



1-1-2020

## Introduction: Fifteenth Annual International Conference on Contracts

Michael P. Malloy  
*University of the Pacific, McGeorge School of Law*

Follow this and additional works at: <https://scholarlycommons.pacific.edu/uoplawreview>



Part of the [Contracts Commons](#)

---

### Recommended Citation

Michael P. Malloy, *Introduction: Fifteenth Annual International Conference on Contracts*, 52 U. PAC. L. REV. 1 (2020).

Available at: <https://scholarlycommons.pacific.edu/uoplawreview/vol52/iss1/17>

This Symposium is brought to you for free and open access by the Journals and Law Reviews at Scholarly Commons. It has been accepted for inclusion in University of the Pacific Law Review by an authorized editor of Scholarly Commons. For more information, please contact [mgibney@pacific.edu](mailto:mgibney@pacific.edu).

# *Symposium—Fifteenth Annual International Conference on Contracts*

## **Introduction: Fifteenth Annual International Conference on Contracts**

Michael P. Malloy\*

### I. IN ADVANCE OF THE PANDEMIC

In mid-February 2020, shortly before the coronavirus pandemic swept across our academic schedule like a tropical storm, the University of the Pacific, McGeorge School of Law hosted the Fifteenth Annual International Conference on Contracts (“KCon XV”). This was a particularly gratifying event for all of us at the Law School because contracts and commercial law constitute one of the significant academic themes and strengths here at McGeorge. The late Gordon D. Schaber, the iconic dean of the Law School for thirty-four years, was himself a contracts scholar<sup>1</sup> and an inspiration to many of us long after his tenure.

This is the second time that McGeorge has hosted KCon. The first time was KCon IV, in 2008, organized by the late Gerald Caplan, a former McGeorge Dean, and former McGeorge associate professor Miriam A. Cherry, now Professor of Law and Associate Dean for Research and Engagement at Saint Louis University. We are in fact one of only two law schools that have hosted KCon more than once. That other school is the KCon founder, Texas Wesleyan Law School, now known as Texas A&M Law School.

Each year the conference’s goal is to present papers and works-in-progress that address the whole spectrum of contract scholarship, whether doctrinal, historical, jurisprudential, economic, philosophical, pedagogical, or interdisciplinary. Presentations by those who work in non-U.S. legal systems and by junior scholars who are new to the field are particularly encouraged as a way to broaden and enrich contract teaching and scholarship. The conference had forty active participants, including four from the McGeorge faculty. Dean Michael Hunter Schwartz, himself a noted *Contracts* scholar,<sup>2</sup> and Professor Jarrod Wong, Co-

---

\* Distinguished Professor of Law, McGeorge School of Law, University of the Pacific. The author wishes to acknowledge the invaluable support of McGeorge administrators and staff that made the Fifteenth Annual Conference possible, and in particular the generous efforts of Dean, then Interim Provost, Michael Hunter Schwartz, then Interim Dean Michael Colatrella, Associate Dean Rachael Salcido, Associate Dean Mary-Beth Moylan, Monica Alarcon, Janice Johnson, Audrey Uber, and Wendy Young. Special thanks to Hayley Graves, then Editor-in-Chief of the *University of the Pacific Law Review*, and the editors and staff of the Law Review who assisted throughout the KCon proceedings; their efforts caused the conference to run cordially and professionally, and more smoothly than would ever have been possible without them.

1. See GORDON D. SCHABER & CLAUDE D. ROHWER, *CONTRACTS IN A NUTSHELL* (West Pub. Co., 1975) (first edition of classic contracts text).

2. See, e.g., MICHAEL HUNTER SCHWARTZ & ADRIAN J. WALTERS, *CONTRACTS: A CONTEXT AND PRACTICE CASEBOOK* (3d ed. 2020) (utilizing innovative approach that places students in roles as practitioners handling simulated law practice problems). Cf. Michael P. Malloy, *Narrative Arcs and Simulations*, 48 U. PACIFIC L. REV. 837, 837–38 (2017) (advocating continuous “narrative arc” of inter-connected problems to en-

Director of our Global Center for Business and Development, served as chairs of panels on pedagogical issues and on comparative and international perspectives, respectively. Professor Jeffrey Proske, then also Associate Dean of Administration, delivered a fascinating talk on pedagogical issues in the *Contracts* course, deeply informed by his experience as a professor of lawyering skills, the mastery of which should always be an important objective of the *Contracts* course. Finally, during the *New Horizons* panel, devoted to emerging areas of interest in *Contracts* scholarship and practice, Professor Daniel Croxall offered an interesting commentary on the field of craft beer law, an almost intoxicating mix of legal issues that has fermented considerable interest among experts in contracts, business organization, and intellectual property law.

## II. A SELECTION OF PAPERS PRESENTED

Drawn from the many presentations during the two days of the conference, this symposium issue presents six articles on a variety of current issues in *Contracts*. The first article, by Sidney W. DeLong,<sup>3</sup> explores the use of contract obligations to suppress information about wrongdoing. Non-disclosure agreements have become a regular feature of the headlines and nightly news as they seem to be routinely used by powerful individuals—including at least one president—to silence their victims or knowledgeable former associates through the terms of legally binding contracts. The power of contract obligation and available remedies can be a markedly effective instrument of oppression or deception, particularly when a non-disclosure provision is coupled with a provision requiring mandatory arbitration of any non-disclosure dispute.<sup>4</sup> Professor DeLong explores a variation on this scenario, in which the person pledging silence is, effectively, a blackmailer who agrees to nondisclosure in return for a demanded payment.<sup>5</sup>

Henry D. Gabriel explores the sad story of the apparent impossibility of salvaging the proposed revision of Uniform Commercial Code Article 2.<sup>6</sup> After 24 years attempting to revise the article in the face of growing opposition to proposed changes, the Uniform Law Commission withdrew the revisions from consideration in 2011.<sup>7</sup> Professor Gabriel undertakes a review of the proposed revi-

---

hance student's understanding of subject area).

3. DeLong, *infra* p. 7.

4. See, e.g., Orly Lobel, *Gentlemen Prefer Bonds: How Employers Fix the Talent Market*, 59 SANTA CLARA L. REV. 663, 681–83 (2020) (discussing the impact of nondisclosure agreements on the employment relationship).

5. Cf., e.g., Jeannie Suk Gersen, *Trump's Affairs and the Future of the Nondisclosure Agreement*, THE NEW YORKER (Mar. 30, 2018), <https://www.newyorker.com/news/news-desk/trumps-affairs-and-the-future-of-the-nondisclosure-agreement> (contrasting two incidents involving nondisclosure agreements required by Donald Trump, one imposing silence and the other “selling” the story to achieve silence).

6. Gabriel, *infra* p. 23.

7. *Recommendation of the Permanent Editorial Board for the Uniform Commercial Code to Withdraw the 2003 Amendments to UCC Articles 2 and 2A from the Official Text of the Uniform Commercial Code*, 65 CONSUMER FIN. L. Q. REP. 150, 160 (2011).

sions. He argues that discussion of some of the proposed revisions could be included in the official commentary of the Permanent Editorial Board (“PEB”) in an effort to achieve some clarification of the meaning and application of current provisions of Article 2 that the revisions were supposed to address.<sup>8</sup> While the PEB has begun to consider the inclusion of such discussion, it is clearly too early to tell whether it will actually undertake the articulation of specific issues for inclusion in the commentary. If the PEB does move forward, it would be well advised to review the issues Professor Gabriel has addressed in his article.

Victor Goldberg provides comparative analysis of the law of direct damages under U.S. and United Kingdom law.<sup>9</sup> He makes a strong case for viewing the contract as an asset and determining direct damages based on the change in value of the asset at the time of the breach. He expects that such a conception would make better sense of the cover measure of damages,<sup>10</sup> as contrasted with a measure of damages based on the market price of the goods.<sup>11</sup> Cover is just “evidence of the market price, not a separate remedy.”<sup>12</sup>

This discussion leads neatly into consideration of James Gordley’s article, which recasts our conception of contract remedies as primarily protecting the “expectation interest” of the parties.<sup>13</sup> Gordley believes that the actual reason for giving relief to the breached party to a contract is to compensate that party for the impact of a risk that the breaching party had been paid to assume. This explanation seems to suggest an unjust enrichment or restitutional explanation for contract damages. I leave it to the reader to determine whether Goldberg or Gordley offers a more satisfactory explanation of the legitimate role of contract damages.

Kate Vitasek and her co-authors then take us through a new approach to contracts that seeks to resolve the apparent dissonance between the formal principles of contract law and the practice surrounding “relational contracts.”<sup>14</sup> Contracts principles seem to treat contracting and contract performance as involving static points of contact between the parties—this for that, in a bargained-for exchange—after which the contract is performed and is completed (“executed”). However, relational contracts establish operating principles for what is intended by the parties to be an ongoing relationship, shaped by and reacting to a stream of events in the course of the parties’ continuing interaction. The relational contract may *terminate* for any number of reasons, specified by the parties’ contract or by external events. However, the contract may never be “completed” in the traditional sense because it contemplates a continuing series of interactions that is almost asymptotic in nature. Can traditional principles, which are static, adequately

---

8. See, e.g., Gabriel, *supra* note 6, at pp. 27–29 (discussing proposed §§ 2-108, 2-103(i)).

9. Goldberg, *infra* p. 45.

10. U.C.C. § 2-712 (AM. LAW INST. & UNIF. LAW COMM’N 1951).

11. U.C.C. § 2-713(1) (AM. LAW INST. & UNIF. LAW COMM’N 1951).

12. Goldberg, *supra* note 9, at p. 48.

13. Gordley, *infra* p. 77.

14. Vitasek et al., *infra* p. 125.

govern the rights and duties of the parties in such a contract setting? Vitasek and her colleagues draw on a rich body of academic literature exploring relational contracts<sup>15</sup> and deep empirical studies initiated by Vitasek and others<sup>16</sup> to develop a theory of formal relational contracts that promises to diminish the dissonance between traditional contract theory and modern business practice in relational contracts. The result may well be one of those moments of “paradigm shift”<sup>17</sup> in which our conception of contract and performance, informed by fundamental principles of good faith, is reset in constructive ways.

Finally, Peter M. Gerhart explores the often unsettling relationship between contract law and concepts of social morality as a governing principle.<sup>18</sup> The paper is prompted by the inadequacy of current approaches to promissory and contractual theory.<sup>19</sup> He suggests that reasoning from authority does not adequately explain our expectations of contract obligation. Likewise, reasoning from abstract legal concepts, as well as theories based on promissory principles, social practices, or efficient incentives may leave us with an incomplete explanation of contracts. He then presents the theory of “other-regarding, values-balancing reasoning”<sup>20</sup> about promissory obligations, to explain the existence of obligations and the scope of such obligations. In light of this theory, Gerhart reimagines contract doctrine to enhance understanding and application of such concepts as contract formation, performance obligations (including good faith), and a variety of other recurring issues in contract law. The result for the reader is a refreshed—and refreshing—approach to contract law and policy.

### III. THE 2020 LIFETIME ACHIEVEMENT AWARD

At KCON XV, the 2020 Lifetime Achievement Award was presented to John Andrew Spanogle, Jr., the William Wallace Kirkpatrick Research Professor Emeritus of Law at George Washington University Law School, “for Exemplary National and International Contributions to the Study, Scholarship and Expertise in the Legal Contracts Field,” as the plaque presented in his honor stated it. A graduate of Princeton University and University of Chicago Law School, Professor Spanogle has been a member of the George Washington University Law Faculty since 1988. He has spent a lifetime working and writing in the commercial and consumer law field. A founding member of Ralph Nader’s Public Interest

---

15. See *id.* at 125–30 (discussing published research on relational contract).

16. See *id.* at 130–32 (discussing empirical research leading to the “vested way” approach to relational contracts).

17. Cf., e.g., THOMAS KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (1962) (utilizing the concept of “paradigm shift” to understand fundamental change in basic concepts and experimental practices of a scientific discipline).

18. Gerhart, *infra* p. 141.

19. See *id.* at 141–44.

20. *Id.* at 149–52.

Research Group, he is co-author of a seminal casebook on consumer law,<sup>21</sup> now in its fifth edition. In addition, Professor Spanogle is the co-author of *International Business Transactions*,<sup>22</sup> one of the most widely used casebook in its field, as well as *International Sales Law*.<sup>23</sup> Perhaps most striking to KCon participants is the fact that he is also a co-author of *Global Issues in Contract Law*,<sup>24</sup> part of the revolutionary twenty-five-volume *Global Issues* book series, designed to respond to the growing impact of globalization on legal practice and curated by one of McGeorge's own, Distinguished Professor Franklin Gevurtz.

Professor Spanogle was a member of the U.S. delegation to the United Nations Commission on International Trade Law from 1982 to 1989, and he was the chief of delegation to its Working Group on Payment Systems. From his early work on the Uniform Commercial Code, through his globe-spanning work on a wide range of commercial law issues, Professor Spanogle has embodied the values and aspirations of the International Conference on Contracts.

#### IV. CONCLUSION

As a community, *Contracts* professors—and their students, it is hoped—enjoy a sense of belonging, of proper placement, in a long historical experience. We deal with pervasive and persisting issues that in many ways give structure to the socio-economic interactions within a society. These issues cross borders and historical settings to give us an explanatory framework for the disparate and variegated voluntary interactions within and among social groups. KCon is an exciting intellectual experience, but it is also a moment of profoundly shared experience within the academic community. I am pleased that we are able to share that experience with the readers of this issue of the *University of the Pacific Law Review*.

---

21. JOHN A. SPANOGLE, JR., RALPH ROHNER, DEE PRIDGEN, JEFF SOVERN & CHRISTOPHER PETERSON, *CONSUMER LAW, CASES AND MATERIALS* (West Pub. Co., 4th ed. 2013).

22. RALPH H. FOLSOM, MICHAEL WALLACE GORDON & JOHN A. SPANOGLE, JR., *INTERNATIONAL BUSINESS TRANSACTIONS: A PROBLEM-ORIENTED COURSEBOOK* (Thomson/West, 11th ed. 2012).

23. JOHN A. SPANOGLE, JR. & PETER WINSHIP, *INTERNATIONAL SALES LAW, A PROBLEM-ORIENTED COURSEBOOK* (West Academic, 2d ed. 2012).

24. JOHN A. SPANOGLE, JR., MICHAEL P. MALLOY, LOUIS DEL DUCA, ANDREA K. BJORKLUND & KEITH A. ROWLEY, *GLOBAL ISSUES IN CONTRACT LAW* (West Academic, 1st ed. 2007).

\* \* \*