

COMMERCIAL CERTAINTY AND CONSTITUTIONALISM: ARE  
THEY COMPATIBLE?

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Maritime law is my particular field of academic study, but this posed a problem in selecting a suitable topic for tonight's lecture. The Waterfront in Bloemfontein does not qualify as an inland waterway and, in a deliberate act of job reservation for coastal lawyers, the Admiralty Jurisdiction Regulation Act largely excludes the courts of the Free State and other inland high courts. So I was forced to cast around for a different topic. But maritime law, from which I will draw some of my examples, well illustrates the need for commercial certainty in law, and to explore that topic in the light of our Constitution, and the Constitutional Court's recent acquisition of jurisdiction in non-constitutional matters, may be of some value.

In his seminal work *A Theory of Justice*,<sup>1</sup> the philosopher, John Rawls engaged in a thought experiment. He imagined what principles humankind would choose to underpin a perfectly just society, if they were unaware of their own abilities or place in any existing society. The participants were to select those principles behind what he called 'a veil of ignorance'. They would be unable to foresee the consequences of their choices on their own lives and therefore he presumed that they would not

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<sup>1</sup> John Rawls *A Theory of Justice* 2d revised ed, 118-123.

be influenced by any desire to obtain or preserve personal advantage. Fortunately for his readers' sanity he went on to tell them what he thought the outcome of the experiment would be and built his philosophy of law and justice on that foundation.

You will be relieved to know that I do not propose to trouble you with such a complex exercise of the imagination this evening. But I should explain why I think the topic of commercial certainty in law is important. So I invite you, at the outset, to engage in a more prosaic thought experiment. Try, if you can, to conceive of a society in which commercial relationships are enforced and enforceable purely as a matter of discretion. Ask yourselves how such a society would function? Who would be willing to sell if they had no means of enforcing payment of the price? Who would establish businesses, employ people and conclude commercial transactions? Who would build, or lease, or lend? From what source would the State derive revenue in order to fulfil those daily functions and provide those services that we believe citizens are entitled to take for granted?

It would be easy, taking this to an extreme, to paint a dystopian vision of that kind of society. In 1993 a judge of the then Appellate Division said it would render all trade impossible.<sup>2</sup> That is perhaps extreme, but economists might tell you that society would rapidly revert to one where commercial transactions took place only within narrow communities and on a limited basis, as it was the distant past.

But it is no part of my theme to suggest that the application of the Constitution in a commercial context has these dire consequences. From the outset our constitutional jurisprudence has endorsed the value of legal

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<sup>2</sup> In *Basson v Chilwan and Others* 1993 (3) SA 742 (A) at 762H Eksteen JA referred to 'The paramount importance of upholding the sanctity of contracts, without which all trade would be impossible ...'

certainty. Justice Ackermann in *Ferreira v Levin*<sup>3</sup> described it as ‘a central consideration in a constitutional state’. My purpose is to address a more modest concern. There is a view abroad, among both academics and legal practitioners, that certain decisions by the Constitutional Court impacting on the commercial life of the country have introduced uncertainty into our commercial law. I wish to examine that and to ask, if that is so, what should be done about it.

I do not propose to spend time examining the reasons why courts should promote commercial certainty. Legal rules governing commercial matters form part of the earliest legal codes, such as that of Hammurabi, which has provisions governing contracts, lease, loans and deposit. In an indication of how early maritime trade became an important element of commerce, it contains provisions governing ship building contracts and charterparties.

One can follow a similar path through later bodies of law, of which the most familiar name for a South African lawyer is the *Corpus Iuris Civilis* of Justinian. Of specific commercial interest from my own field are the codes of laws governing maritime disputes, from the *Rôles of Oléron*, to the *Laws of Wisby* and the *Hanseatic towns*. Merchants developed much of this law through trade guilds and informal arbitration and the customs in particular trades. They aimed for reasonable certainty, so that they could go about their business knowing the rules of the game. And, taking maritime law and international trade as my exemplars, reasonable certainty was by and large achieved both domestically and internationally. In the international sphere, as early as 1844, a Scottish jurist was able to say<sup>4</sup> that:

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<sup>3</sup> *Ferreira v Levin NO; Vryenhoek v Powell NO* 1996 (1) SA 984 (CC) para 26.

<sup>4</sup> By James Reddie, a Scottish advocate, in his treatise ‘*Researches, Historical and Critical in Maritime International Law*’ (Edinburgh, 1844, reprinted Elbron Classics 2004) 19. At 19-20 he wrote: ‘In this amicable and pacific intercourse, questions as to property in vessels – disputes between the owner,

‘... from the similarity of the internal private law of Maritime commerce in all countries, pretty nearly the same justice is obtained by foreigners, as if the litigation had taken place in their own countries.’

More recently an Australian judge speaking of both the maritime law (the *lex maritima*), and mercantile law generally (the *lex mercatoria*) felt able to say that they both embodied ‘a tolerably coherent body of common conceptions, principles and rules ... from which domestic legitimacy (with any necessary adjustment) is given by their adoption as municipal ... law.’<sup>5</sup>

At the heart of these developments has always lain the basic premise that commercial transactions, freely and honestly entered into, and not vitiated by fraud, misrepresentation, duress or public policy, should be respected and enforced. The principle that contracts should be enforced is an international one.<sup>6</sup> Expressed as *pacta servanda sunt*,<sup>7</sup> it may be clothed in what Edward Gibbon is said to have called ‘the decent obscurity of a learned language’,<sup>8</sup> but that should not preclude us from applying it. (I may say that lawyers are especially fond of that learned language – most particularly those who like myself can neither decline or

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part owner, masters and crew, or persons employed in the navigation of the vessel – questions between the owner or master of the vessel, and the charterer or freighter or the vessel, or owner of the cargo shipped for conveyances – the reciprocal rights of the merchants who order or purchase, or who sell or consign for sale, the goods shipped and conveyer – the reciprocal rights and obligations of copartners, of the insurers and insured, and of the parties to bills of exchange, drawn or granted for the value of the goods conveyed, are all judged of and settled, although between parties who stand in relation of foreigners to each other, according to very similar principles and rules, by the judicial tribunals of their respective nations.’

<sup>5</sup> Justice James Allsop, President of the New South Wales Court of Appeal, delivering the 2009 William Tetley lecture at Tulane University entitled ‘Maritime law – the Nature and Importance of its International Character’ on 15 April 2009, para 37

<sup>6</sup> In *Den Braven SA (Pty) Ltd v Pillay* 2008 (6) SA 229 (D) para 33 I said: ‘I know of no developed system of jurisprudence that does not recognise the need, subject to some exceptions such as fraud, misrepresentation, public policy or the like, to enforce contractual obligations.’

<sup>7</sup> The maxim is sometimes expressed as *pactum sunt servanda*. See *Bredenkamp and others v Standard Bank of South Africa Ltd* 2010 (4) SA 468 (SCA) para 37.

<sup>8</sup> Edward Gibbon *Autobiography* (World’s Classics ed) Chapter 8, 212. The popular, and usually quoted, version of the quotation is ‘My English text is chaste, and all licentious passages are left in the decent obscurity of a learned language.’ But the Oxford Dictionary of Quotations (6 ed, 2004) says that the inclusion of ‘decent’ is a misquotation taken from a parody in *The Anti-Jacobin* 1797-8. The Yale Book of Quotations (ed Fred R Shapiro) supports the Oxford Dictionary.

conjugate.) The operation of the maxim has been justified in the modern language of rights, as Ngcobo J did when he said<sup>9</sup> it:

‘... gives effect to the central constitutional values of freedom and dignity. Self-autonomy, or the ability to regulate one's own affairs, even to one's own detriment, is the very essence of freedom and a vital part of dignity.’

We share this approach with the courts of other countries. Lord Bingham once wrote – albeit in dissent – that ‘the importance of certainty and predictability in commercial transactions has been a constant theme of English commercial law at least since the time of Lord Mansfield’.<sup>10</sup> And as a result the dominant legal system in international commerce is the English common law. But why then is there a feeling of uncertainty?

The problem lies in remarks made in decisions, such as those in *Barkhuizen*<sup>11</sup> and *Everfresh*,<sup>12</sup> that appear to suggest that the enforcement of contractual obligations depends upon the judicial sense of reasonableness, fairness and good faith, rather than the terms of the contract.<sup>13</sup> The subsequent decision in *Botha v Rich*,<sup>14</sup> where the court defined the issue as being whether the cancellation of a contract was fair ‘and thus constitutionally compliant’, will have added to that concern. It is legitimate therefore to reflect on these decisions, to assess whether the concerns to which they have given rise are justifiable, and to consider how any misapprehension as to their effect can be addressed.

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<sup>9</sup> *Barkhuizen v Napier* 2007 (5) SA 323 (CC) para 57.

<sup>10</sup> *Golden Strait Corporation v Nippon Yusen Kubishka Kaisha* [2007] UKHL 12; [2007] 3 All ER 1 (HL) para 23. In *Owners of Cargo lately laden on board the ship or vessel “Starsin” and others v Owners and/or demise charterers of the ship or vessel “Starsin”* [2003] UKHL 12; [2004] 1 AC 715; [2003] 2 All ER 785 (HL) Lord Steyn quoted from a lecture delivered by Lord Goff of Chieveley entitled ‘Commercial Contracts and the Commercial Court’ (1984) *LCMLQ* 382 at 391, in which he said:

‘We are there to help businessmen, not to hinder them; we are there to give effect to their transactions, not to frustrate them; we are there to oil the wheels of commerce, not to put a spanner in the works, or even grit in the oil.’

<sup>11</sup> *Barkhuizen v Napier* 2007 (5) SA 323 (CC).

<sup>12</sup> *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 (1) SA 256 (CC).

<sup>13</sup> Carole Lewis ‘The uneven journey to uncertainty in contract’ (2013) 76 *THRHR* 80.

<sup>14</sup> *Botha and Another v Rich NO and Others* 2014 (4) SA 124 (CC) para 24.

The SCA has made it clear that it does not believe that the enforcement of contracts depends on generalised notions of fairness or the view of the judge whether one party is behaving reasonably. In *York Timbers*,<sup>15</sup> it rejected a contention that all contracts should be subject to an implied term that the contracting parties must exercise their contractual rights in accordance with the dictates of reasonableness, fairness and good faith. Brand JA said:

‘... although abstract values such as good faith, reasonableness and fairness are fundamental to our law of contract, they do not constitute independent substantive rules that courts can employ to intervene in contractual relationships. These abstract values perform creative, informative and controlling functions through established rules of the law of contract. They cannot be acted upon by the courts directly. Acceptance of the notion that judges can refuse to enforce a contractual provision merely because it offends their personal sense of fairness and equity will give rise to legal and commercial uncertainty.’

In *Fourway Haulage*,<sup>16</sup> he expressed himself more pithily when saying:

‘In matters of contract, for example, this court has turned its face against the notion that judges can refuse to enforce a contractual provision purely on the basis that it offends their personal sense of fairness and equity.’

This is not to disregard the Constitution, for we cannot do that. In *Bredenkamp*,<sup>17</sup> Harms DP pointed out that the validity of the law of contract depends on the Constitution and that every rule must pass constitutional muster, but added:

‘Public policy and the *boni mores* are now deeply rooted in the Constitution and its underlying values. This does not mean that public policy values cannot be found elsewhere. A constitutional principle that tends to be overlooked, when generalised resort to constitutional values is made, is the principle of legality. Making rules of law discretionary or subject to value judgments may be destructive of the rule of law.’

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<sup>15</sup> *South African Forestry Co Ltd v York Timbers Ltd* 2005 (3) SA 323 (SCA) para 27.

<sup>16</sup> *Fourway Haulage SA (Pty) Ltd v SA National Roads Agency Ltd* 2009 (2) SA 150 (SCA) para 16.

<sup>17</sup> *Bredenkamp and others v Standard Bank of South Africa Ltd* fn 13 *infra*, para 39.

But here, as occasionally elsewhere, there may appear to be a regrettable disjunction between the approach of the SCA and that of the Constitutional Court, whose views on these matters may be less clear-cut.

My starting point is the decision in *Barkhuizen v Napier*.<sup>18</sup> At issue was a time clause in a motor insurance policy requiring that claims be brought within 90 days of the insurance company rejecting the insured's claim. The attack on the clause was based on the proposition that it was contrary to public policy as reflected in the right of access to a court guaranteed in terms of s 34 of the Constitution.<sup>19</sup> It raised a relatively straightforward constitutional issue. Did the clause in question afford the insured an adequate and fair opportunity to seek judicial redress if the insurer repudiated the claim? If it did not, then it would not be enforced, as being against public policy. This was consistent with the long established principle that contractual provisions barring access to courts are contrary to public policy and unenforceable,<sup>20</sup> a principle now strengthened by the protection the Constitution accords to the right of access to courts.

The majority held that the time given after repudiation was adequate, but in doing so it propounded a double-barrelled test for assessing whether a contractual provision is contrary to public policy, one that is both objective and subjective.<sup>21</sup> The clause was held not to offend

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<sup>18</sup> *Barkhuizen v Napier* 2007 (5) SA 323 (CC). For a critique of the vagueness of the language used in, and concepts underpinning, the judgment see Matthew Kruger 'The role of public policy in the law of contract, revisited' (2011) 128 *SALJ* 712 at 719-725.

<sup>19</sup> There was an alternative argument that the clause breached the applicant's rights in terms of s 34 of the Constitution, but this was rejected (paras 27 to 30 of the majority judgment by Ngcobo J) and need not be considered. See the discussion on this in the context of a restraint of trade agreement in *Den Braven* supra, paras 29-31.

<sup>20</sup> 'If the terms of an agreement are such as to deprive a party of his legal rights generally, or to prevent him from seeking redress at any time in the Courts of Justice for any future injury or wrong committed against him, there would be good ground for holding that such an undertaking is against the public law of the land.' Per Kotzé JA in *Schierhout v Minister of Justice* 1925 AD 417 at 424. This is the principle that underlay the historic reluctance of courts to recognise arbitration agreements.

<sup>21</sup> That this is how it is perceived in at least some academic circles is clear from Deeksha Bhana and Anmari Meerkotter 'The impact of the Constitution on the common law of contract: *Botha v Rich NO* (CC)' (2015) 132 *SALJ* 494 at 495 and 504.

public policy. But the dual test may be problematic. Under the general rubric of fairness it said that there are two questions to be answered in any such enquiry:<sup>22</sup>

‘The first is whether the clause itself is unreasonable. Secondly, if the clause is reasonable, whether it should be enforced in the light of the circumstances which prevented compliance with the time-limitation clause.’

According to the judgment those questions fall to be assessed ‘by reference to the circumstances of the parties’.<sup>23</sup>

Moseneke J (as he then was) pointed out in his dissent<sup>24</sup> that this makes the decision whether a particular contractual provision is contrary to public policy one that may vary from case to case, person to person, and be affected by circumstance over which no-one has control.<sup>25</sup> One can only endorse this powerful passage from his judgment:<sup>26</sup>

‘Public policy cannot be determined at the behest of the idiosyncrasies of individual contracting parties. If it were so, the determination of public policy would be held ransom by the infinite variations to be found in any set of contracting parties. In effect, on the subjective approach that the majority judgment favours, identical stipulations could be good or bad in a manner that renders whimsical the reasonableness standard of public policy.’

But the cat is now out of the bag. Its liveliness in spreading contractual uncertainty cannot be assisted by the endorsement in the majority judgment<sup>27</sup> of ‘many of the concerns and sentiments’ in the dissent by Justice Sachs. A reference to that dissent shows that he would have invalidated the clause substantially for the following three reasons:

- it was contained in a standard form contract in very small print;

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<sup>22</sup> *Barkhuizen* para 56.

<sup>23</sup> *Barkhuizen* paras 64 and 65.

<sup>24</sup> *Barkhuizen* para 94 to 104.

<sup>25</sup> The example given in the majority judgment was where the insured had suffered injuries rendering them incapable of pursuing litigation within the specified period. The example is far-fetched because the clause only operated if a claim had been made and been rejected by the insurer. For the example to operate it required the insured to have made a claim in the immediate aftermath of the event and then to have lapsed into unconsciousness for a protracted period, a most unlikely occurrence.

<sup>26</sup> *Barkhuizen* para 98.

<sup>27</sup> *Barkhuizen* para 87.



- it had been prepared by the insurer’s lawyers and was favourable to the insurer; and
- this particular term had not been specifically discussed or brought to the attention of the insured.

I venture to suggest that no term in a standard form contract could ever survive scrutiny on that basis. But then, Sachs J appeared to have regarded it as strange that a Lloyd’s policy of insurance might be subject to copyright protection,<sup>28</sup> although I note that this is a protection that he seeks in his own extra-judicial writing.

*Barkhuizen* has been construed by some judges as endorsing an approach to the enforcement of contracts that depends on the judge’s view of whether such enforcement would be reasonable or fair.<sup>29</sup> Thus the judge in *Potgieter*<sup>30</sup> said:

‘... under our new constitutional dispensation it is part of our contract law that, as a matter of public policy, our courts can refuse to give effect to the implementation of contractual provisions which it regards as unreasonable and unfair ...’

Unsurprisingly he was overturned on appeal because the SCA has on no less than three occasions ‘explained’<sup>31</sup> that *Barkhuizen* does not materially alter the traditional rules regarding the enforcement of contracts, or afford courts a wide discretion to refuse to enforce contractual stipulations on the grounds of fairness and reasonableness. However, there are cases that show that even these strictures have fallen upon deaf ears.<sup>32</sup>

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<sup>28</sup> *Barkhuizen* para 132.

<sup>29</sup> In *Advtech Resourcing (Pty) Ltd t/a Communicate Personnel Group v Kuhn and others* 2008 (2) SA 375 (C) para 26 Davis J referred to the position ‘post- *Barkhuizen*’. See also *Breedenkamp v Standard Bank of SA Ltd* 2009 (5) SA 304 (GSJ) paras 59-68;

<sup>30</sup> *Potgieter and Another v Potgieter NO and others* supra, fn 23, para 31.

<sup>31</sup> As to whether such ‘explanations’ breach the rule of *stare decisis* see Stephen Ryan ‘The balance between certainty and flexibility in horizontal and vertical *stare decisis*: *Bosch v Commissioner for the South African Revenue Service*’ (2015) 132 *SALJ* 230.

<sup>32</sup> *Absa Bank v Coe Family Trust and Others* 2012 (3) SA 184 (WCC) at 189C-191C; *Naidoo v Birchwood Hotel* 2012 (6) SA 170 (GSJ) paras 45 to 47. Andrew Hutchinson ‘Agreements to agree:

*Barkhuizen* was extended to the exercise of a right of cancellation in *Botha v Rich*.<sup>33</sup> A trust sold commercial immovable property to Ms Botha for a price of R240 000 payable in monthly instalments of R4 000 commencing in February 2004. The first three years were uneventful, but the instalments for November and December 2007 were not paid and the trust cancelled the contract. Thereafter, in May 2008, Ms Botha claimed transfer of the property in terms of s 27(1) of the Alienation of Land Act on the basis that she had paid more than half of the purchase price.<sup>34</sup> She tendered, against transfer, to register a mortgage bond over the property to secure payment of the balance of the purchase price. This tender did not extend to paying the arrears, now amounting to some R28 000, or the outstanding municipal rates, taxes and service charges. The trust did not respond until September 2008, when it demanded payment of the sum then outstanding of R40 000 and threatened to cancel the sale.

In her turn Ms Botha did not respond, save to make a single payment of one instalment in January 2009. In April 2009 the trust indicated that it intended to cancel the contract. That prompted a tender by Ms Botha to pay the arrears, interest, and all outstanding rates and municipal charges against transfer of the property into her name. This precipitated – unwisely as it transpired from the perspective of the trust – an application to the high court for an order that the contract had been validly cancelled, or that the court cancel the contract, together with an order for her eviction from the premises. Ms Botha counterclaimed for an order compelling the trust to transfer the property to her in terms of s 27(1) of the Alienation of Land Act.

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Can there ever be an enforceable duty to negotiate in good faith?' (2011) 128 *SALJ* 273 at 280-1 says that *Barkhuizen* 'seemed to provide an overarching requirement of fairness in contracting'.

<sup>33</sup> *Botha and Another v Rich NO and Others* 2014 (4) SA 124 (CC).

<sup>34</sup> Act 68 of 1981.

The trust succeeded in the high court and on appeal to the full court, but on the manifestly incorrect basis that the Alienation of Land Act did not entitle Ms Botha to enforce by way of legal proceedings her statutory right to demand transfer of the property after paying half the purchase price. But that left the fact that, at the time when she demanded transfer of the property into her name, and at all stages thereafter, she had been in material breach of her obligations because, with the one exception, she had failed to pay the instalments due under the contract from November 2007. That was the basis upon which the seller had cancelled the contract.

The Constitutional Court recognised that this constituted a stumbling block to Ms Botha's claim to transfer, but it swept it aside. It did so although it recognised that if her demand for transfer, accompanied by registration of a bond over the property for the balance outstanding on the price, had been implemented, it would have left her in breach of the sale agreement.<sup>35</sup> It nonetheless described the tender as having 'appreciable ameliorative effects' for the seller.<sup>36</sup> The reason for this cold comfort was apparently that the bond would 'serve as security for future instalment payments'.<sup>37</sup> Why the seller should have been satisfied with security for future payments, to be made after the date when the entire price should have been paid, was not explained. The need for such an explanation was considerable, bearing in mind that, by the stage the case was heard in the Constitutional Court,<sup>38</sup> six years had passed since the last regular payment of the price and the date for final payment had

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<sup>35</sup> *Botha v Rich* para 47.

<sup>36</sup> *Botha v Rich* para 47.

<sup>37</sup> *Botha v Rich* para 48.

<sup>38</sup> 20 November 2013.

passed four and a half years before. The justification for the court's approach was expressed in these terms:<sup>39</sup>

'In my view, to deprive Ms Botha of the opportunity to have the property transferred to her under s 27(1) and in the process cure her breach in regard to the arrears, would be a disproportionate sanction in relation to the considerable portion of the purchase price she has already paid, and would thus be unfair. The other side of the coin is, however, that it would be equally disproportionate to allow registration of transfer, without making that registration conditional upon payment of the arrears and the outstanding amounts levied in municipal rates, taxes and service fees. Accordingly, an appropriate order in this regard will be made. The condition that Ms Botha must pay the arrears and all municipal balances, set out in our order, on top of the statutory requirement that a bond be registered, constitutes an equitable exercise of the discretion a court has to avoid undue hardship to the trustees.'

There is no mention, nor was there one in the order, of the payment of interest to compensate the sellers for being required to wait for six and a half years for the outstanding balance of the purchase price. The purpose of registering a bond is unclear. After all the order was subject to a condition that Ms Botha should pay everything that was outstanding up to date and this was the whole balance of the purchase price and all arrears of rates, taxes and other charges.

The court dealt separately with the question of cancellation. It correctly said that, in the ordinary course, cancellation of a contract gives rise to an obligation to restore what was received under the contract. But in this case the contract contained a forfeiture clause. Admittedly that should have had no bearing on the fairness of the cancellation because, if it was a disproportionate penalty, that could be remedied by the court in terms of the Conventional Penalties Act.<sup>40</sup> The trust was presumably

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<sup>39</sup> *Botha v Rich* para 49.

<sup>40</sup> Section 3 of Act 15 of 1962, which reads: 'If upon the hearing of a claim for a penalty, it appears to the court that such penalty is out of proportion to the prejudice suffered by the creditor by reason of the act or omission in respect of which the penalty was stipulated, the court may reduce the penalty to such extent as it may consider equitable in the circumstances: Provided that in determining the extent of

advised that it was for Ms Botha to show that the penalty was disproportionate,<sup>41</sup> a task that might have posed some difficulties bearing in mind that she had throughout remained in occupation of the premises, apart from a brief period in 2008, so that the seller had neither possession nor the money it had anticipated receiving in return for giving up possession, nor any other compensation for this effective dispossession of its property. The trust may have assumed with justification that the law was on its side. If that is so then, that recalls the mordant words of a dissenting member of the House of Lords, who said that the respondent in an appeal had come to their Lordship's House with the knowledge that the law was on its side, but in the majority had encountered the prophets.

The trust's claim for cancellation was dismissed in summary fashion, with the court saying:<sup>42</sup>

'...granting cancellation — and therefore, in this case, forfeiture — in circumstances where three-quarters of the purchase price has already been paid would be a disproportionate penalty for the breach. In their application for cancellation the Trustees did not properly address the disproportionate burden their claim for relief would have on Ms Botha. They took the view that the question of forfeiture and restitution was independent of, and logically anterior to [I think this must mean posterior to], the question of cancellation. That was a fundamental error. The fairness of awarding cancellation is self-evidently linked to the consequences of doing so. The Trustees' stance therefore meant that they could not justify this Court's awarding the relief they sought. In view of the above the cancellation application must fail.'

To add to the trust's woes, the court ordered it to bear the costs in all four courts where the dispute had been adjudicated.

It is legitimate to ask what happened here. True the trust took a bad legal point and had the misfortune of it being upheld by two courts. But at

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such prejudice the court shall take into consideration not only the creditor's proprietary interest, but every other rightful interest which may be affected by the act or omission in question.'

In terms of s 4 of the Act, a forfeiture clause constitutes a penalty.

<sup>41</sup> *Smit v Bester* 1977 (4) SA 937 (A) at 942D-G; *Steinberg v Lazard* 2006 (5) SA 42 (SCA) para 7.

<sup>42</sup> *Bothat v Rich* para 51.

all times it was secure in the knowledge that its purchaser was in material breach of contract; that she had failed to remedy that breach; and that in terms of their agreement, and every principle of law governing their agreement, they were entitled to cancel it. As to forfeiture it was for the court to determine whether the forfeiture claimed by virtue of the agreement was disproportionate. If it were, they would have been ordered to restore what they had received to the extent of the disproportion. But the cancellation would still have stood. Yet they lost. The cancellation of the sale was set at nought. They had been kept out of their money for six years without compensation and they were mulcted in costs. Frankly it is difficult to see on what basis that was fair.

What is of greater importance is that the court simply swept to one side the contractual rights of the seller. It did so apparently because of its view that it would be ‘disproportionate’ for Ms Botha’s default to result in her losing the opportunity to acquire the property. So there is now a decision by the Constitutional Court that a person who breaches their contract and is faced with the legitimate contractual termination thereof may resist cancellation by saying that, notwithstanding the terms of the contract, in their particular circumstances, that is a disproportionate response to their breach. But, if that is so, we can never know when a cancellation will be legitimate and when not. How is a party to a contract to know, when faced with a default by the other party, whether they are entitled to invoke and pursue their contractual remedies? How does a lawyer advise a client wanting to know its remedies for contractual breach?

Let me move on to *Everfresh*.<sup>43</sup> The case involved a provision, commonly to be found in leases, especially commercial leases that on the expiry of the lease the tenant would have a right of renewal at a rental to

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<sup>43</sup> *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 (1) SA 256 (CC).

be agreed. It was well established that such clauses are void for vagueness,<sup>44</sup> although no doubt there are many cases where the parties do agree on a revised rental structure and extend the lease. Curiously, for all the fuss over it, the case decided nothing. Seven judges held that the interests of justice did not require any development of the common law in that case. Four judges held that there was some merit in the argument that the common law should be developed, but they would have remitted the case to the high court to consider whether that should occur. So nothing definite was decided.

I must confess to a measure of personal interest in this case in that the premises were close to our home and we occasionally shopped there. It was well-known that Shoprite had purchased the ageing shopping centre, in which Everfresh occupied the basement, for the purpose of redevelopment. A large part of it had already been demolished and the business was continuing in the middle of a construction site – hardly a favourable spot for a fresh produce outlet. Before the judgment was handed down, Everfresh vacated the premises and had a widely publicised ‘grand opening’ of its new premises in the same area. The suspicion necessarily arises that the argument in regard to renewal of the lease was advanced in order to procure time to locate and fit out alternative premises.

The concern generated by *Everfresh*<sup>45</sup> flows from the breadth of language and some of the rhetorical flourishes in the main, but nonetheless, minority judgment of Yacoob J. He said:

‘[22] The question whether the spirit, purport and objects of the Constitution require courts to encourage good faith in contractual dealings and whether our Constitution insists that good faith requirements are enforceable should be determined sooner

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<sup>44</sup> *Putco Ltd v TV & Radio Guarantee Co (Pty) Ltd and Other Related Cases* 1985 (4) SA 809 (A) at 828I; *Premier, Free State, and others v Firechem Free State (Pty) Ltd* 2000 (4) SA 413 (SCA) para 35.

<sup>45</sup> Carole Lewis, fn 8, supra.

rather than later. Many people enter into contracts daily and every contract has the potential not to be performed in good faith. The issue of good faith in contract touches the lives of many ordinary people in our country.

[23] The values embraced by an appropriate appreciation of ubuntu are also relevant in the process of determining the spirit, purport and objects of the Constitution. The development of our economy and contract law has thus far predominantly been shaped by colonial legal tradition represented by English law, Roman law and Roman-Dutch law. The common law of contract regulates the environment within which trade and commerce take place. Its development should take cognisance of the values of the vast majority of people who are now able to take part without hindrance in trade and commerce. And it may well be that the approach of the majority of people in our country places a higher value on negotiating in good faith than would otherwise have been the case. Contract law cannot confine itself to colonial legal tradition alone.'

The implications of these musings for the law of contract are simply baffling. On a lighter note, I do wonder whether, in complaining of colonial legal tradition, Yacoob J had in mind his and my home province's fabled status as the last outpost of the British Empire.

One should not I think read too much into Yacoob J's comments. Encouraging good faith in contracts and enforcing good faith commitments does not involve overthrowing the entire edifice of our law of contract. Of more concern is what was not said. Nowhere in Yacoob J's exposition is there any reference to good faith when viewed from the side of the landlord and owner of the property. It had bought the site for redevelopment. It did so knowing, as did the tenants if they even considered the question, that as the law stood the renewal clauses in the leases were unenforceable. Most tenants had already vacated and large sections of the building had been demolished. There was no suggestion that the tenants had not been kept abreast of developments, or were given inadequate time to find alternative premises, or would suffer any special prejudice if required to move. The history of the litigation and the ever-



changing case advanced by Everfresh might have suggested that delay was its purpose. If so it achieved that goal, bearing in mind that the judgment was delivered two and a half years after it should have vacated the premises. Finally there was no consideration of the cost of delay; the desirability of the development; the jobs that would be created by the building and the enhanced rates that would be recovered by the local authority once the work was finished. Surely, all these are relevant, if we are going to have a flexible yardstick for the enforcement of contractual obligations?

The majority judgment highlights a different problem. Deputy Chief Justice Moseneke found<sup>46</sup> that had the case been properly pleaded then:

‘...a number of interlinking constitutional values would inform a development of the common law. Indeed, it is highly desirable and in fact necessary to infuse the law of contract with constitutional values, including values of ubuntu, which inspire much of our constitutional compact. On a number of occasions in the past this court has had regard to the meaning and content of the concept of ubuntu. It emphasises the communal nature of society and “carries in it the ideas of humaneness, social justice and fairness” and envelopes “the key values of group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity”.’

This theme of infusing the law of contract with constitutional values is popular with certain academics. By way of example a recent article<sup>47</sup> told us that the SCA’s preoccupation with the possible dangers of a ‘free-floating’ notion of fairness has ‘largely obscured the broader constitutional project of a substantially progressive and transformative common law of contract’. That sounds impressive, but what does it mean to a magistrate in Polokwane, or a judge in the motion court in Bloemfontein? The difficulty lies with the opacity of this type of

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<sup>46</sup> *Everfresh* para 71.

<sup>47</sup> Bhana and Meerkotter *supra* fn 28 at 494.

language. And lawyers are rightly concerned if they cannot understand what is being said. If we are to ‘infuse’ – in the sense of ‘instil’ or ‘inculcate’, rather than in the tea-making sense – constitutional values into our law of contract, that implies that the existing law is wanting in this regard. But if so should we not be told where the deficiency lies? Our law generally does not tolerate bad faith dealings or oppressive conduct. It does say that those who purchase are also responsible for payment of the price; that those who borrow should repay; and, that those who lease should pay the rent and vacate the premises at the end of the lease. But the Constitutional Court has in general endorsed those principles, because:

‘Where parties take care to delineate their relationship by contractual boundaries, the law should hesitate before scrubbing out the lines they have laid down ...’<sup>48</sup>

So where do we stand? An important feature in these judgments is the role of ubuntu. Meaningful as that concept is in many areas of life it would help to have an explanation of how humaneness, social justice, group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity, are to be made applicable in the context of the contractual relationships between artificial persons such as companies created for trading purposes. These are essentially human qualities and principles that guide human interaction. In *Makwanyane*,<sup>49</sup> Mokgoro J said that ubuntu is humaneness, humanity and morality. I do not suggest that there are not circumstances in which they may play a role in commercial relationships – for example the law sets its face against fraud and misrepresentation – but when articulated merely as high principle in the absence of a particular context it does not conduce to clarity. Does it

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<sup>48</sup> *Country Cloud Trading CC v MEC, Department of Infrastructure Development* 2015 (1) SA 1 (CC) para 65.

<sup>49</sup> *S v Makwanyane and another* 1995 (3) SA 391 (CC) para 308.

merely mean, as Davis J has suggested,<sup>50</sup> that ‘in some measure’ – I should add some *uncertain* measure – ‘public policy embraces the concept of good faith and reasonableness’. If so, the mountain has laboured mightily to produce a constitutional mouse. But the concern is that these are the rumblings of a volcano that will in due course erupt.

These three cases dealt expressly with the enforceability of contracts. There are others having a commercial impact that I will be unable to discuss in detail tonight. It is worth noting and commendable that the Constitutional Court has been firm in the respect it gives to the maxim of *stare decisis*.<sup>51</sup> That should encourage those who are concerned about legal certainty. Furthermore, in several cases the Constitutional Court has said that it is in general undesirable for it to sit as the court of first and last instance and to be asked to develop the common law without the matter having been properly raised and canvassed in the pleadings and without the advantage of the views of the high court and the SCA.<sup>52</sup> This is a highly desirable approach because it ensures that if the common law is to undergo change as a result of the impact of the Constitution it does so incrementally and after careful consideration in circumstances where all interested parties have an opportunity to give input.

But the court has not been entirely consistent in this regard. Nor has it always been careful to limit the scope of its pronouncements. In declining to hear a case in which the revival of the *exceptio doli generalis* was sought<sup>53</sup> it added a footnote containing an *obiter dictum* that was construed by a leading scholar in the law of contract as reviving the

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<sup>50</sup> *Combined Developers v Arun Holdings and Others* 2015 (3) SA 215 (WCC) paras 37 to 41

<sup>51</sup> Most recently in *Turnbull-Jackson v Hibiscus Coast Municipality and Another* 2014 (6) SA 592 (CC) paras 54-56.

<sup>52</sup> *Bruce and Another v Fleecytex Johannesburg CC and Others* 1998 (2) SA 143 (CC) para 8; *Minister of Safety and Security and Another v Carmichele* 2004 (3) SA 305 (SCA); *Everfresh* paras 51 and 52; *Government of the Republic of Zimbabwe v Fick and Others* 2013 (5) SA 325 (CC) para 104.

<sup>53</sup> *Bruce and Another v Fleecytex Johannesburg CC and Others* *ibid*.

*exceptio*.<sup>54</sup> Once more the SCA ‘explained’ that this was not the case and the *exceptio* remains for now decently immured.<sup>55</sup> More recently, the Constitutional Court in *Paulsen* decided that in 1997 the SCA had incorrectly developed the law relating to the operation of the *in duplum* rule.<sup>56</sup> It held that, once the double is reached, interest does not accumulate further until after judgment.<sup>57</sup> The court did this without the question having been raised in the high court, before the full bench, or in the SCA,<sup>58</sup> but held that its conclusion was justified by policy rooted in the Constitution. It was concerned that the threat of interest accumulating during the course of litigation might deter borrowers from raising legitimate defences and thereby limit their right of access to courts. The absence of any evidence that such timorous debtors exist was not mentioned and it disregarded the everyday experience of courts that the debtors who delay proceedings are almost always those whose defence is unmeritorious. The expressed belief that unscrupulous defendants will be dealt with satisfactorily by way of summary judgment and adverse costs orders<sup>59</sup> is frankly contrary to my experience in over 40 years of legal

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<sup>54</sup> At 248. AJ Kerr 'The Defence of Unfair Conduct on the Part of the Plaintiff at the Time the Action is Brought: The *Exceptio Doli Generalis* and the *Replicatio Doli* in Modern Law' (2008) 125 SALJ 241.

<sup>55</sup> Per Harms DP in *Bredenkamp* supra fn 13 paras 32-35.

<sup>56</sup> *Paulsen and Another v Slip Knot Investments 777 (Pty) Ltd* 2015 (3) SA 479 (CC) (*Paulsen CC*) overruling in this respect *Standard Bank of South Africa Ltd v Oneanate Investments (Pty) Ltd (in Liquidation)* 1998 (1) SA 811 (SCA).

<sup>57</sup> Relying in part on *Stroebel v Stroebel* 1973 (2) SA 137 (T) a case that on the facts did not raise the problems dealt with in *Oneanate* and *Paulsen* of defendants defaulting and then postponing the day of judgment by raising spurious defences. Summons was issued on 14 September 1972 and included a claim for interest in excess of the capital. Counsel conceded that this breached the *in duplum* rule and that the interest component had to be limited to an amount equal to the capital. Judgment was given one month after the issue of summons and (incorrectly) included interest on the capital alone from date of judgment. It was in that context that the discussion of whether further interest over and above the double could be recovered.

<sup>58</sup> As the author of the majority judgment in the SCA I can say this with some confidence. *Paulsen and Another v Slip Knot Investments 777 (Pty) Ltd* 2014 (4) SA 253 (SCA).

<sup>59</sup> *Paulsen CC* para 84. As a junior advocate in Durban in the period before the enactment of the Prescribed Rate of Interest Act 55 of 1975, when the rate of *mora* interest was 6% and the bank overdraft rate far higher, I encountered a businessman who never paid his creditors. When sued he put up a standard affidavit in opposition to summary judgment, alleging that he had orally been given an extension of time to pay the debt. Having avoided summary judgment he would settle the case on the morning of the trial by agreeing to pay in full, with interest and attorney and own client costs. He explained that this was cheaper than operating an overdraft with a commercial bank.

practice and, I venture to suggest, contrary to that of the vast majority of legal practitioners.

The net effect of the judgment will, I predict, be that lenders – mainly financial institutions – will be reluctant to extend defaulting borrowers additional time to pay and will pursue litigation more vigorously, because of the risk that if too much time is given interest will stop running. In the process debtors who are trying to meet their commitments will be dealt with more harshly, while recalcitrant debtors have been given an extra card to play, because by delaying the inevitable and raising spurious defences – as did the defendant in that case – they in effect obtain an interest free loan for so long as they can keep the litigation running. Had the issue been raised earlier and debated might not these points have emerged?

What I wish to stress is that to overturn well-established rules affecting commercial matters in summary fashion, without input from the parties most affected thereby, promotes uncertainty and renders the law unpredictable. So do generalised *dicta* expressed in vague terms as occurred in *Everfresh* and in *Cool Ideas*.<sup>60</sup> So too do cases such as *Sarrahwitz*,<sup>61</sup> that appear to undermine the hallowed notion of a *concursum creditorum* coming into existence on insolvency

All this may leave lawyers feeling that there is some uncertainty about the impact that the Constitution has had on our commercial law. That is undesirable. As Mokgoro J said in *Hugo*:<sup>62</sup>

‘The need for accessibility, precision and general application flow from the concept of the rule of law. A person should be able to know of the law, and be able to conform his or her conduct to the law.’

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<sup>60</sup> *Cool Ideas 1186 CC v Hubbard and Another* 2014 (4) SA 474 (CC).

<sup>61</sup> *Sarrahwitz v Maritz NO and Another* [2015] ZACC 14.

<sup>62</sup> *President of the Republic of South Africa and Another v Hugo* 1997 (40 SA 1 (CC) para 102.

From the academic side Stu Woolman made the same point in commenting on *Barkhuizen*:<sup>63</sup>

‘An approach to constitutional adjudication that makes it difficult for lower court judges, lawyers, government officials and citizens to discern, with some degree of certainty, how the basic law is going to be applied, and to know, with some degree of certainty, that the basic law is going to be applied equally, constitutes a paradigmatic violation of the rule of law.’

Turning to the question that is the topic of my lecture I think that in principle the existence of a constitution and constitutional rights need not destabilise commercial law and the reasonable expectations of business people. However, it is desirable that the Constitutional Court should make this clear. How is it to do that?

In the first place we should remind ourselves of what Lord Rodger of Earlsferry, once said in giving judgment in the House of Lords<sup>64</sup> that ‘part of the function of appeal courts is to try to assist judges and practitioners by boiling down a mass of case law and distilling [a good word for a Scot to use] some shorter statement of the applicable law.’ That requires, in the memorable instruction that Justice Ruth Bader Ginsburg gives to her clerks,<sup>65</sup> that courts must ‘get it right, and keep it tight’. This means that the Court must avoid qualifying its rulings when it applies established legal principle, by giving what may be described as ‘not now but perhaps next time’ answers, without any clear indication of what circumstances would cause it to depart from settled law. References to the ‘objective normative system’ of the Constitution do not conduce to clarity in this regard. High-flown rhetoric and sonorous phraseology are no substitute for principled analysis and reasoning and clarity of expression.

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<sup>63</sup> S Woolman ‘The Amazing, Vanishing Bill of Rights’ (2007) 124 *SALJ* 762 at 763.

<sup>64</sup> *Commissioner of Customs and Excise v Barclays Bank plc* [2006] UKHL 28 para 51.

<sup>65</sup> Scott Dodson (ed) ‘The Legacy of Ruth Bader Ginsburg’ 104.

The remedy for these concerns lies in the hands of the Constitutional Court. They can best be dispersed by an unequivocal statement in an appropriate case that the Constitution does not demand the wholesale restructuring of our law of contract and other areas of commercial law. A simple statement that contracts will be enforced on their terms, subject only to well-recognised exceptions such as fraud, misrepresentation, duress or conflict with public policy and subject to the provisions of statutes, especially those like the Consumer Protection Act<sup>66</sup> and the National Credit Act<sup>67</sup> that serve to correct imbalances in bargaining power and prevent exploitation of consumers. If it has a different view then it needs to be clearly articulated so that commerce may adapt to this new environment. Either approaches would be consistent with the court's obligation to state the law clearly for the benefit not only of the immediate parties, but for the community at large. The aim of the law is not primarily litigation. It is rather that disputes should be avoided, because the rules of engagement are clear. When disputes cannot be avoided then the least that can be expected is that in most instances they can be resolved by what Lord Devlin once described as 'the disinterested application of known law'.<sup>68</sup>

Perhaps this will be regarded as wishful thinking. Ours is after all a young democracy in a country that is in transition. There may be a wish to guard against statements of the law that have the potential to make the court a hostage to fortune in the future and preclude necessary legal developments. That is understandable. Lord Rodger went on to say in the passage cited above:

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<sup>66</sup> Act 68 of 2008.

<sup>67</sup> Act 34 of 2005.

<sup>68</sup> In his Chorley lecture in 1975 published in Patrick Devlin *The Judge* Chapter 1 at 3. Judges from jurisdictions as far removed as Canada, Scotland, Australia and New Zealand, to mention only the English speaking world, can be cited for the same proposition.

‘The temptation to try to identify some compact underlying rule which can then be applied to solve all future cases is obvious. But the unhappy experience with the rule so elegantly formulated by Lord Wilberforce in *Anns v Merton London Borough Council* [1978] AC 728, 751-752, suggests that appellate judges should follow the philosopher’s advice to “Seek simplicity, and distrust it.”’

But at least the Court could adopt an approach to commercial matters that reassures rather than gives rise to concern. It should be cautious in the breadth of language that it uses and heed the warning that ‘obiter dicta should be resorted to sparingly for the very reason that they are not tested against the outcome of a real-life dispute’.<sup>69</sup> It could helpfully bear in mind the advice of Justice Holmes, the great American judge, that ‘the vindication of the obvious is sometimes more important than the elucidation of the obscure’.<sup>70</sup> It should follow scrupulously its own rule that it does not deal with these matters as a court of first and last instance. Commercial disputes may seem to involve only the parties to the proceedings, but when they involve significant changes to established commercial law their impact is inevitably wider. Such changes affect other agreements, other relationships, underlying financing transactions and, in our modern world, contracts of insurance and reinsurance. The latter at least will always have an international dimension.

Lastly we must accept that the courts cannot resolve every case that excites the sympathies of judges, or lays hold upon the judicial mind as raising issues of unfairness. It is the nature of law and the judicial process that it is required to draw lines and define boundaries. If it fails to do that it fails to discharge an obligation that lies at the heart of the rule

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<sup>69</sup> *Hoërskool Ermelo and Another v Head, Department of Education, Mpumalanga, and Others* 2009 (3) SA 422 (SCA) para 35. Brand JA said this in recanting his assent on a matter of interpretation to the judgment of Streicher JA in *Minister of Education, Western Cape, and Others v Governing Body, Mikro Primary School, and Another* 2006 (1) SA 1 (SCA). His repentance was misplaced as the previous interpretation was upheld on appeal by the Constitutional Court. *Head of Department, Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another* 2010 (2) SA 415 (CC).

<sup>70</sup> Cited by Professor L Schuman (1943) 52 *Yale L J* 938.



of law. A rule of law that is based solely on judicial discretion and a sense of reasonableness and fairness is no rule at all. We have seen how this function of drawing lines and defining boundaries can work in our labour law. Those who drafted the Labour Relations Act<sup>71</sup> constrained and directed those who have to determine whether a dismissal is unfair, by defining what is automatically unfair<sup>72</sup> and providing a code of good practice in other situations.<sup>73</sup> Good King Louis – and I am not referring to Justice Harms – may have dispensed personalised justice under an oak tree,<sup>74</sup> but modern society demands a more structured legal system. Equity in law is not to be determined by the length of the Chancellor’s foot.<sup>75</sup> And, if we can be modest enough to learn a lesson from a different jurisdiction, we need look no further than the storm of legal uncertainty unleashed in the United Kingdom, by the decision in *Fairchild*<sup>76</sup> to relax the ordinary rules governing proof of causation in order to avoid hardship to mesothelioma victims. It is a decision that the author of one of the principal judgments<sup>77</sup> has subsequently described as ‘unprincipled’ and the departure from principle has been regretted in the Supreme Court.<sup>78</sup>

For those who may regard my approach as unduly cautious, my purpose has been to sound a warning. Litigants will not turn to the courts if they are uncertain of the law that will be applied to their disputes. We

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<sup>71</sup> Act 66 of 1995 (the LRA).

<sup>72</sup> Section 187 of the LRA.

<sup>73</sup> Schedule 8 to the LRA.

<sup>74</sup> Wisdom J in *U. S. v Barnett* 346 F 2d 99 (5<sup>th</sup> Cir 1965) 106 para 37.

<sup>75</sup> *Gee v Pritchard* (1818) 2 Swanst. 414, *per* Lord Seldon. R E Megarry *Miscellany-at-Law* (Stevens & Co, 1956 Second Impression, Revised) 139-146.

<sup>76</sup> *Fairchild v Glenhaven Funeral Services Ltd and Others; Fox v Spousal (Midlands) Ltd; Matthews v Associated Portland Cement Manufacturers (1978) Ltd and Others* [2002] UKHL 22 ([2003] 1 AC 32; [2002] 3 All ER 305 (HL)).

<sup>77</sup> Lord Hoffmann ‘Constitutionalism and Private Law’ the Second Cambridge Freshfields Lecture delivered at Cambridge University on 28 January 2015. An audio version of the lecture is available at <http://www.law.cam.ac.uk/press/news/2015/01/lord-hoffmann-delivers-cambridge-freshfields-lecture-on-constitutionalism-and-private-law/2938>.

<sup>78</sup> *Zurich Insurance v International Energy Group* [2015] UKSC 33. See the judgment of the majority on this point by Lord Hodge paras 98 and 102 and the joint judgment of Lords Neuberger and Reed at paras 189-197.

have already seen and are seeing a trend for commercial disputes to be disposed of by way of arbitration. That will continue and may increase. Our commercial law will be impoverished and the constitutional vision of the courts developing the common law will be defeated. I do not say ‘Keep out’, for no area of our law is beyond the reach of the Constitution, but I sound the warning appearing not on maps, but on two ancient world globes, ‘ Here be dragons’!<sup>79</sup>

Thank you very much.

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<sup>79</sup> The expression *hic sunt dracones* appears on the Lenox Globe (c1503-7) and on a globe engraved on two ostrich eggs dating from 1504. See the Wikipedia entry at [https://en.wikipedia.org/wiki/Here\\_be\\_dragons](https://en.wikipedia.org/wiki/Here_be_dragons) accessed on 30 June 2015.