United Nations Day Lecture 2017

50 years of UNCITRAL: What's next?

By Tim D Castle[1]

Introduction

The United Nations Commission on International Trade Law (UNCITRAL) was founded by a resolution of the United Nations General Assembly on 17 December 1966, just over 50 years ago to further the progressive harmonisation and modernisation of international trade law.[2]

One of Australia's early representatives at an UNCITRAL meeting in 1970 was the Hon. Robert Ellicott AC QC, then Solicitor-General for Australia. He recently commented at the Sydney presentation of this lecture at how he was struck by 'the commonality of principles that bring people together – fairness, equity, relevance and integrity'. That ethos, established early on in the life of UNCITRAL, permeated its work throughout its first half-century and continues today.

My own journey in relation to the United Nations started 39 years ago in 1978, when I was selected as a NSW representative at a model United Nations conference in Hobart. I was assigned the role of representing China in our deliberations, possibly because I was one of the first to enroll in what was then a new subject at high school called "Asian Social Studies".

To put these dates in further context, back then Anzac Day marches were still led by veterans from the Boer War, President Nixon visited China for the first time in 1972. In 1975 the Vietnam war ended, Britain voted to enter the European Common Market and Gough Whitlam was sacked by Sir John Kerr

as the Australian Prime Minister.

Casting our attention back to this era, we see a picture of the world emerging from European colonialism, the latter stages of the Cold War, and the first steps being taken towards the global revolutions in commerce, telecommunications and transportation that we know today.

Fast-forward to 2012, when I had my first engagement with UNCITRAL in a side-discussion that took place in a conference room overlooking Wellington Harbour in New Zealand. At that time, I was an observer on behalf of the New York State Bar Association at a meeting of the CISG Advisory Council, having just completed my qualifications to act as an Arbitrator as a Fellow of the Chartered Institute of Arbitrators. That's a rather big mouthful, but is indicative of the interconnected way in which the modern world operates.

The theme of this paper is to address some of those interconnections from a distinctly Australian viewpoint, in three parts - first, what is UNCITRAL; second, what are some of its achievements in the past 50 years; and, third, how might UNCITRAL's role evolve over the next decade?

Before beginning, I would just like to add some further context. As a result of the Wellington meeting, with the endorsement and support of the Commonwealth Attorney General's Department (which has primary responsibility for Australia's engagement with UNCITRAL), the Law Council of Australia and UNCITRAL itself, I set up the body now known as UNCCA - the UNCITRAL National Coordination Committee of Australia - in 2013, which I currently chair. This is our first UN Day lecture, which has now been delivered in Adelaide, Perth, Brisbane, Melbourne, Canberra and Sydney,[3] and I hope will become an annual fixture on the legal program in future years. I will say a little bit more about UNCCA later in this paper.

I - What is UNCITRAL?

Many of you will have heard of the acronym UNCITRAL – which stands for United Nations Commission on International Trade Law - from the UNCITRAL Model Law on Arbitration, which has been incorporated in Australian legislation in the *International Arbitration Act* 1974.[4]

The Model Law is referred to generically as a legal "text", which is produced by the processes set up by UNCITRAL. There are several other types of texts, which include 'conventions', 'model laws', and 'legislative

Representing Australia at the UN in 1966: Solicitor-General the Hon. Robert Ellicott QC.

guides', in ascending order of flexibility of application.

The problem that all of these texts seek to address is how to develop a uniform international legal regime to minimise differences between sovereign states. The UN is not, of course, an international parliament. Thus, a workable approximation involves the development of a standard or harmonised set of legal rules that can be applied by and across individual nations to minimise legal friction for businesses trading internationally.

This, in short, is the *raison d'etre* of UNCITRAL.

It is an independent commission comprising 60 member states elected every three years by the UN General Assembly. It is supported by a permanent Secretariat, based in Vienna, of about 14 legal officers, who form part of the Office of Legal Affairs of the UN. Australia is currently a member of UNCITRAL having been elected in 2015 for a 6 year term. UNCITRAL also has a Regional Centre for the Asia Pacific Region, based in Incheon, South Korea.[5]

Sitting beneath the commission are six working groups which are responsible for developing and drafting the texts. Each working group meets twice a year for a week, once in New York, and the second time in Vienna – 12 meetings in all per year, with continuous translation during their sessions into the six official languages of the UN. The best way I can describe these meetings is that they are very large, well structured technical committees comprising government representatives and invited NGO observers.

As a result of the work of UNCCA, Australians now participate in every working group meeting either as delegates of the Australian government or as observers, usually on behalf of LAWASIA. I will return to aspects of the work of the working groups later in this paper.

Forging consensus is an ambitious goal, and in one sense this is the genius of UNCITRAL's traditions and structure, but it is also its vulnerability

The short point to make is this. The working groups provide a rare forum for multi-lateral discussions of commercial and trade law issues, with a clear focus on producing a solution, in the form of a text, by consensus. UNCITRAL is clear that its modus operandi requires decision-making by consensus at every level through the development and finalisation of its texts.

That process is necessarily time-consuming, but through discussion there can be the discovery of common ground, the identification of differences and the harnessing of energy to find solutions. On the other hand, there is little point in developing a text that incorporates some but not all points of view, if the object is to produce a harmonised set of legal rules, which has a universal global appeal to nation states.

Relevantly, these points of view must take into account the dichotomies between civil and common law traditions, developed and developing countries, western democracies and socialist states, federal states and unitary systems, and different religious cultures. Forging consensus is an ambitious goal, and in one sense this is the genius of UNCITRAL's traditions and structure, but it is also its vulnerability, as I will return to in the Parts II and III of this paper.

How does the process work in practice? It starts with a 'mandate' or legal task being given by the commission to one of the six working groups. Typically each working group will be working on one major mandate at any given time, although some mandates may give rise to several related texts, such as a Model Law and a Guide to Enactment.

The commission meets once a year in July, alternately in Vienna or in New York, for a 2-3 week period. At that meeting it assigns new mandates, and reviews the progress on existing mandates through reports from each

of the working groups.

Once a text is completed by a working group, meaning consensus on all of the terms of the text has been reached, it is then considered in detail by the commission. Finalisation, or adoption, by the commission gives the text its official status. This is not a formality, even though the commission will have been involved in prior consideration of the work on the text as it has been progressed. Again, however, consensus is the key, and government and political considerations are more likely to be at the forefront of deliberations at the commission meeting than in the working groups.

For completeness, I should also mention that certain texts, such as conventions, require approval by the UN General Assembly before they are finalised.[6] In any event, the work of UNCITRAL is reported annually to the General Assembly, and the work of UNCITRAL is considered to be an important part of the broader goals of the UN associated with the promotion of the rule of law and human rights generally.[7]

This whole process from inception to finalisation can take many years. This is a lecture in itself, but the process works in many cases, although not so well in others, as I will turn to shortly.

I want to just say something briefly about the Secretariat. It has two main functions in practice. First, it provides the organisational support for the working groups and their meetings, but the Secretariat does not participate in the deliberations, maintaining studious neutrality and leaving the discussions to the participants. Second, once a text has been adopted by the commission, the Secretariat, particularly in the Asian region through the Regional Centre, organises conferences and seminars to promote the adoption and implementation of texts - which is also work which we in UNCCA have been involved in assisting, when invited to do so.

II - UNCITRAL texts and Australia

The next phase in the process, once a text has been finalised, is known as adoption and implementation. In this part of the paper, I will examine these issues, by looking at the Australian experience with five UNCITRAL texts. Please bear in mind that to have a truly harmonised international law, the process of adoption and implementation must be replicated by countries around the world. So, in one sense the finalisation by UNCITRAL of a text is only the start of the harmonisation process.

The first and obvious point to make is that an international instrument, even one supported and signed by Australia, does not enter domestic law by its own force. It must be embodied in local legislation.[8]

A second and related point is that the mere signing of an international convention by the Australian Government does not give the Commonwealth power to override the allocation of powers under the Constitution.[9]

I propose to deal with five texts to illustrate the complexities, successes and shortcomings of the UNCITRAL process, as seen from an Australian perspective.

1. International Commercial Arbitration

The first text, or related series of texts, are those which underpin the global system of international commercial arbitration. This is an easy starting point as the High Court has recently confirmed in the TCL case that this is an appropriate matter for Commonwealth legislation and, specifically that the enforcement by Australian courts of international arbitration awards is not inconsistent with Commonwealth judicial power.[10]

International commercial arbitration also has a well-established track record that facilitates international trade, by allowing disputes to be resolved by arbitral bodies that private parties are prepared to trust, and it is an area where Australian lawyers are already making an impact.

The main text underpinning this system is the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958).[11] Although this Convention predates UNCITRAL, UNCITRAL has taken on responsibility for the promotion of this text for adoption and implementation around the world. The Convention is also given force of law in Australia by the International Arbitration Act 1974. The Convention provides, in essence, that a properly constituted arbitral award can be enforced in any convention countries without a re-hearing on the merits, with very limited exceptions (even if it is prima facie erroneous). There are 157 countries that are parties to the New York Convention, with more being added each year.[12]

There are 12 arbitration texts listed on the UNCITRAL website, the most recent of which is the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration 2014 ('Mauritius Convention'). This Treaty enables investor state arbitrations, like the plain-packaging tobacco arbitration, to be conducted 'transparently'. That is, by allowing confidentiality restrictions on the arbitration proceedings and award to be removed, as these disputes engage not merely private interests, but also the public interest in the actions of government parties.[13]

The Convention entered into force on 18 October 2017, and is a good illustration of the adoption process. Australian Government representatives were actively involved in the development of the Convention, as members of Working Group II. The Australian Government has indicated its support for the Convention, by signing it. However the Government has not yet ratified it, as there are two domestic matters to be addressed, both of which provide an insight into the complexity of the adoption process.

The first is a review of the Convention, by the Australian Parliament, through the Joint Standing Committee on Treaties (JSCOT), which I understand is presently underway. The second is the passing of amendments to the *International Arbitration Act* to ensure Australian domestic law conforms to the obligations under the Convention. These amendments form part of an omnibus law reform bill currently before the Senate, which will hopefully pass soon.[14]

I hope it is not an over-prediction to state that UNCITRAL texts have now largely completed the task of developing the legal infrastructure required to support the system of international commercial arbitration. The current work of Working Group II involves the development of texts to support a similar system for conciliation, being the phrase used to describe alternative dispute resolution. Representatives of the Australian government and UNCCA have been actively engaged in this project, and it may be a suitable topic for next year's UN Day lecture.

One final comment to make in relation to arbitration is to refer to the joint judgment of French CJ and Gageler J in the TCL Case. In that judgment, their Honours specifically referred to and relied upon the '*travaux preparatoires*' of UNCITRAL, being the Working Group meeting records, for the purpose of interpretation of the Australian statute.[15] This is a signal reminder to all of us of the importance not only of the text as the outcome of the process, but also to the records of the process itself, as we are called upon increasingly to interpret or comment upon international law instruments adopted in Australia.

2. International Sale of Goods - CISG

The CISG, or UN Convention on Contracts for the International Sale of Goods 1980 (also called the Vienna Convention), provides an interesting contrast to the topic of international arbitration. This text represents Australian federalism at its best. The Convention was signed in 1980 and came into effect on 1 January 1988. Australia signed the Convention on 17 March 1988, and within approximately 12 months, all States and Territories passed parallel legislation implementing the CISG to enable the Convention to come into effect domestically on 1 April 1989.[16]

The CISG differs from the arbitration example in the sense that it deals with substantive law and not merely jurisdiction and procedure. Three important facts about the CISG that I wish to note specifically:[17]

(a) There are now 87 countries which have adopted it, comprising all our major trading partners, except the United Kingdom;

(b) Many countries, including China have based their domestic contract law on the CISG;

(c) There is an international jurisprudence about implementation of the CISG which includes the important work of a voluntary body of experts - the CISG Advisory Council, whose meeting I attended in Wellington - who seek in a very practical way to bridge common law and civil law concepts through the ongoing preparation of expert opinions which they issue and publish in support of a harmonised interpretation of the CISG.[18]

Behind this apparent success, there are three caveats that should be made:

(a) First, parties can opt out of the CISG under Article 6, which Australian parties do on a regular basis, driven in part by the boilerplate provisions in large law firm precedents - a matter which requires a more thorough analysis and debate over time.

(b) Secondly, the legal profession does not always recognise that where the CISG applies, it excludes domestic Sale of Goods Acts. The two sources of law are not the same, one striking example being the ability of parties to rely upon subsequent conduct for the purpose of interpreting the contract. This can lead ultimately to judicial error, where counsel either fail to rely upon the CISG, or alternatively seek to apply domestic jurisprudence rather than international jurisprudence, to the interpretation of it.[19]

(c) Thirdly, it has been pointed out that the CISG is a product of 1970s contract jurisprudence, which does not include many developments in the realm of estoppel and the infusion of equitable principles that form part of our current contract law in Australia. An attempt by the Swiss Government several years ago to seek to redress this perceived shortcoming did not achieve the necessary support at UNCITRAL; however, UNCITRAL is now working on a joint project to examine the workings of international sales law with the Hague Conference on International Law and with UNIDROIT.[20]

With respect to these caveats, one might say that it is better to have something which applies broadly at the international level, even allowing for its imperfections, than nothing; but there is certainly a live issue discussed overseas about how the international community should deal with the problem of updating international contract law in the current era of global trade, travel and communications.

3. Cross-border insolvency

The UNCITRAL Model Law on Cross-Border Insolvency 1997 is another UNCITRAL achievement. The Model Law has been adopted in Australia,[21] and was successfully tested in the aftermath of the Global Financial Crisis (GFC) of 2007/2008.

The problem this text addresses is a consequence of the rise of multinational corporations, with numerous subsidiaries around the world, and the easy movement of assets - particularly cash – within those corporate groups to jurisdictions that may have very little to do with the business operations that generated those assets. The advantages of such a regime may be seen with the failure of corporations such as Lehman Brothers, a financial giant with over US$600bn in assets worldwide. Multiple questions of great complexity arise in relation to how the assets of such corporations can be collected and distributed in a fair and equitable manner to creditors and other stakeholders.

Over time, an international body of law can be expected to emerge, with new problems arising, and being addressed, in what one might hope is a relatively harmonised way between the courts of the relevant countries.

The impetus for UNCITRAL to undertake work on the Model Law was the aftermath of the 1987 stock-market crash, almost 10 years before the Model Law was finalised, and 20 years before the GFC where it was tested.

The aim of the Model Law is to envisage a single liquidation of the corporate group by the recognition of a Centre of Main Interest (COMI) as being the place where the principal liquidation is to occur. The central idea is that the COMI approximates the location of the headquarters of the corporate group, pre-insolvency. All other courts and local liquidators around the world are then obliged to act in support of the court and liquidator (or equivalent) at the COMI.

In this way, the expectation is that all assets of the group can be pooled and distributed in an equitable manner to creditors and other stakeholders having a claim against the group. Such a process minimises the time and cost that arises from conflict between insolvency administrators of group companies, and the serendipity of where assets and creditors are located at the time of liquidation. Put simply, groups that are run as a single global enterprise are intended by the Model Law to be liquidated as a single global enterprise.

Australia is one of 43 states to adopt the Model Law, having done so in 2008, noting that Japan and Mexico adopted it in 2000, the United Kingdom adopted it in 2003 and the United States in 2005. Singapore is a recent addition to the list, with an adoption in 2017. There are notable absences from the list of adopting countries, in particular the European Union, which has its own rules relating to cross-border insolvency between member states,[22] as well as Brazil, China, India and Russia.

In UNCITRAL terms, this Model Law is still in its early stages, particularly given the absence of the EU states. It would be naïve to suggest that the Model Law is a panacea, although like the CISG, it is a substantial achievement to have a text that works, even if there are imperfections. One of the potential problem areas to emerge is the risk of forum shopping by groups approaching insolvency, to produce a favourable location for the COMI, which suits the interests of management or particular groups of creditors.

This type of problem was the subject of an important Australian decision in a case called *Akers v Deputy Commissioner of Taxation*[23] in which the Full Federal Court upheld a decision of Rares J to refuse to order payment of certain Australian assets to a liquidator of a company called Saad that was in liquidation in the Cayman Islands, a Model Law state. The problem for the liquidator of Saad was that the Australian tax debt would not be recognised in the Cayman Islands (as the COMI) as a valid claim on the assets in the global liquidation. Thus, put briefly, the court applied Arts 21.2 and 22.3 of the Model Law to refuse part of the transfer to ensure the interests of a local creditor (here the DCT) were adequately protected in a fair and equitable manner.

Over time, an international body of law can be expected to emerge, with new problems arising, and being addressed, in what one might hope is a relatively harmonised way between the courts of the relevant countries. I should note that outside the formal UNCITRAL processes, UNCITRAL organises judicial and non-judicial workshops and colloquia on a range of topics including cross-border insolvency. This role of UNCITRAL, which goes by the general name 'technical assistance', forms part of its role in the implementation of texts.

That is, once the government of a state formally adopts the text, there is then a familiarisation process which must be undertaken in all legal and commercial communities to embed consciousness of the text among relevant actors to make sure the text is used and

applied. Public lectures, such as these United Nations Day lectures, and this subsequently published paper, are all part of the dissemination process, and it is one of the areas for future development by UNCCA within Australia and in our region. I might add that one of the benefits of harmonised texts, and an international jurisprudence in support of that text, is that local legal skills can be readily translated and applied outside Australia in dealing with problems arising under the Model Law.

There is much more to say than time allows in relation to the area of cross-border insolvency and Working Group V, which has a full agenda of matters for consideration that has engaged, and continues to engage, an active international insolvency profession in Australia.

4. Electronic commerce

The fourth topic is one on which Australia has a mixed score-card, and highlights the difficulties of our federal system in maintaining leading-edge status in international commercial law.

I doubt that many of you will have looked into why it is that the law accepts electronic communications in most cases to be the equivalent of traditional hard copy communications. We just seem to take for granted that what can be done by email, or other electronic interaction, will be as good in most cases as if we had taken out pen and paper and sent the communication in the post, with an envelope and stamp on it. UNCITRAL prepared its first Model Law on Electronic Commerce in 1996 – the year Google was invented, the Palm Pilot was released and Microsoft released its first web browser. In 2001, UNCITRAL produced a Model Law on Electronic Signatures, and in 2008 UNCITRAL produced a Convention on the Use of Electronic Communications in International Contracts (known as the ECC Convention). Just to remind you, in 2008, the iPhone had just been released, and we were still running Windows XP on our computers.

The problem in Australia is that electronic commerce, like the sale of goods, involves both state and federal law. The 1996 Model Law on Electronic Commerce was adopted by matching legislation around Australia, both at the state and federal level by a series of cognate Electronic Transactions Acts.[24] An important point to make here about Model Laws, as a form of UNCITRAL text, is that there is greater room for flexibility than with Conventions. This flexibility is important for allowing differences between states and jurisdictions.

In the area of electronic commerce, the individual differences between the jurisdictions was provided for by creating common core provisions in the relevant Electronic Transaction Acts, but allowing each jurisdiction the ability to exclude the operation of the Act by a regulation in relation to particular activities. The net result was nine matching Acts, but nine separate regulations and lists of exclusions prepared by nine sets of parliamentary drafters. Although there are some common subjects for exclusion, such as wills and conveyancing documents, the regulations are not a model of coherence and uniformity which exhibit the benefits of harmonised law – quite the opposite.

The problem with this lack of uniformity became apparent when the Model Law of 1996 was updated by the ECC Convention of 2008. The Standing Committee of Attorneys General, as it was then known, endorsed the amendment of the Electronic Transaction Acts to encompass the changes embodied in the 2008 ECC Convention. This occurred in April 2007. JSCOT also approved the entry by Australian into the Convention in 2011.[25] However the nine state, territory and Commonwealth parliaments did not complete the process of amending their Acts until 2013.

Although the Commonwealth attorney-general, Senator the Hon George Brandis QC announced in December 2015 that Australia would move to become a party to the ECC Convention, this has not occurred in part because of the mish-mash of exceptions that exist in the regulations under the respective Electronic Transactions Acts. A particular problem in this regard is the Commonwealth Regulation, which clearly needs an overhaul as its exemptions include references to Acts that have been repealed and practices that no are no longer used. UNCCA has been offering advice and suggestions to the Australian Government about these problems, but as yet there is no clear solution emerging. The short point is that until this matter is addressed, Australia will not be Convention-compliant, and will slip behind world best practice in electronic commerce until action is taken.

In the meantime, the ECC Convention continues to grow in status, with countries such as Fiji and Cameroon becoming signatories in 2017, joining other earlier adopters such as Singapore and Russia. Further, the ECC Convention was to be one of the platforms to be mandated by the Trans Pacific Partnership (TPP) Agreement, which has not proceeded. However one might speculate that any subsequent multilateral trade agreement will adopt a similar methodology. I remain hopeful that we will have some better news to report next year in relation to the amendment at least of the relevant Commonwealth regulation and the subsequent entry into the ECC Convention.

Representing Australia at the UN in 1966: Solicitor-General the Hon. Robert Ellicott QC.

5. Rotterdam Rules

The fifth area paints a different picture again of the limits of legal harmonisation attempts by UNCITRAL. In 2009, the UN passed a Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, known as the Rotterdam Rules. This was an ambitious project commissioned by UNCITRAL to create a coherent set of rules to govern the rights and liabilities of parties involved in the international carriage of goods from door-to-door.

The problem these Rules were seeking to address is that the domestic part of any carriage of goods, say by road or rail, was regulated by domestic law, while the international part of the carriage by sea was regulated by international rules such as the Hague Rules

or the Hague-Visby Rules. With the growth of international commerce, one might be tempted to say that it would make sense for there to be a single set of rules that applies to individual shipments from the supplier in country A to the consumer or business in country B.

The Rotterdam Rules were the product of seven years work by Working Group I from 2002-2009, yet the Convention is not in force and there are parties who support it and those who oppose it, both domestically and internationally. Where particular parties stand in relation to the Rules seems to be related to whether the new Rules will create a perceived advantage or disadvantage to their side of the industry, *vis-à-vis* other participants in the transport industry. That is, sources of support and opposition do not appear to be geographically aligned, which of course makes the role for governments more difficult as they have constituents and stakeholder groups on both sides of the debate.

I do not wish to enter into the substantive debate, even if there were time to do so. However, the point I would make is that the Rotterdam Rules may be unique from the other areas I have examined, in that these Rules represent an attempt to fundamentally reshape an existing industry and practices, rather than put in place a harmonised legal framework where there were either no existing rules, or the pre-existing rules and practices were weak or divergent. In other words, in the realm of change-management of well-established existing rules, UNCITRAL may have a more difficult role to play than in the realm of creating new rules or bringing coherence to existing rules and practices.

III. What's next?

In this final part of this paper, I wish to touch on two current UNCITRAL projects, which are both of a very different nature, and highlight some interesting issues about UNCITRAL's future.

L to R: Chrissa Loukas SC, the Hon Justice Steven Rares, the Hon Robert Ellicott AC QC, Tim Castle, barrister and chair of UNCCA

1. Investor State Dispute Settlement

At its meeting in July 2017, the commission debated and resolved to give a new mandate to Working Group III to examine the current concerns about the workings of the Investor State Dispute Settlement (ISDS) process, and consider whether reforms were desirable. This is a complex topic, and the most I can do at this stage is set out some preliminary remarks.

For those of you who have not encountered the term ISDS, it is a relatively recent development in trade law. In essence, the bilateral investment treaties (BITs) of many countries now provide a remedy for an overseas entity which makes a financial investment in a foreign country. Where the government of that country exercises its sovereign power to change the law in that country which adversely affects the investment made by the foreign entity, the foreign entity has the right to commence an arbitration seeking damages against the country's government. An analogy to this remedy may be that of provisions similar to s 51(xxxi) of the Australian Constitution, which provide for the acquisition of property on just terms.

Australia has recent experience of such an ISDS dispute, when Philip Morris commenced an arbitration seeking substantial damages against Australia in relation to the passing of the plain packaging tobacco laws. In that case the arbitral tribunal dismissed Philip Morris' claim on a preliminary point as to jurisdiction.[26] This arbitration followed an unsuccessful application by another tobacco company to the High Court of Australia involving claims, inter alia, that the legislation contravened the just terms provision of the Constitution.[27]

There are three important issues that are raised by this topic. First, the desirability of having a mechanism that allows claims to be made by investors, to encourage foreign investment, by removing an element of sovereign risk. Secondly, the philosophical dilemma of an international tribunal (however constituted) passing judgment on the exercise by a state of its sovereign power to act. Thirdly, the tension between the role of the courts exercising judicial power within the state, in accordance with the Constitution and usages of that state, and the role of external tribunals adjudicating on disputes arising out of a treaty entered into by the state with another state.

The third of these issues has been the subject of a paper by French CJ.[28] As the tobacco litigation demonstrated, this tension is not merely theoretical. While it may be accepted that the High Court and the ISDS arbitration in relation to a given piece of legislation would be concerned with different legal heads of claim, it is questionable whether the Australian public would be so discerning, if the High Court were seen to be upholding the legislation and an arbitral tribunal (not subject to any right of appeal) was seen to be declaring the same legislation to be a breach of Australia's international duties, sounding in a very large award of damages.

There are, of course, other areas in which the Australian Government participates in international tribunals – a recent example being the case involving Timor-Leste and Australia's maritime boundaries in the Permanent Court of Arbitration, or Australia's claim against Japan in relation to whaling in the International Court of Justice.[29] This leads to one of the criticisms that has been made of the current ISDS system, that it is essentially one based upon ad hoc tribunals constituted by private individuals who are appointed as arbitrators. These individuals are all eminent members of the arbitration community, and as a member of that community, I can attest to the high standards expected of its members. But the eminence and qualifications of the individuals is not

the essential point.

The real question I suspect goes much deeper, and it is one of the challenges of our times. That is, as Spigelman CJ often remarked, the legitimacy of the exercise of judicial power depends upon public acceptance of the institutional presence of a court and the court system, rather than upon the individual judges who comprised the courts from time to time.[30] In the case of private disputes, party autonomy naturally leads to the conclusion that private appointment of ad hoc arbitration panels is an acceptable exercise of the power to resolve that dispute. I am not sure that the same logic applies to disputes about the exercise of public power.

I don't wish to say too much more on this topic, other than to refer to an excellent paper given by Warren CJ and Croft J in relation to the advantages of international commercial courts.[31] Such a court now exists in Singapore, as an extension of its domestic court system, and there is no reason why an Australian International Commercial Court could not be established, as their Honours have observed.

One of the questions for Working Group III will be whether some form of court ought to be established to deal with Investor State Disputes, whether as a permanent court, or as an appellate body to link in with the existing arbitration mechanisms. However, there are then a myriad of issues to be worked through – what are the extent of its powers, how are judges appointed, where should it be based and so on.

The point I wish to make is this, as Working Group III embarks on its journey into uncharted waters, UNCITRAL has been selected by the member states of the United Nations as the forum for the purpose of having these discussions – albeit over the objections initially made of several member states.

To borrow slightly from Spigelman CJ, such a decision recognises the institutional strength of UNCITRAL and its working groups, as a forum for conducting respectful and effective debate and dialogue about issues that affect international trade and commerce. It is a track record built up over 50 years, based on a model of consensus-driven decision-making, and it is an area in which Australia has played and continues to play an effective role.

We know that the Australian Government intends to play an important role in the ISDS discussions, and we at UNCCA together with other interested organisations hope to provide such advice and opportunities for consultation and discussion within the Australian legal and academic community as may be considered appropriate in support of the Government's endeavours. This will be an endeavour that will unfold, I expect, over many years, but I would encourage all of you who are interested to become informed and participate in these discussions.

2. Simplified Company Law for Less Developed Countries

From the macro to micro, I wish to finish with one of UNCITRAL's ongoing projects that is close to my own area of legal practice. It is the work of Working Group I, which I have the privilege of contributing to, in relation to the development of a text for a simplified company law for less developed countries.

This mandate commenced in 2013 as part of a desire on the part of UNCITRAL to provide assistance to less developed countries to reap the benefits of globalisation, by allowing women and communities, for example, to participate in the global supply chain of goods and services. The foundation assumption is that extending limited liability to micro, small and medium enterprises (MSMEs) will provide an important foundation for participation in economic life. It allows the individuals behind the entity to take risks associated with trade and investment, which are essential to economic participation.

Company law in developed countries like Australia is complex, to say the least, and is hardly a model for countries and communities seeking to take the first, tentative steps towards economic participation in global supply chains.

However, company law in developed countries like Australia is complex, to say the least, and is hardly a model for countries and communities seeking to take the first, tentative steps towards economic participation in global supply chains. The exercise being undertaken by WG I is therefore an attempt to start with a clean sheet of paper, to identify the essence of a limited liability corporation to allow millions of people to set themselves up in business quickly, cheaply and effectively.

Although the idealism behind this project is expressed in terms of those in developing economies, it has certainly occurred to me that if a simplified company law could be developed with universal appeal, then it might also serve as a model for developed countries like Australia to attempt to introduced simplified set of rules here for small business. This is not an uncommon scenario – UNCITRAL has recently adopted new Model Laws in relation to Secured Transactions. While Australia has its own relatively well-developed Personal Property Security Act (PPSA), one of the projects being undertaken in UNCCA at the moment is to look at the insights provided by the Model Laws for the operation and application of our own PPSA.

Returning to Working Group I, what I encountered in New York in April 2016 was an attempt by over 100 individuals from around the world to try to distil the essence of a limited liability entity. It was not an easy task, because of the overlay of systemic and cultural conceptions of what a company is and does.

At a personal level, I felt that the wheel had come full circle from my student days at the model UN conference I attended in Hobart in 1978. However, this time the work was being done by committed experts from around the world, seeking to address challenging issues potentially affecting the lives of millions of ordinary people, founded, as Mr Ellicott QC observed, on the search for common principles of universal appeal. This work will continue, and I hope with a successful and durable outcome for the benefit of the global community generally.

Conclusion

This paper has, in many respects, only touched the surface of the work of UNCITRAL. As I have sought to convey, it has developed an institutional strength and robustness to distil the essence of many important problem areas into workable legal frameworks, through the process of discussion and consensus-building.

As one of the participants remarked at the Canberra presentation of this Seminar, UNCITRAL involves a rather unique partnership between the public and the private sectors. On the one hand, government is concerned with effective and efficient regulation. It makes the domestic laws and it has the official seat at UNCITRAL and the UN. On the other hand, the rationale for the regulations is to facilitate trade and business by the private sector, operating in a global context. The private sector is therefore vitally interested both in the content of the texts being developed, and also in the adoption and implementation of those texts within domestic legal systems.

My work with UNCCA illustrates the possibilities that a body such as ours can offer both to the government and also to our stakeholders among legal practitioners, academics and students interested in participating in and contributing to the work of UNCITRAL. It has been an inspiring journey for me to work with so many passionate and motivated individuals both in the Australian

community and also among our diaspora.

This year, we have restructured our organisation to take account of the interest and success we have achieved in the last four years. We have now signed a Memorandum of Understanding with the University of Canberra to operate our Executive Office for the next three years, and I will shortly be passing over the role of Chair of UNCCA to Justice Neil McKerracher of the Federal Court, based in Perth.

That said, our work will continue. Australia has, since 2015, been represented either officially or by NGO Observers (through LAWASIA) at every UNCITRAL Working Group meeting. We have an established track-record of holding annual Seminars in Canberra in May to encourage the interchange of ideas between the Government and our UNCCA members; we have a successful student programme (UNLAWS) which has approved over 20 law students to attend UNCITRAL Working Group meetings – many with the financial support of their universities; and now we have an annual UN Day lecture to be delivered in major cities around Australia. I know that all of my colleagues at UNCCA look forward to continuing in this work, as do I, under our new structure.

Thank you to all of our distinguished commentators and chairs who have participated in this UN Day lecture series (noted earlier), and to those who have attended the lectures. This paper has undergone revision from its initial draft to reflect some of the feedback and commentary received at these events. I hope that some of those in attendance may join UNCCA as a result, as associate members, and thereafter progress to full membership (as Fellows of UNCCA) by attending future working group meetings.

It would be remiss of me not to mention in closing the tremendous support UNCCA and I have received from my regular interaction with the two heads of the Regional Centre for Asia and the Pacific; initially Luca Castellani and more recently Joao Ribeiro. Their professionalism, inspiration and guidance, and the ideas they have and are constantly generating, have given our work at UNCCA a great sense of significance. The partnership we have with the Regional Centre is a strong one, and there is plenty of scope for development in the future, in the area of the provision of experts to provide technical assistance into the Asia and Pacific Region.

Global commerce does not stand still. The regulatory regime must keep pace, and UNCITRAL plays a vital role in facilitating trade. I commend its work to you, and also the work undertaken by UNCCA in support of that work.

END NOTES

1 Barrister, 6 St James Hall, Sydney; Chair of UNCITRAL National Coordination Committee for Australia (UNCCA); Fellow of the Chartered Institute of Arbitrators.

2 'A Guide to UNCITRAL: Basic Facts about the United Nations Commission on International Trade Law' (2013), www.uncitral.org

3 Adelaide in the Federal Court on 17 October 2017 with Besanko J as chair and Hon Paul Finn as commentator; Perth in the Federal Court on 18 October 2017 with McKerracher J as chair and Professor Camilla Baasch Andersen as commentator; Brisbane in the Federal Court on 23 October 2017 with Greenwood J as chair and Professor Khory McCormick as commentator; Melbourne at Corrs Chambers Westgarth on 24 October 2017 with Bronwyn Lincoln as chair and Croft J as commentator; Canberra at University of Canberra on 1 November 2017 with Professor Lawrence Pratchett as chair and Ian Govey AM as commentator; and Sydney in the Federal Court on 5 December 2017 with Chrissa Loukas SC as chair and Rares J as commentator.

4 The Model Law is set out in Schedule 2 to the *International Arbitration Act* 1974 (Cth). Section 16 of that Act gives the Model Law the force of law in Australia.

5 See Guide to UNCITRAL, op. cit., which contains further details.

6 Guide to UNCITRAL, para 48.

7 Guide to UNCITRAL paras 67-68.

8 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273.

9 *Commonwealth v Tasmania (Tasmanian Dams Case)* (1983) 158 CLR 1 per Mason J at 131.

10 *TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia* (2013) 251 CLR 533. See Allsop CJ and Croft J, 'The Role of Courts in Australia's Arbitration Regime', 11 November 2015, www.fedcourt.gov.au/digital-law-library/judges-speeches/chief-justice-allsop/

11 There are multiple websites where information about the Convention and all related documents can be found – see for example www.newyorkconvention1958.org or www.newyorkconvention.org for a comprehensive set of references to the Convention, court decisions around the world, *travaux preparatoires* and other related materials.

12 Of the 39 member nations of the UN that are not parties to Convention, 13 are in the Asia-Pacific region - namely the Federated States of Micronesia, Kiribati, Nauru, Niue, North Korea, Palau, Papua New Guinea, Samoa, Solomon Islands, Timor-Leste, Tonga, Tuvalu and Vanuatu.

13 The Convention text can be found on the UNCITRAL Website: http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2014Transparency_Convention.html

14 *Civil Law and Justice Amendment Bill* 2017, Schedule 7. This Bill also includes amendments to the *Acts Interpretation Act* 1901, *Archives Act* 1983, *Bankruptcy Act* 1996, *Domicile Act* 1982, *Evidence Act 1995*, *Family Law Act 1974*, *Legislation Act 2003*, *Marriage Act 1961* and the *Sex Discrimination Act 1984*.

15 TCL case at [11]-[14] per French CJ and Gaegler J.

16 *Sale of Goods (Vienna Convention)* Act 1987 (ACT); *Sale of Goods (Vienna Convention)* Act 1986 (NSW); *Sale of Goods (Vienna Convention)* Act 1987 (NT); *Sale of Goods (Vienna Convention)* Act 1986 (Qld); *Sale of Goods (Vienna Convention)* Act 1986 (SA); *Sale of Goods (Vienna Convention)* Act 1987 (Tas); *Sale of Goods (Vienna Convention)* Act 1987 (Vic); *Sale of Goods (Vienna Convention)* Act 1986 (WA).

17 There is a wealth of information on the internet about the CISG, and I would not do justice to it to summarise it in a footnote. The best place to start is Pace University's Institute of International Commercial Law website, www.iicl.law.pace.edu, or the UNCITRAL website.

18 CISG Advisory Council website, www.cisgac.com

19 L. Spagnolo, 'The Last Outpost: Automatic CISG Opt Outs, Misapplications and the Costs of Ignoring the Vienna Sales Convention for Australian Lawyers', [2009] *Melbourne Journal of International Law* 141.

20 This project is in its early stages, with a meeting of Group of Experts taking place in October 2017 to coordinate the preparation of a guidance document – see 'UNIDROIT, UNCITRAL and HCCH Meet with Experts to Discuss Guidance Document on International Sales Law in Frankfurt', http://www.unidroit.org/89-news-and-events/2285-unidroit-uncitral-and-hcch-meet-with-experts-to-discuss-guidance-document-on-international-sales-law-in-frankfurt.

21 *Cross-Border Insolvency Act* 2008 (Cth)

22 European Union Insolvency Regulation No 1346 (2000).

23 Akers v Deputy Commissioner of Taxation (2014) 223 FCR 8; [2014] FCAFC 57.

24 *Electronic Transactions Act* 1999 (Cth); *Electronic Transactions Act* 2001 (ACT); *Electronic Transactions Act* 2000 (NSW); *Electronic Transactions (Northern Territory) Act* 2000 (NT); *Electronic Transactions (Queensland) Act* 2001 (Qld); *Electronic Transactions Act* 2000 (SA); *Electronic Transactions Act* 2000 (Tas); *Electronic Transactions (Victoria) Act* 2000 (Vic); *Electronic Transactions Act* 2003 (WA)

25 House of Representatives Committees, 'Chapter 4 United Nations Convention on the Use of Electronic Communications in International Contracts 2005', Report 116 (2011), https://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=jsct/1march2011/report/chapter4.htm

26 Attorney General's Department website, 'Tobacco plain packaging – investor-state arbitration', https://www.ag.gov.au/tobaccoplainpackaging

27 *JT International SA v Commonwealth* (2012) 250 CLR 1.

28 French CJ, 'ISDS- Litigating the Judiciary', (2015), Chartered Institute of Arbitrators Centenary Conference,http://www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj21mar15.pdf

29 *Timor Leste v Australia* (Arbitration under the Timor Sea Treaty), Permanent Court of Arbitration, see https://www.pcacases.com/web/view/37; *Australia v Japan* (Whaling in the Antarctic), International Court of Justice, see http://www.icj-cij.org/en/case/148

30 Spigelman CJ, 'Seen to be done: The principle of open justice' (1999), in T.D.Castle (ed), *Speeches of a Chief Justice: James Spigelman 1998-2008* (2008), Sydney.

31 Warren CJ and Croft J, 'An International Commercial Court for Australia: Looking beyond the New York Convention' (2016), https://www.monash.edu/__data/assets/pdf_file/0009/467658/Com-CPD-April-2016-Paper.pdf