REVIEW ARTICLE*

International Commercial Law by J MO (Australia: Butterworths Pty Ltd, 1997), pp xxiii + 707. Softcover recommended price $89.00 (ISBN 0 409 310379).

What is international commercial law? John Mo acknowledges the difficulties in defining this term but prefers it to the narrower concept of international trade law. Commercial law, he says, is a mysterious term which can cover anything related to commerce. This book deals with contracts for the international sale of goods, finance of trade and international banking, law of international insurance, foreign investment and international commercial law, GATT and international trade and commerce, and settlement of international commercial disputes. It is designed as an introduction to the topics covered and focuses on issues relevant to Australia and its trading partners.

The introductory chapter on the history of international commercial law goes much further than early European codification such as the Lex Rhodia, the laws of Oleron and the development of the merchant law and its relationship with English law. Specialists might quibble with some accounts. Where is the mention of the trading activities of the Harrapan civilization of the Indus Valley? Indian trade in the nineteenth and early twentieth century is a bigger story than that of the East India company whose monopoly was abolished in 1813. Nevertheless, it is important that international commerce is cast as a human activity which has existed from very early times in the major world civilizations. The account of the Chinese dynastic codes, the regulation of disputes involving foreigners, and the mention of *feiqian* or flying money (an early form of bill of exchange which dates from 806 AD - 820 AD in the Tang dynasty) are tantalizing details in the history of Chinese commercial life and law.

International Sale of Goods

The first chapter, on the international sale of goods, sets out the Incoterms which are compiled by the International Chambers of Commerce to provide a uniform interpretation of commonly used terms such as 'ex works', 'delivered at frontier', 'delivered ex quay' and the commonly used CIF (cost, insurance and freight) and FOB (free on board). The Incoterms may be incorporated into sales contracts governed by the sale of goods legislation or by the Vienna Convention.

Succeeding chapters deal with Australia's sale of goods legislation and the United Nations Convention on Contracts for the International Sale of Goods (Vienna Convention). State sale of goods legislation may apply to an international sale if expressly provided for or through conflict of law rules. The Vienna Convention will prevail over any State law to the extent of any

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inconsistency provided the Convention applies. The Convention will apply to sale of goods contracts between parties whose places of business are in different States, if the States are Contracting States to the Convention or as a result of the conflict of law rules, and where the nature of the contract or the issue to be decided is not excluded from the application of the Convention by the Convention itself. Among other things, the Convention will not apply to sales of goods bought for personal, domestic or household use unless the seller neither knew, nor ought to have known, that the goods were bought for such use: Article 2(a). The Convention is not concerned with the effect which the contract may have on the property in the goods sold: Article 4(b).

Under the sale of goods legislation, the formation of the contract is a matter for the common law. Some jurisdictions still retain the requirement that a contract for the sale of goods be in writing. The book contains an interesting comparison between the previous South Australian, situation when contracts were not enforceable unless in writing, and the current situation with Chinese law, which requires a contract of sale to be made or evidenced in writing. The Vienna Convention does govern the formation of contract. This is set out in Chapter 5 of the book. There is no discussion of price in the account of the sale of goods legislation, but there is a discussion of Article 55 of the Convention, which provides that if a contract does not fix or provide a mechanism for determining the price, then the parties are presumed to have referred to "the price generally charged at the time of the conclusion of the contract for such goods sold under comparable circumstances in the trade concerned".

The general rule of the sale of goods legislation is that risk passes with property. The Convention deals with the passing of risk in Articles 66-70. Mo provides an account of both the sale of goods legislation and the Convention. Risk is intimately connected with insurance. There is an interesting discussion of the duty of the seller to notify the buyer of the readiness of the goods for insurance under the sale of goods legislation and an entire chapter devoted to Marine Insurance and International Trade. This chapter provides a useful account of the *Marine Insurance Act* 1909 (Cth), along with the facts of recent decisions.

Both the section on the sale of goods legislation and the chapter on the Vienna Convention deal with the seller's obligations under the contract to deliver goods, that the goods be free from third party rights, and for the conformity of the goods with the contract. The discussion of the Convention integrates the requirements of quantity, quality, description, packaging, fitness for purpose and conformity with sample with the implied terms of the sale of goods legislation and points out similarities and differences. The buyer's right to examination is discussed in the context of the Convention but not in the context of the sale of goods legislation.

In the sale of goods schema, the remedies of the seller may include rights in the goods and rights against the buyer. The book discusses the seller's remedies under the Convention as set out in Articles 62-5 and Articles 71-8. The buyer's remedies in Articles 46-52 and Articles 71-8 are also discussed. The text of the Vienna Convention is usefully provided in an appendix.

A further chapter deals with contracts for the carriage of goods by sea, air and land. This includes a useful discussion of the Hague Visby Rules, the *Carriage of Goods by Sea Act* 1991 (Cth) and bills of lading in general.

Finance

This section has two chapters: means of payment in international trade and an introduction to international banking. The first sets out the international and Australian legal framework for payment in international transactions. There is a useful section which consists of a glossary of terms used, payment systems and a description of various methods of payment. The bulk of the chapter is an account of bills of exchange and letters of credit. Mo sets out the differences between bills of exchange and documentary credit. The book draws out the comparisons between the *Bills of Exchange Act* 1909 (Cth) and the 1930 Geneva Uniform Law on Bills of Exchange and Promissory Notes, and sets out the 1979 International Chambers of Commerce (ICC) Uniform Rules for Collections. It also refers extensively to the ICC Uniform Customs and Practice for Documentary Credits - UCP500 - which describes, categorises and defines the legal effect of various forms of documentary credit.

The chapter on international banking contains an account of the international bond market, the role of the International Monetary Fund, and the importance of exchange controls and foreign exchange risks to the conduct of international trade. There is also a short account of factoring, essentially trading in debt or receivables, in international trade. It may have been interesting to have included an account of sovereign debt as another matter which has an impact on international trade.

Foreign Investment

This section of the book describes various forms of foreign investment such as foreign direct investment and licensing agreements, and outlines the various efforts made by international bodies such as the Organisation for Economic Cooperation and Development (OECD), United Nations bodies, and the World Trade Organisation (WTO) through the General Agreement on Tariffs and Trade (GATT) to regulate foreign investment and multi-national enterprises. Most of these efforts are in the form of declarations, guidelines and codes and are not binding.

One chapter deals with foreign investment law in Australia, China, Taiwan and Japan. The section on Australia outlines the legal framework including the *Corporations Law, Foreign Acquisitions and Takeovers Act* 1975 (Cth), and other relevant federal laws such as the *Broadcasting Services Act* 1992 (Cth). It also examines the roles of the Federal Treasurer and the Foreign Investment Review Board. The discussion of China is more extensive than that of Taiwan or Japan, and includes an account of the Chinese National Company Law of 1993.

GATT

The General Agreement on Tariffs on Trade is the primary international agreement to foster economic well being through promoting freer trade and the reduction of tariffs.

Mo provides an account of the origin and chief principles of GATT, and lists the agreements administered by the World Trade Organisation as a result of the Uruguay Round of negotiations by parties to the GATT. The text also provides a brief introduction to anti-dumping, customs valuation and subsidies. The section on Australia and GATT sets out the legal framework for the control of imports and exports. More use could have been made of scholarly work in this area. There is also an account of the Australia New Zealand Closer Economic Relations - Trade Agreement, and of the European Union.

International Commercial Disputes

It is a little difficult to understand why the book has two sections dealing with conflict of laws. One chapter at the beginning of the book is an introduction to the function and principles of conflict of laws. The other, towards the end of the book, deals with International Commercial Litigation and conflict of laws. The section dealing with the function of conflicts of laws has some excellent hypotheticals dealing with the trading relationship between Australia and China. The latter section analyses the application of conflicts principles to contracts, torts, real property, and chattels personal. This latter chapter also has a section on the enforcement of foreign judgments in Australia which outlines the legislative framework (both Commonwealth and State) for the enforcement of foreign judgments. It may have been useful to include a section on the enforcement of foreign judgments in countries other than Australia, particularly those countries with whom Australia has a significant commercial relationship. The Hague Conference on Private International Law is outlined in Chapter two which lists and describes international organisations or treaties concerning trade and commerce. Although it is regarded as 'dead in the water', reference could have been made to the 1971 Draft Convention on the Recognition and Enforcement of Judgments. It should be noted that Australia is now represented on the Special Commission to work on a new draft of a Convention for the Recognition and Enforcement of Judgments.

The final chapter of the book deals with alternative means of settling international commercial disputes. It describes a number of conventions dealing with the arbitration of disputes. The book outlines the application and jurisdiction of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards which deals with awards based on the law of a country different from the one where the award is to be enforced. It may have been useful to comment on the extent to which Australia and its trading partners have acceded to the Convention. For instance, Thailand acceded to the Convention in 1959, Japan in 1961, the USA in 1970 and Australia in 1975. The chapter also discusses the 1965 Washington Convention on the Settlement of International Investment Disputes between States and Nationals of

Other States, which created the International Centre for Settlement of Investment Disputes (ICSID). The ICSID has rules for conciliation and arbitration of investment disputes. Legislation based on the UNCITRAL Model Law on International Commercial Arbitration has been enacted in Australia in the *International Arbitration Act* 1974 (Cth). The book outlines a number of Australian decisions. In this Year of South Asia, it might be noted that India is one of the most recent countries to pass legislation based on this model law. The *Arbitration and Conciliation Act* 1996 (Cth), was assented to in the middle of 1996 and is an important development in the economic liberalisation of India. Mo argues that international commercial arbitration is a more effective way to achieve consistent interpretation of the Vienna Sales Convention which operates as the domestic law of each contracting party and thus subject to different interpretation.

This final chapter also reviews the major governmental and non-governmental arbitral institutions. This includes the arbitration services offered by the ICSID which are limited to disputes involving investment where the parties are a government authority of a contracting state and a national of another contracting state under the 1965 ICSID (Washington) Convention. It should be noted that Australia did not ratify the Convention until 1991. It should also be noted that other commentators have suggested that the model arbitration clause recommended by the ICSID is not sufficient to overcome jurisdictional objections to an ICSID arbitration. Other arbitration institutions which are discussed include the International Chamber of Commerce, the American Arbitration Association and the London Court of International Arbitration. In addition to other European based arbitration centres, mention could also have been made of arbitration centres in the Asia Pacific region such as the Hong Kong International Arbitration Centre, the Kuala Lumpur Regional Arbitration Centre and the Singapore International Arbitration Centre. The chapter describes Australian centres for arbitration.

Conclusion

This is not a text for the specialist. It is not the book to go to for an account of, say, Australian sales law or bills of exchange law, but it does place these areas of the law in an international commercial context. Nor does it provide a comprehensive survey of the literature on particular issues, such as the GATT and agriculture, a matter that has been of some interest to Australian legal scholars. The value of the book is that it does provide the structure for a comprehensive understanding of the many facets of international commercial activity. Its systematic compilations of the legal framework for any particular issue and its close attention to explanation of the function of regulatory organisations and the meaning of terms, make it a useful introduction to a great many topics.