

Foundations of Commercial Law

Week One – Introduction to Commercial Law

Lecture: Introduction to Commercial Law

Commercial Law vs Consumer Law

Australia doesn't have a codified commercial law. The primary difference between commercial law and consumer law is that the first is 'based on the premise businessmen are of equal bargaining power, consumer law assumes the consumer and business enterprises are roughly unequal. Commercial law 'is non-interventionist and essentially pragmatic in nature, consumer law intrudes into contracts made between consumer and business supplier and is essentially an instrument of social policy'.

What is commercial law?

"The object of commerce is to deal in merchandise and, if we adopt this criterion, commercial law can be defined as the special rules which apply to contracts for the sale of goods and to such contracts as are ancillary thereto, namely, contracts for the carriage and insurance of goods and contracts the main purpose of which is to finance the carrying out of contracts of sale" – HC Gutteridge

"The totality of the law's response to mercantile disputes, encompassing all those principles, rules and statutory provisions, of whatever kind, from whatever source, which bear on the private law rights, and obligations, of parties to commercial transactions, whether between themselves, or in their relationship with others" – Roystone Goode

Nature of Commercial Law

Roystone Goode suggests commercial law possesses four characteristics: -

- It is based on transactions, not on institutions;
- It is concerned primarily with dealings between merchants, in the broad sense of professionals as opposed to consumers;
- It is centred on contract and on the usages of the market, and
- It is concerned with a large mass of transaction in which each participant is a regular player, so that the transactions are typical and in large measure repetitive and lend themselves to a substantial measure of standardised treatment.

US Commercial Law

The US has a Uniform Commercial Code (UCC). Australia has a negative definition of commercial law which provides 'a commercial transaction is one of a mercantile character that doesn't involve a 'consumer' as defined in the legislation'.

Important Legislation

- *Competition and Consumer Act* 2010; The Australian Consumer Law
- *The Sale of Goods Acts* of the various States
- The *Personal Property Securities Act*, 2009 (Cth)
- The various IP statutes eg copyright, patents, trade marks
- The *Insurance Contracts Act*, 1984 (Cth)
- The *Bankruptcy Act* (1966) Cth

Lecture: The History of Commercial Law

The History of Commercial Law

According to Berman H, the most crucial moment for the development of commercial law was in the late 11 & 12th centuries. During this time, there was large interest in commercial trade and the merchant class. Some of the contributing factors to the development of trade were:

- An agricultural revolution which created surpluses to be traded and which also allowed the redistribution of a largely agrarian population into large cities;
- The doubling of the population size of western Europe;
- The introduction of a discrete merchant class; and
- Religious factors such as the Crusades and the programmes of Papal Revolution.

In relation to religion and the rise of capitalism, Berman noted “the Western Church of the late eleventh and twelfth centuries not only did not denounce money or riches as such, but indeed encouraged the pursuit of money or riches provided that such pursuit was carried on for certain ends and according to certain principles. The secular activities of those engaged in commercial enterprise were to be organised in ways that would redeem them from the sin of avarice. The merchants were to form guilds that would have religious functions and would maintain standards of morality in commercial transactions...Legitimate trade based on good faith was distinguished from illegitimate trade based on avarice”.

Lex mercatoria (from the Latin for "merchant law"), often referred to as "the Law Merchant" in English, is the body of commercial law used by merchants throughout Europe during the medieval period. It evolved like English common law as a system of custom and best practice, which was enforced through a system of merchant courts along the main trade routes. It functioned as the international law of commerce.

Roman law also influenced the *lex mercatoria*. Texts of Justinian was discovered in the west or sea law of Rhodes (300BC) were influential. The merchants also enhanced the law and administered it in their own tribunals.

Characteristics of Early Lex Mercatoria

Characteristics of the early commercial courts were “Speed in adjudication (a particular requirement for the foreign trader), a realistic attitude towards the proof of facts, a relative freedom from technical rules of evidence and procedure that plagued the common law courts and an acceptance of the fact that the customs of merchants generated rights which required

international recognition and which, for the stability of the European markets, needed to be interpreted in a broadly uniform fashion, with an overriding requirement of good faith”.

Staple towns limited disputes since designated particular ports where specific goods could be exported or imported were designated. These were called the 'staple ports'. It also established dedicated courts, known as the courts of staple, where disputes relating to commercial matters could be heard, in preference to the courts of common law.

Further characteristics included:

- A clear distinction between the laws of real and personal property;
- A balancing of the rights of two innocent parties, in particular, the innocent owner of goods and a good faith purchaser;
- “Recognition of the validity of informal oral agreements for the purchase and sale of movables”;
- The creation of a right of possession of moveables which was a source of rights independent of ownership;
- The crucial development of the bill of exchange;
- Bankruptcy law aimed at prioritising creditors but also allowing the debtor to start again with a clean slate;
- Patents and trademarks;
- The development of the joint venture and other forms of business organisations; and
- The development in the 14th and 15th centuries of marine insurance.

Absorption of the Law Merchant into the Common Law

The *lex mercatoria* is originally a “language of interaction”, “thus, through a gradual process of absorption by creating governmentally backed institutional arrangements and laws which would be acceptable to the merchants, and by weakening the authority of the merchant courts, commercial law began to become part of common law. (Bruce Benson). Boycott on future business was the most severe punishment if they didn’t abide by the merchant law.

Trakman

The Law Merchant fared less well in England than in continental Europe, for pragmatic reasons. England had adopted neither the Romanist system of law nor the great commercial codes of continental Europe. Post-medieval English judges also were reluctant to enshrine commercial practice in English Law. Adopting a formulary system of writs and precedents, English courts endorsed merchant customs only if they were 'certain' in nature, 'consistent with law,' and 'in existence since time immemorial.'⁽⁷⁹⁾ English judges also required that merchant custom be proven 'to the satisfaction of twelve reasonable and ignorant jurors.

Lecture: The Source and Nature of Commercial Law

The Major Sources of Commercial Law

- Contract (& exceptions to the doctrine of privity of contract);
- Equity;
- Trade Usage or Mercantile Custom;
- International Bodie