Contract Law

The South Pacific: customary and introduced law

by Jennifer Corrin Care

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The South Pacific is an area of diverse cultures, evidenced by the number of languages spoken. In Vanuatu alone, about one hundred vernacular languages exist. Twelve island countries within the region are bound together by membership of the University of the South Pacific ('USP'). These are: Cook Islands, Fiji, Kiribati, Marshall Islands, Nauru, Niue, Solomon Islands, Tokelau, Tonga, Tuvalu, Samoa and Vanuatu.

BACKGROUND

Political developments in the 1960s saw the majority of USP countries emerge as sovereign states. The general pattern adopted was to replace pre-existing constituent laws with a new constitution, and to establish a representative parliament. These constitutions reflected a desire for laws encapsulating local values and objectives in their preambles. Most constitutions also expressly recognised custom as part of the formal law. However, laws introduced prior to independence were 'saved', as a 'transitional' measure, to fill the void until they were replaced by new laws enacted by the local parliament. This normally included legislation in force in England up to a particular date, common law and equity, and 'colonial' legislation made by the legislature of the country whilst it was under the control of the imperial country.

This article examines the practical effect of this arrangement in the context of the law of contract operating in the USP region. It describes the law governing the sources of contract law in the USP region and examines the problems surrounding its application. Like many other branches of the law, contract law has yet to establish its own identity in the South Pacific. It is still based on the law of England, with little 'localisation' through national parliaments or courts. However, there are significant differences between English law and South Pacific contract law. This is partly a result of the fact that the English law of contract has moved on. Legislative reforms and developments in the common law do not necessarily apply in the region, due to a 'cut-off' date having been imposed. It is also a result of regional innovation, both in the form of legislation and local case law. Finally, there is customary law, which governs agreements and disputes at the village level in most countries. Where customary law is now a formally recognised source of law it may also have effect outside the village setting.

There are also significant differences between the law of contract in each of the regional countries, and the classification 'South Pacific contract law' is used here to distinguish the regional law from that of England and Wales rather than to denote a uniform law of contract in South Pacific countries. These differences are partly the result of different approaches taken by regional courts, particularly in how far they are prepared to depart from the common law of England. They are also the result of countries having differing 'cut-off dates' and of legislative innovation by some regional parliaments. The status and application of customary law also differs from country to country.

COMMON LAW AND EQUITY

Common law and equity were introduced in all countries of the region, other than Marshall Islands, during the colonial era. Introduction was either by direct application by England, Australia or New Zealand or by adoption by the regional country itself. Common law and equity were continued in force at independence by 'saving' provisions embodied in the independence constitution or other legislation. For example, the succeeding constitutions of Fiji Islands have continued in force s. 35 of the *Supreme Court Ordinance* 1875, which states:

> *'The Common Law, the Rules of Equity and the Statutes of general application which were in force in England at the date when the Colony obtained a local Legislature, that is to say on the second day of January 1875, shall be in force within the Colony.'*

English or Commonwealth common law?

In most countries of the region, the 'saving' provisions make it clear that it is the English common law (and equity) which has been adopted as part of the law. The use of the word 'England' in s. 35 of the *Supreme Court Ordinance* 1875, set out above, is an example of this. Provisions in Cook Islands, Kiribati, Nauru, Niue, Tokelau and Tonga also explicitly refer to the law 'of England', or state 'in force in England'. However, the courts in Fiji Islands have shown an inclination to follow Australian and New Zealand contract precedents in preference to the English law. For example, in *Nair v Public Trustee of Fiji and the Attorney-General of Fiji* (High Court, Fiji Islands, civ cas 27/1990, 8 March 1996, at 24) (unreported), Lyons J, in following the Australian and New Zealand approach to estoppel, said:

> *'In my opinion the future of the law in Fiji is that it is to develop its own independent route and relevance, taking into account its uniqueness and perhaps looking to Australia and New Zealand for more of its direction.'*

In Samoa, it has been held that the phrase 'English common law and equity' in art. 111 (1) of the Constitution, which continues the common law in force, is 'descriptive of a system and body of law which originated in England' and not of

the law as applied in England (*Opeloge Ole v Police*, Supreme Court, Samoa, m5092/80 (unreported)). Therefore, courts in Samoa are free to choose from amongst common law principles as developed throughout the Commonwealth. The 'saving' provisions in Tuvalu and Vanuatu are similar to Samoa but have not yet been the subject of express judicial interpretation.

There is no express reference to 'England' in paragraph 2(1) of sch. 3 of the Solomon Islands' Constitution, which contains the relevant provision. However, the Court of Appeal, in *Cheung v Tanda* [1984] SILR 108, held that this must be read in the light of para. 2(2), which states:

'The principles and rules of the common law and equity shall so have effect notwithstanding any revision of them by any Act of the Parliament of the UK which does not have effect as part of the law of the Solomon Islands.'

As this paragraph would have no relevance if the common law and equity of countries other than England were in force in Solomon Islands, the court concluded that para. 2(1) is referring to English common law and equity, even though this is not an express qualification.

In Marshall Islands, American common law is more relevant. In cases involving French law decided in Vanuatu, decisions of French courts may be of persuasive value (see e.g. *Pentecost Pacific Limited and Pentecost v Hnaloane* (1980–88) 1 VLR 134 (CA)).

Conditions of application

In all cases there are conditions on the application of common law. Generally, these are that the principles must be:

(1) consistent with the constitution and/or other local acts of parliament; and

(2) appropriate/suitable for local circumstances.

Accordingly, the principles of common law may be amended by regional statutes. They may also be discarded or modified by the regional courts if they are inappropriate to the country in question. For example, in *Australia and New Zealand Banking Group Limited v Ale* [1980–3] WSLR 468, the Supreme Court, considering the English common law doctrine of unjust enrichment, held that:

'... the courts of Western Samoa should not be bogged down by academic niceties that have little relevance to real life.'

Theoretically, this renders the distinction between English common law and the common law developed in other parts of the Commonwealth, mentioned above, academic. A regional court which prefers a Commonwealth authority to an English authority may justify following the latter on the grounds that it is more appropriate to local circumstances. In practice, courts rarely consider whether common law principles are appropriate.

Further, there is usually a specified date after which, theoretically, new English judicial decisions will not form part of the law. This is sometimes referred to as the 'cut-off' date. In some cases, the legislation does not make it clear whether there is a cut-off date. The dates range from 1840 in Cook Islands, Niue and Tokelau, to 1980 in Vanuatu. There is no cut-off date in Tonga. The statutory provisions introducing cut-off dates do not render later English decisions irrelevant. Such decisions are highly persuasive, and in practice the regional courts will nearly always follow them. Furthermore, once a superior regional court has followed an English decision it will be binding on lower courts of that country in accordance with the doctrine of precedent, whether it was decided before or after any cut-off date.

STATUTE LAW

Most statutes relating to the law of contract in the region are taken from English or French law, although there are a small number of locally-enacted statutes.

Foreign statutes

Apart from in Marshall Islands and Samoa, English acts apply to some extent throughout the region. The legislation introduced in the USP region is normally specified to be the 'statutes of general application in force in England'. Thus, if an English act is not of general application it will not be part of the law. Unfortunately, the term 'general application' is not defined. It has received some judicial attention within the region, but the case law is conflicting. In *R v Ngena* [1983] SILR 1, the High Court of Solomon Islands defined a statute of general application as 'one that regulates conduct or conditions which exist among humanity generally and in a way applicable to humanity generally'. They distinguished this from an act that is 'restricted to regulating conduct or conditions peculiar to or in a way applicable only to persons, activities or institutions in the UK'. This definition was followed by the High Court of Tuvalu in *In the Matter of the Constitution of Tuvalu and of the Laws of Tuvalu Act 1987* (unreported, High Court, Tuvalu, 4/1989). However, conflicting interpretations have been applied elsewhere (see, e.g. *Indian Printing and Publishing Co v Police* ((1932) 3 FLR 142); *Harrisen v Holloway* ((1980–88) 1 VLR 147).

In addition to being of general application, statutes, like common law, must also be:

(1) consistent with the constitution and/or other local acts of parliament; and

(2) appropriate/suitable for local circumstances.

STATUS-BASED DEALINGS

Dealings in a customary setting do not always fit neatly into the definition of contract developed through the English law of contract. Traditional societies have been described as 'status based', as their rights and duties tend to be dictated by their place in society rather than by agreement.

In most countries of the region, there is a cut-off date after which English statutes no longer apply. The dates are

not necessarily the same as those specified in respect of the common law. They range from 1840 in Cook Islands, Niue and Tokelau to 1976 in Vanuatu.

No cut-off date is specified in Tonga, which is thus able to take advantage of modern English legislation such as the *Unfair Contract Terms Act* 1977, provided it is of general application. In Marshall Islands, the Trust Territory Code applies, subject to a cut-off date of 1 May 1979.

The most important English legislation includes:

- the *Unfair Contract Terms Act* 1977;
- the Sale of Goods Acts 1893 and 1979;
- the Law of Property Acts 1925 and 1989; and
- the *Misrepresentation Act* 1967.

CONTINUING RECOGNITION

In most countries of the region, customary law continued to operate throughout the colonial period. Whilst it was given limited, if any, recognition in written laws, it continued to be observed by those persons who felt themselves bound by the customary system, and to whom confirmation or endorsement by any outside authority was unnecessary. It is still recognised by those whose customs are embodied in the law on this basis. Accordingly, where 'contractual' disputes arise at village level, they will be governed by customary law. Customary law will also apply outside the village setting, where the surrounding circumstances are all connected with customary matters.

In Vanuatu it is still possible for a case to be dealt with under French law. The French Civil code or Joint Regulations made prior to independence may apply if there is no local legislation on point. For example, in *Jean My v Société Civile Sarami* (1980–88) 1 VLR 163, the plaintiff's claim for cancellation of the contract and damages was based on art.184 of the Code. Prior to independence, although certain laws applied to all inhabitants of the Condominium, French law applied in other areas to French citizens and those opting to be dealt with under the French system.

The circumstances in which French law rather than English law will apply are not entirely clear. The right to opt for a system of choice was terminated at independence. In *Mouton v Selb Pacific Limited* (Supreme Court, Vanuatu, cc42/94, 13 April 1995) (unreported) an action for breach of a contract of employment, drafted in French, was commenced by a plaintiff of French origin and a Vanuatu company with a French shareholder and managing director. The contract was stated to be subject to Joint Regulation Number 11 of 1969. In fact, that French Regulation had been superseded by local legislation – the *Employment Act* 1983. That act set out minimum standards for employment but, provided those minima were observed, the act did not prevent parties making their own bargain. Accordingly, Chief Justice Vaudin d'Imecourt held that it was intended that the provisions of Joint Regulation 11 should, where possible, be incorporated within the contract, including the provisions as to unilateral termination on the grounds of stipulated events of gross misconduct.

The contract also contained a '*tacite réconduction* clause', whereby the contract was to be renewed by tacit *réconduction* unless a party gave notice in writing, at least three months prior to the expiry of the fixed period of the contract, that the contract was at an end. Chief Justice d'Imecourt regarded art. 93(2) of the Constitution as making it clear that French law still applied where there was a lacuna in the law. The Chief Justice then went on to say that it would not be right to translate French words into English and then to interpret those words as having a meaning that they would not have had in French. His Lordship therefore concluded that the *tacite réconduction* clause had to be interpreted in accordance with French law. His Lordship also stated, obiter, that, in the absence of Vanuatu laws on point, French laws would apply, inter alia, in contracts involving French nationals or 'optants'.

In *Pentecost* the substantive law was dealt with in local legislation. However there was no local legislation relating to procedure. The Court of Appeal did not consider any right to 'opt'. Rather it appears to have considered that, at least in the circumstances of this case, the choice between English and French law on procedure should be decided according to the nationality of the defendant, who was French.

There seems little doubt that if all parties to the contract are French, French law will normally apply. If only one of the parties is French, the nationality of the defendant will be an important factor, as will the language of the contract and the legal terms contained in it.

Regional legislation

There are very few locally-enacted statutes relating to the law of contract in the region. Examples of acts that do apply are set out below.

Fiji

- **Sale of Goods Act, Cap 230** (makes similar provision to the *Sale of Goods Act* 1893 (UK));
- **Fair Trading Decree 1992** (has gone further than any other South Pacific statute in protecting consumer rights; it has been said that 'The Fair Trading Decree of May 1992 reflected a new environment of competition and consumer protection' (*Attorney-General of Fiji and Ors v Pacoil Fiji Ltd*, unreported, civ app ABU0014, 29 November 1996, at 22 (unreported));
- **Indemnity Guarantee and Bailment Act, Cap 232** (makes similar provision to s. 40 of the *Law of Property Act* 1925(UK));

Marshall Islands

- ***Sale of Goods Act* 1986, 23 MIRC, Cap 1** (similar provision to the *Sale of Goods Act* 1893 (UK));

Samoa

- ***Frustrated Contracts Act* 1975** (similar to the *Law Reform (Frustrated Contracts) Act* 1943(UK));
- ***Infants Act* 1961** (modelled on the *Minors Contracts Act* 1908 (NZ));
- ***Sale of Goods Act* 1975** (makes similar provision to the *Sale of Goods Act* 1893 (UK)).

Tonga

- **The Contracts Act, Cap 26** (repealed in 1990, but continues to apply to contracts entered into before that date; provides that certain contracts must be in writing).

In addition to the statutes mentioned above, many countries within the region have their own acts governing companies,

limitation periods and property law that have relevance for the law of contract.

CUSTOMARY LAW

Dealings in a customary setting do not always fit neatly into the definition of contract developed through the English law of contract. Traditional societies have been described as 'status based', as their rights and duties tend to be dictated by their place in society rather than by agreement. This is the context in which Maine proclaimed that:

'the movement of progressive societies has hitherto been a movement from Status to Contract'.

In *The Context of Contract in Papua New Guinea* (1984, Waigani: UPNG Press) Roebuck, Srivastava and Nonggorr went as far as to say that:

'Traditional transactions are not contracts as understood in the modern common law and no good can come of confusing them.'

Contracts and customary dealings compared

Some of the possible distinctions between dealings in a customary context and commercial contracts are set out in the comparative table below.

Customary Dealings	*Contractual Dealings*
Status based	Rights based
Obligatory	Voluntary
Group based	'Individual' based
Benefits and burdens may be imposed on group members	Privity of contract applies
Dealings may be between communities or groups with no formal legal standing	Contracts must be entered into by persons or bodies with legally recognised status
Regulate social relationships	Regulate business relationships
Binding in honour	Binding in law
Enforceable by the community	(Ultimately) enforceable by the courts
Flexible	Certain
Personal	Impersonal
Self-help may be a recognised sanction	Self-help is not a recognised sanction
No right to damages	'Injured party has the right to damages' arises if loss has been suffered
Ceremonial formalities may be required	Written formalities may be required

Notwithstanding the differences between customary dealings and contracts within the Western definition, there are some transactions arising within a customary setting that may loosely be described as contractual. Roebuck, Srivastava and Nonggorr acknowledge elsewhere in their work that:

It is neither possible nor desirable to deny the conceptual and commercial importance of Papua New Guinea's traditional transactions. They contribute greatly to the economic growth of village communities. Some are purely commercial in nature and just like common law contracts.'

Support for the argument that there is some common ground, in the context of Tokelau, can be found in 'Contract Codes, Coral Atolls and the Kiwi Connection' (in *Festschrift für Erwin Deutsch*, Germany: Carl Heymanns Verlag KG, 877). Professor Angelo points out there that, whilst there is little in the culture of Tokelau which specifically addresses the notion of contract in Western European culture:

'There is, however, a strong indication both within contemporary society and in the folklore of Tokelau that basic tenets of contractual obligations are recognised and honoured in Tokelau culture.'

Comparison with African jurisdictions also leads to the view that contracts were recognised in customary law. In Uganda, traditional customary law, at least within this century, is said to have recognised a variety of contracts including those of service, sale, loan and pledge.

In most countries of the region, customary law continued to operate throughout the colonial period. Whilst it was given limited, if any, recognition in written laws, it continued to be observed by those persons who felt themselves bound by the customary system, and to whom confirmation or endorsement by any outside authority was unnecessary. It is still recognised by those whose customs are embodied in the law on this basis. Accordingly, where 'contractual' disputes arise at village level, they will be governed by customary law. Customary law will also apply outside the village setting, where the surrounding circumstances are all connected with customary matters.

Commercial transactions

Whether customary law is applicable to contractual disputes arising outside the customary sphere is a more difficult question. For example, where a dispute arises in a commercial setting or where one or more parties to the dispute do not recognise customary law, is that law relevant? The answer requires examination of three questions:

(1) To what extent has customary law been incorporated into the state system?

(2) Assuming customary law is theoretically applicable, how does it rank in relation to introduced law?

(3) Assuming again that customary law is applicable to a contractual dispute, to what extent is it applied in practice?

With regard to the first question, all countries apart from Fiji Islands and Tonga specifically recognise customary law in their constitution. In Cook Islands and Niue this recognition is restricted to land matters. In other countries recognition is general.

With regard to the second question, in those countries where customary law is expressly recognised as a general source of law the constitution is the supreme law, and therefore, normally, ranks above customary law. Statute is also superior to

customary law. However, there is no uniformity regarding the status of customary law in relation to common law. In Nauru, Niue and Solomon Islands customary law is superior to common law; in Kiribati and Tuvalu it is superior in some matters; in other countries of the region the position is uncertain.

Regarding the third question, notwithstanding that customary law is stated to be superior to common law in some countries of the region there is reluctance to use it. There do not appear to be any reported examples of non-domestic contract cases within the region that have been decided in accordance with customary law. Usually, the common law will be followed without any consideration of whether there is an applicable customary law. This may be due to one or more of a number of reasons. For example, the type of contractual dispute to which customary law might apply is more likely to be decided outside the formal court system. Further, judges and counsel in the formal system may have no knowledge or training in customary law. The fact that legislative schemes have been put in place to govern commercial use of customary land and other resources, such as the Forest Resources and Timber Utilisation Act, Cap 40, in Solomon Islands, may also be relevant. Other factors are relevant, such as the requirement by the courts that customary law be proved by evidence before it can be applied and the difficulty inherent in transferring fundamentally different concepts from one legal system into another.

CHOICE IN VANUATU

There seems little doubt that if all parties to the contract are French, French law will normally apply. If only one of the parties is French, the nationality of the defendant will be an important factor, as will the language of the contract and the legal terms contained in it.

Customary law may also be viewed as inapplicable to commercial transactions and/or to cases where expatriate parties are concerned. In *Semens v Continental Airlines* (2 FSM Intrm. 131 (Pn. 1985)) (unreported), for example, the plaintiff claimed damages for personal injuries suffered by him at Pohnpei airport when he was employed by a sub-contractor to unload cargo from a Continental Airlines plane. The Supreme Court of the Federated States of Micronesia, took the view that liability depended upon interpretation of a clause of the contract. Before embarking on interpretation, the court considered which source of law was applicable. It was held that the Constitution was the supreme law, but that it had no application to the facts. The next source of law in the hierarchy was customary law, but no such law had been put before the court by the parties. The Chief Justice held that he would only be under an obligation to search for an applicable custom or tradition if the nature of the dispute and surrounding facts indicated that this was likely. His Lordship felt that this was not such a case, as the business activities which gave rise to the suit were not of a local or traditional nature. Although goods handling and moving might take place in a traditional setting, baggage and freight handling at an airport was of an international, non-local nature. The Chief Justice gave as a further reason for his decision the fact that three of the four defendants were not Micronesians. Lastly, he relied on the fact that the contract revealed no intention of the parties to be governed by customary law. Accordingly, the common law of the US was applied. Whilst this is not a decision of a regional court, the case demonstrates the issues that arise in deciding whether customary law is applicable.

CONCLUSION

The introduced law of England still forms the basis of contract law in the South Pacific. Whilst regional courts have occasionally demonstrated a spirit of independence by following decisions from other Commonwealth countries or acting on the basis of local circumstances, there is little evidence of the development of a regional jurisprudence. Localisation by regional legislatures has also been limited. Unlike some other Commonwealth countries, no regional country has introduced a code of contract law. Such codification might have much to recommend it as the way forward for Pacific island countries as opposed to piecemeal reform, based on developments in the English common law and subsequent legislative reforms. In the meantime, many countries of the South Pacific remain in a legal time warp imposed by the 'transitional provisions' which continue English law in force as it stood at the date of independence or self-governance.

LOCAL MODIFICATIONS

... the principles of common law may be amended by regional statutes. They may also be discarded or modified by the regional courts if they are inappropriate to the country in question.

The uncertain relationship between introduced law and customary law in the context of contract law is a further area of concern. It is arguable that courts have been given a mandate to search for a more prominent role for customary law in contract cases, at least where there is a customary context. This is particularly so in those countries of the region where customary law has not only been given formal recognition as a general source of law, but has also been emphasised in the preamble to the constitution and in specific provisions relating to customary law. However, clarification of its position, based on comprehensive research, is required before customary law can take its place within the legal system.

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