International Business and the Law*

INTRODUCTION

The subject I have chosen for this lecture is one which not so many years ago would probably have been regarded by most lawyers as somewhat esoteric. Though Australia has throughout its history been heavily dependent upon overseas trade and overseas investment for its economic development, the legal processes by which that trade was facilitated were handled almost entirely by the export branches of the banks; lawyers and the courts were hardly ever involved. For example, the number of decisions by Australian courts in this century on letters of credit could be counted on the fingers of one hand; yet they are one of the main instruments of international trade. At the present time, however, there is, I believe, an increased awareness among lawyers of the implications for their own legal practice of international business transactions, and in particular of the activities in Australia of foreign based companies.

A study of international trade law has not hitherto formed part of the undergraduate curriculum of any Australian law school, though special seminars and courses on the subject have been arranged within some universities at a post-graduate level. It is a matter for consideration whether instruction in that subject should be made available only at the post-graduate stage, or whether it should be included as an optional subject in the LL.B. course. But it seems to me abundantly clear that such instruction should be provided within the Department of Law of this University. The study in some degree of depth of such topics as international sales, international carriage by sea or air, international payments arrangements, international arbitration, legal problems associated with the establishment of a business abroad or those experienced by foreigners who seek to carry on business in Australia, and the role of multinational corporations—all of these seem to me to be both academically worthwhile and of considerable commercial significance. I hope that it will not be long before a course encompassing such topics will be made available within this University.

A general survey of the role of the law in international business is particularly justifiable at the present time when many of the legal rules and institutions by which international trade is transacted are in the process of re-examination and reformulation. International trade law has a long history. Modern maritime law in particular owes much to the medieval codes on the custom of the seas.[1] Such institutions as the bill of exchange, the partnership, and the commercial corporation can also be traced back into the medieval period. The needs and methods of merchants and mariners are international in character, and there has always been a tendency to apply to them legal principles and procedures differing from those applicable in the ordinary courts of the land. At times that tendency has been strong, at others it has been more restricted. Professor Clive Schmitthoff has distinguished three stages in the development of international commercial law.[2] As he states, "it arose in the Middle Ages in the form of the law merchant, a body of truly international customary rules governing the cosmopolitan community in international merchants who travelled through the civilised world from port to port and fair to fair. The second phase began with the incorporation

*This is a somewhat enlarged version of an Inaugural Lecture delivered at the University of Queensland on 6th October, 1970.

1. See Wilmer L.J., "The Sixth Centenary of the Admiralty Court" (1960) J.B.L. 276.
2. "The Unification of the Law of International Trade" (1968) J.B.L. 105.

of the law merchant into the national systems of law, a process which, though universal, was carried out in the various countries at different times and for different reasons. The third place is contemporary; it aims at the unification of international trade law on an international level and has given rise to a new law merchant which reflects the international spirit of our time in the political and economic sphere."

Unfortunately, the international spirit of our time is a troubled and divided spirit. There is no sacred legal text to which recourse can be had as an expression of universal principles to be set off against nationalistic particularities; instead, we find a world divided into groups of countries adhering to legal systems which differ greatly both *inter se* and *intra se*. I am unable to accept fully Professor Schmitthoff's comforting opinion that the modern law merchant is practically the same in all countries of the world. Moreover the divisions between the planned economy and market economy countries on the one hand and the developed and developing countries on the other which emerge in all discussions of a commercial nature reappear when the reform and unification of that law is being considered.

Nevertheless, it is undeniable that there is at the present time widespread interest in the possibility of achieving greater uniformity in the field of international business law. This interest was clearly manifested when in the course of its 21st session in 1966, the United Nations General Assembly by resolution 2205(XXI) established the United Nations Commission on International Trade Law (UNCITRAL) for the progressive harmonisation and unification of the law of international trade. It is a measure of the importance and difficulty in securing uniformity in the law which regulates international commercial transactions that the United Nations agreed on the advisability of establishing a permanent Commission in this field. Probably in no area of the law is the need for international cooperation more demanding than in the law of international trade, since the world-wide promotion of trade depends in considerable measure upon the adoption of rules, usages and instruments which are substantially the same in all countries.

It is a commonplace observation that the flow of international trade only too often follows channels whose course has been determined by historical and cultural factors rather than by economic considerations. Prominent among these factors is a common tradition of legal institutions and practices. When the trading community in one country is familiar with legal usages of another and has confidence in its administration of the law, it will obviously be more willing to engage in commercial relations with it. It is only too apparent that obstacles to international trade exist not only where positive barriers to such trade have been created, but also, and perhaps more significantly, where there is unfamiliarity with the legal and commercial practices of other regions.

At the present time, the natural tendency for trade to follow traditional channels is being powerfully reinforced by the break-up of the international trading community into a number of regional blocs. It is a matter of some importance that in most instances, including the cases of the European Communities and the Council for Mutual Economic Assistance, the grouping is not merely political or territorial; it is also an expression of a common legal tradition. In all members of the European Communities the civil law system is in force; and although there are numerous and important differences within that system, there is nevertheless sufficient unity to make it a relatively easy matter for lawyers and businessmen in France or Germany or Italy or the Benelux countries to adopt instruments or conventions which will have application

throughout the member countries. In the same way, it has proved possible for the Socialist countries of Eastern Europe which are members of COMECON to achieve a considerable degree of success in the unification of trade law within their region.[3]

It is vain to imagine that the prevailing interest in and preoccupation with regional integration will be halted or even seriously diverted by efforts to achieve unification of international trade law on a world-wide basis. At the same time the pursuit of both regional and universal unification is not an irreconciliable objective of governments. Membership of a regional grouping never results in such a closed and exclusive system of economic relationships that trade with countries outside the group is not important and its development not actively promoted. Indeed, the philosophy underlying Article XXIV of the General Agreement on Tariffs and Trade is that regional integration is, on certain assumptions, both compatible with the most favoured nation principle, and an effective means for expanding world trade. It is therefore by no means apparent that a country which is or seeks to become a member of a group will be reluctant to participate in an international movement towards reform and unification of trade law. An Hungarian lawyer has justly remarked: "An interest in a particular region does not exclude an interest in relationships outside that region, and to take part in a unification is not the same thing as to marry; one is not obliged to choose one unification to the exclusion of the others, but may take part in several of them at the same time."[4] However, the impetus to pursue the objective of international rather than regional unification will probably depend upon a country's assessment that its trade interests will be best served by expanding its multilateral dealings rather than intensifying its trade relations within a regional group. It may be that this is one reason why certain Eastern European States in particular have given their enthusiastic support to the establishment and activities of UNCITRAL.

Though there can be little doubt that UNCITRAL will become a major force in the future shaping of the law of international trade, it should be remarked that the major difficulties in inducing joint action by governments have not been due to lack of inter-governmental or international non-government institutions which were concerned with the subject. On the contrary, the very number of such bodies, with diverse membership, and objectives, has been one factor which has perhaps at times impeded progress. To take only one illustration, the question of devising a document of title for container transport is under consideration in such varied bodies as the International Chamber of Commerce, the International Institute for the Unification of Private Law, the Comité Maritime International, the Economic Commission for Europe, and the United Nations Conference on Trade and Development. It will, no doubt, in due course be taken up also by UNCITRAL. Indeed, the proliferation of bodies concerned with questions of international trade law is one reason why the Commission has as one of its principal functions the mandate to coordinate the work of other organisations and to encourage cooperation among them.

The field of international trade law is vast, and any lecture which attempts to survey it must necessarily be highly selective. What I wish to do is to give a very abbreviated account of a few areas of the law which most directly concern an Australian exporter, and of the changes which are taking place or which are

3. See Hoya, "The Comecon General Conditions—A Socialist Unification of International Trade Law" (1970) 70 Col. L.R. 253.
4. Eörsi, "Regional and Universal Unification of the Law of International Trade" (1967) J.B.L. 144 at p. 146.

likely in these areas. In general, it is possible to say that the legal questions which are important to the exporter are of two kinds. One category of questions relates to what I shall call the private law of international trade, and covers such matters as the law relating to sale of goods, carriage and payment. These are matters which are largely within the autonomy of the exporter and the party to whom he forwards his goods, though in increasing measure both governmental and non-governmental international bodies are becoming active in this area. The second, and more fundamental, kind of question is whether he will be able to export at all to a given foreign country. The answer to this will be dependent in large measure on whether the foreign country discriminates against an exporter from certain other countries, or adopts protective devices which make exports to it impossible or economically impractical. The body of law which regulates the commercial policies of states I shall call the public law of international trade.

Accordingly, I shall attempt in this lecture to give some account of certain aspects of the private law of international trade, and also of the major legal instrument under which the principal trading nations have assumed obligations relating to the conduct of foreign trade.

INTERNATIONAL SALE OF GOODS

The Uniform Law on International Sales

In 1964, two international Conventions were adopted relating to the sale of goods, the Convention relating to a Uniform Law on the International Sale of Goods, and the Convention relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods. These Conventions had been more than thirty years in the making. The International Institute for the Unification of Private Law (the Rome Institute) appointed a drafting Committee to prepare a draft uniform law in 1930. This was forwarded by the League of Nations to governments for their comments in 1935. After the war, a conference at The Hague in 1951 appointed a Special Commission to carry on the work. In 1956 this Commission presented a revised draft of a Uniform Law on International Sales for consideration by governments. Meanwhile the Rome Institute had been engaged in the preparation of a draft Uniform Law on the Formation of Contracts for International Sales. These two drafts formed the basis for the two Conventions eventually adopted in 1964.

There can be no question about the vital importance for international trade of a uniform international law of sale of goods and The Hague Conventions made a notable contribution towards securing such a law. However, the solutions adopted at The Hague have not proved universally acceptable and active consideration is now being given, particularly within UNCITRAL, to the revision of the Conventions.

It is not possible for me in the course of this lecture to discuss in any detail the content of the Conventions on the International Sale of Goods. However, there are a few features of the Conventions to which I should like to refer.

The first relates to the sphere of application of the Uniform Law. It applies to contracts of sale of goods entered into by parties whose places of business are in the territories of different states in three situations:

(a) Where the contract involves the sale of goods which are at the time of the conclusion of the contract in the course of carriage or will be carried from the territory of one state to the territory of another;

(b) Where the acts constituting the offer and the acceptance have been effected in the territories of different states;

(c) Where delivery of the goods is to be made in the territory of a state other than that within whose territory the acts constituting the offer and the acceptance have been effected.

It will be seen that the Uniform Law applies only if a sale is international in two senses: with respect to the parties, and with respect to the transaction. It may however be chosen as the law of the contract by the parties; and the parties may expressly or by implication exclude the application of the law either entirely or partially. This provision is particularly significant, since it operates so as to preserve the principle of freedom of contract. It is not surprising that several critics have fastened upon this fact to attack the Uniform Law. The claim was indeed made by one representative at the second session of UNCITRAL that "it was inadmissible from a legal standpoint to subordinate the Uniform Law to the will of the parties"; and other statements implied that the Uniform Law should consist essentially of a set of mandatory norms which would determine the legal rights and obligations of parties who entered into a contract of sale to which the Uniform Law was applicable. It seems clear that one of the major contests which will be fought in any reformulation of The Hague Conventions will be over the scope of the principles of freedom of contract, and "autonomy of the will."

However, quite apart from considerations of public policy, there are good practical reasons why parties must be accorded the power to supersede, supplement or derogate from the general law as declared in the Uniform Law. The Uniform Law does not purport to cover the whole field of the law of sales; but even in regard to matters which fall within its scope, its provisions may well be regarded by parties as obscure or defective or lacking in sufficient detail. The Uniform Law employs many civil law concepts which are quite unfamiliar to the mercantile community (and its legal advisers) in common law countries. Moreover, there is as yet no "jurisprudence" to shed light on the articles of the Uniform Law. In these circumstances, it seems to me imperative that parties must be conceded the right to modify the provisions of the Uniform Law as to give effect to their contractual intentions.

Australia has not as yet acceded to the Convention relating to a Uniform Law on the International Sale of Goods, but it has indicated that its present intention is to accede to it with similar reservations to those made by the United Kingdom. This includes a reservation under Article V, by which a State may declare that it will apply the Uniform Law only to contracts in which the parties themselves have chosen that Law as the law of the contract. The purpose of this Article is, as the United Kingdom has explained, to permit a cautious and progressive unification of the law on the international sale of goods. This Article will, hopefully, be transitory only. But it should be retained until the world trading community, including that of common law countries, has come to accept the desirability of regulating international sales by the provisions of the Uniform Law. It would be imprudent and contrary to the objective of seeking uniformity in the law of international sales to attempt to impose the Uniform Law upon the mercantile community and the main trading nations against their will.

The Uniform Law is concerned only with the obligations of the seller and the buyer arising from a contract of sale. A common lawyer confronted with the Uniform Law will find the obligations of the seller set out quite simply and clearly: He must effect delivery of the goods, hand over any documents relating

thereto and transfer the property in the goods. But when he comes to consider the buyer's remedies for the seller's failure to perform his obligations, he enters a world of conceptions and practices which are totally foreign to his way of thinking. The provisions in the Uniform Law on this subject are of labrinthine complexity. I hasten to say that I shall not in this lecture attempt to unfold the thread to lead you into and out of this maze. But there are a couple of points to which I should like to refer, since they raise in a rather stark fashion one of the central problems in the international unification of law, namely the finding of an acceptable solution when the major systems of law adopt irreconcilable positions on a particular topic.

At common law, a promisor incurs liability if he fails to execute his promise. A buyer may therefore institute proceedings immediately a breach of contract is made by the seller. But in the civil law this is not so. If performance has not been made by the date when it is due, the promisor must be put in default before liability for breach of contract arises. In French law, a seller is put in default by a formal demand in writing served by a bailiff, and this formality is a condition precedent to the recovery of damages for delay in performance. German law, with its institution of the Nachfrist, goes somewhat further—a last opportunity must in general be given to the promisor to carry out his obligation within a specified time.

One can see the influence of these conceptions in Articles 26 to 29, which relate to remedies as regards the date of delivery. The Uniform Law draws a distinction between situations where the failure to deliver at the date fixed amounts to a fundamental breach of the contract and those where it does not. Where the failure amounts to a fundamental breach, the buyer has the option of requiring performance by the seller or declaring the contract avoided. He must inform the seller of his decision within a reasonable time; otherwise the contract is *ipso facto* avoided. On the other hand, where failure does not amount to a fundamental breach, the seller retains the right to effect delivery and the buyer retains the right to require performance of the contract by the seller. However (and here we have the Nachfrist procedure being applied) the buyer may grant the seller an additional period of time of reasonable length. Failure to deliver within that period amounts to a fundamental breach.

Although the Uniform Law has utilised in this area a civil law conception, it has not simply adopted it; it has instead incorporated it into a newly devised scheme for dealing with the problem of delay in delivery. The pivotal idea in this regard is the distinction between fundamental and non-fundamental breaches. The Uniform Law defines a breach of contract as fundamental whenever the party in breach knew, or ought to have known, at the time of the conclusion of the contract, that a reasonable person in the same position as the other party would not have entered into the contract if he had foreseen the breach and its effects. This article is deceptively simple in appearance; but in fact it is an extraordinarily tangled provision. A distinguished American commentator has remarked of it:[5]

> "A breach is fundamental if (1) a hypothetical "reasonable person" in the situation of the aggrieved party; (2) foreseeing the breach and its effects; (3) would not have entered into the contract; and (4) this decision on behalf of the innocent party was foreseen or foreseeable by the other party at the

5. Honnold, "The Uniform Law for the International Sale of Goods: The Hague Convention of 1964", in Law and Contemporary Problems (1965) Vol. 30, p. 326.

time of the making of the contract. Projecting these reciprocating states of mind by hypothetical parties calls for a lively imagination. Even more imagination is needed to suppose that these various ingredients will be useful in deciding cases for the realistic considerations are very different, and surely include factors such as these. Will monetary compensation for any breach fully compensate the wronged party? Is the amount of compensation subject to dispute? Is the payment of such compensation assured?"

There seems to be unanimous agreement among common lawyers at least that this newly fashioned conception of fundamental breach is unworkable. The rules adopted under civil law influence relating to situations where notices are required, the times within which the notices must be given, and the effect of failure to give notice or to act on it are also extremely complex. An English text on the Uniform Laws[6] takes twelve pages to set out in summary form a table of situations in which notice is required. The common lawyer is necessarily inclined to contrast unfavourably the elaborate prescriptions of the Uniform Law with the simple rules of the Sale of Goods Act which on the whole have served the mercantile community well. I do not of course mean to imply that common lawyers would be justified in opposing the Uniform Laws simply on the ground of satisfaction with their own legislation; but they are, in my view, justified in feeling that the Uniform Laws could with advantage be reformulated and simplified in many respects.

It might be thought that, at least until Australia adopts the Conventions, the operation of the Uniform Laws is no concern to us. This is, however, not so. If a question relating to the international sale of goods comes before the courts of a state which has adopted the Conventions, it may and very likely will answer it in accordance with the provisions of the Uniform Law though one of the parties to the sale is a national or resident of a state which has not adopted the Convention, and though the proper law of the contract may not be that of the forum. This is so because by Article 1 the Uniform Law applies to contracts of sale of goods entered into by parties whose places of business are in the territories of different states—not necessarily different contracting states; and because by Article 2 the rules of private international law are excluded for the purposes of the application of the Uniform Law on Sales. One of the fundamental questions which is under consideration in UNCITRAL at the present time is whether the Uniform Law should be applied by the courts of a contracting state to all contracts relating to the international sale of goods which come before them or only in a limited number of cases. The United Kingdom has chosen the latter alternative; the Uniform Law on International Sales Act 1967 confines its operation to contracts between parties whose places of business are in the territories of different *contracting* states. There is, however, a marked reluctance by some states to contemplate any restriction on the present scope of the Uniform Law.

General Conditions of Sale and Standard Contracts

A further, and independent, item with which UNCITRAL is concerned within the field of international sale of goods is the use of general conditions of sale, standard contracts, Incoterms and other trade terms. The value to international trade of having available recognised and acceptable definitions of trade terms is obvious. In this regard the International Chamber of Commerce has been the main instrument in securing uniformity. It has issued a brochure

6. Graveson and Cohn, *The Uniform Laws on International Sales Act* (1967).

formulating definitions of several constantly employed trade terms, such as C.I.F., C. & F., F.O.B., F.A.S., Ex-Ship, etc. These definitions relate to some of the most significant elements in any international contract of sale, such as supply and delivery of the goods, transfer of the risk and the provision of documentation. Since these formulations were in fact based upon the prevailing understanding of the meaning of the terms, they have been widely accepted throughout the world as authoritative and have been incorporated by reference into countless private contracts.[7] In the case of international sales to which the Uniform Law applies, it is possible that the expressions which are not defined by reference to Incoterms will nevertheless be held to have the interpretation which is assigned to them in that brochure, since the Uniform Law specifies that they shall be interpreted according to the meaning usually given to them in the trade concerned. In any case, it is prudent in any international sales contract either expressly to adopt the Incoterms defintions or to exclude or rewrite them.

Another kind of standardisation of great utility is the development of model contracts to cover dealings in particular branches of trade. Several trade associations have long been active in the preparation of such general conditions of sale. More recently, international organisations such as the Economic Commission for Europe and COMECON have been involved in this field. The E.C.E. has been responsible for the preparation of general conditions of sale for six categories of commodities: plant and machinery; durable consumer goods; citrus fruit; sawn softwood; hardwood logs from the temperate zone; and solid fuels. In the case of plant and machinery, general conditions were prepared for transactions between parties in market economy countries, and also for transactions where one of the parties was associated with a centrally-planned economy. These general conditions are apparently widely used not only among the member countries of the E.C.E., but also in their trade with other countries.

Activities directed towards the standardization of the terms and conditions of international contracts have a significance beyond their utility in providing model clauses for the use of parties to an international transaction. It has been frequently observed in our legal history that the legislature has often taken the course of simply giving statutory form to clauses or procedures which had been devised long before by draftsmen for the use of their clients. It is not improbable also that any future redrafting of the international convention on sales will rely heavily on the practice of the international trading community as shown by the terms of the standard contracts they do in fact employ. It seems to me that progress towards the development of a satisfactory and workable system of norms to regulate international sales of goods may be made more surely by pursuing the course of ascertaining what is the content of agreements actually made by traders than by attempting to devise new synthetic formulae in the

SHIPPING

There is no branch of commercial law where international consultation and cooperation is more vital than in the field of the law of shipping. In the course of an international voyage a ship becomes subject to a host of laws, public and private, of many countries—laws relating to liability for collisions, loss of life or personal injury, loss of or damage to goods, salvage laws, customs, health and pollution control regulations, and criminal laws. In addition, a considerable part of public international law is devoted to the establishment of norms which affect the use of the seas. It is inevitable therefore that the settlement of problems con-

7. See Eisemann, "Incoterms and the British Export Trade" (1965) J.B.L. 114.

nected with the law of shipping has been a long and constant objective of international traders, and that international conventions abound on the subject. There are, for example, nearly fifty maritime conventions and recommendations sponsored by the I.L.O. relating only to conditions of employment of seamen. In addition, there are numerous conventions covering such fields as jurisdiction, maritime claims, sea traffic, salvage, and carriage by sea.

The most notable area from the viewpoint of trade law where international cooperation has been forthcoming has been in the law of carriage of goods by sea. Prior to 1924, the law relating to contracts of affreightment covered by bills of lading was a wilderness. Within any particular country it was often extremely difficult to ascertain the rights and liabilities of shippers and consignees on the one hand and shipowners on the other, particularly since the exception clauses by which shipowners limited their liability tended to grow in ever-increasing complexity.

It was bad enough when the operation of a bill of lading was confined to the immediate parties thereto; but it will be realised that the position was intolerable when it is remembered that a bill of lading is a document of title, which may pass from hand to hand, and from country to country, conferring on its holder both rights and liabilities. A bill of lading contract binds not only shippers and shipowners, but also the consignee abroad and his asignee, as well as to a certain extent bankers who take up such documents as securities for loans granted to their customers.[8] In these circumstances, there was added the complexity of different municipal rules to that due to the ingenuity of the draftsmen of exception clauses. International action was clearly imperative, and it was taken at a meeting of the International Law Association held at The Hague in 1921.

The so-called Hague Rules were adopted at a Diplomatic Conference of Maritime Law, which was responsible in 1924 for the International Convention for the Unification of Certain Rules relating to Bills of Lading. Australia has adopted this Convention, and has given domestic effect to it by the Sea Carriage of Goods Act 1924.

The Hague Rules were, I believe, a valuable contribution to uniformity, but it would be vain to pretend, or even to hope, that they would serve in perpetuity. Moreover, in several respects The Hague Rules were unfortunately far from ideal. The distinguished editor of an exhaustive treatise on Carriage by Sea, Mr. R. P. Colinvaux, commented in 1954:

> "A well drafted enactment like the Sale of Goods Act, 1893, has the effect of crystallising the law within a few decades; one such as the Carriage of Goods by Sea Act, 1924, puts it into confusion indefinitely. Now, nearly thirty years later, every month sees some new and insoluble problem arising under it."

The present difficulties being experienced in international trade with bills of lading arise in part from the deficiencies in the formulation and the cover of The Hague Rules. Of particular importance in this regard is the failure of the Convention to deal with the question of the incorporation of charter-party provisions in bills of lading. But a much more potent cause for continuing divergency is to be found in the adaptations made by national legislatures to The Hague Rules in the course of adopting them, and in the varying interpretations given by national courts to their provisions. The United Kingdom legislature, followed by that of Australia, limited the Rules to outward bills of lading though the Rules themselves were designed to cover both inward and outward bills. On

8. Chorley and Giles: *Shipping Law* (5th edition) p. 95.

the other hand, the legislature did provide that every bill of lading issued in Great Britain (or Australia) which contains or is evidence of any contract to which the Rules apply shall contain an express statement that it is to have effect subject to the provisions of the said Rules as applied by the Act. By these Rules any clause or agreement relieving the carrier from the liability for negligence imposed by the Rules is void. But the courts have held that parties can contract out of the Rules by the simple device of selecting as the proper law of the contract a legal system other than that of the port of shipment.[9] A study of shipping law commissioned by UNCTAD[10] (United Nations Conference on Trade and Development) justly concludes that the effect of those decisions that, so far as English courts are concerned, a carrier can, in respect of an inward or outward bill of lading, avoid The Hague Rules. It adds the comment that this is a striking example of the effect of a convention being whittled down by partial adoption and divergent interpretations.

It is also easy to cite instances of cases where the effect of the Convention was, on the contrary, tightened. The common law rule was that the shipowner was absolutely liable for the seaworthiness of his vessel, but such liability could be expressly excluded. Under The Hague Rules the carrier is bound to exercise due diligence to make the ship seaworthy; and neither the carrier nor the ship is liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy. It was a widely held view in England that the effect of the Rules was that a carrier exercised due diligence if he engaged and properly instructed a competent expert to carry out repair work on his ship, so that he would escape liability if the cargo was damaged through the failure of such an expert to do his job properly. However, the House of Lords in the *Muncaster Castle*[11] held that this was not so; a shipowner is not safe guarded by the fact that the negligence in repairing the ship is that of an independent contractor, and the obligation imposed on the shipowner in the work of repair is one of due diligence by whomsoever it may be done, even when the work delegated to the independent contractor calls for technical or special knowledge or experience, and the negligence was not apparent to the shipowner. It is perhaps not surprising that the decision led to a proposal to amend the relevant Hague Rules by the so called Visby Rules. It is somewhat ironical that the decision which led to that result was one in which the House of Lords paid particular regard to decisions given in other common law jurisdictions, so as to achieve uniformity of interpretation with them, if not with civil law countries. It might be pointed out in this regard that the original text defined the shipowner's liability as being to exercise "diligence raisonnable", for which "due diligence" at least as interpreted by the House of Lords, would hardly seem an appropriate translation.

At the present time, there is much that is unsatisfactory about the law relating to bills of lading. I have been concerned only with certain legal uncertainties or deficiencies. However, a strong attack on The Hague Rules has been launched in recent years by representatives of developing countries on economic grounds. An UNCTAD Working Group on International Shipping Legislation is giving priority attention to bills of lading; its mandate is to "review the economic and commercial aspects of international legislation and practices in the field of Bills of Lading from the standpoint of their conformity with the needs of economic

9. *Vita Food Products Inc.* v. *Unus Shipping Co.* [1939] A.C. 277.
10. Thommen, "International Legislation on Shipping" TD/32/Rev. 1.
11. *Riverstone Meat Co. Pty. Ltd.* v. *Lancashire Shipping Co. Ltd.* [1961] 1 A.C. 807.

development in particular of the developing countries and make appropriate recommendations." To assist the Working Group, the UNCTAD Secretariat is preparing a major study of bills of lading, which will include studies of existing laws relating to bills of lading of various representative countries and regions of the world with a view to determining what difficulties had been found to exist in the determination and application of these laws and the extent to which these affect developing countries.

One may consequently expect pressure for change in the existing rules from the developing countries. One may expect it also, and probably with greater insistence, from the forces of technological change. The Hague Rules were obviously drafted without foreknowledge of the techniques of containerisation, and are ill-suited to them. The most obvious illustration of this is provided by Article IV(5) of The Hague Rules, which provides that neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with goods in an amount exceeding one hundred pounds per package or unit, unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading. Is the container with contents a "package" or a "unit" in the sense of this Article? It may well be in the interest of a shipowner to contend that it is, since his liability for all the items of cargo in the container may thus be limited to a comparatively trifling sum; and he may be justified in his contention under the existing rules. Whether his liability should be so circumscribed, is another matter. As another illustration, The Hague Rules distinguish sharply between liability for goods carried on deck and goods carried in holds. Even in the case of containers it is right that a distinction should be drawn between these two modes of carriage, though not necessarily so rigidly as is done by the present rules. Examples could easily be multiplied. What emerges from this, I suggest, is the need either for a reformulation of The Hague Rules to take account of the particular problems posed by containerisation, or, more likely, the adoption of separate, specific rules to deal with this particular mode of transport.

In a more general way, there is obviously need at the present time for international cooperation in the preparation of rules relating to a through bill of lading to cover the carriage of goods from the moment they are loaded into a container until the point of discharge. This will obviously be a difficult undertaking, if for no other reason than the multiplicity of parties involved—shippers, road and rail carriers, shipowners, consignees and assignees and banks—and because of the different rules which currently regulate carriage by land and carriage by sea. However, as I have already mentioned, a number of institutions are currently engaged in seeking to develop an acceptable set of rules, and it is probable that an international convention on the subject will be worked out in the next few years.

INTERNATIONAL PAYMENTS

It is an easy matter to point to shortcomings and deficiencies in the law relating to sales and carriage. It is therefore pleasant to be able to say that in the field of payments at least, one type of instrument is giving universal satisfaction. This is the bankers' commercial credit. It might seem surprising that a branch of the law so technical and so full of potential difficulties as that relating to bankers' commercial credits should be one where in practice little trouble is experienced, but the position is in fact indubitably so. The subject of bankers' commercial credits was disposed of quickly at a meeting of UNCITRAL. The

Commission, which is representative of all legal and political systems, Eastern and Western, developed and developing, unanimously commended the use of what is generally termed the "I.C.C. Code", namely the "Uniform Customs and Practices for Documentary Credits" of the International Chamber of Commerce, in relation to transactions involving the establishment of a documentary credit. It also expressed its satisfaction with the existing arrangements of the I.C.C. for reviewing the operation of, and when appropriate revising, the Code. It recognised that difficulties might arise in connection with the use of the Code either by reason of divergencies of interpretation or by reason of the inadequacy or unsuitability of some of its provisions in relation to commercial needs, but it limited itself to a recommendation that states inform the I.C.C. of those difficulties.

The I.C.C. is currently revising the Code, having regard in particular to recent developments in containerised shipping transport. It is interesting to observe that the Socialist countries of Eastern Europe which are not represented on the I.C.C. are being kept in touch with the revision process through a liaison group representing the Socialist countries; and I understand that the possibility is under consideration of a procedure whereby countries not represented in the I.C.C. can participate in the work of revision.

If it can be said with assurance that the rules relating to bankers' commercial credits are satisfactory, it can be said with equal assurance that the rules relating to negotiable instruments are not. There exist a number of conventions relating to negotiable instruments dating from 1930 which are summarily referred to as the Geneva Conventions. These Conventions are however the product of civil lawyers and civil law traditions, and the common law countries have shown no disposition whatsoever to accede to them. It is not my intention in this lecture to go into details about the difficulties which adherence to these Conventions would create for common law countries. It is enough to say that even the representatives of civil law countries who participated in discussions on the subject in UNCITRAL were in agreement that there was no possibility of securing a wider acceptance of the Geneva Conventions of 1930 and 1931 on negotiable instruments. The possibility of revising the Conventions so as to make them more acceptable to countries following the common law system was also regarded as remote. It was recognised that the uniform laws annexed to the Geneva Conventions applied to both national and international transactions and that it would be unrealistic to expect states already party to the Convention and the countries following the common law system to modify their domestic law and practice for the sole purpose of achieving a greater degree of uniformity where international transactions were concerned.

In these circumstances, it seemed that the most fruitful method for achieving the harmonisation and unification of the law relating to negotiable instruments was to give consideration to the creation of a new negotiable instrument. The majority opinion appears to favour an instrument which could be used either as a bill of exchange or as a bank cheque, and which would be optional in the sense that the parties concerned could choose freely between the new instrument and the instruments now in use, which would continue to be regulated by the applicable municipal law. However, before deciding on the nature and scope of such an instrument, the Commission prudently decided to address a questionnaire on the subject to governments, and banking and trade institutions. This has been done, and the comments made by those institutions are at present being analysed.

One aspect of the law of international payments which has hitherto received little attention is that relating to guarantees and securities. The United Kingdom delegation in emphasising the need for work to be done on this topic by UNCITRAL, said:

> "The problem of guarantees and securities arose in the case of long-term credits, when financing was required for major projects and the method of bills of exchange and documentary credits could not be used to guarantee payment. The creditor would then insist on a guarantee from a third party or a real security. That was an important problem since development was based on credit, which in turn depended on the guarantees offered."[12]

In the case of short-term credits, the commercial letter of credit has often been employed as a security against failure of performance as well as a means to provide payment for international sales. In the field of long-term financing of investment projects, securities are widely used. The I.B.R.D. (the World Bank) in particular has made much use of security devices in connection with loans for construction purposes.

One matter which is particularly relevant in connection with long-term credit is the existence of national schemes for financing exports, such as the Export Payments Insurance Corporation scheme in the case of Australia. The main purpose of the Corporation is to encourage export trade by protecting exporters against risks of non-payment not normally insured by commercial insurers. Guarantees by E.P.I.C. to lending institutions are an important aid to exporters in obtaining finance for overseas sales of capital and semi-capital goods on extended credit terms. Guarantees may be made available in cases where, in E.P.I.C.'s view, post-shipment credit for two years or more is appropriate for the export involved, and in which the contract price is at least $50,000. E.P.I.C. may guarantee up to 100% of any amount advanced by the lending institution to the exporter.

Bank guarantees are of course particularly important in relation to international business transactions. The I.C.C. is in the course of devising a set of uniform rules and standard guarantee clauses in relation to three major types of bank guarantees used for the protection of the "buyer" in international supply and construction contracts, namely performance guarantees, tender guarantees, and guarantees for repayment of advances. Somewhat surprisingly it has not carried out work on guarantees used for the protection of the seller in an international transaction, that is, guarantees of payment, but a request that it should do so has been addressed to it by UNCITRAL. Members have no doubt been impressed by the view expressed by the Hungarian delegation when referring to the work done by the I.C.C. in relation to documentary credits and the collection of commercial papers

> "These two legal instruments published by the I.C.C. and—in their revised texts—accepted and applied by banks and courts all over the world, are also an excellent example of the fact that in certain fields, the unification of law can better be achieved by accepting general business forms and by preparing standard forms than by trying in each case to prepare international conventions or agreements where after the signing of a long-debated text, full of compromise solutions and possibilities for reservations, the question of ratification involves further problems."[13]

12. Quoted in U.N. document A/CN.9/20.
13. U.N. Document A/CN.9/L.13.

to concede to the other contracting party every advantage which had been granted to any third country, immediately, and as a matter of right, without the other party being required to give anything by way of compensation. The nadir of the principle in recent times occurred in the depression years, in which reliance was placed on discriminatory import and export exchange controls. When international trade is subject to quotas and exchange restrictions, or clearing and compensation arrangements, the clause obviously loses much of its practical effectiveness.

What was novel about the GATT was not so much the agreement by the contracting parties to accord M.F.N. treatment to each other, as the development in conjunction with it of the technique of multilateral tariff bargaining. The essential feature of the GATT negotiating coferences was the holding of simultaneous bilateral negotiations between countries and the generalisation of the resulting concessions by virtue of the M.F.N. principle among all the contracting parties. Governments were able, in determining the concessions they were prepared to offer, to take into account the benefits they might expect to gain as a result of all the bilateral pairs of negotiations. In particular, it was possible in the course of these multilateral bilateral negotiations to take into account interests of, and benefits accruing to, not only the principal suppliers of products but also those of secondary suppliers.

If the elimination of discrimination in international trade dealings is an essential conception in the GATT, whose members between them account for more than eighty per cent of world trade, one might well expect that in fact the vast majority of commercial transactions would be conducted on the M.F.N. basis. But when one turns to consider the exceptions to that principle which presently exist, or are in the course of development, it becomes obvious that the operation of the multilateral system of trade envisaged by the GATT is facing grave danger. It also needs stressing that one country which is likely to suffer much from the impairment of the M.F.N. principle is Australia.

There is one exception to the M.F.N. principle which I should mention at this point. This exception which is explicitly covered by the GATT provisions relates to the case of preferential systems which existed prior to the coming into force of the GATT. The most important example of this is the British preferential system, that is the system of Imperial preferences which culminated in the Ottawa Agreement of 1932. The GATT did not put an end to the system; what it did was to freeze the maximum margins of preference at their levels in 1947. Australia therefore continues to give and to receive preferential tariff treatment in certain Commonwealth countries, but the importance of this system is continually declining as the margins of preference are lowered or abolished. Moreover, the GATT rules forbid the creation of any new preferences, unless the contracting parties accord the right to do so. It was for this reason that when Australia introduced a system of tariff preferences in favour of the developing countries in 1966, it was first necessary for it to obtain a waiver under Article XXV of the GATT.

The exception in favour of existing preferential systems is obviously of diminishing significance, and I was not referring to it when I said that the multilateral trading pattern was facing grave danger. I was referring rather to another exception which the GATT admits to the M.F.N. principle, namely the exception in favour of customs unions and free trade areas.

It is not surprising that the GATT has admitted this exception, since it was commonly inserted in bilateral commercial treaties according M.F.N. treatment. But though the GATT accepts the view that regional and universal

approaches to commercial policy may be mutually compatible, it accepts it only subject to carefully defined conditions.

The first of these conditions is that duties and other restrictive regulations of commerce must be eliminated (not, be it noted, merely reduced) with respect to substantially all the trade in products originating in the constituent territories of the customs union or free trade area. The phrase "substantially all" is clearly not free from ambiguity. In the case of E.F.T.A., it has been assumed to justify the exclusion of agricultural products.

The second condition is that the duties and other regulations of commerce imposed at the institution of a customs union in respect of trade with contracting parties who are not parties to such union shall not on the whole be higher or more restrictive than the general incidence of the duties and regulations of commerce applicable in the constituent territories prior to the formation of the union.

This requirement is obviously of fundamental importance so far as third countries are concerned. Its application should result in a limitation of the extent of discrimination which may be practiced against such countries in favour of high-cost producers within the union. It is usual for economists to discuss the impact of regional arrangements in terms of their trade creating and trade diverting effects, and to say that such arrangements conduce to a net liberalisation of world trade to the extent that their trade creating effects predominate over their trade diverting effects. If country A used to import goods from Australia under a system where the same tariff was applied to goods from Australia and country B, and it now imports them from country B with which it has formed a customs union, there is a diversion of trade from a more efficient to a high-cost producer. The extent of this diversion will depend substantially on the height of the external tariff erected against products originating in third countries. There is, however, a considerable uncertainty as to the limit which the GATT article sets to the establishment of the common external tariff. For example, is it a sufficient compliance with its requirements that the common external tariff should be fixed at the arithmetical average of the previous national rates? Or does it require also that consideration be given to the effect of the tariff on the volume of trade of third country suppliers? If, as the relevant Article recognises, the purpose of a customs union or of a free-trade area should be to facilitate trade between the constituent territories and not to raise barriers to the trade of other contracting parties with such territories, it is at least arguable—and it has been forcibly argued—that the impact of the common tariff on individual contracting parties should be taken into account in determining whether there has been compliance with the requirements of the Article.

Finally, it should be observed that the Article permits the adoption of an interim agreement necessary for the formation of a customs union or of a free-trade area. This has in fact been the practice adopted in the case of both the regional integration schemes of the E.E.C. and E.F.T.A. and in the free-trade agreement between Australia and New Zealand. In that case, the Article requires that the interim agreement shall include a plan and schedule for the formation of a customs union of free-trade area within a reasonable length of time.

The most conspicuous instance in recent years of a customs union is of course the European Common Market. I do not intend in this lecture to go into the miscellany of reasons, political and economic, which led to that momentous development. But it may be helpful to sketch in outline the main stages of development in European commercial policy, particularly so far as these were

reflected in terms of GATT activity. Three principal stages can be distinguished:

(a) The stage from the end of the war to 1947. This was of course the period of immediate post-war reconstruction. In the Havana Charter discussions, the European countries were concerned above all to secure the right to continue to impose quantitative restrictions on imports to deal with their critical balance of payments problems.[15] The major advantage to the Europeans of the tariff conference of 1947 which produced the GATT was that it led to a significant reduction in the highly protective U.S. tariff. This of course paved the way for Europe eventually to export to the U.S. market and thereby rebuild its dollar reserves.

(b) The second stage, which covers the next decade, was one in which European activity was centred principally on achieving trade liberalisation among its members; it was carried out under the auspices of the O.E.E.C. rather than of the GATT. The programme adopted in the Code of Liberalisation was one designed to serve the maximum freeing of trade among O.E.E.C. members by the abolition of quantitative restrictions. It was made possible by the simultaneous creation of the European Payments Union which provided for the multilateral transfer of currencies among member countries, and a system of credits to assist countries in temporary deficit with the group as a whole.[16] This period terminated with the decisions of the I.M.F. and GATT in 1959, indicating that the trade discrimination previously maintained for balance of payments reasons could no longer be considered justified in conditions of general convertibility of currencies.

(c) Towards the close of the preceding stage occurred the developments which principally concern us, namely the adopting of the Treaty of Rome which provided for the establishment of a customs union among the Six, and the linking together of the Seven in E.F.T.A. on the basis of the Stockholm Convention. You will all be familiar with the story of the attempts that have been made in recent years to build bridges between the Six and the Seven, and of the current applications by the U.K. and others for membership of the European Communities. What is perhaps not so generally known is that a whole network of special relationships has been built up by the E.E.C. with a number of other States, particularly the less developed Southern European States and a considerable number of States in Africa. It seems indeed that what is in the process of emerging is a great bloc of countries comprising most of the Western European States, joined together in a common market, and linked by preferential arrangements with much of Africa. If this occurs, it may well set the pattern for the division of the trading world into a number of vertically integrated groups, which trade among themselves on the basis of preferential treatment and accordingly discriminate against the trade of others.

That this is a real danger is emphasised in an address given earlier this year by the Director-General of GATT.[17] He stated:

> "Preferential arrangements . . . threaten to proliferate and to have most serious consequences for the multilateral trade system generally. They are a potent threat to order and efficient growth in international trade and consist

15. It will be recalled that the Havana Conference coincided with the initiation of the Marshall Plan for the economic reconstruction of Europe and the creation of the O.E.E.C. to give effect to that plan.
16. See Frank, *The European Common Market*, at p. 47.
17. Reported in Journal of World Trade Law, Vol. 4, at p. 501.

of discriminatory, preferential agreements concluded by developed countries with one, or several developing countries only. The list of such agreements is already long. Others are currently under active consideration . . .

If we look for a moment at the European scene, we must bear in mind that individual European countries will be seeking some form of economic arrangement or association with the European Economic Community in the coming months or years. Such arranagements would not be incompatible with the GATT—to which all these European countries are parties—if the conditions laid down in the GATT are met: in other words provided the arrangements agreed upon were to result within a reasonable period of time in the formation of a customs union or free-trade area as defined in the GATT.

There is no need unduly to anticipate difficulties, but it has already clearly to be said that, if any such arrangements did not conform with the rules subscribed to by Member governments of GATT but were discriminatory and preferential in character this could represent a death-knell for the multilateral trade system; it would be difficult for it to withstand the shock of policies that would constitute the negation of the basic GATT principle, on the basis of which world trade has grown and prospered as never before, particularly when such policies were applied by countries among the most economically developed in the world."

I should like to add to this only one comment. It is possible that the fractionalisation of the trading world into discriminatory regional blocs may not prove too serious, if at the same time those blocs strive to achieve the maximum in trade liberalisation among themselves. But the whole of the evidence points to the fact that in an area of trade with which Australia is most vitally concerned, namely trade in agricultural products, the thrust so far has been against liberalisation and towards the adoption of highly restrictive policies. In the case of both E.F.T.A. and the E.E.C., agriculture is regarded as falling outside the rules of the game. As I have already observed, agricultural trade is excluded from the scope of the Stockholm Convention, and in the case of the E.E.C., a common agricultural policy has been devised which both inhibits trade within the Community for outside producers, and seriously prejudices their markets in other countries by the disposal of highly subsidised products of the E.E.C. in those markets.

There is also under active consideration at the present time another major departure from the principle of M.F.N. trading, but in this case it is a departure which has now received in principle the approval of all the developed trading nations. I refer to the discussions which are proceeding for the introduction of a general, non-reciprocal and non-discriminatory system of preferences for manufactured and semi-manufactured products of developing countries.

Finally, in relation to the exceptions to the M.F.N. clause, I should like to refer briefly to the difficult matter of its applicability to trade with the centrally-planned economies. Those countries have made it clear repeatedly that they expect M.F.N. treatment in their commercial relations with the market economy countries, and that they are prepared to accord it on a reciprocal basis to products originating in those countries. The reply which has been made by some Western countries is that the application of the M.F.N. principle cannot in practical terms be ensured where trading is carried on exclusively or predominantly by state instrumentalities. Where the foreign trade plan rather than the customs tariff is the effective instrument of commercial policy, it is asserted

in particular that it is impossible to determine whether discrimination is being practised against the imports of certain countries by such agencies. For some time past with the increase in the volume of East-West trade, the question of spelling out trading rules to cover relations between free enterprise and state trading economies has been under consideration in the GATT. The need for such rules was crystallised by the application of Poland for accession as a full member of GATT. This application was successful. As Poland was unable to offer tariff concessions (which is the usual "entrance-fee" required by members who accede to the benefits of previous GATT negotiations), the undertaking it accepted was to ensure an increase of not less than 7 per cent per annum in the total value of that country's imports from its GATT partners. At the present time, applications for membership are before the GATT from Rumania and Hungary and Bulgaria has assiduously attended GATT meetings as an observer.[18] What this seems to indicate is an increasing interest on the part of these Eastern European countries in escaping from the bilateral arrangements by which they have hitherto conducted their trade with the West, and a welcome movement towards the multilateralisation of their trading relationships.

CONCLUSION

It will, I trust, be obvious from this very cursory survey of some areas in the field of international trade law that the whole subject is in a condition of flux. This is most evidently true in the sphere of the private law of international trade, in which almost all the instruments, procedures and rules by which foreign commerce has been conducted are being reexamined. It is not unlikely that within the next few years there will be major transformations in the three branches of law which I have touched upon in this lecture, namely sales, carriage of goods and payments arrangements. Other branches of private international trade law, such as that relating to industrial property[19] and the whole complex of rules relevant to the conduct of operations by the multi-national corporation, are also undergoing profound change.

It is perhaps not so evident that an even more fundamental transformation of the public law of international trade may well be in the course of development, as a consequence of changing patterns in trade relationships. The fragmentation of the world trading system which is currently taking place cannot fail to be reflected in the legal rules which govern the conduct of that system. The GATT system presupposes a world where trading is conducted on a non-discriminatory basis; if that basis disappears the system will inevitably disappear with it.

It was not my purpose in delivering this lecture to propound any solutions to the problems which I have much too briefly outlined. It was rather to give an indication of some of the legal difficulties which must be surmounted if a satisfactory law of international trade is to be developed, and of some of the factors which are currently producing the need for reassessment of the existing rules. It is a process in which lawyers as well as governments, bankers and traders and economists, have a role to play. It is therefore my hope that the future lawyers of this State may soon be given the opportunity to acquire some degree of understanding of this complex and important area of the law through the establishment of a course of studies in trade law within the Law School of this University.

K. W. RYAN*

18. Czechoslovakia is an original member of GATT.
19. Thus a recent article by Horwitz on "Patents and World Trade" gives an account of what the author terms "the ferment in the patent laws". See Journal of World Trade Law, Vol. 4, at p. 547.

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Legislation for Reconciliation

When the *Matrimonial Causes Act* was enacted by the Commonwealth in 1959, the Parliament inserted in it certain provisions designed to promote the reconciliation of parties to matrimonial proceedings.[1] It would be cynical to suggest that these were intended to serve no better purpose than to be a sop to those who opposed the liberalisation of the law of divorce which the Act was to bring about, notably the introduction of separation for five years[2] which many regarded as putting the seal of public approval upon immorality and marital infidelity.[3] There is no doubt, however, that the inclusion of these provisions enabled the proponents of the Act to claim in effect that they would more than counteract any harmful results that the more liberal availability of divorce grounds might produce. Indeed, the Attorney-General of the day and chief architect of the Act, Sir Garfield Barwick, outlined the philosophy underlying the new law. This was the recognition of the stable marriage as part of the fundamental organisation of the community. From this there follows logically the further recognition that "a formal bond which has no vitality . . . is not performing the social function of stable and sound marriage".[4] The provision of marriage guidance and reconciliation on the one hand, and of means for dissolving the formal bond with justice, when all chance of reconciliation has completely disappeared, on the other, is the two-pronged weapon with which it was intended to slay the double-headed dragon of marriage breakdown. And in their preface Toose, Watson and Benjafield, the learned authors of the standard work on Matrimonial Causes state that the Act "is widely acknowledged to reach a peak of legislative excellence unequalled in the countries which have inherited the English tradition as to marriage and divorce",[5] a view which presumably is meant to apply to reconciliation no less than to the other provisions of the Act, but which has already been doubted[6] and, it is respectfully submitted, is likely to be subject to continuing and increasing doubt.

Unfortunately, if the Parliament had any great expectations of beneficial effects of the reconciliation provisions, these have not, except perhaps to a marginal extent, been realised. No statistics are available from which their impact may be measured, directly or even indirectly, and any appraisal must therefore be based on the impressions of those who have had some experience of the law in action. Where such impressions have been recorded, they suggest disappointment and pessimism.[7]

*This paper was prepared for delivery at the A.U.L.S.A. Conference held in Brisbane in August, 1970.

1. Part III, ss. 14-17 *Matrimonial Causes Act* 1959—See Appendix A.
2. s. 28(m), *Matrimonial Causes Act* 1959.
3. See e.g. Mr. A. A. Calwell, M.H.R., Commonwealth Parliamentary Debates, 1959, House of Reps. Vol. 25, p. 269.
4. Barwick, "Some Aspects of the New Matrimonial Causes Act", 1961, 3 Syd. Law Rev. 409 at p. 414.
5. Toose, Watson and Benjafield, *Australian Divorce Law and Practice*, Law Book Co., Sydney, 1968.
6. Pearce, "The Broken Marriage—Is Modern Divorce the Answer?", in *Divorce, Society and the Law*, Butterworths, Sydney, 1969, p. 53 at p. 67.
7. See Mr. Justice Selby: "The Development of Divorce Law in Australia" (1966) 29 M.L.R. 473, at p. 487; Pearce, *loc. cit.*; Mr. Justice Barber, "Divorce—The Changing Law" in *Divorce, Society and the Law*, p. 69.

Their prototype in the British Commonwealth was, as in so many cases of enlightened social legislation, a New Zealand enactment, the *Domestic Proceedings Act* 1939. Under s. 5(1) of that Act,[8] no complaint seeking a separation order could be heard by a magistrate unless it had first been referred to a marriage conciliator, or unless the magistrate ordered otherwise, which he could do only if he considered such reference inexpedient.[9] In view of the experience of twenty years of operation which was therefore presumably available in New Zealand, it is interesting to wonder whether inquiries were made there to find out how successful in the experience of the courts these provisions had been. Reference to a leading authority suggests that they had proved on the whole ineffectual, that magistrates were usually content to rely on the solicitors' assurance that conciliation was unlikely to be effective.[10] Indeed, it appears that applications to dispense with conciliation were made in the most casual manner, on the mere letter of a solicitor's clerk for example which rather suggests that the whole scheme soon became a dead letter.[11]

Nevertheless, in their disenchantment with the reconciliation provisions of the *Matrimonial Causes Act* judges and practising lawyers often express the view, that while it is usually too late to conciliate once the parties have got into the divorce court, the possibility of bringing them together again is likely to be much less remote if the attempt could be made at an earlier stage. It would consequently be better to do so in relation to lower court proceedings, such as maintenance applications before magistrates.[12] Two States, Queensland and Tasmania, have in fact enacted legislation to promote reconciliation in lower courts[13] and a brief examination of these provisions may help in assessing their effectiveness.[14] Where these provisions are substantially identical, or where nothing turns on any differences that may exist between them, the word "judge" is used indiscriminately for magistrate in the present discussion.

Sections 8 and 9 of the Tasmanian *Maintenance Act* follow closely sections 14 and 16 of the Matrimonial Causes Act. Section 14 of the *Matrimonial Causes Act* and section 8 of the Tasmanian Act do five things:

(1) They lay a duty upon the court to give consideration from time to time to the possibility of reconciliation between the parties (sub-section (1)). Where there appears to be a reasonable possibility of a reconciliation, the judge may
(2) adjourn the case to give an opportunity for reconciliation, (sub-section (1) para. (a)),
(3) with the consent of both parties, interview them in chambers, with or without counsel (sub-section (1), para. (b)),

8. Substantially re-enacted in the *Domestic Proceedings Act* 1968, ss. 13-18.
9. Inglis, *Family Law*, Sweet & Maxwell, Wellington, 1960, (1st ed.), p. 241.
10. *Ibid.*
11. Inglis: "The Hearing of Matrimonial and Custody Cases", in *Family Law Centenary Essays*, Sweet & Maxwell, Wellington, New Zealand, 1967, p. 40.
12. See Mr. Justice Barber, *loc. cit.* p. 75.
13. The *Maintenance Act of* 1965 (Qld.) s. 130, see App. B; *Maintenance Act* 1967 (Tas.) ss. 8, 9.
14. The author wishes to acknowledge with gratitude the help given to him in carrying out a survey of the operation of the Tasmanian sections by the present Tasmanian Attorney-General, the Hon. E. M. Bingham, M.H.A. and his predecessor, the Hon. R. F. Fagan, M.H.A. and the several magistrates and legal practitioners who were kind enough to offer him the benefit of their experience. In relation to Queensland, thanks are due to the Minister for Justice and Attorney-General, the Hon. P. R. Delamothe, O.B.E. who was good enough to make available the observations of several Queensland magistrates.