

**CONTRACTUAL INTERPRETATION: A COMPARATIVE  
PERSPECTIVE  
PAPER BY THE HONOURABLE J J SPIGELMAN AC  
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TO THE THIRD JUDICIAL SEMINAR ON COMMERCIAL  
LITIGATION  
SYDNEY, 23 MARCH 2011**

In my experience the majority of commercial disputes involve questions of contractual interpretation. Often such questions are at the heart of the dispute. In this paper I will be concerned with contracts between commercial parties – not with consumers – being parties who, despite inevitable differences in bargaining power, are not constrained by anything in the nature of coercion.

For virtually all such contemporary commercial arrangements of any significance, lawyers and judges have before them a text, often a long and detailed text or, at the very least, an exchange of correspondence. Analysis must always begin with the words used. The focus of this paper is how far and in what respects one can or should travel beyond the text for the purposes of contractual interpretation.

## **From Text to Context**

In the common law jurisdictions with which I am most familiar there has been a clear development over the last two or three decades in both statutory and contractual interpretation from a literal approach to a purposive approach. The movement has been from text to context.<sup>1</sup> A comparative analysis shows that there are significant differences between jurisdictions as to the extent of the movement. Such differences also appear in internal debates within jurisdictions.

Although it is useful to distinguish between textualists and contextualists, to identify alternative basic approaches to contractual interpretation, it must be remembered that what is involved is a spectrum of opinion, rather than a simple duality.

I have significant reservations about the substantial expansion of the scope and nature of evidence now available for the purposes of interpreting a written contract. What started out in life as an application of the perfectly acceptable principle that words in a written contract must be understood in their commercial context, has turned into a mechanism for creating a high level of

uncertainty in commercial relationships. This was not originally intended.

In my opinion, in most jurisdictions the balance between certainty and accuracy favours the latter more than it should. My disagreement is based on a difference of approach that is fundamental.

As will appear below, a restatement of the principles of contractual interpretation by Lord Hoffmann has been very influential. Lord Hoffmann's starting point is that "legal interpretation" should be assimilated to the way "any serious utterance would be interpreted in ordinary life".<sup>2</sup> I respectfully disagree. There are, in my opinion, significant differences between legal words and the utterances of everyday life.

Legal words whether in a contract or in a statute, are not the same as words uttered in the course of ordinary life. That is because legal words create and impose obligations. Specifically, in the commercial context, those words, unlike many "ordinary life utterances", are imbued with a desire, from the outset, on the part of all parties to a contract that there be a high level of certainty as

to how their written agreement will be understood in the future, both in any disputes between the parties and by reason of the involvement, in many spheres of commerce, of third parties who will rely on the written text without knowing the full context.

The first requirement for interpreting any text is to understand and give full weight to the nature of the document. That is why a national constitution cannot be interpreted as if it was a will or a trust deed.<sup>3</sup> That is why a statute must be interpreted in accordance with the public values of the system of government, such as the presumptions appropriately grouped under the principle of legality.<sup>4</sup> That is also why a written commercial contract must be interpreted so as to provide as much commercial certainty as the words permit.

Like many other aspects of contract law, interpretation requires the resolution of a tension between certainty or efficiency on the one hand and accuracy or fairness on the other. There exists a broad spectrum of permissible opinion as to where the balance between these often conflicting considerations should be drawn.

“Certainty” in this context refers to the proposition that the extent to which lawyers giving advice on contractual obligations, and practitioners, arbitrators and judges involved in dispute resolution, refer to matters beyond the contractual document, the certainty of advice or of the outcome of the dispute resolution process, is lessened. Furthermore, the length and cost of the process is increased.

“Accuracy” or “fairness” in this context refers to the significance of determining what the *actual* intention of the parties was with respect to the meaning of particular words used in a written agreement. Justice requires that they be held to the bargain upon which they truly agreed. This has been called “a more principled and fairer result”<sup>5</sup> or one that will meet “the reasonable expectations of the parties”.<sup>6</sup> It is supported on the basis that “fairness should trump convenience”.<sup>7</sup> Further, a restrictive approach to evidence for purposes of interpretation may sometimes mean that “justice” is not done.<sup>8</sup> However, as Chief Justice Gleeson forcefully pointed out, the “holy grail of individualised justice” is frequently in conflict with the need for predictability, and certainty in the law, including commercial law.<sup>9</sup>

As is so often the case, reasonable people can differ about where the balance between pragmatism and principle should be drawn. Practical considerations, which are concerned with commercial certainty and the cost of contract writing, advice and adjudication, are regarded by some as an unprincipled constraint upon the true object of contract law, but by others as a valid factor entitled to weight in the balance.

Furthermore, in terms of the justice of the situation, distinct issues arise in that significant range of commercial relationships in which third party interests become involved on the basis of the contractual text. Insofar as the true intentions of the parties is to be determined by extrinsic materials, they invoke matters of which such third parties have no knowledge.

I will concentrate upon jurisdictions of the common law tradition. Relevantly for the purpose of contractual interpretation, the rules which have traditionally restricted the range of material available for purposes of interpreting a written contract, include:

- the parol evidence rule;
- the rule that extrinsic materials could only be referred to if the words used are ambiguous;

- restrictions on the scope of extrinsic materials to which it is permissible to have regard;
- the rule against the admissibility of pre-contractual negotiations;
- the rule against the admissibility of post-contractual conduct.

In various degrees, these exclusionary rules have been modified over recent decades. A comparative analysis reveals considerable divergence in these respects.

### **Parol Evidence Rule**

The traditional approach to the interpretation of a written contract in common law nations turned, in large measure, on the application of the parol evidence rule. The rule has been stated in different ways, but the core principle is that, when parties have reduced their contract to writing, a court should only look to the writing to determine any issue of interpretation.

The rule excluded extrinsic evidence for the purpose of interpretation. However, the rule applied only if the parties had, as a matter of fact, determined that the whole of their contract would

be in writing. Extrinsic material could be considered to determine whether that was or was not the case.

What the Americans call a “hard parol evidence rule” includes a strong presumption that a contract which appears to be final and complete on its face will be accepted as such, whereas a “soft parol evidence rule” permits this presumption to be more readily overridden by extrinsic evidence. Questions of fact and degree arise. Different jurisdictions, indeed different judges within a jurisdiction, will balance the trade off between certainty and accuracy in different ways in this respect.

Over recent decades English courts became more willing to look beyond an apparently complete contract. This deprived the traditional form of the rule of much of its force, as the Law Commission eventually acknowledged,<sup>10</sup> in a report on the Parol Evidence Rule. There are three passages of significance in its report.

First, is the conclusion that:

“...there is no rule of law that evidence is rendered inadmissible or is to be ignored solely because a

document exists which looks like a complete contract. Whether it is a complete contract depends upon the intention of the parties, objectively judged, and not on any rule of law.”<sup>11</sup>

A passage that is also often quoted is:

“We have now concluded that a parol evidence rule ... which on occasions may have been applied to exclude or deny effect to relevant evidence, no longer has either the width or the effect once attributed to it. In particular, no parol evidence rule today requires a court to exclude or ignore evidence which should be admitted or acted upon if the true contractual intention of the parties is to be ascertained and effect given to it.”<sup>12</sup>

Also of significance is the reasoning in the following passage:

“We have now concluded that although a proposition of law can be stated which can be described as the ‘parol evidence rule’ it is not a rule of law which, correctly applied, could lead to evidence being unjustly excluded. Rather, it is a proposition of law which is no more than a circular statement: when it is proved or admitted that

the parties to a contract intended that all the express terms of their agreement should be recorded in a particular document or documents, evidence will be inadmissible (because irrelevant) if it is tendered only for the purpose of adding to, varying, subtracting from or contradicting the express terms of that contract.”<sup>13</sup>

The process of emasculating the traditional effect of the parol evidence rule appears to have arisen by reason of the emphasis which began to be given to the factual matrix of a contract, commencing with the judgments of Lord Wilberforce to which I will refer.<sup>14</sup> The Law Commission’s Report has been adopted by some text writers, who treat the parol evidence rule as a historical footnote.<sup>15</sup> Others are not prepared to dispense with the rule, not least because no court has said it has gone, but acknowledge that it is subject to so many exceptions that, as a matter of substance, it appears to be of little significance.<sup>16</sup>

The Court of Appeal has, on occasions, endorsed the Law Commission’s approach to the parol evidence rule.<sup>17</sup> On the other hand, one Law Lord has affirmed and restated the rule, emphasising its role in promoting certainty.<sup>18</sup> However, it does

appear that English judges are no longer willing to proceed on the basis of a strong presumption that a written contract, which appears complete on its face, should be treated as embodying the whole agreement. Although not overruled, the rule appears to have been superseded by Lord Hoffmann's restatement, to which I will refer below.

The position seems to be the same in Hong Kong, at least at a Court of Appeal level.<sup>19</sup> I am not aware that the Court of Final Appeal has addressed the question.<sup>20</sup>

The position is, in my opinion, different in Australia. Here the rule is not regarded as a historical curiosity. The parol evidence rule has long been accepted as fundamental.<sup>21</sup> It has been affirmed in quite recent times, with traditional justification.

In the *Equuscorp* case<sup>22</sup>, a joint judgment of five judges of the High Court emphasised:

- a person executing a written agreement is bound by it;
- the parol evidence rule accords with the objective theory of contract;

- oral agreements often give rise to “difficult, time consuming expensive and problematic” disputation;
- the rule should be maintained, recognising that it allows for exceptions in “established categories”;
- the growth of international trade with parties from different legal systems reinforces the role of the rule.

It is noteworthy that even Australia’s most reform minded judge, Justice Kirby, formerly of the High Court, has strongly reaffirmed the rule and its core justification.<sup>23</sup> His Honour emphasised:

- the “practical utility” of the parole evidence rule including a “desire to uphold the more formal bargains” and “to discourage expensive and time consuming litigations about peripheral and disputable questions”;
- if the language is clear no extrinsic material “authorises a refusal to give the clear words their legal effect”;
- the growth of international trade supports the policy for “adhering to a general principle that holds parties to their written bargain”.

The *Indian Evidence Act* of 1872 compiled by Sir James Stephens, is one of the most successful acts of codification in the common law world. It remains the basis of the law of evidence in the Republic of India (other than Jammu and Kashmir), Pakistan, Bangladesh, Sri Lanka, Burma, Malaysia and Singapore, as well as a number of nations in Africa and the West Indies. That Act gave statutory force to the parol evidence rule.

The basic principles contained in the *Indian Evidence Act*, as generally adopted are:

- No evidence is admissible of the terms of any written contract, nor any secondary evidence of its contents (s 91).
- For a written contract, evidence is not admissible to add to, vary or contradict its terms (s 92).
- When the language in a document is on its face “ambiguous or defective” evidence may *not* be given of facts which may supply the defect (s 93).
- When “plain” language in a document applies to existing facts, evidence may *not* be given to show that it was not meant to apply to such facts (s 94).
- There are several express provisions for when the language of a written contract may be supplemented (ss 95-98).

Of particular significance for present purposes is the sixth proviso to s 92 which states:

“Any fact may be proved which shows in what manner the language of a document is related to existing facts.”

In view of these express provisions it is not surprising that the traditional approach to interpretation of contracts in India was as strict as the original approach in England. Clear words have to be applied and surrounding circumstances could be referred to only if there is an ambiguity in the actual language.<sup>24</sup>

The primacy of the text has frequently been asserted in Indian authorities. For example, in one case the Supreme Court said:

“ ... In construing a contract, the Court must look at the words used in the contract unless they are such that one may suspect that they do not convey the intention correctly. If the words are clear, there is very little the Court can do about it.”<sup>25</sup>

As the Supreme Court put it more recently:

“When persons express their agreements in writing, it is for the express purpose of getting rid of any indefiniteness, and to put their ideas in such shape that there can be no misunderstanding, which so often occurs when reliance is placed upon oral statements.”<sup>26</sup>

The Indian courts frequently state that extrinsic evidence is not admissible if the meaning is clear. The courts also frequently state that surrounding circumstances can be referred to.<sup>27</sup> It seems to me that such references to “extrinsic evidence”, in their context, are directed to statements of subjective intention, as such. Statements of that character are not admissible in any of the jurisdictions to which I will refer.

However, it does appear to me, on the limited research I have been able to conduct of the Indian case law, that Indian courts are less likely to go behind a written text. Furthermore, the scope of surrounding circumstances to which regard may be had also appears to be more restrictive than in some other jurisdictions.

This is a natural result of the parol evidence rule having statutory force. It cannot be relegated to a historical footnote.

The approach to contractual interpretation in Singapore has been set out authoritatively in a detailed judgment in *Zurich Insurance*.<sup>28</sup> The judgment contains a comprehensive exposition of the issues that arise in this context. It has been supplemented extra-judicially.<sup>29</sup>

Of particular significance for other nations which have adopted Sir James Fitzjames Stephens Evidence Act, is the careful analysis in *Zurich Insurance* of the application of those provisions to the process of interpretation. I will discuss below the analysis of the sixth proviso to s 92 (which is s 94 of the Singapore Act).

The Court emphasised that, although the law of Singapore had moved from textualism to contextualism, because of its statutory enactment, the parol evidence rule remained robust. The rule applies, but that it excludes reference to extrinsic evidence only for the purpose of varying a written contract. The Court distinguished such use from reference to extrinsic evidence for the

purpose of interpretation.<sup>30</sup> Extrinsic evidence can be used for the purpose of interpretation, but cannot be used “as a pretext to contradict or vary it”.<sup>31</sup>

Although, as in India, the statute precludes relegating the rule to a historical footnote, the process of emasculation that has occurred in England has clearly been influential. The balance between certainty and accuracy has been redrawn in jurisdiction, like Singapore, in which the English influence remains significant.

### **Surrounding Circumstances**

In all jurisdictions, the words of a written agreement are the primary focus of attention in the sense that, subject to collateral doctrines such as rectification and estoppel, it is those words that fall to be interpreted. However, the surrounding circumstances in which a text was drafted can be of assistance in its interpretation and that proposition may not have received sufficient emphasis until recently.

Words never stand by themselves. They do not exist in limbo. Justice Learned Hand put the proposition well when he said:

“Of course it is true that the words used, even in their literal sense, are the primary, and ordinarily the most reliable, source of interpreting the meaning of any writing; be it a statute, a contract, or anything else. But it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning.”<sup>32</sup>

The same, of course, is true of the commercial purposes of a contractual relationship. I do not doubt the importance of surrounding circumstances or the “factual matrix”, as it is often called, for purposes of interpretation. However, reasonable minds can differ about how readily and how far such background should be taken into account for that purpose. Questions of fact and degree are involved.

In common law nations the preparedness to take account of surrounding circumstances, and the commercial purpose of contract, accelerated in the 1970’s and has continued to expand.

In England this movement, from text to context, commenced under the influence of Lord Wilberforce. In an influential judgment in 1971, his Lordship re-emphasised the relevance to interpretation of the factual matrix known to both contracting parties, including the genesis and the aim or commercial purpose of the transaction.<sup>33</sup>

I do not believe that Lord Wilberforce intended any dramatic change from past practice. The “factual matrix” which he had in mind encompassed a limited range of basically uncontested commercial facts understood by both parties, even in a context where, almost by definition, their interests were in conflict.

As Lord Wilberforce himself said, in the basal authority:

“As to the circumstance, and the object of the parties, there is no controversy in the present case. The agreement, on its face, almost supplies enough, without the necessity to supplement it by outside evidence. But some expansion, from undisputed facts, makes for clearer understanding ...”

The history of commercial litigation until this time would suggest that the typical case would be like this one, ie, involving “undisputed facts”. Indeed, it ought to be the case, as Lord Hoffmann has put it more recently, that:

“ ... surrounding circumstances are, by definition, objective facts, which will usually be uncontroversial”.<sup>34</sup>

However, this is not how this change has developed in the legal systems with which I have some familiarity. This is due to civil procedure, especially with respect to discovery, in a context where the adversarial system creates perverse incentives, which are not always adequately controlled by case management.

The expanded reliance on context for interpretation of written documents was influential throughout the common law world including Australia,<sup>35</sup> Hong Kong,<sup>36</sup> New Zealand,<sup>37</sup> Singapore,<sup>38</sup> Malaysia<sup>39</sup> and India.<sup>40</sup>

The following statement by the High Court of Australia is representative of this first stage of the movement from text to context:

“The meaning of the terms of a contractual document is to be determined by what a reasonable person would have understood them to mean. That, normally, requires consideration not only of the text, but also of the surrounding circumstances known to the parties, and the purpose and object of the transaction.”<sup>41</sup>

The next stage of development was Lord Hoffmann’s restatement in the *Investors Compensation Scheme* case. He set out a five point scheme for contractual interpretation, which has proven very influential.<sup>42</sup>

His first point has been widely adopted. It is:

“Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.”

The robustness of this principle has been affirmed by the Supreme Court of the United Kingdom which has held that even

without prejudice communications must be available as part of the background available for purposes of interpretation.<sup>43</sup>

In Australia, the High Court has frequently accepted that commercial contracts must be given a business like interpretation and this first proposition of Lord Hoffmann's restatement has expressly been accepted.<sup>44</sup>

English decisions on contract law are highly influential in Hong Kong. As the authors of one text on contract law put it:

"It could be said that, in terms of Hong Kong contract law, it is as if 1997 never happened."<sup>45</sup>

The Hong Kong Court of Final Appeal had the benefit of Lord Hoffmann's own participation in that Court, sitting as a non-permanent judge. The case which is most frequently cited in subsequent Hong Kong authorities is Lord Hoffmann's own judgment in *Jumbo King Ltd v Faithful Property Ltd*. His Lordship said, relevantly:

"[59] ... The construction of a document is not a game with words. It is an attempt to discover what a reasonable person would have understood the parties to

mean. And this involves having regard, not merely to the individual words they have used, but to the agreement as a whole, the factual and legal background against which it was concluded and the practical objects which it was intended to achieve.”<sup>46</sup>

The cycle is complete. Subsequently, in *Chartbrook* his Lordship referred to the judgment in *Jumbo King*.<sup>47</sup>

In one case the Court of Final Appeal went beyond the reference to *Jumbo King* and expressly adopted the cognate first proposition from *Investors Compensation Scheme*.<sup>48</sup> I am not aware that the Court of Final Appeal has endorsed the five point scheme, in terms, but lower courts in Hong Kong apply it.

New Zealand courts enthusiastically adopted Lord Hoffmann’s restatement.<sup>49</sup> This was, of course, understandable at a time when appeals to the Privy Council still existed from the Court of Appeal of New Zealand. More significantly, the Supreme Court of New Zealand has not only reaffirmed the approach, but probably gone further. I will discuss the decisions below.

One author suggested that the Supreme Court of India has rejected the Lord Hoffmann restatement.<sup>50</sup> However, the case upon which he relied recites a submission which was more wide ranging than that advanced by Lord Hoffmann.<sup>51</sup> So far as I am aware the Supreme Court of India has not otherwise addressed Lord Hoffmann's restatement in terms.

Notwithstanding the frequent reassertion of the proposition that effect must be given to unambiguous language, the Supreme Court of India has indicated in more recent judgments that it is legitimate to take into account surrounding circumstances for purposes of ascertaining the intention of the parties.<sup>52</sup>

In Malaysia, the Federal Court has also expressly adopted and applied the first of Lord Hoffmann's principles.<sup>53</sup> At a Court of Appeal level, the whole of Lord Hoffmann's five point restatement has been referred to with approval.<sup>54</sup>

The *Zurich Insurance* judgment, to which I have referred, indicates that in Singapore, in substance, the Hoffmann restatement has been adopted, subject only to the express restriction arising from s 95 in the case of a patent ambiguity.

In the *Investors Compensation* case, as subsequently modified, Lord Hoffmann expanded the concept of the “factual matrix”, which he retitled “background knowledge”, to include “absolutely anything” known to both parties which a reasonable man could have regarded as relevant to an understanding of the way in which the language should be understood.<sup>55</sup> This was the second of his five points. It has not been so enthusiastically received as the first.

Writhing extra-judicially, Justice Rajah of the Singapore Court of Appeal concluded:

“The courts ought to embrace a consistently commonsensical approach in relation to the admissibility of evidence in contractual disputes. All relevant material which assists in revealing the parties objective intentions should be considered. It can be forcefully said that it is the legal entitlement of the parties to have their objective intentions and the ‘goal of a genuine consensus’ ascertained through such a process. Fairness should trump convenience. Such an intuitive approach better

coheres with the idea that a contract law is a facilitative body of principles.”<sup>56</sup>

In substance, his Honour accepts the “absolute anything” element in the Hoffmann Restatement.

However, the “absolutely anything” extension has not been adopted in Australia. Nor has it been adopted by the Federal Court of Malaysia or by the Indian Supreme Court. It is not repeated, in terms, in his Lordship’s own judgment in *Jumbo King*. Nor, has it subsequently been adopted by the Court of Final Appeal in Hong Kong. However, it appears to be applied by the lower courts in Hong Kong.

### **The Ambiguity Requirement**

Traditionally, it was thought that extrinsic evidence could only be taken into account if there was ambiguity in the written text. However, it was implicit in the adoption of Lord Wilberforce’s “factual matrix” approach that, to some degree, surrounding circumstances would be taken into account from the outset of the interpretative process, not only after ambiguity was identified. In 1998, when Lord Hoffmann restated the principles of contractual

interpretation in the *Investors Compensation Scheme* case, the necessity to find “ambiguity” before having regard to “background” was clearly rejected.<sup>57</sup>

In Australia, there is uncertainty as to whether ambiguity is still required before reference to surrounding circumstances is permissible. The basic authority remains *Codelfa* which contains the following formulation:

“Evidence of surrounding circumstances is admissible to assist in the interpretation of the contract if the language is ambiguous or susceptible of more than one meaning. But it is not admissible to contradict the language of the contract where it has a plain meaning.”<sup>58</sup>

There is no authoritative decision on the distinction in *Codelfa* between the word “ambiguous” and the subsequent phrase “or susceptible of more than one meaning”. I have expressed the view that the latter should be distinguished from the former, so that reference to extrinsic materials is permissible not only on the basis of a lexical or verbal ambiguity and/or a grammatical or syntactical ambiguity, but extends to any situation in which the interpretation is for any reason doubtful.<sup>59</sup> What his

Honour had in mind, in my opinion, was something along the lines of the traditional distinction between patent and latent ambiguity, which is of continued significance, as I will discuss below, in those nations which have adopted the *Indian Evidence Act*.

More recent High Court decisions have stated the relevant principles without referring to the need for ambiguity. On that basis, the view has been taken that the ambiguity requirement has been dispensed with.<sup>60</sup> However, *Codelfa* has never been overruled by the High Court.

The traditional rule that extrinsic evidence can be looked at in the case of ambiguity was affirmed by the Privy Council in a New Zealand appeal shortly before *Investors Compensation Scheme*.<sup>61</sup> The subsequent adoption by New Zealand courts of Lord Hoffman's restatement posed some difficulties in this respect.<sup>62</sup> However the issue now appears to be resolved and ambiguity is not required.<sup>63</sup>

In the *Zurich Insurance* case, the Court of Appeal of Singapore concluded that it was no longer necessary to identify an ambiguity before referring to extrinsic evidence.<sup>64</sup> In his extra-

judicial writing Justice V K Rajah reaffirmed the proposition in the *Zurich Insurance* case that it is unnecessary to identify ambiguity prior to relying on extrinsic evidence.<sup>65</sup>

In Singapore, as in other jurisdictions that have adopted the *Indian Evidence Act*, the position is complicated by the express statement in s 95 (s 93 in India) that extrinsic evidence is NOT admissible in the case of ambiguity.

The Singapore Court of Appeal in *Zurich Insurance* concluded that extrinsic evidence could not be used to interpret language in the case of patent ambiguity, but could be used if there is a latent ambiguity, in the sense that the ambiguity only becomes apparent when the language is applied to a factual situation.<sup>66</sup> The Court relied on the sixth proviso to s 94 of the Singapore Act for this approach. This appears to me to be the same result as I understand the Indian Courts to have reached.

In India, s 93 has also been interpreted to require the rejection of extrinsic evidence only in the case of a patent ambiguity. If there is latent ambiguity, however, then extrinsic evidence is admissible, eg, to identify the subject matter of the

contract.<sup>67</sup> Indeed, at least one Indian court has invoked the sixth proviso the same way as in Singapore.<sup>68</sup> However, the Indian authorities do not suggest that once latent ambiguity is identified, the full scope of surrounding circumstances – “absolutely anything” in Lord Hoffmann’s terminology – becomes admissible. The cases and texts I have consulted suggest a more circumspect approach is adopted.

The Malaysian position appears to be the same as in India and Singapore, in that surrounding circumstances can be taken into account pursuant to the sixth proviso, but only in the case of latent ambiguity. However, it appears that the scope of surrounding circumstances to which it is permissible to have regard is, like that of India, also more restrictive than that adopted in Singapore.

As the Federal Court put it:

“It is evidence admissible under proviso (f) to section 92 Evidence Act, to show in what manner the language of a document is related to existing facts. It is admissible evidence *being confined strictly to surrounding facts so intimately connected with the instruments* that they

afford reliable material for ascertaining the nature and extent of the subject-matter referred to. See also *Oriental Bank of Malaya Ltd v Subramaniam* [1958] 1 MLJ 35.<sup>69</sup> (Emphasis added.)

To similar effect are the observations of the Court of Appeal, Kuala Lumpur:

“[S]uch evidence must *be restricted only to what is necessary* for the purpose so that the record will not be bulky.”<sup>70</sup> (Emphasis added.)

The italicised passages use language that does not appear in the English, New Zealand, Hong Kong or Singapore case law.

The statutory restriction in s 93 of the Indian and Malaysian Acts (s 95 in Singapore) does differentiate the position from those nations that have not adopted the *Indian Evidence Act*. Ambiguity, including patent ambiguity on the face of the document, is one context in which extrinsic evidence is, one might have thought, particularly relevant.

It does appear that, in a number of respects, the Australian approach to interpretation of contracts by reliance on extrinsic evidence remains more circumspect than in England and in most other jurisdictions. The scope in Australia for what academics like to call “modern” or “commercial” construction is not clear. Most other common law jurisdictions have followed the English lead, with the possible exception of India and Malaysia. I say “possible” because of the limitations of my research in the Indian and Malaysian authorities.

### **Pre-Contractual Negotiations**

Lord Hoffmann accepted, albeit without enthusiasm, that it was too late for the English courts to change the principle of English law that pre-contractual negotiations were not admissible for the purpose of interpreting the contract, save in the case of ambiguity, or insofar as they demonstrated knowledge of the relevant factual matrix. His Lordship was clearly uncomfortable with the distinction, but saw practical reasons for distinguishing prior negotiations from other aspects of background.

The rule against the admissibility of pre-contractual negotiations has been affirmed in England,<sup>71</sup> Australia,<sup>72</sup> Hong Kong<sup>73</sup> and India.<sup>74</sup>

Although mere declarations of subjective intent, as such, remain inadmissible in Singapore, in *Zurich Insurance*, the Court of Appeal said that “there should be no absolute or rigid prohibition against evidence of previous negotiations or subsequent conduct, although in a normal case such evidence is likely to be inadmissible”.<sup>75</sup>

In *Chartbrook* the House of Lords definitively upheld the proposition that it was too late to change the principle that pre-contractual negotiations were not admissible. *Chartbrook* was delivered after *Zurich Insurance*. The indication in *Zurich Insurance* that Singapore would not follow that aspect of Lord Hoffmann’s restatement appears to be confirmed by the analysis in Justice Rajah’s subsequent article, although his Honour acknowledged that the Court had not judicially considered *Chartbrook*.<sup>76</sup>

In New Zealand, the Supreme Court has addressed the question of pre-contractual negotiations in a case without a clear ratio.<sup>77</sup> One of the judges appeared to start from the traditional position that, where relevant ambiguity was established, evidence of pre-contractual negotiations is admissible but that process should not be subject to previously accepted restrictions.<sup>78</sup> Two of the judges indicated that ambiguity was not required prior to examining background material but, on the facts of the case, their Honours invoked the widely accepted exception<sup>79</sup> that negotiations are admissible to identify the subject of a matter of a contract. In doing so, however, they adopted a wide concept of “subject matter”.<sup>80</sup> A fourth judge said that it was no longer the case that ambiguity was required before taking into account background material, but saw no reason in that case to look at the background material.<sup>81</sup> The fifth judge said that the same underlying principles should be applied to both pre-contractual and post-contractual evidence, concluding that the evidence is admissible if it is “capable of demonstrating objectively what meaning both or all parties intended their words to bear”.<sup>82</sup> This appears to adopt the “absolutely anything” approach.

## **Subsequent Conduct**

The position in England is that, subject to certain exceptions, subsequent conduct is not admissible.<sup>83</sup> As it was put:

“it is not legitimate to use as an aid in the construction of the contract anything which the parties said or did after it was made”.<sup>84</sup>

These decisions have not, or at least not yet, been revisited since Lord Hoffmann’s restatement.

The principle that subsequent conduct is not available as an aid to interpretation has been affirmed in Australia.<sup>85</sup> However, the reaffirmation did not involve detailed consideration of the various issues that arise in this respect.<sup>86</sup>

This position has also been affirmed in Hong Kong<sup>87</sup> and in Malaysia.<sup>88</sup> However, in Singapore, subsequent conduct is probably admissible. It was placed in the same position as pre-contractual negotiations, discussed above.<sup>89</sup>

In India, evidence of subsequent conduct is admissible in certain circumstances for purposes of construing a written agreement. There must, however, be some ambiguity in the contract and particular weight appears to be given to conduct done shortly after the date of a contract.<sup>90</sup>

In *Gibbons Holdings*, a majority of judges in the Supreme Court of New Zealand accepted that subsequent conduct can be referred to for purposes of interpretation. However, the doctrinal basis of this acceptance is unclear.

Two of the judges would limit such evidence to a situation in which the conduct was engaged in by both parties, another judge said that even unilateral conduct was admissible, a further judge accepted that subsequent conduct could be admissible, without advert to this distinction and the fifth judge reserved upon the admissibility of all subsequent conduct.<sup>91</sup>

I am generally critical of the expanded use of extrinsic material for purposes of interpretation. However, the adverse commercial effects which concern me are unlikely to arise if reference to conduct is limited along the lines adopted by the

Indian courts. Where there is ambiguity in the written contract, conduct shortly after it came into effect can be revealing.

### **Entire Agreement Clauses**

Matters of fact and degree arise on the spectrum between a “hard” parol evidence rule approach and a “soft” or “non-existent” parol evidence rule approach. One matter on which the line can still be held is the effect given to entire agreement clauses.

For major contractual relationships a detailed document is usually prepared. It is rare to find one that does not include an entire agreement clause. Where the parties have expressly stated that the written document represents the whole of their agreement then, short of rectification or the application of some other collateral doctrine, that clause should, in my opinion, be given full and clear effect. If reference to extrinsic evidence is admissible in some circumstances to determine the true agreement between the parties, surely the assertion that the true agreement is contained entirely in the document is entitled to at least substantial, and usually determinative, weight in this very respect. In any event, such a clause resolves the preliminary question for the application of the parol evidence rule. This is a contract wholly in writing.

However, judges in jurisdictions which have embraced the Hoffmann restatement, and academics who support the development, have suggested that, notwithstanding an entire agreement clause, extrinsic evidence is still admissible for purposes of interpretation.<sup>92</sup> Indeed, one academic author, whilst acknowledging the difficult issues involved, suggested that not to do so “would resuscitate the now discredited parol evidence rule”.<sup>93</sup> It is not clear to me why consenting adults cannot do that. A more detailed analysis of the reasons for parties adopting an entire agreement clause supports the conclusion that such a clause is a perfectly rational way of “contracting out of contextualism”.<sup>94</sup>

While a number of judges have indicated that an entire agreement clause does not prevent reference to extrinsic evidence for the purpose of contractual interpretation, even in the absence of ambiguity, I am not aware of any court of final appeal that has adopted the proposition. Perhaps more clearly than other aspects of the issues that arise in this context, this matter remains open in a number of jurisdictions. Its resolution will depend very much on

where the balance between certainty and accuracy, to which I have referred at the outset of this paper, ought be drawn.

I accept that sometimes certainty should give way to accuracy or fairness. Whilst the prima facie position should be that such a clause excludes reference to extrinsic circumstances, that could be subject to a qualification of substantial injustice.

### **Common Law and Civil Law**

With respect to contractual interpretation there are significant differences between the common law and civil law traditions. At this seminar the former tradition is represented by India, Hong Kong SAR, Malaysia, New Zealand, Papua New Guinea, Singapore, Sri Lanka and Australia. The civil law tradition is represented by China, Macau SAR, Japan and the Republic of Korea. We will also be considering issues of Islamic finance, but I will not refer in any way to sharia law.

There are, of course, and always have been major differences within each of the two traditions, eg, between the English and American common law or between the French and German civil law traditions. Nevertheless there remain broad

distinctions between the two systems which continue to influence both substantive and procedural law, including with respect to contractual interpretation.

Over recent decades the relationship between the common law and civil law traditions has altered. A process of convergence has been emphasised in the comparative law literature. The focus of attention in international contexts has increasingly been to identify common elements and to seek to resolve differences between the systems. Both in multilateral and regional arrangements, and in nations where legal systems are still being developed or modernised, there is a tendency to draw on both traditions, with a view to identifying the best system. I have referred to such developments when discussing the development by the Peoples Republic of China of a legal system adapted to its contemporary conditions.<sup>95</sup>

Adversarial procedure differs from inquisitorial procedure and that remains true even though contemporary case management, particularly in the commercial area, means that judges in the common law tradition now perform an activist role, closer to that traditionally associated with a civil law system. On

the other hand, many civil law jurisdictions have adopted some aspects of an adversarial system, particularly by expanding the involvement of practitioners. Furthermore, the oral tradition of common law has been substantially attenuated by the general use of affidavit evidence or statements. However, the introduction of an oral dimension, even cross-examination, in some civil law jurisdictions represents the reverse movement.

For purposes of contractual interpretation several matters distinguish the two systems. One substantive and two procedural differences are of particular significance.

The substantive difference is fundamental. The civil law tradition focuses on the subjective intention of the parties. The common law tradition focuses on the objective intention of the parties, ie, what a reasonable person would conclude their intention was.<sup>96</sup> Accordingly, the basal question about the nature of a contractual agreement is posed in quite different ways. In the civil law tradition the basal question is, “What was the intention of the parties?”. In the common law tradition the basal question is, “What is the meaning of the words used?”.<sup>97</sup>

Nevertheless, the civil law tradition, in its actual operation, appears to accept something analogous to the parol evidence rule.

One commentator observed:

“ ... Civilian systems are acutely aware of the need to strike a balance between the desire to achieve a materially ‘right’ outcome on the one hand, and the struggle for legal certainty on the other. As a consequence, they are extremely reluctant to admit that the wording of a contract concluded in writing might be overridden by other factors. They have devised different techniques to achieve this balance.”<sup>98</sup>

It does appear that in its practical operation, the approach to contractual interpretation is not as different as the theoretical divergence between a subjective and an objective approach, suggests. This practical dimension may not have been given sufficient weight in the process of drafting the UNIDROIT Principles of International Commercial Contracts or the Principles of European Contract Law.<sup>99</sup>

As is the case with statutory interpretation, there is a fictional element about determining a legal issue by reference to the

“intention of the parties”, not least in the usual case where neither party adverted to the circumstances of the dispute that has arisen. Nevertheless, the terminology of “intention of the parties” is more than a polite form. It represents a recognition by the law of the autonomy of the parties to a contractual relationship, autonomy which is entitled to respect.

One distinguishing procedural aspect of the common law tradition is that it permits wide-ranging discovery and inspection of documents on the part of the opposing party in civil disputes, including commercial disputes. As a general rule, there is no such practice in civil law systems. The collection of relevant documents and their inspection is, traditionally, primarily a matter for the judge.

A second procedural matter arises from the existence of exclusionary rules of evidence which have no equivalent in the civil law tradition. Admissible evidence in the latter tradition is generally bounded by relevance alone. The common law has developed a number of principles which exclude relevant evidence on the basis of other considerations. To a substantial degree these exclusionary principles emerged as a matter of judge-made

law in a context where findings of fact were made by juries. Many of the principles were designed to maintain the integrity of the process by removing evidence which judicial experience suggested may distort jury decision-making. Notwithstanding the fact that the origins of the rule in the jury system now have virtually no relevance for commercial dispute resolution, save in the United States, the rules persist. They often take statutory form.

I have discussed the parol evidence rule, the rules relating to exclusion of pre-contractual negotiations and of subsequent conduct above. These particular examples are not, as far as I am aware, matters that arose because of the heritage of the jury system. They are, however, manifestations of the proclivity of the common law tradition to restrict the admissibility of possibly relevant evidence.

The process of convergence, particularly the special influence of European law in England, explains to some degree, in my opinion, the expansion of admissible evidence of surrounding circumstances. Lord Hoffmann's "absolutely anything" test could serve as a description of the civil law approach.

## **The CISG**

The process of globalisation gives rise to issues of contractual interpretation of a character with which national courts are only now beginning to grapple. There are multilateral arrangements which change the domestic law of contractual interpretation.

Of particular significance is the *Vienna Convention on Contracts for the International Sale of Goods* (“the CISG”) which has been adopted widely, including in Asia. It has been ratified by 74 nations including Australia, China, Japan, New Zealand, Republic of Korea and Singapore, as well as major trading partners throughout Europe and North America. India and Indonesia are important exceptions. Also, the United Kingdom has never acceded and, because the CISG came into force prior to 1997, Hong Kong has maintained that its position is as it existed at the time that the United Kingdom exercised sovereignty over the city, at which stage China, but not the UK, had already ratified the CISG. There are, however, views expressed that the CISG does apply there.<sup>100</sup>

The CISG is an important international initiative to promote the harmonisation of sales law and, thereby, to reduce uncertainty and transaction costs. As with other international conventions and model laws, the CISG manifests the capacity of international negotiations to evolve a compromise between the civil law and the common law traditions. Nevertheless, the compromise does require adjustment to a new form of discourse.

The CISG provides in Article 8 that statements made by a party are to be interpreted on a subjective basis where the other party knew, or could not have been unaware of, the intent of the person making the statement. This is the primary position. However, in a situation in which this subjective approach does not apply, by reason of a lack of knowledge or lack of obviousness, then statements are to be interpreted according to the understanding of a reasonable person in the same circumstances. The CISG, accordingly, adopts as the default position, the subjective theory of contract of the civil law.

For the purposes of interpretation, also in accordance with the civil law tradition, the scope of relevant circumstances is as widely stated as it could be. Article 38 provides:

“In determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case, including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties.”

Clearly, where the CISG applies the restrictions I have been discussing about the permissible scope of surrounding circumstances at common law are overridden. An important aspect of the CISG is that the parties are entitled to opt out of its provisions. This occurs often in Australia and, it appears, in other nations.

As a result of the exercise of the opt out clause and, probably, because of widespread ignorance within the Australian legal profession about the applicability of the CISG, there have been comparatively few Australian cases applying the CISG.<sup>101</sup> A similar situation appears to exist in Singapore.<sup>102</sup> Indeed, it has been observed that one of the largest bodies of case law with respect to the application of the CISG is from China.<sup>103</sup>

One Australian jurist, a judge with the highest academic qualifications who is closely associated with international developments in contract law, has criticised the isolationist attitude which Australia manifests in this respect. He, like UK observers who do not believe Lord Hoffmann went far enough,<sup>104</sup> invokes the example of CISG, and the similar approach to harmonisation of contract law in the privately generated model laws, namely the UNIDROIT Principles of International Commercial Contracts and the Principles of European Contract Law'.<sup>105</sup>

These are important influences, particularly in England, where they represent part of its progressive integration with Europe. English common law is more susceptible to a process of harmonisation with European civil law systems than other nations in the common law tradition.

## **China**

The contract law of the Peoples Republic of China of 1999 is a synthesis of a variety of sources including both common law and civil law sources, as well as the CISG and the American Uniform Commercial Code. Relevantly Article 125 of that law refers to contract interpretation and provides:

“In case of any dispute between the parties concerning the construction of a contract term, the true meaning thereof shall be determined according to the words and sentences used in the contract, the relevant provisions and the purpose of the contract, and in accordance with the relevant usage and the principle of good faith.”

The last words are a reference back to Article 6 which provides:

“The parties shall abide by the principle of good faith in exercising their rights and performing their obligations.”

Article 41 also makes provision for interpretation. It states:

“In case of any dispute concerning the construction of a standard term, such term shall be interpreted in accordance with commonsense. If the standard term is subject to two or more interpretations, it shall be interpreted against the party supplying it. If a discrepancy exists between the standard term and a non-standard term, the non-standard term prevails.”

There is some dispute amongst commentators on the Chinese contract law as to whether these provisions constitute a

subjective or an objective approach to contractual interpretation. It appears to be of the same character as that contained in the CISG, that I have discussed above.

As the author of one text on Chinese contract law states, what has been adopted is a third, “eclectic approach” to the following effect:

“Under the eclectic theory, the contract interpretation shall first try to ascertain the true intention of the parties because of the paramount significance of the parties’ intention to the contract. If however, the parties’ true intention could not be determined or there is a lack of common intention of the parties, the interpretation shall be made with recourse to the common understanding of reasonable persons under the same or similar situation.”<sup>106</sup>

Article 125 makes it clear that the relevant context extends to the whole of the terms of the contract. Article 125 makes no reference to surrounding circumstances, but the text writers suggest that they are taken into account<sup>107</sup> and that this is so even if the words of the contract are clear and unambiguous.<sup>108</sup>

There is some dispute amongst scholars as to whether or not pre-contractual negotiations are authorised by Article 125. The better view appears to be that they are.<sup>109</sup> It is suggested that they can be taken into account under the provision that “the purpose of the contract has to be considered” or, that they come within the application of the principle of good faith referred to in Article 125 or within reference to commercial usages and customs also referred to in the Article.<sup>110</sup>

It does appear that, in accordance with the civil law tradition, Chinese contract law adopts an expansive approach to the scope of materials available for purposes of interpretation. As one author said:

“Thus it is discernible that in practice, the Chinese courts are open to all relevant evidences when making the interpretation of the contract. Consequently, an important question the courts may have to face is how to identify the truthfulness of each of the evidences that are introduced.”<sup>111</sup>

The author refers to a book written by judges of the Supreme Peoples Court which states that a course of interpretation:

“All other materials related to the contract, such as previous drafts, negotiation records, letters, telegraphs, telex, shall all be used.”<sup>112</sup>

### **Certainty**

Lord Hoffmann who, as I have indicated, advanced an expansive view of the relevant background, nevertheless stated the alternative view with accuracy, when he said:

“There is a certain view in the profession that the less one has resort to any form of background in aid of interpretation, the better ... These opinions ... reflect[s] what may be a sound practical intuition that the law of contract is an institution designed to enforce promises with a high degree of predictability and that the more one allows conventional meanings or syntax to be displaced by inferences drawn from background, the less predictable that the outcome is likely to be.”<sup>113</sup>

As Lord Hoffmann suggested in this passage, it is revealing that those who resist the expansion of the use of extrinsic material

for purposes of interpretation, including its extension to pre-contractual negotiations, tend to be active practitioners with an understanding of the implications for both advice and litigation of this extension.<sup>114</sup> However, in accordance with much current academic discourse, the question often posed in the academy is not whether something works in practice, but whether it works in theory. There is a strong contingent of academic legal writing, indeed near unanimity, in favour of the admissibility of pre-contractual negotiations.<sup>115</sup>

Once one is talking about admissibility in evidence, the adverse effects on commercial life are complete. A fundamental commercial objective for all parties is to know where they stand without undergoing the risks and uncertainties of litigation.

As one practitioner, critical of the failure of Lord Hoffmann's restatement to appreciate the practical implications of this approach, including the position of third parties, put it:

“ ... for a commercial contract, the correct approach is to ask what methods of interpretation the parties, as businessmen and not as jurists, may realistically be taken to have intended should be used, having regard to

two assumptions: (i) the parties cannot have intended that their contract would mean one thing to a court and something else to a lawyer asked to advise about it; and (ii) the parties must have had in mind the possible need, at some future point, to obtain legal advice without delay. On that approach, the parties may reasonably be taken to have intended that the admissible background should be limited to the sort of facts likely to be readily available to a lawyer asked to advise in circumstances in which a decision has to be taken without delay as to the course of action to be taken under the contract.”<sup>116</sup>

It is clear that certainty is a significant value for commercial parties at the time of contracting. That their interests may well diverge subsequently, and lead to disputation, is understood, so that some mechanism for determining such disputes is required. Nevertheless, the idea that an arbitrator or a judge would be called upon to determine the *true* intention of the parties by going beyond the written contract to encompass anything which disputing parties can relevantly imagine, would be regarded by most parties, at the time of formation of the contract, to constitute a commercial disaster.

It is for that reason that so many written commercial contracts include an entire agreement clause asserting that the written form, as executed, constitutes the whole agreement between the parties and replaces all previous representations and drafts. Similarly, it explains why so many commercial contracts adopt arbitration clauses. Although they do have the additional advantage of secrecy and, in the context of international commercial arbitration, the advantage of enforceability, there is little doubt that, originally, it was believed that arbitration was likely to be a more cost efficient mode of dispute resolution. That this expectation has often not been realised does not detract from the commercial desire to ensure that this objective is attained.

A principal purpose of the detail found in commercial agreements, as well as a significant purpose of contract law, is to allocate risks between the parties, not least with respect to contingencies that cannot be, or were not, anticipated. Interpretation is the means by which the court determines how those risks were in fact allocated. Anything which increases the level of uncertainty about how the chosen words have performed that task, creates a new kind of risk. That is why, in my opinion,

commercial decision-makers would generally agree that certainty is more important to them than accurately reflecting their “true” intentions. Of course, with the benefit of hindsight, when the commercial situation has changed or the risks have come home, the position is quite different and is said to have always been so, often on oath.

I realise these are empirical statements, based on my own, necessarily limited, experience. I know of no empirical research that supports my belief that certainty would be given overriding weight at the time of contracting. However, the United States experience is suggestive.

Generalisation about the American approach to these matters is difficult because there is a significant variety of approaches. The Restatement (Second) Contracts adopts a broad approach to access to extrinsic materials. The Uniform Commercial Code, applicable to the sale of goods, also adopts such an approach. However, the general law of contractual interpretation is administered in Federal and State courts and there is no single common law for the United States.

It is useful to categorise the various State jurisdictions as falling towards the textual end of the spectrum or the contextual end of the spectrum. The textualist end involves a strict application of the parol evidence rule, adoption of the plain meaning where it can be discerned and enforcement of whole agreement clauses, which Americans call “merger clauses”. On one recent computation a significant majority of the United States courts follow this traditionalist, textualist approach. Some 38 states are said to do so compared with nine who do not.<sup>117</sup>

The authors note that the leader of the textualist approach is the New York court system and the leader of the contextualist approach, perhaps not surprisingly, is the Californian court system. Indeed, as another author put it, the New York courts adopt a “intensely objective approach”.<sup>118</sup>

An instructive feature of the American debate in this respect is the apparent preference of commercial parties for a textual approach. American empirical evidence strongly suggests that commercial parties are attracted to a textualist jurisdiction, in order to provide the certainty that such a jurisdiction gives. They do not

prefer jurisdictions which try to determine what the true bargain was.

In a survey of almost 3,000 contracts, New York law was chosen in 46% of them. Delaware, also a jurisdiction at the textualist end of the spectrum, was chosen in 15% of the contracts, the second most popular choice. In about 39% of the contracts, an exclusive jurisdiction clause was included. Of that 39%, New York accounted for 41% and Delaware accounted for 11%.<sup>119</sup>

Obviously the choice of New York and Delaware is based on a range of considerations, including the former's history as a financial centre and the latter's development of specific expertise in corporate law. However, the fact that each has a traditional approach to contractual interpretation is clearly understood by the practitioners and judges of such jurisdictions to be a relevant factor.

### **Cost and Efficiency**

The expanded scope for introducing evidence of the factual matrix happened to coincide with technological developments

which reduced the cost of multiple photocopying and, soon thereafter, the introduction of word processing, which multiplied the number of drafts, followed by the adoption of email which multiplied the number of written communications and the comparative indestructibility of hard drives which meant that no draft or communication was ever lost. Lord Wilberforce could not have anticipated this.

The combined effect of these developments led to an explosion in the documentation involved in litigation, so that, in Australia, barristers, who even in 1980 would receive commercial briefs wrapped in pink ribbon, were soon presented with multiple spring back folders and, subsequently, trolley loads of documents. The costs of litigation escalated accordingly, to a degree which, in my opinion, is not sustainable.

There are limits to the proportion of the gross national product which any nation can afford to spent on dispute resolution. More immediately, commercial corporations which have aggressively cut costs in all respects over recent years, as competitive pressures have increased, will not exempt legal costs from this process.

The principal argument against the view that extrinsic material adds to cost and delay, is that issues of contractual interpretation are often accompanied by other issues which would permit reference to a wide range of documentation, eg, collateral contracts, rectification or conventional estoppel. I include in that observation the similar effect in those jurisdictions which imply a good faith obligation into contracts<sup>120</sup> and statutory provisions protecting contractual parties from the effect of misrepresentations whether pre or post-contractual.<sup>121</sup>

Of all the arguments against maintaining a restrictive approach to the extrinsic material available for contractual interpretation on practical grounds of cost and delay, it is the proliferation of these alternative means for altering the effect of a written contract that I find the most compelling.<sup>122</sup>

Most of the jurisdictions I have discussed in this paper, now seek to identify the *actual* intentions of the parties, excluding only statements of actual intention, unless they reveal relevant background. Accordingly, a party is permitted almost complete access to the documentation of the other party to litigation for

purposes of determining the “true” contractual intention of the parties. In my opinion, this system in its practical application is indistinguishable from the subjective approach to contracts of the civil law tradition, notwithstanding the lip service paid to the objective theory.

However, as a matter of civil justice practice the potentially adverse effects of the civil law subjective intention theory, together with the adoption of good faith as a term of all contracts, is substantially mitigated in civil law jurisdictions by two considerations. First, in practice civil law courts appear to be reluctant to go behind a written contract, as discussed above. Secondly, a party to a dispute resolution process is generally confined to its own documents, including anything exchanged with the other party. General discovery is not available, let alone the intrusive interrogation of hard drives in the search for deleted drafts and emails, which has become common practice in Australian commercial dispute resolution.

In view of the fact that I am of the opinion that this development is not sustainable in an economic sense, I continue to hold the position I have hitherto advocated. Unless courts, and

arbitrators, restrict the documentation which commercial dispute resolution now generates, they will be bypassed as a mode of dispute resolution. Furthermore, far from “justice” emerging by the recognition of the “true” intentions of the parties, *only* the strong will prevail. I do not believe that discovery in the extensive form that is usual in major commercial litigation, can survive.

I have no difficulty with a contextual approach to interpretation which restricts the relevant background to what was in the mutual contemplation of the parties as evidenced by communications between them or by what must have been obvious to both of them. The practical difficulties that have emerged arise primarily from adversarial litigation attempting to prove what was in such mutual contemplation by evidence of the knowledge of each, even if uncommunicated. Discovery is used, relevantly, to reveal the internal communications of the other side and thereby establish parallel, albeit uncommunicated, knowledge. Contemporary practice, at least in Australia, has rendered that process too expensive. In this, as so often, the perfect is the enemy of the good.

Those jurisdictions which have moved close to the civil law subjective intention theory should carefully consider adopting the related aspects of civil law practice. This may not be limited to abolition of a right to discovery but extend to other aspects of the adversarial system.

### **Third Parties**

One of the significant defects of contract law is that it operates on the assumption that only the interests of the parties to the contract are involved. That has never been true. However, with respect to any contract of significant size, it is now rarely true. Third parties, particularly financiers, have always relied on the contractual rights of their borrowers. Loan agreements are often closely interrelated with underlying basic contracts and, in contemporary circumstances, many, perhaps most, contracting parties would assume that the other party would, or may, in the future use the contract in support of fund raising.

As I pointed out in my article “From Text to Context”, third party involvement appears to be of a considerable different order to what it has been in the past. There is a difference of scale between traditional forms, such as dealing with book debts by way

of factoring, and contemporary securitisation mechanisms, upon which a range of derivative products have been based.<sup>123</sup>

In a judgment after *Investors Compensation Scheme*, Lord Hoffmann elaborated on an unstated assumption in his original five point scheme for contractual interpretation, when he repeated the first proposition and added to it the observation: “A written contract is addressed to the parties ...”.<sup>124</sup> In my opinion, this assumption does not apply to a significant range of commercial contractual relationships. The interests of third parties can be accommodated in Lord Hoffmann’s scheme, but it requires an express exclusion of the same character as his Lordship accepted for pre-contractual negotiation.

Lord Hoffmann has accepted that there are situations in which contractual documents may not be addressed only to the parties to the contract. In one case he held that a bill of lading addressed to a merchant or a banker should be interpreted only on the basis of what appeared on the front of the bill because material, known only to the parties, on the back of the bill would not have been read by a merchant or banker.<sup>125</sup> In my previous article I pointed out a similar exception based on case law to the

effect that investors were entitled to rely solely on the statutory contract constituted by the memorandum and articles of association.<sup>126</sup> Lord Hoffmann has also accepted this as an exception. Another exception is an interest in land recorded on a public register.<sup>127</sup>

However, Lord Hoffmann clearly regarded such matters as individual exceptions to a general rule. His reasoning suggests that that exclusion of reliance on background known only to the parties has to be determined on a case by case basis. He said:

“Ordinarily ... a contract is treated as addressed to the parties alone and an assignee must either enquire as to any relevant background or take his chance on how that might affect the meaning a court will give to the document. The law has sometimes to compromise between protecting the interests of a contracting parties and those of third parties. But an extension of the admissible background will, at any rate in theory, increase the risk that a third party will find that the contract does not mean what he thought. How often this is likely to be a practical problem is hard to say.”<sup>128</sup>

I take issue with the first word in this quotation: “Ordinarily”. In my opinion, and in the opinion of practitioners who have commented on this issue, third party reliance on written contracts is common. It is not something unusual, nor limited to specific kinds of contracts.<sup>129</sup> It should be dealt with by a broad exclusion, rather than treated on a case by case basis.

## **Conclusion**

There is nothing “commercial” about what has come to be called “commercial construction”. The effect of emasculating the parol evidence rule has introduced a degree of uncertainty into contractual relationships that commercial parties would reject.

I do not doubt that surrounding circumstances, in the sense of the commercial context of a contractual relationship, are relevant to the task of interpretation. However, the expansion of the material now commonly relied upon in this respect has gone too far. I identify a number of desirable changes to recent practice in many jurisdictions.

- (1) Affirm the parol evidence rule as a rule of interpretation and require clear evidence that a written agreement, which appears complete on its face, was not.
- (2) Prima facie, restrict the scope of admissible surrounding circumstances to undisputed objective facts about the commercial context.
- (3) Reaffirm the principle that ambiguity is required before other background facts, known to both parties, are admissible.
- (4) Apply a strict approach to the kind of latent ambiguity that is accepted for purposes of (3).
- (5) Affirm the principle that pre-contractual negotiations are not admissible.
- (6) Restrict the admissibility of post-contractual conduct to a contract which is ambiguous and to conduct engaged in shortly after the contract came into operation.
- (7) Establish a general exclusion of extrinsic evidence, including post-contractual conduct, in any case in which a third party will (or even might) rely on the written contract.
- (8) Affirm the proposition that an entire agreement clause does restrict the use of extrinsic material for purposes of

interpretation, unless significant injustice would arise from so doing.

- (9) Restrict the right to discovery of documents and the right to subpoena third party documents in litigation, so that each is available only with the leave of the court after the identification of issues is dispute.
- (10) Establish a principle that leave under (9) will only be given if it is established on the balance of probabilities that documents of the character sought are both likely to exist and likely to assist in the resolution of issues in dispute.

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- <sup>1</sup> See J J Spigelman “From Text to Context: Contemporary Contractual Interpretation” (2007) 81 *Australian Law Journal* 322, also accessible at [www.lawlink.nsw.gov.au/sc](http://www.lawlink.nsw.gov.au/sc) under “Speeches”.
- <sup>2</sup> See *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1997] UKHL 28; [1998] 1 WLR 896 at 912G; see also Lord Hoffmann “The Intolerable Wrestle with Words and Meanings” (1997) 114 *South African Law Journal* 656 passim.
- <sup>3</sup> As Professor Paul Freund once put it: “We ought not read the Constitution like a last will and testament lest it become one”, quoted by Paul Brest “The Intentions of the Adopter are in the Eyes of the Beholder” in Eugene W Hickok Jr *The Bill of Rights: Original Meaning and Current Understanding* University Press Virginia, Charlottesville (1991) p 21.
- <sup>4</sup> See J J Spigelman “The Principle of Legality and the Clear Statement Principle” (2005) 79 *Australian Law Journal* 769 esp at 774-775; James Spigelman *Statutory Interpretation and Human Rights: The McPherson Lecture Series Vol 3* University of Queensland Press, Brisbane (2008) esp at 22-29 on “The Common Law Bill of Rights”.
- <sup>5</sup> *Static Control Components (Europe) Ltd v Egan* [2004] EWCA Civ 392; [2004] 2 Lloyd’s Rep 429 at [29] per Arden LJ.
- <sup>6</sup> See J Steyn “Contract Law: Fulfilling the Reasonable Expectations of Honest Men” (1997) 113 *Law Quarterly Review* 433 esp at 441-442.
- <sup>7</sup> V K Rajah “Redrawing the Boundaries of Contractual Interpretation” (2010) 22 *Singapore Academy of Law Journal* 513 at 538.
- <sup>8</sup> D J Nicholls “My Kingdom for a Horse: The Meaning of Words” (2005) 121 *Law Quarterly Review* 577 at 586.
- <sup>9</sup> A M Gleeson “Individualised Justice – The Holy Grail” (1995) 69 *Australian Law Journal* 421 at 431-432; applied in this context in J J Spigelman “From Text to Context” supra at pp 333-334.
- <sup>10</sup> See Law Commission *Law of Contract: The Parol Evidence Rule* HMSD, London (1986).
- <sup>11</sup> Ibid at [2.17].
- <sup>12</sup> Ibid at [1.7].
- <sup>13</sup> Ibid at [2.7].
- <sup>14</sup> See, eg, *Youell v Bland Welch & Co (No 1)* [1992] 2 Lloyd’s Rep 127 at 133 per Staughton LJ.
- <sup>15</sup> For example, see H G Beale (ed) *Chitty on Contracts* (13<sup>th</sup> ed) Sweet & Maxwell, London (2008) at 12-099; Gerard McMeel, *The Construction of Contracts* Oxford University Press, Oxford (2007) at 5.60-5.621; J Beatson, A Burrows & J Cartwright *Anson’s Law of Contract* (29<sup>th</sup> ed) Oxford University Press, Oxford (2010) esp at 139.
- <sup>16</sup> Sir Kim Lewison *The Interpretation of Contracts* (4<sup>th</sup> ed) Sweet & Maxwell, London (2007) pp 85-91; Edwin Peel (ed) *Treitel’s Law of Contract* (12<sup>th</sup> ed) Sweet & Maxwell, London (2007) at pp 214-215.
- <sup>17</sup> See, eg, *Wild v Civil Aviation Authority*, English Court of Appeal, unreported, 25 September 1987; *Youell v Bland Welch & Co (No 1)* supra at 140 per Beldam LJ; *Rosseel v Oriental*

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- Commercial & Shipping Co (UK) Ltd* [1991] 2 Lloyd's Rep 625 at 628; *Ocarina Marine Ltd & Ors v Marcard Stein & Co* [1999] EWCA Civ 2003; [1998] All ER 55.
- 18 See *AIB Group (UK) Ltd v Martin* [2001] UKHL 63; [2001] 1 WLR 94 at [4] per Lord Hutton and see also Lord Millett at [7].
- 19 See *HBS Marketing Ltd v Applied Electronics (OEM) Ltd* [1994] HKCA 415 esp at [11]; *Paul Management Ltd v Eternal Unity Development Ltd* [2008] HKCA 315 esp at [41]; and cf *Tam Che Ming v Yeung Kam Lam* [2003] HKCA 280 at [9]; *Nataman Protpakorn v Citibank NA* [2008] HKCA 354 at [33]; *Wai Kam Chin v Chim Siu Fan* [2008] HKCA 250 at [7].
- 20 See *Bank of China Ltd v Fung Chin Kan* [2002] HKFA 35; (2005) 1 HKLRD 181 at [59].
- 21 See *Hoyts Pty Ltd v Spencer* (1919) 27 CLR 133.
- 22 See *Equuscorp Pty Ltd v Glengallan Investments Pty Ltd* [2004] HCA 55; (2004) 218 CLR 471 at [33]-[36]. See also *Ratfland Pty Ltd v Commissioner of Taxation* [2008] HCA 21; (2008) 238 CLR 516 at [33]. For a summary of the principles and case law see *Masterton Homes Pty Ltd v Palm Assets Pty Ltd* [2009] NSWCA 234; (2009) 261 ALR 382 at [90].
- 23 *Royal Botanic Gardens and Domain Trust v South Sydney City Council* [2002] HCA 5; (2002) 240 CLR 45 at [99]-[103].
- 24 See *Chunchun Jha v Ebadat Ali* All India Rep 1954 SC 345 at [6].
- 25 *ONGC Limited v SAW Pipes Limited* All India Rep 2003 SC 2629 at [4].
- 26 *Roop Kumar v Mohom Thadani* [2003] INSC 212.
- 27 See, eg, Nilima Bhadbhade *Contract Law in India* Wolters Kluwer, Netherlands (2010) at [334].
- 28 *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design and Construction Pte Ltd* [2008] SGCA 27; (2008) 3 SLR 1029.
- 29 See V K Rajah "Redrawing the Boundaries of Contractual Interpretation" supra.
- 30 See *Zurich Insurance* supra esp at [43]-[46], [70]-[73], [108].
- 31 Ibid at [122].
- 32 *Cabell v Markham* 148 F2d 737 at 739 (1945).
- 33 See *Prenn v Simmonds* [1971] 1 WLR 1381 at 1385; *Reardon Smith Line Ltd v Yngvar Hansen-Tangen* [1976] 1 WLR 989 at 987.
- 34 *Chartbrook Ltd v Persimmon Houses Ltd* [2009] UKHL 38; [2009] 1 AC 1101 at [38].
- 35 *Codelfa Construction Pty Ltd v State Rail Authority of NSW* [1982] HCA 24; (1982) 149 CLR 337 at 352.
- 36 See, eg, *River Trade Terminal Co Ltd v Secretary for Justice* [2005] HKCFA 29 at [21]-[22].
- 37 See *Boat Park Ltd v Hutchinson* [1999] 2 NZLR 74.
- 38 *Zurich Insurance* supra at [81].
- 39 *Berjaya Times Square San Bhd v M Concept San Bhd* [2010] 1 MLJ 597 at [42]-[43].

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40 Bhadbhade, *supra* at [334].

41 *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* [2004] HCA 52; (2004) 219 CLR 165 at 179 [40].

42 See *Investors Compensation Scheme Ltd* *supra* at 912-913; *Bank of Credit & Commerce International SA v Ali* [2001] UKHL 8; [2002] 1 AC 251 at [39] et seq; *Chartbrook* *supra* at [14].

43 *Oceanbulk Shipping and Trading SA v TMT Asia Ltd* [2010] UKSC 44; [2010] 3 WLR 1424 at [17]-[41].

44 See *Maggbury Pty Ltd v Hafele Australia Pty Ltd* [2001] HCA 70; (2001) 210 CLR 181 at [11], [43]; *Pacific Carriers Ltd v BNP Paribas* [2004] HCA 35; (2004) 218 CLR 451 at 461-462 [20]-[26]; *Toll (FGCT) Pty Ltd* *supra* at 179 [40].

45 Michael J Fischer & Desmond G Greenwood, *Contract Law in Hong Kong* Hong Kong University Press, Hong Kong (2007) p 34.

46 *Jumbo King Ltd v Faithful Property Ltd & Ors* [1999] HKCFA 38; (1999) 2 HKCFAR 279.

47 See *Chartbrook* *supra* at [14].

48 See *Leung Ja Lau v The Hospital Authority* [2009] HKCFA 91 at [37].

49 Commencing with *Boat Park Ltd v Hutchinson* *supra* at 81.

50 See Mark Beeley, “A Rose by Any Other Name? A Comparative Examination of the English and Indian Approaches to Contractual Interpretation” (2005) 6 *Business Law International* 630.

51 See *Citi Bank N.A. v Standard Chartered Bank* [2003] INSC 511.

52 See *Modi Co v Union of India* All India Rep 1969 SC 9 at [8]; *Syed Abdul Khader v Rami Reddy* 16 All India Rep 1979 SC 553 at [12].

53 See *Berjaya Times Square* *supra* at [42]-[43].

54 See *Kwan Chew Holdings Sdn Bhd v Kwong Yik Bank Bhd* [2006] 6 MLJ 544 at [23] and see [26]; *Peter Tang Swee Guan Subramaniam a/l A v Sanka* [2008] 6 MLJ 376 at [14].

55 See *Investors Compensation & Commerce International SA v Ali* *supra* at [39].

56 *Ibid* at [53].

57 *Investors Compensation Scheme* *supra* at 912-913. See also *Westminster City Council v National Asylum Support Service* [2002] UKHL 38; [2002] 1 WLR 2956 at [5], affirmed in *Oceanbulk Shipping and Trading SA* *supra* at [36].

58 *Codelfa Construction Pty Ltd v State Rail Authority of NSW* (1982) 149 CLR 337 at 352.

59 See *South Sydney Council v Royal Botanic Gardens* [1999] NSWCA 478; (1999) 10 BPR 18, 961 at [35]; *Gardiner v Agricultural and Rural Finance Pty Ltd* [2007] NSWCA 235 at [12]-[13]; J J Spigelman “From Text to Context” *supra* at pp 326, 329-330; See also *Lion Nathan Australia Pty Ltd v Coopers Brewery Ltd* [2005] FCA 1812; (2005) 223 ALR 560 esp at [78]-[79] and on appeal (2006) 59 ACSR 444 esp at [45]-[52], [98], [101] and [254].

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60 *Masterton Homes Pty Ltd v Palm Assets Pty Ltd* [2009] NSWCA 234; (2009) 261 ALR 382 at [112]-[113].

61 See *Melanesian Mission Trust Board v AMP Society* [1997] 1 NZLR 391 at 394-395.

62 See e.g. *Potter v Potter* [2003] 3 NZLR 145 at [32] also *Vector Gas Ltd v Bay of Plenty Energy Ltd* [2010] NZSC 5 at [64].

63 See *Ansley Prospectus Nominees Unlimited* [2004] 2 NZLR 590 at [36]. See also *Vector Gas* supra; [2010] 2 NZLR 444 discussed below where, although there was no clear ratio, there was a majority against the requirement of ambiguity at [4], [23], [64], with a dissent at [119].

64 See *Zurich Insurance* supra at [62].

65 V K Rajah, “Redrawing the Boundaries of Contractual Interpretation” supra 521, [16].

66 *Zurich Insurance* supra at [50] and [108].

67 See *Godhra Electricity Co Ltd v State of Gujarat* All India Rep 1975 SC 32; (1975) 1 SCC 149 at 50-51; and the summary in *M Prasad, Nampally, Hyderabad v T Bhavan Trust* [2002] INAPHC 329; Bhadbhade supra at [193], [334], [333], [337]; cf the earlier position referred to at fn 16 above.

68 *M Prasad* supra.

69 *Alee Wah Bank Ltd v Ng Kim Lehr* [1979] 1 MLJ 21 at p 22.

70 *Petroleum Nasional Bhd v Kerajaan Negeri Terengann* [2004] 1 MLJ 8 at [28]. See also the narrow definition of surrounding circumstances adopted in *Oriental Bank of Malaysia Ltd v Subramaniam* [1958] 1 MLJ 35.

71 *Investors Compensation Scheme* supra at 913; *Chartbrook* supra at [28]-[42].

72 *Codelfa* supra at 352.

73 *Marble Holding Ltd v Yatin* [2008] HKCFA 29 at [21]-[22].

74 See R G Padia (ed) *Pollock & Mulla’s Indian Contract and Specific Reliefs Acts* (13<sup>th</sup> ed), vol 1, LexisNexis, Butterworths (2006) at p 277.

75 *Zurich Insurance* supra [132(d)].

76 V K Rajah “Redrawing Boundaries of Contractual Interpretation” supra at [20] and subsequent analysis.

77 See *Vector Gas Ltd* supra.

78 See at [122].

79 For example per Mason J in *Codelfa* at 31. See also the authorities discussed in the context of a contract not wholly in writing in *County Securities P/L v Challenger Group Holdings P/L* [2008] NSWCA 193.

80 See *Vector Gas* supra at [14], [13]-[14] and [151].

81 See *ibid* at [62], [66], [76]-[78] and [83].

82 See *ibid* at [29]-[32].

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- 83 *James Miller & Partners Ltd v Whitworth Street Estates (Manchester) Ltd* [1970] AC 538 at 603, 606, 611 and 614-615; and, *L Schuler AG v Wickman Machine Tool Sales Ltd* [1974] AC 235 at 252, 260, 265-70, and 272-3.
- 84 *James Miller* supra at 603.
- 85 *Agricultural & Rural Finance Pty Ltd v Gardiner* [2008] HCA 57; (2008) 238 CLR 570 at [35].
- 86 See, eg, the range of authorities referred to in *Hide & Skin Trading Pty Ltd v Oceanic Meat Traders Ltd* (1990) 20 NSWLR 310 at 315-316; *FAI Insurance Co Ltd v Savoy Plaza Pty Ltd* [1993] 2 VR 343 at 346-351.
- 87 *Marble Holding* supra at [21]-[22].
- 88 *Petroleum Nasional Bhd* supra at [31]-[33].
- 89 See *Zurich Insurance* supra at [132(d)]; V K Rajah “Redrawing Boundaries of Contractual Interpretation” supra at [48].
- 90 See *Abdulla Ahmeda v Animerndra Kissen Mitter* All India Rep (1950) SC 15 at [23]; R G Padia (ed) supra at 267-278 and Beeley supra at 137-138.
- 91 *Wholesale Distributors Ltd* supra at [52]-[53], [73] and cf [134]-[136], see also [7] and [27].
- 92 See, eg, *John v PriceWaterhouseCoopers* [2002] EWCA Civ 899; [2002] 1 WLR 953 at [67]; *ProForce Recruit Ltd v Rugby Group Ltd* [2006] EWCA Civ 69 at [40]-[41]; *MacDonald Estates PLC v Regenesis (2005) Dunfermline Ltd* [2007] CSOH 123 at [131]; *Air New Zealand Ltd v Nippon Credit Bank Ltd* [1997] 1 NZLR 218 at 224; *Lee Fu Wing v Yan Po Ting Paul* [2009] 5 HKLRD 513 at [103].
- 93 Gerard McMeel, “Prior Negotiations and Subsequent Conduct: The Next Step Forward for Contractual Interpretation” supra fn 97.
- 94 See Catherine Mitchell, “Entire Agreement Clauses: Contracting out of Contextualism” (2006) 22 *Journal of Contract Law* 222 esp at 237-245.
- 95 See James Spigelman “Convergence and the Judicial Role: Recent Developments in China” (2003) *Revue Internationale de Droit Comparé* 57; also accessible at [www.lawlink.nsw.gov.au/sc](http://www.lawlink.nsw.gov.au/sc) under “Speeches”.
- 96 The objective theory of contract has been affirmed throughout the common law world. See, eg, *Investors Compensation Scheme Ltd* supra at 912; *Life Insurance Co of Australia Ltd v Phillips* (1925) 36 CLR 60 at 76; *Taylor v Johnson* [1983] HCA 5; (1983) 151 CLR 422 at 429; *Zurich Insurance* supra at [125]-[127] and [132(c)]; *Vector Gas* supra; *Berjaya Times Square* supra at [42]-[43].
- 97 See *Monypenny v Monypenny* (1861) 9 HLC 114; 11 ER 671 at 684; *Smith v Lucas* (1881) 18 ChD 531 at 542; *Rickman v Carstairs* (1833) 5 B & Ad 651; 110 ER 931; *Deacon Life & Fire v Gibb* (1962) 15 ER 630; *Drughan v Moore* [1924] AC 53 at 57; *Life Insurance Co of Australia v Phillips* (1925) 36 CLR 60 at 77.
- 98 Stefan Vogenauer, “Interpretation of Contracts: Concluding Comparative Observations” in Andrew Burrows and Edwin Peel (eds) *Contract Terms* OUB, Oxford (2007).
- 99 See the analysis of Judge Richard Posner in *Bodum USA Inc v La Cafetière Inc* 621 F.3d 624 (7<sup>th</sup> Cir, 2010) esp at 635-639.

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- 100 See Lutz-Christian Wolff “Hong Kong’s Conflict of Contract Law: Quo Vardis?” (2010) 6 *Journal of Private International Law* 465 at 478-480.
- 101 See Lisa Spagnolo “The Last Outpost: Automatic CISG Opt Outs, Misapplications and the Costs of Ignoring Vienna Sales Convention for Australian Lawyers” (2009) 10 *Melbourne Journal of International Law* 141.
- 102 See Howard Hunter “Singapore Contract Law in an Interdependent World of Commerce: The Example of the Convention on the International Sale of Goods”, paper presented at the Singapore Academy of Law Quinquennial Conference, Singapore, February 2011.
- 103 See Spagnolo *supra* at 146.
- 104 Eg, Lord Nicholls, see D J Nicholls, “My Kingdom for a Horse: The Meaning of Words” *supra*.
- 105 See Paul Finn “International or Isolation: The Australian *Cul de Sac*? The Case of Contract Law” in Elise Bant & Matthew Harding (eds) *Exploring Private Law* Cambridge University Press, Cambridge (2010) esp at 58-61.
- 106 Mo Zhang *Chinese Contract Law: Theory and Practice* Martinus Nijhoff, Leiden (2006) p 130. Bing Ling agrees: see Bing Ling *Contract Law in China* Sweet & Maxwell, Hong Kong (2002) pp 226-227.
- 107 See Zhang *supra* p 127 and Ling *supra* p 226.
- 108 See Ling *supra* p 228 and cf 227.
- 109 Zhang *supra* p 137 and Ling *supra* p 227.
- 110 See Zhang *supra* pp 127, 130-131 and Ling *supra* p 229-231.
- 111 Zhang *supra* at p 137.
- 112 Zhang *supra* at p 137.
- 113 See *Chartbrook supra* at [36]-[37].
- 114 See, eg, A Berg “Thrashing Through the Undergrowth” (2006) 122 *Law Quarterly Review* 354; R Calnan “Construction of Commercial Contracts: A Practitioner’s Perspective” in A Burrows & E Peel (eds) *Contract Terms*, Oxford University Press, Oxford (2007) esp p 17. See also my consideration of matters in “From Text to Context” *supra* pp 336-337.
- 115 See, eg, A Kramer “Commonsense Principles of Contract Interpretation (and how we’ve been using them all along)” (2003) 23 *Oxford Journal of Legal Studies* 173; D McLauchlan “Plain Meaning and Commercial Construction: has Australia adopted the ICS principles?” (2009) 25 *Journal of Contract Law* 7; D McLauchlan “Common Assumptions and Contract Interpretation” (1997) 113 *Law Quarterly Review* 237; D McLauchlan “Contract Interpretation: What is it About?” (2009) 31 *Sydney Law Review* 5; D McLauchlan “Interpretation and Rectification: Lord Hoffmann’s Last Stand” [2009] *New Zealand Law Review* 431; D McLauchlan “Deleted Words, Prior Negotiations and Contract Interpretation” (2010) 24 *New Zealand University Law Review* 277; G McMeel “Prior Negotiations and Subsequent Conduct – The Next Step Forward for Contractual Interpretation?” (2003) 119 *Law Quarterly Review* 272; C Mitchell “Contract Interpretation: Pragmatism, Principle and the Prior Negotiations Rule” (2010) 26 *Journal of Contract Law* 134.
- 116 A Berg, “Thrashing Through the Undergrowth” *supra* at 362.
- 117 Alan Schwartz & Robert E Scott “Contract Interpretation Redux” (2010) 119 *Yale Law Journal* 926 esp fn 1.

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- 118 Joseph M Perillo “The Origins of Objective Theory of Contract Formation and Interpretation” (2000) 69 *Fordham Law Review* 427 at 466.
- 119 Theodore Eisenberg & Geoffrey P Miller “The Flight to New York: An Empirical Study of Choice of Law and Choice of Forum Clauses in Publicly-Held Companies’ Contracts” (31 March 2008) *New York University Law & Economics Research Paper No 08-13* accessible at [papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1114808](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1114808) esp at pp 3-5; see also Schwartz & Scott “Contract Interpretation Redux” supra at 956.
- 120 For the Australian context see James Allsop “Good Faith and Australian Contract Law. The 2010 Sir Frank Kitto Lecture” *Australian Law Journal* (forthcoming) accessible at [www.lawlink.nsw.gov.au/sc](http://www.lawlink.nsw.gov.au/sc) under “Speeches”.
- 121 In the Australian context s 18 of Schedule 2 to the *Competition and Consumer Act 2010* (Cth) (formerly s 52 of the *Trade Practices Act 1974* (Cth)) and its progeny.
- 122 See, eg, *Chartbrook* supra at [38].
- 123 See Spigelman, “From Text to Context” supra at p 335.
- 124 See *Homburg Houtimport BV v Agrosin Private Limited* [2003] UKHL 12; [2004] 1 AC 715 at [73].
- 125 Ibid at [74]-[77].
- 126 See Spigelman, “From Text to Context” supra at p 336.
- 127 *Westfield Management Ltd v Perpetual Trustee Company Ltd* [2007] HCA 45; (2007) 233 R 528 at [37]-[38].
- 128 *Chartbrook* supra at [40].
- 129 See, eg, A Berg “Thrashing Through the Undergrowth” supra at 359.