International Commercial Law by **John Mo** [2000, second edition, Butterworths, Sydney, ISBN 0 409 31637 7, xi+754 pages; soft cover]

It must be acknowledged from the outset that writing a book such as this is not easy. It requires an author with a helicopter view of a subject that straddles a number of topics and jurisdictions. The author must know the commercial law of the relevant domestic jurisdiction, including private and public international law, and be able to weave these into a comprehensive and cohesive mazement. The expression, international commercial law, is itself unsettled in meaning and deemed "wider" in scope than international trade law.[1] In spite of the odds, the author has chosen to write this book, which is good news for the commercial lawyer or student who now has a current account of international commercial law in the second edition.

When the book was first published in 1997 it was a huge effort. Three years later, the author, John Mo, has produced the second edition. He states that the second edition has been especially challenging due to the wealth of material that is available and exacerbated by the ease with which one is able to locate legal material today with the help of the internet. Indeed, three years is a comparatively short period for a book of this scale. During his research, Mo would have faced dilemmas when having to choose between what to include or exclude, and when to call a halt to the research. The subject itself is very content driven and the book has lots of it. However, one has to question whether speed has been at the expense of the accuracy of the information presented and more will be said on this later.

In the intervening period between the first and second editions, international trade and commercial relationships grew by leaps and bounds, fuelled no less by the role of the World Trade Organisation (WTO) and technology. To accommodate the new material, Mo had to omit the first three Chapters found in the first edition from the second edition. Was this a wise move?

The deleted Chapters in the first edition presented a brief history of international commercial law (Chapter 1), selected concepts and terms (Chapter 2) and an introduction to conflict of laws (Chapter 3). Collectively, they formed Part 1 (Preliminary Issues), which examined the

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[1] Refer to Mo J, International Commercial Law (1997, 1st edition, Butterworths, Sydney) 23.

history of international law before taking the discussion through to modern Australia.[2] When writing the second edition, Mo re-worked some of the old material and slotted it into the remaining Chapters to pre-empt suggestions that total removal could be foolhardy.

One result was the omission of the historical information in the old Chapter 1 even though parts of it provided important background to understanding the origins and development of Australian and international trade and commercial law. The discussion on the *Lex Mercatoria*[3] was also deleted instead of being used as the pylon for a substantive Introductory Chapter in the second edition. On the other hand, it is a relief that Mo omitted the extraneous material on early China, India and Japan.[4] Yet another result was the old Chapter 3 (Introduction to Conflict of Laws) becoming part of the new Chapter 12 (International Commercial Litigation and Conflict of Laws).

Web sites are particularly useful to locate materials and Mo does not hesitate in using them for the information on international organisations such as UNCITRAL,[5] the European Union[6] and the WTO.[7] For cases, Mo relies on web sites such as <www.casetrack.com>, <www.austlii.com.au> and <www.un.or.at/uncitral>. The last has an extremely useful section named "Case Law on UNCITRAL Texts" that provides case abstracts from jurisdictions worldwide. An example is the abstract of the 1991 Argentine case, *Oilmes Combustibles SA v Vigan SA S/Ordinario*, cited as "CLOUT Case 22" (note 2 at 59).

In another innovative move, Mo transfers the four Appendices[8] found in the first edition to the publisher's web site in the second edition, enhancing further our reliance on the internet today. However, this assumes that every reader has access to a computer but such access is not synonymous with access to the internet or information databases. If they are not available, online research becomes impossible.

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[2] Ibid 18-21.
[3] Ibid 8-10.
[4] Ibid 13-18.
[5] The web site is <http://www.un.or.at/uncitral>.
[6] See <http://europa.eu.int/inst.en/cl.htm#function>; <http://curiaeu.int/en/pres/jeu.htm>.
[7] See <http://www.wto.org/wto/about/dispute1.htm>.
[8] They are on the Vienna Sales Convention, the (Cth) 1991 Carriage of Goods by Sea Act, the OECD Guidelines for Multinational Enterprises, and Selected Provisions of GATT.

In the second edition, Mo restructures the contents. As a result, the 13 Chapters in the new edition (with no Parts) replace the 16 Chapters in the old edition (in seven Parts). The contents of both editions are shown in the following table constructed for this book review, which facilitates a quick survey of the similarities and divergences:

Chapters in the 1st edition (1997)	*Chapters in the 2nd edition (2000)*
1. A Brief History of International International Commercial Law	(deleted)
2. Selected Concepts and Terms Relating to International Commercial Law	(deleted)
3. Introduction to Conflict of Laws	(deleted)
4. International Sale of Goods under Australian Law	1. International Sale of Goods under Domestic Law
5. Contracts of Sale under the Vienna Sales Convention	2. Contracts of Sale under the Vienna Sales Convention
6. Contracts for Carriage by Sea, Air and Land	3. Contracts Relating to Intellectual Property
7. Means of Payment in International Trade	4. Contracts for Carriage by Sea, Air and Land
8. Introduction to International Banking and Finance	5. Means of Payment in International Trade
9. Marine Insurance and International Trade	6. Introduction to International Banking and Finance
10. Insurance Services in International Trade	7. Marine Insurance and International Trade
11. Selected Issues of Foreign Investment Law	8. Insurance Services in International Trade
12. Foreign Investment Law in Selected Countries or Regions	9. Foreign Investment Law
13. Basic Terms and Forms of International Trade	10. The World Trade Organisation
14. GATT and Related Issues	11. Regional Trade Organisations
15. International Commercial Litigation and Conflict of Laws	12. International Commercial Litigation and Conflict of Laws
16. Alternative Means of Settling International Commercial Disputes	13. Alternative Means of Settling International Commercial Disputes
Appendices 1-4	(transferred to publisher's web site)

The new structure helps to streamline the contents making the topics seem less anomalous. Mo updates the materials and shifts emphasis to reflect global developments. For example, a new Chapter 9 on foreign investment incorporates two old chapters on foreign investment and terms and forms in Chapters 11 and Chapter 12. A new Chapter 10 (WTO) replaces old

Chapter 14 (GATT). Another new chapter, Chapter 11 on Regional Trade Organisations, acknowledges the importance of and rise in regional trading blocs in international commercial relationships.

However, the restructure may be improved further. For example, although general material is usually presented prior to specific material, this does not always occur in the book as seen in the discussion on marine insurance (Chapter 7) that is followed by the generic discussion on insurance services (Chapter 8). As stated above, normally, the reverse happens. Further, marine insurance is allocated one chapter (Chapter 7) but not land or air insurance even though Chapter 4 discusses all three modes of carriage.

A possible reason for the anomalies may be lack of attention to logical sequencing when the materials were collated for publication but an alternative reason may well be the prejudices of the author. It is known that authors have pet topics and they may be more expert in some areas than others. Nevertheless, the contents of a basic text have to be objective and reasonably balanced to maintain its general characteristic and application. Be that as it may, when embarking on this review, I fell prey to my own prejudices and allowed them to dictate my approach. Consequently, the first item that I checked was whether there was any discussion on the 1966 Montreal Agreement. So, why pick this Agreement?

Although the 1966 Montreal Agreement is straightforward enough as a document, it is often misunderstood conceptually. As a consequence, its place and role within the system that regulates international air transportation are often misinterpreted or misplaced. This system is known as the Warsaw system, which is a complex framework of several international treaties, starting with the 1929 Warsaw Convention for the Unification of Certain Rules Relating to International Carriage by Air.[9] The confusion is caused by the full title of the 1966 Montreal Agreement, namely, *Agreement Relating to Liability Limitations of the Warsaw*

[9] The treaties that have subsequently amended the 1929 Warsaw Convention and forming part of the Warsaw system are: (a) the 1955 Hague Protocol to amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air; (b) the 1961 Gaudalajara Convention Supplementary to the Warsaw Convention, for the Unification of Certain Rules Relating to International Carriage by Air Performed by a Person Other than the Contracting Carrier; (c) the 1971 Guatemala Protocol to Amend the Warsaw Convention; (d) the four 1975 Montreal Additional Protocols Nos 1-4 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929.

Convention and the Hague Protocol, which tends to lead to the assumption that the Agreement is part of this system. However, this is incorrect and the reason is twofold. First, unlike the treaties in the Warsaw system where the Parties are States, the 1966 Montreal Agreement is a private agreement between the United States Civil Aeronautics Board (CAB) and the International Air Transport Association (IATA) carriers such as Qantas Airways Limited.

In the book, the reference to the 1966 Montreal Agreement is nested in the following paragraph (at 291):

> **[4.198]** Outside the four [Warsaw] regimes, there is also the Agreement Relating to Liability Limitations of the Warsaw Convention and the Hague Protocol (the Montreal Agreement), which was adopted on 13 May 1966. The agreement is not really an international convention in an orthodox sense, because it is basically an agreement entered into between the United States and any other country in the world. It was intended to regulate the liability of carriers for passengers, instead of carriage of goods. Thus, this agreement is not to be studied here.

A few observations may be made here. First, the Hague Protocol *is not* the Montreal Agreement. Secondly, the Hague Protocol was signed on 28 September 1955 and entered into force on 1 August 1963 after ratification by 30 States, and *was not* "adopted on 13 May 1966." Thirdly, as stated above, the 1966 Montreal Agreement *is not* an agreement between countries. And finally, the Agreement *was not* "intended to regulate the liability of carriers for passengers, instead of carriage of goods" *per se.* The real intention of the Agreement was to replace the fault-based liability of the air carrier under the Warsaw system with risk-based liability and raise the liability of the carrier for passengers.

In 1955, the Hague Protocol amended the 1929 Warsaw Convention and raised the liability limits established in the Convention. As a result, it became part of the Warsaw system. On the other hand, the 1966 Montreal Agreement *is not* an agreement "between the United States and any other country in the world" and, as such, it cannot raise the liability limits established by the Convention. However, it should be noted that the 1966 Montreal Agreement has the *de facto* effect of raising the limits established

by the Convention because in practice it juxtaposes with the Convention. How does this work?

It has been noted above that the 1966 Montreal Agreement is not an international treaty between States and the reason is that it is a private agreement that the CAB signs with international airlines, not States.[10] The CAB approved this Agreement on 13 May 1966. The Agreement gave signatory airlines the right to fly into and out of the United States subject to liability limits that are higher than those set by the Warsaw system, involving points in the United States that are either an agreed stopping place, point of departure or point of destination. This is permitted by the Warsaw system because it establishes minimum liability limits only for the Contracting States. As such, the United States, as a Contracting State, is permitted to increase such limits, which it has done in the form of the 1966 Montreal Agreement. Perhaps, had this Agreement avoided the label "Montreal" and been known as "the CAB Agreement" in the first place, for instance, confusion would not reign today.

Furthermore, the 1966 Montreal Agreement should not be confused with the four 1975 Montreal Protocols[11] that amended the Warsaw system nor with the 1971 Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation.[12]

It will be noticed that there are other flaws in the book and three are selected for further comment below. However, on the whole, Mo does well to restrict their numbers in a project of this size.

The first concerns the material on the Chicago Convention, which may be relegated to the same bin as historical China, India and Japan. When opening discussion on the legal framework for air carriage, Mo states (at 209):

> [I]nternational air transportation is largely regulated by international conventions, which are normally regarded as being divided into two systems: the Chicago System and the Warsaw System. Both systems are relevant...but to different degrees. The Chicago system regulates

[10] Refer CAB No 18900.
[11] They are Additional Protocols 1-IV, International Civil Aviation Document Nos 9145 - 9148 respectively.
[12] International Civil Aviation Document 8966.

> international civil aviation by maintaining...order and peace in international civil aviation. It sets out the uniform rules for the share, use and control of national air space for the purpose of international civil aviation. In fact, it deals with the relationship between governments.

The full title of the Chicago Convention is the Convention on International Civil Aviation,[13] which governs the relationship between States concerning air traffic rights and safety in air navigation, which are functions of States. It does not regulate international commercial relationships, which are the relationships that exist between the air carrier, on the one hand, and the passenger or consignor of goods by air, on the other hand. In this context, it has little, if nothing to do with international commercial law. As such, the reference to the Chicago Convention is irrelevant and tends to confuse.

The second is the inaccurate comment on Nauru's claim against Australia for the latter's breach of international responsibility in *Case Concerning Certain Phosphate Lands in Nauru,* which Mo notes as a "pending decision" (at 573). On the contrary, this case was settled several years ago and the proceedings before the International Court of Justice discontinued. By Order dated 13 September 1993, the case was removed from the Court's list[14] following the Parties' notification of their settlement agreement to the Court.[15]

The third refers to another inaccurate statement (at 574):

> [I]t is certain that the ICJ is able to deal with international commercial disputes arising from international conventions and treaties, provided that at least one of the parties is a state.

It is correct that the Court may deal with international commercial disputes[16] but it is incorrect to say that only one of the parties needs to be a

[13] It was signed in Chicago on 7 December 1944: 171 United Nations Treaty Series 387.

[14] International Court of Justice, 13 September 1993, General List No 80. The Order may be located at <www.icj-cij.org>; [1993] Australian International Law News 198.

[15] See Case Concerning Phosphate Lands in Nauru (Nauru v Australia), Joint Declaration of Principles, [1993] Australian International Law News 189-193; Agreement between Australia and the Republic of Nauru for the Settlement of the Case, ibid 196-197. Under Article 1(1) of the Agreement, Australia agreed to pay "a cash settlement" of A$107 million to Nauru to help Nauru prepare "for its post-phosphate future".

[16] For example, see Barcelona Traction Light and Power Co Case [1970] International

State. On the contrary, all parties *must* be States because only States are permitted to appear as parties before the Court. The reason is entrenched in Article 34(1) of the Court's Statute which provides that "[o]nly states may be parties in cases before the Court." Also, Article 93(1) of the United Nations Charter provides that all Members of the United Nations are *ipso facto* parties to the Court's Statute. However, if non-Members wish to become a party, they may do so only on conditions determined in each case by the General Assembly upon the Security Council's recommendation under Article 93(2).[17]

The Court bases its jurisdiction in a particular case on the consent or will of the parties before it. This pre-requisite, found in Article 36 of the Court's Statute, rests on the principle of sovereign equality of States. Recently, in *Case Concerning the Aerial Incident of 10 August 1999,*[18] India argued successfully that the Court had no jurisdiction to adjudicate the dispute described in Pakistan's Application. Under Article 36, the States in dispute must submit to the Court's jurisdiction either compulsorily or *ad hoc* before the Court is able to entertain the claim of the Applicant State. Since India had done neither, the Court found that it could not hear Pakistan's complaint.

Moving on from the criticisms above, this book has a number of strengths with its wealth of information and many good aspects. There is a modern section on "E-commerce" in the chapter on intellectual property (Chapter 3). Chapter 13 on alternative means of dispute resolution includes practical information, and the reference to the Hague Conventions (at 698-699) and the New York Convention on international commercial arbitration (at 716-722) are as expected. Although dispute resolution within the WTO is not given separate treatment here, it is dealt with later when the Organisation is discussed in Chapter 10.

In the Introduction, Mo states that his target audience is Australian and he also states that the book permits the study of international commercial law

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Court of Justice Reports 3.

[17] It is worth noting that under the United Nations Charter, the Court may give Advisory Opinions. Article 65 provides that the Advisory Opinion may be "on any legal question at the request of whatever body may be authorised by or in accordance with the Charter". This provision should be read in conjunction with Article 96(1)-(2), which provides that only the organs or specialised agencies of the United Nations may request for an advisory opinion, generally speaking.

[18] An extract of this case is reproduced below.

from the combined perspective of international and common law. At the same time, he refers to Australian law or the law of another common law jurisdiction when legal issues are examined in the context of domestic law. He writes the book for the classroom, describing it as a "reasonably comprehensive discussion of major issues of international commercial law within a length deemed reasonable for students." He intends the book to include issues of international commercial law falling under public international law as well as those falling under private international law.

Some may query this as overly ambitious since Australian universities use semesters to divide up the academic year and the question is whether the sheer volume of this work may fit comfortably into one semester. Whenever a subject is too content driven, it is at the expense of greater depth. However, it is arguable that since international commercial law is not a core subject, this may be acceptable if the students themselves plug the gaps by engaging in self-directed learning and research.

Cases abound in this book drawn from around the world. Many are highlighted and appear in summary form, represented as key cases, and their citations appear in a variety of modes. It is arguable that this eclectic presentation may be acceptable owing to the nature of this book but others may not see inconsistency in the same light. Yet, the use of the internet to locate cases has undeniable benefits, such as the speed and ease with which the research may be carried out. In addition, online research is ideal for cross-referencing and it is cheap, its advantages becoming even more obvious when the cases come from disparate jurisdictions. In some jurisdictions, the courts have gone online as part of best practice management, including Australia.

As Mo states in the Preface:

> International trade and commerce entered a new era in the 1990s. The completion of the Uruguay Round negotiations of GATT, the establishment of the WTO, the growth of the EU, the expansion of electronic commerce, the rapid development in modern technology and the acceptance of China into the WTO (in principle) were the most significant changes in international trade and commerce in this period. The world has become smaller. Economic interdependence has become a reality... The world is ready for a much faster, more productive and rational twenty-first century (at ix).

The WTO is discussed in Chapter 10 and its structure shown in a flow chart (at 580). The acceptance of China into the WTO is now reality, and no longer just "in principle", since it signed an enabling and historic agreement with the United States earlier this year. The WTO plays a key role in globalisation that has impacted on international trade and commerce in a profound way. To illustrate, Mo begins the Chapter with the following words (at 575):

> The World Trade Organisation (WTO) is the most important development in the history of international trade. It came into operation on 1 January 1995 and...is the only international body dealing with the rules of trade between nations. The WTO has three main objectives:[19] to help trade flow as freely as possible, to achieve further liberalisation gradually through negotiation, and to set up an impartial means of resolving disputes. The WTO is the continuation of GATT, but it is much more powerful and covers more areas of international trade and commerce than GATT, which is now one of the trade agreements included under the WTO Agreement.

Since the WTO came into existence it has been busy, producing more than 60,000 documents and resolving disputes. Mo observes (at 613):

> Renato Ruggiero, the former Secretary-General of the WTO, called the WTO dispute settlement procedure its most significant contribution to the stability of the global economy.[20]

Although Australia has been a party in proceedings using the WTO dispute resolution processes, Mo does not highlight these cases for special treatment. One such is Australia's dispute with the United States on the subsidies that Australia gave to its producers and exporters of automotive leather.[21] A more recent example is the dispute with Canada in *Case*

[19] Although the WTO has three main objectives, it has five functions found in Article 3 of the WTO Agreement. The other two functions are the administration of the Trade Policy Review Mechanism and cooperation with the International Monetary Fund (IMF) and International Bank for Reconstruction and Development (IBRD): at 576-577.

[20] Between 1 January 1995 and 30 July 1999, there were 179 consultations pursuant to the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). Twenty-two cases were resolved using the DSU process and 37 cases were resolved by the parties themselves or lapsed for various reasons. The figures demonstrate the success of the Dispute Settlement Body (DSB) in assisting WTO members in their disputes: ibid.

[21] Refer WTO, Australia – Subsidies Provided to Producers and Exporters of Automotive

concerning Measures Affecting Importation of Salmon[22] where Canada had complained against Australia's quarantine restrictions and the measures used to prevent the commercial importation into Australia of Canadian salmon.[23]

Generally speaking, international commerce thrives on acronyms and Mo uses them extensively. But unless the reader is trained in the jargon, it can be quite meaningless. To assist, he explains them as they are introduced into the text. On the other hand, he does not always explain the abbreviations used for case citations. Although there are secondary sources for the meaning of abbreviated citations, such sources are sometimes not easily available or simply not available to a reader.

Therefore, it is recommended that the third edition of this book should consider adding an *Abbreviations* section and all acronyms collected and explained here, rather than dot the text with explanations as and when they first appear. When quick answers are sought, being able to locate the abbreviations and explanations under a single banner in this way is most helpful and effective. It is recommended further that more attention be given to detail to address the inconsistencies in the footnotes. This comment may seem to be nitpicking but taken collectively, the inconsistencies tend to mar the entire work. An example is the inconsistent practice in serial referencing (note 14 at 168; compare note 57 at 235.)

So far, it has been easier to be critical than complimentary in this book review. Unfortunately, negatives stick out like a sore thumb and beckon the reviewer to say something. By his own admission, Mo states in the Preface that the writing of the book "has by no means been an easy task" and as such it is no wonder that there are slips.

However, on the whole, the book lives up to its claims. It is concise yet comprehensive and Mo tries to present technical and involved information as simply as possible. He resorts to visual impact and relies on charts and tables. For example, page 13 sets out the major responsibilities of the Seller

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Leather, 25 May 1999, WT/DS126/R (99-1888) at <www.wto.org/english/tratop_e/dispu_e/1343d.doc> (visited August 2000).

[22] WTO, Australia – Measures Affecting Importation of Salmon, 20 October 1998, WT/DS18/AB/R (98-000) at <www.wto.org/english/tratop_e/dispu_e/ds18abr.doc> (visited August 2000).

[23] Refer to the Case Note on this case at 234-242 above.

and Buyer under domestic law in two parallel columns and page 630 presents a flow chart on the European Union Council. He writes for the student who is served by the inclusion of case summaries. Nevertheless, reliance on case summaries should not be at the expense of reading original cases and law students should be encouraged to read more cases since case analysis is a basic lawyering skill that is developed and reinforced in law school.

To sum up, the book illustrates that international commercial law is a huge and complicated area. Although some inaccuracies have been identified in this review, they should not be permitted to detract from the usefulness of this work or its concept. Generally speaking, as stated above, Mo has done well to get this far in a book of this size and scope. In this effort, he is the puppeteer who has drawn together seemingly intertwined yet separate strings and he succeeds in bringing this complex subject area to his intended audience. However, when preparing the next edition, Mo may have to slow down slightly and exercise more care when revising and refining the text. If he does this well, he will also find that he will be able to work more easily within any reasonable page limit the publisher may choose to impose on him.

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