# COMMERCIAL LAW ISSUE

**Papers presented at the 7th Transnational Commercial Law Teachers’ Conference**

<table>
<thead>
<tr>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Introduction</td>
<td>1</td>
</tr>
<tr>
<td>Bruno Zeller</td>
<td></td>
</tr>
<tr>
<td>Teaching Transnational Commercial Law in the African Context</td>
<td>3</td>
</tr>
<tr>
<td>Seig Eiselen</td>
<td></td>
</tr>
<tr>
<td>The Cape Town Convention – The Australian Experience &amp; the View from the Classroom</td>
<td>23</td>
</tr>
<tr>
<td>Eva Chye</td>
<td></td>
</tr>
<tr>
<td>Equity in Active Learning and Peer-review in Designing International Commercial Law PG Units</td>
<td>41</td>
</tr>
<tr>
<td>Camilla Baasch Andersen</td>
<td></td>
</tr>
<tr>
<td>Natural Resources and Teaching Transnational Commercial Law</td>
<td>55</td>
</tr>
<tr>
<td>Thomas Keijser</td>
<td></td>
</tr>
</tbody>
</table>

**Commercial law developments**

<table>
<thead>
<tr>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Explaining the Corporation to Students and Other Non-specialists: A Graphic Approach</td>
<td>69</td>
</tr>
<tr>
<td>Benedict Sheehy</td>
<td></td>
</tr>
<tr>
<td>The Trendtex Principle in Australian Law: Context and Recent Developments</td>
<td>85</td>
</tr>
<tr>
<td>Glen Anderson</td>
<td></td>
</tr>
</tbody>
</table>

**Case note**

<table>
<thead>
<tr>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Natural Justice in International Commercial Arbitration: TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd</td>
<td>113</td>
</tr>
<tr>
<td>Tanya Shankar</td>
<td></td>
</tr>
</tbody>
</table>
INTRODUCTION

Bruno Zeller

Currently – though, encouragingly, to a diminishing extent – law students are taught subjects in neatly prepared packages. This is especially the case where legal education requires compulsory instruction in particular aspects of the domestic legal system. As an add-on, units in international and comparative law are offered as electives. The end product of such a legal education is a legal practitioner who believes that domestic laws are the only laws he or she needs to know. Indeed, this is the opinion of many law students, who have been trained and who expect to practice exclusively within a legal system. However, this assumption is misguided, as even domestic systems are not immune to international law developments. The contributions to this special edition of the University of Western Australia Law Review, which arose out of the 7th Transnational Commercial Law Teachers’ Conference held on 25 and 26 November 2015, highlight this.

In a global commercial context, the significance of national borders is in decline. There is an increasing volume of transnational law affecting domestic legislation, such as the Cross-Border Insolvency Act 2008 (Cth) enacting the UNCITRAL Model Law on Cross Border Insolvency. As a result, the increasing focus of the academic world is on the effect and utility of harmonising and unifying laws. However, a survey of the faculty in most (if not all) law schools would, one expects, show that the vast majority of staff still think and teach in their specific ‘boxes’ without any thought to interlinking the domestic law with the burgeoning volume of transnational law.

The Conference highlighted the interplay between home-grown legislation and ‘imported’ law, which requires special attention in the teaching process. It goes without saying that the intent of transnational law reform is to harmonise – that is, to bring together and reconcile variations in – aspects of law in respect of which participating jurisdictions have already legislated. Thus, a transnational law such as the Cape Town Convention will touch upon other areas of domestic law, beyond the direct subject matter of the transnational law,

* BCom, BEd, PhD, (Melb); MIL (Deakin). Professor, Faculty of Law, The University of Western Australia; Adjunct Professor, School of Law, Murdoch University; Fellow of the Australian Institute for Commercial Arbitration; Member, MLAANZ Panel of Arbitrators; Visiting Professor, Stetson University College of Law; Visiting Professor, Humboldt University of Berlin.
such as insolvency, the PPSA and secured financing. The task of the transnational teacher is to make sure that students understand not only the more obvious features of a new transnational law, but also where and how the law reform instrument interacts with other areas of domestic law. Arguably, knowledge of conflict of laws is the gateway into an understanding of the interrelationship between domestic law and transnational law. The most important aspect of teaching transnational law is to instill in our students a competence that does not end at the national borders.¹

Another prominent theme of the Conference was the changing focus of transnational law. No longer is it the drafting of a body of law like the Vienna Sales Convention that attracts the attention of organisations such as UNIDROIT or UNCITRAL. Rather, law reform now occurs in specialised areas in which the business community has a special interest, such as the Cape Town Convention on International Interests in Mobile Equipment.

On that basis, a view of the transnational landscape is incomplete without considering the role of industry. Rather than viewing transnational commercial law reform through a state-centric lens, Professor Gopalan suggests that a private demandeur-centric approach is more appropriate. That is, it is the preferences of these demandeurs that determines the form and structure of transnational laws, notwithstanding that those laws are ostensibly agreed between state parties. The design of the Cape Town Convention bears this out.² While outcomes in transnational law arguably are more and more driven by industry, it remains the role of the state to decide whether the outcomes are in their best interest. However, as the Incoterms and the Uniform Customs and Practice for Documentary Credits (UCP) have shown, if states not implement laws, industry (in this case the International Chamber of Commerce) will incorporate soft laws as part of their contractual design.

It is therefore important, in teaching the next generation of drafters of contract, that a full view of the transnational landscape is presented, which covers the interplay between transnational and domestic laws, and between states and industry.

TEACHING TRANSNATIONAL COMMERCIAL LAW
IN THE AFRICAN CONTEXT

SIEG EISELEN

CONTENTS

I Introduction .................................................................................................. 3
II Legal Landscape in Africa ........................................................................... 6
III Economic Development Blocks ................................................................. 8
IV Legal Harmonization .................................................................................. 15
V UNCITRAL in Africa ..................................................................................... 18
VI Teaching Transnational Commercial Law .............................................. 20
VII Conclusion .................................................................................................. 22

I INTRODUCTION

There is little doubt that the process of globalisation in all spheres of life, but importantly in international trade is placing strain on domestic laws to properly provide for acceptable solutions in international commercial relations. Globalisation is also detected in the regional organisations that are coming into existence to overcome the obstacles of national borders such as different legal systems and rules, customs and excise duties, standards and the free movement of goods. In this context one needs to look no further than organisations such as the European Union, OHADA in West Africa, COMESA in East-Africa, NAFTA in North America and of course Mercosur in South America.

The relative slowness of the law to respond to the challenges posed by globalisation is mentioned quite often as one of the major obstacles in the path of greater globalisation and international trade.\(^1\) The process of amending the law to respond to new challenges is notoriously sluggish causing international

---

traders to simply accept the legal risks and uncertainties involved, rather than lag behind in developing their international markets.

Unlike international trade which barely knows any national borders these days, law is still very much a domestic affair – there is as yet no overarching international trade law or *lex mercatoria* that will generally apply to international transactions except where the parties make such concepts and regimes applicable to their transaction. Every international trade transaction is still very much based on the domestic law of a specific country to be chosen by the parties or appointed by the rules of private international law. Domestic laws differ quite significantly even on something as essential as sales law. For instance, most civil law systems require a buyer to inform the seller of any non-conformity of the goods within a fairly brief period of time after which the buyer may lose the remedies available for such non-conformity. In systems based on the common law the duty to notify the seller of deficient goods, is much less clearly defined and usually does not lead to a loss of remedies; the failure to give a timely notification merely reflects on the probability of the buyer’s allegations of non-conformity. Such differences may have quite significant consequences for the conduct of the various parties to a sales contract depending on their understanding of the law. For this reason a number of countries around the world have tried to implement harmonized or unified law in targeted areas. The level of unification and harmonization within the

---


5 Schwener, above n.4 Article 39 para 4; Eiselen and Kritzer, above n.4, Article 39 para 34.
European Union is at an unprecedented level. In Africa the work of OHADA is well known in this regard.\(^6\)

The globalisation of trade has also led to the formation of a number of Free Trading Areas as provide for in the World Trade Organisation Convention ("WTO Convention"). Although one of the key principles of the WTO Convention, namely most favour nation status as contained in Part I Article I of the General Agreement on Trade and Tariffs 1947 (GATT), would seem to conflict directly with the establishment of free trade zones, GATT makes a specific exception for this anomaly in Article XXIV.\(^7\)

In South Africa the teaching of international or transnational commercial law is still in its infancy. The isolation of South Africa during the apartheid years meant that there was no great need or emphasis on internationalisation and the teaching of international commercial law. The first course in this discipline was only launched in 1996 when I started the taught LLM in Import and Export Law at the University of Potchefstroom.\(^8\) As there was nothing similar, the structure of the course was to a large extent based on my own academic expertise and my practical experience, as well as the perceived needs of practice.

At present there are five taught masters courses at South African universities, each with its own distinct flavour and composition dependent on the expertise and interests of the lecturers.\(^9\) Although transnational commercial law forms part of the curricula of all of these programs, some of them include quite a large portion of international trade law, ie WTO and other related laws falling more in the public international law sphere. For purposes of this discussion, transitional commercial law is seen as those areas of law more traditionally associated with private law such as contract, private international law and payment law.

Teaching transnational commercial law in the African context as we do, cognizance must be taken of all the various regional bodies involved in free

---


\(^7\) J T Gathii *African Regional Trade Agreements as Legal Regimes* (Cambridge University Press, 2011) 86-87.

\(^8\) Now the Potchefstroom Campus of the Northwest University.

\(^9\) The available courses are taught in the law schools of the Northwest University, University of the Free State; Stellenbosch University, University of Cape Town and University of the Witwatersrand.
trade areas and the harmonization or unification of law in their region. The legal landscape in Africa is further interesting due to the influence of colonial law which still persists in many countries on the continent or form the basis for their current law. The discussion will be focused on the various regional harmonization and economic bodies which must be taken into consideration when teaching transnational commercial law, before briefly dealing with the composition of the curriculum of the Northwest University program where I have been involved since 1996.

II Legal landscape in Africa

The introduction of the Napoleonic Code in the Democratic Republic of the Congo (“DRC”) in the course of the 19th century is illustrative of the way in which European civil law, and more particularly contract and sales law was imported into Africa by the colonizing powers, but it also has certain quirks of its own. Kahindo remarks that when the Belgian colonizers arrived in the Congo, they did not find a country without law, but a country where the law was unwritten and based on custom as was the case with most other sub-Sharan African countries.

In the French colonies the Code Napoleon was introduced without further ado, but in the Congo the Belgian King appointed a drafting civil code commission composed of experienced Belgian lawyers, the so-called Superior Council. Although the Superior Council drafted a novel civil law for the Congo, taking into account the latest codes in Europe, the law was still based largely on Belgian law, which in turn was still largely based on the Napoleonic Code. And so the Book on Contracts and Conventional Obligations was published in 1888, based on Belgian and French law, but not identical to it.

10 In South Africa I have also taught in the programmes of Stellenbosch, the University of Johannesburg and the University of the Witwatersrand besides the Potchefstroom programme.
English common law, and more specifically English contract law and sales law was introduced in some of its colonies and protectorates like Zambia (formerly Northern-Rhodesia), Kenya, Malawi (formerly Nyasaland), parts of Cameroon and Tanzania (formerly Tanganyika). In other colonies and protectorates like South Africa, Botswana (formerly Bechuanaland) and Zimbabwe (formerly Southern Rhodesia) the Roman-Dutch civil law which had been established by the Dutch was left intact. Many of these countries also chose to base their commercial legislation on English legislation rather than the modern Dutch codes as English legislation was much more accessible due to the language.

The one exception is South Africa where under Dutch rule the Roman-Dutch law was introduced. When England annexed the Cape in 1806 the Roman-Dutch civil law which was already well established in the colony, was simply continued to be applied. This also applied to other Southern African countries such as Namibia, Swaziland and Zimbabwe where Roman-Dutch law was also established. Mancuso quite correctly indicates that although the legal systems of African countries are generally classified according to the legal system introduced in the colonial period, important changes have taken place and there has also been some Africanization of the law.

It is against this background that the work conducted by regional economic blocks and legal harmonization efforts must be seen. In a globalized economy the modernization of antiquated colonial laws and the removal of stumbling blocks such as perceived legal uncertainty has become a priority.

14 Matipé supra n 13, 10-11.
15 H R Hahlo and E Kahn The South African Legal System and its Background (Juta 1973) 571 ff.
16 Hahlo and Kahn supra n 15, 571-2.
17 Hahlo and Kahn supra n 15, 578-9.
18 Mancuso supra n 12, 45.
III ECONOMIC DEVELOPMENT BLOCKS

A Introduction

As part of teaching transnational commercial law in the African context it is necessary to take cognizance of a number of regional economic blocks and regional legal harmonization efforts. In some cases there is an overlap between the regional economic cooperation and legal unification or harmonization efforts. In this section a brief introduction will be provided to the most important of these blocks and efforts. Although much has been made politically about the African Economic Community after the signing of the Treaty in Abuja in June 1991, so far little tangible has been achieved. One of the reasons may be that the architects of that project failed to properly analyse the different regional economic blocks and harmonisation efforts before embarking on that venture.20

B ECOWAS

The major emphasis of creating regional economic communities in West Africa was the liberalization of intracommunity trade and related projects such as linked infrastructure to support the economies of the participating states. It also included the free movement of people within the region.21 The organizations established include the Economic Community of West Africa (ECOWAS), the West African (UEMOA),22 and the now defunct Mano River Union.23

ECOWAS was founded in 1975 and is based on the Treaty of Lagos. Its membership numbers 15 and consists of Benin, Burkina Faso, Cape Verde Islands, Gambia, Ghana, Guinea, Guinea Bissau, Ivory Coast, Liberia, Mali,

21 Bundu supra n 20, 31; W C Peters, The Quest for an African Economic Community – Regional Integration and its Role in Achieving African Unity – The Case of the SADC (Peter Lang, 2010) 123-4;
22 Gathii supra n 7, 357-8.
23 Gathii supra n 7, 4.
Niger, Nigeria, Senegal, and Sierra Leone, Togo. The dominant economic countries in the region are Nigeria, Ghana and the Ivory Coast. Cocoa, coffee, timber, cotton and oil are the region’s main export products.

Although the one of the stated missions of ECOWAS is the economic integration of the region, the member states can be grouped into two distinct monetary groups, namely the CFA franc region and the non-CFA region. The CFA franc is a common currency which is guaranteed by the French treasury and has been pegged to the Euro since 1999. The countries using it are Benin, Burkina Faso, Guinea Bissau, Ivory Coast, Mali, Niger, Senegal, and Sierra Leone, Togo. The countries in the non CFA group use their own currencies. In a number of countries such as Mali, Niger and Nigeria, Sharia law also plays a role in commercial legal matters.

In 2000 the heads of state of six other African countries decided to set up a new monetary zone known as the West Africa Monetary Zone (WAMZ). These non-francophone countries, namely Gambia, Ghana, Guinea, Liberia, Nigeria and Sierra Leone, signed the Accra Declaration which defined the objectives of the Zone. The currency, the ECO, was to be launched on 1 January 2015 but that did not materialize. All the ECOWAS countries are now expected to adopt a single currency regime by 2020, after the failed attempts to introduce the ECO for the non-francophone countries in the region.

There is no common commercial law which applies in the region although a number of the countries are members of OHADA, namely Benin, Burkina Faso, Gambia, Guinea, Guinea-Bissau, Mali, Niger, Senegal and Togo. Under the OHADA Treaty countries must adopt inter alia the General Commercial Law. The underlying commercial in the region is based either on

24 S Buthelezi Regional Integration in Africa: Prospect & Challenges for the 21st Century (Ikwhezi Afrika, 2006) 129. See also ECOWAS Member States <http://www.ecowas.int/member-states/>;
Peters supra n 21, 120-1; Gathii supra n 7, 144-5.
25 Buthelezi supra n 24, 129-130.
26 Buthelezi supra n 24, 129.
27 Gathii supra n 7, 352 ff.
28 ECOWAS <http://www.ecowas.int/>.
civil law, and more particularly the French Civil Code and Portuguese Civil Code or English common law. In the countries where the unified OHADA law has been adopted the general contract law and sales law has been displaced by the OAHDA laws.

At present ECOWAS is focused on their Vision 2020 programme. The programme aims at setting a clear direction and goal to significantly raise the standard of living of the people through conscious and inclusive programmes that will guarantee a bright future for West Africa and shape the destiny of the region for many years to come.31

C ECCAS

The Economic Community of Central African States (ECCAS) was founded in 1983 and aims at the promotion of regional economic cooperation in central Africa. 32 It aims to achieve collective autonomy, raise the standard of living of its populations and maintain economic stability through harmonious cooperation.33

It had its origins in the Customs and Economic Union of Central Africa (or UDEAC) that was established by the Brazzaville Treaty in 1964 to form a common customs union. UDEAC was superseded by the Economic and Monetary Community of Central Africa (CEMAC) which established a common monetary union based on the Central Africa CFA franc, which is guaranteed by the French treasury similar to the West Africa CFA franc.34

30 Mancuso supra n 12, 45.
31 Chapter II Article 4 of the Treaty. See also ECOWAS, About <http://www.ecowas.int/about-ecowas/vision-2020/>.
In 1981 the UDEAC leaders decided to form a wider economic community of Central African states and was established in 1985. Its current membership consists of Angola, Burundi, Cameroon, Central African Republic, Chad, Congo, Democratic Republic of the Congo, Equatorial-Guinea, Gabon, Rwanda and São Tomé.

There is no common commercial law which applies in the region although most of the countries are members of OHADA, with the exception of Angola and. Under the OHADA Treaty countries must adopt *inter alia* the General Commercial Law. The underlying commercial in the region is based either on civil law, and more particularly the French Civil Code and Portuguese Civil Code or English common law although the latter’s influence is only felt in part of the Cameroon. In the countries where the unified OHADA law has been adopted the general contract law and sales law has been displaced by the OHADA laws.

**D EAC**

The East African Community was founded in 1967 as a regional economic promotion block in the African Great Lakes region in eastern Africa. After its initial failure and collapse in 1977 due to disagreements on representation and other political tensions in the region, the organisation was revived in July 2000.

---

35 African Union *Economic Community of Central African States* (<http://au.int/en/recs/eccas>); Gathii *supra* n 7, Gathii *supra* n 7, 342.

36 Mancuso *supra* n 12, 45.

37 Kahindo *supra* n 11, 45. Under the Treaty of Versailles Cameroon was placed in part under British rule (2 provinces) and in part under French rule (8 provinces) resulting in the dual application of English common law and French civil law in regard to commercial and sales laws. See S Cziment, “Cameroon: A Mixed Jurisdiction? A Critical Examination of Cameroon’s Legal System through the Perspective of the Nine Interim Conclusions of Worldwide Mixed Jurisdictions” 2009 (28) Tulane University Law School 1-12; Matipé *supra* n 13, 13 ff.

The broad objects of EAC is to develop policies and programmes aimed at widening and deepening co-operation among the partner states in political, economic, social and cultural fields, research and technology, defence security and legal and judicial affairs, for their mutual benefit. Although the countries intended to establish a customs union, a common market, a monetary union and ultimately a political federation, only the establishment of a free trade agreement has come to fruition.

EAC currently has six members, namely Burundi, Kenya, Rwanda, South Sudan, Tanzania and Uganda. Most of these countries are also members of COMESA, another economic integration block that is active in the area. The official languages of the Community is English, but the Treaty aims at developing Kiswahili as a lingua franca for the region.

There is no common commercial law which applies in the region. The underlying commercial law in the region is based either on civil law, and more particularly the French Civil Code (in Burundi) or English common law (in Kenya, Tanzania and Uganda).

E COMESA

The Common Market for Eastern and Southern Africa traces its genesis to the mid-1960s. In the aftermath of the colonial period, the post-independence period was characterised by a buoyant and optimistic mood of ‘of pan-African solidarity and collective self-reliance born of a shared destiny’. The first step was the establishment of a Preferential Trade Area for Eastern and Southern Africa” (PTA) in 1981 with the signing of the PTA Treaty. The Treaty envisaged its transformation into a Common Market and, in conformity with this, the Treaty establishing the Common Market for Eastern and

39 See Article 5(1) of the Treaty.
40 See Article 5(2) of the Treaty.
41 Alexander supra n 38, 6-7.
42 See below. Tanzania and South Sudan are not members of COMESA.
43 See Articles 119 and 137 of the Treaty.
44 See COMESA About <http://about.comesa.int/index.php?option=com_content&view=article&id=95&Itemid=117>. 
Southern Africa, COMESA, was signed on 5th November 1993 in Kampala, Uganda and was ratified a year later 8th December 1994. COMESA’s Vision is to “be a fully integrated, internationally competitive regional economic community with high standards of living for all its people ready to merge into an African Economic Community”. It also aims to achieve sustainable economic and social progress in all member states through increased co-operation and integration in all fields of development particularly in trade, customs and monetary affairs, transport, communication and information, technology, industry and energy, gender, agriculture, environment and natural resources. Although not explicitly stated, it also aims at greater legal harmonization in specific areas of the law.

COMESA has 20 members namely Burundi, Comoros, Congo, Democratic Republic of the Congo, Djibouti, Egypt, Eritrea, Ethiopia, Kenya, Libya, Madagascar, Malawi, Mauritius, Rwanda, Seychelles, Sudan, Swaziland, Uganda, Zambia and Zimbabwe.

The official languages of the Community is English, French and Portuguese.

There is no common commercial law which applies in the region. The underlying commercial law in the region is mostly based on civil law, and more particularly the French Civil Code (in Burundi, Comoros, Congo, Democratic Republic of the Congo, Djibouti, Egypt, Madagascar, Mauritius, Rwanda,) or English common law (in Kenya, Malawi, Uganda, Zambia).

46 COMESA Treaty Article 3.
49 Article 185 of the COMESA Treaty. Portuguese was included as an official language due to the initial membership of Angola and Mozambique, both of which have now withdrawn from the Treaty, leaving no Portuguese speaking country as a member.
50 Peters supra n 21, 163 refers to the artificial character of COMESA as a regional body.
51 Although the DRC had the civil law of Belgium imposed, the Belgium civil code was largely based on the Napoleonic Code. See Kahindo supra n 11, 31 ff. Two legal systems are however based on Roman-Dutch law, namely Swaziland and Zimbabwe.
exception is Ethiopia where no colonial power introduced its own private law. Instead a distinctly Ethiopian Civil Code was drafted in the 1950’s, drawing from both civil and common law where modernization was necessary.\textsuperscript{52} In a number of countries such as Libya and the Sudan Sharia law also plays a role in commercial legal matters.

\section*{SADC}

The Southern African Development Community (SADC) is an organisation that strives for regional integration to promote economic growth, peace and security in the southern African region. It was founded on 17 August 1992 with the adoption of the Treaty of the Southern African Development Community.\textsuperscript{53} It was preceded by Southern African Development Coordination Conference (SADCC) whose membership consisted of the so-called Front Line States.\textsuperscript{54} These states were involved in the political and military struggle to bring an end to apartheid rule in South Africa. After the fall of apartheid the way was open to establish a regional economic block including South Africa.\textsuperscript{55}

SADC aims to create common political values, systems and institutions among its 15 member states, to build social and cultural ties, and to help alleviate poverty and enhance the standard of living among a regional population of 277-million.\textsuperscript{56} It stands for the sovereignty of its member states, the upholding of human rights and the rule of law, and the peaceful settlement of disputes.\textsuperscript{57}

SADC has 12 members, namely Angola, Botswana, Democratic Republic of the Congo, Lesotho,

\textsuperscript{52} For a more detailed discussion see T Beru ‘Brief History of the Ethiopian Legal System – Past and present’ (2013) 41 International J of Legal Information 351 ff where the codification of Ethiopian law is discussed.
\textsuperscript{54} Oosthuizen supra n 53, 54-54.
\textsuperscript{56} See the Preamble to the Treaty and Article5. See also Gathii supra n 7, 211-2
\textsuperscript{57} See Article 4 of the Treaty.
Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania and Zimbabwe.\textsuperscript{58} The working languages of the Community are English, French and Portuguese.\textsuperscript{59}

There is no common commercial law which applies in the region. The underlying commercial law in the region is mostly based on civil law, and more particularly the French Civil Code (in the Democratic Republic of the Congo,\textsuperscript{60} Madagascar, Mauritius, Mauritius, and the Seychelles) the Roman-Dutch law (Botswana, Lesotho, Namibia, South Africa,\textsuperscript{61} Swaziland, and Zimbabwe), Portuguese law (in Angola and Mozambique or English common law (in Malawi and Tanzania).

As envisaged in the Treaty SADC has adopted a number of protocols to further the aims of the organisation. The Protocols on Trade (1996), Finance and Investment (2006) and Trade and Services (2012) are the most relevant for purposes of trans-border commercial law.

\textbf{IV Legal Harmonization}

\textbf{A Introduction}

Although many of the organisations listed above are also involved in legal harmonization projects, these projects are aimed at very specific issues and is not one of the primary aims of the organisations. There is, however, one organisation whose primary aim has been the legal harmonization and unification of commercial law, namely OHADA. It is the only regional organisation in Africa which has had considerable success with legal harmonization as its instruments have been adopted across most of francophone West Africa.\textsuperscript{62}

\textsuperscript{58} See SADC Member states <http://www.sadc.int/member-states/>.
\textsuperscript{59} Treaty Article 37.
\textsuperscript{60} Although the DRC had the civil law of Belgium imposed, the Belgium civil code was largely based on the Napoleonic Code. See Kahindo \textit{supra} n 13, 31 ff. Two legal systems are however based on Roman-Dutch law, namely Swaziland and Zimbabwe.
\textsuperscript{61} For a good introduction to South African commercial law see P Stoop \textit{Commercial and Economic Law in South Africa} (Alphen ad Rijn 2015).
\textsuperscript{62} For a history of legal commercial law harmonization efforts in Africa see Matipé ‘\textit{supra} n 13, 21 ff.
B OHADA

The Organization for the Harmonization of Business Law in Africa (OHADA) was established on 17 October 1993 in Mauritius with the signing of the OHADA Treaty. OHADA was created with the objective of fostering economic development in West and Central Africa. Its objective is to create a better investment climate so as to attract investment in order to foster more growth in this market which includes 225 Million of Africans. The Treaty is open for accession by any state member of the Organization of African Unity (OAU) as well as the accession of any other state not member of the OAU invited to accede to the agreement of all States Parties. The geographical area thus may stretch beyond the borders of the franc zone.

The main reason for establishing the Treaty was the awareness that the globalization of trade in a world of national commercial laws, created unnecessary barriers to the liberalization of trade, especially where the commercial laws of many West African countries were antiquated and out of step with modern requirements. The purpose of OHADA is therefore providing member states with a harmonised set of business laws by elaborating and adopting simple and modern common rules adapted to African economies.

OHADA consists of 17 member states at present, namely Benin, Burkina Faso, Cameroon, Central African Republic, Chad, Comoros, Congo, Equatorial Guinea, Gabon, Guinea-Bissau, Mali, Niger, Senegal, Togo and the Democratic Republic of the Congo. The official working language of OHADA is French which

63 OHADA is the French acronym for Organisation pour l’Harmonisation en Afrique du Droit des Affaires.
64 OHADA Actualité <http://www.ohada.org/lohada.html>.
66 Treaty Article 53.
67 Treaty Article 53. See OHADA Actualité <http://www.ohada.org/lohada.html>. See also Kahindo supra n 11, Kahindo supra n 11, Kahindo supra n 11, 47.
68 Moumoul supra n 65, 7. See for instance the case of the Democratic Republic of the Congo where 19th century Belgian law prevailed until fairly recently with the adoption of the OAHDA laws – Kahindo supra n 11, 4, 31-44, Mancuso supra n 12, 41.
69 Kahindo supra n 11, 45; Mancuso supra n 12, 40-1.
has caused some difficulties in a country such as Cameroon where judges in the English provinces of the country have been reluctant to apply the Uniform Acts because they were initially only available in French. The Uniform Act on Commercial Law has been translated, but it would seem that the translation is also causing difficulties because of poor translation in a number of instances making a substantive differences.

According to Articles 5 and 6 of the Treaty, OHADA statutes are prepared by the Permanent Secretariat in association with governments of member states. They are adopted by the Council of Ministers on the advice of the Cour Commune de Justice et d’Arbitrage. Those statutes are known as “Uniform Acts. So far nine various Uniform Acts have been enacted under OHADA’s sponsorship. These include the Acts relating to Commercial Law, and Commercial Companies and Economic Interest Groups; the Acts regulating Securities, Arbitration, and the Carriage of Goods by Road; the Acts organising Simplified Recovery Procedures and Enforcement Measures, Collective Insolvency Proceedings, and Accounting Systems; and more recently, the Uniform Act relating to Cooperative Corporations. Generally the Acts are based on civil law and has borrowed to some extent from French business law.

Central to the OHADA law is Article 10 of the Treaty which states:

_Uniform Acts are directly applicable and overriding in the Contracting States notwithstanding any conflict they may give rise to in respect of previous or subsequent enactment of municipal laws._

This means that OHADA members no longer have any competency to legislate on any matter covered by a Uniform Act and such Acts will take precedence over any local custom, unwritten law of legislation.

The OHADA sales law is contained in Book VIII of the Uniform Commercial Act. The Act applies in all instances where both the parties have

70 Cziment _supra_ n 37, 8; Mancuso _supra_ n 12, 48.
72 Mancuso _supra_ n 12, 41.
73 Kahindo _supra_ n 12, 47.
74 Mancuso _supra_ n 12, 42.
75 Mancuso _supra_ n 12, 48.
their places of business in a OHADA country and therefore also applies to internal commercial sales in the various countries.\textsuperscript{76} This unification of sales law has modernized sales law and commercial law in the region and has made cross-border trade much easier to conduct as they are regulated by one common law. Based on the CISG the OHADA sales law is in line with modern international sales law as the CISG applies to 84 countries worldwide, representing about 80% of world trade. There are 4 OHADA countries which are also CISG members, namely Guinea, Liberia, Gabon and the Congo. It is not yet clear which law will apply if for instance if a Liberian and Congolese company should conclude a sales agreement.

There are a number of other acts which are still being drafted including the Uniform Acts dealing with contract law, labour relations and evidence.\textsuperscript{77}

\textbf{V \hspace{1em} UNCITRAL IN AFRICA}

\textbf{A \hspace{1em} CISG}

Although UNCITRAL has had some major successes with some of its instruments worldwide, it does not really hold true for Africa where the CISG has only been adopted by 14 countries so far as illustrated on the map. Of these members, only Egypt can be described as economically significant party. The two countries with the biggest economies and the most international trade, South Africa and Nigeria, are not yet members of the CISG and do not look likely to do so in the near future.\textsuperscript{78}

The following African countries have adopted the CISG so far: Benin, Burundi, Congo, Egypt, Gabon, Ghana, Guinea, Lesotho, Liberia, Madagascar, Mauritania, Rwanda, Uganda, and Zambia. The reason for the reluctance of African countries to adopt the CISG is not clear. In the case of OHADA countries it may be that due to the close similarity between OHADA sales law and the CISG, there is a reluctance to complicate the

\textsuperscript{76} Kahindo \textit{supra} n 12, 50.
\textsuperscript{77} Kahindo \textit{supra} n 11, 48.
\textsuperscript{78} In respect of South Africa see Eiselen S "Adopting the CISG in South Africa; Reflections 8 years down the line" 2007 \textit{SA Merc LJ} 14-25.
legal situation by introducing a further sales law regime.

The reasons for South Africa's reluctance to become a member is hard to fathom, but it may be that amongst a number of priorities in the Department of Trade and industry, international legal harmonization does not feature high at this stage.\footnote{Eiselen supra n 56 14.} The moves to adopt the convention in the late 1990's came to nothing as the person responsible for the project took employment in the private sector. It was hoped that regional harmonization within SADC might provide the necessary interest and impetus, but even that factor has not yet played any significant role.

The adoption in Africa has been rather fragmented so far and none of the economic development areas such as ECOWAS, COMESA or SADC has taken any steps to adopt the convention. OHADA countries are also unlikely to adopt the CISG as the sales law part of the OHADA Treaty 1993 is based on the CISG and quite similar in many respects, but there are also significant differences.\footnote{See Kahindo supra n 11, 9 ff and 381 ff; U Magnus, \textit{CISG vs. Regional Sales Law Unification with Focus on the New Common European Sales Law} (Sellier, 2012) 3; F Ferrari, \textit{Quo Vadis CISG? Celebrating the 25th Anniversary of the United Convention on Contracts for the International Sale of Goods} (Bruylant, 2005) 79-81.}

\section*{B UNCITRAL Model Law on Electronic Commerce 1996}

The UNCITRAL Model Law on Electronic Commerce has also met with considerable success serving as a drafting model for more than sixty countries worldwide, including Australia, Canada, China, France, India, Korea, South Africa, the United Kingdom and the USA.\footnote{UNCITRAL, \textit{Status UNCITRAL Model Law on Electronic Commerce} (1996) <http://www.unictral.org/unictral/en/unictral_texts/electronic_commerce/1996Model_status.html>.} Unlike conventions, the Model Law only provides harmonizing text to be adopted but also adapted to the needs of a particular country.

Similar to the CISG, use of the Model Law on the African continent has been slow. To date only Gambia, Ghana, Liberia, Madagascar, Mauritius, Rwanda, Seychelles, South Africa, and Zambia have adopted legislation based on the model, but at least there are
indications that at least COMESA and SADC is in the process of supporting the use of the Model Law in their regions. COMESA commissioned a model law in 2011. The draft model law was adopted and recommended by a committee of experts at workshop in Khartoum, Sudan in June 2011. Unfortunately no further developments have taken place since that workshop and it is unclear where the process got stuck. SADC similarly adopted a text based on the UNCITRAL Model Law at a conference in Gaborone, Botswana in January 2012. This text is now an officially recommended Model Law to be implemented by the SADC members.

It is to be hoped that the endorsement of SADC and COMESA for the Model Law will provide impetus for its adoption in more countries in these regions. There are indications that the Model Law is being considered in Kenya, Malawi and Botswana at present.

VI Teaching Transnational Commercial Law

A Materials

It is against this background that transnational commercial law must be taught in the African context. Some of this teaching is missionary in nature, promoting amongst others the adoption of UNCITRAL legal instruments to modernize and harmonize the transnational commercial law of Africa.

With a few exceptions such as South Africa and Egypt, the availability of primary legal materials in African states is notoriously difficult since the publication of legislation and case law is often haphazard and unreliable. The situation is improving with the availability of some of these materials on the internet, but it is still difficult to determine the true legal position in many of these countries. This makes the implementation of harmonized law such as the CISG and OAHDA Uniform Acts particularly important and valuable as they provide a measure of legal certainty.

The CISG provides an excellent example of an international instrument where the relevant legal materials are available and easily accessible on websites such as UNCITRAL82, the Pace Institute for Internationals Commercial Law83.

and the Global Sales Law portal of the University of Basel\textsuperscript{84}, to mention a few. On these sites the not only the primary texts such as the Convention and case law can be found, but also interpretative materials such as books and journal articles. This makes teaching these materials very easy, in contrast to the teaching of domestic law.

B First Steps

The teaching of transnational commercial law in South Africa was for quite a long period restricted to the teaching of maritime transport law at a couple of coastal universities and the teaching of private international law as an elective in LLB programmes. This was caused in part by the isolation of South Africa at the time.

With the dismantling of apartheid and greater freedom South Africa enjoyed economically and the globalization of international trade that was increasing at an unprecedented speed during the 1990’s it soon became apparent to some of us that we needed to introduce course on transnational commercial law.

I started a structured masters course in 1996 building on my research into electronic data interchange and international harmonization at the Potchefstroom University (now Northwest University). This programme is still going strong after almost twenty years. In 1998 a similar programme was introduced at the Free State University. Soon afterwards the University of Stellenbosch, Rand Afrikaans University (now University of Johannesburg and the University of the Witwatersrand also started offering some courses on the subject. Considering the content of these programmes it is clear that often the structure and emphasis of each particular programme has been built around the expertise of the teachers involved. So for instance, does the Northwest University programme reflect my strong background in private law and the law of obligations, whereas the programme at the University of Johannesburg focuses on private international law and procedural law, the strengths of Prof Jan Neels.

\textsuperscript{84} Global Sales Law <http://www.globalsaleslaw.org/>.
C Northwest University Curriculum

The masters course at the Northwest University consists of 4 compulsory core taught courses plus a research component. In addition students must choose one additional elective. The courses are:

**Compulsory modules:**
- International Law of Contracts – CISG and INCOTERMS
- International Instruments of Payment and Guarantee – Letters of Credit and UCP600
- International Transport Law – Hague-Visby, Rotterdam Rules
- Customs and Excise Law – World Customs Organization and the Brussels Harmonized System
- Short dissertation of between 20,000 and 30,000 words.

**Electives:**
- Private International Law and Aspects of Insurance Law
- International Commercial Arbitration
- Cross-Border Insolvency Law and International Transfer of Technology
- International Environmental Law
- International Tax Law

VII Conclusion

Teaching transnational commercial law in the African context is both exciting and challenging. As indicated above one has to take into account a number of different contexts when teaching these courses, not only to sensitize South African students to the multitude of different laws that may be applicable to transnational transactions, but also to accommodate the needs of the growing cohort of African students from north of the South African borders. It is a common feature of most of the South African programmes that about 50% of the student enrolment consists of foreign students, mostly from Africa.
THE CAPE TOWN CONVENTION – THE AUSTRALIAN EXPERIENCE AND VIEWS FROM THE CLASSROOM

Eva Chye*

CONTENTS

I Introduction .................................................................................................. 23
II Background to the Adoption of the Cape Town Convention .................. 25
III Effects of Acceding to the Cape Town Convention ................................ 28
IV A Conclusion to the Australian Experience ........................................... 34
V Views from the Classroom on the Teaching of Transnational Law ...... 37

I Introduction

On 1 September 2015, the Convention on International Interest Mobile Equipment 2001 (‘the Cape Town Convention’) and the Aircraft Protocol (‘the Aviation Protocol’) (together the ‘CTC’) entered into force in Australia.¹ As with all convention the words of Professor Roy Goode apply, namely that “governments around the world display inertia when it comes to ratifying an adopted instrument.”² This is true in the case of Australia but rather surprising especially since the CTC is unique because its invention was driven by industry rather than by government. Furthermore there are very sound financial considerations that support the adoption of the CTC. The Government’s last assessment in 2013 estimated that airlines could save between AU$330,000 to AU$2.5 million for the purchase of a new aircraft.³ This is for both regional and

¹ Student in Masters of International Commercial Law at The University of Western Australia (UWA) and Associate Director and Principal Adviser in the Global Government and Corporate Partnerships division of UWA. I would like to thank Professor Bruno Zeller for his help and support in completing the present article, and also acknowledge Tejaswi Nimmagadda from King & Wood Mallesons, Neil Hannan from Thomson Geer and Jeffrey Wool and the UWA Law School, without whom this research would not have been possible.


³ Commonwealth, Second Reading Speech – International Interests in Mobile Equipment (Cape Town Convention) Bill 2013, House of Representatives, 29 May 2013 ([Anthony Albanese]).
larger airlines. The Government estimated a savings of up to $2.5 million on a new Airbus A30 and $1.7 million on a Boeing 787-8. Regional airlines will be able to expand or renew their fleets and save up to $330,000 on an ATR-72. Discounted financing will also be available for purchases of second hand aircraft which will help smaller regional airlines upgrade and maintain their fleet.4 For a start, it gives Australia a premium discount of up to ten percent from export credit agencies under the Organisation for Economic Co-operation and Development’s (‘OECD’) Aircraft Sector Understanding on Export Credits for Civil Aircraft (‘ASU’).5 In addition to discounts from export credit financing, financial institutions may be willing to reduce their lending charges in light of the enhanced creditor security that the CTC provides. In fact, financiers have indicated a trend towards ratification of the CTC becoming the ‘rule rather than the exception’ when it comes to aircraft financing. This global shift towards the CTC is something that Australia had to confront. Prior to accession, the financial infrastructure for Australia’s aviation industry was incongruent with international standards. Given Australia’s relatively isolated location and reliance on air transportation, harmonising Australia’s aviation securities laws with those that apply internationally would only strengthen Australia’s competitive edge. In contrast, the cost of compliance is small. These primarily involve the costs of logging with the CTC’s international registry (US$200 user set up fee and US$100 registration fee). The Government also found that accession to the Convention would have “no financial impacts on the Commonwealth Budget.”6 Given that the CTC provides the aviation industry with a fee discount from international export credit agencies and generates cheaper finance as a result of reduced capital risk there was no real reason for the government not to ratify the CTC. This is especially so as the convention is cost-neutral to government budgets. This paper therefore argues that the CTC is the perfect impetus for law reform especially in the two connected areas such as the insolvency legislation and the personal property securities legislation and explore the scope of the CTC and its interactions with

4 Campaign Transcript: Key Note Address to CAPA Australia-Pacific Aviation Summit by Deputy Prime Minister (Australian Labour Party, 7 August 2013).
5 Annex 1 of the ASU allows countries that have ratified the CTC under specific declarations to qualify for discounted credit finance from international Export Credit Agencies (ECAs).
national law. This paper discusses Australia’s perspective and how the CTC affects laws in Australia. The issue of how the CTC is reconciled with domestic law is of interest. To that end it is important to understand the background in the negotiations and thinking of government agencies in relation to the CTC.

II Background to the Adoption of the CTC

Australia’s journey leading to 1 September 2015 began as far back as 1996 when the Australian Law Reform Commission (‘ALRC’) tabled a report on “Legal Risk in International Transactions” (more commonly known as the “Cross Borders Report”) ('Report'). Two major findings came out of the Report: the aviation industry supported greater access to international capital market; and when the Report assessed the scope for legal reform in international commerce, it found that a foreign creditor who leased an aircraft to an Australian carrier had to contend with “commercial comfort”. This is rather interesting because Section 27A of the Air Navigation Act 1920 provides the government with legislative authority for the establishment of a register containing security interests in relation to aircraft and aircraft objects. The Department of Transport and Regional Services (‘DOTARS’), which had the function of instituting and maintaining an encumbrance register, did not get around to it. It would not be entirely true to say that Australia did not have a security register for aircraft. There was definitely no registrations system for retention of title claims. The company charge system was recording security for aircraft, however, they were over aircraft as a whole, rather than aircraft objects such as engines and tyres. In addition, Australia did not recognise security interests over aircraft created in other countries. The same mutual lack of recognition was afforded to Australia. As a result, other means of identifying security interests had to be applied, including, the use of fireproof name places in cockpits and on aircraft engines to identify the owner and other interest holders. A part from being a costly exercise, this practice is unreliable since name plating interferes with aircraft safety and maintenance compliance on

---

some engines, making it an impossible exercise. It should be noted, there wasn’t any security system with legislative backing. The problem with not having a proper system of recording securities reared its ugly head not long after this issue was pointed out by the Report. In 2001, Ansett Airlines, Australia’s second largest and oldest domestic carrier collapsed. Ansett owned 14 businesses and 134 aircraft. Hazelton Airlines, a regional airline under Ansett, had to appoint four administrators over its parts due to conflict of interests relating to auditors and between members in the group. As with most airlines when they purchased a fleet of aircraft, Hazelton also purchased spare engines so that these could be swapped out for routine maintenance. When the group went into voluntary administration, engines that originally belonged to a particular aircraft were either undergoing maintenance or on another aircraft. Without a system of recording securities, engines ended up on aircrafts owned by different members of the group. As one can imagine, different members had different secured creditors or creditors with different priority positions. In the end, the administrators report, at paragraph 3.2, recommended the Ansett Group as a whole be pooled because it was concluded that they may never be able to determine the right owner of certain engines. It wasn’t difficult to see why international financiers lost confidence in Australia’s asset security system. Coincidentally, two months after Ansett’s collapse, the CTC was adopted in Cape Town on 16 November 2001 and entered into force on 1 March 2006.

In 2008 the Australian government consulted the aviation industry on whether or not Australia should sign the CTC. Most supported accession to the CTC. They also regarded the CTC’s international register for security in aircrafts objects to be useful. Three significant recommendations by the law firms who made submissions were noted namely a system for dual registration; a preference for the ‘Alternative A’ insolvency regime; and the

10 Its demise in September 2001 has far-reaching implications. It is the largest mass sacking in Australian history with 16,000 jobs lost and threatened another 60,000 jobs in supplier companies and throughout the tourism industry.
11 The real problem with engines was that most of those that arrived with the aircraft were not charged separately and not registered as such on the company’s register of charges. Those, which were delivered separately, were mostly separately registered.
importance of ensuring that Personal Property Securities Act 2009 reforms and the CTC balanced and complemented each other. They also suggested that the CTC be implemented around the same time as the PPSA reforms. All these recommendations were adopted. In 2012 the Minister for Infrastructure and Transport announced that Australia would accede to the Convention. Consequently, the Government called for feedback from key stakeholders and received significant support. The responses expected Australia to benefit both financially and in legally. The respondents saw harmonisation of Australia’s aviation securities laws that are in line with international standards as being desirable. The Government tabled the Regulation Impact Statement and National Interest Analysis at a Joint Standing Committee of the Senate (‘JSCOT’) during the implementation process. These documents provided a good starting point for assessing whether the Convention should be made law in Australia. In summary, the objective of government action is to provide the Australian aviation industry with cheaper access to capital finance, including international finance. In order for this to happen effectively, Australia needs to ensure that its financial infrastructure is consistent with global standards. Financiers needed more certainty around Australia’s insolvency laws in relation to aircraft objects.

In 2013 the enabling legislation International Interests in Mobile Equipment (Cape Town Convention) Act 2013 and the International Interests in Mobile Equipment (Cape Town Convention) (Consequential Amendments) Act 2013 were drafted to provide the legislative framework for the Convention.

---

13 Personal Property Security (PPS) reform brings the different Commonwealth, State and Territory laws and registers regarding security interests in personal property under one national system. PPS reform introduces the Personal Property Securities Act 2009 (Cth) and a single national online PPS register. The PPS replaced numerous State, Territory and Commonwealth electronic and paper registers, such as REVS and ASIC charges.


15 Benefits include (1) improved predictability of the enforceability of security, title reservation and leasing rights in respect of high value mobile equipment and aircraft objects; (2) reduced risks for creditors and consequently borrowing costs for debtors, that will in turn facilitate the extension of credit for the acquisition of aircraft and aircraft engines in Australia; and; (3) harmonisation of Australia’s aviation securities law in line with other participating countries.

to have force of law in Australia. In 2015 Australia’s accession to the CTC completed a formal process, which commenced with the passing of enabling legislation in 2013 and came into effect by proclamation on 1 September 2015. Australia made declarations under Articles 39(1)(a), 52, 54(2) and 55 of the CTC and under Articles XXX(1) and XXX(3) of the Aircraft Protocol which will be discussed below.

III Effects of acceding to the Cape Town Convention

The course of law reform is never a simple process. Any accession to a convention necessitates changes to domestic law hence it is of importance to understand: how the enabling legislation has changed national laws; what has changed; and what are the contentious areas. It is worth noting that Australia considered three alternative models for ratification before acceding to the CTC, including, UNIDROIT providing regulatory tool kits (‘accession kits’) and States are able to choose a number of different routes to incorporation of the specific rules. Each option results in a different outcome. Option one gives the CTC direct force of law in Australia by making all declarations specified in the ‘Sector Understanding on Export Credits for Civil Aircraft’ (‘ASU’). In the event of conflict, the CTC prevails over Australia’s domestic securities law, the PPSA. This in turn means better security for aircraft financiers and reduced costs for airlines. Option two is to do nothing as far as the CTC is concerned. The fact that Australia already amended the PPSA in 2009 and incorporated CTC terms and provisions within it meant that the domestic environment for the protection of securities interests had improved. However, this does not open up access to international finance. Airlines may continue to struggle for finance in a limited local market. Option three is a hybrid approach. It means acceding to the CTC without making all the necessary declarations to qualify for cheaper finance. This option would have little impact on the aviation


18 Department of Infrastructure and Transport ‘Cape Town Convention Implementation Options, Pre-existing Interests, Courts and Insolvency Issues’ (Consultation Paper, Department of Infrastructure and Transport, 2010).
industry and essentially rendered ratification a futile exercise. The recommended option was option one, which promotes maximum economic benefits to all industry stakeholders at minimal costs.

A  Enabling legislation and reforms to national law

So far, studies on the impact of Australia’s accession showed “no major constitutional impediments” that might stop or delay Australian engagement with the CTC.\(^{19}\) The enabling acts that set the legislative framework for Australia’s accession to the CTC and provides for instruments to be made under the legislative power to give the Convention effect in Australia are firstly, the *International Interests in Mobile Equipment (Cape Town Convention)* Act 2013 and its Explanatory Memorandum. As the Explanatory Memorandum pointed out, the enabling acts will allow the Convention “to have precedence over all other laws to the extent that any inconsistency arises.” Secondly, *International Interests in Mobile Equipment (Cape Town Convention) (Consequential Amendments)* Act 2013 which was assed to deal with the PPSA, insolvency and other related issues. It allows amendments to the Air Services Act 1995, Civil Aviation Act 1988,\(^{20}\) and PPSA to ensure the CTC and protocol “complement and operate in harmony” with other Australian laws.\(^{21}\) Thirdly, *International Interests in Mobile Equipment (Cape Town Convention)* Rules 2014 (‘Rules’) which confers powers upon the Civil Aviation Safety Authority (‘CASA’) in relation to an Irrevocable Deregistration and Export Request Authorisation (‘IDERA’). The IDERA Rules will become effective when the CTC commences, which means it is in place as at 1 September 2015. With IDERA rules having been legislated, Australia has adopted the relevant provisions of the Aircraft Protocol relating to irrevocable deregistration and export request authorisations. So how does the CTC apply in Australia?

---


\(^{20}\) The legislative rules require consequential amendments to Part 47 of Civil Aviation Safety Regulation 1998 with regards to the registration of aircraft, identification of the registered operator of an aircraft, transfer of ownership and suspension and cancellation of registration.


\(^{22}\) *International Interests in Mobile Equipment (Cape Town Convention)* Bill 2013 (Cth).
B Australia’s declarations and reservations under the CTC

1 Article 39(1)(a) “Rights having priority without registration”

Gives protection to the State and State entity around the recovery of debt and allows it to arrest or detain aircraft and aircraft object under domestic laws; and a statutory liens registered under the Air Services Act 1995 are non-consensual rights with priority over the International Registry.

2 Article 53 “Determination of courts”

The Federal Court of Australia and Supreme Court of all states and territories have jurisdiction in respect of the CTC.

3 Article 54(2) “Declarations regarding remedies”

In the event of debtor default, Australian courts are required to observe the ‘self help’ nature of remedies available to creditors under the CTC. All parties seeking to enforce the remedies may apply to a court without need to exercise leave of the court. It is expected that international financiers and lessors will welcome access to the CTC’s self help remedies.

4 Article 55 “Declarations regarding relief pending final determination”

Australia will not adopt the CTC’s interim relief measures.

5 Article 30(1) “Declarations relating to certain provisions”

Australia will apply the following Articles under the Aircraft Protocol.

6 Article 8 “Choice of law”

Parties may agree freely on a choice of law that is to govern their contractual rights and obligations, wholly or in part. This rule becomes part of Australia’s domestic law in relation to the contracts.

7 Article 13 “Insolvency assistance”

Australian courts will cooperate with foreign courts and foreign insolvency administrators in carrying out Article 11. This means two things: Australia will adopt IDERA, a remedy provided under the CTC that allows for deregistration and export of an aircraft asset in the event of debtor default or insolvency. It is a voluntary measure that provides greater security to creditors by preventing a

23 For example, preservation, immobilisation or custody of the relevant object.
debtor from flying the asset to a jurisdiction where the CTC does not apply.\textsuperscript{24} To facilitate this remedy the registration holder submits an IDERA to the Civil Aviation Safety Authority (‘\textit{CASA}’) indicating that the only party with the right to deregister and export a specified aircraft object is a specified ‘authorised party’.\textsuperscript{25} In the case of a foreign aircraft situated in Australia, Australia courts shall cooperate with foreign courts and foreign insolvency administrators by exercising remedies under the CTC.

8 \textit{Article 30(3) “Declarations relating to certain provisions”}

For insolvency related proceedings, Australia has adopted “Alternative A.” This means during an insolvency, the administrator or debtor must give possession of the aircraft object to the creditor no later than 60 calendar days, or if a shorter period applies under Australian insolvency law, within that shorter period. With this declaration, Australian courts are restrained from delaying or preventing the enforcement of this remedy. However, it should be noted that currently, Australia’s insolvency law does not specify any period. Section 443B of the \textit{Corporations Act 2001} (‘\textit{Corporations Act}’) applies so that an administrator has to elect, within five business days, to notify the creditor that the debtor does not propose to exercise rights in relation to the aircraft. If an administrator does this, it becomes liable for rent and other costs relating to an aircraft during the course of the administration. Even without specifying a period, this provision often gives rise to consensual agreement that the possession of an aircraft is given back to a creditor earlier. The Corporations Act will still apply, but in any event, the CTC now sets a maximum give back period of 60 calendar days. In summary, the main provisions and declarations relevant to Australia are: freedom as to choice of law; timely interim remedies and the ability to exercise remedies without leave of court; insolvency regime under Alternative A with a waiting period of 60 calendar days and de-registration and export remedy (IDERA mechanism).

\textsuperscript{24} IDERA are a remedy provided under the CTC that allows for deregistration and export of an aircraft asset in the event of debtor default or insolvency.

\textsuperscript{25} Explanatory Statement, International Interests in Mobile Equipment (Cape Town Convention) Bill 2013 (Cth).
C Interactions between the CTC and the PPSA

As noted before on 30 January 2012, the PPSA commenced in Australia and established a new system for the registration of security interests in personal property. The Act overhauled Australia’s regulation of personal properties securities and reconciles more than 70 pieces of Commonwealth, State and Territory legislation. It provides a comprehensive national PPSA framework covering all personal property and now includes aircraft objects. Importantly, aircraft is personal property to which the PPS Act applies. This means security interests in aircraft can be registered and searched on the Personal Property Securities Register (‘PPS Register’). Prior to the PPSA reform, security interests in aircraft were created by way of mortgage or fixed and floating charges. These were registered on the Australian Securities and Investment Commission (‘ASIC’) Register of Company Charges. Registration and the relative priority of these interests were governed by the Corporations Act. However, as we saw earlier, there wasn’t a separate register for security interest in aircraft even despite legislative provision for one under the Air Navigation Act 1920. The Australian Civil Aircraft Register, provided for by the Civil Aviation Safety Regulations 1998 does not record security interests in an aircraft. It records the aircraft for the purpose of designating Australian nationality to it. It is worth noting that security interest in an aircraft asset registered with the CTC’s International Registry of Mobile Assets will have priority over the PPSR even if registration was lodged with the PPSR first.26 The CTC does not exclude the operation of the domestic PPSR. It is just that the CTC prevails over Australian laws to the extent of any inconsistency. Whilst the provisions of the CTC had been taken into account during amendments of the PPSA Act, “aircraft equipment” has not been excluded in its entirety. This means that the PPSA will continue to operate alongside the CTC to some extent. At this stage, the full impact of this is unknown. But a number of effects should be noted. Firstly, the impact of Australia signing up to the CTC is that checks for registration on both the domestic and international registries will now be required. Secondly, given that the CTC is now in force, registration of aviation interests should be made under the Convention.27 Thirdly, The PPSA also

covers proceeds, therefore the continued registration on the PPSR should be considered for all transactions. Whilst the interplay of these pieces of legislation is being fine-tuned, financiers should ensure that their aviation interests are recorded on both the PPS Registry and the CTC’s International Registry. The practical effect for both financiers and insolvency administrators mean that there will be two competing security registration systems in place in relation to aircraft covered by the CTC. In terms of remedies, the PPSA appears to be broader in its application compared to the CTC. The PPSA extends rights over proceeds from the sale of an aircraft object to ‘identifiable or traceable property which will allow property to be identified where it is different to the property originally received by the debtor as proceeds. Another difference is the ambit of each regime. Lastly, while the PPSA applies to all aircraft objects regardless of size and type, the CTC is more limited in its application. It only applies to airframes of a certain size and aircraft engines of a certain thrust. For many smaller, recreational fliers, the targeted scope of the CTC is a positive if not neutral feature, as the benefits of the CTC may not necessarily outweigh the costs of this segment within the aviation industry.

D Interactions between the CTC and domestic insolvency laws

Earlier, we saw that Australia adopted Alternative A for insolvency related proceedings under Article 30(3). This means secured creditors are entitled to enforce their rights after 60 calendar days without court interference. Whilst the courts are restrained from delaying or preventing the enforcement of this remedy, they continue to have jurisdictions in relation to other aspects of security matters, such as validity of the claim over a security interest. This could have significant consequences for a company which enters into voluntary administration under Part 5.3A of the Corporations Act. Under this provision, administrators and creditors are given 25 business days to consider what to do


29 Ibid.

Government must make certain qualifying declarations under the CTC (for example, Alternative A) for cheaper finance through export credit agencies to happen.
with the company. In practice, courts often extend this by up to six months or more. During the administration period, secured creditors are prohibited from exercising their rights. This is a fundamental feature of Australia’s voluntary administration regime. Implementation of the Alternative A insolvency regime will mean that, in some circumstances, companies that enter into voluntary administration will lose the debtor-friendly arrangements under the Corporations Act. Giving secured creditors, owners or lessors the ability to enforce their security or rights during voluntary administration undoubtedly lowers the prospects of a company with aircraft assets being reorganised successfully. This clashes with the intention of Part 5.3A, which the courts have stringently defended. Going back to Ansett Airlines as an example, during its voluntary administration, the owners and lessors of a Boeing 727-227F aircraft attempted to repossess their aircraft. The Federal Court granted their application. However, their leave to obtain possession of the aircraft was both temporary and limited to the sole purpose of enabling it to continue freight operations that it had previously been carrying out in conjunction with Ansett. Despite their interest, the Court refused to give the owners and lessors full and unconditional possession of the aircraft, so as not to prejudice the negotiations which the administrators were undertaking, or undermine Part 5.3A of the Corporations Act. In fact, an independent third party legal analysis by Fitch Ratings in 2013 concluded that the Australian insolvency regime is slightly less beneficial to note holders than Section 1110 of the US Bankruptcy Code or the CTC and the Australian regime is not aircraft-specific, unlike Section 1110 and the CTC and does not have a cure requirement, unlike Section 1110 or the CTC.

IV Conclusion on the Australian Experience

As we saw earlier, International Interests in Mobile Equipment (Cape Town Convention) (Consequential Amendments) Act 2013 allows

31 Re Ansett Australia Ltd (administrator appointed); Intrepid Aviation Partners VII LLC v Ansett Australia Ltd (administrator appointed) and Others (2001) 39 ACSR 255.
amendments to the Air Services Act 1995, Civil Aviation Act 1988,33 and PPSA to ensure the CTC and protocol “complement and operate in harmony” with other Australian laws.34 We also saw some incongruence between the CTC and the PPSA and domestic insolvency laws. Even though the CTC holds precedence over Australian laws in the event of inconsistency, it is not clear what “to the extent of any inconsistency” really means. On one level, it would not be inconsistent to record security interests on both the PPSR and the CTC’s International Registry. The real untested issues in the future is going to be priority issues between security interests registered on the PPSR and those on the CTC register, especially considering the differences in interests that can be registered. Financiers will need to check both registers to determine what securities are held over the aircraft, and what rights they have as such rights will vary according to whether the CTC or the PPSA applies. Until these issues are determined, it’d be wise for financiers to register on both. A potential issue of contention may arise over the proceeds of sale of aircraft. A PPSA security interest over aircraft includes the proceeds of that collateral. That means the PPSA security interest extends to cash proceeds if the grantor were to sell the aircraft. On the other hand, the CTC is intended only to deal with security over the “metal.” The security interest continues in the aircraft metal but not the proceeds after sale. So in this respect, a secured party would not be protected under the CTC International Register even though they would be protected if a PPSA security interest were made. Therefore, security registration under the PPSA may require some amendments to reflect the prevalence of the CTC to the extent of any inconsistency. The States and Territories will not be required to amend their legislation. However, they will be consulted on any changes to the PPSA. More analysis needs to be done around the interaction of the CTC with Australia’s insolvency laws especially its interaction with administration laws under the Corporations Act. It may require amendment so that Alternative A can prevail over existing insolvency laws where aircraft objects are concerned. It appears that the areas being looked at closely right now are the operation of an insolvency moratorium under s 440B and the exception for

33 The legislative rules require consequential amendments to Part 47 of Civil Aviation Safety Regulation 1998 with regards to the registration of aircraft, identification of the registered operator of an aircraft, transfer of ownership and suspension and cancellation of registration.
34 International Interests in Mobile Equipment (Cape Town Convention) Bill 2013 (Cth).
leases under s 443B. Opinions within the legal profession are that even solely for aircraft, for example, metal, both the Corporations Act and the Alternative A regime would co-exist. Only if there were an inconsistent result if both regimes applied would the CTC provision prevail. Arguably the Government was not prepared to make any substantial changes to domestic laws to accommodate for the CTC. They relied on the inconsistency provision in the enabling legislation instead. However, the Government was prepared to choose Alternative A because it wanted to give financiers the creditor-friendly protection, for example, the hard 60 days give back provision, and Acession qualified Australia and its airlines for a “Cape Town discount” in the exposure fees to export credit agencies.35 In a parliamentary address given by Mr Warren Truss, leader of The Nationals, he acknowledged the benefits of acceding to the Convention and concluded that the Coalition will support implementation of the Convention, he also stated, “I must add that I have some discomfort with the concept that treaties might override Australian courts and cede authority to another land of an international organisation.” Coming from a politician with more than 25 years of experience in parliament, this is perhaps a not uncommon reflection of sensitivities and protectionism towards national laws. Fortunately, economic sense prevailed and Mr Truss conceded that, “I recognise, however, that to remain outside this Convention will disadvantage Australian airlines and make aircraft purchase more expensive.”36 The impact of the CTC, and what it means for aircraft leasing and financing transactions in Australia will – in the expressed opinion of the legal market - need the combined efforts of the law firms, banks, lessors and airlines to come to a common understanding.37

V  Views from the Classroom on the Teaching of Transnational Law

So how does the CTC fit into a Transnational Commercial Law program from a students’ point of view, as an example? I consulted with my classmates, both law and non-law students like myself. We all think it would be great to touch upon the CTC a little more than we did, although we understood time did not allow it. Professor Camilla Andersen introduced the CTC to us in the foundation unit in the context of legal harmonisation. I was intrigued by her description of the CTC, for example, how the protocol modifies and supplements the CTC in relation to aircraft objects. She first talked about how the CTC reached into areas of law that were until now, the domain of national legal systems. For example security registration, priority rules, insolvency and enforcement remedies.18 She used the analogy of paper figure with different clothes to describe how by varying the content of the protocol, the contracting state, or the figure in this analogy, can address different domestic obligations and balance this against the legitimacy of the CTC. So I got hooked and ended up choosing the CTC as the topic for my very first legal paper, ever! I did not expect to see such narratives used to describe the CTC such as, “wildly unrealistic”,39 “unorthodox”,40 and breaking “new ground”,41 just to name a few. As I wrote the paper, I fell totally in love with the CTC and in the process, the study of law. These are the reasons I can’t get enough of the CTC. It is unique, in the quarter of a century of international lawmaking in the field of secured transactions; the CTC is the only convention that has come into fruition.42

39 Roy Goode, ‘Earth, Air, and Space: The Cape Town Convention and Protocols and Their Contribution to International Commercial Law” in Mads Andenas and Duncan Fairgrieve (eds), Tom Bingham and the Transformation of the Law: A Liver Amicorum (Oxford Scholarship Online, 2009). In which he stated, “they both came into force on 1 March 2006 and provide precisely the international legal regime that would once have been dismissed as wildly unrealistic.”
42 The International Institute for the Unification of Private Law (‘UNIDROIT’) Convention on International Factoring, concluded in 1988, is in force but has secured few ratifications, mainly because its scope is too narrow: it is confined to notification factoring, which went out of favour soon.
What an amazing feat. I’d like to know how we could replicate this? Driven by industry, the CTC has demonstrated that modern international commercial law should be derived from a wider field of sources, including the business community, to be truly responsive to market needs. It embodies the interplay between law and business from an original perspective. It was industry push that brought all the stakeholders including, governments, manufacturers, financiers, leasing companies and airlines, together and got everyone working together on an international substantive law. Exploring party autonomy, I learnt about how party autonomy can be applied in a treaty by example of the CTC. Because of the CTC, I learnt how scholarship freedom from the constraints of comparative methodology and compulsion to adopt widely different judicial concepts allowed commercial outcomes to be kept firmly in focus. Whilst the CTC was not constructed using traditional legal methods, it is backed by a system of best practice based on modern financial modeling techniques. Since law is meant to facilitate trade, it bodes well for the authorities to support a legal framework informed by commercial objectives,

after its conclusion following a strong move towards non-notification invoice discounting. The UNIDROIT Convention on International Financial Leasing, adopted at the same diplomatic Conference, is also in force but has not been a success, though there are greater hopes for the 2008 UNIDROIT Model Law on Leasing. The 2006 Hague Convention on the Law Applicable to Certain Rights in Respect of Securities Held with an Intermediary, which came close to success after a mere two and a half years from start to finish, largely due to the driving force of Australian lawyer Richard Potok, came unstuck because of a significant change in approach and formulation at the diplomatic Conference, which upset the Europeans. Finally, the 2001 United Nations Convention on the Assignment of Receivables in International Trade has secured only a single ratification (by Liberia) in more than 11 years, which is perhaps because it is too wide-ranging and unfocused, though there are rumours that the US will ratify it.

In the interest of progressing a common market, and perhaps in a nod to laissez-faire and party autonomy, the Convention was driven by industry both in effort and resources, rather than by lawmakers … This can be traced back to 1994 when an ad hoc Aviation Working Group (AWG) was formed to emphasize the economic aspects of the international private law system. Before that, national legal regimes do not provide adequately for securitisation of aircraft assets. Consequently, the AWG proposed the negotiation of an umbrella Convention to be supplemented and modified by individual protocols to address different categories of high value equipment. For instance, it aims to reduce the cost of credit by providing predictability as well as the ability to create transactions that addresses different commercial needs. Article 8 allows for the inclusion of self-help remedies and Article 54(2) provides the right to opt out. Article 42 also allows parties to select the jurisdiction where disputes can be adjudicated. So how far can party autonomy reach? The answer is in so far as to not affect the proprietary aspects of a transaction.

based on responsible scholarship methodology, and brings in financial benefits. When looking at thinking outside the square, if anything, the freedom to identify areas in need of an improved legal framework, and free reign to structure the processes and organise the work, allowed the AWG to develop two unique and flexible instruments, including, the base convention and its associated protocol. Whilst it was not unusual for a treaty to be amended or supplemented by a protocol, what is uncommon about the CTC is the prevalent role assigned to the associated protocol since it is not simply an addendum but yields the power to override the base convention.\textsuperscript{46} I learnt that harmonisation is not just about creating a global standard. For example, Australia’s ratification of the CTC will bring the Council of Australian Governments (‘COAG’) one step closer to harmonising the laws between Australia and New Zealand. This has been an objective of the National Reform Agenda since 1992 and the CTC has played a supporting role in this.\textsuperscript{47}

The CTC is influential and inspiring. I think the CTC is a pioneer in so many ways. When it was first debated in 1996, there was a reference to its application to the shipping sector. The CMI, IMO as well as UNCTAD opposed it right away. They didn’t think it was a good idea as the shipping sector always had its own international legal regime. The international convention governing security interests in ships, The Maritime Liens and Mortgages Convention 1993, had also just been adopted.\textsuperscript{48} However, I believe that UNIDROIT is giving consideration to incorporating ships within the CTC. This time round, CMI is open to the idea and the President has convened a working group to review their position.\textsuperscript{49} So I think the CTC is influential in many ways. What would I have like to learn more in class? If time permits, general principles and features of debt capital markets financing and the importance of predictable insolvency laws. When I wrote the paper on the CTC earlier this year, I asked whether it

\textsuperscript{46} This means that in essence, by varying the content of the protocol as it is adopted, a Contracting State can address its domestic obligations and balance this against the legitimacy of the Convention.

\textsuperscript{47} In 1992, COAG signed an Agreement Relating to Mutual Recognition with New Zealand. The aim of the mutual recognition has been to create a national market for goods and services by establishing a regulatory environment which encourages this.


was a “balancing act or brave new world?” I approached the paper by debating the following issues: commercial sensibilities versus political sensitivities, national laws versus international laws, scholarship freedom versus bureaucratic constraints, compromise versus clarity, rules-based system versus mercantilist approach, legal authority versus influence of the private sector. One of the board positions I hold in my day job is Governing Board Member of The Confucius Institute at UWA. So please allow me to give Confucius a plug by sharing a quote I used to conclude the paper on the CTC: Confucius might well have had the Convention in mind when he said, “this equilibrium is the great root from which grow all human acting in the word, and this harmony is the universal path which they all should pursue.”

EQUITY IN ACTIVE LEARNING AND PEER-REVIEW IN DESIGNING INTERNATIONAL COMMERCIAL LAW PG UNITS†

CAMILLA BAASCH ANDERSEN*†

CONTENTS

I Introduction .................................................................................................................. 41
II Professional Cognitive Behaviour: Thinking about what we do .......................... 42
III Context and Box-ticking .......................................................................................... 43
IV Student Diversity: Designing something to make everyone happy ............. 44
V Dealing with Different Backgrounds ....................................................................... 45
VI Teaching Ethos and Learning Outcomes ............................................................... 46
VII Teaching Format ..................................................................................................... 49
VIII Equity in Assessment .............................................................................................. 49
IX Conclusion ................................................................................................................ 53

I Introduction

The present paper was given at the 4th Transnational Commercial Law Teachers Convention and represents an attempt to share learning and teaching theories in the context of program design. The emphasis of the paper is to share the experiences of developing a sustainable degree with ethical assessment which remains fruitful and enjoyable for students. It is an exercise in epistemology – of thinking about the knowledge itself and how we got to where we arrived at. It is thus not an academic paper of law, but one of teaching and learning in context, and the mindfulness required in program design in the commercial law space.

† Or ‘How I Designed the Degree I Wanted to Teach and Tried to Make the Students Love it (and Like Me)!’.

* PhD (AU). Professor, Faculty of Law, The University of Western Australia.
II PROFESSIONAL COGNITIVE BEHAVIOUR: THINKING ABOUT WHAT WE DO...

Legal academics across the globe have been engaged in program design for as long as we have had programs to teach. However, over the last decade or so we have seen a big shift in the way universities are run, and as a consequence program design has developed into a more modern exercise of ensuring programs meet a host of different needs. It is not just a question of curriculum any longer, but one of quality assurance – through organisations such as TEQSA, AQF, the UK AQAA and others – and of student satisfaction, sustainable delivery, internal academic policies for assessment and ensuring sound pedagogical delivery. In short, program design now needs a number of boxes to be ticked. We sometimes do this intuitively, without much thought to the process, but in a recent experience after relocating to a new jurisdiction, new institution and new quality assurance rules, this author tried to be more mindful of the process in hand. Thinking about what we do when we teach, how we best ensure attractive programs which incorporate interactive Masters level teaching and ensure knowledge is tested and applied as well as independently explored. This can be referred to as a sort of metacognition of program design. John Flavell, who is credited with the term metacognition in 1976,\(^1\) develops the concept further in his 1979 seminal paper,\(^2\) where he divides metacognitive knowledge into three categories: knowledge of person variables, task variables and strategy variables. Metacognitive knowledge of program design can thus refer to the acquired knowledge about the cognitive processes of constructing a teaching program. This knowledge can be used to control or influence future cognitive processes in decision making. It is the authors hope that this paper provides sufficient metacognition on law program design to help influence thinking in others; not to copy what was done (although ‘imitation is the sincerest form of flattery’)\(^3\) but to be more mindful of the processes and considerations involved.

\(^1\) John Hurley Flavell, ‘Metacognitive aspects of problem solving’ in Lauren Resnick (ed), The Nature of Intelligence (Lawrence Erlbaum, 1976) 231.


\(^3\) Quote from Rev. Charles Caleb Colton, The Lacon: or Many Things in Few Words Addressed to Those who Think (Longman et al, 1826) – interestingly subsequently amended or peppered by Oscar Wilde as: ‘Imitation is the sincerest form of flattery that mediocrity can pay to greatness.’, leading one to wonder if he considered himself mediocre since he was (at least partly) imitating Colton...
III CONTEXT AND BOX-TICKING

The degree this paper describes designing is the (relatively new) Master of International Commercial Law (hereinafter referred to as MICL) offered at University of Western Australia (hereinafter referred as UWA). The push for new Masters Degrees arose following the Vice Chancellor’s vision statement in the strategic plan for UWA, where he called for more specialised masters degrees to attract international students and meet market needs. And so, in 2013-2015, the Law School at UWA designed no less than 11 new Masters Degrees and Graduate Diplomas for coursework study. These degrees, including MICL, had a lot of boxes to tick, in two main categories:

1) Quality assurance:
   - Meeting the specifications of the Australian Tertiary Qualifications (AQF) requirements for level 9 degrees (as MICL is considered). The main milestone for AQF in monitoring degrees is learning outcomes, and mapping them with appropriate knowledge and application of skills.
   - Meeting the Tertiary Education Quality and Standards Agency (TEQSA) standards both present and future. Meeting specific thresholds for degree entrance, format and delivery is central to TEQSA.
   - Meeting international expectations for quality in teaching. These are not easily defined, but in Europe some harmonised rules for high quality tertiary education are developed through the ongoing Bologna Process springing from the Bologna Accords. This European process is not only relevant to Australian education as an example of harmonised European consent for good practice, it has been held out as a cornerstone of the Melbourne Curriculum model as good Australian practice.

---

5 List of UWA Postgraduate coursework options available at The University of Western Australia, Postgraduate Coursework (14 June 2016) <http://www.law.uwa.edu.au/courses/coursework>.
6 For more on AQF see Australian Qualifications Framework <http://www.aqf.edu.au>.
7 For more on TEQSA see Tertiary Education Quality and Standards Agency <http://www.teqsa.gov.au>.
8 For more on the Bologna Process in the European Higher Education Area, see European Higher Education Area <http://www.ehea.info>.
• Meeting the requirements of internal university policies.

2) Sustainability:

• Market research to ensure sufficient market interest was carried out independently by a market survey company for the relevant degrees, including MICL. The survey showed a number of potential student markets for students with very different backgrounds.

• Student satisfaction, to ensure good word-of-mouth publicity, is central to growing new degrees in today’s international market.

• Ensure sufficient available staff to offer degrees in future as well as at time of design.

In designing MICL, the above requirements highlighted a number of essential points and challenges. It was essential to address some key needs and find solutions to problems in relation to delivery and form of the program at the design stage. The key challenges faced were:

• Student Diversity: Teaching format for different backgrounds/needs
• Interactivity: Ensuring class participation
• Group work & Equity
• Peer Assessment
• Incorporation of oral advocacy skills

These are set out below.

IV  Student Diversity: Designing something to make everyone happy

The need to build a program that bridges the needs and backgrounds of various different students was initially a serious concern. The considerations for a full time student on campus, for instance, are different to those for a part-time practitioner. While the latter is squeezing class attendance into a busy work schedule, the former needs a more immersive experience and more activities and challenges. Similarly, the different background of varied cohorts will result in different needs: International vs Domestic, Inexperienced vs Experienced, Lawyers vs non-lawyers, and differing cultural backgrounds on appropriate assessments and skills makes a unified classroom challenging. This challenge of student diversification was met on two fronts.
V Dealing with Different Backgrounds

The solution to this challenge was found in adaptability and finding common ground. All MICL students MUST complete a foundation unit (6 credits), which brings their basic contextual knowledge of International Commercial Law to the same level. ALL students must take this unit before they can undertake any others—it is thus taught twice a year to coincide with student intakes. Since the program is designed on a teaching ethos of pragmatic contextual application (more on this later), this will mean that the lawyers will combine their study of law with pragmatic application of business and the non-lawyers with a cognate business background will combine their business savvy with a basic understanding of legal concepts in the field. This core unit has proven popular with both lawyers and non-lawyers in setting a common basis for study, in introducing the forms of assessment and in shaping their expectations.

To ensure that the non-lawyers, or non-Australian lawyers, are able to catch up on the necessary skill-set of basic knowledge of the Australian legal system, as well as legal research and writing (for their independent research essays as their assessment, see below), an independent online study resource support page was developed for them. The resource page contains independent modules, which can be completed with online quizzes and exercises. Through the Blackboard interface, students can gain ‘medals’ for successful completion of modules. Each module is independent of the next, so students can target the training they need. The modules include: Basic Legal Terminology, Introduction to the Australian Legal System, Legal Research, Legal Writing 1 (Basic Skills), Legal Writing 2 (Referencing and Avoiding Plagiarism in Law) and Legal Writing 3 (Critical Legal Analysis). In the teaching of the Foundation unit, reference is frequently made to the skill-sets represented in these pages, and students are urged to use them. Especially Legal Writing 2, which tests international students in referencing and citation, and ensures that there is no accidental plagiarism.

11 A separate paper on the design of this legal resource is underway elsewhere, and is outside the scope of this paper.
To further ensure a very structured learning, as well as a shared basis of learning before progressing to optional modules, MICL was designed with four core modules that needed to be studied sequentially, each building on the next to progress contextual knowledge. The first module being Foundations of International Commercial Law, as explained above, the next International Sales, followed by Trade Financing and, finally, International Shipping. This structured sequential learning ensured that a common core of knowledge was gained before progression to optional study, in units like WTO Law, Comparative Law, Commercial Arbitration, etc were commenced.12

Finally, to ensure issues with non-English language speakers are minimal, it is important to note that UWA Law maintains rigorous English language requirements for entry.13 We prepare non-native English speakers for study here at pre-sessional English classes if they do not meet requirements, but they must meet a high standard to gain entry. This eases program design – especially in ensuring interactivity in class – as language skills can be presumed. Should students need further support, e.g. for a larger piece of research, the Central University skills support will step in.

VI Teaching Ethos and Learning Outcomes

One of the most valuable opportunities presenting itself when designing an entire degree from scratch is the opportunity to make it a cohesive and consistent program, which builds on specific skills and tailors learning outcomes for individual units towards a shared target.

The AQF Level 9 targets for Masters degrees makes a number of assumptions. In summary, they prescribe that: ‘[g]raduates at this level will have specialised knowledge and skills for research, and/or professional practice and/or further learning’ with the knowledge in question described as:

12 This structure is currently under revision, with less core units and more elective elements preferred.
13 Information about English language competency requirements at UWA can be found at The University of Western Australia, English language competence: undergraduate and postgraduate coursework, Future Students <http://www.studyat.uwa.edu.au/postgraduate-coursework/requirements/english>. The requirements are currently the highest amongst the GO8 universities in Australia.
‘[g]raduates at this level will have advanced and integrated understanding of a complex body of knowledge in one or more disciplines or areas of practice’.  

Contextualising commercial regulation in commerce has long been a secret to success of understanding it. Clive Schmitthoff describes this pragmatism thus:

[An international commercial lawyer] ... cannot only be a man [or woman] learned in law. His [or her] antennae must be tuned to receive financial and monetary information; he [or she] must understand the fluctuation in the world markets whether they deal in commodities, securities, shipping, insurance or other goods and services; he [or she] must take account of the tax position, both national and international; he [or she] must appraise the political risks and the percetive of the shift in social power – in brief, in addition to being a man [or woman] of law, he [or she] must be an Homme [ou Femme] D'affaires.  

So, for MICL, achieving an advanced and integrated understanding of international commercial law, will depend on grasping some of the key aspects; i.e. describing certain basic principles of International Commercial Law, and integrating them into the curriculum of all core units. Distilled from Schmitthoff’s ethos, these basic principles include:

• Understanding the bigger picture of trade
• Commercial Sense: appearance and intention
• Pragmatism; understanding the business which commercial law facilitates
• The role of party autonomy in commerce
• ‘Follow the Money’; commerce centers around it

To the commercial law teacher, these may be self-explanatory. But seldom do we take the time to integrate them visibly into the curriculum. In MICL they are drummed into students throughout the Foundations unit, and regularly repeated during the teaching of other units.

For instance, to transcend knowledge of shipping law beyond the regulation and into contextual understanding, students need to understand the nuts and bolts of what is being regulated. So before we plough on with shipping regulation, the Hague Visby Rules, indemnities and Bills of Lading, they need to be able to visualise the context. A very helpful BBC documentary entitled

"The Box that Changed Britain" is great for this – or even just a picture of the Emma Maersk, who is so large that a freight train pulling containers equal to her capacity would take about 17 hours to cross a railroad crossing. Teaching them THIS isn’t law – but it IS an essential context for the regulation they are about to learn – and without that knowledge they will never TRULY understand the information they are given, or see why it works in the greater scheme of things.

But a Master degree must do more than give students knowledge; it is also expected to result in demonstrable skill sets. Returning to the AQF, at level 9 they require: ‘[g]raduates at this level will have expert, specialised cognitive and technical skills in a body of knowledge or practice to independently: •analyse critically, reflect on and synthesise complex information, problems, concepts and theories; •research and apply established theories to a body of knowledge or practice; •interpret and transmit knowledge, skills and ideas to specialist and non-specialist audiences’ and this must be shown through an application of skills: ‘[g]raduates at this level will apply knowledge and skills to demonstrate autonomy, expert judgement, adaptability and responsibility as a practitioner or learner’.

To ensure these specialised analytical skills in interpretation and communication are regularly applied, a high level of interactivity is required in the classroom. Accordingly, MICL students are expected to participate actively in exercises which require them to perform a judgement or find and communicate information. Through mini-moots of dispute resolution, to drafting contracts, to constant questioning, they are encouraged to be inquisitive and apply skills. Every PPT is peppered with Class Discussions, tasks, exercises and interactive case studies. Roleplaying plays a central part in some of this. A special format for this is the open space discussion, conducted at the beginning of every day, where students are encouraged to convene 5-10 minute discussions about a topic from the preceding day which they want to learn more about, are not sure of, or simply wish to discuss more.

This highly interactive teaching ethos of Socratic and Inquisitive learning is ideally applied to class sizes of 20 or less. And with 2 yearly intakes, this is well suited for MICL, in its unique teaching format.

VII  Teaching Format

Finding the right teaching format for MICL was a challenge, given the different needs from different types of students. While market surveys indicate practitioners prefer intensive one-week programs, campus students need more campus time and activity. The MICL degree is designed to appeal to both, so it needed to be flexible and accommodate both basic underlying needs.

The result is a combination of intensives and semester based units, with compulsory units being offered sequentially, on a ‘Quasi-Intensive’ basis. This compromise is a 2½ week intensive, structured as part of a sequential learning, and it proved very popular with both full time and working part time students. With specific gaps in the structured sequential learning timetable, full time students can easily fill the gaps between teaching with independent research, class preparation, group study or self-study. Part-time students can timetable four weeks of half-days of teaching into their work schedules with little issue.

One advantage in this format is the opportunity for sequential learning. Instead of having semester long units running in parallel, the units run sequentially in the quasi-intensive mode. This allows adaptability for both full time and part time students as well as the luxury of focus on one topic at a time, in depth. It affords the advantage of being able to build on pre-existing knowledge and maintain continuity of teaching.

Another advantage in the quasi-intensive format is student concentration. While students find it difficult to concentrate during a full day of teaching (never mind the person teaching them!), a half-day seems entirely appropriate for condensed learning with interactive inclusion.

So the typical format will be 8-10 teaching days of approximately four hours across 2 weeks, followed by a Monday of workshops surrounding the assessment (see below).

VIII  Equity in Assessment

Most MICL assessment is comprised of a 75% research essay (75% of the total mark) and an Oral Group Presentation (25% of the total mark). The reasons behind this are multiple. First of all, internal UWA policy requires a minimum of two forms of assessment. This is also in line with a balanced
multi-cultural approach. The two that were chosen are designed around the following principles and ethos.

A Legal Research Essays

Students’ views on the best form of assessment are normally colored by two factors: their cultural expectations and their subjective abilities for performance. The latter may be influenced by the former, insofar as students who have no background of independent research degrees or assessment may struggle with this as a new skill set.

Nevertheless, historically, a Master degree has always entailed independent research, to allow the student to demonstrate independent proficiency and skill. While some institutions abroad are departing from this, and introducing unseen written examinations at Master level as the main form of assessment, the UWA Law School has chosen to maintain the tradition. Part of this reason is one of quality of learning. Another is to prepare Master students for independent legal research in the work place. Another again is the AQF expectation that independent research is part of the curriculum.

For the students unused to this form of assessment, the Legal Resource page, outlined above, hopes to alleviate this in part. As do the Essay Workshops, which are part of the Foundations unit, and every core unit developed. This workshop is intended to allow students to present their Oral Presentations (see below) and to showcase ideas for their research essay. This latter element is especially important in the Foundations unit, where many will be conducting their very first piece of legal analysis. While it is made clear that this is NOT a supervised piece of research, basic outlines and methodologies are discussed. Attendance is NOT compulsory for those who have a law background, but all who participate in the workshops have fed back that they find it a very welcome helping hand. And, interestingly, most students attend even if they do not need to, because they find the discussions of research issues and methods in critical analysis very helpful, regardless of background.

Another hotly debated issue is that of group work.
B Group Work

Group work is one of those teaching formats which ticks all the right boxes for quality assurance (AQF, TEQSA, Bologna, etc). It has the real world element of collaboration and it hones communication skills, assertiveness, compromise, etc. But any University teacher who has ever prescribed it, faces a number of (similar) issues with equity and shared marks. We can - loosely – divide the two categories of nightmare participants in group work into two categories:

- CONTROL FREAKS, here we find people who may be somewhat closed minded, who over-commit themselves to the group task and take (often unwanted) leadership without consultation. They over-influence a project, and the project often suffers because the ideas of others are not heard.
- SLACKERS, these are the unengaged, who may feel marginalised or just plain lazy, they can be too busy or too shy to assert themselves, and they end up being an underutilised resource.

In designing MICL, we set out to solve some of the problems of group work. Initial ideas included mark-adjustment software and student mediation for all groups. But while the latter was too labour intensive, and may create problems rather than solve them, the former was not ideal as it would depart from the real-world lesson of groups sharing a mark. However, we really wanted to include a shared group assessment with an oral advocacy element, to meet the teaching and learning criteria of high quality degrees.

It was at this point that our wonderful teaching intern put her knowledge of teaching and learning to the test. In addition to designing the learning outcomes for the Dispute Resolution Module, which she had been tasked with, she came up with a very satisfactory solution for ensuring equity in group marks. While it was originally intended for her own module, it was so successful that all MICL core units have adopted it.

---

17 This author is eternally grateful to Ms Dilyara Nigmatulina for her contributions in this field. She has shared her sources for the development of the system, and indicates that she was influenced by John Biggs and Catherine Tang, Teaching for Quality Learning at University: What the Student Does (Open University Press, 3rd ed, 2007); David Carless, Gordon Joughin and Ngar-Fun Liu, How Assessment Supports Learning: Learning-oriented Assessment in Action (Hong Kong University Press, 2006); and Dannelle Stevens and Antonia Levi, Introduction to Rubrics: An Assessment Tool to Save Grading Time, Convey Effective Feedback, and Promote Student Learning (Stylus Publishing, 2005).
In essence, the system is based on managing expectations, and knowledge of a double peer review, which is still simple to execute.

When student presentations are delivered in groups, they are subject to two peer reviews:

- The internal Group peer assessment. Each member of the group assesses the others, based on their input, commitment, reception of ideas from others, etc. on a scale of 1-5. They are told that if there are serious issues, we will conduct student mediation.

- Peer assessment from other students. While listening to the presentations, they are encouraged to rank aspects of their colleagues’ performances from 1-5, before submitting this to the teaching staff. A group is never shown its peer review, and it is made clear that it may or may not have any influence on the mark given.

These two exercises are clearly communicated to students at the allocation of their group and tasks – alongside the basic outline of why group work can be tricky and how not to be a slacker or a control freak... they are encouraged to be professional, and reminded that there are no excuses in a real work place.

Together, the two peer reviews ensure smoother group work and less issues with incompatible group members, and the peer review also ensures that students feel their opinion is valued, assessors don’t miss any aspects of the presentation, and – finally – the class tends to listen more intently to a personation they are asked to peer review, so it acts as an enhancer of the presentations’ value as teaching platforms in their own right.

One key to success is that students KNOW about this peer review in advance – they are far less likely to disappoint their group members and they want to impress their peers. Another key to success is that as students know they have a mediation forum to air their grievances, if there are any, they tend to communicate better – ultimately minimising discord. A third aspect is that in composing the groups, mindfulness is had towards personalities. The confidential form is submitted to the teaching staff only.

The result? To date there have been no problems in group work, in any MICL unit.
IX  Conclusion

MICL was a joy to design and is a joy to teach. The statistics speak for themselves: student feedback scores in all MICL units have ranged between 3.8 and 4.0 (on a 4.0 scale) in the 1st year; and student perception of learning has expressed satisfaction with the assessment models (97.3% expressed extreme satisfaction, 2.7% expressed satisfaction).

While there is always room for improvement as we adapt the curriculum and continually update MICL, we think the first steps have been successful.
I  Introduction

“Once a photograph of the Earth, taken from the outside, is available . . . a new idea as powerful as any in history will be let loose.”
Fred Hoyle (1948); opening quote of Guy Reid (documentary director), Overview (2012)

“Science does not necessarily equal wisdom.”
Herbert Kronke, in the context of the 5th Transnational Commercial Law teachers’ conference in Kyushu, Japan (2013)

“The right use of natural resources, the proper application of technology and the harnessing of the spirit of enterprise are essential elements of an economy which seeks to be modern, inclusive and sustainable.”
Address of Pope Francis to US Congress (24 September 2015)"
One of the major challenges of our time is addressing the impact of commerce on natural resources worldwide. The industrial and technological revolutions and related paradigms such as (short-term) profits for shareholders, competition, and ‘growth’ have, paradoxically, had unintentional yet far-reaching, if not devastating, consequences for virtually all natural resources (or, to put it in less economically inspired terms, for whatever form of natural wealth or riches), including the earth’s land surface and its deeper layers, vegetation and wildlife, oceans, seas and other water resources, the atmosphere, and even outer space. Nonetheless, education for commercial and financial lawyers typically focuses on the technicalities of commercial and financing constructions, paying no heed to the (potentially) calamitous consequences these may have. This essay proposes a method to make the issue of natural resources an integral part of the commercial and financial law curriculum, contributing to the education of a new generation of commercial and financial lawyers that has been equipped with the knowledge to make responsible choices.

The approach here identified is to integrate case studies that in one way or another relate to natural resources into mainstream commercial and financial law courses. It is explicitly not intended to propose the creation of separate courses on the issue, as these are likely to reach only a limited group of students with a specific focus of interest. The sample case studies presented below are roughly organized as per a broad range of natural resources. They aim at familiarizing students with a variety of commercial and financial law aspects relating to natural resources. ‘Commercial and financial law’ is broadly understood as any legal issue concerning commercial activity, including issues in the realm of civil law, liabilities, intellectual property law, financing constructions, criminal law, State/regulatory law, constitutional law, public international law, private international law, human rights, dispute resolution, etc. Some reading material and other sources are listed for each case to illustrate the (scientific, economic, social, legal, or other) debate in relation to the issue concerned, but students should search for additional legal background material. In many of the cases no jurisdiction has been chosen in order to keep this text ‘neutral’, but when actually working with students such a choice is likely to be instrumental. Clearly, further case studies could be devised, concerning a variety of legal issues relating to other natural resources.
II  ENERGY

A broad variety of energy sources, including fossil fuels (oil, coal, gas) and wind, solar, biomass, tidal and wave power, are currently (still) available or being developed. Each of these sources has its advantages and disadvantages.¹

Case 1. A broad body of scientific studies singles out fossil fuels as a primary cause of climate change. The Oslo Principles on Global Climate Change Obligations, on the basis of canons of inter alia international human rights law, environmental law and tort law, identify obligations of States and enterprises (including enterprises in the banking and finance sector) in the context of global warming. Students are asked to investigate whether and how this approach can be applied in the context of different industry sectors, such as the extraction of rare minerals (see Case 7) and agriculture (see section 5), and to identify obligations of States and enterprises in these sectors. The results proposed by the Oslo Principles² and for the other industry sectors could be compared in the context of in-class presentations.

Case 2. In several countries, judicial proceedings have been or are being conducted to force States and enterprises to ensure a viable biosphere in the future. Students are asked to draw up a risk analysis for their employer, a major energy company, interested in possible future policy developments due to climate change. In particular, students should identify the legal strategies (eg tort, a government’s duty of care towards its citizens, public trust, public nuisance, human rights invasions, invalidity of permits, classification as a toxic substance, etc) underlying court cases regarding climate change in the Netherlands, the United States, and elsewhere.³

Case 3. One (potential) energy source are sea currents and/or waves.⁴ Students are asked to write an essay in which they identify legal aspects of generating such energy. These may include inter alia financing aspects of equipment needed; public international law aspects (whose is the sea territory where the necessary instruments are installed?); liability for cleaning up the equipment or for paying any damage caused (e.g., where the equipment damages a vessel or its cargo belonging to a company in another State).

Besides authoritative guidelines such as the *Oslo Principles on Global Climate Change Obligations* and court cases regarding the role of the State in guaranteeing a viable biosphere, some States have taken a novel approach on the issue in their legislation.⁵ For example, the Constitution of Ecuador introduced a chapter on the rights of nature in 2008⁶, while Bolivia enacted a Law on the Rights of Mother Earth in 2010.⁷ Moreover, criminal law has been proposed as a tool to establish the limits of acceptable (corporate) behaviour.⁸ This raises the question of how such legislative approaches relate to the imperatives of doing business.


Case 4. An energy company Y with its seat in State X would like to produce energy in Ecuador by way of fracking. It wonders whether this is compatible with Ecuador’s Constitution, in particular Articles 10 and 71-74. Moreover, it wonders whether it should opt for dispute resolution by way of arbitration under a bilateral investment treaty (BIT) concluded between Ecuador and State X or under the conventional court system. One group of students puts forward arguments showing why fracking should be fine under the Constitution and in favour of arbitration; another group of students puts forward arguments against fracking under the Constitution and in favour of the conventional court system; a third group of students decides on both issues.9

III EXTRATION OF RESOURCES AND DEFORESTATION

Case 5. European legislation envisages transparency requirements for issuers whose securities are admitted to trading on a regulating market and which have activities in the extractive or logging of primary forest industries.10 In particular, payments to governments in the countries where these issuers operate should be reported. Students are invited to incorporate this approach into draft provisions to be elaborated by them for potential inclusion in the UNIDROIT11 Legislative Guide on Enhancing Trading in Securities in Emerging Markets (which is intended, or should in this context be considered to be intended, to apply to developed markets as well). In doing so, they should

evaluate what natural resources merit protection, whether mere transparency of issuers is sufficient, or whether they wish to envisage complementary, more robust mechanisms, also in relation to other actors (investors, financial intermediaries, etc.) Eg: an outright prohibition of trading of securities of certain issuers; imposing conditions for the admission of securities of certain issuers to trading (eg measures to compensate the damaging effects of extraction or logging, a ‘net zero impact’ or ‘carbon capture and storage’ certificate, or a cap on payments to governments); requiring parties holding an interest in securities issued by certain issuers to be transparent about the volume of their holding; and imposing requirements as to voting behaviour in relation to certain issuers by shareholders or their proxies (eg proxies must receive explicit instructions in respect of certain decisions). Moot negotiations on the draft provisions could be held between students representing exporting and importing countries.

Case 6. Students are asked to draw up a legal risk profile for their employer, a company in State X that intends to exploit a variety of resources in part of a rain forest (timber, palm oil, etc) in State Y. Issues that could be included are: government regulation; permits; organization of the land registry (eg on a local and/or centralized level) and its quality; native land rights; self-regulatory industry standards for certain commodities; import limitations on certain commodities by States; reporting obligations regarding payments made by enterprises to States (see Case 5); civil and/or criminal liability; analysis of the (potential) impact of court cases on behalf of future generations (eg in the Netherlands, the Philippines, the US) regarding the long-term effects of exploitation of natural resources (see Case 2); etc.

Case 7. The extraction of so-called ‘rare earth’ minerals, which are used in the production of a wide range of technological devices (magnets, cars, mobile phones, TV screens, etc.) has a far-reaching social and environmental impact. Think of the toxic lake in Baotou in China. Students are asked to write an essay or conduct in-class presentations on the legal aspects of this phenomenon. These include licensing by governmental authorities, civil and/or criminal liability for the deterioration of human health and environmental

---


pollution, and human rights (including the rights to health, water, food, and a clean environment). As to liability, the question is who is liable: the enterprises that extract the minerals at source, the government that provides licenses/permits, the companies that process the raw materials in third States into marketable products, the financial institutions that provide financing, consumers, or yet other actors? If placed in the setting of the Arctic or Antarctic territories or the seabed, students could additionally be asked to elaborate on the public international law aspects of the (potential) extraction of rare minerals (who ‘owns’ certain territories?).

IV Newly Created Materials: Plastics

The widespread use of plastics has become a considerable problem since the invention of a first type of plastic about a century ago, as plastics are often not or not easily bio-degradable. They are part of a much wider human waste issue. An enormous quantity of plastics is currently present in the earth’s water systems, in the oceanic gyres in the Indian, North Atlantic, North Pacific, South Atlantic and South Pacific Oceans, and elsewhere, in the form of larger, micro- and nano-plastic particles. These (and the harmful substances they contain and absorb) are eaten by fish, birds, and other animals, and through them and through plants also enter into the human food chain.

This development has triggered a range of new approaches. Examples are the invention of a technique for cleaning up at least part of the plastic in the oceans or for the decomposition of plastics (e.g., by way of fungi); the development of new alternatives for plastics (again, e.g., fungi); the use of recycled plastic (e.g., for the production of sports shoes or the construction of roads); and the appearance of package-free stores.

Case 8. Students are asked to work on the legal aspects of these new approaches, presenting their results in papers or in-class presentations. A first legal aspect are patents and intellectual property rights protecting (investments in) new inventions and approaches, e.g., in relation to inventions for the clean-

up of the oceans, decomposition of plastics, or alternatives for plastics (cf. Case 9). Secondly, students could work on the issue of who is responsible (or liable) for plastic in oceans from an international law perspective. A third research field is the legal aspects of structuring and financing of new approaches relating to plastics. E.g., what legal form do you choose for a new enterprise focused on package-free sales; the legal aspects of other constructions to finance innovative start-ups (e.g., by way of crowd funding, venture capital, the issuance of debt securities, bank financing, etc). 15

V FOOD: TRANSGENETIC MODIFICATION

Over the past decades, the transgenic modification of living organisms has become booming business. In particular, genetically modified plants are the subject of commercial practice, whereas animals are (still) largely the subject of experiments (aside from the consideration that they may be fed genetically modified plants). Genetic modification of plants and related issues, such as the impact of the use of pesticides, biodiversity, food security for a growing population, and the economic and social impact of commercial control over and exploitation of seeds, have given rise to intense debate. These developments also raise a range of intricate legal issues.

Case 9. A number of these legal issues come to the fore in the critical documentary *The World According to Monsanto*. Students are instructed to present the legal issues mentioned in this documentary, or to identify and evaluate them in a paper. The legal issues referred to in the documentary include aspects of criminal law, labour/employment law, civil law suits (e.g., damages claimed for the unauthorized use of seeds, the threat of legal proceedings if corporate information is disclosed in a labour/employment dispute), ‘technology/stewardship agreements’, liability for asserted environmental impact (e.g., pollution of the soil by pesticides; reduction of animal life, including bees, and plant varieties; cross-pollination), liability for asserted health impact (due to the use of pesticides and/or the consumption of GMOs), the civil and company law aspects of (international) take-overs of seed companies, regulatory law, human rights (including those relating to health, food, a clean environment, and other economic and social rights, as well as the rights of children, women, minorities, and indigenous peoples), (the exploitation of) patents and other intellectual property rights (cf. on this issue Case 8), trade agreements between States.

VI WATER

A Freshwater

The quantity and quality of freshwater is high on the policy agenda. While climate change affects the availability of resources, an ever growing world population requires more and more water for drinking, washing, irrigation of agricultural land, etc. One of many telling examples is the recent scarcity of freshwater in California due to extreme drought combined with

---

intensive agriculture, requiring radical readjustment measures.\textsuperscript{18} The quality of freshwater is affected by the widespread use of agricultural pesticides, hydraulic fracturing (‘fracking’) chemicals, medicines, etc. The establishment in 2003 of UN-Water, the United Nations inter-agency coordination mechanism for freshwater- and sanitation-related issues, underlines the importance of freshwater from a public policy perspective. Commercial enterprises also have an interest in control over freshwater sources.\textsuperscript{19}

\textit{Case 10.} Students are instructed to identify and evaluate the legal aspects in the documentary \textit{Bottled Life} (and/or \textit{Tapped})\textsuperscript{20} on water extraction and bottling by commercial entities. These include State laws (such as the one in Maine, intended to give settlers the right to withdraw as much water as they needed to live and farm); government regulation (permits, administrative proceedings, etc); constitutional law; human rights (access to water); public or private ‘ownership’ of water; civil law aspects (e.g., to whom does a single water reservoir under several parcels of land belong?; buy/sale transactions in respect of water rights; civil law suits to enforce rights to extract water).

\textit{Case 11.} Some additional legal questions arise in the context of ancient water reservoirs being discovered kilometers down in the earth crust\textsuperscript{21}, on which students can be asked to elaborate. What are the financing and intellectual property law aspects of developing new machinery for investigating and possibly extracting the underground water resources? Does anyone have a


claim to this water so deep down from a public international law perspective? What is the analysis where water reservoirs cross (perceived) national borders?

B Commercial activity relating to seas and oceans

The world’s seas and oceans are the theatre of large-scale economic activity. If we confine ourselves to focus only on the sea and ocean beds, then fishing, the laying of cables and pipes, and the winning of oil, gas and other resources spring to mind. Techniques used include bottom trawling, dredging, rock sinking and positioning, and extraction. Specialized companies offer research services regarding the sea and ocean beds (using satellites, sonar, etc) in order to make such economic activity possible.

Case 12. Students are asked to come up with a legal framework for trawling. Issues to be covered include a public international law analysis (who is or should be ‘entitled’ to carry out economic activity in relation to the sea/ocean bed, and where?); national policies, including protected zones; liability for damaging pipes/cables and other structures on the sea and ocean beds; liability for the long-term consequences of trawling (availability of food, environmental impact). A variation of this case would be to ask students to explore in how far rules on trawling can be applied to rock sinking and positioning activities.22

VII THE ATMOSPHERE: RADIATION

Radiation exists in many forms. The case proposed here by way of example focuses on radiation for mobile communication.

Case 13 (moot court). Students are split into three different groups. One group acts as the lawyers in joint proceedings initiated by a farming

corporation (which claims that radiation for mobile communication has exterminated bees, making pollination and harvest virtually impossible) and individuals (who assert that such radiation has had a damaging effect on their health, leading to personal expenditures and costs for the national health system) in State X. The defendants, represented by another group of students, are antenna providers and mobile telephone companies in State X and the International Commission on Non-Ionizing Radiation Protection based in Germany, which commission, according to claimants, has provided inadequate scientific advice and guidance, on which authorities and companies worldwide have relied to set exposure limits to telephone-related radiation. A third group of students acts as judges. Legal issues to be discussed include: applicable law; liability for asserted economic losses, environmental consequences, and health costs; the role of governmental and non-governmental standard-setting bodies.23

VIII Outer Space

An ever-increasing amount of space debris is in orbit around the earth at enormous speeds, with potentially damaging effects on other objects in space (satellites and other space assets, affecting such currently common applications as mobile telephones, television broadcasting, and navigation systems, to name but a few) and in case space debris hits territory on earth. Until recently, space was predominantly the realm of States and space agencies. The new trend towards a (potential) increase in commercial activity by private entities in space is likely to aggravate the problem of space debris.

Case 14. Students are invited to establish a link between, on the one hand, the imminent ‘commercialization of outer space’ and the international convention that deals with commercial law/financing aspects of space assets (i.e., the Protocol on Matters Specific to Space Assets to the so-called Cape Town Convention) and, on the other hand, the broader consequences of such developments, in particular the increase in space debris. The students are asked

to draft a supplementary protocol to the Cape Town Protocol addressing space debris as the consequence of financing/commercial activity, including questions like: In what ways can space debris be limited? Who is or should be legally responsible for damage to assets in space or on earth caused by space debris or for cleaning it up?24

IX Conclusion

Commercial activity since the industrial revolution has been a core driver of change at unprecedented speed and with ever more visible, far-reaching consequences. Traditional commercial and financial law teaching no longer does the job. A new, more holistic approach is needed, which takes into account the limited availability of natural resources and the potentially catastrophic impact of their unlimited exploitation. The proposed method of integrating case studies involving natural resources into the mainstream curriculum is easy to implement. Students are invited to investigate a broad range of legal issues on the crossroads of commercial activity and natural resources, and to present their findings in papers, in-class presentations, moot court cases, moot intergovernmental negotiations, etc. Following this or other, comparable methods will equip a future generation of commercial and finance lawyers with the knowledge to contribute to responsible choices.

EXPLAINING THE CORPORATION TO STUDENTS AND OTHER NON-SPECIALISTS: A GRAPHIC APPROACH

Benedict Sheehy

CONTENTS

I Introduction .................................................................................................. 69
II Use of the Graphic in Higher Education ................................................... 70
III The Basic Challenges of Corporate Law .................................................. 71
IV Theories of the Corporation ....................................................................... 73
V Distinguishing Legal and Human Persons .................................................. 74
VI Distinguishing the Legal Person and its Assets .......................................... 79
VII Integrating the Legal and the Human Person .......................................... 80
VIII Transactions ............................................................................................ 83
IX Conclusion .................................................................................................. 84

I Introduction

The corporation needs to be explained to a wide range of people both in and well beyond the academic context. Everyone from first year law students, frustrated creditors and fired employees, to would be entrepreneurs and investors struggle to understand basic corporate issues such as why the person they interacted with is not liable for a transaction and how the corporate entity provides new opportunities. It is difficult yet critical to be able explain the corporation simply yet effectively.

Explaining the corporation can become easier when thinking graphically about the problem and using new technologies. Experienced corporate counsel, Rosman, lays down the challenge: ‘[w]ell-crafted images—charts, diagrams, photographs—can make your briefs [and other presentations] more interesting and persuasive, and law schools would do well to incorporate instruction in visual presentation’.

This article proposes a graphic tested in both professional and academic settings as a useful solution to the problem of explaining


BTh (EPBC), LLB (Windsor), MA (W Laur), MA (McM), LLM (Qld), PhD (ANU). Associate Professor, School of Law & Justice, University of Canberra.
corporate law, corporate actors and transactions to learners and other non-specialists.

II USE OF THE GRAPHIC IN HIGHER EDUCATION

There are three aspects to the pedagogical use of graphics in education. First, the purpose of using a graphic is to provide a grounding for ethereal socio-legal phenomena, the corporation at law. In educational contexts, the use of graphic representation of ideas is referred to as ‘mind mapping ... a nonlinear visual outline of complex information that can aid creativity, organization, productivity, and memory’. Essentially, although not a traditional mind map, the graphic here proposed provides a map of sorts for thinking about the legal phenomenon of the corporation. Doing so reduces the cognitive load associated with holding ideas in one’s mind while simultaneously extrapolating, explaining and challenging the idea. Here, the learner is both learning and challenging the various doctrines, rules and transactions. A graphic provides a visual, and hence, a cognitive focal point for attention. This shifting of cognitive load away from short term memory to the task at hand is important; it frees up the mind to pay attention and so assists both the teaching and the learning of how to think about phenomena — i.e. the task of higher education — as opposed to mere surface learning associated with rote memorisation strategies. Graphics are particularly useful in this context. As Davies explains, ‘[i]f students can represent or manipulate a complex set of relationships in a diagram, they are more likely to understand those relationships, remember them, and be able to analyse their component parts. This, in turn, promotes ‘deep’ and not ‘surface’ approaches to learning.’

Secondly, as educators have come to understand the different modalities of learning, it is clear that using a graphic approach helps visually orientated

---

2 Martin Davies, ‘Concept mapping, mind mapping and argument mapping: what are the differences and do they matter?’ (2011) 62(3) Higher Education 279.
3 Tony Buzan and Barry Buzan, The Mind Map Book: How to use radiant thinking to maximize your brain's untapped potential (Reprint 1996 ed, 1993), cited in Murley, above n 2.
5 Davies, above n 3.
In law as in other disciplines, learners come from various orientations and being able to communicate the idea of the corporation across the orientations enhances the learning experience. The challenge for educators dealing with corporate law has been to develop graphic that is effective, versatile and comprehensive. The proposed model addresses these issues and solves for the basic corporate law doctrines, corporate theory and transactions.

The third and final pedagogical aspect of the use of the graphic is consistent use. This point can hardly be overstated. Students need to learn to consider the implications, various iterations and alternatives consistently in every instance in which a corporate actor is involved. Students are confused or misled when incomplete or partial corporations are presented, and variations in the diagram are introduced. Just as we teach students to use language technically, with precision and consistently not varying except to show different legal issues, so too the graphic must be used without variation except to show different circumstances. As each corporation is the same in terms of legal structure, there is no cause to draw it otherwise than presented. While it can be slightly cumbersome at first to draw the whole graphic, once the discipline is entrenched in both teacher and learner, it becomes second nature and helps learners (and other non-specialists) to ensure they are remembering to consider all the rights and duties easily, by default. They are not at risk of overlooking or omitting some consideration of rights or duties in error.

III The Basic Challenges of Corporate Law

It is widely acknowledged that the law of corporations is one of the more difficult areas of law. The reasons for this difficulty are fourfold. These are first, there are contradictory theories underlying the corporation as well as the mix of laws that inform it including the laws of property, agency, contract and trust. This underlying theoretical issue means that people whose task it is to explain the corporation, whether instructors, counsel or others, struggle to find a single, coherent model to use as a framework. The second issue relates to the distinction and relationship between the legal person and the human person.

---

Non-specialists struggle to identify and understand the concept and nature of legal personhood and its implications for their situation. The third difficulty comes from the distinction between the legal person and its assets. Again, as with the second difficulty, non-specialists struggle to understand the distinction between the property of and contracting with the legal person and the property and contracts of the human actors. Finally, confusion often arises from the facts which, for example, may include individuals holding multiple roles or multiple corporations interacting with each other.

Stripping back this complexity is critical to communicating the corporation to learners and other non-specialists. There are two steps to the simplification task: identifying the core doctrines which need to be communicated and settling on a single, workable theory of the corporation which facilitates explanation.

A core challenge for a party explaining the corporation is identifying the basic doctrines. These doctrines need to be clear before one can successfully explain how they apply to the issue, person or case at hand. There are two foundational doctrines that need to be explained: first, the corporation as a separate entity or legal person. The separate entity doctrine is the overarching doctrine from which logic allows it to exist in perpetuity independently of its membership. Further, as a legal person, the corporation has the rights and duties of human persons, including the right to be a litigant. Finally, the separate entity doctrine facilitates limited liability in which neither directors nor shareholders are liable for the debts of the corporation.

The second foundational doctrine allows the apparent disconnect between decision-making and accountability. Decision-making in the corporate form is divided between the two corporate organs — the member-shareholders and director-officers. The latter, who are identifiable humans, appear to bear no consequence for their actions. Rather, it is the corporation which bears liability. The basic issue is that corporations, as non-human persons, require human agents for all their actions. Hence, these people are acting as agents for the legal person and bear only the liabilities appropriately visited upon agents.
IV Theories of the Corporation

The variety of theories of the corporation and their inconsistency makes both teaching and understanding corporate law problematic. Despite this diversity, two particular theories are most helpful — the contractual theory and the organisational theory. In both the legal and business academy, a common view is that the corporation as no more than a nexus of contracts\(^9\) — a view championed by law and economics scholars.\(^10\) Yet problematically for those trying to explain the corporation, the contract analysis fails as a legal analysis at a number of critical points. For example, it is a contract that can be amended without the consent of the parties; it is not limited to parties who made,\(^11\) courts lack jurisdiction to amend it if it does not accord with the intentions of those currently bound by it; members face significant hurdles if they wish to enforce it against the company;\(^12\) the rights attach to shares not the contracting parties, and contractors are limited in damages remedies ‘whilst still a member and without seeking rescission of the contract whereby the shares were obtained.’\(^13\) The use of the term ‘contract’ in this instance is perhaps best understood as a metaphor.\(^14\) Yet, corporations are highly dependent on contracting and their ability to contract needs to be explained easily and clearly to parties.

Other theories of the corporation such as concession theory with its focus on origins,\(^15\) social purpose theories\(^16\) or organisationally focused theories have different focal points. For non-specialists, the organisational focus is helpful. It identifies the different parts or corporate organs and explains their different roles governance and the needs for agency.\(^17\) Fortunately, it is also easy to represent graphically, as this paper will demonstrate.

---


\(^12\) Bailey v NSW Medical Defence Union Ltd (1995) 13 ACLC 1698, 1717.

\(^13\) Houldsworth v City of Glasgow Bank (1880) 5 AC 317.


\(^16\) Frederick Hallis, Corporate Personality: A Study in Jurisprudence (Oxford University Press, 1930).

This graphic reifies legal phenomena and provides a location or focal point for the explanation and discussion. Using it consistently has proved helpful to communicating the ideas, rights and responsibilities to learners and other non-specialists.

V Distinguishing Legal and Human Persons

The distinction between the legal person and the human person is problematic for most non-specialists, and particularly so in the small corporations where the directors may also be shareholder, manager and employee. In commerce, the two are often so closely identified that non-specialists, including corporate insiders fail to differentiate between them. This can happen easily as often the sole human person is agent for the legal person and acts in all matters. The legal person, having no physical representation, is forgotten or downplayed. Yet, making the distinction clear is fundamental to any understanding of the interaction between the corporation and human persons.

This ‘two person’ approach—human person and legal person—is provides the foundation for understanding the corporation. One successful strategy for explaining is to work from the known to the unknown. Accordingly, an
explanation which begins from the known human person and moves to the unknown corporate person works well using both language and a graphic comparison. The linguistic comparison setting out the parts and graphic representation of legal and human persons is set out first in the table below.

## People at Law: 2 types

<table>
<thead>
<tr>
<th>1. NATURAL PERSON</th>
<th>2. LEGAL PERSON</th>
</tr>
</thead>
<tbody>
<tr>
<td>Rights and duties</td>
<td>Rights and duties</td>
</tr>
<tr>
<td>Birth by biological reproduction</td>
<td>Birth given by state</td>
</tr>
</tbody>
</table>

**PARTS**
- Head
- Torso
- Arms and legs
- Name

**PARTS**
- Members
- Corporate body
- Directors
- Assets
- Name

Table 1: Comparing Persons

Taking the comparison a step further provides a workable graphic. The graphical depiction must represent the two but distinguish them adequately. The proposed graphic representation clears up confusion and sets out the basis for the legal issue which is being explained. Drawing the graphic below, setting the persons side-by-side and accompanying it by a simple narration, works best. ‘The human person is represented with one ball and four sticks.’ And, ‘The legal person is represented by four boxes and three sticks.’ Although seemingly juvenile, this clear description accompanying the graphic greatly facilitates grasping the bodies and the distinction. Getting a successful understanding of the distinction between the legal and human person depends on the successful rendering or depiction of the two. Today’s tablet technology allows it to be done very simply.
People at Law

Explain the two types of people in graphic terms helps reify the both the legal person and distinguish it from the human person. It serves the purpose well when it is emphasised that just as one does not draw a human with the circle or stick missing, every corporation needs to be drawn with four boxes and three lines. Why?

Each of the lines and each of the boxes represent distinct rights and duties. For example, the line between the directors and the box containing the corporate name ABC Ltd are directors’ duties, including fiduciary duties. Or, as another example, the line between the corporate box and the assets box represents property rights and contracts.
Further, as noted, each of the boxes represents a different category of participant or actor. Each category has its own rules about joining or exiting, and has distinct rights, duties and procedures. So for example, understanding that a shareholder does not have the decision-making rights that a director has, or that neither a director nor a shareholder is the ‘owner’ of corporate property, can be easily illustrated using the graphic. Having this clear is a first significant step.

The next set of challenges is identifying and explaining the relationship between the legal and human persons. For the non-specialist, it can be quite difficult to understand how legal persons and natural persons interact. Therefore, identifying the different roles or locations where human persons interact with legal persons is helpful. For example, a human person can occupy the role of shareholder, or director or be an employee of the corporation. Each of these relations can be represented by a wavy line.
Such roles may be alternatives, or concurrent — a situation many non-specialists initially find particularly confusing. Helping non-specialists conceptualise multiple legal roles can be done rather easily by using a familiar example. It is helpful to point out that a person may be an employee, an account holder at a bank and a person with property rights all simultaneously without any of the roles interfering with or offending the other. Thus, the graphic can help the non-specialist readily grasp the various roles — director, shareholder, employee or other contractor — including simultaneous roles.

A common further confusion arises when human persons name the corporation after themselves. In order to understand the confusion, all one needs to remember one’s initial consternation at the first encounter with the case establishing independent corporate identity in commonwealth countries, the case of *Salomon v Salomon & Co Ltd*. Understanding that Mr Salomon was not suing himself but the company is a basic challenge for the beginning law student. In the diagram above, Mr ABC has incorporated a company named ABC Ltd and is a director, shareholder and employee of the company — a situation familiar to most corporate law students.

By identifying and illustrating graphically the contractual relationships between the corporation and the human person and explaining those...
relationships the specialist takes the non-specialist a step further in clarifying the mystery of the doctrine of separate legal entity.

VI Distinguishing the Legal Person and its Assets

Distinguishing between the legal person and its assets is often a challenge for the non-specialist. Non-specialists, when asked what a corporation looks like will often refer to a building, such as a bank building. They confuse the physical assets with the legal corporation. In addition, terms such as ‘corporate car’ or ‘corporate retreat’ are ubiquitous reinforcing such confusion. Having the issue identified and clarified helps people to focus on the legal issues related to the organisation when so required. Or alternatively, to understand and focus on assets and associated business issues when that is appropriate.

The basic conceptual issue is the existence of the corporation’s own, independent legal capacity to enter into contracts and to hold property—an extension of the consequence of separate legal entity. Once this concept is made clear, these corporate rights can be readily distinguished from human rights to property and contracts. Graphically representing the assets in the lower box as distinct from the legal person of the corporation makes this legal and conceptual distinction clear. In addition, it identifies these assets and related liabilities as distinct from those held by human persons. Accordingly, using a separate box to indicate assets — at law, merely collections of contractual and property rights — helps the discussion to focus on the particular doctrine or rule or legal issue under discussion.
In Image 5 the bottom box of the graphic illustrates the difference between, the corporation, its assets and personal assets. The conceptual failure seems common not only among beginning scholars but even among sophisticated business people — if one is to put any weight on the defences raised by white collar criminal defendants who claim not to be able to distinguish between their own personal assets and those of the corporation.¹⁰

VII Integrating the Legal and the Human Person

The graphic provides a cognitive platform for explaining how the integrating of the human person into the legal person, and provides a focal point for discussion of the substantive legal issues involving corporate law.

A Identifying Directors’ Rights and Duties and the Agency Issue

The organ of the board of directors is created by a section of a statute and/or articles of incorporation and is interpreted by case law.

Becoming a director is determined by the substantive rules governing membership on the board. Removal from the board of directors is determined by rules. Explaining the rule frameworks and the associated rights and duties using the graphic, helps learners and other non-specialists distinguish between and stay focused on the relevant legal issues and actors. They are less likely to be confused because it is clear which part of the corporate body is under discussion.

Further, understanding the location of the directors as intimately involved with and directing the operations of the corporation but separate from it allows non-specialists to conceptualise the agency relationship between directors and the corporation more readily. It facilitates explaining to the non-specialist how Smith of Smith & Co Ltd., can sign a contract for the corporation and not be personally liable. Or, for example, it can help show how a director can be a director of a corporation that has a policy which has significant negative environmental ramifications without personally being in support of the policy.
B Identifying Shareholders’ Rights

In the same way, identifying and distinguishing shareholders is facilitated through use of the graphic. Shareholders may have their own rights vis-à-vis directors. This too can easily be graphically illustrated. For example, whereas the stick which joins the director box to the corporate box depicts directors’ duties, the dotted line can represent shareholders’ right to elect directors. A simple arc connecting the corporate body box to the shareholder box can be used to illustrate a derivative action.

![Diagram of corporation structure]

Image 7: Shareholders

Again, the graphic makes it clear that the corporation has its own rights and duties as independent of the members and the board of directors.

C Corporate Governance

Governance can readily be illustrated as divided between the member-shareholders and directors. The two separate boxes and the two distinct sticks illustrate the different decision making rights allocated to the two organs. Removal of the directors and replacement by administrators can be illustrated by removing the stick between the director and corporate box, and dissolution by removing the corporate box altogether along with directors and member-shareholder boxes.
VIII Transactions

Many of the issues non-specialists encounter come about as a result of corporate transactions. These transactions may be between corporate persons or between corporations and natural persons. The graphic is particularly helpful to illustrate these transactions. Below is a new class of shares from A Ltd issued to purchase assets from B Ltd.

![Corporate Transaction Diagram]

Image 8: Share classes and transaction

The next image shows a transaction in which a sole proprietor sells a business to the corporation for shares and debt which debt is secured. Mr ABC sells his assets to ABC Ltd and takes security over the assets—the security represented by the circle around the assets and the rights as secured creditor being represented by the dashed line.
SALE AND SECURITY

IX  CONCLUSION

While explaining and understanding corporate law can be a difficult challenge it can also be a rewarding experience for lawyer, client, teacher and student. Using a graphic on a consistently can facilitate the communication of the ideas, doctrines and substantive law as well as help a client understand potential liabilities. Teaching and explaining the corporation as an entity, with organs, subject to governance, created, controlled and wound up by laws has the potential to be an enjoyable challenge for all involved and it is hoped that the graphic presented in this article can be useful in that endeavour.
THE TRENDTEX PRINCIPLE IN AUSTRALIAN LAW: CONTEXT AND RECENT DEVELOPMENTS

GLEN ANDERSON

The Trendtex principle provides that a right to litigate can be assigned when the assignee has a genuine commercial interest in the litigation. The principle finds its origins in the English decision of Trendtex Trading Corporation v Credit Suisse¹ and its application in Australia has recently been affirmed by the High Court decision in Equuscorp Pty Ltd v Haxton.² There are, however, some uncertain aspects of the Trendtex principle, such as (1) exactly what constitutes a genuine commercial interest (2), whether an assignee must have a pre-existing enforceable right against the assignor (3), whether the Trendtex principle can include the assignment of a cause of action in tort, and if so (4), whether personal torts are assignable. The article resolves these uncertainties and concludes that the Trendtex principle has a wide scope, allowing for the assignment of causes of action in contract, restitution and tort – the latter extending to personal torts under appropriate conditions. It is contended that the principle’s wide scope appropriately mirrors the relaxation of judicial attitudes towards maintenance and champerty in the latter half of the last century. It also represents a suitably flexible policy response to the upsurge in diversified commercial litigation in the late twentieth and early twenty-first centuries.

CONTENTS

I Introduction .................................................................................................. 86
II Maintenance, Champerty and the Assignment of Rights to Litigate ... 87
III The Trendtex Principle in Legal Context ............................................. 90
IV The Trendtex Principle ......................................................................... 94
V Conclusion ............................................................................................... 111

¹ BA (Hons) BA/LLB (Hons) PhD (Macq), Lecturer, Newcastle Law School, University of Newcastle, Australia.
³ (2012) 246 CLR 498, 525 (French CJ, Crennan and Kiefel JJ), 533 (Gummow and Bell JJ), 558 (Heydon JJ).
I INTRODUCTION

The Trendtex principle provides that a right to litigate can be assigned when the assignee has a genuine commercial interest in the litigation. The principle finds its origins in the English decision of Trendtex Trading Corporation v Credit Suisse\(^1\) and its application in Australia has recently been affirmed by the High Court decision in Equuscorp Pty Ltd v Haxton.\(^4\) There are, however, some uncertain aspects of the Trendtex principle, such as (1) exactly what constitutes a genuine commercial interest (2), whether an assignee must have a pre-existing enforceable right against the assignor (3), whether the Trendtex principle can include the assignment of a cause of action in tort, and if so (4), whether personal torts are assignable.

The article is divided into three principal sections. Section II begins by briefly discussing the concepts of maintenance, champerty and their interrelationship with the assignment of rights to litigate. Section III places the Trendtex principle into legal context, juxtaposing it with other exceptions to the prohibition on the assignment of rights to litigate. Section IV specifically explores the Trendtex principle, examining its origins, the scope of the genuine commercial interest criterion, whether an assignee must have a pre-existing enforceable right against the assignor, whether the principle extends to causes of action in tort, and whether personal torts are assignable.

The conclusion condenses all aspects of the preceding discussion and argues that the Trendtex principle has a wide scope, allowing for the assignment of causes of action in contract, restitution and tort – the latter extending to personal torts under appropriate conditions. It is contended that the principle’s wide scope appropriately mirrors the relaxation of judicial attitudes towards maintenance and champerty in the latter half of the last century. It also represents a suitably flexible policy response to the upsurge in diversified commercial litigation in the late twentieth and early twenty-first centuries.

---

\(^1\) [1982] AC 679; [1981] 3 All ER 520.
\(^4\) (2012) 246 CLR 498, 525 (French CJ, Crennan and Kiefel JJ), 533 (Gummow and Bell JJ), 558 (Heydon JJ).
The Trendtex Principle In Australian Law: Context And Recent Developments

II MAINTENANCE, CHAMPERTY AND THE ASSIGNMENT OF RIGHTS TO LITIGATE

Common law rules have developed over time preventing people who have rights to sue in contract, tort and equity from assigning those rights to people with no genuine interest in the litigation. These rules were based upon public policy considerations designed to prevent maintenance and champerty. But to what do these terms refer? Maintenance is the support of an action by a person who has no interest in the cause of action. Champerty is a more extreme (aggravated) form of maintenance, consisting of the support of an action on the basis that the person receives part of the verdict on completion. The concepts of maintenance and champerty are therefore interrelated: “[m]aintenance is the genus and champerty a species of maintenance.”

The origins of the prohibition on maintenance and champerty lay in medieval concerns with the manipulation of witnesses, encouragement of unviable litigation, and corruption of the legal system’s integrity by men of means and influence. Over time, as the courts became more standardised in their approach and function, these concerns became less acute.

5 Prosser v Edmonds (1835) 160 ER 196, 203 (Lord Abinger); Georgiadis v Australian and Overseas Telecommunications Corp (1994) 179 CLR 297, 311 (Brennan J); Magic Menu Systems Pty Ltd v AFA Facilitation Pty Ltd (1997) 72 FCR 261; 142 ALR 198, 205 (Lockhart, Cooper and Kiefel JJ); Campbells Cash and Carry Pty Limited v Fostiff Pty Ltd (2006) 229 CLR 386, 484 (Callinan and Heydon JJ).
6 Alabaster v Harness [1895] 1 QB 339, 342 (Lord Esher MR); Glegg v Bromley [1912] 3 KB 474, 489-490 (Parker J); Stevens v Keogh (1946) 72 CLR 1, 28 (Dixon J); Campbells Cash and Carry Pty Limited v Fostiff Pty Ltd (2006) 229 CLR 386, 425 (Gummow, Hayne and Crennan JJ); We should note, however, that the prohibitions on maintenance and champerty were not absolute. There were exceptions. In Magic Menu Systems Pty Ltd v AFA Facilitation Pty Ltd (1997) 72 FCR 261; 142 ALR 198 at 205 Lockhart, Cooper and Kiefel JJ intimated as much: “[w]hat maintained actions were thought likely to produce, and which was inimical to the public interest, altered over the course of time and with changing social conditions, as did the recognition of interests which were sufficient to justify interference in another's litigation by supporting it: see Hill v Archbold [[1968] 1 QB 686] at 694; Trendtex Trading Corp v Credit Suisse [1980] QB 629; Condiffe v Hislop [1996] 1 WLR 753 at 759; [1996] 1 All ER 431 at 437 and Roux v Australian Broadcasting Commission [1992] 2 VR 577 at 607. It may now be observed, for example, that concerns expressed earlier this century, as to the potential for the maintenance of actions to give rise to an increase in litigation, might now be considered of lesser importance than the problems which face the ordinary litigant in funding litigation and gaining access to the Courts. In the latter respect, by the time Martell v Consett Iron Co Ltd [1955] 1 Ch 363 came before Danckwerts J, his Honour was able to observe that support of legal proceedings based upon a bona fide common interest, financial or philosophical, must be permitted if the law itself was not to operate as oppressive. The Courts today, in our view, are likely to take an even wider view of what might be acceptable, particularly if procedural safeguards are present or able to be applied.” These comments were endorsed by McClelland J in Smits v Roach [2002] NSWSC 241 [240].
7 In Giles v Thompson [1994] AC 142; [1993] 3 All ER 321, Steyn LJ similarly stated: “[i]n modern idiom, maintenance is the support of litigation without just cause. Champerty is an aggravated form of maintenance. The distinguishing feature of champerty is the support of litigation by a stranger in return for a share of the proceeds.” See also Jeb Recoveries LLP v Judah Eleazar Binstock [2015] EWHC 1063 (Ch) [9] (Simon Barker QC); Body Corporate 326421 v Auckland Council [2015] NZHC 862 [274] (Gilbert J).
8 As was eloquently expressed by counsel in In re Trepeca Mines Ltd (No 2) [1963] 1 Ch 199, 210.
9 W. J. V. Windeyer, Lectures in Legal History (2nd ed, 1957), 151-152; Damian Reichel “The Law of Maintenance and Champerty and the Assignment of Choses in Action” (1983) 10 Sydney Law Review, 166; Saunders v Houghton...
In Australia, legislation has progressively abolished criminal and tortious offences associated with maintenance and champerty. This abolition is commensurate with the view which rose to prominence in the second half of the twentieth century questioning the vigorous prohibition on maintenance and champerty. Legitimate concerns have thus been expressed regarding the inability of potential litigants to fund proceedings, this having a greater deleterious impact on the cause of justice in contemporary times than concerns relating to maintenance and champerty. As articulated by Lockhart, Cooper and Kiefel JJ in Magic Menu Systems Pty Ltd v AFA Facilitation Pty Ltd:

What maintained actions were thought likely to produce, and which was inimical to the public interest, altered over the course of time and with changing social conditions, as did the recognition of interests which were sufficient to justify interference in another’s litigation by supporting it... It may now be observed, for example, that concerns expressed earlier this century, as to the potential for the maintenance of actions to give rise to an increase in litigation, might now be considered of lesser importance than the problems which face the ordinary litigant in funding litigation and gaining access to the courts.


11 In New South Wales, for example, criminal and tortious offences associated with maintenance and champerty were abolished by sections 3 and 4 of the Maintenance, Champerty and Barratry Abolition Act 1993 (NSW). These sections, repealed by the Statute Law (Miscellaneous Provisions) Act 2011 (NSW), are now incorporated in Schedule 3, sections 5 and 6 of the Crimes Act 1900 (NSW), and Schedule 2, section 2(1) of the Civil Liability Act 2002 (NSW).


13 (1997) 72 FCR 261; 142 ALR 198.
14 Ibid., ALR 205.
Nonetheless, courts still retain an inherent discretion to find maintenance illegal on public policy grounds.\(^{15}\)

Importantly, there is a distinction between maintenance, champerty and the assignment of the right to litigate.\(^{16}\) In the case of maintenance and champerty, no assignment of the right to litigate need take place. Instead maintenance and champerty may merely involve litigation funding, which as indicated in *Campbells Cash and Carry Pty Limited v Fostif Pty Ltd*\(^{17}\) and *Jeffery & Katauskas Pty Ltd v SST Consulting Pty Ltd*\(^{18}\) is permissible under Australian law.\(^{19}\) Having said this, where a right to litigate is assigned, then under certain circumstances it may be invalid if it does not fall within one of the recognized exceptions to the prohibition on the assignment of rights to litigate.

Finally, a distinction can be drawn between the prohibition on the assignment of rights to litigate and the assignment of future property arising as the result of litigation.\(^{20}\) In *Glegg v Bromley*,\(^{21}\) for example, the future results of litigation were assigned. Vaughan Williams LJ stated that:

I know of no rule of law which prevents the assignment of the fruits of an action. Such an assignment does not give the assignee any right to interfere in the proceedings in the action. The assignee has no right to insist on the action being carried on... There is in my opinion nothing resembling maintenance or champerty in the deed of assignment.\(^{22}\)

This is because there is no assignment of a right to litigate, only the future property which might arise as a result thereof. So long as valuable consideration is provided for such an assignment, the assignor’s conscience will be bound and

---

\(^{15}\) *Singleton & Anor v Freehill Hollingdale & Page* [2000] SASC 278 [25] (Olsson J); In New South Wales, this discretion was legislatively acknowledged in section 6 of the *Maintenance, Champerty and Barratry Abolition Act 1993* (NSW). This section, repealed by the *Statute Law (Miscellaneous Provisions) Act 2011* (NSW), has now been replaced by Schedule 2, section 2(2) of the *Civil Liability Act 2002* (NSW).

\(^{16}\) Anthony J. Sebok, “Betting on Tort Suits After the Event: From Champerty to Insurance” (2011) 60 *DePaul Law Review*, 453-545.

\(^{17}\) (2006) 229 CLR 386, 412 (Gleeson CJ), 432-436 (Gummow, Hayne and Crennan JJ), 451-452 (Kirby J), 486 (Callinan and Heydon JJ).


\(^{19}\) For various types of litigation funding which were permitted even in the era of a strict prohibition on maintenance, see *South Australian Management Corporation v Sheaun* (1995) 16 ACSR 45, 54 (Debelle J); For litigation funding in New Zealand, especially the importance of funding agreement disclosure, see *Waterhouse v Contractors Bonding* [2013] NZSC 89; See generally, Lee Atkin “Litigation Lending” After Fostif: An Advance in Consumer Protection, or a License to “Bottomfeeders”?” (2006) 28, *Sydney Law Review*, 171.

\(^{20}\) *Glegg v Bromley* [1912] 3 KB 474, 484 (Vaughan Williams LJ); *Cummings v Claremont Petroleum NL* (1996) 184 CLR 124, 145 (Dawson and Toohey JJ); *Campbells Cash and Carry Pty Limited v Fostif Pty Ltd* (2006) 229 CLR 386, 427 (Gummow, Hayne and Crennan JJ).

\(^{21}\) [1912] 3 KB 474.

\(^{22}\) Ibid., 484. See also ibid., 489 (Fletcher Moulton LJ), 490 (Parker J).
equity will make the assignment effective, as it would for any other future property transaction.\textsuperscript{23}

III  THE TRENDTEX PRINCIPLE IN LEGAL CONTEXT

It is useful to situate the Trendtex principle in legal context. The task is complicated by the fact that the broader area of law – exceptions to the prohibition on the assignment of rights to litigate – is unsystematic and conceptually confused. To begin with, there are two classes of interests – debts and the benefit under a contract prior to any breach – which are exceptions to the prohibition on the assignment of rights to litigate, but which anomalously, are not classified as such. Second, there are various recognised exceptions to the prohibition on the assignment of rights to litigate, among which the Trendtex principle is included.

A  Debts and the Benefit Under a Contract Prior to Any Breach

The assignability of a debt, even if overdue for payment, was established in Comfort v Betts.\textsuperscript{24} The logic of excluding this particular assignment type from the category of recognised exceptions to the prohibition on the assignment of rights to litigate seems to stem from two interrelated factors. First, the legal assignment of debts was made possible by section 25(6) of the Supreme Court of Judicature Act 1873 (UK).\textsuperscript{25} Prior to this legislative intervention, a debt was only assignable in equity because the common law courts traditionally considered the right to be personal to the creditor.\textsuperscript{26} Second, in light of the statutory intervention and accompanying decisions, a debt was

\textsuperscript{23} Chancery v Graydon (1743) 2 Atk 616, 621 (Lord Hardwicke LC); Grey v Kentish (1749) 1 Atk 280, 280 (Lord Hardwicke LC); Meek v Kettlewell (1843) 1 Ph 342, 347 (Lord Lyndhurst); Re Linds; Industrials Finance Syndicate Limited v Lind [1915] 2 Ch 345, 359-360 (Swinfen Eady LJ), 370 (Bankes LJ); Williams v Commissioner of Inland Revenue [1965] NZLR 395, 399 (Turner J).

\textsuperscript{24} [1891] 1 QB 737, 740 (Lord Esher), 740 (Fry LJ), 741 (Lopes LJ); Lord Esher MR, 740 noted his unease with the result: contributing to the growth of the new business of debt collecting and the removal of debt claims from the jurisdiction of the county court. For subsequent cases: Fitzroy v Cave [1905] 2 KB 364, 370 (Collins MR), 374, (Cozens-Hardy LJ (with whom Mathew LJ agreed)); County Hotel and Wine Co Ltd v London and North Western Railway Co [1918] 2 KB 251, 261 (McCardie J); Ellis v Torrington [1920] 1 KB 399, 411 (Scrutton LJ); Re Daley: Ex parte National Australia Bank Ltd [1992] 8 ACSR 395, 37 FCR 390, ACSR 400 (Heerey J); Camdex International Ltd v Bank of Zambia [1998] 1 QB 22, 30-31 (Hobhouse LJ); Rickard Constructions v Rickard Hails Moretti [2004] NSWSC 1041 [42] (McDougall J).

\textsuperscript{25} See s 12 of the Conveyancing Act 1919 (NSW); s 134 of the Property Law Act 1958 (Vic); s 199 of the Property Law Act 1974 (Qld); s 15 of the Law of Property Act 1936 (SA); s 20 of the Property Law Act 1969 (WA); s 86 of the Conveyancing and Law of Property Act 1884 (Tas); s 205 of the Civil Law (Property) Act 2006 (ACT); s 182 of the Law of Property Act 2000 (NT).

\textsuperscript{26} Master v Miller (1791) 4 Durn & E 320, 340 (Buller J); Camdex International Ltd v Bank of Zambia [1998] 1 QB 22, 30 (Hobhouse LJ), 39-40 (Peter Gibson LJ), 40-41 (Neil LJ).
henceforth regarded as “property,” and *ergo*, the legal assignment of a debt was not the assignment of a right to litigate.\(^{27}\) Although this may appear conceptually anomalous, it is the traditional and well-established characterisation used to justify the legal assignment of debts.\(^{28}\)

The second interest which would fit into the same category is the assignment of a benefit under a contract, whether a claim to which that benefit gives rise is liquidated or unliquidated, *before* a breach of contract occurs. This was established in *Torkington v Magee*\(^ {29}\) which concerned an assignment, prior to any breach, of an executory contract for purchase. Channell J (with whom Lord Alverstone CJ and Darling J agreed) upheld the right of the assignee to sue for damages on the grounds that a court of equity would have acted analogously prior to the passage of section 25(6) of the *Supreme Court of Judicature Act 1873* (UK).\(^ {10}\) The rule has been applied by subsequent cases\(^ {31}\) and is explicable by the fact that there is no assignment of a right to litigate at the time the assignment occurs, even though such a right may subsequently accrue to the assignee.\(^ {32}\)

The merit of maintaining a distinction between the assignment of a benefit under a contract before and after breach, with only the latter impugned for maintenance, has been subject to criticism. Oliver LJ, for example, in *Trendtex Trading Corporation v Credit Suisse*\(^ {33}\) has framed the issue thus:

> What is it (if anything) that distinguishes the assignment of the benefit of a subsisting contract from the assignment of a right to enforce a contract the performance of which has been withheld? What logical dividing line is there between the innocent assignee of a contract and the champertous assignee of the right to sue for damages for its breach? Why is it to be assumed that the former will

\(^{27}\) See for example, *Fitzroy v Cave* [1905] 2 KB 364, 373 (Cozens-Hardy LJ (with whom Mathew LJ agreed)); *Camdex International Ltd v Bank of Zambia* [1998] 1 QB 22, 32 (Hobhouse LJ), 39-40 (Peter Gibson LJ), 40-41 (Neil LJ); *Zabih v Janzemini* [2009] EWHC 3471 (Ch) [20] (Sales J); *EWC Payments Pty Ltd v Commonwealth Bank of Australia* [2014] VSC 207 [82] (Elliott J).

\(^{28}\) See J. D. Heydon, M. J. Leeming and P. G. Turner, *Meagher, Gummow and Lehane’s Equity Doctrines and Remedies* (Butterworths LexisNexis, 5th ed., 2015), 294. The learned authors note that, “[t]he case of an overdue debt merely points up the problem inherent in the distinctions drawn in this breach of the law: for what is a debt but a right to sue to recover a sum certain?” Similar observations were made by Mccardie J in *County Hotel and Wine Co Ltd v London and North Western Railway Co* [1918] 2 KB 251, 260: “[t]he whole law upon the matter requires broad juristic consideration and decision by an appellate tribunal in the light of modern circumstances.”

\(^{29}\) [1902] 2 KB 427.

\(^{30}\) Ibid., 431.


behave with total rectitude whilst the latter may suppress evidence, suborn witnesses and advance inflated and unsustainable claims? Authority gives no certain answer.\footnote{Ibid., 671.}

Despite these valid criticisms, the distinction between the assignment of a contract before and after breach endures.

\section*{B Recognised Exceptions to the Prohibition on the Assignment of Rights to Litigate}


The \textit{Trendtex} principle can perhaps be characterised as a conflation of various recognised exceptions, such as the assignment by a trustee in bankruptcy, assignment by a company liquidator and the assignment of...
property with an incidental right to litigate.\textsuperscript{42} This is because the assignment of a cause of action on the grounds of a genuine commercial interest can be used to stave off the final plunge into bankruptcy or liquidation whereupon legislatures have authorised wholesale assignments. Moreover, the assignment of property with an incidental right to litigate has long been regarded as permitting the assignment of causes of action not only in contract but also tort.\textsuperscript{43} In Williams \textit{v} Protheroe,\textsuperscript{44} for example, Williams took an assignment of an estate in land along with an action for arrears in rent and breach of covenants by Protheroe to repair the premises. Best CJ stated that the assignment was not champertous, stemming from “antient times, when it was necessary for the then existing state of society.”\textsuperscript{45} A similar outcome occurred in Dawson \textit{v} Great Northern and City Railway Co\textsuperscript{46} in which Stirling LJ (with whom Collins MR and Mathew LJ agreed) upheld the assignment to a land purchaser of a statutory claim of compensation against a railway company: “[a]n assignment of a mere right of litigation is bad... but an assignment of property is valid, even although that property may be incapable of being recovered without litigation.”\textsuperscript{47} More recently, in Re Kenneth Wright Distributors Pty Ltd (in liq); W J Vines Pty Ltd \textit{v} Hall,\textsuperscript{48} an assignment of a right to sue a bailee for damages caused by the bailor’s negligence was upheld by Kaye J on the basis that the assignment was incidental to the assignment of the chattels themselves.\textsuperscript{49}

It is also arguable that the \textit{Trendtex} principle draws support from the unrecognised exception of the assignment of a debt. This is because the assignability of a debt can oftentimes be justified on the grounds of a genuine

\textsuperscript{42} See subtle discussion in \textit{Trendtex Trading Corporation v Credit Suisse} [1982] AC 676, 703 (Lord Roskill).

\textsuperscript{43} Williams \textit{v} Protheroe (1829) 2 Moo & P 779, 787 (Best CJ); Dickinson \textit{v} Burrell (1865-66) LR 1 Eq 337, 342 (Romilly MR); Re Kenneth Wright Distributors Pty Ltd (in liq); W J Vines Pty Ltd \textit{v} Hall [1973] VR 161, 166-167 (Kaye J); First City Corporation Ltd \textit{v} Downsvie Nominente Ltd [1989] 3 NZLR 710, 754 (Gault J); Camdex International Ltd \textit{v} Bank of Zambia [1998] 1 QB 22, 34 (Hobhouse LJ), 40 (Peter Gibson LJ); Krishell Pty Ltd \textit{v} Nilant [2006] WASCA 223; (2006) 32 WAR 540 [77] (Wheeler JA); Campbells Cash and Carry Pty Limited \textit{v} Fostif Pty Ltd (2006) 229 CLR 386 [258] (Kirby J).

\textsuperscript{44} (1829) 2 Moo & P 779.

\textsuperscript{45} Ibid., 787.

\textsuperscript{46} [1905] 1 KB 260.

\textsuperscript{47} Ibid., 271.

\textsuperscript{48} [1973] VR 161.

\textsuperscript{49} Ibid., 166-167; See also Sartori \textit{v} BM2008 Pty Ltd (No 2) [2010] FCA 1160 [57] (Mckerracher J); Daine Skapinker, “Equitable Assignments”, in Patrick Parkinson (ed.), \textit{Principles of Equity} (Lawbook Co., 2nd ed., 2003), 538, footnote 201.
commercial interest, as demonstrated by *Re Daley; Ex Parte National Australia Bank Ltd.*\(^{50}\)

It thus emerges that the *Trendtex* principle – which is predicated upon a genuine commercial interest – did not arise *in vacuo*. Rather, it represents a conflation of other recognised and unrecognised exceptions to the prohibition on the assignment of rights to litigate, tailored to modern commercial realities.

### IV  THE *TRENDTEX* PRINCIPLE

Before moving to consider the controversial aspects of the *Trendtex* principle in Australian law, it is first useful to outline the principle’s origins.

#### A  Origins

In *Trendtex Trading Corporation v Credit Suisse*\(^{51}\) a Swiss Corporation, Trendtex, had contracted to sell 240,000 tons of cement to an English company for shipment to Nigeria. The deal was to be financed by a letter of credit issued by the Central Bank of Nigeria (CBN), which subsequently reneged upon the deal. Trendtex claimed damages of US $14,000,000 in England against the CBN. Credit Suisse was a creditor of Trendtex and offered to guarantee the legal costs and fees incurred by Trendtex’s English solicitors in the action against the CBN. Trendtex’s claim failed at first instance, with the CBN pleading sovereign immunity, but this was successfully appealed to the Court of Appeal in *Trendtex Trading Corporation v Central Bank of Nigeria*.\(^{52}\) While a further appeal to the House of Lords was pending, Credit Suisse pressed Trendtex for an assignment of the cause of action against the CBN under the threat of bankruptcy. Trendtex agreed. The assignment stated that an offer of US $800,000 had been received from an anonymous third party to purchase Trendtex’s cause of action against the CBN. The cause of action was eventually assigned to the anonymous third party for US $1,100,000 and was settled by the payment of US $8,000,000. Trendtex subsequently decided to take action.

---

\(^{50}\) (1992) 8 ACSR 395; 37 FCR 390 (facts discussed in the following section).


against Credit Suisse, arguing that the assignment of the cause of action was invalid as it savoured of maintenance. On the application of Credit Suisse, Robert Goff J, in the exercise of the Court’s inherent jurisdiction, ordered that the action be stayed with reference to the assignment’s exclusive jurisdiction clause which required disputes between Trendtex and Credit Suisse to be decided by a Swiss court. Trendtex appealed to the Court of Appeal which decided that Credit Suisse had a genuine and legitimate interest in maintaining Trendtex’s cause of action against the CBN and this was sufficient to allow it to take an assignment of the whole cause of action.\(^53\) Both Lord Denning MR and Oliver LJ (with whom Bridge LJ agreed) failed to discuss the effect of the introduction of the anonymous third party to the agreement due to the exclusive jurisdiction clause. On appeal to the House of Lords, it was unanimously decided that although the assignment of the cause of action to Credit Suisse did not savour of maintenance, the subsequent assignment by Credit Suisse to the anonymous third party did.\(^54\) This was because there was “no genuine commercial interest”\(^55\) in the assignment. It was further held that the exclusive jurisdiction clause required the dispute should be decided in a Swiss court with reference to the assignment’s invalidity under English law.\(^56\) The House of Lords thus held that the prohibition on maintenance and champerty is suspended in circumstances where an assignee can demonstrate a “genuine commercial interest” in the assignment. The House thereby ushered in a new ground upon which a right to litigate could be assigned.\(^57\)

### B Initial Australian Applications

The Trendtex principle first fell for application in the Australian context in *Re Timothy’s Pty Ltd*.\(^58\) In that case Timothy’s Pty Ltd (TPL) had taken proceedings against Affiliated Holdings Ltd (AHL) regarding a breach of lease.

---

\(^53\) *Trendtex Trading Corporation v Credit Suisse* [1980] QB 629, 658 (Lord Denning MR), 675 (Oliver LJ (with whom Bridge LJ agreed)).

\(^54\) *Trendtex Trading Corporation v Credit Suisse* [1982] AC 679; [1981] 3 All ER 520, AC 694 (Lord Wilberforce with whom Lord Edmund-Davies, Lord Fraser of Tullybelton and Lord Keith of Kinkel agreed), 703-704 (Lord Roskill with whom Lord Edmund-Davies, Lord Fraser of Tullybelton and Lord Keith of Kinkel agreed).

\(^55\) Ibid., AC 702 (Lord Roskill (with whom Lord Edmund-Davies, Lord Fraser of Tullybelton and Lord Keith of Kinkel agreed)).

\(^56\) Ibid., AC 695-697 (Lord Wilberforce (with whom Lord Edmund-Davies, Lord Fraser of Tullybelton and Lord Keith of Kinkel agreed)), 704-705 (Lord Roskill (with whom Lord Edmund-Davies, Lord Fraser of Tullybelton and Lord Keith of Kinkel agreed)).

\(^57\) *The Trendtex principle was subsequently applied by the Court of Appeal in Brownton Ltd v Edward Moore Inbuscon Ltd* [1985] 3 All ER 499 (discussed *infra* with respect to the assignment of causes of action in tort).

\(^58\) [1981] 2 NSWLR 706.
TPL was indebted to Bronze Lamp Pty Ltd (BLPL) to the amount of $25,000 and assigned its cause of action against AHL to BLPL, in consideration that BLPL would release TPL of its indebtedness. Needham J upheld the assignment’s validity on the grounds of a genuine commercial interest:

> [W]ithout the assignment of the cause of action, [BLPL] would not be able to obtain payment of its debt. I think, in the light of the decisions of the Court of Appeal and of the House of Lords in the Trendtex case, that [BLPL] had a sufficient commercial interest in the proceedings to entitle it to accept an assignment of them.\(^59\)

The Trendtex principle was reapplied in Australia in *Re Daley; Ex Parte National Australia Bank Ltd.*\(^60\) The facts were that the assignee of a debt, Daley, was the sole shareholder and guarantor of the assignor company, Opal Hotel Group Pty Ltd (OHGPL) which owned all the shares in Dewmask Pty Ltd (DPL). The two companies were formed with a view to purchasing the Opal Cove Resort at Coffs Harbour and another in Surfers Paradise. Whilst Daley was overseas, the National Australia Bank (NAB) had honoured cheques on the DPL account in the sum of $138,199.70 and on the OHGPL account in the sum of $45,811.28. The cheques were signed by Raffin, who Daley alleged had been added to the NAB’s signing mandate without his knowledge or approval or the proper authority of the companies. Whilst the matter was being investigated, and to allow OHGPL and DPL to continue trading, the NAB’s Crow’s Nest bank manager provided a $50,000 overdraft to the companies on the condition that Daley was guarantor. OHGPL subsequently assigned its cause of action to recover the money owing from the disputed cheques to Daley. Heerey J noted that, “[a]plying [the Trendtex principle], it can hardly be denied that Mr Daley has a genuine commercial interest in the enforcement of the claims by [OHGPL] and [DPL] against the Bank. He is the sole beneficial shareholder of the companies and has also guaranteed their liability of some $48,000 to the Bank.”\(^61\) His Honour continued that in any event the relationship between the OHGPL, DPL and the NAB was one of a debt owed, and that debts are regarded as property and are capable of assignment: “[t]he rule prohibiting assignments of bare rights of action does not extend to the assignments of debts”.\(^62\)

---

\(^59\) Ibid., 829.
\(^60\) (1992) 8 ACSR 395; 37 FCR 390.
\(^61\) Ibid., ACSR 400.
\(^62\) Ibid., ACSR 400. On this point see also *Rickard Constructions and Anor v Rickard Hails Moretti and Ors* [2004] NSWSC 1041 [42] (McDougall J): “[a] debt arising under a contract is regarded as property, and is assignable; and
C The Trendtex Principle in the High Court

The Trendtex principle has been discussed by two High Court decisions: *Campbells Cash and Carry Pty Limited v Fostif Pty Ltd* and *Equuscorn Pty Ltd v Haxton*. The issue was primarily one of litigation funding, as opposed to the assignment of a cause of action. The facts were that a tobacco retailer began a representative action to recover amounts paid to tobacco wholesalers for the purposes of a licence fee pursuant to the *Business Franchise Licenses (Tobacco Act) 1987* (NSW) and equivalent legislation in other states and the Australian Capital Territory. This was made possible by *Ha v New South Wales* in which the High Court decided that the licence fees were invalid excise duties under section 90 of the Australian Constitution. A litigation funder, Firmstones Pty Ltd, had financed the representative action and was entitled to one-third of any money received by the tobacco retailers, as well as all costs awarded from the tobacco wholesalers. The High Court indicated that the funding agreement was not contrary to public policy, thereby providing a green light to litigation funding. In the course of its decision, however, the High Court indicated obtuse support for the Trendtex principle, but stopped short of explicitly approving it. This is perhaps unsurprising as the case did not concern the assignment of a cause of action. The High Court’s obtuse support for the Trendtex principle spawned divergent judicial divinations in lower courts. In cases such as *TS and B Retail Systems Pty Ltd v 3Fold Resources Pty Ltd (No 3)* and *Toisch v Tasman Investment Management Ltd* a more liberal interpretation was made,

---

63 (2006) 229 CLR 386, 431 (Gummow, Hayne and Crennan JJ), 484 (Callinan and Heydon JJ).
64 (2012) 246 CLR 498, 525 (French CJ, Crennan and Kiefel JJ), 533 (Gummow and Bell JJ), 558 (Heydon J).
67 This is especially the case with regard to the comments of Gummow, Hayne and Crennan JJ at 431 which only mentioned the Trendtex principle in passing. It is arguable that the comments of Callinan and Heydon JJ at 484 were more directed, and perhaps can be accurately framed as obiter in favour of the Trendtex principle. Callinan and Heydon JJ at 484 remarked: “[b]ut the cases do point to some clear criteria. As between the funder and the party funded, there is “trafficking” in causes of action where they are assigned by the latter to the former in circumstances where there is neither any transfer of any property interest to which the causes of action are ancillary nor any genuine commercial interest which the funder has in taking the assignment of the causes of action and enforcing them for the funder’s own benefit. Although the term “genuine commercial interest” calls for further definition, in this sense to traffic in litigation is to attempt an invalid assignment of a bare cause of action, or to enter a champertous agreement [See Trendtex Trading Corporation v Credit Suisse [1982] AC 679 at 703 per Lord Roskill; Kaukomarikkinaat O/Y v Elbe Transport-Union GmbH (The Kelo) [1985] 2 Lloyd’s Rep 85 at 89 per Staughton J].”
suggesting *Campbells Cash and Carry Pty Limited v Fostif Pty Ltd*⁷⁰ approved the *Trendtex* principle, whilst other cases, such as *Salfinger v Niugini Mining (Australia) Pty Ltd (No 3)*,⁷¹ indicated to the contrary.

The confusion was resolved with the High Court’s decision in *Equuscorp Pty Ltd v Haxton*.⁷² In that case Rural Finance Pty Ltd (RFPL), a lender to investors in a blueberry farm, assigned to Equuscorp Pty Ltd (EPL) the rights that it had against the investors. These rights included those under allegedly invalid loan agreements and restitutionary claims. French CJ, Crennan and Kiefel JJ held that the assignments of the restitutionary claims to EPL were valid as they were assigned “along with contractual rights, albeit their existence is contestable” and that EPL had a “legitimate commercial interest in acquiring the restitutionary rights should the contract be found to be unenforceable.”⁷³ Gummow and Bell JJ similarly held that EPL held a genuine commercial interest evidenced by the charge which it held over the assets of RFPL to secure RFPL’s indebtedness.⁷⁴ Heydon J made analogous remarks.⁷⁵

### D The Genuine Commercial Interest Criterion

The *Trendtex* principle revolves around the genuine commercial interest criterion. This prompts the inevitable question: what is a genuine commercial interest? To begin with, a mere personal interest will not suffice.⁷⁶ This was aptly demonstrated in *Monk v ANZ Banking Group Ltd*⁷⁷ where the assignee, Monk, had attempted to take the assignment of a cause of action against the ANZ Bank so that he would have something to set off against a judgment debt recovered by the ANZ Bank against him. It was held by Cohen J that Monk did not have a genuine commercial interest in the assignment: “[t]he using of the debt as a set-off against the judgment debt is merely an example of obtaining some personal benefit … [W]here the *Trendtex* test has been applied, the commercial interest has gone beyond a mere personal interest in profiting from the outcome in the proceedings….”⁷⁸ The assignment was thus found to

---

⁷² (2012) 246 CLR 498, 525 (French CJ, Crennan and Kiefel JJ), 533 (Gummow and Bell JJ), 558 (Heydon J).
⁷⁴ Ibid., 533 (Gummow and Bell JJ).
⁷⁵ Ibid., 558 (Heydon J).
⁷⁷ (1994) 34 NSWLR 148; BC9405181.
⁷⁸ Ibid., BC9405181, 8.
be ineffective. Instructively, Cohen J rendered the following empirical categorisation of situations where the genuine commercial interest criterion had been satisfied:

> [T]he assignee was already a substantial creditor of the assignor with a right to enforce the debt (Trendtex, Re Timothy’s) or where the assignee was the sole shareholder who was guarantor of the overdraft of the assignor (Re Daley) or where the assignee was a debenture holder with an interest in protecting the value of his security (First City Corporation).\(^79\)

Cohen J also attempted to make a more abstract distillation of principle suggesting that the genuine commercial interest criterion required “an interest by the assignee in the assignor or its business affairs or activities which the assignment may in some way protect.”\(^80\) This alludes to the need for the interest to be commercial in nature, or in other words, related to a business activity which will supersede any personal interest attaching to the assignee.

In *National Mutual Property Services (Australia) Pty Ltd v Citibank Savings Limited*\(^81\) Lindgren J was confronted with the assignment of causes of action by investors to the National Mutual Group of companies against Citibank Saving Ltd and individual agents arising from a negative gearing investment scheme. His Honour defined a genuine commercial interest as, “an interest which exists already or by reason of other matters and which receives ancillary support from the assignment.”\(^82\) In a negative sense, his Honour held that a genuine commercial interest “is not a nebulous notion of the general commercial advantage of the assignee but something more specific and limited.”\(^83\)

In *Project 28 Pty Ltd (Formerly Narui Gold Coast Pty Ltd) v Barr*\(^84\) the New South Wales Court of Appeal was required to decide whether a property developer, Austcorp Group Ltd (AGL), held a genuine commercial interest in an assignment from a lessee, Tim Barr Pty Ltd (TBPL), which had an option to purchase the demised land. The land’s owner, Narui Gold Coast Pty Ltd (NGCPL), had purported to terminate the lease and TBPL sought a declaration that the termination was invalid so that it could exercise the option to purchase

---

\(^{79}\) Ibid., BC9405181, 8.

\(^{80}\) Ibid., BC9405181, 8.


\(^{82}\) Ibid., 540.

\(^{83}\) Ibid., 540.

\(^{84}\) [2005] NSWCA 240.
and then sell the land to the AGL. TBPL subsequently assigned its lease proceedings to AGL. Ipp JA (with whom Hodgson JA and Campbell AJA agreed) held that AGL only had a “mere wish”\(^{85}\) of acquiring the land for redevelopment, and that this was “far too insubstantial and tenuous” to satisfy the genuine commercial interest criterion.\(^{86}\) His Honour continued that the interest “must, at least, be rights-based and not a mere hope.”\(^{87}\)

The foregoing authorities allude to the interaction of abstract principle and tangible fact in this area, i.e., what is a “genuine commercial interest” will inevitably depend upon individualised case circumstances.\(^{88}\) Nonetheless, some delimitation is possible: a genuine commercial interest must be commercial in nature, not merely personal, and rights based.

### E Whether an Assignee Must Have a Pre-existing Enforceable Right Against the Assignor

It has been argued in various cases that an assignee must have a pre-existing enforceable right against the assignor to satisfy the genuine commercial interest criterion. This view, however, has been rejected. An example is provided by *Deloitte Touche Tohmatsu v JP Morgan Portfolio Services Ltd.*\(^{89}\) In that case JP Morgan Portfolio Services Ltd (JPMPSL) had purchased two share registry businesses from Deloitte Touche Tohmatsu (DTT). JPMPSL was a member of the Bankers Trust Group (BT Group) and its shares were owned by BT Australia Ltd. At the time of the litigation, however, Westpac Banking Corporation (WBC) had become the holding company and owner of BT Group. Relying on the *Trendtex* principle, it was decided by Tamberlin and Jacobson JJ that WBC held a genuine commercial interest in the assignment as it was the holding company of the owner of the shares in the company that held the right of action. This decision was reached despite the fact that WBC as assignee did not have any pre-existing enforceable right against the assignor, JPMPSL, at the time the cause of action arose.

---

\(^{85}\) Ibid., [42] (Ipp JA (with whom Hodgson JA and Campbell AJA agreed)).

\(^{86}\) Ibid; See also Mateljan v HTT Huntley Heritage Pty Ltd [2016] NSWCA 20 [42] (Gleeson, Leeming JJA Emmett AJA).

\(^{87}\) Project 28 Pty Ltd (Formerly Narui Gold Coast Pty Ltd) v Barr [2005] NSWCA 240[42] (Ipp JA (with whom Hodgson JA and Campbell AJA agreed)).


\(^{89}\) [2007] FCAFC 52; 158 FCR 417.
The same issue fell for consideration in *Dover v Lewkovitz*.

In that case Dover was the lessee of premises in Coogee and vacated. The lessor, Tolicar Pty Ltd (TPL), took possession of the premises and assigned its rights under the lease with Dover to Lewkovitz by way of deed for $1. Lewkovitz subsequently commenced proceedings against Dover in the Retail Leases Division of the Administrative Decisions Tribunal claiming outstanding rent, outgoings and liquidated damages under the lease. Importantly, the ordinary shares in TPL were owned by Solrose Investments Pty Ltd (SIPL), which in turn were owned by Barak Pty Ltd (BPL) and held under a discretionary trust by Lewkovitz Nominees Pty Ltd (LNPL). Lewkovitz, his wife and sister were the directors of TPL, SIPL and BPL. The principal beneficiaries of LNPL were Lewkovitz and his sister. Macfarlan JA upheld the assignment from TPL to Lewkovitz with reference to the *Trendtex* principle. On the issue of whether an assignee required a pre-existing enforceable right against the assignor to take the advantage of the *Trendtex* principle, his Honour stated:

> The prima facie prohibition against the assignment of bare rights of action is founded upon a public policy of precluding trafficking in litigation. *Trendtex* recognised that that policy would not be infringed if the assignee had a pre-existing genuine commercial interest in the right of action sought to be assigned. In my view this is so whether or not that interest is constituted, or accompanied, by a pre-existing enforceable right of the assignee against the assignor. In neither type of case is the assignee acting as “an officious intermeddler”.

This import of these comments was reaffirmed in *WorkCover Queensland v AMACA Pty Ltd* and *EWC Payments Pty Ltd v Commonwealth Bank of Australia*.

**F Whether the Trendtex Principle Extends to Causes of Action in Tort**

It will be recalled that the *Trendtex* principle was formulated in response to a factual matrix involving the assignment of a cause of action in contract – not tort. This is significant, as earlier authorities such as *Prosser v*...
Edmonds, Dawson v Great Northern & City Railway Co, Defries v Milne and Poulton v The Commonwealth indicate that a cause of action in tort is incapable of assignment. Decisions subsequent to Trendtex Trading Corporation v Credit Suisse have investigated whether this principle should be qualified where the assignment of the cause of action in tort involves a genuine commercial interest.

In Monk v ANZ Banking Group Ltd Cohen J indicated in the affirmative, noting that there was nothing to be gained by drawing a distinction between a cause of action in tort or in contract which involved a genuine commercial interest. His Honour also noted that the Trendtex principle was shaped primarily with reference to the “genuine commercial interest” criterion, rather than the assignment of a cause of action in contract. Accordingly, so long as a cause of action in tort satisfied the genuine commercial interest criterion, it would be assignable.

In South Australian Management Corporation v Sheahan Debelle J similarly decided that the Trendtex principle extended to causes of action in tort, so long as these were not imbued with a personal nature. The case was brought by the former State Bank of South Australia which was attempting to assume control of causes of action in contract and tort which were instituted by receivers appointed by it over the third defendant, Health and Life Care (HLC), with respect to advice HLC obtained from Price Waterhouse concerning the acquisition of a group of companies. Debelle J noted:

The decision in Trendtex has the effect of qualifying substantially the principle that it is not possible to assign a bare right to sue for unliquidated damages for breach of contract. There seems to be no reason in logic or as a matter of public policy, why it should not also be possible to assign the bare right to sue for unliquidated damages in tort where the cause of action is not for a personal tort such as damages for personal injury, defamation, or false imprisonment: cf Lord Denning MR in Trendtex [1980] 1 QB at 656.

94 (1835) 1 Y & C Ex 481.
95 (1905) 1 KB 260, 270-271 (Stirling LJ (with whom Collins MR and Mathew LJ agreed)).
96 (1913) 1 Ch 98, 109 (Farwell LJ), 112 (Hamilton LJ (Corens-Hardy MR agreeing)).
97 (1953) 89 CLR 540, 602 (Williams, Webb and Kitto JJ).
99 (1994) 34 NSWLR 148; BC9405181.
100 BC9405181 at 7.
101 These views were endorsed by Olsson J in Singleton v Freehill Hollingsdale & Page [2000] SASC 278 [30]-[32].
103 Ibid., 57-58.
Debelle J soon thereafter noted that *Poulton v Commonwealth*[^104] did not prevent the assignment of causes of action in tort, as the decision did not involve consideration of a genuine commercial interest.

In *Beatty v Brashs Pty Ltd*[^105] Smith J also endorsed the extension of the *Trendtex* principle to a cause of action in tort provided it was not of a personal nature. The case was initiated by deed administrators under a deed of company arrangement seeking orders that the deed “operated in equity to assign absolutely to the Deed Administrators… the whole of the right title and interest of Brashs in any cause of action or cause of action being the claims for debts, damages or other relief arising out of “the Proceedings”…” Smith J noted that *Poulton v Commonwealth*[^106] was “decided before modern developments in the law of negligence which is now commonly relied upon in commercial disputes.”[^107] In light of these observations, his Honour concluded that there was “no justification for any distinction between rights of action in tort and contract.”[^108]

In *Vangale Pty Ltd (in liq) v Kumagai Gumi Co Ltd*[^109] Mullin J was confronted with the question of whether upon crystallisation of a floating charge, the chargee was entitled to pursue in the chargor’s name rights of action in contract, tort and a *quantum meruit* claim. Her Honour, under the heading “assignability of claim for damages in negligence”, stated that older authorities indicating that a right to sue for damages in tort were incapable of assignment were outdated in light of the *Trendtex* principle.[^110] Mullin J continued by endorsing Smith J’s comments in *Beatty v Brashs Pty Ltd*[^111] and explicitly noting that the modern law of negligence is now routinely applied in commercial disputes and is thus no longer mostly personal in nature.[^112] Mullin J consequently approved the assignment of a cause of action in tort when there was a genuine commercial interest, subject to the *proviso* that the tort not be of a personal nature.[^113]

[^104]: (1953) 89 CLR 540.
[^105]: [1998] 2 VR 201; BC9507670.
[^106]: (1953) 89 CLR 540.
[^107]: [1998] 2 VR 201; BC9507670.
[^108]: Ibid.
[^110]: Ibid., [68]-[69].
[^112]: [2002] QSC 137 [70].
[^113]: This reasoning was received favourably by Selway J in *Deolitte Touche Tohmatsu v Cridlands Pty Ltd* (2003) 204 ALR 281 [101].
Two further supreme court cases support the extension of the Trendtex principle to causes of action in tort: Rickard Constructions v Rickard Hails Moretti\(^\text{114}\) and Whyked Pty Limited v Yahoo!7 Pty Limited.\(^\text{115}\) In both cases McDougal J was the presiding judge and both opinions on this point are, \textit{mutatis mutandis}, identical. In Whyked Pty Limited v Yahoo!7 Pty Limited,\(^\text{116}\) a case which involved the assignment of an online freighting business, his Honour acknowledged the importance of \textit{Poulton v Commonwealth},\(^\text{117}\) but notwithstanding admonitions by the High Court in \textit{Farah Constructions Pty Ltd v Say-Dee Pty Ltd}\(^\text{118}\) that an intermediate court of appeal should not depart from the serious \textit{dicta} of a majority of the High Court, felt that it was permissible to extend the Trendtex principle to the assignment of causes of action in tort.\(^\text{119}\)

The interaction of the Trendtex principle and the assignment of causes of action in tort was touched upon by the High Court in \textit{Equuscorp Pty Ltd v Haxton}.\(^\text{120}\) There three judges arguably indicated it was correct to distinguish the result in \textit{Poulton v Commonwealth},\(^\text{121}\) which affirmed the then general rule that causes of action in tort could not be assigned, in light of Trendtex. Gummow and Bell JJ noted that:

[\text{T}he Assignment was not open to the objection that it dealt with no more than “bare” rights of action and so attracted the statements of principle in \textit{Poulton v Commonwealth} [(1953) 89 CLR 540 at 571, 602]. It has long been held that an exception exists where the assignee has an interest in the suit [\textit{Ellis v Torrington} [1920] 1 KB 399 at 406], and a genuine and substantial commercial interest is now regarded as sufficient [\textit{Trendtex Trading Corporation v Credit Suisse} [1982] AC 679 at 703; \textit{Rickard Constructions Pty Ltd v Rickard Hails Moretti Pty Ltd} (2004) 188 FLR 278 at 280-285 [42]-[61]].\(^\text{122}\)

Heydon J similarly found:

There is a different point which favours the appellant. \textit{Poulton’s case} predates \textit{Trendtex Trading Corporation v Credit Suisse}…. In \textit{Poulton’s case} no argument

\(^{114}\) [2004] NSWSC 1041
\(^{115}\) [2008] NSWSC 477.
\(^{116}\) [2008] NSWSC 477.
\(^{117}\) (1953) 89 CLR 540.
\(^{118}\) (2007) 81 ALJR 1107 [135].
\(^{119}\) \textit{Whyked Pty Limited v Yahoo!7 Pty Limited} [2008] NSWSC 477 [136]. His Honour stated, “I acknowledge that the point made by their Honours applies a fortiori to judges of first instance. Nonetheless, I think, the developments that I traced in Rickard Constructions at [42] and following justify what, otherwise, must be an unacceptable course.”
\(^{120}\) (2012) 246 CLR 498.
\(^{121}\) (1953) 89 CLR 540.
\(^{122}\) (2012) 246 CLR 498 at 533.
was presented that there was any “genuine commercial interest” associated with the supposed assignment. There is a “genuine commercial interest” here…. Hence what was said in Poulton’s case is distinguishable.\Footnote{123} On a strict reading of *Equuscorp Pty Ltd v Haxton*,\Footnote{124} it could be said that since only three of the six judges indicated support for the extension of the *Trendtex* principle to the assignment of a cause of action in tort, a majority on this point was lacking, and the previous authority of *Poulton v Commonwealth*\Footnote{125} endured.

Interestingly, this more restrictive view was taken by McCallum J in *Kovarfi v BMT & Associates Pty Ltd.*\Footnote{126} In that case a building quantity surveyor, BMT & Associates Pty Ltd (BMTAPL), was employed by the Commonwealth Bank to oversee the work of a mortgagor building development company, Kata-Lyn Pty Ltd (KLPL), on a commercial development in Queenscliff. As a result of BMTAPL over-stating the value of work undertaken by builders, KLPL had its loan facility with the Commonwealth Bank unexpectedly cut short. KLPL subsequently entered into a new building contract with Atilla Kovarfi to complete the development for a fixed price of $2,120,349 which exceeded the loan facility’s undrawn balance. Soon thereafter the Commonwealth Bank sold the development as mortgagee in possession. KLPL meanwhile had assigned its professional negligence claim against BMTAPL to Curl Curl Creative Co Pty Ltd (CCCCPL), which in turn assigned its rights to Kovarfi’s wife. Although the professional negligence claim was statute barred under section 14 of the *Limitation Act 1969* (NSW), McCallum J nonetheless discussed the effect of *Equuscorp Pty Ltd v Haxton*,\Footnote{127} drawing a distinction between the assignment of a cause of action in tort (*Poulton v Commonwealth*)\Footnote{128} and contract (*Trendtex Trading Corporation v Credit Suisse*).\Footnote{129} Her Honour explicitly observed that:

*Equuscorp* was not specifically concerned with the question that arises in the present case and does not resolve it. The joint judgment of French CJ, Crennan and Kiefel JJ did not analyse the relevant principles in terms that shed

\begin{footnotes}
\item[123] Ibid., CLR 588.
\item[124] (2012) 246 CLR 498, 525 (French CJ, Crennan and Kiefel JJ), 533 (Gummow and Bell JJ), 558 (Heydon J).
\item[125] (1953) 89 CLR 540.
\item[126] [2012] NSWSC 1101.
\item[127] (2012) 246 CLR 498.
\item[128] (1953) 89 CLR 540.
\item[129] [1982] AC 679; [1981] 3 All ER 520.
\end{footnotes}
any light on the present question [concerning the assignment of a cause of action in tort].\textsuperscript{130}

In the final analysis, however, it is submitted that the view in \textit{Kovarfi v BMT & Associates Pty Ltd}\textsuperscript{131} is an excessively cautious one, as \textit{Equuscrop Pty Ltd v Haxton}\textsuperscript{132} clearly indicated support for the \textit{Trendtex} principle, thereby suggesting that \textit{Poulton v Commonwealth},\textsuperscript{133} which antedated the \textit{Trendtex} principle, must in contemporary times be subject to qualification, namely, that where the genuine commercial interest criterion is satisfied the assignment of a cause of action in tort can be upheld.

This view is supported by the recent New South Wales Court of Appeal decision in \textit{Hazard Systems Pty Ltd v Car-Tech Services Pty Ltd (in liq)}\textsuperscript{134} where the assignment of a cause of action in tort (and also in contract and under statute) from an insured to an insurer regarding allegedly defective equipment was held to satisfy the genuine commercial interest criterion on the grounds “that it supported and enlarged the existing right acquired by way of subrogation.”\textsuperscript{135}

\textbf{G Assignment of Causes of Action in Tort in Canada, New Zealand and the UK}

Jurisprudence from other common law jurisdictions supports the extension of the \textit{Trendtex} principle to the assignment of causes of action in tort. In \textit{Fredrickson v Insurance Corporation of British Columbia}\textsuperscript{136} McLaughlin JA in the British Columbia Court of Appeal upheld the assignment of Frederickson’s cause of action in tort against his insurer, Insurance Corporation of British Columbia (ICBC), for failing to properly defend him in an action brought against him by Neilsen arising from a motor vehicle collision. ICBC settled the claim for $1,200,000, but Fredrickson was only covered for $500,000. Fredrickson, who had no assets of any significance, assigned the cause of action against ICBC to Neilsen. After discussion of the \textit{Trendtex}
The Trendtex Principle in Australian Law: Context and Recent Developments

principle, McLaughlin JA stated that “the assignee [Neilsen] had a legitimate pre-existing financial interest in the cause of action in tort assigned to her, and that consequently the assignment is valid.” The result was upheld by the Canadian Supreme Court in *Insurance Corporation of British Columbia v Fredrickson.*

In *Continental Bank of Canada v Arthur Andersen & Co* Montgomery J in the Ontario High Court of Justice also upheld the assignability of a cause of action in tort. The facts were that the Continental Bank of Canada (CBC) had commenced proceedings against various companies for breach of contract and negligence. CBC was subsequently purchased by Lloyds Bank under a sale agreement which included all of CBC’s “business, undertaking, property and assets, real and personal, moveable and immoveable, tangible or intangible, of whatsoever nature and kind.” The companies subject to proceedings contended that CBC intended to convey to Lloyds Bank bare causes of action which savoured of maintenance. In the course of delivering his opinion, Montgomery J indicated that causes of action in contract and tort were assignable:

(a) if the assignee has a legitimate property or commercial interest in enforcement of the claim: … (b) if, looking at the totality of the transaction, the assignment is of a property right or interest and the cause of action was ancillary to that right or interest: … [and] (c) even where the assignee has no ancillary property interest, where the assignment is a bona fide business arrangement for legitimate business reasons…

His Honour thus stressed the need for a business arrangement or interest to be involved before the assignment of a cause of action in tort could occur.

An analogous conclusion was reached by Gault J in the New Zealand High Court in *First City Corporation Ltd v Downsvi...e Ltd.* In that case the assignment from a parent company, First City Corporation Ltd, to its subsidiary, First City Finance Ltd, of causes of action in tort were upheld because they were ancillary to the assignment of property, namely, a debenture. However Gault J expressly linked the assignment with the Trendtex principle, stating that the assignee possessed a genuine commercial interest:

---

139 Ibid., 266.
140 [1989] 3 NZLR 710.
In light of the modern approach to maintenance in general, and paying particular regard to the approach of the House of Lords in Trendtex, I conclude that the assignment from First City to First City Finance of the right of action in tort falls within the category of valid transactions. […] First City Finance had a genuine commercial interest in the actions, for the reason that as the new debenture holder, it clearly had an interest in protecting the value of the security. Added to this fact is the relationship between First City and First City Finance (parent and subsidiary), and the nature of the restructuring exercise which, to my mind, strengthens the commercial interest involved.\textsuperscript{141}

Support for the assignment of a cause of action in tort was also provided by Lloyd LJ in the Court of Appeal in \textit{Brownton Ltd v Edward Moore Inbucon Ltd.}\textsuperscript{142} In that case ED & F Man Ltd (EDFML) were commodity brokers, and hired EMR Management Services Ltd (EMRMSL) to consult on the installation of a suitable computer system. As a result of the consultancy, EDFML entered into a contract with Cossor Electronics Ltd (CEL) for the supply, installation and maintenance of a computer system which ultimately failed to work as intended. As part of a settlement with EDFML, it was held that EMRMSL held a genuine commercial interest in taking the assignment of EDFML’s rights against CEL. Lloyd LJ stated that, “[a] bare right to litigate, the assignment of which is still prohibited, is a cause of action, whether in tort or contract, in the outcome of which the assignee has no genuine commercial interest.”\textsuperscript{143} These comments were interpreted by Smith J in \textit{Beatty v Brashs Pty Ltd}\textsuperscript{144} to mean that his Lordship had “expressly treated [the Trendtex] principle as applying to assignments of rights of action in both tort and contract.”\textsuperscript{145}

A further case to approve the assignment of a cause of action in tort is \textit{24 Seven Utility Services Ltd v Rosekey Ltd (t/a Atwasl Builders)}.\textsuperscript{146} The facts were that London Power Networks (LPN) supplied electricity in Kent, and 24 Seven Utility Services Ltd (24SUSL) entered into an agreement with the London Electricity Group (LEG) to maintain and repair LPN’s underground cables. An electrical cable at Dartmouth, Kent, was subsequently damaged by a pile driving accident on a building site which 24SUSL repaired at its own cost. LPN

\textsuperscript{141} Ibid., 754.
\textsuperscript{142} [1985] 3 All ER 499.
\textsuperscript{143} Ibid., 509 (with whom Sir John Donaldson MR agreed).
\textsuperscript{144} [1998] 2 VR 210.
\textsuperscript{145} Ibid.,
\textsuperscript{146} [2003] EWHC 3415 (QB).
subsequently assigned to 24SUSL the right to claim damages for negligence from the building site third party. Leighton Williams QC upheld the assignment:

[24SUSL] has established to my satisfaction that, in the words of Lord Roskill, it has “a genuine commercial interest in taking the assignment and in enforcing it for his own benefit”. I can see no reason in the present case why the assignment should be struck down as an assignment of a bare cause of action or as savouring of maintenance.147

Leighton Williams QC qualified these comments, however, by indicating that the Trendtex principle would not extend to the assignment of personal torts.148

Canadian, New Zealand and UK case law therefore supports the extension of the Trendtex principle to causes of action in tort. This adds further credence to the numerous Australian cases which have expressed the same position post-Trendtex.

H Assignment of Causes of Action in Tort in Canada, New Zealand and the UK

It has traditionally been held that personal torts are not assignable.149 In WorkCover Queensland v AMACA Pty Ltd,150 however, the Queensland Court of Appeal upheld the assignment of a personal injury claim from a worker affected by asbestos induced mesothelioma to WorkCover Queensland (WCQ). McMurdo P stated that WCQ, which had previously paid out statutory compensation to the worker, held a “legitimate or genuine commercial interest, akin to an insurer’s right of subrogation” in taking the assignment.151 Gotterson JA (with whom Martin J agreed) similarly analogised with an insurer’s right of subrogation152 and further observed that:

147 Ibid., [31].
148 Ibid., [25].
149 Glegg v Bromley [1912] 3 KB 474, 488 (Fletcher Moulton LJ); Trendtex Trading Corporation v Credit Suisse [1980] 1 QB 629, 656 (Lord Denning MR); Trendtex Trading Corporation v Credit Suisse [1982] AC 679, 702 (Lord Roskill (with whom Lord Edmund-Davies, Lord Fraser of Tullybelton and Lord Keith of Kinkel agreed)); Union Gas Co. of Canada v Brown (1968) 67 DLR (2d) 44 (Ont. HC) 51 (Moorehouse J); First City Corporation Ltd v Downview Nominees Ltd [1989] 3 NZLR 710, 754 (Gault J); South Australian Management Corporation v Sheahan (1995) 16 ACSR 45, 57-58 (Debelle J); Beauty v Brashs Pty Ltd [1998] 2 VR 201; BC9507670 (Smith J); Deolitte Touche Tohmatsu v Cridlands Pty Ltd (2003) 204 ALR 281 [101] (Selway J); 24 Seven Utility Services Ltd v Rosekey Ltd (t/a Atwater Builders) [2003] EWHC 3415 (QB) [25] (Leighton Williams QC).
151 Ibid., [16].
152 Ibid., [66].
Whilst it is true that *Equuscorp* did not involve the assignment of causes of action for damages for personal injury [...] there is no reason to think that the observations made were not intended to refer to them as well. There is no inherent characteristic of an action for damages for personal injury which would make the observations inapplicable to them.\(^{153}\)

There is Canadian authority indicating that a blanket prohibition on the assignment of personal torts is incorrect. In *Margetts v Timmer*\(^{154}\) two motor vehicles laden with passengers collided near Gibbons, Alberta. This was followed by the conclusion of “Mary Carter agreements”\(^{155}\) between two sets of plaintiffs and the Province of Alberta. The conclusion of the agreements was challenged by the non-settling defendant on the grounds that they violated common law rules prohibiting maintenance and champerty. Berger JA (with whom Nash J (ad hoc) agreed) stated that, “[t]here is no policy or other principled reason to automatically conclude that the assignment of every action in tort based on a personal wrong is champertous and therefore non-assignable.”\(^{156}\) This *dicta*, whilst not bearing upon the *Trendtex* principle, does suggest that a blanket prohibition upon the assignment of personal torts is too inflexible and ought not to be followed.

A similar position on the assignment of personal torts – with direct reference to the *Trendtex* principle – was recently taken by the UK Court of Appeal in *Simpson v Norfolk & Norwich University Hospital NHS Trust*.\(^{157}\) In that case Catchpole had contracted Methicillin Resistant Staphylococcus Aureus (MRSA) at the Norwich University Hospital (NUH). At the same time, Simpson had contracted MRSA at the NUH before soon thereafter dying of cancer. Catchpole had commenced proceedings against the NUH seeking £5000 for the personal injury he suffered as a result of contracting MRSA. However he subsequently assigned the claim by deed to Simpson’s widow, Jennifer Simpson, for £1. Although increasing the value of the claim to £15,000 Simpson claimed to take up the action not for financial reasons, but to ensure that the NUH

---

\(^{153}\) Ibid., [62]. See also by way of obiter *Press Metal Aluminium (Australia) P/L v Total Concept Group P/L (Externally Administered) & Anor* [2014] QDC 280 [148] (Dorney QC, DCJ).


\(^{155}\) A “Mary Carter” agreement has been defined as: “[A]n agreement where a Plaintiff has sued at least two parties as joint and several tortfeasors and where one of the Defendants wants to settle with the Plaintiff but the other does not. The Defendant favouring settlement may not be able to remove himself from the action simply by settling with the Plaintiff because this Defendant is usually also subject to a claim for contribution from the remaining Defendant pursuant to statutory authority.” See Barbara Billingsley “*Margetts v Timmer Estate: The Continuing Development of Canadian Law Relating to Mary Carter Agreements*” (1998) 36 Alberta Law Review, 1018.

\(^{156}\) (1999) 178 DLR (4th) 577 [12].

would undertake more effective infection control procedures. Moore-Brick LJ (with whom Dame Janet Smith DBE and Maurice Kay LJ agreed) stated that a cause of action in tort could be assigned if there was a genuine commercial interest, and this might also potentially include “a cause of action in tort for personal injury”. Importantly, with respect to the facts at hand, a genuine commercial interest could not be ascertained, and consequently the purported assignment was invalid.

V Conclusion

The Trendtex principle is one of many well recognised exceptions to the prohibition on the assignment of rights to litigate. The principle’s precursors are arguably traceable to other recognised exceptions to the prohibition on the assignment of rights to litigate in favour of trustees in bankruptcy, company liquidators and vendors of property with an incidental right to litigate. It can also be argued that the principle’s development was given secondary impetus by the recognition of the assignment of debts in judicature legislation, as well demonstrated by the facts and ratio of Re Daley; Ex Parte National Australia Bank Ltd.

Although the Trendtex principle was originally crafted with respect to the assignment of contractual claims, the recent High Court decision in Equuscorp Pty Ltd v Haxton has established the principle’s application to the assignment of restitutionary claims, and arguably non-personal torts. Cases such as WorkCover Queensland v AMACA Pty Ltd and Simpson v Norfolk & Norwich University Hospital NHS Trust also seem to extend the principle’s application to personal torts under appropriate conditions.

The fulcrum around which the Trendtex principle turns is the “genuine commercial interest” criterion, which as highlighted in Monk v ANZ Banking Group, requires something more than a mere personal interest. Put slightly differently, the genuine commercial interest must be one which extends beyond

---

158 Ibid., [24].
159 Ibid., [28].
161 (2012) 246 CLR 498, 525 (French CJ, Crennan and Kiefel JJ), 533 (Gummow and Bell JJ), 558 (Heydon J).
163 Ibid.
164 (1994) 34 NSWLR 148; BC9405181, 8 (Cohen J).
the mere benefit of the assignment itself.\textsuperscript{165} Furthermore, as emphasized by the New South Wales Court of Appeal in \textit{Project 28 Pty Ltd (Formerly Narui Gold Coast Pty Ltd) v Barr},\textsuperscript{166} the interest must be grounded in rights, as opposed to mere hope. Having said this, cases such as \textit{Deloitte Touche Tohmatsu v JP Morgan Portfolio Services Ltd}\textsuperscript{167} and \textit{Dower v Lewkovitz}\textsuperscript{168} have held that the assignee does not require a pre-existing enforceable right against the assignor. Ultimately, determination of what constitutes a “genuine commercial interest” will turn upon individual case circumstances.\textsuperscript{169}

The \textit{Trendtex} principle’s current flexibility suitably parallels the relaxation of judicial attitudes towards maintenance and champerty throughout the latter half of the twentieth century. It also compliments the upsurge in usage of the corporate form and commercial litigation in the late twentieth and early twenty first centuries. Without the flexibility afforded by the \textit{Trendtex} principle, a plausible argument can be made that the arteries of capitalism might be unduly restricted. Why, for example, should the \textit{Trendtex} principle not exist if creditors, trustees in bankruptcy, company liquidators and vendors of property with an incidental right to litigate are able to assign causes of action? This argument is heightened when it is considered that the threat posed by maintenance and champerty has diminished since medieval times.\textsuperscript{170} Future case law will no doubt further develop the \textit{Trendtex} principle ensuring its continued adaptation to modern commercial exigencies.

\textsuperscript{166} [2005] NSWCA 240 [42] (Ipp JA (with whom Hodgson JA and Campbell AJA agreed).
\textsuperscript{167} [2007] FCAFC; 158 FCR 417 (Tamberlin and Jacobson JJ);
\textsuperscript{168} [2013] NSWCA 452 [23] (Macfarlan JA).
\textsuperscript{170} \textit{Jeb Recoveries LLP v Judah Eleazar Binstock} [2015] EWHC 1063 (Ch) [9]-[17] (Simon Barker QC).
NATURAL JUSTICE IN INTERNATIONAL COMMERCIAL ARBITRATION: TCL AIR CONDITIONER (ZHONGSHAN) CO LTD V CASTEL ELECTRONICS PTY LTD

TANYA SHANKAR*

International Commercial Arbitration is increasingly becoming the preferred means by which contractual parties whose relationship is transnational in nature choose to have their disputes resolved. The Australian judiciary has confirmed its minimal role in the arbitral process in the case of TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd (2014) 232 FCR 361. The court for the first time in Australia addressed how a party may succeed in having an arbitral award being refused enforceability or set aside on the basis of a denial of Natural justice in the proceeding. This case note comprehensively reviews the decision and tracks its judicial reception and impact on the judicial landscape in Australia.

CONTENTS
I Introduction .......................................................... 113
II Factual Background ................................................ 114
III Appeal Grounds ..................................................... 116
IV Legal Principles and Factual Application ..................... 116
V Judicial Reception ................................................... 119
VI Conclusion .......................................................... 121

I INTRODUCTION

The growth of International Commercial Arbitration currently spreading across Australia is not to be understated. Recent legislative amendments.¹

¹ LLB(Hons) (S.Aust.), Graduate Diploma of Legal Practice (Coll.Law). The author is an admitted Barrister and Solicitor to the Supreme Court of South Australia and is currently undertaking the White & Case International Arbitration LLM at the University of Miami.

¹ The International Arbitration Act 1974 (Cth) was amended on 6 July 2010 to give effect to the changes made to the United Nations Commission on International Trade Law Model Law on International Commercial Arbitration in 2006.
inaugurations of arbitration institutions and case law are indicative of this expansion.

In 1975 Australia became a signatory State to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (NY Convention). To give effect to Australia’s obligations under the NY Convention the Commonwealth Parliament enacted the International Arbitration Act 1974 (Cth) (IAA). As well as the IAA, the UNCITRAL Model Law on International Commercial Arbitration (Model Law) has the force of law in Australia. Together these two instruments provide the legislative framework for the regulation of international arbitration in Australia.

The global rise of international commercial arbitration has seen a corresponding increase in Australian case law in the field, and thus an increasing focus on the IAA. Commentators have recognized this rise as reflecting a ‘heightened awareness of Australia’s legal framework’ concerning International Arbitration. TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd (2014) 232 FCR 361 (TCL Air Conditioner) is one such case that interprets the IAA. This paper is a critical analysis of TCL Air Conditioner, which was the first case to analyse the circumstances in which an alleged denial of natural justice could justify a Court, under the IAA, in setting aside or refusing to enforce an arbitral award.

II FACTUAL BACKGROUND

TCL Air Conditioner was heard in the Full Court of the Federal Court of Australia by Allsop CJ, Middleton and Foster JJ. Section 18(3)(c) of the IAA conferred jurisdiction on the Federal Court of Australia to hear the matter. TCL Air Conditioner (Zhongshan) Co Ltd (TCL) was a Chinese based

---

1 Contracting States, New York Arbitration Convention <http://www.newyorkconvention.org/countries>
2 Scholars have noted the Model Law as beneficially serving as a ‘...template aimed at harmonizing and modernizing national arbitration legislation’ for those nations which are signatory States to the NY Convention. See for example, Monichino, Nottage and Hu, 'International Arbitration in Australia: Selected Case Notes and Trends' (2012) 19 AUIntLawJ 181, 181.
3 International Arbitration Act 1974 (Cth) s 16(1).
4 Monichino, Nottage and Hu, above n 5, 184.
5 Only this aspect of the decision will be analysed in this Note.
company in the business of manufacturing air conditioning (AC) units. Castel Electronics Pty Ltd (Castel) was an Australian based company that entered into a contract with TCL. The contract stipulated Castel as the exclusive distributor of TCL-manufactured AC units in Australia.

A dispute arose between the parties when it surfaced that TCL had been selling in Australia for 4 years AC units it had manufactured, albeit the units not bearing its brand. Castel asserted that such business activity on TCL’s part breached the contractual term conferring exclusivity upon the former to rights of distribution. As the dispute could not be mutually resolved, the contract provided for arbitration as the means by which to settle it. In December 2010 the appointed arbitration panel, following a 10 day hearing, delivered an arbitral award in Castel’s favor in the amount of $2,874,870.00, with an additional $732,500.00 in costs.

Castel then sought to enforce the award pursuant to Article 35(1) of the Model Law. TCL resisted Castel’s action to enforce pursuant to Article 36(1)(b)(ii) and moved to have the award set aside pursuant to Article 34(2)(b)(ii). TCL also relied on ss 8(7A) and 19(b) of the IAA as the basis for its claims. TCL submitted the award ought to be set aside or not be enforced as being in conflict with or contrary to the public policy of Australia, on the basis that the arbitral panel did not afford it natural justice during the hearing. TCL appealed to the Full Court after being unsuccessful at first instance.
III Appeal Grounds

TCL did not allege bias in the arbitrators. It would have been a difficult argument to make given the panel was constituted of Dr Gavan Griffith AO, the Hon Alan Goldberg AO and Mr Peter Riordan SC. The only limb of natural justice considered by the court was the fair hearing limb.

TCL contended that it was ‘denied an opportunity to present evidence and argument’ on findings which together enabled the arbitrators to quantify the financial detriment caused to Castel as a result of TCL’s breach. It was argued that the quantum of damages was calculated in the absence of probative evidence. The issue falling for determination was whether the content of natural justice in the context of the IAA extended to the allegations made by TCL.

In determining whether natural justice had been afforded TCL asserted that the proper approach was to examine the facts of the case afresh and revisit in full the questions which were before the arbitrators in order to evaluate whether or not probative material supported the factual conclusion.

IV Legal Principles and Factual Application

A Limited Scope of Public Policy Defense

The Court provided a detailed analysis of the discussions and extrinsic legislative material leading to the creation of the NY Convention, the Model Law and the IAA, including what each of those instruments entailed. In this respect, the Court appeared to be employing a contextual statutory interpretation technique to enable it to gain a holistic understanding of the legislative framework with which it was dealing. The phrase ‘public policy’, appearing in all three instruments, was given particular attention. Drawing

19 TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd (2014) 232 FCR 361, [7].
20 Ibid [33] - [41].
21 Ibid [8].
23 Ibid [8].
24 Ibid [57] - [67].
25 Ibid [64].
upon the legislative history of the NY Convention, the Court stated the phrase did not refer to ‘particular domestic national public policy’, but rather denoted ‘a concept recognizing the international place of the NY Convention and the need for public policy to be restricted to be State’s most basic, fundamental principles of morality and justice’. The Court also referred to Article 18 of the Model Law as ensuring fairness in arbitration hearings.

The court supported its initial construction with an analysis of international jurisprudence dealing with similar legislation to the IAA. Such authorities, though not binding upon Australian Courts, are of persuasive value due to the transnational provenance of international arbitration and the need to maintain ‘a degree of international harmony and concordance of approach’. After an in depth analysis of the case law the Court found the weight of authority endorsed the phrase ‘public policy’ as being intended by its drafters to be ‘…limited to the fundamental principles of justice and morality of the state’. To this effect, the Court was verifying that its narrow interpretation of ‘public policy’ was one which had widespread support.

B  Requisite Natural Justice for Enforceable Arbitral Awards

The Court then considered how natural justice sits against this narrow construction of public policy, an issue that had not yet been addressed by Australian courts. After exploring the legislative background of sections 19(b) and 8(7A) of the IAA, the Court held that a breach of the rules of natural justice was listed in the IAA as a circumstance in which an arbitral award might be in conflict with or contrary to the public policy of Australia ‘to avoid confusion’ and ‘any doubt’ that it was not such a circumstance. Therefore, the meaning of ‘public policy’, found in the Model Law and elsewhere as a defense
to resist enforcement or as grounds to set aside an award, was not in any shape or form altered as a result of the introduction of those IAA provisions.

Appreciating this permitted the Court to articulate natural justice as falling ‘…within the conception of a fundamental principle of justice, being… equated with, and based on, the notion of fairness’.

The effective and efficient running of the international arbitration system in Australia was at the forefront of the Court’s mind.

As their Honors importantly noted, the Model Law embraces a system which places ‘independence, autonomy and authority into the hands of arbitrators’. Similarly, it was noted elsewhere that arbitral hearings and resulting awards ‘should not be scrutinized with an overcritical or pedantic eye’ or with undue legality, but rather ought to be reviewed with ‘commonsense’.

Maintaining a workable balance between the finality of arbitral awards and appropriate judicial interference required, in the Court’s view, courts to act ‘…prudently, sparingly and responsibly, but decisively when grounds under Articles 34 and 36 are revealed’.

The Court held that the rules of natural justice in this context do not require arbitrators to have probative evidence to support their factual findings, nor are they required to show logical reasoning to support factual conclusions. If the court was to make these inquiries it would have to re-agitate the proceedings and go over the panel’s findings and this would severely undermine the arbitration system in Australia. In this respect, the distinction between a factual evaluation of available evidence and a complete absence of supporting material should not be blurred. The rules of natural justice cannot be ‘broken’ in a minor and technical way. The natural justice ground will not

---

36 Ibid. For example, for a finding to be deemed to be in breach of the rules of natural justice for want of probative evidence, the Court noted the fact or facts upon which the finding of the arbitral panel was based must have been critical, have never been the subject of attention at the hearing and the finding must have been made without the parties taking advantage of the chance to address it, see ibid [83].

37 Ibid [109].

38 Ibid.

39 Colin Joss & Co Pty Ltd v Cube Furniture Pty Ltd [2015] NSWSC 735, [47].

40 Ibid.

41 Ibid [109].

42 Ibid [54].

43 Ibid.

44 Ibid.

45 Ibid.
be made out unless it is shown that some real unfairness or practical injustice occurred.\footnote{Ibid [55].}

C \textbf{Application of the Principles to the Case}

TCL bore the onus to show, in a succinct manner, that there was a meaningful breach of the rules of natural justice such that it suffered real unfairness or real practical injustice.\footnote{Ibid [153].} This was, in the circumstances, found by the Court not to have been discharged by TCL. It was essentially seeking a re-hearing of the facts, an approach which unacceptably worked to ‘undermine the object of facilitating the expeditious and fair enforcement of awards’\footnote{TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd (2014) 232 FCR 361 (16 July 2014), [81].} in international arbitration. TCL was misusing the court’s judicial review function by ‘dressing up’\footnote{Ibid [53].} its complaints regarding the factual findings as an allegation concerning ‘asserted procedural unfairness’.\footnote{Ibid.} In the Court’s view, the arbitrators calculated a damages amount after carefully evaluating the available evidence, as opposed to engaging in mere guesswork.\footnote{Ibid.} In dismissing the appeal, the Court concluded that TCL ‘…received a scrupulously fair hearing in a hard fought commercial dispute’,\footnote{TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd (2014) 232 FCR 361, [163].} and so TCL could not avail itself of the established ‘no evidence’ rule of natural justice. As Chief Justice Menon of Singapore relevantly stated in a recent judgment, courts should resist the temptation to offer parties ‘…a second chance to canvass the merits of their respective cases’.\footnote{AKN v ALC [2015] SGCA 18, [37].}

\section{V \textbf{Judicial Reception}}

The utility and strength this decision of the Full Court of the Federal Court holds in Australia is best gleaned through an analysis of subsequent case law in which it has been considered. The Supreme Court of Victoria in \textit{Robotunits Pty Joint Operation v PT Perusahaan Gas Negara (Persero) TBK} [2011] SLR 305, 342-343.
Ltd v Mennel (2015) 297 FLR 300 at [13] – [14] and in Cameron Australasia Pty Ltd v AED Oil Ltd [2015] VSC 163 at [19] was guided by the notion promulgated by the Federal Court of the need to pay due deference to international judgments in order to maintain international uniformity in the area of International Arbitration.

In New South Wales, Aircraft Support Industries Pty Ltd v William Hare UAE LLC [2015] NSWCA 229 involved a direct application of the principles laid down by the Federal Court. A sub-contract existed between the appellant, an Australian company, and the UAE based respondent which provided for the respondent to perform certain construction work in exchange for payments from the appellant.\(^5\) A letter was sent from the appellant to the respondent detailing the final amount, money already paid in satisfaction of this and the dates by which retention monies would be released.\(^5\) A dispute\(^5\) arose regarding the appellant’s failure to pay the second installment of retention monies by the date stipulated in the letter.\(^5\) In accordance with the contract, the dispute was settled by arbitration in the UAE after which an award was made in favor of the respondent prompting the respondent to seek enforcement of the award in Australia under the IAA.\(^\) The appellant, in resisting enforcement, contended the sent letter was not executed in accordance with the required formalities and so could not constitute a variation to the sub-contract or indeed bear any legal character.\(^\)

The appellant argued that this submission was not considered by the arbitral tribunal and accordingly the award was contrary to the public policy of Australia as there was a breach of the rules of natural justice. The primary judge,\(^6\) with whom the appeal division of the Supreme Court of New South Wales agreed, applied the TCL Air Conditioner case to find the appellant had not demonstrated it had suffered any practical unfairness or injustice.\(^6\) It was duly noted that the arbitral panel had dealt adequately with each of the

---

\(^5\) Aircraft Support Industries Pty Ltd v William Hare UAE LLC [2015] NSWCA 229, [3].
\(^6\) Ibid.
\(^6\) Among others raised.
\(^7\) Aircraft Support Industries Pty Ltd v William Hare UAE LLC [2015] NSWCA 229, [3].
\(^8\) Ibid [6].
\(^9\) Ibid [39].
\(^\) See William Hare UAE LLC v Aircraft Support Industries Pty Ltd [2014] NSWSC 1403, [111].
\(^\) Aircraft Support Industries Pty Ltd v William Hare UAE LLC [2015] NSWCA 229, [44].
appellant’s arguments which were clearly articulated.62 However, the appellant failed to substantiate clearly its main contention beyond merely raising it in its pleadings.63 The arbitral tribunal had no obligation to deal with unsupported assertions.64 The foreign award was found not to be infected with any material breach of the rules of natural justice and was thereby capable of being enforced so far as the second installment of the retention monies was concerned, with the sent letter amounting to a binding settlement.

Another noteworthy New South Wales case is Colin Joss & Co Pty Ltd v Cube Furniture Pty Ltd [2015] NSWSC 735. All Australian States have enacted uniform arbitration statutes dealing with the subject matter in the domestic context. Similar to the IAA, the New South Wales Act allows for the setting aside of arbitral awards made in conflict with the public policy of the State.65 Significantly, the Court here extended the applicability of the principles expressed in the TCL Air Conditioner case to the domestic arbitration arena by requiring the aggrieved party to demonstrate real unfairness or real practical injustice by reference to the established rules of natural justice. In providing further content to this principle, the Court stated that the public policy ground to set aside an award ‘...is not concerned with mere procedural imperfections but with a negation of rights which our legal system recognizes as being fundamental and therefore matters of public policy’.66

VI Conclusion

In TCL Air Conditioner the Federal Court clarified an ambiguous area of the law that had not yet had the benefit of judicial attention. The case placed Australia in line with its foreign counterparts. For this reason it seems unlikely that the High Court of Australia would depart from the reasoning adopted by the Federal Court should s19(b) of the IAA be revisited in that forum. A study of TCL Air Conditioner demonstrates how courts vested with jurisdiction under the IAA are tasked with crucial supervisory functions, the limits of which

62 William Hare UAE LLC v Aircraft Support Industries Pty Ltd [2014] NSWSC 1403, [103].
63 Aircraft Support Industries Pty Ltd v William Hare UAE LLC [2015] NSWCA 229, [44] - [45].
64 Ibid [46].
66 Colin Joss & Co Pty Ltd v Cube Furniture Pty Ltd [2015] NSWSC 735, [46].
must be strictly observed in respect of the setting aside, non-enforcement or non-recognition of awards.

TCL Air Conditioner confirms that the collective effect of the IAA, the Model Law and the NY Convention is to encourage courts not to stifle the integrity, finality and certainty of the arbitral finding process. As Allsop CJ stated extra-curially, the Australian judiciary, in the context of International Arbitration decision-making, needs to continue to display an assistive, supportive and sympathetic attitude in respect of the arbitration process and to exercise reasonable restraint where appropriate.67 TCL Air Conditioner is a prime example of the Australian judiciary adopting a pro-arbitration stance68 and taking a proactive stride in bolstering the country’s ‘reputation as a strong arbitral jurisdiction’.69 This case will also inform future decisions on the topic as well as provide great assistance to lawyers in advising clients as to the merits of challenging the legality of an arbitral award on public policy grounds given the high threshold imposed.

69 Croft, above n 65.