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

A FRAMEWORK FOR BETTER COMPARISONS OF DEVELOPMENTS IN THE LAW OF UNFAIR CONTRACTS

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Recently there has been talk of change in the law of contract in the United States, England, New Zealand and Japan. Often this is linked to broader trends of internationalisation. This article builds on the "form-substance" framework proposed by Atiyah and Summers, focusing on the fine print doctrine, the duty of good faith, and the law of unconscionability and undue influence. It argues that developments in these areas of contract law, which control unfair contracts, tend to be consistent with the overall orientation of each national legal system. This suggests that counter-systemic developments in each legal system's contract law will be met by more resistance than expected. Further, those overall orientations are not necessarily convergent, and this is likely to affect the impact of international developments in contract law on each legal system.

Now it has become widely accepted that there may be more ways than one in which national common law systems, starting from the same roots, may justifiably go. Different chains of reasoning and weightings of values may be reasonably open. Indeed United States legal history has long demonstrated that truth. For a decade or more it has been a commonplace that

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> Australian and Canadian common law, for instance, are not necessarily the same as English common law. The same has been accepted recently by the Privy Council itself in relation to New Zealand [...]. But emancipation does not necessarily mean abandonment of cooperation to mutual advantage. Common denominators may be usefully sought, as long as the process is not compelled from outside and the national ethos is allowed its own weight.**

Rui wa tomo o motte atsumaru ***

A *The Changing Law of Contract?*

Eminent contract law scholars in a number of jurisdictions have recently proclaimed that contract law is developing in new directions, or at least changing.[1] But, like the diagnosis in 1974 that contract was "dead", is the case for a distinct new direction being overstated?[2] The cynic might say that a changing law of contract promises to make the world a more interesting place for contract law scholars. Yet eminent judges, who more directly face the slow accretion of particular cases, also talk of "an emerging maelstrom" or, more cautiously, note that many such writings "at least superficially show modern contract

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** Sir Robin Cooke, President of the Court of Appeal of New Zealand, "The Dream of an International Common Law", *Paper presented at the conference on "The Mason Court and Beyond", Melbourne 1995*, 12 (footnote omitted).

*** Like attracts like (Japanese proverb).

1 In the US, see eg I Macneil "Restatement (Second) of Contracts and Presentation" (1974) 60 *Va L Rev* 589, 591 and 595-7, leading to I Macneil *The New Social Contract* (Yale University Press, New Haven, 1980). For similar interest in England as to what new values might infuse contract law in the light of wider socio-political developments, see H Collins "The Transformation Thesis and the Ascription of Contractual Responsibility" in T Wilhelmsson (ed) *Perspectives of Critical Contract Law* 293 (Dartmouth, Aldershot, 1993), 293-4. In New Zealand, see D McLauchlan "The 'New' Law of Contract in New Zealand" [1992] *NZ Recent L Rev* 436 and even B Coote "The Changing New Zealand Law of Damages in Contract", *Paper presented at the 6th Annual Journal of Contract Law Conference: 'The Changing Law of Contract', Auckland, 14-15 August 1995*. But see now D McLauchlan "The Plain Meaning Rule of Contract Interpretation" (forthcoming, 1996) *NZBLQ*, and L Nottage "Form and Substance in New Zealand, US and Japanese Law: What Role for Grand Theory in the World of International Contracting?" *Proceedings of the 1995 Annual Meeting of the Research Committee on Sociology of Law (International Sociological Association), "Legal Culture: Encounters and Transformations"*, Papers - Section Meetings, Supplement 1, 203, 211-2. In Japan, see eg T Uchida "The New Development of Contract Law and General Clauses - A Japanese Perspective -" in The Organising Committee (ed) *Japanese and Dutch Laws Compared* 119, International Center of Comparative Law and Politics, Tokyo, 1992. But see also L Nottage, "Contract Law, Theory and Practice in Japan: Plus ça change, plus c'est la même chose?" in V Taylor (ed) Australian Perspectives on Asian Legal Systems (Law Book Co, Sydney, forthcoming 1996).

2 G Gilmore *The Death of Contract* (Ohio State University Press, Columbus, 1974). Cf R Speidel "An Essay on the Reported Death and Continued Vitality of Contract" (1975) 27 *Stanford Law Review* 1161, and most recently P Linzer "Law's Unity: An Essay for the Master Contortionist" (1995) 90 *NWULR* 183.

law to be in something of a ferment".[3] If there is at least some change in a particular jurisdiction, how extensive is it and what are its longer term prospects?

The question of change in today's law of contract is often linked to the broader phenomenon of internationalisation.[4] However, the implications of this phenomenon should not be overstated either. The impact of underlying socio-economic changes brought about by internationalisation is clear. But possible repercussions on each national legal system and its contract law deserve to be closely analysed. Furthermore, as the quotation from Sir Robin Cooke's recent speech implies, there remains a tension between convergence and divergence, even among common law jurisdictions.[5] Divergence is likely to remain particularly apparent, when one adds developments within the civil law tradition.[6] To the broad question, "Is commercial law becoming world law?", Hunter and Carter conclude:[7]

> although the movement toward a global commercial legal system is real and will continue, it will not supplant the many different local variations that now exist.

This article therefore begins to tease out some significant local variations in contract law, attempting to identify possible different chains of reasoning and weightings of values. It proposes a wider framework to determine how differences might relate to a particular national legal system as a whole - a national legal ethos. Hence the article begins to consider trajectories for a range of contract law developments at both the national and international levels.

First, Part B updates and expands on an aspect of the framework developed by Atiyah and Summers.[8] This framework aimed to systematically contrast US and English law. But New Zealand law, firmly within the common law tradition, can be readily added. So too can Japanese law, with some additional difficulty stemming from its roots in the civil law

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3 See respectively L Priestley "Contract - The Burgeoning Maelstrom" (1988) 1 *JCL* 15, and R Cooke "Introduction" (1995) 9 *JCL* 3.

4 D King "Commercial Law: Times of Change and Expansion" in R Cranston and R Goode (eds) *Commercial and Consumer Law: National and International Dimensions* 121 (Clarendon Press, Oxford, 1993); K Keith "Lawyers in the Law Reform Process" (1993) *Paper presented at the 10th Commonwealth Law Conference, Nicosia, May 1993.*

5 See also J Matson "The Common Law Abroad: English and Indigineous Laws in the British Commonwealth" (1993) 42 *ICLQ* 753, 779.

6 J Merryman *The Civil Law Tradition* (Stanford University Press, Stanford, 1985). All the more so, in light of the differences within civil law jurisdictions: H Kötz "Taking Civil Codes Less Seriously" (1987) 50 *MLR* 1 at 7-8.

7 H Hunter and J Carter "Is Commercial Law becoming a World Law?" *Paper presented at the 6th Annual Journal of Contract Law Conference: 'The Changing Law of Contract', Auckland, 14-15 August 1995*, 20.

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

tradition.[9] As it may be less familiar to readers, Japanese law is more extensively covered. The treatment is still tentative and necessarily rather general, but some particular developments in the various jurisdictions are highlighted to bring out points of comparative reference.

Atiyah and Summers developed their framework as part of a much broader comparative study.[10] However Part B first expands on aspects of three areas of contract law, which they cite as examples illustrating different approaches to the general question of determining the "authoritativeness of law" in each legal system. These are the fine print doctrine, the duty of good faith, and the doctrines of unconscionability and undue influence. Each is of considerable contemporary relevance. Together, they represent a significant part of the law controlling unfair contracts, particularly on standard forms. Part B then considers how each legal system generally approaches that broader issue through legislative intervention. The analysis confirms the wider usefulness of Atiyah and Summers' framework.

Part C concludes by outlining how that framework's other dimensions might be fleshed out. Systemic local variations seem to be confirmed. The framework identifies various dimensions to a legal system, which seem to fit together quite consistently. To paraphrase the quoted Japanese proverb: "like attracts like". Each of those dimensions must therefore be carefully fully explored, before making a definitive pronouncement on developments in a particular area of law, such as contract law. But already it seems likely that developments that are broadly counter-systemic may not result in the degree of change in contract law that some envisage at both national and international levels.

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9 Atiyah and Summers (above n 8, 430) had indeed anticipated some difficulty in adding a comparison of a civil law system, particularly one like Japan which had "received" so much of its modern law directly from other jurisdictions.

10 A primary concern of the authors (above n 8, 28-31) was to reemphasise the coherence of organising a legal system on more formal lines, in response to criticism of formality in general. Although not expressly stated, that warning is no doubt directed primarily at the critical legal studies movement (see eg D Kennedy "Legal Formality" (1973) 2 *J Leg Stud* 351.) Even so, the authors criticise some excessive formal reasoning and formal attributes in contemporary English law (above n 8, 421-4).
The present author agrees on the need to consider legal norms, institutions and the general vision of law in particular legal systems and societies, as a sounder basis for criticism. That tends to be overlooked by those within in the "critical" tradition both in America (and England) and on the continent. However, such an extensive inquiry seems likely to identify even more problems in retaining an overall formal orientation in contract law and its underlying social and political philosophy, in contemporary societies, than Atiyah and Summers had initially detected. See C Joerges "*Politische Rechtstheorie* and Critical Legal Studies: Points of Contact and Divergence" in C Joerges and D Trubek *Critical Legal Thought: An American-German Debate* (Nomos, Baden-Baden, 1989), 597. But cf now R Summers "The Formal Character of Law - Criteria of Validity for Contracts" (1995) 9 *JCL* 29, 33-34.

B *Dimensions of Form and Substance*

Atiyah and Summers argue that legal reasoning can revolve around two types of reasons. A *substantive* reason involves a "moral, economic, political, institutional or other social consideration".[11] A *formal* reason is "a legally authoritative reason on which judges and others are empowered or required to base a decision or action, 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".[12]

This definition brings out two dimensions of formal reasoning, respectively termed "authoritative formality" and "mandatory formality". Mandatory formality is usually present in any legal system; but varies depending on its openness to substantive reasons as well. On the other hand, authoritative formality is fundamental to legal reasoning. However it derives from the authoritativeness of a rule or other valid legal phenomenon (such as a statute, case precendent or contract norm), and that authoritativeness is partly determined by standards of validity. Such standards can be either "source-oriented" (turning solely on whether a recognisable source of the rule or norm is seen as valid), or "content-oriented" (depending to some degree on its substantive content). Thus, this dimension also varies, with more "formal" legal systems looking to "source-oriented" standards, and more "substantive" legal systems prefering "content-oriented" standards of validity, to determine the authoritativeness of legal phenomena.

1 *The Authoritativeness of Law: Source- vs Content-Standards of Validity in Contract Law*

Along the dimension of "authoritative formality", Atiyah and Summers note that English law has traditionally looked almost exclusively to the source of statute law or of case law, to determine its validity, with little scope to investigate or challenge its content.[13] By contrast, constitutional law and the nature of case law in the US involve more obviously content-oriented standards and more substantive reasoning.

Atiyah and Summers further argue that "private contract, the largest body of governing norms in the American system, is also subject to wide-ranging content-oriented standards of validity".[14] The contrasting source which is impliedly more determinative of the validity of contract norms in English contract law appears to be the agreement or intentions of the

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11 Above n 8, 1.

12 Above n 8, 2. And see now M McDowell and D Webb, *The New Zealand Legal System* (Butterworths, Wellington, 1995) 352-357.

13 Above n 8, 42-51. See 1.1.A and 1.1.B in the Figure in the Appendix.

14 Above n 8, 51.

parties, characteristic of the classical view of contracts deeply rooted in English law.[15] From that perspective, the rest of this Part looks more closely at some of the contract law examples given to support their general proposition.

2. *The "Fine Print" Doctrine*

The first example is the so-called "fine print" doctrine. In US law, a contract term can be refused effect because:[16]

> 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".[17]

Similarly, in the English law tradition, the "ticket cases" established that reasonable notice is required of unusual and onerous terms.[18] More generally, in *Interfoto Library Ltd v Stiletto Ltd*,[19] 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.

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?".[20] In this case, notice was held to have been inadequate, and the exclusion was not allowed.

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15 P Atiyah *An Introduction to the Law of Contract* (Clarendon Press, Oxford, 1989), 8-17, 30-39. Summers (above n 10, 31) has now further categorised formal criteria for contractual validity as "source-oriented", "procedurally oriented" and "structurally" oriented. The structure of offer and acceptance, constituting agreement, would therefore fit into at least the last two of these categories.

16 E A Farnsworth *Contracts* (Little Brown, Boston, 2ed 1990) 314.

17 As defined in UCC §1-201(1).

18 J Burrows, J Finn and S Todd *Cheshire & Fifoot's Law of Contract* (Butterworths, Wellington, 8th NZ ed 1992) 181-2.

19 [1989] QB 433.

20 [1992] 3 NZLR 230, 238.

Japanese courts have used similar techniques in an important series of recent cases, the so-called "Dial Q2" (or "Dial 0900") cases. An initial 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 (typically, the defendant's child). NTT argued that in 1989 it had amended its standard form telephone contract to clearly 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,[21] the Osaka District Court held for the defendant. 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.

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: 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 arguably be readily 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.[22]

Japanese law reveals a similar ambivalence in the overlapping but more general area of doctrines of contract interpretation. For instance, the Osaka District Court judgment might be seen as applying a broad *contra proferentem* doctrine.[23] 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.

More forthrightly, most noticeably in a recent series of insurance contract cases, Japanese courts have developed principles of "reasonable intepretation" (*goriteki kaishaku*) and "restrictive interpretation" (*seigenteki kaishaku*). A clause can be interpreted "restrictively" where a literal reading would lead to "unreasonable results".[24] Unlike the

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21 Judgment of 22 March, 1993 (reported in (1993) 820 *Hanrei Taimizu* 108).

22 Atiyah, above n 15, 8-17, 63-65.

23 The author thanks Professor 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).

24 Above n 23, 39. Omura cites for instance the 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 the *Interfoto* case (above n 19), the Yamaguchi High Court (12 May, 1987) only

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.[25] Once again, this may represent a tendency in Japanese courts towards applying more direct, source-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.[26] These counter-tendencies indicate the resiliency of a formal approach.

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.[27] However his Honour also suggested that looking for ambiguity could result in "artificial or strained interpretation".[28] His Honour 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.[29] However his Honour appears to arrived at something very close to 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.[30] Other New Zealand courts have not been quick to pursue this alternative line of reasoning. In any event, Thomas J's insistence that it remains interpretation of the parties' agreement - however strained - is an indication of the continued importance of an appeal to "source-oriented" standards in contemporary New Zealand contract law.

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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 (above n 23, 37, fn 6). See also Y Yamamoto "*Futo Joko to Kojo Ryozoku* [Unfair Terms, and Public Order and Good Morals]" (1994) 66 *Horitsu Jiho* 101, 103 (and case cited in his fn 9).

25 19 May, 1994 (unreported). 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.

26 See eg S Yasunaga, "*Hokenkeiyaku no kaishaku to yakkan kisei* [The Interpretation of Insurance Contracts and the Control of Standard Terms]" (1994) 56 *Shiho* 109.

27 Above n 20, 234-235.

28 Above n 20, 235.

29 Above n 20, 235 and 239.

30 C Nicholson "Excluding Liability for Negligence: 'All Care and No Responsibility' in *Livingstone v Roskilly*" (1994) 24 *VUWLR* 289, 308-312.

In sum, both 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 doctrine of *contra proferentem* interpretation, or indeed of "restrictive" interpretation or some version of the doctrine of fundamental breach. Even with that last view, however, these developments are ambiguous: they can be viewed as representing either a more substantive approach, or as reconciliable with a formal approach to contract law. Hence a closer comparative analysis of more wide-ranging controls of unfair contract terms is called for.

3 *Good Faith, Unconscionability and Undue Influence*

3.1 *United States Law*

Good Faith

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".[31] A brief survey of the scope of this duty indeed provides significant contrasts with the English law tradition, as well as several parallels with 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.[32] 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.[33]

More ambitiously, but equally familiar to a Japanese lawyer, the duty provides a focus for discussion as to whether there is or can be a duty to negotiate in good faith before a contract would usually be said to be validly formed.[34]

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

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31 Above n 8, 51.

32 H Hunter "The Duty of Good Faith and Security of Performance" (1993) 6 *JCL* 19, 23.

33 Above n 32, 23-24.

34 Above, n 16, §3.26. However, Farnsworth notes US courts' reluctance to recognise such a duty. Courts still tend to require a recognisable preliminary agreement, or some form of a contractual agreement to negotiate in good faith (E A Farnsworth "Developments in Contract Law During the 1980's: The Top Ten" (1990) 41 *Case West Res L Rev* 203, 212).

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. And, by heightening the overtly political background to the legislation, the development of this area of the law remained notably substantive.[35]

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.[36] 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 gave rise to a contract claim, thus limiting the scope for claiming punitive damages.[37] Nonetheless, even the possibility 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 language excluding it.[38] Furthermore, as of 1993, seventeen out of thirty-six states recognised a cause of action based on a duty of good faith.[39] 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, the

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35 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). The author thanks Mr Richard Boast (Victoria University) for the reminder that legal reasoning in a particular area can become overall more substantive in nature as a result of a highly politicised law-making process.

36 S Macaulay, J Kidwell, W Whitford and M Galanter *Contracts: Law in Action* (The Michie Company, Charlottesville, 1995), Vol 1, 471-481.

37 *Foley v Interactive Data Corp* 47 Cal. 3d 654 (1988). 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.

38 Above n 36, 501.

39 Above n 36, 487.

discussion remains highly political.[40] Overall, this area also remains characterised by distinctly substantive reasoning.

Also in the 1980s, the duty of good faith was invoked in cases 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.[41] Hunter notes that such limitations on enforcement of rights may operate under other principles such as estoppel or waiver, but is generally comfortable with this additional control mechanism open to US courts.[42] He 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:[43]

> 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, an oil company was held liable for failing to give adequate notice of its decision to raise prices, despite its standard form reserving that right.[44] Macaulay and others suggest that the court was impressed by the close links between the oil company and the plaintiff purchaser, and the events leading to the particular dispute: "The Court looked to the relationship rather than the abstractions of formal contract law."[45] 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" behind the "paper deal".[46]

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 by its application to the control of disclaimer clauses in written contracts. Adams asserts that

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40 Above n 36, 488-490.

41 *KMC Corp v Irving Trust Co* 757 F 2d 752 (6th Cir 1985).

42 H Hunter "The Duty of Good Faith and Security of Performance" (1993) 6 *JCL* 19, 23-25.

43 Above n 42, 25-26.

44 *Nanakuli v Shell Oil* 664 F 2nd 772 (9th Cir 1981). Discussed in detail by Burton (below n 184) and particularly by Dickerson (below, n 68).

45 S Macaulay, J Kidwell, W Whitford and M Galanter *Contracts: Law in Action* (The Michie Company, Charlottesville, 1995) Vol 2, 367.

46 Above n 45, 366.

the duty has been used to control clauses limiting buyers' remedies to repair or replacement, and limiting liability for consequential losses.[47]

Unconscionability

In fact, to strike down the offending clauses, the two cases respectively cited rely primarily on a third example given by Atiyah and Summers: the doctrine of unconscionability.[48] 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.[49] 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, 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.[50]

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.[51] In fact, the courts have generally applied it with care.[52] This has been so particularly in disputes between businesses.[53] 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.[54] On occasion, the broad wording of the doctrine of unconscionability has allowed some US courts to strike down contracts on the basis of

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47 J Adams "The Economics of Good Faith in Contract" (1995) *JCL* 126, 135-136 (at fn 39).

48 See *Eckstein v Cumming* 321 NE 2nd 897 at 902-903, and *Select Pork v Babcock Swine* 640 F 2d 147 at 149. 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).

49 See eg E Jordan "Unconscionability at the Gas Station" (1978) 62 *Minn L Rev* 813, 830.

50 Above n 16, 316-319.

51 A Leff "Unconscionability and the Code - The Emperor's New Clause" (1967) 115 *U Pa L Rev* 485.

52 A Angelo and E Ellinger "Unconscionable Contracts: A Comparative Study of the Approaches in England, France, Germany, and the United States" (1992) 14 *Loy of LA Intl and Comp L J* 455, 504-505. Leff's fatalistic prediction has thus proved correct (above n 51, 558): "The courts will most likely adjust, encrusting the irratating aspects of the section with a smoothing nacre of more or less reasonable applications".

53 Above n 16, 331-322.

54 See eg above n 36, 798-799.

severe contractual imbalance, even without some procedural impropriety in the bargaining process.[55] Generally, it has bolstered the resolve of US courts to embark, where necessary, on a wide-ranging investigation of the contracting parties' relationship.

Thus, the doctrines of good faith and of unconscionability together remain prominent examples of "content-oriented" standards of validity in US contract law.

3.2 *English Law*

Good Faith

By contrast, English law remains noticeably reluctant to develop a broad duty of good faith. This and the ensuing discussion of New Zealand law picks out some broader points of comparative interest regarding that stance.

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". His Lordship argued that they were also concerned with the broader question of "whether in all the circumstances it would in all the circumstances be fair (or reasonable) to hold a party bound".[56] 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. However his Lordship noted that "English law has, characteristically, committed itself to no such overriding principle, but has developed piecemeal solutions in response to demonstrated problems of unfairness".[57] His Lordship then listed a number of such solutions, such as equity's control of unconscionable bargains and penalty clauses.

Drawing together various strands that might overlap with, or equate to, a general principle of good faith in English law is not a recent endeavour.[58] Partly in response to

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55 Farnsworth notes however that the more frequent approach is to require a mixture of both aspects (above n 16, 334). See also below, text at n 99. Of course, a range of results can often emerge simply because of the scope for diversity in the US federal system (see J Priestley "A Guide to the Comparison of Australian and United States Contract Law" (1989) 12 *UNSWLR* 4, 5-9.

56 Above, n 19, 439.

57 Above n 19, 439.

58 See the pioneer study by R Powell "Good Faith in Contracts" (1956) 9 *Current Leg Prob* 16.

recent developments in EC law, further excellent work has been undertaken.[59] Rather than review that work, two examples will suggest that the chances of reformulation as a general duty of good faith in English law nonetheless remain quite slim.

One way of improving those chances may be to give detailed content to such a duty, in the hope of avoiding criticism that application of the duty is simply a matter of unfettered judicial discretion.[60] 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.[61] 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.[62]

Certainly, fiduciary obligations have differed historically from contractual obligations as to burden of proof, remedies, and so on.[63] For immediate practical purposes, those distinctions remain important. But there is a risk in then reasoning backwards. Traditionally, English private law has often developed in this way, which has not necessarily been detrimental to its certain "rational strength".[64] But such an approach can obscure areas of actual and potential overlap. This 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.

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59 A revival of interest began in Australia in the late 1980s: H Lücke "Good Faith and Contractual Performance" in P Finn (ed) *Essays on Contract* (Law Book Co, Sydney, 1987). This was shortly 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 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 the main upsurge in interest has only been evident since it became clearer that developments in EC law would impact on domestic law (see eg P Duffy "Unfair Contract Terms and the draft E.C. Directive" (1993) *JBL* 67).

60 J Carter and M Furmston "Good Faith and Fairness in the Negotiations of Contracts (Part 1)" (1994) 8 *JCL* 1, 5-6.

61 Above n 60.

62 J Maxton "Contract and Fiduciary Obligation" (1995) *Paper presented at the 6th Annual Journal of Contract Law Conference: 'The Changing Law of Contract', Auckland, 14-15 August 1995*, 5-6.

63 Above n 62, 9. L Sealy "Commentary on 'Good Faith and Fairness in Negotiated Contracts'" (1995) 8 *JCL* 142, 144.

64 F Lawson *A Common Lawyer Looks at the Civil Law* (Ann Arbor, University of Michigan Press, 1955), 141. F Lawson *The Rational Strength of English Law* (London, Stevens, 1951).

Thus, a Japanese lawyer 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.[65]

In the US, even those who wish to retain certain distinctions recognise more blurring of the edges between contractual and fiduciary duty.[66] No doubt this has encouraged supporters of the "economic analysis of contract law", who argue that fiduciary duties should be subsumed under a contractual analysis.[67] Alternatively, it could underpin an extension of "relational contract law".[68]

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.[69] 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,

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65 As mentioned below (text at n 114 and 115), Article 1(2) has developed a function that is broadly seen as "equitable", prompting wider jurisprudential debate.

66 D DeMott "Beyond Metaphor: An Analysis of Fiduciary Obligation" (1988) *Duke LJ* 879, 896-897, 901, 906-911.

67 F Easterbrook and D Fischel, "Contract and Fiduciary Duty" (1993) 36 *J Law & Econ* 425, 427.

68 C Dickerson ("From Behind the Looking Glass: Good Faith, Fiduciary Duty, and Permitted Harm" (1995) 22 *Fla State Uni L Rev* 955, 958-9) 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 eg I Macneil, "Values in Contract: Internal and External" 78 *NWULR* 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.

69 S Waddams "Good faith, Unconscionability and Reasonable Expectations" (1995) 9 *JCL* 55.

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.[70] But this advocacy of a broadened doctrine of unconscionability is premised on a rejection of what might be even broader content-oriented standard, a general duty of good faith. Furthermore, the availability of other means of protecting reasonable expectations has not prevented the development of such a duty in US law.[71]

Unconscionable Bargains and Undue Influence

Waddams' alternative proposal of an expanded notion of unconscionability meets with the difficulty that its English law variant has been characterised by piecemeal and limited development.[72] This has important practical results. For instance, claims of an unconscionable bargain are highly unlikely to be given much consideratin in cases involving businesses, in contrast to the residual role of unconscionability in the US even in this category. English law's more restricted scope, both historically and in current practice, is thus another indication of its comparative uneasiness about content-oriented standards of validity.

Any consideration of unconscionability under English law should in turn take into account the doctrine of undue influence.[73] In practice, many cases involve discussion of both.[74] 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. For instance, *Bundy* is well known for the suggestion by Lord Denning MR that these doctrines might be drawn together

70 Above n 69, 61.

71 Above, text at n 42.

72 Above n 69, 460-472.

73 In US law, the expansion of a very broad notion of unconscionability, together with the expansion of the doctrine of economic duress (above n 16, 286), works to reduce the scope of application, and theoretical and practical relevance, of undue influence.

74 See eg *Lloyds Bank Ltd v Bundy* [1975] QB 326, 337.

by "a single thread ... 'inequality of bargaining power'".[75] This new and broadly worded concept is, if anything, even more content-oriented than either unconscionability or undue influence. But Lord Denning's reformulation has been firmly put to rest.[76]

More recently, the question has been raised again as to whether and how to delimit the doctrine of undue influence. But the primary orthodox distinction is vigorously reasserted. Undue influence is said to focus on the plaintiff's vitiated consent; unconscionability, on the defendant's overreaching or exploitation of the plaintiff.[77]

The impetus for this revival of interest is a series of cases culminating in two decisions of the House of Lords.[78] They involve a fairly common situation, and are thus of clear practical importance. But they have also led to conceptual difficulties, partly because they involve three, rather than two parties. Typically, the defendant (such as a wife) alleges that the wrongdoer (the husband) has unduly influenced her into entering into a transaction with a third party (the defendant bank), to the sole benefit of the wrongdoer. At first sight, the approach taken by the House of Lords seems bold, a more substantive departure from weighty earlier precedent. For instance, in *Pitt*, it was doubted whether the doctrine of undue influence should be restricted, just because another equitable doctrine is arguably applicable.[79] Further, the requirement that the defendant establish "manifest disadvantage" was abolished.[80]

Nevertheless, limits are also apparent. The test to decide whether the bank should be held to be "tainted", by constructive notice of the husband's undue influence, was whether "the transaction is *on its face* not to the financial advantage of the wife".[81] Admittedly, the House of Lords was impressed by the need to promote certainty by setting a bright line rule -

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75 Above n 74, 337. Interestingly, his Lordship had adverted to American law during argument (above n 74, 333).

76 *National Westminister Bank Plc v Morgan* [1985] AC 686, 708 (also cited by Atiyah and Summers, above n 9, 51). See also J Beatson "The Common Law Today" (1991) *IBL* 78, 80.

77 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). Approved by 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.

78 *Barclays Bank Plc v O'Brien* [1993] 3 WLR 786, *CIBC Mortgages Plc v Pitt & Anor* [1993] 3 WLR 802.

79 *Pitt*, above n 78, 808-809.

80 Certainly if actual undue influence is established, and perhaps even in cases where undue influence can be presumed (*Pitt* above n 78, 807-809). See A Berg, "Wives, Guarantees — Constructive Knowledge and Undue Difference" [1994] *LMCLQ 34, 38.*

81 *O'Brien*, above n 78, 798 (emphasis added). Hence the House of Lords found that the agreement could be set aside against the bank in *O'Brien*, where the wife gave security to secure a loan to her husband's company; but not in *Pitt*, where she gave the security to obtain a loan jointly with her husband.

the "face" of the transaction. It also overtly aimed to set a test which reflected "the current requirements of society". That included the policy argument that joint loans should not be impugned because this would discourage such loans, to the detriment of the "average married couple".[82] "Certainty", and particularly "social needs", can indicate more content-oriented standards. However, it is revealing that further policy arguments were not advanced to determine those assumed social needs, and that the "face" of the transaction is proving problematic.[83] Also, limiting the analysis to "financial" benefit excuses the courts from looking into the more intangible - even subjective - aspects of the relationship between the plaintiff and the "wrongdoer". That self-imposed restriction also signals a more formal approach.[84] Lastly, the decision in *O'Brien* to set aside only part of the impugned security - a type of "half measure" - may also be seen as more substantive.[85] But subsequent cases restored doctrinal purity, namely an "all or nothing" remedy.[86] This implies a formal reaction.

3.3 *New Zealand Law*

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 indicated (extrajudicially) that:

> A distinct possibility is that the common law of contract, at least in some at least 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.

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82 *Pitt*, above n 78, 811.

83 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.

84 For instance a more content-oriented test might have been: "whether the transaction is unreasonable to the wife in the light of the particular benefits she obtained from her relationship, and for the wider community". Or, more simply, whether the transaction was against "good faith" or "public order and good morals" (see below, text at n 134-136 and n 161-163).

85 W Young "Half Measures" (1981) 81 *Colum L Rev* 19.

86 Lawson, above n 83, 284.

Further, Sir Robin seems to have implied that Waddams' particular fears, of thereby making contract law too subjective, were overstated.[87] However one cannot make too much of either suggestion.[88]

Similarly, in *Livingstone*,[89] Thomas J supported Bingham LJ's attempt to unearth from disparate strands of the law controlling unfair contracts something amounting to a general duty of good faith. Indeed, His Honour was prepared to go further, arguing that:[90]

> 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, his Honour 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".[91]

However, Thomas J added these "general considerations" to the main reasoning in the case. Further, the latter reasoning itself contained an alternative argument that has been criticised as reintroducing 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*.[92] Finally, a New Zealand commentator has recently criticised "unjustified generalisations", giving as one example the very "generalisation from the defences of fraud and unconscionability to a positive requirement of good faith,

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87 Above n 3, 9. Sir Robin 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.

88 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 McLauchlan (1996), above n 1.

89 Above n 20, 237.

90 Above n 20, 237-238.

91 Above n 20, 238.

92 Above, n 27. Similarly, although not in the context of exemption clauses, Tompkins J has recently suggested that the trend of authorities does not support Thomas J's obiter statements regarding a general good faith obligation in New Zealand contract law (*Isis (Europe) Ltd v Lateral Nominees Ltd & Ors*, Auckland HC, CP 444/95, 17/11/95).

particularly in negotiation, which some academics maintain despite denial by the courts".[93] 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 obligation.[94]

Thus, the germ of a general duty of good faith may have now been planted and some shoots may be emerging.[95] But the development of such a new content-oriented standard in New Zealand contract law appears to face similar obstacles to those encountered in English law.

Unconscionability and Undue Influence

The doctrine of unconscionability in New Zealand also faces obstacles to developing a more substantive orientation. Courts do continue to stress that a finding of unconscionability involves balancing a range of factors.[96] However, lower courts have

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93 B Coote, "Contract — An Underview" in B Brown (ed), *Contract — An Underview: Souvenir at a Valedictory Lecture* 13 (Legal Research Foundation, Auckland, 1995), 26. But cf R Sutton "Commentary on 'Codification, Law Reform and Judicial Development'" (1995) *Paper presented at the 6th Annual Journal of Contract Law Conference: 'The Changing Law of Contract' (Auckland, 14-15 August 1995)*, 1.

94 Eg C Rickett *Equity in Commerce* (NZ Law Society Seminar Paper, Wellington, 1993), 4-6. But see now McLauchlan (1992, above n 1, 3), and the more extensive investigation by Maxton (above n 62).

95 See for instance the dicta of Fisher J in *Eldamos Investments Ltd v Force Location Ltd and Ors*, CP 17/94, Auckland HC, 22/2/95, 11. 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 (Farnsworth, above n 34, 210-212. See also Carter and Furmston, above n 68, 117).
Also, noting the uneasy relationship between a general duty of good faith and fidiciary law, Peterson has recently advocated imposing a general duty of good faith *in tort* on insurers and the Accident and Rehabilitation Compensation and Insurance Corporation when the latter act in bad faith (above n 37, 206-207). Furthermore, he suggests that New Zealand courts' comparative willingness to now allow damages for mental distress, following a breach of contract, may substitute for such an expanded form of tort liability. In fact, this new remedial flexibility of New Zealand courts in contract cases, combined with calls for a general duty of good faith in tort, may eventually result in the recognition of a general duty of good faith *in contract*. Japanese law, for instance, has also come to allow damages for mental suffering due to breach of contract (extending article 711 of the Civil Code), while still continuing to develop a general duty of good faith in a variety of contract cases. See Z Kitagawa "Contract Law in General" in Z Kitagawa (ed) *Doing Business in Japan* (Matthew Bender, New York, 1980ff) §1.15[3][d]; and below, text at n108-114.

96 *Contractors Bonding Ltd v Snee* [1992] 2 NZLR 157, 174 (per Richardson J).

recently latched on to the set of factors and weightings conveniently presented by Tipping J in *Bowkett v Action Finance Ltd*.[97]

The factors parallel those culled by Chen-Wishart from a compendious review of Commonwealth case law on unconscionability.[98] 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 diminishes the degree of other "procedural" elements needed (the so-called "sliding scale").[99] Yet Chen-Wishart also pointed out that a truly exceptional contractual imbalance may be *conclusive* in finding unconscionability.[100] That point was not taken up even in the Law Commission's draft scheme, proposed in 1990, and itself perceived as going too far regarding the role of contractual imbalance.[101] Nor have the courts been keen on the notion of looking into non-financial or subjective factors in determining the degree of contractual imbalance.[102] Lastly, New Zealand courts are still extremely unlikely to find unconscionability in cases involving commercial parties.[103]

Similarly, the contours of undue influence remain quite clearly delimited. New Zealand courts have adopted the framework set out by the House of Lords in *Pitt* and *O'Brien*, but

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97 [1992] 1 NZLR 449, 460-1. For instance, this restatement was invoked - if not rigorously applied - in *Harlick v ASB Bank Ltd* [1995] 5 NZBLC 103,675.

98 M Chen-Wishart *Unconscionable Bargains* (Butterworths, Wellington, 1989).

99 See eg *Bowkett*, above n 97, 461.

100 Above n 98, 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 (above n 55) and particularly in Japan (below 150a).

101 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, 321-2.

102 Cf above n 98, 54-6. For instance, see *Bowkett* (above n 97, 461), Gallen J in the High Court in *Snee* (above n 96, 162.) But cf Richardson J in *Snee*, above n 96, 174.

103 Cf above n 98, 35. See eg *Walmsley v Christchurch City Council* [1990] 1 NZLR 199. In addition, a review of the case law suggests that unconscionability is often raised by a commercial party who is obviously clutching at a last straw or is quite unmeritorious. (An example of the latter is the unsuccessful defendant in *Forthwith Shelf Co No 95 Ltd v Alexander & Ors*, CP 173/94, Wellington High Court, Ellis J, 4/8/95. The author is grateful to Mr John Wild QC for bringing this case to my attention, although of course this reading of the judgment remains the author's.) A vicious circle can be created, whereby precedents accumulate against the application of the doctrine in commercial settings, followed by even more unmeritorious attempts to invoke it.

have usually managed to dismiss pleas of undue influence raised against financiers.[104] Certainly, the High Court's decision in *ASB Bank v Harlick* focused on the financier's improper conduct, and therefore implied that the law of unconscionable bargains is 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.[105] Undue influence doctrine's orthodox focus on voluntariness of the complainant's consent is reaffirmed, to distinguish it from the law of unconscionable bargains.[106]

Thus, as with the suggestion of an overriding duty of good faith, New Zealand lawyers appear cautious about releasing a new standard, broad and content-oriented, into the neatly ordered realm of contract law doctrine. That is a hallmark of a more formal system.[106a]

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104 See *Tilialo v Contractors Bonding Ltd* (unreported, CA 50/93, 15/4/94), and the reversal of *Harlick* (above n 97) in *ASB Bank Ltd v Harlick & Anor* (unreported, CA 46/95, 6/12/1995).
The latter decision is likely to act as a significant brake on arguing similar cases in New Zealand courts, and hence to further doctrinal debate. The judgment notes (at p13) that the appeal was brought by the bank "out of concern for the precedent impact of the judgment in the Court below". The Court of Appeal reversed the High Court's finding of presumed undue influence, on the evidence it alone heard, instead taking a robust view of what constitutes a normal family relationship.
Furthermore, the Court of Appeal remains on record for requiring manifest disadvantage even in cases of actual undue influence (*Snee*, above n 96, 166), although this has recently been criticised (C Callaghan, "Manifest Disadvantage in Undue Influence: An Analysis of its Role and Necessaity" (1995) 25 *VUWLR* 289).

105 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.

106 Above n 105, 336-337 and 349-350. In *ASB Bank Ltd v Harlick & Anor* (above n 104, 5-7), the Court of Appeal reemphasised this distinction, refering also to Birks and Chin (above n 77). Callaghan (above n 104, 302-312) also argues advocates victimisation and inadequate consent as the proper principle underlying the doctrine of undue influence.
Cf R Bigwood "Commentary on 'Undue Influence and Third Parties'" (1995) *Paper presented at the 6th Annual Journal of Contract Law Conference: 'The Changing Law of Contract', Auckland, 14-15 August 1995*, 9. Bigwood argues that undue influence should now be reconceptualised as focusing on improper conduct or exploitation. However, he does not go as far as to propose a conceptual merger with unconscionability. He still points to "definitional" distinctions (as to presumptions of wrongdoing, etc) and suggests that unconscionability may remain conceptually distinct in arising from cases of deficiencies in judgmental or "rational" capacity. Cf also Chen-Wishart, above n 98, 91-93, 35-44.

106a However the proposal to extend the doctrine of a duty of care in equity, as an alternative means to find financiers liable, could be seen as more substantive. One perceived advantage is to "avoid the all or nothing remedial response based on the inherent proprietary aspects of the notice doctrine" (above n 105, 348-349). See above n 86. But also cf above, text at n 63-64.

3.4 Japanese Law

By contrast, at least at first sight, Japanese contract law appears distinctly open to content-oriented standards of validity in this field. Thus the analysis must begin with the hypothesis that Japanese law exhibits a more substantive orientation along this dimension. In fact, a closer analysis shows that Japanese law has been slow to develop such standards, particularly in regulating unfair contracts on standard forms.

As mentioned above, two of the Dial Q2 cases opened the way to striking 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 talking of "interpretation" of the parties' "intentions", it 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.[107] 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".

Article 1(2): The Duty of Good Faith

In fact, 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 increasingly criticised.[108] This suggests a formal reaction. It also makes it less surprising that in fact article 1(2) was not expressly relied on in the Dial Q2 cases, against 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 information provider and which had already been "interpreted" as unenforceable. Thus, the invokation 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,

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107 Above n 25.

108 Above n 26. See also K Yamamoto in H Endo, H Mizumoto, Z Kitagawa and S Ito (eds.) *Minpo Chukai* [Commentary on the Civil Code] 37 (Seirin Shoin, Tokyo, 1989), 52.

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.

It is therefore relevant to survey other uses to which article 1(2) has been put, in controlling unfair terms particularly on standard forms, to determine whether it acts overall 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.[109] 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 limited in scope to performance of agreements), and aimed to reinforce the moral principle of *pacta sunt servanda*.[110] 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"[111] - requires consideration of "trade practices".[112] 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 to faithfully perform assumed obligations. It has extended to faithful enforcement of rights, and hence into more general consideration of socio-political factors and how private law relations should be developed.[113] Nevertheless, whether as a window into individual morality or wider socio-political considerations, the wording of article 1(2), its pre-1947 antecedents,

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109 M Yasunaga in T Taniguchi and K Ishida (eds) *Chushaku Minpo* [Commentary on the Civil Code] 71 (Yuhikaku, Tokyo, 1988), 71-74.

110 Above n 109, 71. But cf 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 recognisable philosophical principles.

111 So dubbed ("königliche Paragraphen") by W Hedemann in 1910, because the duty rapidly came to be applied not just as regards performance of obligations, but also as regards the enforcement of rights (above n 109, 72).

112 *Verkehrssitten*.

113 K Yamamoto "*Shingizoku, Kojoryozoku* [The Duty of Good Faith, and Public Order and Good Morals]" (1992) 144 *Hogaku Kyoshitsu* 42, 43. Further, as with Article 90, the duty of good faith has also appealed to *jori* (below n 152).

and indeed some developments immediately after World War II: all offered 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 principles of "clean hands", laches, and estoppel - the duty not to act so as to contradict one's earlier acts.[114] This leads to fruitful jurisprudential discussion even among civil law professors in Japan as to the role of such a function in these cases, in the context of an overarching duty of good faith.[115] 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.[116]

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.[117] 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,[118] and supports the notion of *exemptio*.[119] 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

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114 Above n 108, 44-50.

115 Above n 108, 39-41. This contrasts with the tendency of English and New Zealand lawyers to delimit boundaries of equitable principles vis-a-vis any suggested duty of good faith, without embarking on wider jurisprudential inquiry. Above, text at n 61-62.

116 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 (above n 108, 45). Both lines of reasoning may well be found in other cases involving the duty of good faith. This might allay Waddams' fears (above, text at n 69) 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.

117 Above n 108, 57-62. More generally, see Z Kitagawa *Minpo Koyo (1) - Minpo Sosoku* [Civil Code Lectures (1): General Part] (Yuhikaku, Tokyo, 1993) 18.

118 This restricts what constitutes a breach, under the requirement of article 415 to perform "in accordance with the tenor and purport of the obligation", and the grounds for termination under article 541.

119 Article 533. Cf 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.

cooperate in the obligor's performance, to cure a minor defect in the latter's notification of readiness to perform.[120]

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*).[121] 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.[122] But again the contours of this doctrine have now been thoroughly discussed and reconceptualised.[123]

It is also widely admitted 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*).[124] 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 largely established well before 1947.[125] Further, the doctrine witnessed a peak in the economic and social turmoil immediately following World War II. Overall, it has found little favour in Japanese courts.[126] 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.[127] Similarly, a doctrine which developed to limit termination of leases to "breakdown in the trust relationship" (*shinraikankei hakai no hori*), seems to serve a more wide-ranging "correcting", a perhaps even "creative" function[128]. But this

120 Cf article 493 proviso.

121 Above n 108, 54-55.

122 Above n 108, 56-57.

123 S Kawakami "Japan" in E Hondius (ed) *Precontractual Liability* 205 (Kluwer, Deventer, 1991).

124 Above n 108, 51-52.

125 H Kubo "A Comparative Study of the Basic Concept of Impossibility under Japanese, American and Uniform Law" [1991] *Sandai Hogaku* 567.

126 Nottage (1996), above n 1.

127 Above n 108, 42.

128 Cf the basic right to terminate "at will" for non-performance (article 541); Yamamoto, above n 113, 50.

doctrine has attracted much academic comment and attempts to restrict its scope - to clarify the types of situations in which it could be invoked, and on what specific grounds.[129]

Admittedly, this latter doctrine has seen a revival in new types of contractual relationships, particularly distributorships and franchise contracts.[130] In this run of cases, often drawing on the duty of good faith, termination has generally come to be permitted if there has been a "transactional breakdown"; but mostly subject to an obligation to give reasonable notice and, often, to pay some compensation.[131] Furthermore, the inquiry of the Japanese courts into the "transactional breakdown" 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:[132]

> where there is no relevant serious reason, a wholesaler who requests termination merely for his own benefit, or who stops delivery of foods, 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.

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".[133] 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 preparedness, or at least a possible avenue, for Japanese courts to occasionally take into consideration subjective motivation as well as more objective factors. But, as with its precursor doctrine of "breakdown in the trust relationship", this particular manifestation of the duty of good faith may well have already spent 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, namely 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

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129 Above n 108, 50-51, 62-64.

130 V Taylor "Continuing Transactions and Persistent Myths: Contracts in Contemporary Japan" (1993) 19 *MULR* 352-398, 380-383.

131 Above n 130, 383-384.

132 Above n 130, 383.

133 Above n 130, 383.

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* - but also a willingness to inquire into, and directly police, the actions of the guarantor.[134] Thus, for instance, in 1932 it was held that if a guarantee was for an indefinite term, the guarantor's obligations ceased when notice of termination had been given after a reasonable period, but 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 a problem of interpretation of the contract.[135] 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 held not have been able to foresee. Once again, 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.[136] Furthermore, although a similar result was reached in cases of guarantees of a lease contract, the difficulty of arguing sufficient changes of circumstances in Japanese law must be remembered.[137]

Uchida sees these types of cases as a good example of Japanese law's willingness to develop new concepts to recognise underlying social concerns, namely protection of the guarantor.[138] But we have seen that they can be approached from a more formal perspective. Also, as Uchida goes on to admit, a significant proportion of these cases - certain guarantees given by employees - quickly came to be regulated by special legislation.[139] Uchida argues that this legislation was distinctive in allowing for wide judicial discretion.[140] However, the very fact of shifting control of potential contractual unfairness to the legislative arena tends to impart more "formality" to the system.[141] At the very least, it works to restrict more vigorous growth of the broader doctrine of good faith. In fact, such a restrictive tendency

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134 Above n 78. In contrast, English law has been reluctant to pursue the latter possibility (J Phillips "Guarantees: The Effect of Creditor's Prejudicial Conduct towards the Guarantor" (1990) *JBL* 325).

135 Above n 108, 60.

136 Or of interpreting Article 589. Above n 108, 60.

137 See the cases cited in Yamamoto, above n 108, 61. Above, text at n 125-126.

138 T Uchida *Keiyaku no Saisei* [The Rebirth of Contract] (Kobundo, Tokyo, 1990), 230-231.

139 Employee Guarantees Act (*Mimoto Hosho Ho*), Law No. 42, 1933.

140 Above, n 137, 233-235.

141 Atiyah and Summers argue (above n 9, 96-97) that by its very nature, legislation tends to have higher "rank formality", "content formality" and "mandatory formality". But also cf above n 35.

continues to be evident, as in more recent types of cases where good faith is invoked.[142] Lastly, all these types of cases involve third parties. Apparently, the duty of good faith has not played the major role in directly regulating unfair contract terms between two parties, in a way that unambiguously points to a tendency towards the highly substantive approach advocated by scholars such as Uchida.

In sum, the duty of good faith in Japanese law has largely developed incrementally, into reasonably distinct groups of cases, in a way that - like the "fine print" doctrine - can often be quite readily encompassed within a formal approach. At the same time, it at least allows courts and commentators a foothold to develop a more substantive approach.[143] This opportunity follows from 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 refering to the duty - however much in passing.[144] Furthermore, in some of its manifestations the duty of good faith has been refined in purely commercial cases, making 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 brief 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.

Article 90: "Public Order and Good Morals"

Article 90 is an obvious candidate.[145] As with article 1(2), it potentially amounts to a highly content-oriented standard, and hence another mechanism opening the Japanese legal system to more substantive reasoning. Article 90 provides that:

> 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 also 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.

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142 These tend to be consumer contracts, where a "creative" function is apparent as the social goal of promoting of consumer protection. However, once again, some important issues soon came to be covered by legislation. Above n 108, 64-65.

143 Hence eg Uchida's recent argument that the duty of good faith calls for a version of "relational" contract theory, underpinned by communitarian moral philosophy. Above n 1, 133-135.

144 Kitagawa, above n 95, §1.07[2][d].

145 So is article 1(3), restricting "abuse of rights" (*kenri no ranyo*). But this has exercised even less control over "unfairness" in contractual relationships. Instead it has been prominent in regulating real property rights. See eg K Sono and Y Fujioka "The Role of the Abuse of Right Doctrine in Japan" (1975) 35 *La L Rev* 1037.

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.[146]

Secondly, however, article 90 adds a second component: "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.[147] But supporters had responded that this component could be used to identify "general interests of the state", relating to fundamental rights inherent in the legal order.[148] In fact, this is how it was seen by its proponents when included in article 90 of the Japanese Civil Code.[149] 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.

Third, 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".[150] This has led to broader application of this article, compared to article BGB 138. On the one hand, legal theory and caselaw 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

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146 K Hayashi "*Doitsuho ni okeru Ryozokuron 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.

147 Dating back only to the French Civil Code of 1804: Above n 146, 246.

148 Above n 146, 247-248.

149 Above n 108, 42.

150 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 article 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 article 138(2) (see Hayashi, above n 146, 247).

no obvious weakness exploited, but a grossly disproportionate bargain.[150a] In sum, even a brief comparison with a similar civil law 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.[151] 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 hosho*) 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*).[152]

However, as with article 1(2), a closer analysis of reported article 90 cases reveals limits. 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.[153] 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 then largely addressed by the Interest Rate Regulation Law.[154] Challenges to excessive liquidated damages clauses were no doubt limited by an initially strict approach to the remedy under article 90, namely

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150a Above n 146, 247.

151 Above n 113, 42.

152 H Orita "*Senzen Hanrei ni okeru Kojoryozoku* [Public Order and Good Morals in Pre-War Caselaw]" (1992) 64 *Horitsu Jiho* 61. *Jori* is another civil law concept (*Natur der Sache*), associated with natural law theory. However it may also have been interpreted by its early Japanese proponents in more indigineous terms. In 1875 it arguably achieved the status as another direct "source of law". See H Tanaka *Introduction to Japanese Law* 1972), 125, 175-177.

153 Above n 139.

154 *Risoku Seigen Ho*, Law No. 100, 1954.

total invalidity.[155] Third, only 2 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%.[156] Many will have involved more challenges to excessive liquidated damages clauses or "one-sided clauses".[157] Matching this development, 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,[158] which US and English law have had to regulate more indirectly by the device of striking down "penalty clauses".[159] 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.[160]

Another post-War development of comparative interest in this category has been the "bar hostess guarantee" cases. At least 11 cases have successfully challenged guarantees of

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155 H Nakaya "*Sengo Hanrei ni okeru Kojo Ryozoku* [Public Order and Good Morals in Post-War Caselaw]" (1992) 64 *Horitsu Jiho* 73, 79.

156 For the period 1955-89, 101 of the 185 successfully invoked article 90. Above n 155, 75.

157 However Nakaya's category appears broader than Orita's pre-War category of "Usurious Acts". It probably includes the cases like the Tokyo District Court decision cited above (n 132), and almost certainly the "hostess guarantee" cases (below, text at n 161-163), as Nakaya's remaining category ("Others") contains so few cases for the relevant period.

158 See eg the agency case discussed by Taylor (above n 130, 389-390), where only 25% of the liquidated damages amount claimed was awarded.

159 Atiyah and Summers (above n 8, 51) give the regulation of penalty clauses as a further example of a more content-oriented standard of validity in US contract law. (This is also mentioned in *Interfoto* and *Livingstone*, above n 19 and 20.) Overall, this means of regulation is more "formal", in finding the validity of such clauses solely in the "source" of the parties' agreement at the time of contracting (see also below n 186). However, aspects of the US law do appear more "substantive", compared to English law (see eg Treitel, above n 119, 229-33).

160 For instance, the task of drawing the line and finding a term to be only partially invalidwas 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.

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.[161] 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.[162] That decision is seen as justified by the close and special relationship that existed between the particular hostess and client. This constrasts sharply with the undue influence cases in the House of Lords, and the unconscionability cases in New Zealand. It 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 that allow the hostess to claim money back from the manager, despite having invalidated the underlying guarantee.[163] On the other hand, 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.[164] However, critics pointed out that this proposal ran counter to the reticence of the courts to invoke article 90 in this area, and reemphasised its traditional conceptual limits.[165]

Among those cases that continue to challenge exemption clauses, many have applied either or both article 90 and the duty of good faith.[166] 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

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161 Nakaya, above n 155, 75.

162 Judgment of 20 November, 1986.

163 Above n 155, 79-80.

164 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 G Rahn *Rechtsdenken und Rechtsauffassung in Japan* [Legal Thought and the Conception of Law in Japan] (C H Beck, München, 1990), 248-264.

165 Above n 108, 104.

166 Such as contracts of carriage: above n 155, 77-78.

parties.[167] This has traditionally been the preserve of the duty of good faith. However such cross-overs have attracted considerable concern from commentators, who have generally attempted to reinstate the original conceptual differences between the two articles.[168] 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 former later prove to be unpalatable, they have switched to applying the latter.[169]

Finally, the courts have often dealt with problem areas with potentially widespread repercussions, such as insurance contract standard forms, with techniques of contract "interpretation".[170] Commentators do note that even "restrictive interpretation" runs into difficulties when an agreed clause is is absolutely clear; but there is a concern lest application of article 90 be taken as widespread opprobrium of practices in an industry.[171] Overall, the trend in these areas also indicates a formal tendency.

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. This also tends to 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. This more formal side 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"[172] - or, put more theoretically - as too direct an application of a content-oriented standard.

4. *The General Approach to Legislative Intervention to Control Unfair Contracts*

An overall pattern begins to emerge, particularly from the still tentative analysis of the development of doctrines of good faith and unconscionability. US law prefers a highly substantive approach. Japanese law takes a substantive approach, tempered by a formal dimension evident from a closer analysis of actual developments. New Zealand and English law tend to retain a resolutely formal approach. This pattern seems to be reinforced by each

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167 Above n 155, 74. Also recall the 1977 termination case (above, n 132) which applies both articles.

168 See also Y Yamamoto above n 29, 103 and 106-107.

169 Above n 155, 87.

170 Above n 26 Y Yamamoto; above n 29, 103.

171 Above n 29, 107, 103.

172 The author thanks Professor Tsuneo Matsumoto for this phrase.

legal system's approach to the question of legislative intervention to control unfair contracts.

More extensive legislation based on broadly worded content-oriented standards of validity would indicate a more substantive approach. Piecemeal, more tightly drafted legislative intervention would indicate a more formal approach, particularly in the light of Atiyah and Summers' point that legislation by its very nature tends to promote other dimensions of formality within a legal system.[173]

The United States

It is therefore significant that the development of US law in this field remains largely driven by general doctrines of good faith and unconscionability. Certainly, as mentioned above, 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 caselaw developments, and is itself the result of and part of a visibly political process.[174] 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 ongoing work by the Study Group of the Permanent Editorial Board (PEB) on amendments to article 2 of the UCC.

First, its Executive Report 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.[175] 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 emergence of more direct regulation of unfair terms under broad standards of unconscionability, not just by focusing on the parties' agreement.[176]

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173 Above n 141.

174 Above text at n 35-40.

175 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.

176 Above, text at n 50.

Second, there was little momentum by the PEB Study Group to overhaul the broad standards of unconscionability laid down in the UCC.[177] 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.[178] Furthermore, the majority rejected the proposition that the provision differentiate between consumer sales and sales between merchants.[179] This tends to confirm the impression that unconscionability in US law remains available as a residual technique for controlling unfairness, even in commercial situations.[180]

Finally, the role of the duty of good faith has also been largely confirmed. The Executive Summary confirms that rejection under §2-601 must be in good faith, in derogation of the strict "perfect tender rule".[181] A minority even suggested more generally that the revised UCC adopt a type of "material breach" framework.[182] Furthermore, the majority insisted that termination of continuing supply contracts "at will", under §2-309, be done in good faith.[183] There is some attempt to reemphasise the objective aspects of the inquiry, but that itself can be substantive in orientation as well.[184] Thus, the duty of good faith under any revised UCC article 2 promises to remain an broad "content-oriented" standard playing a significant part in contemporary US contract law.

England

Atiyah and Summers admit that the enactment of the Unfair Contracts Terms Act 1977 (the UCTA) does import more content-oriented standards of validity into this area of

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177 Cf J Murray "The Revision of Article 2: Romancing the Prism" (1994) 35 *William and Mary L Rev* 1447, 1496-1497.

178 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.

179 Above n 178, 1307.

180 Above text at n 54.

181 However it proposes to retain the rule in consumer sales, as a protective measure (above n 175, 885-886).

182 Proponents alluded to the similar 'fundamental breach" concept in article 25 of the Vienna Sales Convention

183 Also, notice must be given or the bargain may be held unconscionable under §2-309(3) (above n 178, 1330).

184 The Preliminary Report proposes to expand §2-103 (refering 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 refering to the more "subjective" indicator of "honesty"). Above n 178, 1335-1336. Also see S Burton "Good Faith in Articles 1 and 2 of the U.C.C.: The Practice View" (1994) 35 *William and Mary L Rev* 1533, 1561-1563.

English contract law, in particular through its test of "reasonableness" for exemption clauses.[185] However they suggest that the UCTA will continue to be interpreted in the narrow, formal fashion representative of 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 admit, the scope (or "sweep") of the UCTA remains restricted by requiring "reasonableness" of the clause to be tested when the contract was concluded.[186] 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 argue that the UCTA implies a restriction in "pitch":[187]

> 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.

If this is so, it can be seen as restricting the scope for inquiry into more subjective considerations, an additional avenue for more substantive reasoning. Lastly, Adams and Brownsword do point out that one strand of the caselaw may be taking a more expansive view. But they criticise this development as leaving too much judicial discretion, and highlight a more restrictive strand in the case law as well.[188]

The restrictions of the UCTA can be further brought out by a brief comparison with the EC Directive on Unfair Terms in Consumer Contracts.[189] 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.[190]

In turn, the Directive has its limitations. First, article 5 requires terms to be "plain" and "intelligible", and construed *contra proferentem*. But Collins argues that this can justified by the more limited notion of "market failure", and sees article 5 as "the formal test" required by

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185 Above n 9, 52. Foreign observers have tended to see the UCTA in this light: see Kötz (above n 6, 4-5). Also, in *Interfoto* (above n 19, 439), Bingham LJ alludes to the UCTA as another "piecemeal solution" to the general problem of unfairness in English law.

186 J Adams and R Brownsword "The Unfair Contract Terms Act : A Decade of Discretion" (1988) 104 *LQR* 94, 116.

187 Above n 186, 116.

188 Above n 186, 97-99, 104-105.

189 93/13/EEC. Brought into force in England by the Unfair Terms in Consumer Contracts Regulations 1994 (S.I.1994 No 3159) on 1 July 1995.

190 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.

the Directive. This parallels the point developed above, namely that the "fine print" doctrine and certain techniques of contact interpretation can be quite readily reconciled with a "formal" approach to contract law.[191]

Collins argues that article 3(1) sets "the substantive test", but 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, conditions, 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 as 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 makes it *more* than "arguable that [the direct reference to good faith in the Directive] will have profound effects on the English law of contracts".[192] Finally, there may be a particular risk of conflicting readings when an English lawyer approaches a Directive, the product of EC law and Continental conceptions, using English techniques of statutory interpretation.[193] Thus, in the case of the Directive, even superficially content-oriented legislative standards run the risk of not being consistently applied in a "substantive" manner within the English law system. That pattern of development would support the Atiyah and Summers' general proposition.

New Zealand

Impetus towards a more substantive approach in the wider legislative reform process in New Zealand is, 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.[194]

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191 Above n 22.

192 Beatson, above n 77, 143.

193 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.

194 Article 7(1) of the Vienna Sales Convention (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*

The criticism of the Law Commission's draft scheme for regulating Unfair Contracts has already been mentioned.[195] Its demise is now seen as resulting in part from its attempt to propose a reconsideration of philosophical underpinnings in contract law.[196] 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 stride and has eventually led to some revival - now perhaps with sounder jurisprudential grounding - at the practical level of impetus for legislative reform.[197] New Zealand's experience is thus consistent with a more formal approach.

Lastly, one noticeable 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.[198] But, compared to the EC Directive, it has emerged with little debate on possible underlying rationales. This hampers its potential for injecting more substantive reasoning into New Zealand law. Further, given the Act's limited scope and occasionally complex drafting, it too is likely to be approached in a formal manner, at least initially.[199]

Japan

In Japan, the tendency for important categories of unfair contract cases to be "siphoned off", to be directly regulated by statute, has already been noted. Kitagawa lists a total of 16 statutes directly controlling aspects of contractual validity, often in transactions on standard forms.[200] However, 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

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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, Paper presented at the Eason-Weinmar Colloquium on International and Comparative Law: "Duties of Good Faith and Fair Dealing under the Unidroit Principles, Relevant International Conventions and National Laws" (1995) 3 *Tul J Intl and Comp L* 47, 56-57.) Other than the Commission's report, there has been no published discussion whatsoever in New Zealand regarding this concept of "good faith", now incorporated into New Zealand law.

195 Above n 101.

196 Sutton, above n 93, 3.

197 Below, text at n 204-205.

198 Furthermore, it is of potentially greater effect than an English counterpart, as it allows direct actions against manufacturers: cf G Howells "The Modernization of Sales Law?" [1995] *LMCLQ* 192.

199 Some of its complexity is noted by T Telfer "The Consumer Guarantees Act 1993" (1995) 1 *NZBLQ* 46.

200 Above n 95, §1.07[4][b].

tendency to regulate unfairness in contracting through local government ordinances.[201] Combined with the formal dimension even within the window for more substantive reasoning offered by Articles 1(2) and 90, this has added a formal dimension to the whole area.

Recently, there has been considerable academic discussion of the issues in regulating unfair contracts as part of a more systematic framework. This discussion has roots in studies in the early 1980s of overseas reforms, such as the UCTA and initiatives at the EC level, at a time when regulation of standard form contracts was being investigated by a government advisory body, the Social Policy Council (*Kokumin Seikatsu Shingikai*). But that more practical edge was has somewhat dulled. This reduced the immediate prospects for the introduction of general legislation containing new content-oriented standards, drawing on some of those overseas reforms. First, Japanese commentators increasingly realised the extent - and sometimes usefulness - of "administrative guidance" in regulating various standard forms used in particular industries.[202] In some cases, as in life insurance, the standard form must be approved by the responsible Ministry, which is therefore in a position to threaten de facto, if not legal sanctions to control excesses. Such control was

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201 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 in 1994 (Tokyo City Ordinance No 110, 6 October 1994, in force since 1 January 1995). On the one hand, article 25 of the Ordinance establishes broad, generally worded categories of "improper dealings", including those largely covered by doctrines of unconscionability or undue influence (paragraph 2), and those condemning "contracts containing terms which are excessively unfair and disadvantageous, violating the requirement of good faith (*shingizoku*) in dealings" (paragraph 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 article 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). Such "adminstrative guidance" (below n 202) may also indicate a more substantive approach, namely less "enforcement formality" (Atiyah and Summers, above n 8, 18, 186-221; see also L Nottage, "Contract Law and Practice in Japan: An Antipodean Perspective" in H Baum (ed) *Japan - Economic Success and Legal System* (Berlin, de Gruyter, forthcoming 1996), fn 46). On the other hand, the Regulations are extremely detailed, now attempting to cover 40 categories of unfair dealings. Already, commentators are calling 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 is also apparent in recent 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.

202 "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.

heightened by a Council Committee report in 1984, which identified problems in particular areas after widespread public discussion and research.[203] 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, a main problem came to be perceived not as particular unfair contract terms, but as improperly inducing the contract itself. 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 more general jurisprudential arguments.[204] By default, this hiatus left the Japanese law on unfair contracts with substantive roots, but formal counter-tendencies.

Some momentum has now re-emerged. Concern has grown about the inability of administrative guidance to adequately control the range of cases involving claims of contractual unfairness, particularly those involving consumers.[205] The Economic Planning Agency, responsible for coordinating consumer policy, formed a working group which reported on the EC Directive in 1994. It is too early to predict whether this will eventually lead to new legislation for regulation of unfair contracts generally, and thus to a significant injection of a more substantive approach into this area of Japanese law. The formal counter-tendency identified in this Part suggests that that may take some time to realise.

5 *Summary: Form and Substance in the Law of Unfair Contracts*

Testing the broad propositions of Atiyah and Summers, Part B has considered the extent to which content-, rather than source-oriented standards are used to determine the authoritativeness of contract law, as one indication of the degree to which substantive, rather than formal reasoning is accepted in four legal systems. The fine print doctrine or similar approaches are found in all the legal systems, but this can be indicative of either a substantive or a more formal orientation. However a consideration of the doctrines of good faith and unconscionability suggests a pattern with US law at the substantive end of the spectrum, Japanese law as somewhat more formal, and New Zealand and English law at the formal end of the spectrum. Closer analysis of other contract law doctrines listed by Atiyah and Summers seems likely to reinforce this pattern.[206] The general role of legislative reform in this area, of controlling contractual unfairness, does just that.

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203 Z Kitagawa "Unfair Contract Terms in Administrative Guidance" (1985) 16 *Rechtstheorie* 181.

204 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.

205 Matsumoto, above n 25, 146. Furthermore, foreign observers are increasingly critical of administrative guidance's "intransparency" (see eg M Dean "Administrative Guidance in Japanese Law: A Threat to the Rule of Law" [1991] *BL* 398).

206 See eg the brief discussion of penalty clauses (above n 159).

C. *A Broader Framework for Comparing Other Developments in Contract Law*

This pattern may hold for other aspects of the "authoritative formality of law" mentioned by Atiyah and Summers (tentatively summarised as 1.1.A, 1.1.B and 1.2 on the Figure in the Appendix). It also seems to hold for the other suggested dimensions of formal reasoning (2. ~ 3.), and for corresponding general "attributes" of formal legal systems (4. ~ 6.).[207]

If there are such systemic local variations within and surrounding the contract law of each legal system, Atiyah and Summers' framework is a salutary reminder that they tend to be deep-rooted and inter-related. Counter-systemic developments will therefore tend to be met with resistance.[208] What appear to be inevitable developments in domestic contract law must be reevaluated for that broader perspective. The form-substance framework promises more sensitivity and structured insight into differences in result, conceptualisation, and legal reasoning as a whole, in the context of traditional ways of systematically ordering legal institutions.

That framework also seems useful in analysing developments at an international level. In particular, if an international instrument or restatement embodies a more substantive orientation, formal systems may be expected to be more reluctant to embrace it.[209] For instance, some see the Vienna Sales Convention as exhibiting such an orientation.[210] This would make less surprising its early adoption by the US, its belated adoption by New Zealand (largely driven by pragmatic considerations), and vigorous opposition by some prominent English jurists to its adoption there.[211] Furthermore, even after implementation of

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207 Each dimension is briefly explored in Nottage (1995, above n 1), and more fully analysed in the author's ongoing PhD thesis research.

208 Atiyah and Summers (above n 8, 430) also briefly anticipated this point.

209 Abstracting from everyday pragmatic impediments, often similar in each domestic legal system. L Nottage "Trade Law Harmonisation in the Asia-Pacific Region: A Realist's View from New Zealand - and a Way Forward?" [1995] *NZLJ* 295.

210 A Kastely "Unification and Community: A Rhetorical Analysis of the United Nations Sales Convention" (1988) 8 *Northwest J of Intl L and Bus* 574. Uchida, above n 1, 12. A better example of a substantive orientation may be the Unidroit Principles (R Hyland "On Setting Forth the Law of Contract: A Foreword" (1992) 40 *AJCL* 541). Specifically, they also include provisions directly addressing contractual unfairness, principally §3.10 (see Bonell, above n 150, 90-106). However, since the Principles must be adopted by individual parties and otherwise do not have force of law, it is very difficult to know the extent to which they are "adopted".

211 J Hobhouse, "International Conventions and Commercial Law" (1990) 106 LQR 530. Japan would remain somewhat of an exception, in still not having adopted CISG, despite a largely substantive orientation. However the Japanese legal system does have a formal streak, and the pragmatic impediments in Japan's case are potentially particularly severe (see D Henderson "Some Developments in Japan's Transnational Law" in R Cranston and R Goode (eds) *Consumer and Commercial Law: National and International Dimensions* 60 (Clarendon Press, Oxford, 1993).

such instruments, interpretations may tend to diverge roughly along formal and substantive lines.

The desire for more convergence among legal systems may be laudable.[212] However, such convergence may be more gradual than expected. Similarly, those who perceive or anticipate widespread and rapid change in a particular legal system's contract law will need to carefully analyse carefully its overall orientation and that of its surrounding institutions - its national legal ethos.

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212 See eg B Markesinis (ed), *The Gradual Convergence: Foreign Ideas, Foreign influences and European Law on the Eve of the 21st Century*, (Clarendon Press, Oxford, 1993); 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*, 6-7.

Appendix

Overview

Formal Reasoning

1. Authoritative Formality

1.1 Validity Formality: Source- vs Content Oriented Standards

1.1.A Legislation

1.1.B Case Law: 'Policy' considerations

1.1.C Contract Law: Eg Control of Unfair Contracts

1.2 Rank Formality: Sources of Law and Ranking Rules
(Parliamentary Sovereignty, Stare Decisis, Custom)

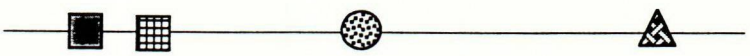
2. Content Formality: Extent and Nature of Legislation

3. Interpretative & Mandatory Formality: Perceptions of the Nature of Legal Rules

Formal Orientation: Law and Practice

4. Enforcement Formality

5. Truth Formality



6. "Didactic" Formality

Etude comparative des concepts de substance et de procedure aux Etats-Unis, Angleterre, et Nouvelle-Zelande: plus particulièrement dans le context des clauses abusives en matière contractuelle

Récemment la doctrine a préconisé que dans de nombreux droits internes, des changements soient apportés dans le domaine du droit des contrats.

Une justification souvent avancée repose sur le constat que cette matiere doit s'adapter aux exigences qui découlent de l'internationalisation des rapports contractuels. Cet article met en garde contre toutes tendances à une généralisation hâtive. Il met en exergue que chaque droit interne demeure fortement attaché à des valeurs constantes qui apparaissent aussi bien dans la doctrine, dans les décisions de justice ou encore dans les institutions juridiques. Partant toute velléités de nouveauté se heurtera inévitablement à une résistance soutenue qui ne sera pas sans répercussion sur les rapports contractuels internationaux.

Pour examiner l'orientation générale des 4 systèmes juridiques retenus pour cette étude, la discussion débordera le cadre de l'analyse traditionnelle préconisée par Atiyah et Summers, à savoir opérer une distinction entre la forme et le fond. Le choix de la presente étude s'est porté sur une analyse théorique de plusieurs différences entre le droit anglais et le droit américain. Pareille démonstration vaudra pour le droit néo zélandais qui à beaucoup d'égards suit le modèle anglais. Il pourra même etre étendu au droit japonais qui d'une part, est à certains égards, imprégné des préceptes de la tradition civiliste et qui d'autre part tend à privilégier le fond sur la forme.

De plus un des aspects de ce distinguo entre la forme et le fond, à savoir la valeur qu'il convient d'accorder aux normes, dépend largement de la manière dont les règles du droit des contrats privilégieront soit l'origine de la règle soit le critère du contenu. Cet article analyse de manière détaillée trois exemples particuliers proposés par Atiyah et Summers: la doctrine de la bonne foi, du dol, et de la valeur juridique des dispositions contractuelles indiquées en petits caractères. Si sur ce dernier point à l'inverse de la position fort claire des tribunaux, les justifications doctrinales retenues demeurent encore incertaines, les deux autres exemples font ressortir que chaque système particulier du droit des contrats continue néanmoins à se développer tout en conservant une orientation stable. De plus ces trois exemples représentent une grande part des règles relatives aux principes gouvernant les situations de déséquilibre contractuel, et plus particulierement en ce qui concernent les contrats d'adhésion. Dès lors il n'est guère surprenant de retrouver dans chaque système de droit considéré la marque récurrente de l'intervention du législateur qui tend à imposer des constantes idéologiques et conceptuelles du droit dans le domaine des contrats.

L'analyse retenue dépendra aussi de la place que l'on accordera aux autres éléments constitutifs du cadre traditionnel dans lequel l'opposition "fond/ forme" s'exerce. En effet certaines recherches actuelles tendent à démontrer que ces paramètres annexes ne sont pas

sans influencer le droit des contrats tant au niveau des droits internes qu'au niveau international.