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Abstract

At first impression the scope of this book was breathtaking. To attempt both legal and financial perspectives on many of the major issues in both international trade and international business is a courageous undertaking. Most texts satisfy themselves with only one of these perspectives on one of these subjects. This combination of legal and economic perspectives is one of the greatest strengths of this book, and, I believe, makes it unique in the Australian literature.

BOOK REVIEWS

INTERNATIONAL TRANSACTIONS -
TRADE AND INVESTMENT, LAW AND FINANCE

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International Transactions - Trade and Investment, Law and Finance,
Sydney: The Law Book Company Limited,
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At first impression the scope of this book was breathtaking. To attempt both legal and financial perspectives on many of the major issues in both international trade and international business is a courageous undertaking. Most texts satisfy themselves with only one of these perspectives on one of these subjects. This combination of legal and economic perspectives is one of the greatest strengths of this book, and, I believe, makes it unique in the Australian literature.

Such a task is virtually beyond the capacity of any one author and this book is the product of the efforts of seventeen contributing authors in twenty-one chapters. The editor has said that "understandably, much of the material is presented from an Asian-Pacific ... perspective". Indeed, the geographical context is virtually entirely Asian-Pacific. There are at least three good reasons for such a focus:

- (i) these are the emerging markets and investment destinations and thus the ones in which the need for professional guidance will be greatest;
- (ii) these are the topical markets, the flavour of the decade, and this is supported by the government's view of our role in Asia and the formation of APEC; and
- (iii) these countries are often lacking both the regulatory framework and sophisticated local professional support to facilitate international transactions and thus they are demanding destinations in which to do business. The Asian focus is sensible for all these reasons and the fact that these are the countries in which, in my experience, students are most interested. However, when such a substantial proportion of our international trade is with the European Community and North America, these reasons for choosing an Asian focus need to be expressed. It is vital that Australia become more economically integrated with Asia. It is also vital that we do not allow our focus on Asia to blur the current reality of our trade and investment patterns and

each unreasoned exclusion of the rest of the world runs the risk of adding to our present case of tunnel vision to the north.

The book begins with a series of four chapters by James L Roberts on, respectively, Carriage of Goods by Sea, International Sale of Goods, International Payments and Electronic Bills of Lading. Jim Roberts' clear, concise writing style makes him an admirable choice of first up author. Prospective readers could only be encouraged by such lucid prose. I commend what Mr Roberts has said. I find the order of its saying and what has been left unsaid a little curious. The first chapter deals with the Hague Rules and the Hague-Visby Rules and does so admirably. The likely, although by no means assured, introduction of the Hamburg Rules in October this year is highlighted and an extremely useful introduction to the Hamburg Rules and a tabular comparison of the three regimes¹ is included. Why, then, are the introduction to the Hamburg Rules and the comparison of the regimes relegated to Appendix A and cross-referenced in the text only by an easily overlooked footnote? The Hamburg regime is not yet law but it will probably be so soon and would have been far better placed in the text. The table comparing the different regimes is very useful and readily useable. Its existence in an Appendix deserves highlighting in the text.

However, trade transactions commence with a contract, not a shipment. The second chapter entitled The International Sale of Goods deals with the Vienna Convention on Contracts for the International Sale of Goods. This chapter should have come first. It could then have been followed by a chapter on the basic trade transaction dealing with trade terms (such as f.o.b. and c.i.f.) and the functions and legal effect of the bill of lading and other transport documents (including transport by air). Then the stage would have been set for the chapter on shipping regimes which begins this book.

One of the most significant omissions in this volume is the lack of such a chapter on the basic trade transaction. Chapter Four is an excellent treatment of electronic bills of lading but is not underpinned elsewhere by an analysis of traditional bills of lading. There would be no compelling need for such a chapter if this text were addressed only to practitioners and scholars. Such material is dealt with comprehensively by the traditional authorities and has this year been ably revisited by an Australian academic lawyer.² However, this book "has evolved as the basis for a course of the same name and is intended as a textual reference work for professionals and academics".³ Such a gap in coverage is a significant flaw in a student text.

¹ The author compares and contrasts the Hamburg Rules with each of the six other international conventions on carriage in a very useful and readily useable table.

² R Burnett, *The Law of International Business Transactions*, The Federation Press, Sydney, 1994, in chapter 1 section 2 and chapter 2.

³ Preface, at ix.

Chapter Three deals with international payments by way of open account, documentary collections and documentary credits. It should logically follow chapter four on electronic bills of lading. It also would benefit from a more in-depth treatment. To deal with three forms of international payments in eleven pages is out of proportion to this topic's importance and the coverage given to other topics.⁴

The next four chapters are on foreign exchange, trade finance, government trade finance and insurance and countertrade. These chapters are written from an economic or financial perspective and this juxtaposition of legal and financial perspectives is enlightening. For instance, the chapter on trade finance from a banker's perspective throws an entirely different light on a topic analysed earlier from a legal perspective. Each perspective complements the other. All that is missing is cross-references. The two chapters do not follow each other and the busy practitioner consulting this book, unaided by cross-references, risks discovering only one.

Chapter Seven is entitled 'Government Trade and Investment Finance and Insurance' and is by Lloyd Edgecombe. This is one of the best treatments of the role, function and operations of the Export Finance Insurance Corporation ('EFIC') that I have read. This has been a most neglected topic in the literature. The author's experience as a former General Counsel and Divisional Manager of EFIC has permitted a much needed contribution to our understanding of the workings of EFIC.

The next chapter by Peter Liesch deals comprehensively and well with countertrade from an economic perspective. Some attention is given to the mechanics of the transaction but a following, briefer chapter from a legal perspective would have been illuminating. This chapter is an admirable piece of scholarship well suited for advanced business students. For law students it is perhaps too detailed for background reading and too economic for direct use. Continuance of the dual perspective approach here would have broadened the book's appeal.

The next two chapters are on the most favoured nation clause and the GATT and are by the associate editor, Rafiqul Islam. These are well adapted for teaching purposes and will provide a useful introduction for any practitioner new to this field.

The following chapter is a useful simple introduction to private trade insurance. Once again, it is not what has been written that is troubling but its relation to the rest of the book. I would have expected this chapter to follow the earlier chapter on government instituted trade insurance under the aegis of EFIC and there needs to be at least one significant cross-reference between

⁴ For example, 23 pages on electronic bills of lading in chapter four and 43 pages on countertrade in chapter eight.

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the two treatments. There follow four chapters on tax aspects of international trade, investment incentives, taxation of investments in Australia and double taxation agreements. I find the separation of the three taxation chapters by one on investment incentives confusing. The reason for this, apparently, is that the investment incentives chapter marks the end of the trade section of the book and the beginning of the investment section. In this case I would have expected the latter two taxation chapters to appear towards the end of the investment section just as the initial taxation chapter did in the trade section. Perhaps these quibbles apply only to those consigned the job of reading the book from cover to cover and not to its intended audience.

All of the taxation chapters are useful. The intervening chapter on investment incentives by Bernie Bishop is particularly useful as this is another area in which the Australian literature has been very thin. Mr Bishop compares and contrasts the types of incentives used by a number of Asian jurisdictions and in the limited space available critically considers the effectiveness of incentives. This chapter may, I expect, find its way into materials for courses in both law and business schools for which the text itself is not prescribed.

Chapters 16 and 17 come next and are the scholarly highlight of this volume. Professor Sornarajah from the National University of Singapore has written an illuminating analysis of bilateral investment treaties and followed it with an equally insightful treatment of the nationalisation of foreign investment. I would have expected these two chapters to come in the reverse order as the former is one response to the latter. Initially the fact that the author defines the Hull formula (for compensation for nationalised property) for the first time in chapter 17 but uses the term extensively in chapter 16 persuaded me that I was not alone in this expectation. But a reference in Chapter 17 to the earlier analysis of bilateral investment treaties gave the lie to this idea and the place of definition of the Hull formula must be an oversight. It is one of the few oversights in this penetrating analysis of these difficult areas. Professor Sornarajah has struck a good balance between the differing perspectives of the developed and the developing worlds on these topics and has outlined clearly the interests and arguments of each side. His starting point is Singapore rather than Australia and his coverage of Australia's treaties could have been far more detailed; for instance, he fails to record the current preference in the Australian treaties for arbitration under the aegis of the International Centre for the Settlement of Investment Disputes ('ICSID') wherever possible.⁵ Nonetheless these two chapters stand out as being of great interest to practitioners, scholars and students alike.

⁵ Fortunately, this oversight is remedied by Bernie Bishop in his earlier treatment of this topic at 273.

The next three chapters are regional overviews of the intellectual property, investment security (in the sense of available security interests such as mortgages and charges) and insolvency regimes of a number of Asian-Pacific jurisdictions. All are useful and a marvellous starting point for a practitioner venturing into one of these jurisdictions for the first time. However, each chapter has the Asia-Pacific region in its title and each considers different countries. Hence, Chapter 18 on intellectual property by Michael Pendleton considers the laws in the PRC, Hong Kong, Taiwan, Singapore, Japan, Korea, Malaysia and Thailand. The next chapter on investment security by Peter McDermott adds Australia, Indonesia, the Philippines and the USA to the list and ignores Hong Kong whereas the chapter on bankruptcy by Andrew Key deals with Canada in addition to Australia and the US but ignores all Asian countries except Japan and China. Authorial independence is all well and good; the book would have benefited from more coordination in such matters.

Indeed, there seems to have been some confusion among authors as to the intended audience for this book. The chapters on investment security and insolvency begin by considering the law in Australia. Given the introductory nature of such a review of regional laws, the consideration of Australia is presumably for foreign users of the book.⁶ There is potentially a substantial audience abroad for this book particularly among teachers and practitioners of law in places such as Hong Kong, Malaysia, New Zealand and Singapore. Indeed, the chapter on Taxation of Investment in Australia is presumably aimed directly at such an audience and the chapters on the Most Favoured Nation Clause, the GATT, International Economic Institutions, Bilateral Investment Treaties and the Nationalisation of Foreign Investment would all hold considerable appeal for a regional audience. However, this audience is ignored in the review chapters on investment incentives and intellectual property (which cover the region but omit Australia) and in the chapters on both private and government instituted trade insurance (which focus entirely upon Australia). In short, there is no consistency among authors. Some have written for an exclusively Australian audience, others have addressed a regional audience.

The courage of the editor is not limited to tackling two perspectives on two topics. It extends to conceiving a book on topics which call for frequent updating. Some chapters are on fairly enduring topics or cast in an enduring style. However, the chapters which review the region's laws in fields such as investment incentives, intellectual property, investment security and insolvency and all of the taxation chapters will require quite frequent revision. Compounding this is the changeable nature of the entire field. Indeed, in a few places the text has shown its age within months of

⁶ A consistent consideration of the Australian position would have been useful for teachers interested in a comparative approach and would have greatly improved the usefulness of the volume in other regional jurisdictions, particularly those with a common law heritage.

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publication. The chapter on trade finance from a financial perspective refers to the Uniform Customs and Practice for Documentary Credits ('UCP') and states that the current edition is ICC publication no. 400. Likewise the chapter on international payment systems makes a reference which is clearly to ICC publication no. 400. There has now been a new edition of the UCP (ICC publication no. 500) which was three years in the drafting, published in May, 1993 and came into effect on January 1 this year. Doubtless these authors finished their chapters well before the latest revision of the UCP was published although the book was published at least six months later. Such are the perils of publishing in such a fluid field.⁷ Still, I hope we can look forward to a second edition in a few years time which will be both updated and more integrated.

An economic treatise on third world debt has been dedicated 'To those who starve and to those who die young because of bad policy or sloppy theory'.⁸ This book is dedicated to the children of the world who too often fall within the earlier dedication. The editors and contributing authors believe that to the extent this work facilitates world trade and investment it may contribute to making the world a better place for these children to live. However, true to the useful and pragmatic nature of their book, the editors and authors have gone beyond words: all royalties from this volume go to the United Nations Children's Fund.

The breadth of coverage in this work means most chapters hold little for scholars. The few exceptions have been mentioned. It is the basis for a student course and, as has been noted, the absence of coverage of some of the basics makes one think of it more as a student resource book than a text. In that role it has a great deal to offer and the paucity of literature in this field increases its relative value immeasurably. Many teachers will doubtless use and prescribe this book. They and their students will be well served by it. However, in my opinion, it is as a practitioner resource that the book succeeds best. Its useability in this regard is greatly enhanced by an excellent, comprehensive index. If you are an accountant, consultant or lawyer involved in international transactions, this volume deserves space on your shelf and dollars from your wallet. It will be a source of guidance on many of the issues likely to cross your desk.

⁷ Regrettably, there is no addendum or footnote to alert users to this major revision of the UCP which is central to all documentary credit transactions. This runs the risk of being misleading.

⁸ O'Cleireacain S, *Third World Debt and International Public Policy* (1990) Praeger Publishers, New York.