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Précis Paper

Australia and UNCITRAL

A discussion of Australia's participation in the work of UNCITRAL, and in private and public international law more generally

Discussion Includes

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Précis Paper

Australia and UNCITRAL

1. **In this edition of BenchTV, Tim Castle (Barrister, 6 St James Hall Chambers, Sydney) and Professor Vivienne Bath (Professor of Chinese and International Business Law, University of Sydney, Sydney) discuss Australia's participation in the work of UNCITRAL, and in private and public international law more generally.**

What is UNCCA?

2. **UNCCA is the UNCITRAL National Coordination Committee for Australia. It promotes the work of the United Nations Commission on International Trade Law (UNCITRAL) in Australia. It was established because of concern over Australia's lack of participation in UNCITRAL.**

3. **The Committee was set up with the intention of bringing together lawyers and academics interested in UNCITRAL topics for the purpose of advancing Australian representation and participation in UNCITRAL activities.**

4. **The function of UNCITRAL over the years has been to draft conventions that essentially deal with international trade law more so at a business-to-business level, rather than at a state-to-state level (which is generally covered by the World Trade Organisation's function).**

5. **It has been a very important organisation for Australia and for other nations because of the impact that it has had on setting the framework and establishing the structures for things like:**
    - **international commercial arbitration**
    - **carriage of goods by sea**
    - **sale of goods**

    among other things that we tend to take for granted.

6. **We tend to just assume that international trade will simply work. But of course this is not necessarily the case. So UNCITRAL has played a very important role in getting together the participants - both developed and developing countries - in order to talk about what the general regime should be in order to facilitate international sales, and to deal with electronic transactions, which are now absolutely fundamental to international trade relations.**

7. **An important part of this is bringing into people's consciousness:**

- **the fact that these conventions even exist**
- **that there are model laws, many of which Australia in fact applies in its own domestic law**
- **the significance of these conventions and model laws in practice**

8. **The central problem UNCITRAL addresses is the fact that there is no international parliament that can pass law in the same way a national parliament can.**

9. **International commerce is borderless. Behind the everyday things that we have and we use, there are lots of individual transactions, which means there are lots of opportunities for disputes to arise. Where big companies are involved, there are opportunities for cross-border insolvency.**

<u>UNCITRAL's current work</u>

10. **UNCITRAL is a sub-body of the United Nations, with 60 elected members from different regional groupings. The Commission meets once a year. It has six working groups which are given tasks.**

11. **One of UNCITRAL's six working groups, which is focused on arbitration, has just settled the text of a mediation convention.**

12. **There is a very successful international system of international commercial arbitration, but it is a formal mechanism. There had been a perceived need to, as the commerce of the world is becoming more sophisticated, allow for a mechanism through which parties wishing to resolve disputes between themselves could do so without having to go to court or a tribunal.**

13. **The Convention will be presented to the Commission Session in July. It will be an addition to the framework of laws which give parties options in the international trading network.**

14. **The purpose of the convention is essentially to facilitate recognition and enforcement, because at the moment if parties have a mediated settlement, they end up with a contract, when in most cases these parties have started with a contract, and what they instead want is something that has better effect than a contract at the end of the mediation process, i.e. something capable of:**
    - **being taken to Australia, for example, and**
    - **being recognised immediately, without its substance having to be examined, and**
    - **being enforced, like a foreign judgment, or potentially like an arbitration award**

15. There is no doubt that the objective of the convention is good.

16. The first big question the convention will soon face though is whether most countries consider that they need it, or whether they consider that they already have a system that satisfactorily deals with the recognition of this type of document.

17. The second is how the convention will fit into the existing structure. If Australia becomes a signatory to it, for example, we will have to consider all the rules we will need to create in order to establish its function domestically.

18. The model law that accompanies the convention provides a framework for governments to implement the convention domestically.

19. At the working group meetings, the regions give a range of input - sourced from government, non-government, academia, etc. The idea is to come up with a settled text, which is achieved by consensus among the experts. The text/s then goes to the Commission. If it is a model law, the Commission can adopt it; if it is a convention, the Commission then approves it and then passes it to the UN General Assembly.

20. The way a harmonised system of law works is that national governments must each then adopt the text which has been developed, which in practical terms is when it gets introduced into domestic legislation.

21. The key UNCITRAL texts generally contain a regime that is fairly clear about what is to be done and what is not, with an exception in most for public policy which allows domestic courts to fine tune the text's application. What is interesting about the arbitration model law is that the Australian courts in particular (but reflecting views around the world) have tended to take a fairly limited approach to what constitutes a public policy ground for rejecting an arbitration.

22. There will similarly be a public policy exception in relation to the mediation convention and model law. Courts are generally very reluctant to apply the public policy exception, not just in relation to arbitral awards, but also judgments.

23. In mediation, the mediator does not actually enforce the decision. The mediator simply assists the parties in reaching agreement. When two parties come to an agreement between themselves, there is potentially more scope for closer scrutiny of it by the courts.

<u>Harmonisation of law</u>

24. The concept of harmonising the law is a good one. There is, however, difficulty in achieving consistency in the way in which an agreement is enforced when it comes to mediated outcomes.

25. Various surveys have indicated that compliance with mediation agreements varies very substantially across the world. The work of UNCITRAL has been very important to the harmonisation of laws, particularly the most recent effort in relation to transfers of electronic documents, which is focused on how to deal with transactions that are all digitalised.

26. A lot of our law relating to international transactions goes back centuries, and is very much based on the authenticity and existence of physical documents. The attempt to replicate the same assurance of authenticity (i.e. some reliable method of verification) in an electronic world of electronic documents is really quite a challenge.

27. The work that UNCITRAL is doing in this area is going to have a huge impact on international trade, and the way in which transactions are effected. A lot of the work of UNCITRAL, and the law that it has developed, has been focused on the private aspects of trade (i.e. trade between companies, businesses and individuals). We have seen in the last year a slight movement towards something new in the work of UNCITRAL.

<u>Investor-state dispute settlement (ISDS)</u>

28. One of UNCITRAL's working groups (no.3) received a request from the international trade community to look at the issue of investor-state dispute settlement.

29. ISDS is a creature of both public and private dispute. The private element derives from the right of investors to make complaint. The public element derives from the fact that rights of investors by definition come from a treaty between states.

30. The hybrid nature of ISDS makes UNCITRAL's task rather a new excursion.

31. Party autonomy is a core assumption in an arbitration setting, including the fact that parties have actually *chosen* to submit their dispute to arbitration. Therefore, to a certain extent, parties have submitted themselves to a process, the consequences of which they are aware, and which include the possibility of the enforcement of an arbitral award.

32. Australia has had some exposure to the ISDS system through the tobacco plain-packaging litigation.

33. There has been a fair amount of judicial commentary on the fundamental challenges about the relationship between courts and government, but also between international

bodies (like an ISDS arbitral panel, for example) and government, where the government chooses to exercise sovereign power, and in the tobacco case, to impose laws that it believes are in the interests of the community.

34. These laws are capable of being challenged in the domestic courts, as was witnessed in the tobacco case; but they are equally capable of being challenged through a privately appointed tribunal.

35. The first endeavour of working group no. 3 is to work out what the scope of the mandate is, which is proving to be very difficult, because at the moment we have a very complex network of bilateral treaties. This has given rise to a whole host of arbitrations which may or may not be consistent with each other, but which are not supposed to have precedential value.

<u>The ever-rising relevance of international law</u>

36. The issues the subject of investor-state arbitrations have expanded over time. There is already very lively discussion amongst the members of the working group as to how to deal with these challenges going into the future, like for example establishing a court, which might take over some of the functions of the bilateral treaties. The mandate is massive.

37. We can anticipate that the lively debate will continue for the next couple of years, or at least before something is concretely come up with.

38. International law has become much more integral to the everyday activities of people in legal and corporate practice. Most practising lawyers will readily acknowledge that in searching for solutions to problems they will often turn to online databases of countries from all around the world.

39. The traditional focus of the law and its practitioners has been very much an inward one, with a tendency to view international developments in the law as being generally interesting, but not as necessarily having any decisive or determinative effect.

<u>Australia & international trade</u>

40. Where does Australia sit in the overall scheme of international trade? And what are the limits of government power?

41. Australia will need to modify its current stance of viewing these things so traditionally.

42. Australian judicial practice in relation to the operation of the *Convention on Contracts for the International Sale of Goods*, for example, has been very parochial. It has not

referred to the CLOUT (Case Law on UNCITRAL Texts) database, for example. So far, despite the provisions of the Convention that refer to international practice, Australian courts have not paid a lot of attention to international cases. This may partly be the fault of the Bar in not drawing the courts' attention to such international cases.

43. On these issues, we are going to have to look outwardly, more so than we currently do, which means we are going to have to look at our very tight rules in relation to judicial precedent and start broadening our horizons.

44. It is very important for Australia as a trading nation that the endeavour of harmonisation does work. We need to have a holistic change at all levels of the legal profession in order to raise awareness about what the potential is/possibilities are for introducing international law into our daily legal discourse. It is certainly already starting to happen at universities.

45. There is a wealth of opportunity for engagement in the public and private international law space. And the Australian contribution to debate at the international level is valued, because there are blocks of countries which actually value a smaller and more independent player such as Australia, which has the ability to talk to all participants with a view to moving the debate forward.

BIOGRAPHY

Tim Castle

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Tim was admitted to the bar in 1992 and was appointed as Chair of the UNCITRAL National Coordination Committee for Australia in 2013. Tim's role promotes opportunities for increased participation by Australia in the work of UNCITRAL. Prior to this appointment, Tim also held experience as a partner at specialist firm Atanaskovic Hartnell, as a senior executive leader in financial special deterrence at ASIC, and as in-house counsel at Competitive Foods Australia Pty Ltd.

Professor Vivienne Bath

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Vivienne is a professor of Chinese and International Business Law at the University of Sydney, and also holds director positions at the Centre for Asian and Pacific Law and the China Studies Centre. She has extensive professional experience in Sydney, New York and Hong Kong, specializing in international commercial law, and holds first class honours from the Australian National University and an LLM from Harvard Law School.

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