream of cases seeking all sorts of relief even on the basis of extreme market price fluctuations.⁴⁷ In England, and perhaps especially New Zealand in the light of cases like *Gore*, the significantly stricter approach of the courts is probably a major reason for the paucity of litigation on this point.⁴⁸

II.C Japanese Law: Non-Imputable Impossibility and the Doctrine of Changed Circumstances

Like US law, Japanese law has long recognised the possibility of relief in the event of extreme economic dislocation.⁴⁹ On the one hand, this can follow from Article 415 of

⁴⁴ Farnsworth, above n 35, 572-573. Art 79 of the Vienna Sales Convention adopts a similar approach: see D Maskow "Hardship and Force Majeure" (1992) 40 AJCL 657; S H Jenkins "Exemption for Nonperformance: UCC, CISG, UNIDROIT Principles - A Comparative Assessment" (1998) 72 Tulane L Rev 2015; and generally on "CISG", J O Honnold *Uniform Law for International Sales under the 1980 United Nations Convention* (2 ed, Kluwer, Deventer-Boston, 1991).

⁴⁵ See especially R Speidel "The New Spirit of Contract" (1982) 2 J L & Comm 193, 206-208.

⁴⁶ Farnsworth, above n 35, 580; E A Farnsworth "Developments in Contract Law During the 1980's" (1990) Case Western L Rev 203. For a representative critique, see for example J P Dawson "Judicial Revision of Frustrated Contracts" [1982] Jurid Rev 86.

⁴⁷ Macaulay and others, above n 38, 732-742. Compare also *Oglebay Norton Co v Armco Inc* (1990) 556 NE 2d 515 (Ohio). The Ohio Supreme Court was prepared to appoint a mediator to engage the parties in reaching a reasonable price per tonne under a long-term transportation contract, which had provided for prices to be set in relation to a published rate (which was discontinued) and then upon mutual agreement, but which had not provided for any mediation or arbitration clause. Compare the New Zealand cases reviewed by McLauchlan, above n 26, which would not allow this outcome designed to adjust the parties' longstanding relationship in the light of radical changes in market circumstances.

⁴⁸ Compare Treitel, above n 13, 255-265; *Gore*, above n 22. See also *Pacific Energy*, above n 32.

⁴⁹ See generally K Igarashi and L V Rieke "Impossibility and Frustration in Sales Contracts" (1967) 42 Wash L Rev 445; T Sawada *Subsequent Conduct and Supervening Events* (University of Tokyo Press, Tokyo, 1968); P Waer "Frustration of Contracts in Japanese Law: The Doctrine of Changed Circumstances" (1987) 20 L in Japan 187.

the Civil Code, which provides that the promisor becomes liable for damages if performance becomes impossible for any cause attributable to him or her. By reverse implication, the promisor will not be liable for non-attributable performance (for instance by an Act of God or another event beyond his or her control). Impossibility here has long been interpreted as including not only physical impossibility, but also impossibility in the light of "common sense in society" (*shakai tsunen*). Thus, a promisor could be excused if to perform his or her obligation would incur extremely high labour or other costs (as where the seller of a diamond ring drops it in the middle of a lake).⁵⁰

On the other hand, the more recently developed "doctrine of changed circumstances" (*jijo henko no gensoku*) has proven more popular in providing relief where costs of performance have increased dramatically, and also where the market price of the subject matter of the contract (such as land) has fluctuated widely. The doctrine was developed at first by Japanese academics drawing on German legal theory, itself rooted in the wake of hyperinflation after World War I and bolstered by the German Civil Code's express recognition of a generalised duty of good faith. The Japanese doctrine came to be recognised by the courts towards the end of World War II, and during the decade of economic turmoil and reconstruction which followed.

One prerequisite for the doctrine is a substantial change in circumstances affecting the basis of the contract. A second, sometimes related in that it can involve weighing any resultant disequilibrium in contractual obligations, is that enforcing strictly the promisor's original obligation would be highly unfair in the light of the principle of good faith. Although mainly in older cases, courts have found these hurdles to have been cleared often enough for claims of relief under the doctrine to continue appearing before Japanese courts, including in cases involving commercial impracticability. However, significant numbers have failed, sometimes because of further hurdles: the prerequisites that the changed circumstances not be attributable to the promisor, and that they not be foreseen or foreseeable.

The latter requirement, in particular, is criticised by Japanese commentators, following the view accepted by commentators and some Courts in the US that foreseeability should only be a factor in deciding whether the promisor has assumed the risk which eventuated. This more flexible approach in fact appears in some lower court decisions.⁵¹ However, the Supreme Court seems to have taken a stricter view in a very recent case.⁵² It rejected a defence of changed circumstances on the part of a golf course management company. A group of club members had sued seeking a declaration of their continued rights to use the golf course facilities and transfer rights, after the company tried to levy further funds to pay for extensive construction work related to major subsidence problems on the property. The Court held that the defendant company had not proved that its predecessors had not foreseen the possibility of subsidence. This restatement of orthodox principle, and the holding itself, nonetheless may have been dictated by the way in which the case came before the Supreme Court. It had involved a

⁵⁰ H Kubo "A Comparative Study of the Basic Concept of Impossibility under Japanese, American and Uniform Law" (1991) *Sandai Hogaku* 567.

⁵¹ See for example H Kubo *Keizai Hendo to Keiyaku Riron [Economic Change and Contract Theory]* (Seibundo, Tokyo, 1992).

⁵² *Sato & Ors v Painu Hiruzu Gorufu KK*, 1 July 1997, Supreme Court (953 Hanrei Taimuzu 99) (noted by Noyama, 1128 *Juristo* 74).

claim by members and a defence of changed circumstances by the management company (impliedly, seeking *termination* of the club member's membership rights). One commentator points out that the company might have succeeded if it had been the one bringing suit, also invoking the doctrine of changed circumstances, but seeking only an *adjustment* in the rights and obligations on both sides.⁵³

This leads to the important point that under the law in Japan, as in the US, a right of adjustment is recognised as a possible consequence of applying the doctrine. Indeed, as originally proposed by academics, this was to be the primary effect, with termination only following if adjustment was not achievable. In fact, in a survey of the 64 reported cases (as of 1994) where the doctrine had been invoked, only 13 first sought adjustment and otherwise termination; 28 cases simply claimed termination. On the other hand, contract adjustment alone was claimed in 20 cases. Of these, adjustment was allowed by the courts in nine cases; and, out of the 13 seeking adjustment and otherwise termination, adjustment was allowed in four cases.⁵⁴ This may seem activist, when compared to rare examples in the US such as *ALCOA*.⁵⁵ But it should be noted that court adjustment in Japan has been by the lower courts (never by the Supreme Court), always within the range proposed by one or both parties, and predominantly in earlier cases (arising during or from World War II).⁵⁶ Partly in the hope of providing more legitimacy and background for courts adjusting contracts under the doctrine of changed circumstances, as well as permitting more scope for party autonomy during the course of performance,⁵⁷ various scholars recently have suggested a duty to renegotiate in good faith.⁵⁸ Its contours remain unclear, however, and these suggestions mostly are made in the context of much broader theoretical debates. Meanwhile, the notion of a duty to renegotiate has not been clearly affirmed even by lower courts.⁵⁹

Nonetheless, the potential for greater flexibility resulting from the doctrine of changed circumstances in principle permitting court adjustment may help explain, as in US law, the somewhat greater readiness to apply the doctrine compared to the law of frustration in England or New Zealand. Likewise, the willingness to extend the Civil Code notion of "impossibility" from physical to "practical" impossibility (although

⁵³ H Kubo "*Jijo Henko no Gensoku to Yoken Kanosei - Seme ni Kisubeki Jiyu no Yoken* [The Doctrine of Changed Circumstances and Requirements of Foreseeability and Non-Imputable Cause]" (1999) 208 *Hogaku Kyoshitsu* 100.

⁵⁴ K Iijima "*Jijo henko no Koka to shite no Keiyaku no Tekigo to Kaijo* [Rescission and Adjustment of Contracts as Effects of the Doctrine of Changed Circumstances]" (1994) 35 *Toritsudai Hogakkai Zasshi* 127

⁵⁵ *ALCOA*, above n 38.

⁵⁶ See further L Nottage "Economic Dislocation in New Zealand and Japan: A Preliminary Empirical Study" (1997) 26 *VUWLR* 59.

⁵⁷ Y Wada "*Choki Keiyaku to Jijo Henko no Gensoku* [Long Term Contracts and the Doctrine of Changed Circumstances]" (1998) 1126 *Juristo* 240, 244.

⁵⁸ See for example Kubo, above n 51, 242; K Yamamoto "*Saikosho Gimuron ni Tsuite* [On the Duty to Renegotiate] (Part One)" (1996) 63 *Hosei Kenkyu* 1; K Matsui "*Katei Shikoteki Ho Shisutemu to Saikosho Gimu* [The Process Oriented Legal System and the Duty to Renegotiate]" (1996) 115 *Hitotsubashi Ronso* 250; S Kitayama "*Keiyaku Kaito no Purosesu ni kansuru Jakkann no Kosatsu* [Some Reflections on the Process of Adjusting Contracts]" (1998) 31 *Hosei Riron* 197, especially 201-203.

⁵⁹ Compare K Igarashi "*Jijo Henko - Keiyaku Chosei - Saishogimu*" (1997) 2 *Satsudai Kigyō Homu* 47, 65-66, with T Uchida "*Keiyaku Purosesu to Ho* [Contract Process and Law]" in Iwanami Koza (ed) *Shakai Kagaku no Hoko VI - Shakai Hendo no Naka no Ho* [Directions in Social Sciences (6): Law Amidst Social Change] (Iwanami, Tokyo, 1993) 129, 150.

there is far less reported case law decided on that basis) may be tied to the fact that allowing an excuse on this ground does not automatically terminate the contractual relationship. Instead, as in US law,⁶⁰ the effect on the other party (for instance as to their rights of termination) is determined as if there had been a breach (so the other party must usually give notice, and so on).

Although beyond the scope of this study, the Australian law of frustration appears similar to English and New Zealand law in its conceptual basis and restricted scope of application.⁶¹ This helps explain the following remark by an Australian commentator in discussing contract disputes involving Japan and Australia in the early 1970s.⁶²

There was the added risk that the Japanese courts might refuse to enforce the Australian judgment based on *radically different law* [favouring strict contractual liability] *from that which the Japanese courts recognise as applicable in the circumstances.*

Nonetheless, describing Japanese law as “radically different” is clearly an over-exaggeration. As just mentioned (Part II.C), both the doctrine of non-attributable impossibility and the doctrine of changed circumstances have requirements, such as unforeseeability, which are common to the law of frustration. Japanese courts, especially the Supreme Court, are also reluctant to apply both doctrines to relieve promisors. The contemporary law of frustration in England and especially New Zealand, and perhaps Australian law, may be even stricter; but Japanese law appears only somewhat more lenient than US law. Correctly, John Haley criticises any suggestion in two much earlier works that Japanese law is decidedly more liberal than US law, with respect to the doctrine of non-attributable impossibility.⁶³ Later, echoing the now shared understanding among Japanese academics and commentators, Haley also acknowledges the Supreme Court’s reluctance to apply the doctrine of changed circumstances, and concludes: “The courts do not readily accept excuses. The courts implicitly agree that *certainty and consistency* are community values. Particularised justice is not an overriding concern”.⁶⁴

⁶⁰ Not surprisingly in the light of its heavy influence on Japanese contract law, this is also the approach in German law: see generally G H Treitel *Unmöglichkeit Impracticability und Frustration im Anglo-Amerikanischen Recht* (Nomos, Baden-Baden, 1991); R Zimmermann “Heard melodies are sweet, but those unheard are sweeter ...” (1993) 193 AcP 121.

⁶¹ See generally J W Carter and D Harland *Contract Law in Australia* (3 ed, Butterworths, Sydney, 1996) 711-761. But see *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* (1982) 149 CLR 337. The High Court of Australia adopted a similar test to that in *Davis* (above n 6) and *Gore* (above n 22), namely whether the situation was fundamentally different from that provided for on a “true construction” of the original contract; but, unlike the House of Lords in the similar *Davis* case, the Court held the long-term construction contract to be frustrated. This may signal a somewhat more liberal approach, but the judgment was rendered well after publication of the article by Opas cited below (n 62).

⁶² P Opas “What Happens When the Contract Becomes Unprofitable?” (1973) 1 Aust Bus L Rev 59, 62.

⁶³ J O Haley *The Spirit of Japanese Law* (University of Georgia Press, Athens/London, 1998) 172, citing Igarashi and Rieke (above n 49) and Sawada (above n 49).

⁶⁴ Above n 63, 175-176 (emphasis added). Compare for example K Igarashi “*Keiyaku to Jijo Henko no Gensoku* [Contract and Changed Circumstances]” in T Taniguchi (ed) *Shinpan Chushaku Minpo* [Civil Code Commentary: Revised Edition] Vol 1 (Yuhikaku, Tokyo, 1996) 62, and the anonymous headnote commentator for *Fujisawa KK v Honso KK*, 1 February 1989, Tokyo High Court (717 Hanrei Taimuzu 155: see above Chapter Two, Part II.D.1).

III Renegotiating and Planning Long-Term Contracts: Preliminary Empirical Comparisons

The following remark from another Australian commentator is also incorrect if it implies that Japanese courts more readily grant relief:⁶⁵

Instead of trying to spell out all possible contingencies and provisions for enforcement in inflexible terms, the Japanese prefer to handle problems as they arise, often *recognising the doctrine of changed circumstances*.

On the other hand, although seemingly referring to a *legal* doctrine (*jijo henko no gensoku*), this remark can be read as an assertion about the *lay attitudes* of Japanese contracting parties. Indeed, he goes on to mention the *Ajinomoto* soyabean dispute as demonstrating an alleged penchant among Japanese businesses for informality in contract formation, echoing Kawashima but without specifically citing his work nor the particular case.⁶⁶ March also discusses in detail the Australia-Japan Sugar Case, drawing various conclusions, such as “Long-term contracts with the Japanese suffer, in Western eyes, from the Japanese refusal to honour the contract when circumstances change”.⁶⁷ As mentioned above (Part One Introduction), this view of distinctly “Japanese” attitudes towards contract still often parallels similar views of Japanese contract law, and Japanese law generally, as unique or unusual. Recent empirical studies, however, allow such attitudes to be gauged more systematically, in broader comparative perspective (below Parts III.B and C). As well as forcing stereotypes to be revised, moreover, these studies allow Atiyah and Summers’ framework to be expanded (Parts III.A and III.D), to bring out another important way in which New Zealand law and (more tentatively) English law appear to differ significantly from both Japanese and US law.

III.A Contract Law in Books and Contract Law in Action: A Tentative Hypothesis

As mentioned above (Chapter One, Part II.D), Atiyah and Summers argue that English law is distinct from US law in respect to two varieties of formality, enforcement and truth formality, reinforcing its preference for more formal reasoning and a corresponding set of legal institutions. New Zealand law, it was suggested, is closer to English law in these respects, whereas Japanese law is closer to US law.

Arguably, higher degrees of both types of formality help bring the “law in books” closer to the “law in action”. Higher enforcement formality – ensuring ready access to courts, enforceability of judgments, and so on – can be conceived as the law in books being projected outwards, affecting the law in action. Higher truth formality, by maintaining or developing trial processes which uncover the truth of the matter – the actual facts in particular cases – can be conceived as the law in action conversely being

⁶⁵ R M March *The Japanese Negotiator: Subtlety and Strategy Beyond Western Logic* (Kodansha, Tokyo, 1988) 112.

⁶⁶ Above n 65, 97-107. See above Chapter Two Part II.D.

⁶⁷ Above n 65, 97.

connected up with the law in books. From this, a possible hypothesis is that more formal legal systems will better reflect actual contract practices and expectations (contract law in action) in their contract law rules (contract law in books).

The following empirical data provides some indication of the former, in the context of long-term contracting involving New Zealand, Japan and the US (Parts III.B and C). This can then be compared with the doctrines discussed above (Part II), to test this hypothesis. That leads to a refinement of the hypothesis, however, which uncovers a third variety of formality reinforcing significant differences between New Zealand law on the one hand, and US and Japanese law on the other (Part III.D).

III.B The Student Survey: The Main Kato/Young Hypothetical

Concerns primarily about lingering stereotypical views regarding Japanese attitudes towards contract renegotiation led Masanobu Kato (Nagoya University Law Faculty) and Michael Young (then at Columbia Law School) to embark in 1995 on an ambitious multinational survey of law and business students.⁶⁸ This tested their attitudes, compared to Japanese students, towards the actions of the parties in a hypothetical contract renegotiation situation modelled on the Australia-Japan Sugar Case.⁶⁹

The Kato/Young survey was devised by the Research Centre for International Comparisons of Legal Consciousness, based at Nagoya University Law School, and an interdisciplinary group of nine researchers from other Japanese universities.⁷⁰ Along with several others based overseas at the time, I was asked to assist in implementing the survey.⁷¹ It was aimed at law and business students, and has already been administered to students in over a dozen countries.⁷² Tentative comparisons for some of those countries were presented at an international conference in Tokyo in 1995, but further data collection outside Japan and more detailed comparisons are still underway.⁷³ A comprehensive data analysis for almost all countries will be presented at an international conference in Tokyo in early 2002. Already, the final results for Japan have been published in one of Japan's leading law journals.⁷⁴ Some responses from

⁶⁸ See, in more detail, Nottage, above n 56.

⁶⁹ March, above n 65.

⁷⁰ Directors of the Center are Masanobu Kato and Michael Young. Two of the nine other researchers based in Japan and contributing to the Center's present research project into contract consciousness are in fact Chinese, and one is Korean.

⁷¹ They included academics from Columbia University (Michael Young); Humboldt University; Hanoi University; Victoria University of Wellington (the author of this thesis, at that time); and a Thai jurist (then in private practice, who later taught at Kyushu University).

⁷² The main ones include Japan, China, Korea, Philippines, France, the US, Australia, Hong Kong, Thailand, New Zealand, the UK, and India.

⁷³ M Kato and A Fujimoto "An International Comparison of Contract Consciousness - Which is More Unique, Japan or the US?" Paper presented at the 1995 Annual Meeting of the Research Committee on Sociology of Law (International Sociological Association), "Legal Culture: Encounters and Transformations" (Tokyo, 1-4 August 1995), Section Meetings Supplement 3, 39.

⁷⁴ Six articles beginning with M Kato and M Young "Nihonjin no Keiyakukan [Conceptions of Contract held by Japanese]" (1996) 1096 *Juristo* 44. See also M Young "Japanese Attitudes Towards Contracts: An Empirical Wrinkle in the Debate" (Paper presented at "Japanese Law Online: A Symposium", Nagoya, 9 March 2000).

New Zealand students have also been collected, and partially entered into a database allowing statistical analysis, although the sample is smaller.⁷⁵

Multiple variants of the survey were administered in each country because respondent "nationalism", or systematic bias towards certain other countries, was considered a distinct possibility. For New Zealand, the organisers formulated six variants:

- (i) Japanese buyer – New Zealand seller (of timber)
- (ii) New Zealand buyer – Japanese seller (of ships)
- (iii) New Zealand buyer – New Zealand seller (of oil products)
- (iv) "Country A" buyer – "Country B" seller (of commodity X)
- (v) New Zealand buyer – US seller (of oil products)
- (vi) US buyer – New Zealand seller (of oil products)

All variants were based on the same Sugar Case scenario. A long-term supply contract concluded at a fixed price well below the then market price is followed by an even greater fall in the market price, prompting the buyer to call repeatedly for renegotiation. The scenario is divided into four stages, interspersed with eight propositions (qA - qH). With respect to each proposition, respondents were asked to indicate whether they strongly agreed (by circling 1 on the questionnaire form), agreed (2), were uncertain (3), disagreed (4), or strongly disagreed (5). The scenario and propositions was as set out overleaf.⁷⁶

⁷⁵ A total of 475: 362 from Victoria University, 114 from Massey University, and 9 from Waikato University. Data entry has proven quite laborious for the Japanese organisers. So far only 368 (254 from Victoria and 114 from Massey) have been entered.

⁷⁶ The scenario and questions are not reproduced verbatim, because multiple survey variants were used. However, despite some infelicities in expression, the wording above is as close as possible to that used in the student surveys. A further set of survey questions were included to compare respondents' attitudes towards authority and power, building on earlier work by Adorno. Preliminary data for New Zealand has not yet been fully analysed, but results from Japan suggested the need for closer analysis of the way respondents develop attitudes and expectations as a particular dispute unfolds. See A Fujimoto "Keiyaku Sonjundo to Kenryoku Shiko [The Extent to which Contracts are Adhered To, and Orientation towards Authority]" (1996) 1096 *Juristo* 64. As well as providing theoretical challenges, this reinforced the importance of follow-up interviews in the further research still underway.

The Main Kato/Young Hypothetical

- (i) Buyer and seller conclude a five-year contract at a fixed price half that of the then prevailing market price; but a year later the market price drops to a quarter of its original price. The buyer, now locked into an expensive contract, and in poor shape financially, attempts to renegotiate terms. The seller initially agrees to postpone sales for one year. However, during that second year, the price drops further, to one fifth of the original market price. The buyer then repeatedly attempts to renegotiate a lower contract price; but, despite negotiations, the seller refuses.
- qA. It is imprudent to conclude a contract for five years for the products, whose market price fluctuates markedly.
- qB. It is natural to alter the contract terms if the market price falls greatly, so it is reasonable for the buyer to take the actions set out in (i).
- qC. Despite the great fluctuation in market price, the seller's refusal to lower the contract price demonstrates too inflexible an attitude.
- (ii) At the start of the fourth year, the buyer decides to refuse to take delivery of the goods.
- qD. This action by the buyer should be supported.
- (iii) The seller insists on shipping the goods, so they begin accumulating in the buyer's port. After three months of this, towards the end of the fourth year, the seller agrees to reduce the contract price by one tenth.
- qE. These actions by the buyer should be not be supported because one should observe terms once a contract is made.
- qF. These actions by the buyer are ethically sordid.
- qG. It is ridiculous for the seller to finally agree to reduce the contract price, despite the originally fixed price.
- (iv) It turns out that the buyer would have risked bankruptcy had it kept to the original contract terms.
- qH. Since contract terms cannot be kept upon bankruptcy, the buyer would inevitably take all the above actions.

As shown by the following Table 1, one striking result was the strong similarity in overall responses by students in both countries – there were no statistically significant differences at the 95% confidence level:

Table 1: New Zealand vs Japanese Students Overall

	qA	qB	qC	qD	qE	qF	qG	qH
NZ (297)	2.23	3.0	3.04	3.39	2.47	2.79	3.61	2.48
Japan (2856)	2.26	2.90	2.85	3.33	2.70	3.04	3.58	2.42

Similar patterns also emerged along two other dimensions (Tables 2a and 2b, 3a and 3b). Law students in both countries (and in particular the more advanced students, especially

in Japan) were significantly more lenient on the hypothetical buyer than business students. Women students (especially in Japan) were significantly more lenient than men.

Table 2a: New Zealand Law vs Business Students

	qA	qB	qC	qD	qE *	qF *	qG *	qH
Law (158)	2.17	2.95	2.95	3.34	2.59	3.01	3.77	2.53
Business (139)	2.29	3.06	3.15	3.44	2.34	2.53	3.43	2.42

Table 2b: Japanese Law vs Business Students

	qA*	qB	qC	qD*	qE *	qF *	qG *	qH
Law (1773)	2.35	2.93	2.84	3.37	2.90	3.13	3.74	2.40
Business (1072)	2.12	2.88	2.86	3.26	2.55	2.99	3.32	2.45

Table 3a New Zealand Women vs Men Students

	qA*	qB*	qC *	qD	qE *	qF *	qG	qH
Women (167)	2.25	2.76	2.95	3.33	2.55	2.93	3.66	2.55
Men (161)	2.26	2.96	3.20	3.50	2.32	2.60	3.58	2.41

Table 3b: Japanese Women vs Men Students

	qA*	qB*	qC *	qD*	qE *	qF *	qG*	qH
Women (895)	2.18	2.76	2.69	3.16	2.97	3.19	3.74	2.33
Men (1950)	2.31	2.96	2.92	3.41	2.63	2.99	3.51	2.46

* Indicates statistical significance at the 95% confidence level

One apparent difference is interesting. In the few cases where there was significant bias depending on whether the hypothetical buyer was domestic, as opposed to foreign, Japanese law and business students (combined) tended to be more *lenient* towards the hypothetical foreign buyer. Two significant examples of this are their lesser degree of moral criticism of the buyer in response to qF when the buyer is Australian or Korean, as opposed to Japanese. Consistently with this, the sub-group of Japanese law students were also more critical of the seller (i.e. supportive of the buyer) in responses to qC when it was a Japanese seller rather than a Korean seller. Only in responses to qD by business students, who were significantly tougher in all cases (still rare) where they exhibited country bias, was there more criticism of a Korean as opposed to a Japanese buyer. Kato and Young suggest that such lenience, which they term "anti-nationalistic", may be directly linked to feelings of remorse held by Japanese people nowadays towards Koreans.⁷⁷

Rather than linking attitudes to such general trends in foreign policy, however, these differences may stem from increased "inter-subjectivity".⁷⁸ That is, in situations where a Korean buyer is involved, Japanese respondents may base their expectations on

⁷⁷ M Kato and S Ota "Nihonjin no Kakkoku Imaji to Keiyakufunso [Contract Disputes and Japanese Images of Various Countries]" (1996) 1096 *Juristo* 60, 61.

⁷⁸ Compare the notion of "communicative rationality" posited by Habermas, below Chapter Five Part II.B.2.

their perception – correct or incorrect, as the data from Korea will eventually reveal – that Korean legal and social norms are more lenient towards a buyer renegotiating in the hypothetical situation.⁷⁹ Anyway, by contrast, New Zealand students emerged as significantly tougher when the hypothetical buyer was Japanese – although not when the buyer was a US buyer. Perhaps they are less “inter-subjective” as a whole than Japanese students, or perhaps they do harbour strong nationalistic feelings when it comes to the Japanese.

Final results from the survey of US students have not been published. However, some initial trends comparing responses from Japan with those from the US were reported at the Tokyo conference,⁸⁰ and, as just mentioned, Japanese responses have emerged as very similar to New Zealand responses. Thus, from the differences with regard to qC, qE, qF and qG, it can be anticipated that US students’ attitudes will tend to be tougher compared to both Japanese and New Zealand students. Furthermore, it seems that US responses have already started to exhibit considerable country bias – “nationalism” or lower inter-subjectivity – when a Japanese as opposed to domestic buyer is postulated in the hypothetical.⁸¹ In this respect, the overall attitude of US students bears more affinity with that of New Zealand, than that of Japanese students.

III.C The Company Survey⁸²

1 The Main Kato/Young Hypothetical Revisited

Some of the scenario and propositions devised by the organisers, as translated by them into English, might have presented difficulties for New Zealand respondents. Some of the propositions themselves also seemed to present interesting issues of interpretation.⁸³ There was little opportunity to elicit comments on such matters from New Zealand student respondents, as the survey was administered primarily in a classroom setting under the usual time constraints. More importantly, a query arose at the Tokyo conference as to whether law and business students were good proxies for lawyers and businesspeople. Partly to address such issues, in 1996 I administered a mail survey to 102 companies in New Zealand and 51 companies in Japan, which included the Kato/Young hypothetical, inviting comments and requesting follow-up interviews.⁸⁴

This survey included extra questions, although this made it quite long. It was also directed to companies thought likely to have dealings with the other country in the hope of attracting more responses and, in particular, agreement to follow-up interviews.

⁷⁹ Nottage, above n 56, 72. This would help explain why Japanese business students turn tough against a Korean buyer (and other foreign buyers): they probably get less training in “putting themselves in the other side’s shoes” than Japanese law students. It would also help explain why Japanese business and law students (combined) are, exceptionally, *tougher* on the US or British buyer, in response to qD: they may perceive law and business ethics to be much *stricter* on buyers in this situation.

⁸⁰ Kato and Fujimoto, above n 73.

⁸¹ Kato and Young, above n 74, 62.

⁸² See, in much more detail, L Nottage “Planning and Renegotiating Long-Term Contracts in New Zealand and Japan: An Interim Report on an Empirical Research Project” (1997) NZ L Rev 482.

⁸³ For example qE and qA respectively, discussed at Part B.1 (e) and (a) in Nottage, above n 65.

⁸⁴ The full text of the company survey, in both English and Japanese versions, is available on request. Thanks are due to Yoshitaka Wada for assistance in preparing the Japanese version during his stay at Victoria University of Wellington in 1996.

Twenty four largely valid responses were obtained from New Zealand companies (a 23.5% response rate), and 21 from Japanese companies (41%).⁸⁵ Their responses to the main Kato/Young hypothetical are as follows:

Table 4: New Zealand Companies

	qA	qB	qC	qD	qE	qF	qG	qH
1. NZ cos with respect to domestic buyer – Q.13 (24)	1.92	3.29	3.08	3.54	2.46	2.58	3.46	2.62
2. NZ cos with respect to Japanese buyer – Q.26 (21)	1.86	3.19	2.91	2.86	2.48	2.67	3.29	2.24
3. NZ cos overall (weighted average)	1.89	3.24	3.00	3.22	2.47	2.62	3.38	2.44
4. NZ students (297 now inputted)	2.23	3.00	3.04	3.39	2.47	2.79	3.61	2.48

Table 5: Japanese Companies

	qA	qB	qC	qD	qE	qF	qG	qH
1. J cos with respect to domestic buyer – Q.13 (20)	2.15	2.85	2.85	3.20	2.95	2.90	3.40	2.30
2. J cos with respect to New Zealand buyer – Q.26 (20)	2.20	2.95	3.05	2.75	2.95	3.00	3.35	2.40
3. J cos overall (20)	2.18	2.90	2.95	2.98	2.95	2.95	3.38	2.35
4. J students (2856)	2.26	2.90	2.85	3.33	2.70	3.04	3.58	2.42

Comparing lines 3 and 4 of Table 4, aggregate responses of New Zealand companies are quite similar to those for New Zealand students. Exceptions are to qA, where companies consider it distinctly more “imprudent” to enter into long-term contracts like the one in the hypothetical; and possibly to qB, qD, qF and qG, where they tend to be slightly tougher than New Zealand students as a whole. Aggregate responses of Japanese companies are even more similar to those of Japanese students (see Table 5), except possibly with regard to qG. Tests for statistical significance of possible differences would be more reliable if the sample of company responses could be increased. Moreover, to allow for the abovementioned possibility that legal professionals are systematically more “lenient” than those with a business background, to a degree similar to law students in both countries, it would be wise to increase the sub-sample of legal professionals in company responses to a proportion closer to that of law students in the student survey. With those caveats in mind, however, one tentative conclusion from these results is that, in aggregate, students in both countries have proven reasonable proxies for company personnel.

⁸⁵ Three of the 24 New Zealand company respondents did not complete the second part of the mail survey, which included the variant involving a Japanese (as opposed to New Zealand) buyer and which repeated queries as to actual practices when dealing with Japanese companies. Two responses additional to the 24 were largely incomplete as to the Kato/Young hypothetical, so responses were excluded in that respect only. Of the 21 responses from Japanese companies, one circled “uncertain” with respect to all eight propositions in both variants of the hypothetical, ending the survey with the comment that it had little understanding and experience in the area covered. Accordingly, its responses were excluded in this respect; but the rest of its responses were included, as to its actual practices and so forth. Some survey responses were also missing for other questions, so the sample size for each of those varies accordingly in the results summarised in Appendix C at the end of this thesis.

Comparing next the shaded Rows 3 of both Tables, a second tentative conclusion is that overall companies in New Zealand are slightly tougher than their counterparts in Japan. This contrasts with the student survey, where there were no statistical differences in responses between the two countries. On the other hand, the fact that companies in Japan are only slightly more lenient may still come somewhat as a surprise to those who take as typically “Japanese” the response of the buyers in the actual Sugar Case, described above. Again, the sample of company respondents will need to be increased to determine reliably whether differences are statistically significant, and there should be a particular focus on obtaining more responses from New Zealand legal professionals. However, this general tendency is apparent from some other responses from company respondents in both countries, particularly in respect to shared attitudes towards court adjustment, mentioned in Part III.C.2 below.

Comparing Rows 1 and 2 in each Table, a third tentative conclusion concerns some possible country bias among both New Zealand and Japanese company respondents. Specifically, there seems to be a tendency among New Zealand company respondents to be more lenient when the buyer is Japanese (what Kato and Young would term “anti-nationalistic”); and, among Japanese respondents, to be tougher (“nationalistic”). This runs counter to trends from the survey of law and business students combined, noted in Part III.B above. The tentative results of the company survey suggest that, in aggregate, respondents in both countries are quite inter-subjective. New Zealand companies appear more ready to make some concessions when dealing with Japanese counterparts, based in part on what some probably perceive as significantly more lenient attitudes towards contract renegotiation in Japan. Likewise, the reverse occurs among Japanese companies dealing with New Zealand. Again, caveats apply in light of the still small sample and the high proportion of respondents with a business as opposed to legal background.⁸⁶ However, such inter-subjectivity has also been reinforced to a considerable extent by comments and follow-up interviews. A good proportion of those with a background in business, as well as those with legal training, seem to become more prepared to put themselves “in the other’s shoes” as a result of actually dealing with others – although perhaps misjudging shoe size to some degree.

A survey of US company personnel also should be undertaken to test for their responses to versions of the main Kato/Young hypothetical. From the results in Japan and New Zealand, however, it can be anticipated that US students will also prove reasonable proxies for US companies. If so, from the trends emerging in US student survey results, US companies may tend to demonstrate a significantly tougher attitude towards the hypothetical buyer than New Zealand and, especially, Japanese companies. It will also be interesting to see if US company personnel adopt a more lenient (anti-nationalistic or more inter-subjective) attitude towards the hypothetical Japanese buyer, than their US student counterparts.

⁸⁶ Another potential problem arises because the same survey included one hypothetical variant involving a domestic buyer, and later another largely similar variant involving a buyer from the other country. There is a risk that respondents, realising this, will approach the latter in a fashion closer to that involving the domestic buyer. However, only including one variant in each survey form would have halved the number of potential responses to each variant, and the differences that have emerged in responses to this hypothetical suggest that this “framing” problem has not been overwhelming.

2 A Weintraub Hypothetical

Fortunately, in 1988 a quite different mail survey had already been administered by Russell Weintraub to general counsel (in-house legal officers) of 182 corporations from all regions of the US. He received 82 valid responses from companies of various sizes in various sectors.⁸⁷ One of the hypotheticals put to his respondents was based on the *ALCOA* case.⁸⁸ It postulated a simpler situation of commercial impracticability, where the *seller* to a long-term fixed-price domestic supply contract is almost bankrupted by adverse market fluctuation in input prices and attempts to renegotiate. Weintraub asked specifically what respondents thought a court's judgment should be.

A Weintraub Hypothetical

Company A has contracted to sell B a fixed quantity of fuel oil per month at a fixed price for 10 years. An unprecedented OPEC oil embargo causes the cost of the oil to A to far exceed the price that B has agreed to pay. A's loss over the 10 years of the contract would be so large as to require liquidation of A. B can pass on the added cost of oil to its customers without suffering a competitive disadvantage. A refuses to deliver the oil at the contract price, and B sues A for the difference between the contract price of the oil and the much higher price that B must pay to obtain oil from other sources.

This hypothetical was added to the above-mentioned company survey of New Zealand and Japanese companies, to further test for differences in their attitudes towards long-term contract renegotiation under changed market circumstances. A variant was added involving a domestic seller, but a Japanese or New Zealand buyer respectively, to test also for nationalism or inter-subjectivity. Weintraub's mix of respondents is not dissimilar to mine so far (see Tables 7-9 of Appendix C at the end of this thesis). Although his survey was only aimed at legally trained personnel in firms, and he did not focus on companies with dealings internationally, the US results (Column 1 in Table 6) can also be roughly compared to those for New Zealand and Japan (Columns 2 and 3 respectively).

Table 6: US, New Zealand and Japanese Companies

Percentage of respondents for:	1. US [80]	2. NZ [26]	3. J [16]	4. J: NZ [16]	5. NZ: J [24]
[A] B should receive a judgment for the difference between the contract price and the market price	35.0	38.4	18.7	37.5	41.6
[B] A should be excused from performance	13.7	11.6	6.3	6.3	4.2
[C] The contract price should be adjusted to avoid ruinous loss to A, but give B a significant savings over current market price	46.2	50.0	68.7	56.2	50.0
[D] Other	5.0	—	6.3	6.3	4.2

Consistently with the second tentative conclusion above (Part III.C.1), Japanese companies were the most lenient. Only 18.7% answered that the buyer should receive full expectation damages for the seller's refusal to perform under the new circumstances.

⁸⁷ R J Weintraub "A Survey of Contract Practice and Policy" (1992) *Wisc L Rev* 1.
⁸⁸ Above n 38.

They were also the most likely (68.7%) to answer that the contract price should now be adjusted by the court, although very few (6.3%) answered that the seller should be excused outright. Further, supporting the third tentative conclusion above, they became tougher when asked what the result should be when a New Zealand rather than a Japanese seller was involved (Column 4 of Table 6). US companies were noticeably tougher in awarding expectation damages (35%) against a US seller, and less willing to permit price adjustment by the court (46.2%), although some were more lenient in excusing the seller outright (13.7%). However, somewhat surprisingly in the light of the results summarised so far (Parts III.B and III.C.1 above), New Zealand companies' responses for domestic contracting were close to those of US companies, not Japanese companies (compare Columns 2 and 1 respectively).

Comments from Japanese and New Zealand companies help explain these responses. Personnel even with more of a business background, in each country, were aware of the doctrine of changed circumstances (*jijo henko no gensoku*) or the concepts of *force majeure* or frustration, which *theoretically* provide for relief in this sort of situation in Japan and New Zealand respectively (above Part II). However, in Japan they seemed to be more unaware of the relatively restricted use made of the doctrine by the Japanese courts. Alternatively, perhaps they were indeed aware of that, but their responses to this hypothetical were driven by a preparedness to say that *the law should go further*, at least in this sort of situation.⁸⁹ In New Zealand, respondents had a better

⁸⁹ The second alternative seems somewhat less likely in view of another mail survey conducted in 1993, involving Takeshi Uchida (Tokyo University), Michael Young and John Haley (University of Washington). The survey was sent to 130 companies in Japan – engaged in areas of activities broadly similar to those surveyed by the present author, although it is not clear whether theirs were selected randomly or not – and 76 replies were received (58% response rate). Results were published in October 1997: S Kitayama “*Keizokuteki Torihiki ni kansuru Kokunai Anketo Chosa no Kekka* [Results from a Domestic Mail Survey of Continuing Transactions] (Part One)” (1997) 627 NBL 11. The following hypothetical is clearly based on the Weintraub hypothetical, although without citing his work (changes or additions are marked by italics):

Company A has contracted to sell [*company*] B a fixed quantity of fuel oil per month at a fixed price for [5] years. [*That price was within a reasonable range for both parties given the circumstances at the time the contract was concluded. However*] An unprecedented OPEC oil embargo causes the cost of the oil to A to far exceed the price that B has agreed to pay. A's loss over the [...] contract [term was] large [*enough to threaten the viability of*] A. [*On the other hand,*] B can pass on the added cost of oil to its customers[...]. A refuses to deliver the oil at the contract price [...].

The following responses were given to the question, “What attitude do you think should be taken if you were the person in charge in company B?”:

	Percentage (number of companies)
[1] Ultimately agree to raise the price	72 (54)
[2] Urge A to perform as per the contract, and bring suit if it does not	16 (12)
[3] Other	12 (9)

Five of the nine companies which answered “[3] Other” gave answers like “we should look for a compromise after negotiating”, seen as closer to [1], whereas only one gave an answer closer to [2]: S Kitayama “*Keizokuteki Torihiki ni kansuru Kokunai Anketo Chosa no Kekka* [Results from a Domestic

sense for the restricted scope of the doctrine of frustration; and/or were more reticent about urging the courts to take it further, even when invited to do so. (Perhaps US respondents approached this hypothetical in a similar way; but that is not apparent from Weintraub's rather brief report.)

In other words, the law does structure commercial attitudes in Japan – there is “bargaining in the shadow of the law”⁹⁰ – but perceptions of the contours of the law's shadow may be somewhat less accurate. In Japan, there may also be more expectation that the law can and should accord with commercial (and social) mores – what might instead be called “the law in the light of bargaining”. Nonetheless, the difference from New Zealand responses is only one of degree. In particular, New Zealand companies were also remarkably prepared to permit court adjustment in the Weintraub hypothetical situation – not much less so than Japanese companies. In this respect New Zealand company personnel also either “misread” the New Zealand law,⁹¹ which never permits such a remedy; and/or still urge that remedy on the courts.

3 Weintraub Questions on Contract Planning and Dispute Resolution Practices

Weintraub's survey included questions on actual contracting practices among his US company respondents. These were added to the survey of New Zealand and Japanese companies. Results complemented those derived from the hypotheticals, although the abovementioned caveats about the small sample size and its make-up become all the more important. The questions (q3-q8) and responses from all three countries are reproduced below. Results from enquiries into practices in purely domestic transactions in the US, New Zealand and Japan are summarised in Columns 1, 2 and 4 respectively of Tables 7-12. In addition, results for New Zealand companies dealing with Japan are summarised in Column 3 of those Tables.⁹²

Responses to q3 and q4, overleaf, give some indication of how businesses in each country approach long-term contracting.

Mail Survey of Continuing Transactions] (Part Three)” (1997) 630 NBL 52, 59. If response [1] can be said to correspond roughly to responses [C] and [B] (lenience through price adjustment and excuse) to the Weintraub hypothetical administered to the smaller sample of Japanese companies, while response [2] corresponds to [A] (no lenience), then the proportions are roughly similar. This suggests therefore that the company respondents may not have made a distinction between what a *court* should decide, and what *they as businesspeople* should do. Rather, at the least the ones who were thinking of *jijo henko no gensoku* as potentially applicable in this situation, may simply have overestimated or misread the extent to which it would actually be applied by Japanese courts.

⁹⁰ R H Mnookin and L Kornhauser “Bargaining in the Shadow of the Law: The Case of Divorce” (1979) 88 Yale LJ 950. See also above Chapter One Part II.D.

⁹¹ Compare the broader debate on creative “misreadings” of law, below Chapter Five Parts II.B.1 and II.B.3.

⁹² Data for Japanese company practices with regard to New Zealand are not added to the Tables, because so many fewer (only seven) have so far responded that they had relevant contracting experience with New Zealand companies. In part, this may have been a result of specifying that the present author was interested in contracts governed by Japanese law – to better compare with domestic transactions.

(a) Long-Term Contracting

3. Does your company enter into contracts lasting more than a year to sell your products or services or to buy another company's products or services?

Table 7

Percentage for:	1. US [83]	2. NZ [26]	3. NZ: J [21]	4. Japan [21]
yes - if your answer is "yes", go to Q.4	89.2	73.1	43.7	80.9
no - if your answer is "no", go to Q.5	10.8	26.9	56.3	19.1

4. If your company enters into long-term contracts to sell or buy, circle the letter next to the category or categories that describe how the contracts provide protection against substantial changes in market prices during the term of the contracts. (More than one letter may be circled)

Table 8

Percentage For:	1. US [74]	2. NZ [19]	3. NZ: re J [7]	4. Japan [17]
[A] indexing	71.6	23.1	18.7	9.5
[B] option to cancel at intervals	66.2	3.8	13.7	42.8
[C] force majeure clause not addressed specifically to deviation between contract and market prices	40.5	19.2	13.7	33.3
[D] clause providing for renegotiation if substantial deviation between contract and market prices	41.9	34.6	13.7	28.6
[E] other	17.6	11.5	6.2	9.5
[F] no provision in contract for excuse if other party performs	16.2	15.3	18.7	—

Of New Zealand companies, 73 percent conclude contracts of more than one year's duration, compared to 81% of Japanese companies and 89% of US companies (see Table 7). This relative short-term orientation of New Zealand companies is also apparent in their responses to the Kato/Young hypothetical (above Part II.C.2). That is, they agreed distinctly more with qA (average 1.89), which concluded that the long-term contract in that hypothetical was "imprudent", compared to Japanese companies (2.18). We also know that US students think this is more imprudent than Japanese students,⁹³ and a survey of US companies may reveal a significant difference in their attitudes too. But such attitudes, in the case of that particular hypothetical or in response to abstract questioning, do not deter US companies from being the most willing to enter into long-term contracts.

One explanation for these differences is that the tendency to use long-term contracts is likely to be particularly sensitive to the industry or primary area of activity in which respondent companies is engaged.⁹⁴ It may also depend on whether a

⁹³ Kato & Fujimoto, above n 56, 19.

⁹⁴ O Williamson "Transaction-Cost Economics: The Governance of Transaction Cost Economics" (1979) 22 J of L & Econ 233, for example, suggests that long-term "relational" contracting will be more frequent in industries involving dealings requiring more "idiosyncratic" investments, such as automobile parts supply. But see B Lyons & J Mehta "Private Sector Business Contracts: The Text

company is primarily a buyer or a seller.⁹⁵ Such variables should be controlled for, preferably with a much larger sample of survey and interview respondents, before too many definite conclusions are drawn.

Nonetheless, it is apparent already from responses to q4 (Column 1 of Table 8), that US companies seem to take good advantage of the possibilities afforded by US contract law to plan effectively for contingencies, for instance through index or renegotiation clauses. Those (comparatively fewer) New Zealand companies that enter into long-term contracts (Column 2) also incorporate such clauses in their long-term contracts, especially renegotiation clauses. Japanese companies (Column 4) undertake less of such planning in their long term contracts, although a high proportion (42.8%) include an "option to cancel at intervals" – which in fact reintroduces a more short-term orientation even in contracts of more than one year's duration. These results suggest an obvious but important point: the use of long-term contracts by businesses in a country will depend on the degree to which the legal system supports planning and implementing them. US and Japanese law are very supportive, whereas New Zealand law is not. Thus, ironically, the latter may find renegotiation clauses too "uncertain" and therefore void.⁹⁶ Alternatively, courts in New Zealand have to interpret them without being able to draw upon a general principle of "good faith".⁹⁷

On the other hand, arguably greater institutional barriers to enforcing rights in Japan may make careful contract planning less obviously worthwhile. This may help explain why concluding contracts of more than one year may be less frequent than in the US.⁹⁸ Another explanation, though, may be the greater degree of "extra-legal" reinforcement of promise-making between businesses, for instance through trade associations.⁹⁹ As a recent study has shown, these factors – facilitative contract law, relative easy access to courts, and strong trade association norms – combine to make long-term contracting much more prevalent in Germany compared to the UK and, especially, Italy.¹⁰⁰

Between the Lines" in S Deakin and J Michie (eds) *Contracts, Cooperation and Competition* (Oxford UP, Oxford, 1997) 43, suggesting an overarching tension between economic rationality and normative discourse.

⁹⁵ Compare for example the differing proportions in the survey by Uchida and others: Kitayama, above n 89, 12-13.

⁹⁶ Compare for example E McKendrick "The Regulation of Long Term Contracts in English Law" in J Beatson and D Friedmann (eds) *Good Faith and Fault in Contract Law* (Clarendon Press, Oxford, 1995) 319-321; Q Lowcay "'Best Endeavours' and 'Reasonable Endeavours'" [1999] NZLJ 211; *ECNZ*, above n 26.

⁹⁷ See generally above Chapter Three, Part III.B.1.

⁹⁸ See above Chapter One, Part II.D. Compare Haley (above n 63, 147-155) who talks about the prevalence of "relational contracting" in Japan, and the way Japanese contract law principles support that (for example by punishing non-renewal of fixed terms). That is therefore a broader term, covering more than "long-term" contracts, defined for the purposes of this empirical study (following Weintraub) as those of more than one year in duration. Compare also above Chapter Three Parts III.A.1 and III.D.1 mentioning caselaw on termination of long-term contracts; and below Part III.C.4.

⁹⁹ See generally J O Haley "Relational Contracting: Does Community Count?" in H Baum (ed) *Japan: Economic Success and Legal System* (de Gruyter, Berlin, 1997) 167.

¹⁰⁰ J Burchell and F Wilkinson "Trust, Business Relationships and the Contractual Environment" (1997) *Cambridge J Econ* 217, 222. See also S Deakin, C Lane and F Wilkinson "Contract Law, Trust Relations, and Incentives for Co-Operation: A Comparative Study" in S Deakin and J Michie (eds) *Contracts, Cooperation and Competition* (Oxford UP, Oxford, 1997) 105.

These factors also seem important when it comes to contract dispute resolution. Questions 5 and 6 inquired about firms' practices in responding to requests for contract price modification:

(b) *Responding to Requests for Contract Price Modification*

5. If, because of a shift in market prices, one of your suppliers or customers requested a modification of the contracted-for price, would your company always insist on compliance with the contract?

Table 9

Percentage for: [Number]	1. US [82]	2. NZ [26]	3. NZ: re J [13]	4. Japan [21]
[] yes - go to Q.7	4.9	15.8	7.7	52.4? [28.6]
[] not always - go to Q.6	95.1	84.2	92.3	47.6? [71.4]

6. If your company would sometimes agree to a modification of the contracted-for price, which of the following factors would be relevant to the decision? (*More than one letter may be circled*)

Table 10

Percentage (of those responding "not always" to q5 [as amended]) for: [Number]	1. US [78 of 82]	2. NZ [24 of 26]	3. NZ: re J [12 of 13]	4. Japan [?15 of 21]
[A] the request was reasonable under trade practice	75.6	42.3	76.9	[73.3]
[B] if the request is made by a supplier, the additional cost can be passed on to customers	25.6	11.5	7.7	[20.0]
[C] if the request is made by a buyer, our company will make a reasonable profit even if the request is granted	28.2	19.2	46.1	[20.0]
[D] relations with the company making the request have been long and satisfactory	79.5	61.5	76.9	[40.0]
[E] either the company making the request or our company is much larger	7.7		-	
[F] other: ...	23.1	15.4	-	

As Table 9 shows, a large majority of companies in all three countries would not always insist on compliance with the contract when modification was requested.¹⁰¹ For those

¹⁰¹ On a preliminary review of results, the percentage of Japanese companies that would compromise (Column 4) seemed remarkably low: 52.4%. This percentage is distinctly inconsistent with the abovementioned second tentative conclusion based on responses to the Kato/Young and Weintraub hypotheticals discussed above, which suggested a (slightly) more lenient attitude to contract renegotiation. A closer analysis of the data on q5, and follow-up interviews, uncovered an unintended ambiguity created in the Japanese version of the survey. In translation, Japanese companies were asked whether they would have "asserted" (*shucho suru*) their strict contractual rights. Many answering "yes" saw this merely as a first step in an ongoing negotiation process which did not preclude eventual price adjustment - whereas "insisting" on one's rights in the English version implied a more categorical refusal. Thus, in spite of the instruction to proceed directly to q7, five of the 21 valid Japanese responses which answered q5 affirmatively went on to answer q6, which focused on what drove the eventual negotiation process. Those

that do not, Table 10 sets out the factors that they say become relevant to their decision about modifying the contract. The more obviously instrumental, profit-maximising factors – being able to pass on additional cost or make a reasonable profit – are approximately equal in importance in all three countries. Whether “the request was reasonable under trade practice”, however, was distinctly more important in Japan (73.3%) and the US (75.6%) than in the New Zealand (42.3%). This can be explained directly by the greater role of trade associations and other business groupings in the former countries (especially Japan) in promoting trade practices as norms for resolving disputes. However, it seems likely that trade practices in those countries also have an indirect effect: the legislature and the courts in both the US and Japan seem to be more able and willing to incorporate trade practices into the law.¹⁰² Similarly, the importance of “long relations” for US companies may reflect the greater ability of US contract law and courts to bring such aspects into the picture when dealing with contract disputes.¹⁰³

Finally, questions 7 and 8 addressed the opposite situation, namely experiences in requesting contract modification from trading partners:

(c) *Requesting Contract Modification*

7. How frequently has your company asked relief from or modification of its contractual obligations?

Table 11

Percentage for: [Number]	1. US [76]	2. NZ [21]	3. NZ: re J [9]	4. Japan [16]
[A] never - go to Q.9	17.1	42.8	33.3	37.5
[B] an average of less than once per year - go to Q.8	42.1	52.4	66.6	37.5
[C] an average of 1 to 5 times per year - go to Q.8	22.4	–	–	12.5
[D] an average of over 5 times per year - go to Q.8	18.4	4.8	–	12.5

five responses, at least, could therefore be considered as negative replies, reducing the percentage accordingly (to 28.6%, in square brackets in Column 4). The Japanese response to q5 then become more comparable, and more consistent with the rest of this study's results.

Interpreting the ambiguity to q5 in this way also alters the percentages for Japanese company responses to q6, indicated by square brackets in Column 4 of Table 14.

¹⁰² Macneil, above n 1; J Esser, “Institutionalizing Industry: The Changing Forms of Contract” [1996] L & Soc Inq 593; T Uchida, “*Gendai Keiyakuho no Aratana Tenkai to Ippan Joko* [New Developments in Contemporary Contract Law, and General Clauses]” (1993) 51 NBL 6; V Taylor “Continuing Transactions and Persistent Myths: Contracts in Contemporary Japan” (1993) 19 MULR 352.

¹⁰³ The comparative lack of importance of this factor in Japan may be related to a more classical or formal counter-tendency in Japanese contract law. See for example L Nottage, “Contract Law, Theory and Practice in Japan: ‘Plus ça change, plus c’est la même chose?’” in V Taylor (ed), *Asian Law through Australian Eyes* (Sydney, Law Book Co, 1997) 199; and above Part Two Introduction Part IV, Chapter Three Parts III.D and IV.D.

8. Describe your company's experience when it has asked relief from or modification of its contractual obligations. (More than one letter may be circled. If more than one is circled, indicate the relative frequency of each experience by inserting a number in each box selected, with 1 indicating the most frequent experience, 2 the next, etc.)

Table 12

Percentage for: [Number (of those responding positively to q7)]	1. US [63]	2. NZ [11]	3. NZ: re J[6]	4. Japan [10]
[A] [] amicable working out of the problem by modification of performance of the contract in question	87.9	100.0	100.0	83.3
[B] [] amicable working out of the problem by adjustments in future contracts	66.7	45.4	50.0	72.3
[C] [] request refused and we performed	48.5	27.2	—	18.2
[D] [] dispute resolved by arbitration	18.2	18.2	—	—
[E] [] suit was filed and settled before judgment	33.3	9.1	—	—
[F] [] suit was filed and litigated to judgment	25.8	9.1	—	—
[G] [] other: ...	4.5	—	—	—

When it comes to asking for relief (Table 11), US companies do so far more than Japanese companies, which do so slightly more than New Zealand companies. The importance of "amicable working out of the problem by adjustments in future contracts" (see Table 12) is distinctly higher in the US (66.7%) and Japan (72.3%) than in New Zealand. This too may be due to the support of a long-term orientation in business by US and Japanese courts, compared to that of New Zealand courts, not just by business associations. On the other hand, the fact that no dispute had been litigated or taken to arbitration by a Japanese company is a reminder that significantly reduced access to judicial institutions can dampen the direct effect of such trends in the law.

4 Follow-Up Interviews

Ongoing follow-up interviews of company respondents have been undertaken in both Japan and New Zealand.¹⁰⁴ These have provided more than just an opportunity to explore the reasoning behind and background to responses to the survey questionnaire, including written comments added to particular responses. The interviews also suggest an interesting new tension between contemporary contract "law" norms and the background legal system, and business ethics or social norms. A basic pattern appears common to commercial contracting at least in New Zealand and Japan, which may also

¹⁰⁴ So far, as of October 2001, eight companies in New Zealand and six in Japan have been interviewed. The New Zealand companies were based in Wellington (3), Auckland (4), and a provincial centre (1). At least one other in Auckland, two in Wellington, and one in Christchurch remain to be interviewed. Japanese respondent companies interviewed so far were from Tokyo (4), Kansai (1) and a provincial centre (1). At least two more (one from Kansai and another from a provincial centre) remain to be interviewed. A Fukuoka company involved in recent contract litigation in the High Court in Auckland (*Tak & Co Inc v AEL Corp Ltd* (1995) 5 NZBLC 103,887) was also interviewed, to get a broader insight in contemporary Japanese contract practices and expectations. Three attorneys (*bengoshi*) in the Kansai area, which was devastated by the Kobe earthquake in January 1996, were also interviewed in the latter half of 1996.

be consistent with some tendencies emerging from recent studies in England and the US. Differing structural parameters, however, may create some variation within or alongside that pattern.

Specifically, three types of contracting can be seen in all these legal systems, and notably in international transactions at least between New Zealand and Japan. The first involves one-off or spot contracts. Naturally, these can take place within the context of a long-term business relation. But when a dispute emerges, the tension between “the law” and social norms is usually particularly stark. The product or the deal is often less complex, so contract planning may be more adequate. Alternatively, default contract law provides more “bright-line rules”. The social norms involved are also usually less complex. But these will almost invariably not add up to the norms now set by “the law” for the situation. Generally, the result of this uneven contest will be that the relatively clear law will prevail, whether in negotiations between the parties or in court. The whole process will also be driven more by instrumental rationality, by simple short-run profit-maximising behaviour. But this will not always be so. A residual tension remains between the final outcome or decision, and the process of argumentation in the light of particular circumstances leading up to the decision.¹⁰⁵ Nonetheless, the space created for the parties and the courts to explore this tension is significantly curtailed by the initial choice of contract form, on the one hand, and the more ready applicability of bright-line legal rules to any dispute, on the other. As mentioned above (Part III.C.3), New Zealand companies tend to prefer this type of contracting. Its contract law also appears more comfortable operating within this normative framework – what Macneil and others term the “classical” model.¹⁰⁶ But there remain important examples of this behaviour and this model in the US and Japan as well.

A second type of contracting involves long-term contracts, of fixed duration, with agreed prices and/or quantities or clauses providing mechanisms to settle those within a tolerably clear range of outcomes. Examples are the Sugar Case (above Parts III.B, III.C.1) and the Weintraub hypothetical based on the *ALCOA* case (Part III.C.2). Here, the social norms become more complex. The law also attempts to absorb them into its normative world either through recognition of trade custom, or by developing broader rules or “standards” – what Macneil and others have termed the “neo-classical” or “relational” model.¹⁰⁷ But there remains an ambiguity in this type of contracting. The choice of the long-term contract form, the legal principles that can come into play in supporting that type of contract, and the social norms associated with the relations between parties can still be driven by instrumental rationality, albeit by more long-term profit-maximising behaviour. Often, therefore, this world remains a “neo-classical” one. Nonetheless, there is more scope for a truly “relational” world to emerge: occasionally,

¹⁰⁵ Compare J Habermas (W Rehg trans) *Between Facts and Norms* (MIT Press, Cambridge Mass, 1996), especially the Translator’s Introduction, ix, xi-xx; T Tanase “*Junpo Seishin to Kenri Ishiki* [Rights Consciousness and The Spirit of Abiding by the Law]” in T Tanase and J Kinoshita (eds) *Ho no Kodogaku [Law and Behavioural Sciences]* (Iwanami, Tokyo, 1991) 130; and more generally T Tanase “*Keiyaku to Shiteki Jichi: Josetsu* [Contract and Individual Autonomy: Introduction]” (1993) 43 *Hoso Jiho* 1. See also below Chapter Five, especially Parts II.B.2 and II.B.3

¹⁰⁶ See for example I Macneil “Contract: Adjustment of Long-Term Economic Relations under Classical, Neoclassical and Relational Contract Law” (1978) 72 *Northwest Univ L Rev* 854. See also above Part Two.

¹⁰⁷ Macneil, above n 106; above Part Two Introduction Part I.

the business relations and social norms can create “a normative framework which can trump the rational utility-maximising behaviour of actors”.¹⁰⁸ As mentioned, Japanese and US law seem more supportive of both worlds. That is related to and feeds back into the way businesspeople plan and implement their contracts – although there may be less such feedback in Japan, given more restricted ready enforceability of the relevant legal norms. Ironically, New Zealand law is still not supportive of either world, for instance in the doctrine of frustration’s restrictive and “all or nothing” approach to addressing complications in long-term contractual relationships (above Part II.A). But New Zealand companies seem to be planning and implementing long-term contracts regardless.

A third type of contracting seems increasingly prevalent. It involves a much looser framework agreement, superimposed over a series of individual contracts. It may have a (rolling-over) term; but clauses on pricing or quantities may only be in the most general of terms. Sometimes it can arrive on the scenes in a very low key fashion. One (New Zealand) party’s lawyers, for instance, had drafted a new framework agreement which may have been mentioned once when negotiating individual contracts, but was left in the drawer without any talk of its specifics, let alone elaborate negotiation and formal signing. Another (Japanese) party’s in-house legal personnel had insisted on a formal distributorship agreement with the New Zealand counterpart as part of an in-house legal audit. In a third case, a (Japanese) shipping company had decided from the start to make clear that its ships were to be available for three voyages at a time, each under a standard form voyage charterparty. Contracting parties nowadays seem quite open to concluding this sort of framework agreement. Perhaps it is a reflection of the penetration of legal norms into everyday life, on a global scale.¹⁰⁹ Importantly, this is not a simply a matter of reducing all contingencies to a lengthy contract document. Instead, a relatively short agreement is added to the existing pattern of contract order and confirmation, faxed offer and acceptance, or series of deals. Many terms are very vague indeed, more like statements of intent to cooperate closely in a long-term business association.¹¹⁰ Courts even in the US or Japan, able to invoke general clauses

¹⁰⁸ Compare H Collins “Competing Norms of Contractual Behaviour” in D Campbell and P Vincent-Jones (eds) *Contract and Economic Organisation* (Dartmouth, Aldershot, 1996) 88. He demonstrates at length that the use of long term contracts does *not*, in itself, necessarily entail more than long-term rational profit maximization. Going beyond the neo-classical world, he argues, requires something more.

¹⁰⁹ Compare generally L M Friedman *The Horizontal Society* (Yale UP, New Haven (Conn), 1999) with below Chapter Five Part II.B.1.

¹¹⁰ A similar phenomenon has been noted in certain contemporary US subcontracting relations: J Esser “Institutionalising Industry: The Changing Forms of Contract” (1996) 21 *L & Soc Inq* 593, especially 622-623. In subcontracting, problems of contractual unfairness (above Chapter Three) are more likely to emerge than in the trading relations which constituted most of the domestic business relations investigated in the company survey and follow-up interviews, and almost all of the New Zealand-Japan ones. Note for example the significant one-sidedness reported in both the US and Japan in, respectively, J Kenworthy, S Macaulay and K Rogers “‘The More Things Change ...’: Business Litigation and Governance in the American Automobile Industry” (1996) 631; and S Honma “*Jidosha - Jidosha Buhin Kogyo ni okeru Shitauke Kihon Keiyakusho no Tokucho - Shitauke Keiyaku no Jisshoteki Bunseki* [Peculiarities of the Basic Subcontracting Agreement in the Automobile and Automobile Parts Industries: An Empirical Analysis of Subcontracting]” (1994) *Hokei Kenkyu* 273. Even in such subcontracting relations, however, a framework agreement may add some symbolic value and create some space for the mediation of norms and factual circumstances described in the text above. This is alluded to, for example,

in statutes and case law like the principle of good faith, or to incorporate trade practices, would have difficulty in enforcing them. But in some cases they may, and experienced businesspeople nowadays are generally aware of that possibility.

The framework agreement also provides a new, more formally “normative reference point”¹¹¹ to guide parties’ behaviour, or the way they argue matters when a dispute arises. It still seems not to be readily invoked, or specific provisions pointed to; but sometimes it is, and at most other times it is present in a more tangible sense than a completely informal agreement. Thus, at one stage when the New Zealand charterer thought it might not be able to fully utilise the vessel as planned and requested the Japanese shipowner to cancel the voyage, the latter refused to do so unless the former covered any extra costs in reassigning the vessel, invoking their framework “three-voyage” understanding. The latter was particularly clear in this case, and the New Zealand charterer eventually took the vessel and made the voyage. But in the process of invoking this overarching agreement, more scope was created for normative discussion exploring the legal rules and principles involved, *and* their application to the particular circumstances the parties found themselves in. The process was facilitated by the perception among the parties that the framework understanding did have some legal effect, even if courts might have differed in this assessment, especially if following the strict approach evident in some charterparty cases in England in recent decades (above Chapter Two Part II.A.4).

It seems that the benefits of this way of structuring contemporary business relations, with the impact it has on dispute resolution, is not lost on New Zealand businesspeople, especially in their dealings with Japanese counterparts. Ironically, again, it is even more doubtful whether current New Zealand law and New Zealand courts can meet their expectations and facilitate this type of contracting. The situation in the US and in Japan seems more healthy, with the latter’s problems of enforceability less problematic than in the second type of long-term contracting. That is because what seems to be much more important here is the partially *symbolic* nature of the framework agreement, and especially the extra space it creates for *the parties* to mediate the tension between the factual and the normative (below Chapter Five Part II.B.2 and 3).

by one of the respondents in an analysis of electrical engineering subcontracting in Kagoshima Prefecture, reported by T Yamamoto “*Shitauke Torihiki Kihon Keiyakusho no Genjo to Hyojunyakkanteki Kisei* [Regulation by Standard Terms and the Current Situation with regard to Basic Subcontracting Agreements]” in I Takahashi and S Honma (eds) *Gendai Keizai to Hokojo no Henkaku* [Contemporary Economics and Changes in Legal Structure] (Tokyo, Sanshodo, 1997) 412, 433, n 11.

Compare also Deakin and others, above n 100, 105, 119, observing that in inter-firm contracting involving “framework or requirement contracts under which the supplier agreed to make and deliver goods on demand, but with the precise quantities being left up to the buyer when it put each order in” (used by 30% of the 16 UK firms interviewed), “the legal status of the ‘framework was often unclear; only the individual orders were clearly seen as giving rise to legal commitments of payment and performance, but there was a mutual understanding that the buyer would place a certain number of orders and that the supplier would be ready to supply”.

In another business context, compare for example E Schanze “Symbiotic Contracts” in C Joerges (ed) *Franchising and the Law: Theoretical and Comparative Approaches in Europe and the US* (Nomos, Baden-Baden, 1991) 67.

¹¹¹ T Daintith “The Design and Performance of Long-Term Contracts” in T Daintith and G Teubner (eds) *Contract and Organisation* (de Gruyter, Berlin, 1986) 164, 187 (citing S Macaulay “Elegant Models, Empirical Pictures, and the Complexities of Contract” (1977) 11 L & Soc’y Rev 507, 515).

Thus, three broad patterns of contracting are common in New Zealand and Japan, and possibly England and the US. There remain variations, however, driven by the state of contract law principles and the attitudes of law-makers, access to ready enforceability of legal rights, and perhaps the strength of “non-legal” norms like those of trade associations or more informal business groupings. These emerge as some of the important mechanisms and parameters to help make sense of the responses so far to the company survey. They give new content to the processes in each country of “bargaining in the shadow of the law”, and add insights on the ongoing debate (especially in the US and Japan) as to whether contract law should reflect commercial expectations and how the latter should be determined.¹¹² This ties in to even broader sociological and jurisprudential debate on the role and conception of law in complex industrialised societies, amidst globalisation of economic and political relations,¹¹³ introduced below (Part Three).

III.D Revising the Hypothesis – “Didactic Formality”: The “Law in Books” Trying to Lead the “Law in Action”

Before moving to that broader discussion, recall the hypothesis advanced above (Part III.A), namely that more formal legal systems should better reflect actual contract practices and expectations (contract law in action, possibly with normative dimensions related to the law) in their contract law rules (contract law in books, defined in a more positivist sense). Comparing some evidence from the empirical studies described above (Part III), with the contract law rules (Part II), seems to indicate that this hypothesis does not hold.

For instance, there was remarkably little difference in attitudes between New Zealand and Japanese student respondents to the Sugar Case contract renegotiation hypothetical. Overall they were quite sympathetic to the buyer, although preliminary data analysis for responses from US students suggest that the latter were tougher on the buyer. New Zealand and Japanese firms, administered the same hypothetical, revealed similar attitudes, although the New Zealand firms were someone tougher. Given the much more formal orientation of the New Zealand law of frustration (Part II.A), much tougher attitudes among New Zealanders should have been found. In addition, fully half of the New Zealand firms asked what a court should in a situation similar to that in the *ALCOA* case (Part III.C.2) thought that “the contract price should be adjusted to avoid ruinous loss to [the supplier] but give [the buyer] a significant savings over current market price”. That, of course, is a remedy totally excluded under the New Zealand law of frustration, which insists on either automatic termination or (much more often) no relief whatsoever.

The hypothesis also encounters difficulties with regard to some practices and expectations in long-term contracting on the part of New Zealand firms (Part III.C.3). Certainly, they undertook somewhat fewer contracts of one year or more in duration, compared to their Japanese and especially US counterparts. Slightly more also insisted on compliance with the contract, in response to a supplier or customer requesting a

¹¹² See above Part Two Introduction. Compare also for example J Pildes “The Destruction of Social Capital Through Law” (1996) 144 U Pa L Rev 2055, 2055-2056.

¹¹³ Compare for example K Keith “Governance, Sovereignty and Globalisation” (1998) NZACL Yearbook 3: 1997 477.

modification in price because of a shift in market prices. Yet the overwhelming majority did not insist on this (84.2%), with the most frequently cited factor relevant to this situation being – as in the US – “long and satisfactory” relations with that party. Certainly, too, New Zealand firms were more likely than Japanese and especially US firms “never” themselves to have asked for relief from, or modification of, contractual obligations. When however they did, the most common experience – as in the US and Japan – was “amicable working out of the problem by modification of the performance of the contract in question”. Such evidence also suggests that there may remain a gap between the law in action and the law in books, surprisingly large given the overall formal orientation of New Zealand law – including high truth formality in trial processes and high enforcement formality.

Of course, it is risky to overgeneralise from the limited set of responses obtained so far. A bigger sample may reveal a very different pattern, with contracting characterised instead by much more careful planning and documentation, and tough practices and expectations with respect to renegotiations. That may be so particularly if firms with no known dealings with Japan are surveyed and interviewed, and if their size and main areas of business are different. Yet the data so far indicate a significant and theoretically quite surprising gap.

Arguably, however, this conundrum can be resolved by reformulating the hypothesis, by proposing a third type of formality. The strict attitude of New Zealand courts in this area can be considered as exhibiting “didactic formality”.¹¹⁴ This develops an idea relegated to a footnote at the start of their discussion of trial processes in England and the US, where Atiyah and Summers remark, without elaboration:¹¹⁵

Lawyers who remain preoccupied with ‘law in books’ when it really does not represent ‘law in action’ may also be accused of taking an excessively ‘formal’ view, in a rather different sense.

“Didactic formality” can be defined as the preference – or hope, however forlorn – for any remaining gaps between law in books and law in action to be lessened by the latter (social practices and expectations) coming to accord with the former, rather than vice versa. Such formality can be expected to be greater in a legal system with higher degrees of other types of formality, such as enforcement and truth formality, as well as the dimensions of reasoning suggested by Atiyah and Summers.

Thus, New Zealand courts hope that by denying relief in cases like *Gore*,¹¹⁶ parties concluding long-term supply contracts will become more careful in planning and drafting for contingencies, obviating the need for adjustment during performance.¹¹⁷

¹¹⁴ Compare D F Henderson *Conciliation and Japanese Law: Tokugawa and Modern* Vol 1 (Seattle, U Washington Press, 1965) 4 (coining the term “didactic conciliation” to describe the tendency of mediators in Tokugawa Japan to educate, and impose their views of a just solution, on disputants).

¹¹⁵ Atiyah and Summers, above n 3, 158, n 3.

¹¹⁶ Above n 22. Recall that the Court of Appeal in that case also expressed the hope that the government will become involved in fashioning a statutory solution or framework for long-term supply contracts involving public utilities. Since the legislature has not yet acted on this point, this suggests over-optimism or a lack of appropriate boldness on the part of the judges. Because it also therefore means “inappropriate reasoning according to the criteria properly employed by the legal system in question”, Atiyah and Summers (above n 3, 31, original emphasis) might well criticise this as “formalistic”. Broader criticism is also attempted below, Chapter Five Part II.A.

¹¹⁷ Commentators may come to stress this too. For example, in noting *Motor Machinists Ltd v*

Moreover, by not readily enforcing a variety of informal agreements (above Chapter Two Part II.B), they hope to channel contracting party behaviour towards more formalisation. Finally, the courts hope that by awarding relief for contractual unfairness in only the most egregious cases (Chapter Three Parts III.C.2, IV.C), consumers and others will come to negotiate fairer terms in their contracts, or at least take more care in their dealings.¹¹⁸

English courts, still reluctant to revive the doctrine of unconscionable bargains and only recently starting to feel the effects of initiatives like the EC Directive on Unfair Contract Terms, for instance (Chapter Three Part IV.B), exhibit this attitude also. The decline of the doctrine of frustration in recent decades can be seen, again, as the courts trying to encourage parties to plan more carefully for contingencies (above Part II.A).¹¹⁹ This is especially so now that the types of triggering events (wars, strikes, nationalisations, embargos, and so on) have become more well known. As noted by Treitel in relation to commercial impracticability:¹²⁰

English law has tended to place greater emphasis than American law on the ... requirements of certainty and of the sanctity of contract, even though the result of doing so might occasionally appear to be harsh to one of the parties. It seems that mitigation of such hardship should, in the view of the English courts, be achieved not by a broad doctrine of discharge, uncertain in its operation, but by express contractual provisions, or, in times of general economic dislocation (for example by war) through special legislative intervention.

Craig [1996] 2 ERNZ 585 in which the Employment Court denied the employer's frustration defence, G Anderson "EC Act - Personal Grievance - Dismissal - Illness - Frustration of Contract" (1997) Employment L Bull 56 suggested that "a sensible employer" should take steps like including a force majeure clause.

¹¹⁸ See for example *Portman Building Society v Dusangh & Ors* (19 April 2000) unreported, English Court of Appeal Civil Division, per Ward LJ; *Richmond Ltd v DHL International (NZ) Ltd* (1991) 3 NZBLC 102,118 (CA). The notion that rules must be stated precisely for parties to plan their contractual relationships also underlies the judgment the seven-member Court of Appeal judgment in *Aoraki Corporation Ltd v McGavin* [1998] 3 NZLR 286, overturning one of its own earlier judgments. However, it has been pointed out that statistics cited in the majority judgment "may suggest that parties have indeed been able to make clear arrangements in this area [redundancy clauses in employment contracts] without legislative or court assistance" (P Pepperell "Rules and Certainty Rule (For Now)" (1998) 21 TCL 1).

¹¹⁹ This appears to be of little effect, at least among suppliers of manufactured goods in the UK, according to interviews of 16 companies carried out in 1993-1994 as part of a broader comparative empirical study. None of them included hardship clauses in their contracts with other companies, in sharp contrast to the 23 German companies interviewed (68% of which did so). See Deakin and others, above n 100, 124. See also the gaps between English contract law and business practices and norms, which English courts and even law reformers seem uninterested in acknowledging or even investigating more systematically, found by R Lewis "Contracts between Businessmen: Reform of the Law of Firm Offers and an Empirical Study of Tendering Practices in the Building Industry" (1982) 9 Brit J L & Soc'y 153, and other researchers cited above Part Two Introduction Part II.

¹²⁰ Above n 13, 260. On the other hand, perhaps English law will be infiltrated or perturbed by the more substantive approach of European law and thinking in this respect too (see for example M Parker "Force Majeure in EC Law" in E McKendrick (ed) *Force Majeure and Frustration of Contract* (Lloyd's of London Press, London, 1991) 139; T Wilhelmsson *Critical Studies in Private Law* (Kluwer, Dordrecht, 1992) 180-216 (developing some principles primarily in Nordic law into the broader principle of "social force majeure"). However, that seems likely to be even more difficult than with regard to good faith principles. Compare G Teubner "Legal Irritants: Good Faith in British Law and How Unifying Law Ends Up in New Divergences" (1998) 61 MLR 11, and generally Chapter Five Part II.B below.

A high degree of didactic formality also helps explain the strictness of English courts in not giving effect to informal dealings, especially in cases involving charterparties or ship sales when the words “subject to details” have been interposed. As mentioned above (Chapter Two Part II.A.4), it is hard to believe that only English courts – and not Second Circuit courts – are capable of correctly perceiving the practice and expectations in maritime commerce, or that the latter are so different in England compared to the US. Rather, what seems to drive the English courts in this area too is the hope that by setting a bright-line rule, they will encourage commercial parties to negotiate and conclude contracts in conformity those rules.¹²¹

This view of contemporary English contract law runs counter to suggestions that Commercial Bench judges are highly responsive to the expectations of international traders. A representative argument along these lines comes from a New Zealander who has made his career as an academic in Cambridge, Len Sealy:¹²²

The Commercial Court works on something of a chicken-and-egg principle: if it gives its clientele what it wants, they will come in goodly numbers, and if they come in such numbers, the court and those who make their living from it will prosper. And what they want is a law of contract as seen through Lord Diplock’s eyes [giving primacy to certainty, allowing parties to look after themselves or at least take advice].

The main difficulty with the proposition is that there is little empirical evidence as to “what they want”.¹²³ Sealy argues that English law’s reputation for applying clear rules attracts parties from all around the world to the Court and to arbitration in London, as evidenced by the frequent appearance of foreign parties in reported case law. However,

¹²¹ See especially Steyn J in *Star Steamship Society v Beogradska Plovidra* [1988] 2 Lloyd’s Rep 583 (*The Junior K*: above Chapter Two Part II.A.4). But see R Brownsword “Contract Law, Co-operation, and Good Faith: The Movement from Static to Dynamic Market-Individualism” in S Deakin and J Michie (eds) *Contracts, Cooperation and Competition* (Oxford UP, Oxford, 1997) 255, 259. He argues that there are competing ideologies in contemporary English contract law, with the former giving way to the latter. “Static market individualism”, he suggests, “imposes [its] view [, of the purpose of contracting and how transactions should be regulated,] onto the community; and in this sense, it ‘constitutes’ the market. By contrast, the ideology of dynamic market-individualism is to a considerable extent dependent, reflecting the practice and expectations of the contracting community (particularly the business community”. The former ideology is very similar to what this thesis proposes as “didactic formality”, while the latter is closer to the view taken in US and Japanese contract law. In view of the arguments made in this and the preceding two Chapters, it appears that any move in the latter direction may be much more difficult than Brownsword anticipates. Compare also his later assessment, in R Brownsword “General Considerations” in M Furmston (ed) *The Law of Contract* (Butterworths, London, 1999) 1, 94: “if the recent case law bears some imprints of dynamic market-individualist thinking, it equally bears the continuing imprint of static market-individualism”. The analysis in this Part suggests that any such transition is likely to be difficult for New Zealand too.

¹²² L Sealy “Ties That Bind: Security of Contract in England at the End of the 20th Century” (2000) 16 JCL 47, 49.

¹²³ Another difficulty concerns why judges would want to try to attract cases to their courts. This would just seem to create more work for themselves, for no obvious financial gain. English judges no longer get paid by the case, a factor which has been suggested as lying behind their willingness to intervene in arbitral proceedings until comparatively recently: see F Nariman, “The Spirit of Arbitration” (2000) 16/3 Arb Int’l 22, 23. Nowadays, one consideration may be sense of loyalty to former colleagues at the Bar, who do work involving the Commercial Court and arbitrations. But such motivations, and many others, should and can be tested empirically. See generally F Schauer “Incentives, Reputation, and the Inglorious Determinants of Judicial Behaviour” (2000) 68 U Cinn L Rev 615.

he acknowledges that this may occur “in part for reasons of history: for instance, because the exchange or trading association through which their deal was concluded is based there”.¹²⁴ The importance of this factor should be determined by empirical research, for example through statistical analysis of the subject matter dealt with in cases and changes in the relevant market institution, or through surveys and interviews. The latter could also inquire as to what the parties really wanted from dispute resolution in the Commercial Court, and whether they got what they wanted. It seems likely that an attraction of London as a dispute resolution forum will be related to factors largely unrelated to the nature of the substantive law of contract, such as speed of proceedings, the quality of lawyers, the independence of the judiciary from political influence, and so on.¹²⁵ Even if certainty of contract law rules is reported to be a major factor, by parties who ended up the Commercial Court, one could investigate their attitudes after being subjected to such rules. A starting point could be to determine how many foreign parties who appear in reported and unreported judgments later reappear in separate proceedings, at different stages of the Court’s history. Further, because even unreported judgments represent only a small proportion of litigated disputes, especially in a legal system allegedly focused on certainty of outcome, one should also examine patterns in the drafting forum selection and choice of law clauses.

All this research should also be comparative, comparing jurisdictions like the Second Circuit in the US which also generates much commercial litigation involving foreign parties, yet applies more substantive contract law principles.¹²⁶ Already, moreover, it seems that English arbitrators have not been giving parties to international commercial transactions “what they want”. Since the 1970s, much new arbitration business seems to have gone to venues like the AAA in New York and the International Chamber of Commerce in Paris.¹²⁷ This parallels the emergence of the “new *lex mercatoria*”, based on broad standards rather than bright-line rules, with which arbitration specialists in England still seem to be much more uncomfortable about compared to their counterparts elsewhere.¹²⁸

In short, it may be true that certainty of contract law rules meets the expectations of *some* international traders, but the overall and relative significance of this is not proven. Another problem is that English law may have over-generalised from perceptions (right or wrong) of those expectations, establishing contract law rules which then come to be applied inappropriately in other contexts.¹²⁹ Empirical studies of

¹²⁴ Above n 22.

¹²⁵ Compare also E McKendrick “English Contract Law: A Rich Past, an Uncertain Future?” [1996] CLP 25, 59; E Scrutton “The Work of the Commercial Court” (1932) 1 CLJ 6 (stressing in particular the need for speedy dispute resolution).

¹²⁶ Compare for example H von Freyhold “Cross-Border Legal Interactions in New York Courts” in V Gessner (ed) *Foreign Courts: Civil Litigation in Foreign Legal Cultures* (Dartmouth, Aldershot, 1996) 43.

¹²⁷ See generally L Nottage “The Vicissitudes of Transnational Commercial Arbitration and the *Lex Mercatoria*: A View from the Periphery” (2000) 16 Arb Int’l 73.

¹²⁸ K Berger and others “The CENTRAL Enquiry on the Use of Transnational Law in International Contract Law and Arbitration – Background, Procedure and Selected Results” in K Berger (ed) *The Practice of Transnational Law* (Kluwer, The Hague, 2001) 91.

¹²⁹ Compare also M Bridge “Good Faith in Commercial Contracts” in R Brownsword, N Hird & G Howells (eds) *Good Faith Good Faith in Contract: Concept and Context* (Dartmouth, Aldershot et al, 1999) 139, 147:

It is a fair reproach to English contract law that it unthinkingly treats the rules and principles of

contract law in action show significant gaps between the law and both practices and expectations in many types of domestic transactions, such as manufacturing, construction, and dealings involving the public sector.¹³⁰ Even commentators like Roy Goode, who sees the strength of English contract law overall as having included a responsiveness to business expectations, believes that they are now not being met in several areas, for instance in regard to agreements to agree, suspension of performance, assurance of future performance upon future performance, and the all-or-nothing approach and limited scope for relief from commercial impracticability under the doctrine of frustration. In the latter respect, despite a reluctance to allow into English law new generalised principles of good faith and substantive unconscionability, he argues that it presents:

a legitimate case for invoking a doctrine of substantive unconscionability. It would be inequitable for a party to seek to hold the other to the terms of the original bargain in the light of changed circumstances, and reasonable that the court should offer him the choice of accepting the modification or having it terminated by the court.

Goode appeals to German law in support of this approach, which is also that of Japanese law (above Part II.D); and to other European, US, and/or transnational law in criticising all four areas in which contemporary English contract law is thought not to be meeting business expectations.

However, the reluctance to countenance broader standards and applicability of the doctrine of frustration has roots deep in English history. In 1916, in a case involving an increase in freight rates, Scrutton J insisted that it could only operate upon “physical or legal prevention, not economic unprofitableness”.¹³¹ It may be that he was in tune with commercial expectations in the shipping trade at the time, for Karl Llewellyn acclaimed him for the robust business sense exhibited in the Judge’s later writings.¹³² However, it is probably too late to know, and the more important question is whether businesspeople nowadays would agree that commercial impracticability should not provide relief. What is clear is that Commercial Court Judges, beginning with Scrutton J and continuing with Bingham LJ in *The Super Servant Two*, have stressed that parties concerned about hardship caused by the strict English doctrine should make contractual provision for future events.¹³³ The didactic tone is unmistakable. Treitel also approves of such suggestions, noting how the GAFTA standard form used in the grain trade had included elaborate provisions, and were redrafted after they were held not to have

commodity sales, time and voyage charterparties and so on as though they could be applied without modification in very different contractual settings.

Such tendencies are surely related to the fact that a significant majority of people in England appear to find the courts to be out of touch with ordinary people’s lives. In a recent large-scale survey looking at access to civil justice generally, 66 percent thought this was so, 21 percent were uncertain, while only 13 percent thought they were in touch. See H Genn *Paths to Justice: What People Think and Do About Going To Law* (Hart, Oxford, 1999) 239.

¹³⁰ See for example Lewis, above n 119; and above Part Two Introduction Part II.

¹³¹ *Blythe & Co v Richards, Turpin & Co* (1916) 85 LJKB 1425, 1427. See also *Comptoir Comm Anversois v Power Son & Co* [1920] 1 KB 868, 196 per Scrutton LJ.

¹³² Compare K Llewellyn “On Warranty of Quality, and Society” (1936) 36 Colum L Rev 677, 707, which had cited *Ronaasen & Son v Arcos Ltd* [1932] 43 Lloyds Rep 1 and Scrutton, above n 125.

¹³³ *Comptoir*, above n 131, 970; *The Super Servant Two*, above n 10, 8.

covered a particular supervening event.¹³⁴ However, Treitel's view that cases involving such clauses should be distinguished from those developing the general doctrine of frustration, and not influence the latter, runs counter to one argument presented by Jack Beatson in favour of abandoning a strict rule against allowing relief for commercial impracticability under English law:

The rules governing discharge for frustration are "default rules" provided by the law, and it is arguable that a default rule should seek to provide a reasonable person's estimation of what the parties would have done had they considered the matter ...

Beatson leaves his counter-argument at that. Yet it allows for a much less didactic approach, investigating not only foreign and transnational rules on this point (as Goode does), but also the standard form contracts used and other indications of what businesspeople generally consider reasonable.

Such empirical investigation appears to have supported Llewellyn's decision to allow for commercial impracticability and flexible allocation rules in the UCC.¹³⁵ This was part of a longstanding and well articulated philosophy, framed by debates in contract law theory dating back to the 1920s (above Part Two Introduction Part I), which reinforce distinctly lower "didactic formality" in US law. Of course, the recent debates about reforming the UCC have engendered empirical and theoretical studies which question the nature of expectations and practices in different trades and their optimal relationships to black-letter law. But they too have ingested heavy doses of legal realism. Similar comments apply to Japan (above Chapter Two Introduction Parts I and II).¹³⁶ By contrast, despite statements by judges and academic commentators in England and New Zealand that contract law is to be shaped to accord with the expectations of commercial parties, there have been far fewer attempts to systematically and openly explore such expectations (Chapter Two Introduction Parts III and IV). Combined with more appeals to the need to promote certainty and careful planning of contractual relationships, this indicates that both jurisdictions put significantly more weight on "didactic formality", reinforcing formal reasoning and related institutions more generally. It seems that Blackstone's words in 1809 still have more weight than in the US and Japan: "Merchants ought to take their law from the courts, and not the courts from the merchants".¹³⁷

¹³⁴ Treitel, above n 13, 449.

¹³⁵ White, above n 43.

¹³⁶ See also H Katz "When Should An Offer Stick?" (1996) 105 Yale LJ 1249, 1251-1253. He suggests that most US courts and commentators, following for instance the lead given in the UCC, analyse and advocate contract law rules by adopting an "interpretive" or "convention maintenance" approach, searching "for the parties' reasonable or customary expectations"; "legal analysis proceeds from the bottom up". However, he prefers a "regulatory perspective", where "the direction of analysis is top-down". The latter can be seen as more "didactic", and the approach more common in English and New Zealand contract law. Like that of some other critics of the "UCC approach", however, Katz's arguments come primarily from "law and economics" – following directly within the tradition of legal realism. In Japan, too, contemporary theorists trying to reevaluate the relationship between legal and social norms draw on a tradition of legal realism, and more recently, the recent "law and economics" theories in the US. See for example H Sono "*Shokanshuho to Nin'i Hoki* [Commercial Customary Law and Default Rules]" (1999) 1155 *Juristo* 85; and generally above Part Two Introduction.

¹³⁷ K Berger "The New Law Merchant and the Global Market Place" in K Berger (ed) *The Practice of Transnational Law* (Kluwer, The Hague, 2001) 1, 4 n 15, citing Blackstone's *Commentaries*

IV Conclusions

Part II above demonstrates that English and especially New Zealand law are much more wedded to formal reasoning along the dimension of “authoritative formality”, compared to US and especially Japanese law, in the “time dimension” as well as the “contextual dimension”, explored in the preceding Chapter. This Chapter focused mainly on key doctrines dealing with the problems arising from supervening and extreme changes in circumstances, however, and the analysis could be broadened to consider other legal doctrines and principles which also deal with such problems.¹³⁸ As in Chapters Three and Two, however, the preceding comparison of key doctrines gives grounds for predicting that many of latter, related doctrines will also be more formal in England and perhaps especially New Zealand; but demonstrably more substantive in the US and Japan.¹³⁹ These contrasting approaches are also likely to be found beyond contract law per se, reflecting and reinforcing differing orientations overall.¹⁴⁰

Part III broadened the scope of inquiry differently, moving beyond comparisons of legal reasoning to empirical studies of attitudes and practices relating to economic dislocation in contractual relations, especially in long-term contracts (Parts III.B and C). A significant gap was identified between this “contract law in action” and the “contract law in books”, even in New Zealand, with comparatively high enforcement and truth formality which arguably draw together the law in books and law in action more generally. Ongoing comparative research should explore that gap further.¹⁴¹ Already, it has suggested a refinement to Atiyah and Summers’ framework, namely the notion of “didactic formality”. Consistently with the rest of this thesis, adding that third type of formality to the framework reveals contrasting orientations between New Zealand and English law on the one hand, and Japanese and US law on the other, not only in this area of law but also perhaps in others such as formal requirements for contract formation (Chapter Two) and contractual unfairness (Chapter Three). Accordingly, the four legal systems can be positioned along two further dimensions (lines 4 and 5) in Figure 3 above (Part Two Introduction).

on the Laws of England (Vol 1, 15th ed, 1809) 273.

¹³⁸ See for example J W Carter “The Renegotiation of Contracts” (1998) 13 JCL 185.

¹³⁹ For example, the requirement that contract terms be “certain”. Compare already for example McLauchlan and ECNZ (both above n 26) with Farnsworth (above n 35, Vol I, 353-372) and *Oglebay* (above n 47).

¹⁴⁰ Hence, for instance, the reluctance to recognise a duty to negotiate in good faith in employment law (G Anderson “Collective Bargaining and the Law: New Zealand’s Employment Contracts Act Five Years On” (1996) 9 Aust J Lab L 107, 124); and attempts to resolve Treaty of Waitangi claims “finally” (compare K Minogue *Waitangi: Morality and Reality* (NZ Business Roundtable, Wellington, 1998) with A Mikaere “Settlement of Treaty Claims: Full and Final, or Fatally Flawed?” (1997) 17 NZULR 425 and E Durie “Will the Settlers Settle? Cultural Conciliation and the Law” (1996) 8 Otago L Rev 449, 455-459).

¹⁴¹ In autumn 1999 a mail survey including some Weintraub questions was administered to Japanese companies dealing with Thailand, and Thai companies dealing with Japan, and follow-up interviews were conducted in November 1999 and March 2000. (This is part of a collaborative research project on contract renegotiation in the wake of the Asian economic crisis, organised by Yoshitaka Wada (Kyushu University) and funded by the Nomura Securities Foundation.) It is hoped that the project can be extended to include New Zealand.

However, even refining Atiyah and Summers' model by adding the dimension of didactic formality may not be enough to explain fully – let alone to begin justifying *normatively* – the clearly complicated interactions between law in action and law in books. In particular, the increasing use of and interest in framework agreements in long-term contracting between New Zealand and Japan suggests an important way in which parties revisit and (sometimes) restructure their long-term business relationships. That appears not to be driven solely or even primarily by immediate or even long-term self-interest; but nor is it driven by altruism. Rather, the framework agreement provides a new normative reference point, which in turn opens up the possibility of new communication processes between persons and structures within different organisations. Except that it mostly arises from party initiative, that promotion of communication processes finds some similarities in the creation of new types of institutions and the expanding role for general clauses in Japan and in other legal systems in recent decades.¹⁴² Since the 1980s, various legal theories have focused on such developments to expound theories of “reflexive law”, or “neo-proceduralist” theories of contemporary law generally. These are the focus of Chapter Five below, ultimately going “beyond form and substance”.

¹⁴² Compare for example T Uchida “*Gendai Keiyaku Ho no Aratana Tenkai to Ippanjoko* [General Clauses and New Developments in Contemporary Contract Law]” (1993) 514 NBL 6.

PART THREE: FORM, SUBSTANCE AND NEO-PROCEDURALISM

INTRODUCTION

Part One of this thesis set out to revisit lingering stereotypical views of Japanese law as unique or even oxymoronic, adopting a broader comparative perspective. Chapter One expanded and updated Atiyah and Summers' "form-substance" framework of analysis, based on various dimensions of formality in legal reasoning, two broader varieties of formality, and corresponding legal institutions. The framework was extended to compare Japanese and New Zealand law generally, as well as US and English law. Specifically, Chapter One demonstrated that Japanese law adopts a more substantive orientation, similar to that in US law, compared to the formal orientation of both English and New Zealand law. It also showed the consistency of this orientation in all these legal systems, even in Japanese law which borrowed many normative and institutional structures from the West over a century ago. In addition, Chapter One drew on some recent empirical studies (Chapter One Part II.D). Those provided some confirmation of a further suggestion by Atiyah and Summers: that their thesis was amenable to quantitative social scientific verification, not just the more broad-brush qualitative comparative observations making up the bulk of their original study. Thus, Part One suggested new directions for comparative legal studies, particularly those encompassing Japanese law generally,

That analysis was necessarily very broad, covering four legal systems and multiple parameters, so Part Two examined in much more detail whether the contrasts applied in the narrower field of contract law. In four areas, significant differences were found again between Japanese and US law, on the one hand; and New Zealand and English law, on the other. This therefore reinforced the need to reevaluate any further stereotypes about Japanese contract law, as well as the usefulness of the Atiyah and Summers' framework. First, in an extended Introduction to Part Two, it was shown how the US and Japan developed a much more substantive orientation in developing contract law theory more generally, dating back to the early decades of the 20th century. Secondly, applying Atiyah and Summers' notion of "content formality" in legal reasoning, Chapter Two focused closely on case law developed by courts in the four legal systems to deal with an issue involving formal requirements for contract formation. Along the dimension of "authoritative formality", Chapter Three examined in less detail, but in broader compass, a range of doctrines related to contractual unfairness. Along the same dimension, Chapter Four Part II considered in similar detail a narrower range of doctrines providing relief in the event of supervening changes in circumstances. Part III then broadened considerably the scope of inquiry, by incorporating some results from related comparative empirical studies. Those resulted in a refinement to Atiyah and Summers' framework, namely the suggestion of a third variety of formality: "didactic formality". Along this dimension, too, New Zealand and English law were found to differ significantly from Japanese and US law, especially with regard to the courts' attitudes towards supervening events, but perhaps also with respect to contractual unfairness and formal requirements for contract formation. Combined, the contrasts in these four areas suggest a very different orientation in contract law overall in the four jurisdictions: distinctly more classical or neoclassical in New Zealand and English law, compared to Japanese and US law. Part Two therefore aimed to provide new

perspectives on contemporary debates on contract law theory generally.

Part Three now broadens the scope of enquiry even further. Results from the empirical study of contracting, particularly the use and functions of framework agreements (above Chapter Four Part III.C.4), indicated the possibility of “proceduralisation” of contractual relationships in at least some situations. Chapter Five below sets this in the context of recent general theories on the proceduralisation of contemporary law. It therefore proposes an even more ambitious refinement to Atiyah and Summers’ legal framework, albeit one not necessarily inconsistent with that framework (Part II.A). Part II.B introduces two major theoretical variants, the systems-theoretical approach of Niklas Luhmann and Günther Teubner (Part II.B.1) and Jürgen Habermas’ discourse theory of law (Part II.B.2). It sets out fundamental concepts for each, while picking out some more concrete arguments most directly relevant to this thesis. Part II.B.3 then suggests that these offer promising new insights into the evolution of Japanese law generally, as well as contract law and product liability law (related to regulation of contractual unfairness). The arguments presented are the most tentative of all those in this thesis, but they follow the trend set by leading contract law theorists in all four jurisdictions, attempting to develop an empirically-informed philosophical basis for the observation and critique of contemporary developments in contract law.¹ Part III concludes by contending more broadly that such general theories of law must be grappled with, to provide a firmer foundation in social science and legal philosophy for “reorienting” comparative legal scholarship as well.

¹ Compare for example D Kennedy “From the Will Theory to the Principle of Private Autonomy: Lon Fuller’s ‘Consideration and Form’” (2000) 100 Colum L Rev 94; T Uchida *Keiyaku no Jidai: Nihon Shakai to Keiyakuho [The Contract Era: Japanese Society and Law]* (Iwanami Shoten, Tokyo, 2000); D Campbell “Reflexivity and Welfarism in the Modern Law of Contract” (2000) 20 OJLS 477; R Brownsword “General Considerations” in M Furmston (ed) *The Law of Contract* (Butterworths, London, 1999) 1; R Bigwood “Conscience and the Liberal Conception of Contract: Observing Basic Distinctions” Part One (2000) 16 JCL 1.

CHAPTER FIVE: FORM, SUBSTANCE, AND NEO-PROCEDURALISM IN COMPARATIVE PRIVATE LAW

- I Introduction
- II Rebuilding Legal Theory
 - II.A Beyond Form and Substance
 - II.B Formal, Material, and Reflexive Legal Rationality in Modern Law
 - 1 Systems Theory and Autopoiesis
 - 2 Discourse Theory of Law
 - 3 Proceduralisation of Japanese Law: Contract and Product Liability
- III "Reorienting" Comparative Legal Studies and Contract Law Theory

I Introduction

One of the aims of Atiyah and Summers' study was to contribute more generally to jurisprudential enquiry. By identifying differing types of legal reasoning and supporting visions of law in concrete contexts, namely English and US law, they called into question the attempts by some legal philosophers to develop a "universal jurisprudence".² Rather similarly, Atiyah had previously looked to more concrete contract law principles to revisit broader philosophical debates about promising, while using the latter to develop contract law theory.³

Part II.A below argues that their original study did not develop adequately this potential. That is understandable, for as it was their book ran to over 400 pages, and some of the most interesting "proceduralist" general theories of law have only become more prominent in the 1990s (Part II.B). Nonetheless, those theories now indicate important tendencies at least in Japanese law (Part II.B.3), and arguably more generally in other advanced socio-economic and legal systems (Part II.B.1), as well as allowing greater scope for normative critique of legal systems than that proposed by Atiyah and Summers in their work (Part II.B.2). Developing more ambitious legal sociology and jurisprudential theory in this way, moreover, takes comparative legal scholarship further than they were able. Contemporary phenomena, such as globalisation of economic and legal affairs, can then be examined in a more sophisticated manner. New insights into contemporary debates in contract law theory are generated as well (Part III).

II Rebuilding Legal Theory

II.A Beyond "Form and Substance"

In concluding their study, Atiyah and Summers offer only a brief attempt at "evaluation and criticism" of the two legal systems they examined.⁴ They suggest there exist strong rationales supporting the general practice of resorting to formal legal reasoning. Those include the conceptual or jurisprudential argument that any viable "legal" system requires a degree of authoritativeness and formal mandatoriness, rather than just norms

² P S Atiyah and R S Summers *Form and Substance in Anglo-American Law: A Comparative Study of Legal Reasoning, Legal Theory, and Legal Institutions* (Clarendon Press, Oxford, 1987) 415-419.

³ P S Atiyah *Promises, Morals, and Law* (Clarendon Press, Oxford, 1981).

⁴ Atiyah and Summers, above n 2, 420-426.

“giving rise to prima facie reasons no weightier than the substantive considerations underlying them”,⁵ and several functional and pragmatic rationales. One is the legal system’s function of making decisions which have some finality, implying certain procedures to be followed (at least in most cases). A second is cost-effectiveness, as (arguably) with enforcement of contracts based on the parties’ own agreement: that being a much cheaper basis to resolve disputes than leaving matters “at large for the judge to decide, for instance, on what would be a fair price for services rendered, or whether any reliance on a promise had been justifiable”.⁶ A third justification, proposed to support formal reasoning generally, is that its use may minimise the risk of error:⁷

When writing is required for a will, for instance, this minimises the danger that we will incorrectly give effect to what we think are the intentions of the testator, although of course it does so at the price of excluding from consideration cases where there is very good ground for thinking we know the testator’s real intentions, even though they were not written down. If, however, we are willing to look at all the cases in which we think there is such good ground, we are more likely to go wrong than if we exclude such cases from consideration.

That involves an empirical assumption, they argue; if this is unsoundly based, then formal reasoning becomes inappropriate. Fourthly, “formal reasons may be justified by value judgments about the appropriate persons to make decisions, as in the cases of contracts once again, where one of the reasons for not going behind the agreement of the parties in the actual case is the value judgment that individual freedom of choice should be respected”.⁸ Fifthly, “there is the value of repose and security and peace in human affairs”, hence strict rules in statutes of limitations and “why judgments must be treated as finally disposing of many issues”.⁹ A sixth justification is that “generally, appropriate formal reasoning is likely to make the law more certain and predictable”.¹⁰ In addition, Atiyah and Summers argue even more briefly that all such “second-level reasons” can combine, in determining the justificatory force of particular formal reasons in a particular context. This possibility arises because “first level reasoning” typically consists of particular instances of substantive reasoning along with “varying degrees of the four key attributes of formality” (authoritative formality, and so on).¹¹

Even within these strictures, New Zealand contract law seems problematic in several respects. Following the argument as to the third rationale, for instance, New Zealand law’s strict attitude towards enforceability of informal agreements seems dubious in the light of several reported instances where the parties nonetheless seem to have intended to be bound.¹² The second rationale also seems weak in cases involving very long-term contracts where frustration is argued, such as *Gore*,¹³ since the courts

⁵ Atiyah and Summers, above n 2, 42, 24.

⁶ Atiyah and Summers, above n 2, 24.

⁷ Atiyah and Summers, above n 2, 25.

⁸ Atiyah and Summers, above n 2, 26.

⁹ Atiyah and Summers, above n 2, 26.

¹⁰ Atiyah and Summers, above n 2, 26.

¹¹ Atiyah and Summers, above n 2, 27-28.

¹² D McLauchlan “Informal Agreements for the Sale or Lease of Land: When Are They Contracts?” (1993) NZ Recent L Rev 442; D McLauchlan “‘We Have a Deal’ - Mere Consensus or Concluded Bargain?” (1996) 2 NZBLQ 206; NZ Law Commission *Repeal of the Contracts Enforcement Act 1956: A Discussion Paper* (Wellington, 1997). See generally above Chapter Two Part II.B.

¹³ [1997] 1 NZLR 537. See above Chapter Four Part II.A.

must incur costs anyway in digging into a lengthy and complicated history to ascertain the parties' original "intentions". Similar criticisms can be addressed towards contemporary English contract law.

Atiyah and Summers also suggest that second-order substantive reasons should be appraised differently in different legal systems. They stress, for instance, that although an English court adopted more formal reasoning than an earlier US court in interpreting a limitation statute, in the case of an insidious disease whose early symptoms were not detectable, legislation dealing with this problem was quickly enacted in the England soon thereafter.¹⁴ Their response to cases like *Gore*, then, might be that formal reasoning was still justified because the New Zealand legislature or executive can remedy any dispute remaining between the parties, or develop rules or policies to address the issues raised in that case. In fact, this has not occurred, despite the Court of Appeal's rather strong hint that this should be done. Accordingly, even Atiyah and Summers might criticise that judgment as excessively "formalistic" – involving "inappropriate reasoning according to the criteria properly employed by the legal system in question".¹⁵

Combined with their stress on the way legal systems tend to fit together as a cohesive whole, and hence their skepticism about the possibility of successfully "transplanting" aspects of one legal system to a differently oriented one,¹⁶ Atiyah and Summers seem to allow only limited potential for developing normative critique. That potential can be dramatically expanded by considering more broadly the historical evolution of legal systems in modern democracies characterised by industrialising economies and increasing social differentiation. Atiyah's own monumental study of *The Rise and Fall of Freedom of Contract*¹⁷ itself captured key elements in this development in England. Ironically, the lack of such broader perspective in his work co-authored with Summers results in theory-building inadequate to develop both a description of where complex legal systems may be heading, at the start of a new millennium, and how to appraise this normatively.¹⁸

A useful point of departure is to note that the main focus of Atiyah and Summers' study is on various dimensions of legal reasons in a narrow ("first-order") sense. "Second-order" reasons – especially the value of individual autonomy and

¹⁴ Atiyah and Summers, above n 2, 29-30 (comparing *Cartledge v Jopling & Son Ltd* [1963] AC 758 with *Urie v Thompson* (1949) 337 US 163).

¹⁵ Atiyah and Summers, above n 2, 31 (original emphasis). See above Chapter Four Part II.D.

¹⁶ Atiyah and Summers, above n 2, 426-428. There is now a voluminous literature on "legal transplants". See for example A Watson "From Legal Transplants to Legal Formants" (1995) 43 AJCL 469; W Ewald "Comparative Jurisprudence (II): The Logic of Legal Transplants" (1995) 43 AJCL 489-510. Compare also for example E Feldman "Patients' Rights, Citizens' Movements and Japanese Legal Culture" in D Nelken (ed) *Comparing Legal Cultures* (Dartmouth, Aldershot, 1997) 215; L Nottage "The Still-birth and Re-birth of Product Liability in Japan" in D Nelken and J Feest (eds) *Adapting Legal Cultures* (Hart, Oxford, 2001) 147.

¹⁷ P S Atiyah *The Rise and Fall of Freedom of Contract* (Clarendon Press, Oxford, 1979).

¹⁸ Summers has continued to write prolifically, attempting to develop more general legal theory which arguably corresponds to "second-order" reasoning: see for example R Summers "The Formal Character of Law - Criteria of Validity for Contracts" (1995) 9 JCL 29; R Summers "How Law Is Formal and Why It Matters" (1997) 82 Cornell L Rev 1165. However, these attempts have become difficult to follow (see for example the bewilderment expressed in R Cooke "Introduction" (1995) 9 JCL 1), and arguably more and more staid (see L Barnett "Defensor Fidei: The Travails of a Post-Realist Formalist" (1995) 47 Fla L Rev 815).

consequentialist arguments, such as cost-effectiveness – are only considered briefly, as just mentioned. Rather similarly, in his sociological comparison of the emergence of modern law, Max Weber focused more on *internal structures* of modern law, supporting “formal rationality”, defined as a strong rule-orientation involving conceptually constructed rules applied through deductive logic. Yet Weber also noted that some anti-formal tendencies had emerged from the early 20th century, involving a “materialisation” of law or the emergence of a “substantive” rationality. The latter was characterised by a purposive orientation, whereby purposive programmemes of action are implemented through regulations, standards and principles. As Teubner points out, more is involved in each type of legal rationality. Historically, a formal internal structure has been associated with a particular *justification of law*, namely the perfection of individualism and autonomy; and a particular view of the *external functions of law*, namely structural premises for the mobilisation and allocation of resources in a developed market society, and for the legitimisation of the political system:¹⁹

Dimensions	Formal	Substantive	Reflexive
Justification of Law	The perfection of individualism and autonomy; establishment of spheres of activity for private actors	The collective regulation of economic and social activity and compensation for market inadequacies	Controlling self-regulation: the coordination of recursively determined forms of social cooperation
External Functions of Law	Structural premises for the mobilisation and allocation of resources in a developed market society and for the legitimisation of the political system	The instrumental modification of market-determined patterns and structures of behaviour	Structuring and restructuring systems for internal discourse and external coordination
Internal Structures of Law	Rule-orientation: conceptually structured rules applied through deductive logic	Purpose-orientation: purposive programmemes of action implemented through regulations, standards and principles	Procedure orientation: relationally oriented institutional structures and decision processes

Tellingly, Atiyah and Summers’ fourth “second-level” justification of *formal* reasons includes the value of promoting individual autonomy. So too, in considering differing degrees of content formality when comparing rules as to formal requirements in contract formation (above Chapter Two), a guiding premise can be to give effect to the parties’ intentions.

Yet that is not the only possible justification for such rules, and for law generally. Even stricter requirements for contracts to be in writing can be aimed, for instance, at promoting economic planning in some socialist legal systems. The justification of law in such systems manifests itself in the collective regulation of

¹⁹ G Teubner “Substantive and Reflexive Elements in Modern Law” (1983) 17 L & Soc Rev 239, 257 (Table 1). See also H Willke “Three Types of Legal Structure: The Conditional, the Purposive, and the Relational Programme” in G Teubner (ed) *Dilemmas of Law in the Welfare State* (de Gruyter, Berlin, 1987) 280. Compare D Kennedy “Form and Substance in Private Law Adjudication” (1976) 89 Harvard Law Review 1685 (suggesting that the correspondence may have been no more than an historical accident).

economic and social activity. Even in capitalist welfare states, this sort of justification in the legal system has emerged throughout the 20th century, tied to growing instrumentalism as a new external function of law, and a more purposive-oriented internal structure of law. It may be that this transformation has been stronger in the US (and Japan²⁰) than in England; but Atiyah's earlier work demonstrated exhaustively that it was very significant in England too, at least in contract law.²¹ His assertions over the 1990s that English law nowadays simply may be returning to individualistic justifications, rule-orientation and so on, is far from convincing.²² Specifically, many British scholars recently have drawn primarily on the legal sociology developed by Luhmann and especially Teubner (below Part II.B.1) to argue that in many instances, contemporary English law reveals a strong "reflexive" or (neo-)proceduralist rationality,²³ in common with other complex industrialised democracies. Other examples may be the growing prominence of the Office of Fair Trading,²⁴ offering a new forum and procedures for the interaction of legal norms, consumer needs and the dictates of business organisations (above Chapter Three Part IV.B). Although not yet conceptualised carefully in this way, the growth of sector-specific Ombudsmen schemes in New Zealand,²⁵ "collaborative governance" in US administration,²⁶ and industry association based Product Liability ADR Centres in Japan (below Part II.B.3.2),²⁷ may also be seen as promoting such reflexive rationality in increasingly complex democratic economies.

II.B Formal, Material and Reflexive Rationality in Modern Law: Towards a "Neo-Proceduralist" Paradigm

The theory of reflexive rationality accepts that focused intervention in social processes

²⁰ See for example M Takahashi *The Emergence of Welfare Society in Japan* (Ashgate, Aldershot, 1997).

²¹ Atiyah, above n 17.

²² See for example P S Atiyah "Freedom of Contract and the New Right" in his *Essays on Contract* (Clarendon Press, Oxford, 1990) 355.

²³ See for example C Scott "The Proceduralization of Telecommunications Law" (Paper presented at the Seikei University 50th Anniversary Conference, "Dreams and Dilemmas in the Asia-Pacific Region", Tokyo, 12-13 March 1999) 243; R Nobles and D Schiff "The Never-Ending Story: Disguising Tragic Choices in Criminal Justices" (1997) 60 MLR 293; P Vincent-Jones "Responsive Law and Governance in Public Services Provision: A Future for the Local Contracting State" (1998) 61 MLR 362; J Black "Constitutionalising Self-Regulation" (1996) 59 MLR 24; J Black "Regulation as Facilitation: Negotiating the Genetic Revolution" (1998) 61 MLR 621; M King "Children's Rights as Communication: Reflections on Autopoietic Theory and the United Nations Convention" (1994) 57 MLR 385; A Beck "Is Law an Autopoietic System?" (1994) 14 OJLS 401; R Rogowski and T Wilthagen (eds) *Reflexive Labour Law: Studies in Industrial Relations and Employment Regulation* (Kluwer, Deventer, 1994); C Graber and G Teubner "Art and Money: Constitutional Rights in the Private Sphere?" (1998) 18 OJLS 61. A rather rare critique, mainly on theoretical grounds, is D Nelken "Blinding Insights? The Limits of a Reflexive Sociology of Law" (1998) 25 J of L & Soc 407.

²⁴ See for example L Santin "Unfair Contract Terms in the Mobile Phone Industry" (1999) 19 ACCC Journal 36, 38; above Chapter Three Part IV.B.

²⁵ See for example N Tollemache "Taking the Ombudsman Concept into the Private Sector: Notes on the Banking Ombudsman Scheme in New Zealand" (1996) 26 VUWLR 233.

²⁶ J Freeman "Collaborative Governance in the Administrative State" (1997) 45 UCLA L Rev 1.

²⁷ L Nottage and Y Wada "Japan's New Product Liability ADR Centers: Bureaucratic, Industry, or Consumer Informalism?" (1998) 6 ZJapanR 40.

is within the domain of law, but it does not take full responsibility for substantive outcomes. In this sense, it is “proceduralist” – or perhaps better “neo-proceduralist”, since formal rationality and classical liberal constitutional orders can be seen as involving a minimalist “proceduralism”.²⁸ First, in its justification:²⁹

reflexive law resembles liberal or neo-liberal concepts of the role of law. To the extent it supports social autonomy, it relies on invisible hand mechanisms. But reflexive law does not merely adapt to or support “natural social orders”. Quite the contrary, it searches for “regulated autonomy”. It seeks to design self-regulating social systems through norms of organisation and procedure. [...]

[Secondly, in its external social functions:] reflexive law shows elements of “system rationality” insofar as it facilitates integrative processes within functionally differentiated society. [...] What is important is that to facilitate integrative processes does not, for reflexive law, mean to prescribe authoritatively ways and means of social integration. It means to create the structural premises for a decentralised integration of society by supporting integrative mechanisms within autonomous social systems.

[Finally,] The “internal rationality” of reflexive law is represented neither by a system of precisely defined formal rules nor by the infusion of purpose-orientation through substantive standards. Instead, reflexive law tends to rely on procedural norms that regulate processes, organisation, and the distribution of rights and competencies.

By focusing primarily on the latter dimension, and autonomous internal legal evolution based on tensions arising within each stage,³⁰ Teubner also argues that Nonet and Selznick’s earlier theory³¹ could not adequately determine whether there will be a tendency for purposive/material rationality or participatory/reflexive rationality to prevail. This requires a broader focus, he asserts. Specifically, “social developments outside the legal system drastically limit the potential of substantive law while they systematically favour the reflexive type of legal rationality”.³²

Before examining that dimension (below Parts II.B.1 and 2), this highly conceptual discussion can be rendered more concrete by considering several examples of emergent reflexive legal structures, given later by Teubner. These are so cogently stated that they need not be paraphrased at this stage:³³

Consider again the development of contract law. A trend towards substantive legal rationality is obvious in legislative definitions of minimal conditions and judicial concern with the substance of agreements [...]. Yet, if this trend is to involve more than marginal correction of the formal approach, it will encounter conditions that impose limits on the capacity of the legal system, some of which are already visible today. Labour law, in contrast, is, with respect to collective bargaining, characterised to some degree by a more abstract control technique in which we can recognise a ‘reflexive’ potential. The legal regulation of collective bargaining operates

²⁸ Compare P S Atiyah “Contract and Fair Exchange” in his *Essays on Contract* (Clarendon Press, Oxford, 1990) 329, 348-349. See also the early work of contemporary liberal philosopher, J Rawls, for example *A Theory of Justice* (Clarendon Press, Oxford, 1972).

²⁹ Teubner, above n 19, 254-255.

³⁰ Along similar lines, and therefore open to a similar critique, see for example T Tanase “Fuhokoi sekinin no dotokuteki kiso [The Moral Foundations of Tort Liability]” in T Tanase (ed) *Gendai no Fuhokoiho - Ho no rinen to seikatsu sekai [Contemporary Tort Law: The Ideal of Law and the Lifeworld]* (Tokyo, 1992).

³¹ P Nonet and P Selznick *Law and Society in Transition: Toward Responsive Law* (Harper Colophon Books, New York, 1978).

³² Teubner, above n 19, 245.

³³ Above n 19, 276-278.

principally by shaping the organisation of collective bargaining defining procedural norms, and limiting or expanding the competencies of the collective actors. Law attempts to balance bargaining power, but this only indirectly controls specific results.

Corresponding efforts at constructing systems of countervailing powers in other spheres, particularly in consumer protection law, have not fared so well [...]. However, functional parallels might be found in the "artificial" creation of autonomous semi-public institutions (for example in Germany the "*Stiftung Warentest*" [Product Testing Foundation] or "*Verbraucherzentrale*" [Consumer Centres]) which provide consumer information and political-legal representation for unorganised social interests [...]. The role of state law is, again, not substantive regulation but the procedural and organisational structuring of "autonomous" social processes. Organisations are fostered to give consumers a voice. To paraphrase Joerges [...]: the law does not authoritatively decide what constitutes the consumer's interest; it restricts itself to defining competences for the articulation of consumer interests and to securing their representation. The task of the legal system is neither to develop its own purposive programme nor to decide goal conflicts between competing policies. It is to guarantee coordination processes and to compel agreement. To these observations one may add the fact that the law can help resolve inter-system conflicts by arbitrating claims across sectors and settling boundary problems.

Perhaps consumer law provides a shaky example of reflexive law at work because it is an example of the limits of the strategy we have called "external decentralisation" [...] This strategy necessarily fails if social asymmetries of power and information can resist institutional attempts at equalisation. One solution is for law to develop in itself "reflexive" structures which can compensate for inequality of power and information, thus supplementing the operation of decentralised systems through modes of compensatory legal logic. It is possible to interpret the developments of certain "general clauses" or standards as evidence of a reflexive logic within doctrine. For example, even though standards like "good faith" or "public policy" are usually regarded as instruments of substantive judicial interventionism, they might be seen as a means of "socialisation of contract" quite different from what is traditionally thought of as state intervention [...]. Using standards like good faith and public policy to compensate for irreducible inequities at, for example, the level of concrete interaction between contractual partners or the level of market and organisation, as well as at the societal level where there is an interplay among politics, economics, culture, and law is "reflexive" insofar as the legal system itself "simulates" processes of social self regulation. This means that in the case of "interaction deficiencies" between contracting parties, objective purposes and duties are defined authoritatively by virtue of law; in the case of "market deficiencies," commercial customs are replaced by the judicial definitions of market behaviour rules; and in the case of "political deficiencies," the judicial process defines standards of public policy. Common to these examples is a logic of internal simulation. An actual deficiency in subsystem mechanisms of self-regulation is presumed, and the general clause of "good faith" or "public policy" is interpreted as a command to simulate within the legal system self-regulatory processes – as they might exist – internal to non-legal subsystems. Obviously such a simulation has its own deficiencies. It can be perverted easily into a sheer moralistic appeal, and its cognitive and procedural adequacy is unclear.

These ideas will be revisited below (Part II.B.3), adding further concreteness by analysing recent developments in contract and product liability law and practice in Japan. Those examples also provide some grist for the conceptual mill on which Teubner (and even Habermas) rely when analysing those "social developments" favouring reflexive law mechanisms, derived from Luhmann's "system-theoretical" analysis, introduced next.

1 Systems Theory and Autopoiesis

Luhmann defines a "system" simply as any entity which delimits itself from a

more complex “environment”.³⁴ The latter’s complexity is reduced by selection of external information and by internal structuring within systems. Systems are of various types: interactions, organisations, social sub-systems, and the social system (society overall). Neither type can be reduced to another; persons are not considered elements of social systems, for instance, but instead constitute the environment of social systems. Importantly, moreover, modern societies are seen as characterised by social differentiation. This means that they are no longer hierarchically structured as class societies, but functionally differentiated into the political system, the legal system, economics, religion, education, art, and so forth.

Luhmann’s theory of law begins with expectations. Environments are not only complex, but also contingent – holding innumerable possible states of the world. Expectations reduce complexity so we can cope with this contingency. But other persons also have expectations and vary their behaviour accordingly. This creates the sort of “double contingency” in interaction processes identified earlier by the sociologist, Talcott Parsons. It requires not only expecting the behaviour of others, but also their expectations; and those expectations can also be expected; and so on and so on. In this dynamic, however, Luhmann argues that expectations come in two types. “Cognitive expectations” involve “learning”: changing one’s expectations in the light of inconsistent or unexpected events. By contrast, “normative expectations” are defined as “not learning”: maintaining counterfactual expectations, due to explanations in society for deviant events (for example that inconsistencies are due to supernatural forces) or by the threat of sanctions. Norms are therefore “counterfactually stabilised behavioural expectations”, which facilitate interactions by reducing complexity. To be “legal norms”, though, expectations must be generalised. In principle, this can occur on three dimensions: temporal (becoming enduring over time), substantive (according to whether expectations refer to persons, roles, programmes or values), and social (involving institutionalisation: third parties, observers or an anonymous public can be expected or assumed as becoming involved in the interaction). Law, therefore, is defined as “congruently (temporally, substantively, and socially) generalised behavioural expectations”. In his earlier work,³⁵ Luhmann saw the particular function of law as stabilising or guaranteeing expectations in this way, not just the control or guidance of behaviour – a function which could be shared by many other systems.

More recently, he has suggested that it involves using conflicts: “an exploitation of conflict perspectives for the formation and reproduction of congruently generalised behavioural expectations”.³⁶ He has also come to stress aspects related to substantive generalisation, namely that the basic form of legal norms consist of an if-then relationship or “conditional programme” (*if* a past event, *then* consequences), which allocate the “values” legal or illegal (or “right or wrong”: *Recht/Unrecht*) – that is, through a “binary code”. All this heightens his skepticism towards the materialisation of law in the sense of the politicisation of the legal system, since the conflict perspective is lost, and conditional programmes become future oriented. Luhmann’s increasing

³⁴ This and the next two paragraphs draw heavily on the excellent analysis by H Rottleuthner “A Purified Sociology of Law: Niklas Luhmann on the Autonomy of the Legal System” (1989) 23 L & Soc Rev 779, 780-784.

³⁵ N Luhmann *Rechtssoziologie [Sociology of Law]* (Rowohlt, Reinbek, 1972).

³⁶ N Luhmann “The Unity of the Legal System” in G Teubner (ed) *Autopoietic Law: A New Approach to Law and Society* (de Gruyter, Berlin, 1988) 1, 27.

focus on more precise functions of law, and the specific nature of legal structuring, also relate to his growing interest throughout the 1980s (shared by Teubner) in “autopoiesis”, discussed below. First, however, some continuities in Luhmann’s theoretical development can be identified by reviewing some aspects of his discussion about “communication about law in interaction systems”.³⁷ This may also help to render Luhmann’s theory more concrete as well, since it refers to the more micro-level “interaction systems”, and he even draws on some early empirical studies of contracting in the US and Japan.

The first part of that discussion begins, typically, by presenting more theoretical building blocks. Interaction systems (like other systems) require communication, which Luhmann sees as a selection of information being offered for selective acceptance. Conflict arises when refusal to accept is made the topic of further communication, and escalates as “interaction systems can normally only handle one topic at a time”.³⁸ Such “thematic concentration”, however, leads to simple interaction systems having a very low “conflict potential”.³⁹

the very prospect of a dispute leads to such conflicts being avoided wherever possible (or, in some cases of course, actively sought – precisely because this leads to a dispute. Primitive societies limited mainly to such simple interaction systems use this mechanism to suppress or avoid conflict. For complex societies, on the other hand, it can (must?) become very important that the conflict potential be increased – in order to open up a wide range of communication possibilities that are more varied and richer in selection. It then becomes important that conflicts be given a form that can be used by the participants in the interaction, one that is suited for interaction and at the same time stabilised from the outside, supported by the environment. Such possibilities are afforded by law. It renders conflicts of a more general interest, understandable even for those external to the interaction, and removes the odium of merely local unpleasantness. It also takes the criteria for resolving the dispute out of the hands of the interaction partners. ...

After a long evolutionary development, a clearly binary structure has been institutionalised in law, that is, in certain respects one can be either in the right or in the wrong, but not both at the same time. ... [Further,] such binary schemata deal with normative questions, that is, with topics that involve the contrafactual stabilisation of expectations.

Thus, Luhmann sees “legalising” premises of interaction as lowering a “thematization threshold”, compared to that involved for example in language; but contends that this will remain significant, so that crossing it requires a communication partner “to activate some special source of motivation, for example anger or a sense of justice, or call upon some source of authority, such as legal texts that can be cited, expert advice, or social support”.⁴⁰ Luhmann declines to investigate, however, whether the development and formalisation of a legal system has lowered the thematisation threshold. He asserts that different situations would be difficult to compare. Giving as examples Japan – citing early work in English by Kawashima – along with Mexico, the US and Germany), he also argues that different jurisdictions would yield widely

³⁷ N Luhmann “Communication About Law in Interaction Systems” in K Knorr-Cetina and A V Cicourel (ed) *Advances in Social Theory and Methodology: Toward an Integration of Micro- and Macro-Sociologies* (Routledge & Kegan Paul Boston, 1981) 234 (and in slightly revised form as ch 3 in *Ausdifferenzierung des Rechts*, Suhrkamp, Frankfurt, 1981).

³⁸ Luhmann, above n 37, 240 (comparing the notion of “focused interaction” developed by ethnomethodologist, Irving Goffman).

³⁹ Luhmann, above n 37, 241.

⁴⁰ Luhmann, above n 37, 242.

divergent results as “social support” could vary considerably, especially under industrialisation.⁴¹

Instead, Luhmann temporarily shifts levels of abstraction. He assumes that increasing complexity of society opens the way for a diversity of interaction systems, not just involving physical presence. It also means the emergence of a legal system based on rules. On the one hand, such rule orientation means that:⁴²

the system becomes compatible with arbitrary beginnings [...]. This independence, however, results in generalised (and thus not easily controllable) dependence on the aggregate effect of many interactions. As a conflict-regulating system that is always belatedly set in motion, that is, only when called upon, the legal system very seldom takes the initiative. [...] Excessive inhibition of the thematisation of law may, therefore, lead to a type of drying up of the legal system, and so leave the regulation of conflict to other mechanisms – for example morality, ignorance, class structure, or the use of force outside the law – whose social structural compatibility may be problematic.

Thus, thematisation thresholds are important not just in individual interaction systems, but also in maintaining functional differentiation within the overall society. Further, Luhmann’s concluding discussion focuses more on thematisation issues in interaction systems, implying that the spectre of an atrophying legal system is a quite realistic one. For he argues, firstly, that contract formation processes tend to avoid thematisation into the legal system. This is because “even for agreements that are understood to be binding, insistence on a written legally binding form is probably more the exception than the rule”. Luhmann cites Macaulay’s classic study of “non-contractual relations in business” in the US; and, intriguingly, quotes extensively from Kawashima in asserting that “especially in the cultures of the Far East, there is reportedly a widespread reluctance to fix the terms of contract in a legal form; this, it is felt, would show a feeling of distrust and assume from the outset a situation of conflict”.⁴³

Luhmann notes, however, some exceptions. One involves requests for signing of standardised contract forms; but in this case thematisation difficulties are thought to be mitigated by reference to an organisation (a separate system) and its requirements. Another involves situations, such as real-estate transactions, where the law itself makes validity dependent of legal form – also “excusing” thematisation. In addition, Luhmann suggests that contracts do not become possible just because of “acceptance of the norm of the binding nature of contracts, and the solidarity this presupposes”. To overcome “double contingency”, the temporal dimension – the entire prior process – is also important. Specifically: “every single communication is understood as establishing or defining a commitment and used accordingly, being made even more binding by subsequent behaviour. [...] no side is free to completely avoid

⁴¹ Luhmann, above n 37, 245 (citing T Kawashima “Dispute Resolution in Contemporary Japan” in A von Mehren (ed) *Law in Japan: The Legal Order in a Changing Society* (Harvard University Press, Harvard, 1963) 41).

⁴² Luhmann, above n 37, 247.

⁴³ Luhmann, above n 37, 249, n 34 (citing S Macaulay “Non-Contractual Relations In Business: A Preliminary Study” (1963) 28 *Am Socio Rev* 55; and Kawashima, above n 40). Compare above Chapter Two Part II.D.

committing itself, as long as the process is directed towards agreement on a contract".⁴⁴

Nonetheless, the parties can withdraw from negotiations, using remaining open points. Luhmann only suggests that the cost of opting out is to abandon the hopes of achieving the goals associated with it.⁴⁵ But it also seems likely to entail the risk that he identifies where parties do not attempt "friendly legalising" in the form of a written contract, in favour of the possibility that everything can be concluded without any communication about law. That is, should legalisation later be attempted, "the thematisation threshold will be higher than before, having been raised by signs of impending conflict and uncertainty about the legal situation".⁴⁶

This initial avoidance of thematisation is reinforced, secondly, by the "de-thematisation of law" which can arise in concrete interaction systems if a contractual dispute arises. Once initiated, legal communication is seen as propelled by "a certain internal logic to a decision that rigorously separates right and wrong"; but this is so primarily at the more abstract level of the legal system, which must render a particular decision on any conflict brought before it. The immediate past or future prospects may encourage parties in conflict-charged interaction systems to end hostilities and settle out of court. Law will not simply vanish from their minds, says Luhmann, but with third parties (specifically, arbitrators and mediators) other topics may be substituted and legal questions pushed out.⁴⁷ Consequences, not of strictly legal relevance, can be reintroduced. So can criteria of reasonableness, "unthematically assuming or implying a willingness to continue the relationship or at least of once again making claims on the moral continuum of a common way of life". Similar effects can emanate from secondary topics, social interaction in an everyday sense, which interrupt more specifically legal communication.⁴⁸

Luhmann does not return from these thematisation difficulties to re-examine implications at the level of the legal system. Yet the latter seems to risk atrophy if, empirically, contract law is not used or communicated, in formation and even conflict resolution. Not returning to implications at the less abstract level may be an unfortunate consequence of Luhmann's bias towards erecting grand theoretical structures to view the world, rather than working the other way around.⁴⁹ Or perhaps he expects the legal system as a whole to be robust enough to overcome the atrophy effects at the level of interaction systems. Whatever the case, from around this time Luhmann developed a strong interest in the theory of autopoiesis, together with Teubner.

The key to autopoiesis, an idea derived from biology, is that a system can begin to "constitute the elements of what it consists through the elements of which it consists". Such an autopoietic system is "recursively" closed in that it "can neither derive its operations from its environment nor pass them on that environment".⁵⁰ It is open to and views its environment; but the latter provides perturbations or irritations which encourage further internal development of the autopoietic system based on its unique

⁴⁴ Luhmann, above n 37, 250.

⁴⁵ Luhmann, above n 37, 250.

⁴⁶ Luhmann, above n 37, 249.

⁴⁷ Luhmann, above n 37, 251.

⁴⁸ Luhmann, above n 37, 251-252.

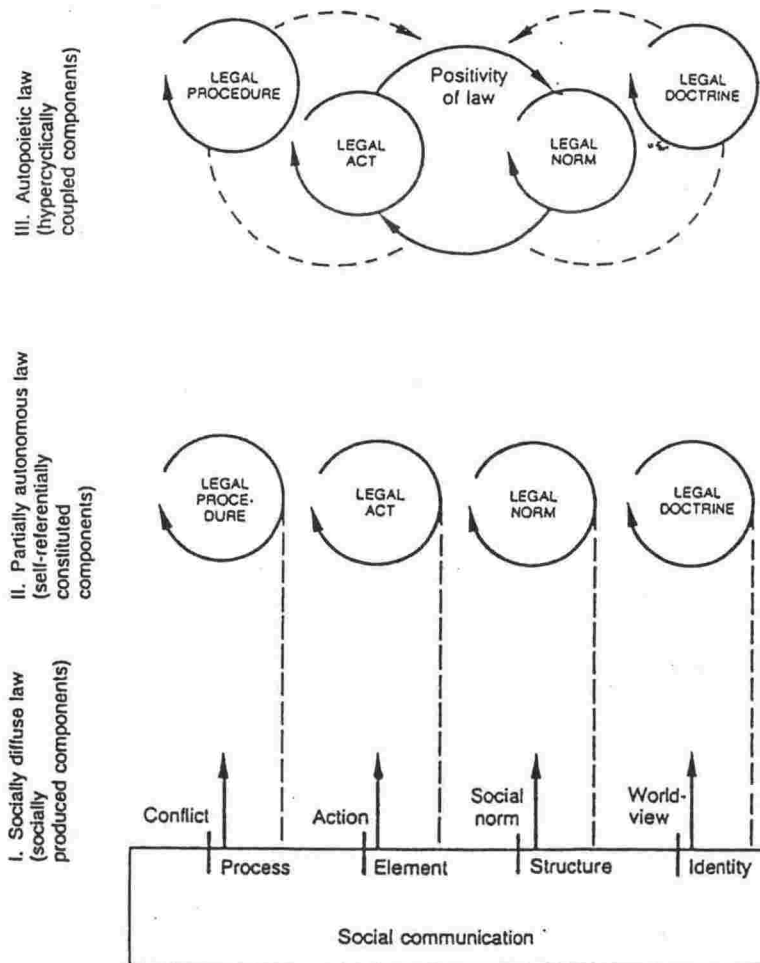
⁴⁹ See Rottleuthner, above n 34. See also one of Luhmann's last works published in English: "Quod Omnes Tangit: Remarks on Juergen Habermas's Legal Theory" (1996) 17 *Cardozo L Rev* 883.

⁵⁰ Luhmann, above n 37, 14, 18.

function and distinct internal operations. Accordingly, inquiry becomes focused on the unique function of each system and its internal dynamics. Luhmann's later work has elaborated these, but at higher levels of abstraction. For the legal system generally, for instance, he has redefined its function, while stressing the mutually reinforcing nature of legal norms (based on the binary code of right versus wrong) linked through conditional programmes to legal acts (legislative enactments, court judgments etc, which must be precise and definite for norms to emerge). This seems to suggest considerable continuities with his earlier theory; but he has not elaborated them carefully.⁵¹ Certainly he has not returned to the abovementioned dilemma at the level of interaction systems.

Teubner does not deal well with this dilemma either. It is also troublesome for his version of autopoiesis, because that too centres on a close coupling of "legal norm" (structure within the legal system) and legal acts (its elements), depicted as follows:⁵²

Figure 4: Autopoietic Law



⁵¹ Rottleuthner, above n 34, 793.

⁵² G Teubner *Recht als Autopoietisches System [Law as an Autopoietic System]* (Suhrkamp, Frankfurt am Main, 1989), 48-56. Figure 4 is a copy from the English translation of Teubner's book (*Law as an Autopoietic System* (London, Blackwell, 1993) 37), kindly supplied to me at short notice by Alex Ziegert.

If “legal acts” do not in fact include contracts, due to deficiencies at the interaction level in the contract formation stage, then this core mechanism in autopoietic law risks breaking down. Since in Teubner’s scheme “legal procedure” (developing out of conflict) is linked to this mechanism – although in what way, precisely, is left much more unclear – dethematisation at the conflict change should also be of concern.

Perhaps the problem is overstated. After all, many contracts undoubtedly are thematised as legal from the start, and/or are taken through the courts – or at least seen through “legal” lenses – through to the bitter end (compare below Part II.B.3). Anyway, there are many other aspects of the legal system which may not give rise to such informational deficiencies or generate their own legal logic.⁵³ All this may allow the emergence of an autopoietic legal order overall. Seemingly taking this for granted, in his later work Teubner too has focused on implications at a very abstract level. Nonetheless, just as most economists make assumptions they know are not accurate reflections of reality, in the hope of generating useful predictions, core conceptualisations of systems-theory and especially of autopoiesis should be given the benefit of the doubt, to see if they can offer useful insights at a more concrete level.

One interesting point developed by Teubner is that:⁵⁴

the relations between law and other social fields result from internal differentiation of one and only one society. Thus, in spite of all their autonomy, they belong to the same comprehensive social system and cannot simply be conceptualised according to the model of two independent autopoietic systems.

Such “autopoiesis within autopoiesis” may, he suggests, make law more open than general systems theorists had thought.⁵⁵ Specifically, for instance, “in the relations between social discourses [Teubner proposes] replacing perturbation with *productive misreading*. In legal pluralism the legal discourse is not only perturbed by processes of social self-production, but law productively misreads other social discourses as ‘sources’ of norm production”.⁵⁶

One concrete example given involves economic transactions. Their structures are “essentially nonlegal; they build on factual chances of action and create new chances of action, or they build on trust in future changes of chances”.⁵⁷ Citing Macaulay’s study of automobile manufacturers and dealers in the US, Teubner adds that “in ongoing business relations it is wise to keep the lawyers out. They will distort business realities”. Yet he concludes that: “The lawyers observe economic action under the code legal/illegal and misread economic processes and structures as sources of law. Conversely, clever economic actors misread legal norms under the economic code as bargaining chips, as new opportunities for profit-making. Again, we have a symbiosis of

⁵³ For example taxation: compare J Prebble “Ectopia, Tax Law and International Taxation” (1997) 1997/5 Brit Tax Rev 383.

⁵⁴ G Teubner “The Two Faces of Janus: Rethinking Legal Pluralism” (1992) 13 Cardozo L Rev 1443,1447; see also G Teubner “How The Law Thinks: Toward a Constructivist Epistemology of Law” (1989) 23 L & Soc Rev 727.

⁵⁵ Recall however that Luhmann (above n 37) had made a point along similar lines; but at a lower level of abstraction.

⁵⁶ Teubner, “Two Faces”, above n 54.

⁵⁷ Teubner, “Two Faces”, above n 54, 1454.

mutual distortion".⁵⁸ Elsewhere, Teubner elaborates more clearly. The legal system, by ostensibly allowing contracts to be freely concluded with any content whatsoever, "creates the fiction that the economic process itself produces legal norms ... [which it uses] as a third source of law alongside statute and case law", even though studies by Macaulay and others show that business is often divorced from the law. In turn, the "economy reads legal constructions (new legal forms of contract ...) as favourable opportunities to open up new markets and exponentially increase economic transactions".⁵⁹

This may add an additional way out of Luhmann's dilemma, discussed above, of legal system atrophy. But Teubner takes his own argument further.⁶⁰

While the economic discourse initially disposes freely as to the content of contractual norms, it then loses control and gets tied up in the self-set linkages of law. For the power of definition is now transferred to the legal discourse which, in the interest of internal legal consistency, disposes autocratically over the contractual norms, defining what the actual will of the parties has to be, manipulating contractual content arbitrarily through "implied conditions" in contractual interpretation, declaring contractual norms invalid in accordance with "public policy" and setting completely new contractual norms under the general clause of "good faith". And as long as the legal discourse does not overstrain structural coupling, the economic discourse willingly follows the legal corrections to the self-created law of the economy.

Now strikes the hour of politics! ... For structural coupling, institutionalised and made durable through the contractual links, continue to function even once the contractual norms are effectively changed with regulatory intentions. And the difficult conversion of political decisions into economic transactions now becomes mere self-regulation of law. The policy-oriented law deliberately regulates some norms of contract law. It is as simple as that. One just has to watch out that the tie between the structural coupling of the economy and the law does not break ...

In short, the linking of economics and law through mutual misreadings, combined with the autopoietic development of law, generates more potential for politics to intervene through that "law".

Recently, Teubner has indicated that a similar pattern may emerge in the new *lex mercatoria* in international trade. The latter is determined strongly by consensual arrangements between traders, closely connecting it to economic rationality; but this complex may be increasingly open to (re-)politicisation.⁶¹ Likewise, Teubner sees a similar dynamic behind British rulers of African colonies instructing their legal

⁵⁸ Teubner, "Two Faces", above n 54, 1455 (citing S Macaulay *Law and the Balance of Power: The Automobile Manufacturers and Their Dealers* (Russell Sage, New York, 1966)). See also S Macaulay "The Standardized Contracts of United States Automobile Manufacturers" in A von Mehren (ed) *The Impact of Large Scale Business Enterprise upon Contract* (Mohr, Tuebingen, 1974) ; J Kenworthy, S Macaulay and K Rogers "'The More Things Change ...': Business Litigation and Governance in the American Automobile Industry" (1996) *L & Soc Inq* 631 .

⁵⁹ G Teubner "Autopoiesis and Steering: How Politics Profit from the Normative Surplus of Capital" in R in 't Veld and others (eds) *Autopoiesis and Configuration Theory: New Approaches to Societal Steering* (Kluwer, Dordrecht, 1992) 127, 135.

⁶⁰ Above n 59, 136-137.

⁶¹ G Teubner " 'Global Bukowina': Legal Pluralism in a World Society" in G Teubner (ed) *Global Law Without A State* (1997) 1, 19-22. See also G Teubner "Breaking Frames: The Global Interplay of Legal and Social Systems" (1997) 45 *AJCL* 149. On the *lex mercatoria*, see generally L Nottage "The Vicissitudes of Transnational Commercial Arbitration and the *Lex Mercatoria*: A View from the Periphery" (2000) 16 *Arb Int'l* 73.

functionaries in the early 20th century to apply “indigenous law”. In fact, recent research has shown that in many cases this “law” was invented, but this did not stop colonial courts applying it: “The British thereby opened up for themselves a new, richly yielding source of law with its origin ostensibly lying in the actual social practices of oppressed peoples – but usable by them for political manipulation”.⁶² Here, then, it was community misread into law, opening the way to effective politicisation.

Finally, Teubner sets out some lessons to be learned from these examples, refining ideas from his 1983 work cited at length above (Part II.B).⁶³ First, decision-making bodies cannot just be pluralist. They must be closely coupled to “the real elementary operations of functional systems”, rather than just inventing their norms freely. DIN and other safety standards bodies look promising, even if their social representativeness is questionable, because they stick closely to actual technical and economic processes. Secondly, the limits of structural coupling must be respected, especially the motivational leeway of the relevant social processes. Hence “substantive regulation of pluralist law by politics is practicable only within very narrow limits, while procedural regulation, the political redefinition of control rights, property positions, participation rights, decision-making procedures, and rules of evidence have much better chances of being taken up”.⁶⁴ Again, Teubner gives the example of collective labour law. Thirdly, he points out that successful pluralist norm production appears to proceed in two stages: law’s constructive misunderstanding, followed by politicisation. Again, European safety law developments seem sound “by providing for procedural separation of safety standardisation in private standardisation bodies, and its political and administrative control by national or European authorities”.⁶⁵

From a similar perspective, Teubner cautions against the assumption that the principle of good faith in contract law (notably as reflected in the EC Unfair Terms Directive) can be readily transplanted from continental Europe into England. He draws on empirical studies showing that the latter’s production or economic regime is a “Liberal Market Economies”, unlike that in Germany, a typical “Coordinated Market Economy”. Teubner argues that a good faith principle will not make sense to such a regime in England if presented as a facilitative bundle of duties requiring trust and cooperation, but only if the principle outlaws certain excesses of economic action. This implies firstly that the judiciary will likely draw on an English legal tradition of “constitutional rights” hitherto invoked against only against excesses of governmental authority. Secondly, without a regime as in Germany in which business and other associations cooperate to produce uniform standard contracts, English courts are expected to continue to intervene more directly when such contracts are impugned by consumers as contrary to good faith, rather than collaborating with intermediate bodies such as the Office of Fair Trading.^{65a} Both propositions are subject to empirical verification. The first might be reconceptualised as the hypothesis that English courts

⁶² Teubner, above n 59, 128.

⁶³ Teubner, above n 19.

⁶⁴ Above n 59, 140.

⁶⁵ Above n 59, 140. See also C Joerges and others, “The Law’s Problems with the Involvement of Non-Governmental Actors in Europe’s Legislative Processes: The Case of Standardisation under the ‘New Approach’” (EUI Working Paper LAW No 99/9, European University Institute, Florence, 2000).

^{65a} G Teubner “Legal Irritants: Good Faith in British Law and How Unifying Law Ends Up in New Divergences” (1998) 61 MLR 11.

will favour an “excluder” approach, elaborating the contours of good faith by prohibiting discrete categories of egregious behaviour, rather than positively imposing a broad range of “relational contract” norms. Unfortunately there is insufficient case law yet to reach a clear judgment. By contrast, Teubner’s second hypothesis already seems questionable, in light of the vigorous activity by the OFT and its impact in several of the cases.^{65b} This suggests that autopoiesis underestimates the potential for “coupling” or alternative forms of communication between the legal system and other social sub-systems.

2 Discourse Theory of Law

Habermas argues powerfully that Teubner, by attempting to allow for some legal “influencing” of other social spheres, however indirect, appears to part with Luhmann’s systems theory architechtonic.⁶⁶ The latter is seen as entailing strict self-reproduction of legal discourse, whereas Teubner retains the notion of general “social communication” (see Figure 4 above). That brings back the “lifeworld”, contends Habermas, predicated on “communicative action” which in turn builds on the properties of ordinary language. Unlike “instrumental action”, but rather interaction mediated by language, communication action presupposes an orientation towards mutual understanding, which serves as mechanism of social integration through grounding shared expectations and ways of interpreting situations.

Habermas’ able translator usefully explains these core ideas as follows:⁶⁷

According to Habermas, conflict resolution on the basis of reasoned agreement involves at least three idealising assumptions: members must assume they mean the same thing by words and expressions; they must consider themselves as rationally accountable; and they must suppose that, when they do arrive at a mutually acceptable resolution, the supporting arguments sufficiently justify a (defeasible) confidence that any claims to truth, justice, in so far that these underlie their consensus will not subsequently prove false or mistaken. No local, spatio-temporally finite consensus can fully realise these idealisations; yet if they should subsequently prove false – if members discover that a crucial term was understood in two different ways or that they were seriously self-deceived or that they were mistaken about certain facts or norms – then there are grounds for questioning the original agreements and reopening the discussions. That is, these idealisations imply a tension between the de facto social acceptance ... of a group consensus and the idealised validity ... that such a consensus must claim for itself if members are to accept it as reasonable. Communicatively achieved agreements are in principle always open to challenge, and thus are at best a precarious source of social integration. If a community is to be a stable one, then, it requires more than explicit agreement as a basis for social cooperation.

^{65b} Compare R Summers “‘Good Faith’ in General Contract Law and the Sales Provisions of the Uniform Commercial Code” (1968) 54 Va L Rev 195, and see L Nottage “Convergence, Divergence and the Middle Way in Unifying or Harmonising Private Law”, EUI Working Paper in Law No 2001/1 (European University Institute, Florence, 2001, <www.iue.it/LAW/publicat.htm>) 23-25. See also above Chapter Three Part IV.B.

⁶⁶ J Habermas (W Rehg trans) *Between Facts and Norms* (MIT Press, Cambridge Mass, 1996), 52-56. Compare also O Gerstenberg “Justification (and Justifiability) of Private Law in a Poycontextural World” (2000) 9 Social and Legal Studies 419.

⁶⁷ Rehg, in Habermas, above n 66, xv-xvi. For another concise overview of Habermas’ recent work, see J McCormick “Habermas’ Discourse Theory of Law: Bridging Anglo-American and Continental Legal Traditions?” (1997) 60 MLR 734.

By providing some background consensus on matters unproblematic for group members, some stabilisation is provided by the lifeworld. This consists of three broad components: the stock of taken-for-granted certitudes and ideas, which Habermas defines as "culture"; the norms, loyalties, institutions and so on which secure group cohesion or solidarity ("society"); and the competences and skills internalised by members ("personality").⁶⁸

Importantly, Habermas does not deny that the lifeworld is threatened by increasing complexity and differentiation of social spheres, and the role played by legal positivism in modern legal systems. Hence, arguably, the insights from Luhmann's theory and perhaps especially Teubner's attempted synthesis (described above Part II.B.1) retain some descriptive value. Part II.B.3 of this chapter therefore explores some possibilities of this in a Japanese context.

Habermas nonetheless rejects Luhmann's narrow definition of the normative, as "non-learning" following disappointment of expectations. Ultimately he sees the structure of communicative action, rooted in lifeworld settings and ultimately by language, as also infusing the law, more directly connected with social systems like the economy and politics.⁶⁹

The subsystem "law", as a legitimate order that has become reflexive, belongs to the societal component of the lifeworld. Just as this reproduces itself only together with culture and personality structures through the flow of communicative actions, so legal actions too constitute the medium through which institutions of law simultaneously reproduce themselves along with inter-subjectively shared legal traditions and individual competences for interpreting and observing legal rules. [...] Law includes all communication oriented towards law, such that legal rules refer reflexively to the function of social integration directly fulfilled in the process of institutionalisation. But the legal code not only keeps one foot in the medium of ordinary language, through which everyday communication achieves social integration in the lifeworld; it also accepts messages that originate there and puts these into a form which is comprehensible to the special codes of the power-steered administration and the money-steered economy. To this extent the language of law, unlike the moral communication restricted to the lifeworld, can function as a transformer in the society-wide communication circulating between system and lifeworld.

This more expansive view of normativity, premised on the theory of communicative action, also leads Habermas to a necessary relationship between the rule of law or the constitutional state and deliberative democracy, and between private and public autonomy.⁷⁰ In turn, this requires rights which each concrete democratic regime must elaborate, but which fall into several broad categories: basic negative liberties, membership rights, and due-process rights (ensuring individual freedom of choice and private autonomy); rights of political participation (to foster self-understanding, legitimacy and public autonomy); and social-welfare rights (meeting basic material conditions for achieving both private and public autonomy). Other chapters of his recent monumental work address further normative corollaries, such as basic institutional linkages of constitutional democracies (such as the separation of powers⁷¹), and

⁶⁸ Rehg, above n 66, n 11.

⁶⁹ Habermas above n 66, 80-81.

⁷⁰ Habermas, above n 66, ch 3.

⁷¹ Habermas, above n 66, ch 4.

rationality in adjudication and the role of the courts.⁷² Importantly, moreover, Habermas argues that these normative precepts can be empirically grounded.⁷³

Of most direct relevance to this Part is the way he brings together these strands in a concluding chapter, on “paradigms of law”.⁷⁴ In particular, Habermas identifies and criticises the “materialisation of private law” since the 19th century in Germany and other jurisdictions, whereby democratic constitutions come to take priority over private law and liberal legal models come to be eclipsed by the social-welfare model. Hence he summarises as follows, for instance, “combinations of features whereby cases of liability in business transactions were once described – and therewith interpreted –” from both viewpoints:⁷⁵

The Liberal View	Today's View
unique	statistical
individual, personal	category, impersonal
concrete, anecdotal	generalised, purged of detail
occasional, random	recurrent, systemic
isolated conduct	part of an activity
unforeseeable (in the particular)	predictable (in the aggregate)
wait and see, fatalism	manageable, planning through insurance and regulation

Read from top to bottom, Habermas argues, differences appears as a change in an observer's perspective: from the action level, of individual actors in natural (contingently changing) environments, to that of statistically described interrelationships of a system, with “the doubly contingent decisions of the involved parties together with their consequences taken as dependent variables”. From bottom up, transformation appears from the actor's perspective: from society arising spontaneously and resisting individual actors, to a system no longer quasi-natural whereby the state may come to be held accountable for crises. The main problem perceived with this dichotomy is that the administration and private actors come to be perceived as involved in a sort of “zero-sum game: what the one gains in competence the other loses”.⁷⁶ Instead, Habermas sees them as mutually reinforcing, just like valid or legitimate law:⁷⁷

reproduces itself only in the forms of a constitutionally regulated circulation of power, which should be nourished by the communications of an unsubverted public sphere rooted in the core private sphere of an undisturbed lifeworld via the networks of civil society. With this conception, the burden of normative expectations in general shifts from the level of actors' qualities, competences and opportunities to the forms of communication in which an informal and non-institutionalised opinion- and will-formation can develop and interact with the institutionalised deliberation and decision-making in the political system. [...] In the final analysis, the legitimacy of the law depends on the undistorted forms of public communication and indirectly on the communicational sphere of the private sphere as well.

⁷² Habermas, above n 66, chs 5 and 6.

⁷³ Habermas, above n 66, chs 7 and 8.

⁷⁴ Habermas, above n 66, ch 9. Thanks are due to Kenji Yamamoto for refocusing attention on this point.

⁷⁵ Habermas, above n 66, 405.

⁷⁶ Habermas, above n 66, 406.

⁷⁷ Habermas, above n 66, 408, 409.

Despite its proceduralist core, that understanding leads him to be critical of proposals which tend to prioritise certain procedures as means to overcome welfare-state paternalism. Hence, simply activating procedural status is not enough:⁷⁸

Class-action suits or community complaints, as well as the creation of ombudsmen, arbitration boards and such, will counteract the disempowerment of overburdened clients only if collective legal protection, besides relieving the strain on individuals through competent representation, also *involves* them in the organised perception, articulation and assertion of their own interests. [...] affected citizens must experience the organisation of legal protection as a political process, and *they themselves* must be able to take part in the construction of countervailing power and the articulation of social interests.

Nor is it enough just for the legislature “to make procedures and organisational forms available for the internal constitutionalisation of different spheres of action”, modelled for example on self-governing bodies. That sort of “social autonomy”, aimed at supplementing or replacing private autonomy, must instead be linked again to “public autonomy”. Hence, drawing on empirical research, he is sceptical of some rosy views of modern collective bargaining. Such arrangements do “not imply an *unqualified* gain in autonomy for the individual employees”, since they may “satisfy social claims at the cost of dictating schemata and behavioural patterns from above. These normative controls can have the effect of *normalisations that restrict freedom*”.⁷⁹ Overall, he argues: “One cannot specify the correct relation between material and legal equality with a view to individual private rights alone. If private and public autonomy are original, then this relation can in the final analysis be specified only by the citizens themselves”.⁸⁰

In sum, Habermas adds an extra dimension of normativity to the law, building from communicative action rooted in lifeworld contexts and ultimately in linguistic discourse. This entails certain basic rights and constitutional structures. Nonetheless, he accepts the differentiation of social systems. Furthermore, the normative prescriptions he develops are supported by, and invite, empirical research. So does the determination of the ways in which proceduralisation of law does or does not contribute to mutual reinforcement of private and public autonomy, in particular contexts, through greater or lesser participation and so on by those affected.

3 Proceduralisation of Japanese Law: Generally, in Contract Law and Practice, and in Product Liability

Having set out some conceptual building blocks of major strands in contemporary neo-proceduralist theory, while picking out some more concrete implications in broader comparative context, the following section applies the theory to Japanese law. First, it argues rather generally that basic mechanisms in both systems-theory and autopoiesis, as well as a discursive theory of law and democracy, appear to be in place in Japan as much – or as little, if the foregoing still seems difficult to swallow – as they are in other advanced industrialised democracies. Accordingly, but also to support that tentative

⁷⁸ Habermas, above n 66, 411 (original emphasis).

⁷⁹ Habermas, above n 66, 413. Compare Teubner, above n 33, 64.

⁸⁰ Habermas, above n 66, 414.

view, this section argues that Teubner may offer some helpful insights into the issue of “invented traditions” in Japanese law and society.⁸¹ In addition, it introduces some very recent work by Kashizawa,⁸² who also draws together Luhmann and Habermas to analyse a range of contemporary disputes in Japan. More specifically, this section argues that these new theoretical perspectives help explain, setting in broader context, results from recent empirical research into contracting (above Chapter Four Part III) and product liability.

Few could deny that since at least the latter half of the 19th century, and arguably during the late Tokugawa period (at least in some respects),⁸³ Japan has experienced escalating social differentiation. As mentioned above (Parts II.B.1 and 2), contemporary theorists from diverse perspectives – Habermas as much as Luhmann – see this as a key to understanding modern law and its future path. This includes the emergence of positivity in law, over the last century in particular. Modern private law in Japan, for instance, originated in conceptual strictures laid down by the Civil Code enacted at the close of the 19th century, refined by “theory reception” through to the 1920s in particular.⁸⁴ Case law and notions of precedent then grew in importance.⁸⁵ Especially since the 1960s, special legislation or particular statutes have played an ever increasing role in private law.⁸⁶ This development parallels major developments in other jurisdictions, such as the US.⁸⁷ The process of civil litigation in Japan, despite low enforcement formality and problems of access to justice after World War II (above Chapter One Part II.D), nonetheless has resulted in an exponentially increasing civil litigation rate since around 1970, as in most other industrialised democracies.⁸⁸ This

⁸¹ See generally S Vlastos (ed) *Mirror of Modernity: Invented Traditions of Modern Japan* (University of California Press, Berkeley, 1998).

⁸² H Kashizawa “*Kenri Shucho o Shien Suru Mono* [Support for Asserting Rights]” (Paper presented to the annual meeting of the Japanese Sociology of Law Association, Sapporo, 22-23 May 1999).

⁸³ See for example H Ooms *Tokugawa Village Practice: Class, Status, Power, Law* (University of California Press, Berkeley, 1996).

⁸⁴ Z Kitagawa *Rezeption und Fortildung des Europaischen Zivilrechts in Japan [Reception and Development of European Civil Law in Japan]* (Alfred Metzner Verlag, Frankfurt, 1970).

⁸⁵ See for example T Kawashima “The Concept of Judicial Precedent in Japanese Law” in E von Caemmerer, S Mentschikoff and K Zweigert (eds) *Ius Privatum Gentium (FS Max Rheinstein)* (Mohr, Tuebingen, 1969) 87.

⁸⁶ Thanks are due to Nobuhisa Segawa for pointing out this pattern in a comment at the Civil Code Centennial Conference in Tokyo, 12 November 1998, and especially in developing it further in private discussions at Hokkaido University, 23 May 1999. See also N Segawa “*Minpo* [Civil Law]” (2000) 491 *Shosai no Mado* 2.

⁸⁷ R Hyland “Perspectives on Private Law Codification in America in the 21st Century” (Paper presented at the Civil Code Centennial Conference, “Legislation in the 21st Century and Private Law”, Tokyo, 12 November).

⁸⁸ See C Wollschlaeger “Historical Trends of Civil Litigation in Japan, Arizona, Sweden and Germany: Japanese Legal Culture in the Light of Judicial Statistics” in H Baum (ed) *Japan: Economic Success and Legal System* (de Gruyter, Berlin/New York, 1997) 89; L Nottage and C Wollschlaeger “What Do Courts Do?” (1996) *NZLJ* 369. See also S Kawashima “A Survey of Environmental Law and Policy in Japan” (1995) 20 *North Carolina J of Int'l L and Comm Reg* 231; D H Foote “Judicial Creation of Norms in Japanese Labor Law: Activism in the Service of - Stability?” (1996) 43 *UCLA L Rev* 635; L Nottage “The Still-birth and Re-birth of Product Liability in Japan” in D Nelken and J Feest (eds) *Adapting Legal Cultures* (Hart, Oxford, 2001) 174; Y Taniguchi “The Post-War Court System as Instrument for Social Change” in S De Vos (ed) *Institutions for Change in Japanese Society* (University of California Press, Berkeley, 1984). A different view is taken by J Sanders “Courts and Law in Japan” in

indicates that enough “legal events” are being generated to bring private law norms to life, thus engaging the core mechanism of legal autopoiesis described by Teubner (above Part II.B.1). That has been so notwithstanding the much maligned institutional barriers to civil litigation in Japan.⁸⁹ Indeed, the recent reform of the Code of Civil Procedure may itself provide a good example of positivity in law, in that it feeds off – and will no doubt prompt further – case law development and de facto ways of proceeding in court, underpinned by academic theory development.⁹⁰

If the key elements have entrenched themselves enough to generate autopoiesis in Japanese law, then some of the more concrete implications suggested by Teubner also should follow. Thus, invocations of consensus and harmony in legal settings in Japan might well be explained as the law developing through creative or “productive misreadings”.⁹¹ From Teubner’s perspective, it would not be surprising to find this emerging or increasing in the latter half of the 20th century, as the Japanese legal system becomes fully autopoietic. Interestingly, Frank Upham’s case study of land use disputes in a small rural community near Kyoto, pitting *burakumin* (hereditary outcastes) against tenant farmers over more than 150 years, showed that *more formal* processes were involved in late Tokugawa and early Meiji, but more protracted *informal* processes only *after* World War II.⁹² If notions of harmony were in fact invoked or created in the latter processes, as seems likely, yet at least some of the communication was oriented towards the law (the “binary code” of legal/illegal), then this may be one instance of creative “invention” which more generally reinforced the autopoietic development of law. This therefore provides an alternative to the general thesis advanced by Upham, namely that elites use further structural barriers directly to maintain the status quo, or at least manage social change.⁹³

Also consistent with this historical progression, Haley and especially Vanoverbeke show how the rhetoric of “harmony” emerged strongly in the context of tenancy disputes *before* World War II, during a period of heavy industrialisation and increasing social mobility.⁹⁴ *After* the War, by contrast, the rhetoric expands into a varieties of legal settings. One fairly clear example is the development of the “abuse of rights” doctrine to prevent worker dismissals, based on a new conception of “lifetime

H. Jacob and others (eds) *Courts, Law and Politics in Comparative Perspective* (Yale UP, New Haven/London, 1996) 315.

⁸⁹ J Haley “The Myth of the Reluctant Litigant” (1978) 4 *J Japan Studies* 359.

⁹⁰ See generally Y Taniguchi “The 1996 Code of Civil Procedure of Japan: A Procedure for the Coming Century?” (1997) 45 *AJCL* 767. On this point, therefore, this writer must take issue with no less than Luhmann himself (above n 37, 142). He dangerously overgeneralises – to the extent he includes contemporary Japan in “the Far East”, which can be inferred from his earlier work (see above n 43) – when he asserts: “A look at the legal cultures of the Far East also shows that recourse to the law can be interpreted as an intention to engage in conflict, and consequently it is *institutionally discouraged*” (emphasis added). Thanks are due to Mark Fenwick for highlighting this rather off the cuff remark by Luhmann.

⁹¹ Teubner, above n 56.

⁹² F Upham “Weak Legal Consciousness as Invented Tradition” in S Vlastos (ed) *Mirror of Modernity: Invented Traditions of Modern Japan* (University of California Press, Berkeley, 1998) 48.

⁹³ Upham, above n 92. See also generally F Upham *Law and Social Change in Post-War Japan* (Harvard UP, Cambridge, Mass, 1987).

⁹⁴ Haley, above n 89; D Vanoverbeke “Tradition and Law in Conflict: Farm Tenancy Conciliation and Social Change in Interwar Japan” (1998) 64/4 *Hosei Kenkyu* F11. Compare J O Haley *The Spirit of Japanese Law* (University of Georgia Press, Athens/London, 1998) 134-140.

employment". The prevalence of this system of employment seems to have been exaggerated from the start,⁹⁵ and certainly is nowadays. Yet this seems to have been done "creatively", thus fostering internal growth of the legal system itself, rather than actual "community" as suggested recently by Haley.⁹⁶ A more tentative example, since the rhetoric and the results are more varied, may be the increased application of the principle of good faith to termination of commercial contracts, since the 1960s.⁹⁷ A third example may be (lack of) antitrust enforcement in post-War Japan.⁹⁸ Also consistent with Teubner's arguments about creative misreadings would be subsequent repoliticisation in all or any of these fields. Thus, for instance, the current debate on legislation for consumer contracts can be seen as building on the expansion of the doctrine of good faith in cases involving "weaker" commercial partners,⁹⁹ but assisted by creative misreadings in those cases.

Particularly when considering the process of enacting specific legislation in contemporary Japan, however, it becomes hard to ignore the broader normative dimension stressed by Habermas, namely the *legitimacy* of positive law (above Part II.B.2). Specifically, the post-War Constitution guarantees most, if not all, the rights which he argues form the general necessary conditions for institutionalising democratic processes of discourse in law and politics.¹⁰⁰ Despite judicial reserve, the rule of law seems ensconced in contemporary Japanese democracy to a degree sufficient to reflect and promote legitimacy in particular areas of law or in particular legal institutions.

Recently, Hideki Kashizawa has combined both discourse- and systems-theoretical insights to analyse recent trends in a variety of disputes involving citizens, businesses, and public authorities in Japan.¹⁰¹ On the one hand, drawing on Habermas, he argues that there are various procedural prerequisites to initiating and engaging in communication in forums for asserting rights. These include the absence of physical coercion, sufficient information disclosure, equal opportunities to express opinions, obligations on all sides to respond, and so on. If people perceive that those requisites are not met, Kashizawa contends, then they react violently against the way in which the forum is constituted. Examples given in Japan include disputes involving Narita Airport, filling in part of Hakata Bay in Fukuoka (where one objection was that developers did not *respond*, even though they *listened*), resort developments, and waste

⁹⁵ Foote, above n 88.

⁹⁶ Haley, *Spirit*, above n 94, 134-140. Compare also generally J O Haley "Inside Japan's Community Controls: Lessons for America" (1999) 9/2 *The Responsive Community* 22.

⁹⁷ Compare V Taylor "The 'New' Japanese Contract: Law and Practice in the 1990s" in Attorney General's Department and Law Council (eds) *Twentieth International Trade Law Conference* (Attorney General's Department, Canberra, 1993) 37; and V Taylor "Continuing Transactions and Persistent Myths: Contracts in Contemporary Japan" (1993) 19 *Melbourne University Law Review* 352; with T Uchida "The New Development of Contract Law and General Clauses - A Japanese Perspective -" in ICCLP (ed) *Japanese and Dutch Laws Compared* (ICCLP, Tokyo, 1993) 119; and Haley, *Spirit*, above n 94, 151-155, 162-166.

⁹⁸ Compare for example J M Ramseyer "The Costs of the Consensual Myth: Antitrust Enforcement and Institutional Barriers to Litigation in Japan" (1985) *Yale LJ* 605. But see J O Haley "Error, Irony, and Convergence: A Comparative Study of the Origins and Development of Competition Policy in Postwar Germany and Japan" in B Grossfeld and others (eds) *Festschrift fuer Wolfgang Fikentcher zum 70 Geburtstag* (JCB Mohr, Tuebingen, 1998) 876.

⁹⁹ Above Chapter Three Part IV.D.

¹⁰⁰ Above Chapter One Part II.A.

¹⁰¹ Kashizawa, above n 82.

disposal.¹⁰²

On the other hand, building on insights from Luhmann's theory, Kashizawa focuses on the structures which support rights assertion. These are important because a person against whom a right is asserted can always leave the asserter's forum for communication. In particular, Kashizawa stresses that systemic support (public support including legal assistance), professional support (by lawyers and other professionals), and social support (by mass media and outside supporters) all contribute to "self-support", which emerges out of the communication process. Specifically, the rights asserter will try to build up a communication process so the other party cannot leave, while the latter may build a communication process so that it can. One example of the latter ("exit") strategy is waste disposal firms or developers holding many additional explanatory meetings (*setsumeikai*), even if not legally obliged to do so. As this suggests, such strategies involve costs, perhaps escalating costs.¹⁰³

If and when communication proceeds, Kashizawa argues that "opposed common topics" emerge, topics which form the dispute (such as "safety" in waste disposal dispute resolution). These also entail the recognition that by asserting one version of this (for instance, that the firm alleging the waste is "safe" in a particular way) one opens up the possibility of the opposite being so: what Kashizawa describes as the need to "take a gamble" in any structured communication or dispute resolution process. In waste disposal disputes, many common topics go to whether the firm is "serious" or not, entailing further topics, each of which can give rise to counter-arguments and/or evidence. However, although the parties to such a process of communication theoretically admit the possibility of reversal, they usually do not want to in practice. Hence, Kashizawa contends, "authoritative third parties" often come to be interposed. Examples include the prefectural officials who sit in the waste disposal firms' explanatory meetings to local citizens, and the *Sumiya Chosadan* (involving some retired officials from the Construction Ministry, responsible for building the extra runway) in the Narita dispute.¹⁰⁴

¹⁰² Another wonderful illustration of this was provided during the concluding plenary session of the annual meeting of Japanese Association of Sociology of Law held in Sapporo on 23 May 1999, at which Kashizawa had earlier presented his paper (above n 82). Two co-chairs had implemented a novel procedure aimed at limiting to about two minutes the time allowed to a member from the floor to address a question or comment to the presenters. One member, who had raised one question earlier in the session, suddenly stood up and violently objected to the procedure. He argued that the Association was formed to encourage members to express and exchange their opinions, and that the new procedure did not allow this adequately. One co-chair immediately reacted quite vigorously, stressing that anyone could raise a question but only for two minutes. The objector, however, then made it clear that his objection was rather that the opportunities were unfair or unequal in that paper presenters were not bound by a two minute limit in giving their answers or replies to comments! The co-chair then acknowledged the point, but insisted on maintaining the procedure which they had proposed at the start of the session. During the exchanges, however, it also became clear that people could ask multiple questions, provided each was kept to within 2 minutes. The objector then sat down, but later in the session asked several more questions (each within 2 minutes); but presenters also subsequently shortened their responses to all questions! The point here is that this was an extremely hot dispute (so much for those harmonious Japanese!) generated by a perception that a procedural "right" had been breached.

¹⁰³ Compare Luhmann, above n 44.

¹⁰⁴ Kashizawa, above n 82. In the conference dispute (above n 102), some of these processes were at work too. Specifically, the co-chair risked being controverted when responding, and in effect was, which he admitted. However he also mentioned a new topic, the initial agreement to the procedure, at the start of the session. The objector in turn seems to have accepted this, for he later asked more questions but

Kashizawa draws several conclusions. First, as in systems theory, communication cannot be completely controlled by the parties; it develops a life of its own. Secondly, parties reach "quasi-agreement".¹⁰⁵ This is neither the "true agreement" of the parties, nor its opposite, but instead something in between.¹⁰⁶ Although it is not impossible for it to be overturned, that would entail large costs (in a broad sense). Further, *legitimacy* is gained through *process*, as in the case of the "Narita symposium" leading to the Construction Ministry body's apology and withdrawal of enforcement of the development approval, followed by sale of the land and agreement on a new runway). Thirdly, Kashizawa stresses the continuities with court processes.¹⁰⁷

In sum, Kashizawa provides a fruitful range of examples and theoretical insights which build on proceduralist theories of law and society, illustrating their relevance in a Japanese context. These theories and insights will now be explored further by focusing on some areas of contract law and practice, as well as product liability (indirectly relevant to contractual unfairness). This will include revisiting social-legal research into private law and civil dispute resolution in Japan.

Contract: Domestic and Transnational

As just mentioned, following Teubner it may be possible to analyse as a creative or productive misreading the development of good faith doctrine in regulating contract termination. Especially given the doctrine's uneven development and application, making it difficult to conceive it as promoting *substantive* "community",¹⁰⁸ it may be more accurate to see the good faith doctrine in private law as developing *procedural* mechanisms to encourage "lifeworld" *communicative rationality* in particular contexts. Indeed, the latter possibility is hinted at in some of Uchida's writings.¹⁰⁹ However, it sits uneasily with his focus on Herculean judges in the Dworkinian vein.¹¹⁰ Following Habermas more consistently (above Part II.B.2), the focus must be widened to include more actors, especially the parties themselves, as well as examining democratic fundamentals theoretically related to communicatively oriented action. Systemic constraints cannot be overlooked, either, and inquiry should be supported by empirical research.

Focusing solely on those systemic factors, but at the level of interaction

within the 2 minutes each time. Otherwise the dispute might have required the intervention of an "authoritative third party"!

¹⁰⁵ *Jun-goi*: compare generally T Tanase "Goi to Kankei Keisei [Agreement and Forming Relationships]" (1995) 138 *Hogaku Ronso* 105.

¹⁰⁶ Kashizawa, above n 82.

¹⁰⁷ Also noting this based on empirical work on contemporary dispute resolution in Japan, but from a different theoretical perspective, see Y Wada "Merging Formality and Informality in Dispute Resolution" (1997) 27 *VUWLR* 45.

¹⁰⁸ Haley, above n 96.

¹⁰⁹ See for example Uchida, above n 97; T Uchida "*Keiyaku Purosesu to Ho* [Contract Process and Law]" in Iwanami Koza (ed) *Shakaikagaku no Hoko VI - Shakai Hendo no Naka no Ho* [Directions in Social Sciences (6): Law Amidst Social Change] (Iwanami, Tokyo, 1993) 129. See also generally T Tanase "*Keiyaku to Shiteki Jichi: Josetsu* [Contract and Individual Autonomy: Introduction]" (1993) 43 *Hoso Jiho* 1.

¹¹⁰ L Nottage "Contract Law, Theory and Practice in Japan: Plus ça Change, Plus c'est la Môme Chôse?" in V Taylor (ed) *Asian Laws Through Australian Eyes* (Law Book Company, Sydney, 1997) 316.

systems, requires analysis of the problematic identified by Luhmann, a potential lack of thematisation in contract negotiations; and possibilities for dethematisation in disputes involving contracts (above Part II.B.1). The increasing importance of *culpa in contrahendo* doctrine, imposing liability (admittedly to varying degrees) on those negotiating contracts, must be acknowledged. This too has grown since the 1960s, often by means of the doctrine of good faith.¹¹¹ Also important is the trend for Japanese courts not to recognise as legally binding mere oral or informal agreements, at least in contexts not involving land sales (above Chapter Two Part II.D). All this suggests more thematisation in Japan, moving communication into legal communication, than Luhmann had perceived. Hence too, perhaps, the emergence of autopoietic Japanese law overall (sketched above at the start of this Part II.B.3).

This thematisation has a rather ambivalent nature, however, at least in one particular context. Recall one tendency noted above (Chapter Four Part III.C.4) in interviews of Japanese and New Zealand companies, mainly involved in cross-border trade between the two countries. In a number of actual trading relationships – especially those involving goods, but also some services (for example shipping) – framework agreements had been formalised in recent years, thus adding a new dimension to the relationship previously formed by spot sales. This had more than organisational aspects, related to the position of legal departments or professional advisors.¹¹² It also involved more than economising, streamlining interactions through having some clauses now collated in the framework agreement rather than appearing in various guises and at various stages during negotiations of particular deals. A key point seems to be that new levels of – and opportunities for – communication were injected into the relationship between the parties. This occurred when formalisation was first mentioned, and all the more so when disputes subsequently emerged. This phenomenon may be amenable to analysis along the lines proposed by Kashizawa. As well as the emergence of new “common topics”, often opposed by one party (not all formal framework agreements were actually signed), another parallel may be the insertion of clauses in the new agreements providing for arbitration. Even if latently, this brings in the possibility of an “authoritative third party” becoming involved in any subsequent disputes. Although these may later serve to de-thematise communication (above Part II.B.1¹¹³), they too contribute to further orienting the parties towards *legal* communication.

Differences with the dispute resolution processes discussed by Kashizawa, and in product liability (discussed next), are that contracting parties have a pre-existing relationship and they can provide beforehand more readily (through contractual

¹¹¹ S Kawakami “Japan” in E Hondius (ed) *Pre-Contractual Liability: Reports to the 13th Congress, International Academy of Comparative Law* (Kluwer, Deventer/Boston, 1991) 207; S Kawakami “*Keiyaku Junbi Dankai de no Shingizoku ni Motozuku Chui Gimu Ihan to Baisho Sekinin* [Liability in Damages for Breach of a Duty of Care in the Contract Formation Stage based on the Doctrine of Good Faith]” (1995) 10 *Shiho Hanrei Rimakusu* 48; Haley, above n 94, 167-168. See generally above Chapter Three Part III.D.1.

¹¹² Compare Macaulay, above n 43; H Ota “*Kosho Katei ni okeru Keiyaku no Yakuwari - Nichibei no Hikaku wo Chushin ni shite* [Functions of Contract in Negotiation Processes: Focusing on Comparisons of Japan with the US]” in K Fujikura and R Nakao (eds) *Kokusai Masatsu - Sono Hobunkateki Haikei [International Friction: Its Legal Culture Background]* (Nihon Hyoronsha, Tokyo, 1987) 203.

¹¹³ Although transnational commercial arbitration has become increasingly legalised: Nottage, above n 61.

agreements) for procedures fostering communication in the event of disputes arising. These possibilities already may be oriented in part towards *legal* communication. Hence the contracting parties may find it easier to actively remodel and reinvigorate their trading relationship through the framework agreement mechanism.¹¹⁴

Product Liability: Legislation and ADR Centres

The “still-birth and re-birth of product liability law in Japan”,¹¹⁵ resulting in new strict liability legislation in 1994 (the PL Law), also can be seen as illustrating the accelerating autopoietic development of Japanese law during this century. Norms emerged from early litigation in the late 1960s, assisted by some academic theory development especially in the early 1970s. Efforts to enact specific legislation foundered in the mid-1970s, however. As well as collective action problems in new types of disputes (such as those arising from alleged automobile defects, compared to earlier “mass injury” incidents), case law was too sparse. Academic theory still lacked sophistication too, as indeed it did in other jurisdictions to which Japanese scholars turned at the time. Conceptualisations in product liability law developed overseas thus scarcely registered on the “screens” of Japanese jurists at that time; even as “legal irritants”, they remained very weak.¹¹⁶ Nonetheless, cases continued to be decided by the courts, or at least filed, and this trend developed accelerating momentum from around 1990. Enactment of the new PL Law now creates a new source of norms to be applied in particular cases, and the first judgment under the law has already been rendered.¹¹⁷ This occurred within a much shorter timespan than most European jurisdictions, which incorporated the EC Directive in the late 1980s or early 1990s, and Australia which created a similar legislative regime in 1992.¹¹⁸ It therefore demonstrates the high degree of positivity in Japanese private law, reinforcing its potential for autopoietic development (above Part II.B.1).

Another development consistent with implications from recent systems theory comes from the broad definition of “manufacturer” contained in Article 2(2) of Japan’s PL Law.¹¹⁹ Arguably, this type of provision is highly suited to regulating new hybrid forms of business networks such as franchise systems, which have emerged strongly in post-War Japan as well as in other jurisdictions.¹²⁰ After all, Teubner contends that in

¹¹⁴ Also consistent with this trend may be the growing use of more “constitutional” terms in contracts between manufacturers in the US, noted by J Esser “Institutionalising Industry: The Changing Forms of Contract” (1996) 21 L & Soc Inq 593. Another may be the introduction of various types of quality assurance mechanisms in inter-firm contracting in the UK: see H Collins and C Scott “United Kingdom” in G Brueggermeier (ed) *Rechtsprobleme von Qualitätsmanagementvereinbarungen und EG-Binnenmarkt [Legal Problems of Quality Assurance Agreements and the EU Internal Market]* (Nomos, Baden-Baden, 1998) 239. See also above Chapter Four Part III.D.

¹¹⁵ Nottage, above n 88.

¹¹⁶ Compare Teubner, above n 65a.

¹¹⁷ “*Ibutsu Fumei de mo Kekkan* [‘Defect’ Even when Not Clear What the Extraneous Matter Was]” *Nihon Keizai Shimbun*, Tokyo, 1 July 1999, 3.

¹¹⁸ L Nottage “Global Harmony and Disharmony in Accident Compensation: Japan’s New Product Liability Legislation Compared to the EC Directive and Part IV.A of the Trade Practices Act” (1999) 66/2 *Hosei Kenkyu* F1.

¹¹⁹ Compare art 4(2), narrowly exempting component manufacturers following instructions: Nottage, above n 118.

¹²⁰ See generally Taylor, “Continuing Transactions”, above n 97.

theory franchise systems are a mixture of contract and organisation, orienting transactions to individual actors and the franchise network itself, and that:¹²¹

This double orientation which is made in 'practice', and which combines organisational self-regulation with external regulation by the market, ought to become the legal model for a notion of liability which does justice to the peculiarities of the network. Indirect regulation via liability law which can only "hit" the self-regulatory nerve of the network if it can "irritate" the double orientation of network behaviour.

[...] On the whole, the instrument of product liability shows many features which are "network adequate". It imposes increased duties of care on the head of the organisation, and makes it liable for the organisation as a whole as far as this is subject to its supervision. At the same time it is decentralised insofar as "net" and "knot" are burdened with complementary duties of care according to the internal division of labour. The sharing of tortious duties of care means that *product liability reflects exactly the internal division of labour within the network. In this way it would seem that product liability "hits" the self-regulation of the network with sufficient provision.*

In addition, the PL Law's more general definitions of key concepts such as "defect"¹²² can be seen as addressing systemic deficiencies in a way similar to the expanded general clause of good faith.¹²³ Following Habermas, such general provisions in the PL Law can be appraised in discourse theoretical terms (above Part II.B.2). They can be seen as reflecting and inviting an ongoing process of affected groups participating in forming new legal rules, legitimated by promoting both private and public autonomy.¹²⁴ That too seems plausible in light of the argumentation processes plus the broad participation in the process leading to the enactment of the PL Law, including new lobbying groups, intense media pressure at key junctures, and so on.¹²⁵

Systems theory, discourse theory, and especially Kashizawa's analytical framework also shed new light on the emergence and the operations of the product-specific, industry association based PL ADR Centres set up soon after enactment of the PL Law.¹²⁶ Thematisation, or engendering legal communication, perhaps is even more difficult than envisaged by Luhmann (compare above Part II.B.1). So is the potential for withdrawal stressed by Kashizawa, since the Centres are used primarily to gather information,¹²⁷ rather than as a forum to resolve disputes which more readily can engender structured two-way communication. Nonetheless, closer analysis of Centre activities reveals that some requests for information in fact presuppose a specific dispute and are or may become part of a conflict, even if eventually played out more in other forums. In situations involving significant conflict-oriented communication, moreover, withdrawing or de-thematising also tends

¹²¹ G Teubner "Beyond Contract and Organization: The External Liability of Franchising Systems in German Law" in C Joerges (ed) *Franchising and the Law: Theoretical and Comparative Approaches in Europe and the United States* (Nomos, Baden-Baden, 1991) 105, 121-123 (emphasis added).

¹²² Nottage, above n 118.

¹²³ Compare Teubner, above n 33.

¹²⁴ See also the positive appraisal of "incompletely theorised agreements", drawing in part on Habermas, in C Sunstein *Legal Reasoning and Political Conflict* (Oxford UP, New York, 1996).

¹²⁵ Nottage, above n 88.

¹²⁶ Nottage and Wada, above n 27.

¹²⁷ T Tanase "The Management of Automobile Disputes: Automobile Accident Compensation in Japan" (1990) 24 L & Soc Rev 651 notes a similar tendency in automobile accident dispute resolution. Compare also Kashizawa, above n 103.

to entail further communication. ADR Centre personnel who have originally communicated by free-dial telephone, for instance, may have to meet in person the enquirer/complainant, or examine the alleged defective good and investigate the site of any accident.¹²⁸

If communication is maintained, new "opposed common topics" also appear to emerge. Particularly interesting is the way that focus often seems to shift away from the dichotomy "defective/not defective", central to the PL Law, towards that of "safe/unsafe". Both are related, of course, and the dichotomy remains, so that communication is *legal* from a systems-theoretical perspective. Yet the issue of "safety" is broader, bringing in for instance the role of *ex ante* administrative regulation. That can only become relevant to a limited extent under article 2(2)'s definition of defect, in which "other circumstances" is interpreted as meaning that the mere fact of compliance with administrative standards should not determine the question of liability.¹²⁹

At a more abstract systemic level, as noted above (Part II.B.1), Teubner welcomes private associations' development of product safety standard-setting in Europe.¹³⁰ Perhaps he would welcome the emergence of this through industry-based dispute resolution/information exchanging mechanisms like Japan's PL ADR Centres. From that perspective, moreover, an eventual repoliticisation can be expected in Japan, for example enactment of broader product safety legislation in addition to the PL Law, as in Europe recently.¹³¹

A final point of intersection with Kashizawa's analysis is the way in which other bodies remain indirectly involved in communication, as authoritative third parties, for instance between consumers and PL ADR Centre personnel. Empirical research has found or suspected considerable involvement of local government sponsored Consumer Living Centre personnel.¹³² Most obviously, this occurs when they bring requests and/or complaints on behalf of consumers; but it also occurs simply by them remaining on the sidelines as another potential source of information for consumers, or another step in a much broader dispute resolution process. Similarly, lawyers are involved most visibly in the (still few) cases which go to formal proceedings within the ADR Centres; but more generally the Bar Associations also played an important monitoring role when the Centres were established. A similar role was played by the media, and lobbying or interest groups which had hitherto focused on getting the PL Law enacted; and the media, with its more institutionalised memory, is well positioned to reemerge in this function in the event of a major case.¹³³ Thus, "professional support", and "social support" (albeit often latent), becomes apparent; but all are deeply entwined with "self support" in particular communication settings, as suggested by Kashizawa in other contexts in Japan (above Part II.B).

It also seems promising to reinterpret these processes more from a discourse

¹²⁸ Nottage and Wada, above n 27.

¹²⁹ Nottage, above n 118.

¹³⁰ See also Teubner, above n 64.

¹³¹ See for example H-W Micklitz "Product Liability and Product Safety - Standardisation and Certification: The European Challenge" (Paper presented at the Symposium on "Products Liability: Comparative Approaches and Transnational Litigation", Austin Texas, 19-20 February 1998).

¹³² Nottage and Wada, above n 27.

¹³³ See also Nottage, above n 88. Compare Habermas, above n 66 (generally more sceptical about the effects of mass media in contemporary democracies).

theoretical perspective, connecting them to communicative action. The emergence of common topics, bringing a risk of controversion, can prompt inter-subjective understanding. But procedural prerequisites must be met here too. Nor is it enough simply to allege that rights entailing these apply at a very general level. Rather, Habermas correctly draws attention to the need to tease out in particular settings the moment at which private autonomy and public autonomy *both* are fostered (above Part II.B.2). In particular, the Centres vary in their operations in terms of information disclosure, although most are quite open. Some, like the auto industry's Centre, also seem particularly set on one-way communication; not explaining well, let alone responding well. More generally, it can be questioned whether the mass media can effectively play much of an ongoing role, since they tend to live off bigger or newsworthy disputes. They also are continuously distracted by other topics emerging on legislative agendas which are either simply not relevant to product liability law; or may be, but are not subjected to more profound analysis which would help sustain interest in the PL Law and related reforms. Nonetheless, Japanese democracy and constitutional arrangements (in their broader sense) do not seem hopeless in such regards either, compared to the way in which product liability issues faded from the agenda in Europe – until the sensationalist aspects of the BSE (Mad Cow Disease) outbreak combined with broader changes in EU law and administration (recent disgust with corruption or at least lack of accountability of the Commission).^{133a}

Overall, therefore, product liability law and practice in Japan present a comparatively good example of the emergence of “pluralistic coordinating forums”,¹³⁴ in both legislative and dispute resolution processes within a modern democratic polity.

III “Reorienting” Comparative Legal Studies and Contract Law Theory

These rich sociological and jurisprudential theories of proceduralisation of contemporary law, presented in admittedly summary fashion in this Chapter, add a further dimension to the framework initially proposed by Atiyah and Summers applied in Parts One and Two of this thesis, as well as justifying the attention throughout to “law in action” as well as the “law in books”. The theories also hold a broader relevance for comparative law scholarship. Part II.B.3 focused on specific neo-proceduralist tendencies in Japanese law. However, as indicated in passing at the start of Part II.B, these theories were developed primarily by German theorists keenly interested not only in the evolution of law in Germany, but also in other complex industrialised democracies. As mentioned above in Part II.A, tendencies consistent with neo-proceduralist models also can be detected in England, New Zealand, and the US, although for the latter two legal system theorists have very rarely conceptualised developments in such terms.¹³⁵ Future research will need to examine those

^{133a} See generally C Joerges with S van den Bogaert “Law, Science and the Management of Risks to Health at National, European and International Level: Stories on Baby Dummies, Mad Cows and Hormones in Beef” (forthcoming, 2001) 7/1 *Columbia J European L*.

¹³⁴ Compare more generally S Tanaka “Metamorphosis of the Legal System: Towards a Pluralistic Coordinating Forum” in Z Kitagawa and others (eds) *Das Recht vor der Herausforderung eines neuen Jahrhunderts [Law Before the Challenge of a New Century]* (Mohr Siebeck, Tuebingen, 1998) 91.

¹³⁵ See above nn 23-26. A useful framework for broader comparisons, including new directions in European law generally, is set out in K-H Ladeur “Proceduralization and Its Use in Post-Modern Legal

developments more carefully, in comparison with Japanese law as analysed in Part II.B.3 above. Yet one can expect all these contemporary industrialised democracies to exhibit significant proceduralist tendencies, according either to systems-theoretic approaches (Part II.B.1) or Habermas' discourse theory of law, premised on social differentiation in modern times (Part II.B.2). Despite the more substantive orientation generally and in contract law found in Japanese and US law, compared to the more formal orientation in English and New Zealand law, over the course of this century all four legal systems appear to have developed the core positivity of law and supporting institutions needed to generate an autopoietic legal system (see Part II.B.1 above, Figure 4), or one differentiated from other social (sub-)systems (see also Part II.B.2).

Theoretically, moreover, neo-proceduralist tendencies can emerge from – or accumulate on top of – legal systems with either more formal or more substantive orientations. Future comparative research should investigate whether these tendencies emerge faster or more prolifically in the former rather than the latter types of legal systems, or in other contrasting ways; but arguably there is no theoretical necessity for that to occur.¹³⁶ Indeed, precisely because these developments involve new *processes*, it is likely that even similar developments – such as the emergence of good faith doctrine in England, sparked primarily by EU law (above Chapter Three Part IV.B) – will result in differing *outcomes*.¹³⁷ Thus, neo-proceduralist theories point to both the potential for common themes in the development of advanced contemporary legal systems, yet different evolutionary paths.¹³⁸ This also explains patterns of convergence *and* divergence in law at a global level, including the new *lex mercatoria* in transnational commercial relationships,¹³⁹ casting doubt on assertions of some overarching “world law”.¹⁴⁰ Incorporating a broader comparative perspective, therefore, this Chapter has shown another important way – in addition to notion of “didactic formality” proposed above (Chapter Four Part III.D) – in which Atiyah and Summers' analytical framework can be further developed, transcending the dichotomy of “universal jurisprudence” and “jurisprudential relativism”.¹⁴¹ This also promises new insights into “legal transplants” between contemporary legal systems amidst globalisation of economic, political and legal relations.¹⁴² All these insights force

Theory” (LAW No. 96/5 European University Institute Working Paper, Florence, 1996).

¹³⁶ Compare generally Rottleuthner, above n 34; Teubner, above n 32.

¹³⁷ See Teubner, above n 32; n 65a. See also Habermas, above n 80.

¹³⁸ Compare also Uchida, above n 97.

¹³⁹ See for example Teubner, above n 61; Nottage, above n 61.

¹⁴⁰ See for example K Sono “Towards a Modern Jus Commune: Converging Trends in a Shrinking World - The Law of Contract” (Paper presented at the IALS Annual Conference, “Towards a Modern *Jus Commune*”, Buenos Aires, September 1995); H Berman “World Law” (1995) 18 *Fordham Int'l LJ* 1617; Lord Cooke “Party Autonomy” (1999) 30 *VUWLR* 257, 268; M Bonell *An International Restatement of Contract Law: The UNIDROIT Principles of International Commercial Contracts* (Transnational Juris Publications, Irvington (NY), 1994); W Gray “Globalisation of Contract Law: Rules for Commercial Contract in the 21st Century” [1996] *NZLJ* 52. Compare for example L Nottage “Trade Law Harmonisation in the Asia-Pacific Region: A Realist's View from New Zealand - and a Way Forward?” [1995] *NZLJ* 295; L Nottage “Japanese Corporate Governance at a Crossroads: Variation in ‘Varieties of Capitalism?’” EUI Working Paper in Law No 2001/7 (European University Institute, Florence, 2001, <www.iue.it/LAW/publicat.htm>; forthcoming also in *North Carolina J In'l L & Comm Reg*).

¹⁴¹ Compare Atiyah and Summers, above n 2, 415, 428.

¹⁴² Compare for example Teubner, above n 65a with Atiyah and Summers (and others cited) above

reappraisals of received wisdom, especially tendencies still to conceive of Japanese law as just "Far Eastern law" or even "civil law".¹⁴³

Sociological and jurisprudential inquiry along the lines proposed in this Part Three may also reinvigorate comparative law methodology more generally. This is important because comparative law scholarship experienced some serious malaise as the end of the 20th century; and an appropriate methodology is still being vigorously debated, in dealing with increasingly important new issues such as the harmonisation or unification of private law in Europe.¹⁴⁴ Specifically, Part II.B.3 of this Chapter reinforced the need for theory building in comparative context to be underpinned by empirical studies.¹⁴⁵ Yet those need not be limited to those adopting the narrower view of social science advocated recently by comparativists wedded to the economic analysis of law.¹⁴⁶ Further, although Part II.B stressed the potential for synthesis between systems theory and Habermas' discourse-theoretical approaches to explaining neo-proceduralism in contemporary legal systems, Habermas' more expansive concept of normativity allows for more *critique* of different legal systems.¹⁴⁷ The malaise of comparative law arguably arises from the attempt to avoid normative critique, epitomised by the "functionalist" approach long advocated by scholars like Zweigert and Koetz,¹⁴⁸ for arguably any *legal* analysis remains a *normative* endeavour.¹⁴⁹ Recent work on Japanese law, otherwise extremely valuable, is flawed by the lack of a convincing general jurisprudential theory, able to establish grounds for coherent normative critique as well as providing direction for empirical or descriptive inquiry.¹⁵⁰ The present thesis at least identifies this as a significant issue, and suggests promising directions to be developed in further comparative studies.

For similar reasons, general jurisprudential and sociological theory along the lines proposed above (Part II.B) is central for further reconceptualisations of contract

¹⁴³ Compare for example A Marfording "The Fallacy of the Classification of Legal Systems: Japan Examined" in V Taylor (ed) *Asian Laws Through Australian Eyes* (Law Book Company, Sydney, 1997) 65.

¹⁴⁴ On the former malaise, see for example C Rogers "Gulliver's Troubled Travels, or the Conundrum of Comparative Law" (1998) 67 *Geo Wash L Rev* 149 (and the various recent symposia referred to therein). On the latter, see Nottage, above n 65b.

¹⁴⁵ This is one weakness in the most recent work by Haley, *Spirit*, above n 94.

¹⁴⁶ See for example J M Ramseyer and M Nakazoto *Japanese Law: An Economic Approach* (University of Chicago Press, Chicago, 1998); U Mattei *Comparative Law and Economics* (University of Michigan Press, Ann Arbor, 1997).

¹⁴⁷ Compare Gerstenberg, above n 66. See also Teubner, above n 19; D Jabbari "From Criticism to Construction in Modern Critical Legal Theory" (1992) 12 *OJLS* 507.

¹⁴⁸ See, still, K Zweigert and H Koetz (T Weir trans) *Introduction to Comparative Law* (3 ed, Clarendon Press, Oxford, 1998) 37-40. Compare for example G Frankenberg "Critical Comparisons: Rethinking Comparative Law" (1986) 26 *Harv Int'l LJ* 411.

¹⁴⁹ See for example J Gessner "Praesumptio similitudinis? A Critique of Comparative Law" in Proceedings of the 1995 Annual Meeting of the RSCL (International Sociological Association), Tokyo, 1-4 August 1995, Section Meetings Supplement 2, 41, 44. See also W Ewald "Posner's Economic Approach to Comparative Law" (1998) 33 *Texas Int'l LJ* 381.

¹⁵⁰ This is especially true of the latest book by Haley (*Spirit*, above n 94), which reads as a positive appraisal of Japanese law, but without articulating clearly any "communitarian" jurisprudence to support that appraisal. This attempt remains an advance on an earlier study, however, founded on a very narrow behaviouralist view of law which came in for robust criticism on jurisprudential grounds (D T Johnson "Authority Without Power: Haley on Japan's Law and Politics" (1993) 27 *L & Soc'y Rev* 619). A similar critique can be directed at the recent study by Ramseyer and Nakazoto (above n 145).

law theory. First, just as they helped explain contemporary developments in Japanese law and practice, they will likely help uncover similar tendencies in New Zealand – and not just among the companies dealing with Japan, interviewed in the empirical study described above (Chapter Four Part III.C) – as well as England and the US. Secondly, despite autopoietic structures probably being in place in all these legal systems, those tendencies may play themselves out differently given varying legal, economic and social systems.¹⁵¹ However, as suggested by this Chapter's analysis of product liability in Japan (above Part II.B.3), along with the several occasions at which this thesis has identified areas of private law related to contract law doctrines being examined (above Chapter Two Part IV, Chapter Three Part V), further inquiry into the proceduralisation of contract law could examine trends in the law of private obligations more generally.¹⁵² Thirdly, incorporating broader sociological and jurisprudential theory will help underpin the development of such contract law theory with both empirical research, and resources for normative appraisal.¹⁵³

Without attempts along these more ambitious lines, stereotypical views of Japanese law will remain difficult to extirpate; contract law theory development will be impeded; and general legal theory will not be able to draw on comparative analyses to render it more concrete and meaningful. Already, therefore, Part Three of this thesis introduces and begins to apply broader legal theory to reinforce the comparative analysis of Japanese, US, English and New Zealand generally (above in Part One), and their contract law in particular (Part Two).

¹⁵¹ Compare for example T Ginsburg "System Change? A New Perspective on Japan's Administrative Procedure Law" in T Ginsburg, L Nottage and H Sono (eds) *The Multiple Worlds of Japanese Law* (University of Victoria, Victoria 2001) 107.

¹⁵² See also generally H Collins "The Transformation Thesis and the Ascription of Contractual Responsibility" in P Wilhelmsson (ed) *Perspectives of Critical Contract Law* (Dartmouth, Aldershot, 1993) 293.

¹⁵³ See also K Yamamoto "Glocalisation, Contract and Community: Reflections on Contemporary Contract Law Discourses" (1999) Paper presented at the conference on "Legal Crisis? Japan and Asia", Melbourne, 12-14 August 1999.

GENERAL CONCLUSIONS

The **Introduction to Part One** began by questioning older views, propounded by eminent Japanese scholars such as Kawashima in the 1960s and still influential among some commentators outside Japan, about the marginality of law and contract law in Japan. It was suggested that the continued attraction of such views, stressing Japan's distinctiveness rather than features shared with other countries, had roots in the cultural relativism in the 1960s and the 1970s, along with the patterns of Japan's encounters with Europe and especially the US. Adding an antipodean perspective – particularly one encompassing New Zealand, with its different pattern of encounters – might allow Japan to be positioned more accurately.

Accordingly, **Chapter One** went beyond Atiyah and Summers' analysis of the more formal orientation of legal reasoning and related institutions in England, and the more substantive orientation in the US. It showed how Japanese law bears strong similarities with US law along major dimensions of legal reasoning: authoritative formality (Part II.A), content formality (Part II.B), and mandatory and interpretive formality (Part II.C). The noticeable differences were instead with English and New Zealand law. The same pattern emerged when considering two "varieties" of formality (Part II.D). It held perhaps less conclusively with regard to truth formality in Japan; but more so when taking into account the reality of trial processes, in turn related to low levels of enforcement formality. "Summing up" these various dimensions certainly was complicated by Japan being sometimes more formal in orientation than the US, and sometimes less so. Overall, however, both appeared distinctly more substantive than both New Zealand and England (Part III, Figure 2). The general analysis of the four legal systems was necessarily selective, but it demonstrated the usefulness of new conceptualisations sensitive to socio-political context, at a time when some comparative law theorists advocate abandoning attempts at systematic or macro-level inquiry, in favour of post-modernist or micro-level approaches.

Specifically, Chapter One showed how Atiyah and Summers' framework could be extended beyond a comparison of two legal systems, at least to distinguish important contrasts between the two pairs of legal systems examined in this thesis. This permitted a multi-level critique of perceptions that Japan is very different from the US, while recognising divergences at some levels. The framework also allowed the comparison to extend beyond the law in books to encompass the law in action, including findings from some social scientific research. Finally, Chapter One demonstrated considerable coherence in the orientation even of legal systems like those of Japan and New Zealand, which extensively borrowed – or were forced to adopt – legal precepts and institutions in the 19th century. This helps uncover and explain difficulties in transplanting new legal concepts into these systems nowadays, and their general inertia, despite instances of effective transplants. The need for sensitivity about the fragility of borrowing among legal systems, mentioned briefly by Atiyah and Summers, is becoming increasingly relevant in an era of rapid globalisation of legal as well as economic relations.

Much of that globalisation is occurring by trans-border trading and investment, involving parties actually or potentially linked by contractual relations. Partly to examine the development of contract law in reaction to these trends, but also to further demonstrate the explanatory potential of Atiyah and Summers' analytical framework, **Part Two** focused on some narrower topics. The **Introduction to Part Two** compared

the historical development of contract law theory generally, showing how the heavy influence of legal realism set the stage for a much more substantive approach in the US and Japan from the early decades of the 20th century. The survey also introduced some of the topics discussed in ensuing chapters, located them in terms of the debate about the deeprootedness of classical and neoclassical models of contract law, and reinforced the need to examine developments in terms of both black-letter law and contract law in action. **Chapter Two** then analysed judicial reasoning in detail, primarily through case law development, with regard to one issue in contract formation related to the broader dimension of authoritative formality. **Chapter Three** compared a broader range of norms developed in the four legal systems to deal with contractual unfairness, related to the dimension of content formality. Also related to that dimension, but in its time aspect rather than its contextual one, **Chapter Four Part II** discussed important legal doctrines providing relief from supervening changes in circumstances. Consistently, New Zealand and English contract law were more formal in their reasoning than US and Japanese contract law (Part Two, Figure 3). As in Chapter One, however, it proved more difficult to determine whether Japanese or US law was the most substantive, and whether New Zealand or English law was the most formal, especially as there may be more scope for change in a particular area of law (less constrained by a full range of interlocking institutional constraints) than at the level of the legal system as a whole.

Nonetheless, the dichotomy between each pair of jurisdictions was consistent with that suggested by the more general comparative analysis, so Parts One and Two mutually reinforced each other. Part Two likewise showed the usefulness of Atiyah and Summers' framework in comparing particular areas of law in multiple legal systems, especially by allowing the law and practice of contracting in Japan to be positioned more accurately. It also helped uncover and explain difficulties in reshaping contract law, particularly that characterised quite coherently by more formal reasoning, into a body of law adopting more pervasive substantive reasoning. In addition, empirical research was drawn upon to provide a greater insight into contract law in action, and specifically its relation to contract law in books (Chapter Four Part III). Didactic formality was proposed as a third possible variety of formality, rising to another challenge laid down by Atiyah and Summers, namely to imagine and investigate other dimensions of formality in legal systems. The notion of didactic formality helped explain the greater tendency of Japanese and US courts and commentators to incorporate into their contract law the practices and expectations of contracting parties. Although the need to do this have been expressed by some counterparts in New Zealand and England, the general approach still seems to be that contract law should lead or channel practices and expectations, at least when developments in the US and Japan are brought into the picture. Combined, moreover, the dimensions of formality explored in Part Two added a broader comparative dimension to ongoing debates on contract law theory generally.

The empirical studies introduced at the end of Chapter Four also revealed mechanisms at the contract formation and (especially) dispute resolution stages, in at least some types of dealings, by which both economic and legal discourse could be engaged. This suggested some parallels first with new types of legal institutions or forums perceived by Teubner and others as distinctive of many contemporary legal systems, and secondly with patterns of argumentation within constitutional democracies characterised by social differentiation, observed and advocated by Habermas. Such

neo-proceduralist theories of law, introduced in **Chapter Five** and applied to contemporary Japan particularly in the context of contract law and product liability (Part II.B), implied that Atiyah and Summers' framework requires a second and more ambitious refinement (Part II.A). More attention needed to be paid to the justification of contemporary law and its external functions (similar to "second-order reasoning", in their framework), not just the internal structures of law ("first-order reasoning") which constitute the main focus of this thesis. Nonetheless, the latter structures – and the dimensions thereof proposed by Atiyah and Summers – remain important for analysing the emergence of neo-proceduralist or reflexive rationality in more formal as well as more substantive legal systems. That rationality, and the institutional framework supporting it, *may* generate some commonalities between Japan and New Zealand or England, despite contrasting orientations (towards substantive and formal reasoning, respectively) highlighted in this thesis. Conversely, even if the US develops and institutionalises features of neo-proceduralist or reflexive rationality, divergences from Japan *may* ultimately develop. Such are the seeming paradoxes which emerge from turning the main focus on *processes* in contemporary legal systems. Identifying some of the underlying mechanisms, as Chapter Five attempted to do, nonetheless allows for a better understanding of how divergence as well as convergence can occur in increasingly complex national and transnational legal systems. Theories like those of Habermas hold the added attraction of overt normative critique. Thus, rising to a further challenge laid down by Atiyah and Summers, this thesis attempted to draw comparative legal studies (and contract law theory) into a symbiotic relationship with sociological and jurisprudential inquiry.

This thesis therefore aimed to contribute to three disciplines: comparative law, contract law, and general legal theory. Several directions for future research were set as well. The Introduction to Part One invites more detailed examination of the patterns of New Zealand's encounters with Japan, particularly in the legal arena. English encounters have not been explored at all. Japanese companies appear to have been heavy users of litigation and arbitration in London, so stereotypical views of Japanese contracting behaviour and legal principles may be less prevalent than in the rest of Europe or the US. While calling into question overgeneralisations, examining English encounters with Japan may identify further particular points of true contrast. However, an analytical framework to position Japan in broader comparative context, like that developed in Chapter One, will still be required. Part Two, deliberately focusing on developments in contract law theory and specific issues arising at different stages of the contracting process, also leaves open several areas of inquiry for future research. Some noted in passing include related contract law doctrines, but others invite comparative studies of the private law of obligations more generally. Directions were also set for comparable empirical research into contract planning and renegotiation, especially in England and the US. Lastly, Part Three introduced two main variants of contemporary neo-proceduralist theory, providing the first sustained attempt (in the English language) to begin applying them concretely to developments in Japanese private law. However, further attempts will be required as the theoretical debate continues to evolve. Further, more research along these lines is needed for England, the US, and especially New Zealand, where these neo-proceduralist theories have received almost no attention so far. The analysis can also be extended to transnational settings, to examine the impact of globalisation upon contract law and practice, as well as upon national legal systems

more generally.

In sum, this thesis itself should be considered part of an ongoing process. Drawing on recent legal theory as well as the framework first proposed by Atiyah and Summers, it has set out conceptual matrices for positioning Japanese law, which have broader implications for comparative legal studies. Those matrices proved to be of value in comparing and analysing developments in contract law, especially in Japan, and add new insights into contemporary debates about contract law theory more generally. This constitutes a rather ambitious attempt to “reorient” comparative law, contract law theory—building, and general legal theory; but the thesis hopefully clears paths, and advances scholarship, towards that goal.

Appendix A (see above Part One Introduction):

Litigation in New Zealand Courts involving Japanese affiliated companies incorporated in New Zealand

Parties	Citation	Summary and Result
<i>Juken Nissho Ltd v Northland Regional Council</i>	CA 68/00, 15 May 2000, Richardson P, Gault and Thomas JJ	Juken's conviction, for breach of resource consent regarding discharge of contaminants, upheld; reports from consultants that it forwarded were admissible (as an exception to the rule against hearsay)
<i>Juken Nissho Ltd v A-G</i>	(1998) 12 PRNZ 380	Juken granted extension of time and application for leave to appeal on a question of law under the Arbitration Act 1996 (subsequently heard together with CCH Ltd v A-G, 29 March 1999, High Court, Auckland, CL 9/98 and 17/98, Paterson J), relating to Crown Forest licenses
<i>Pacrim Forest Products (NZ) Ltd v Mitsui & Co Ltd & Anor</i>	17 December 1997, High Court, Christchurch, CP 16/96, Hansen J	Mitsui successfully defended claim that agreement entered into for purchase of logs
<i>Stanley & Anor v Fuji Xerox NZ Ltd</i>	5 November 1997, High Court, Auckland, CP 479/96, Elias J	Fuji Xerox held liable, for underpayment of commission and wrongful termination of agency agreement
<i>OEM International Ltd v The Ship "Wellington Maru"</i>	(1997) 11 PRNZ 142	Defendant's application refused, to admit Partlow charts for containers in cargo defect dispute
<i>A-G v Juken Nissho</i>	21 August 1996, Court of Appeal, CA 128/96, Richardson P, Henry & Blanchard JJ	Juken held to be bound by appointment of Crown valuer for forest license fees, despite lack of strict compliance with timeframe set out in licence contracts
<i>Sea Tow Ltd v The Ship Katsuei Maru No 8 KXN</i>	8 May 1996, High Court, Auckland Registry, AD 736/96, Salmon J	Ship involved in collision arrested, but released because Japan Mutual Insurance Company (Gyosen Hoken Chuokai) acceptable as guarantor
<i>Commissioner of Inland Revenue v Mitsubishi Motors NZ Ltd</i>	[1995] 3 NZLR 671 (PC)	Mitsubishi entitled to deduct the reasonably estimated costs of meeting warranty claims in the year of sale.
<i>Mitsui & Co (NZ) Ltd v Commissioner of Inland Revenue</i>	(1995) 17 NZTC 12,112	Mitsui failed to satisfy that CIR wrong to consider amounts written off from failed subsidiary business were capital in nature, and thus deductible
<i>Quality Systems Ltd v Perkom Ast Pty Ltd & Fujitsu NZ Ltd</i>	7 June 1994, Court of Appeal, CA 187/93, Richardson and Gault JJ, Sir Gordon Bisson	Fujitsu successfully defended claims in contract and quantum meruit for sale of computer hardware to third party Telecom, as subcontractor to Quality Systems (which later lost its rights to market software to Telecom); however CA urged Fujitsu to pay some commission ex gratia!
<i>A-G v The Ship "Tosa Maru"</i>	(1992) 5 PRNZ 661	Defendants' application to strike out admiralty proceeding, stemming from collision with police vessel, denied but leave to amend proceeding granted

APPENDICES

<i>Nippon Credit Australia v Girvan Corporation NZ Ltd & Anor</i>	(1991) 5 NZCLC 67,498	Nippon successfully applied to strike out counterclaim by defendant in winding up proceedings based on its guarantee obligation
<i>CBI NZ Ltd v Badger Chiyoda</i>	[1989] 2 NZLR 669	Badger Chiyoda (joint venture between Netherlands and Japanese companies, head contractor for Marsden Oil Refinery extensions) successfully prevented CBI (Chicago-controlled, subcontractor) remitting ICC arbitral award to courts
<i>Japan Line (NZ) Ltd & Anor v New Zealand Harbours IOUW & Anor</i>	[1988] NZILR 879	Japan Line, agent for ship "Toyo Fuji 2" and prevented from discharging parts for Toyota (NZ) Ltd, successfully claimed that defendant union members were striking; second defendant's plea that their members' performance frustrated, by first defendant's picket line, rejected ("The possibility of entry by sea to the wharf was not effectively explored and there is no suggestion that police assistance was sought to ensure a peaceful entry": p884)
<i>Dow Chemical Co v Ishihara Sangyo Kaisha Ltd (No 2)</i>	(1986) 1 TCLR 332; (1985) 5 IPR 415	Ishihara granted relief from discovery in proceedings brought by Dow for revocation of Ishihara patent
<i>Fletcher Industries Ltd v Japan Line (NZ) Ltd</i>	18 October 1984, High Court, Wellington Registry, A 313/83 and 314/83	Japan Line held liable for damage to cargo
<i>Collings Reisch Meade Motorcycles Ltd v Moller Yamaha Ltd</i>	(1983) NZCLC 98,719	Moller Yamaha successfully claimed security for costs in proceedings brought by plaintiffs for unjustified termination of sub-distributorship agreement

Appendix B (see above Part One Introduction):

Litigation in New Zealand Courts involving Japanese residents or incorporated companies

Parties	Citation	Summary and Result
<i>Yoshimoto v Canterbury Golf International Ltd</i>	[2001] 1 NZLR 523	Appellant succeeded in claim for payment of \$1 million out of the \$3.2 million price to purchase his land for a golf course development; written contract's condition precedent, that "all necessary authorisations or resource consents" for the development should be obtained within 12 months, not interpreted literally – lateness of one consent irrelevant given all contract provisions, commercial objective, and broader contractual matrix; <i>obiter dicta</i> by Thomas J arguing that extrinsic evidence (earlier drafts of final contract) should be admissible, in principle
<i>MacAlister & Anor v Ishizuka & Anor</i>	18 June 1998, Court of Appeal, CA 254/97, Richardson P, Thomas & Keith JJ	Respondents justified in directing their company in Japan to stop purchasing jackets manufactured in a joint venture company in which they invested in New Zealand; offer to later buy shares at \$3.50 not oppressive
<i>Nippon Credit Bank v Air New Zealand</i>	8 December 1997, Privy Council, PC 33/97, Lords Browne-Wilkinson, Lloyd, Hutton (Lords Hoffman and Saville dissenting)	Nippon, as assignee of aircraft leases, required to contribute to cost of modifications "upon redelivery" (Court of Appeal decision noted by McLauchlan, 113 LQR 237)
<i>Ohnuma v Jiang & Anor</i>	29 October 1997, High Court, Auckland Registry, CP 301/97	Ohnuma obtained return of cash advances and travel expenses (?) provided to Jiang for promise to work for her in Japan; registry of joint tenancy for home purchased, based on oral agreement; and so on
<i>Fukumoto v Rudd Watts & Stone</i>	15 September 1995, High Court, Christchurch, CP 47/95, Holland J	Defendant law firm's application to join third party insurer allowed, in claim by Japanese investor against law firm for breach of contract, negligence and breach of fiduciary duty regarding golf course investment
<i>Tak & Co Inc v AEL Corporation Ltd & Anor</i>	(1995) 5 NZBLC 103,887	Tak successfully claimed damages (including exemplary damages!) for fraudulent breach of export sale contract of live Angus cows to Japan (preceded by interlocutory judgment, reported in (1994) 7 PRNZ 432)
<i>Multiply Ltd v Old Mill Farm Ltd & Ors; Millbrook Country Club Ltd v Multiply Ltd & Anor</i>	(1995) 7 NZCLC 260,746	Japanese and New Zealand partners in golf course joint venture require to compensate Hong Kong partner for terminating consultancy without reasonable notice, and \$0.6 million awarded for 40% shareholding in joint venture company (with additional implied term argument rejected in supplementary judgment, 13 April 1995, High Court, Auckland, CL 79/93 and 1/94, Barker J)

Appendix C (see above Chapter Four Part III.C):

Background of Survey Respondent Companies

Field of Business

1. Circle the letter in the brackets next to the one category that best describes your company's business (if part of a family of corporations, reference is to the company with whose operations you are most familiar):

Nature of Business	US [82]	NZ [26]	Japan [21]
[A] diversified, combining more than one of following:	25	–	3
[B] business services other than financial	–	2	–
[C] chemicals	4	1	–
[D] consumer products other than food	3	2	1
[E] consumer services other than financial	1	–	1
[F] financial services (eg banking, insurance)	2	1	2
[G] food products	4	7	4
[H] fuel other than petroleum	1	–	–
[I] high tech (for instance computer hardware or software)	2	1	1
¹ manufacturing hard goods (for instance automobiles or parts, machinery, business machines)	6	–	–
[K] materials supplier (for instance paper, glass, metals, raw materials)	2	7	1
[L] petroleum products	9	–	–
[M] pharmaceutical	3	–	–
[N] publisher	–	–	–
[O] transportation	–	3	3
[P] utility supplying gas or electricity or both	14	–	1
[Q] utility other than gas or electricity	2	–	–
[R] other: ...	4	2 (tourism)	4 (tourism)

Size of Business

2A. Circle the category describing the amount of your company's annual sales during the most recent year.

Annual Sales ¹	US [82]	NZ [26]	Japan [21]
[A] \$1 billion US dollars or more	62	7	12
[B] \$500 million or more, but less than \$1 billion	4	5	3
[C] \$100 million or more, but less than \$500 million	14	5	2
[D] \$10 million or more, but less than \$100 million	2	8	2
[E] less than \$10 million	—	1	1

2B. Circle the category describing the number of employees in your company during the most recent year.²

Employees	NZ [26]	Japan [21]
[A] 1000 or more	11	10
[B] 500 or more, but less than 1000	4	4
[C] 100 or more, but less than 500	6	3
[D] 10 or more, but less than 100	4	4
[E] less than 10	1	—

¹ The US companies surveyed by Weintraub were asked to report sales in terms of US dollars. Japanese companies were asked to report sales in Yen, taken at US\$1 = 100 Yen, a reasonable approximation of the mid-rate prevailing at the time of the survey. (Thus, for instance, category [A] was for sales of 100 billion Yen or more; category [E], less than 1 billion Yen.) Hence, Japanese and US company size is directly comparable. New Zealand companies, however, were asked to report sales in New Zealand dollars (with category A for sales of \$1 billion New Zealand dollars or more, etc). Since New Zealand dollars are still worth less than US dollars, some of the New Zealand companies in fact may fall into a lower category when compared to US (or Japanese) counterparts. Although this means even more smaller companies among New Zealand correspondents, there is still a spread including even the biggest companies, comparable to US and Japanese counterparts

² This and q2C were not included in the Weintraub survey.

Background of Respondents

2C. Please circle the category best describing the work you currently do in your company, and any background in law.

Position and Background	NZ [25 only]	Japan [21]
[A] corporate affairs; no legal background	17	11
[B] corporate affairs; graduate (or at least 1 years' tertiary education) in law	5	2
[C] legal affairs; graduate (or at least 1 years' tertiary education) in law	-	7
[D] legal affairs; enrolled as barrister or solicitor (now or previously; in NZ or elsewhere)	3	1

BIBLIOGRAPHY AND RELATED WORKS

This thesis has been a long time in planning and bringing together. As a consequence, several parts have had or will have a public audience, in some form or another.

Part One reflects some ideas first presented in the author's "Contract Law and Practice in Japan: An Antipodean Perspective" in H Baum (ed) *Japan: Economic Success and Legal System* (de Gruyter, Berlin, 1997) 197. Chapter One develops arguments outlined in the author's paper, "The Centennial of Japan's Civil Code and the Future of New Zealand Contract Law", presented at the Australasian Law Teachers Association conference held at Victoria University of Wellington, 4-7 July 1999. That itself had extensively updated and expanded a framework first proposed in the author's paper "Form and Substance in New Zealand, US and Japanese Law: What Role for Grand Theory in the World of International Contracting?", presented at the annual meeting of the Research Committee for the Sociology of Law (International Sociological Association) held at Tokyo University, 1-4 August 1995.

Parts I-V of the Introduction to Part Two will be presented at the Australian Law and Society Conference at Victoria Law School, Melbourne, 10-12 December 2001. Some results from research for Chapter Two were presented at the 18 April 1998 meeting of the Kyushu University Private Law Study Group (*Minjiho Kenkyukai*); and at the Conference on "Japanese Law Online" hosted by Meijo University in Nagoya on "The Future of Formal Requirements for Contract Formation in a Digital World" on 9 March 1999, and by the Kyoto Comparative Law Center on 10 March 1999. Chapter Three is a much revised, expanded and updated version of the author's "Form and Substance in US, English, New Zealand, and Japanese Law: A Framework for Better Comparisons in the Law of Unfair Contracts" 26 *Victoria University of Wellington Law Review* 247 (1996). Chapter Four Part II develops an argument first proposed in the author's Kyoto University LL.M thesis, "*Igirisuho no Keishikisei to Amerikaho no Jisshitsusei - Furasutoreshonho o Chushin ni shite* [Form in English Law and Substance in American Law: Focusing on the Law of Frustration]" (unpublished, 1993). The discussion of Japanese and New Zealand law in Part II also draws on arguments in the author's "Economic Dislocation and Contract Renegotiation in New Zealand and Japan: A Preliminary Empirical Study" 27 *Victoria University of Wellington Law Review* 59 (1997). That article also reported on preliminary results from a student survey. Results from a company survey, undertaken with the support of the NZ Asia 2000 Foundation and the Legal Research Foundation, were discussed in the author's "Planning and Renegotiating Long-Term Contracts in New Zealand and Japan: An Interim Report on an Empirical Research Project" [1997] *New Zealand Law Review* 482. Combined results then were presented in Spain in the author's "Bargaining in the Shadow of the Law and Law in the Light of Bargaining: Contract Planning and Renegotiation in the US, New Zealand, and Japan", published in abridged version in J Feest & V Gessner (eds) *Interaction of Legal Cultures* (International Institute for the Sociology of Law, Oñati, 1998) 113. The last-mentioned work was drawn on for Part III of Chapter Four.

The author's paper on "Proceduralisation of Japanese Law in Comparative Perspective: Product Liability and Contract", presented at the annual meeting of the Law & Society Association held in Chicago on 27-30 May 1999, is reflected in Chapter Five.

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