



Third annual UNCITRAL seminar

On 19 May 2017 members of the Australian legal profession attended the 2017 UNCITRAL Seminar in Canberra. The United Nations Commission on International Trade Law (UNCITRAL) aims to modernise and harmonise of rules on international business and trade.



The UNCITRAL Seminar was opened by Tim Castle, Chair of the Australian Coordination Committee for UNCITRAL (UNCCA). UNCCA is an organisation comprised of members of the Australian legal community dedicated to promoting the work of UNCITRAL in Australia.

In welcoming participants to the 2017 Seminar, Principal Legal Officer Autumn O'Keefe (Attorney-General's Department) commented on the progressive development of private international law and the longevity of the UNCITRAL instruments.

Assistant Secretary Andrew Walter (also from the Attorney-General's Department) outlined some of the history of Australia's involvement in the work of the Hague Conference on private international law. The current work of the Hague Conference in relation to recognition

and enforcement of judgements raises important questions impacting on fairness and access to justice. In time, these Hague Conference deliberations will be important for the law of trusts and intellectual property.

UNCITRAL achievements

In a video address, Joao Ribeiro, Head of the UNCITRAL Regional Centre for Asia and the Pacific, highlighted UNCITRAL's achievements over the last twelve months. The Regional Centre started as a pilot project in 2012 and has been continued by the United Nations Commission so that it might focus on four areas:

- Providing support for civil society initiatives.

- Facilitating capacity building for states, regions and banks.
- Building and participating in regional initiatives.
- Strengthening information knowledge and statistics in the region.

The major achievements of the UNCITRAL Secretariat in 2016-17 include:

- 50th Anniversary events in both Australia and New Delhi.
- The Incheon Trade Forum in Korea, featuring many Australian experts, including an opening address by former Chief Justice of the High Court, Robert French.
- A range of capacity building exercises with the UN, as well as technical assistance projects, including drafting and reviewing

regional legislation and supporting the adoption of the New York Convention.

- Assisting Fiji with the eCommerce Convention, Pakistan with the secure transactions regime, and promoting the rules in relation to investor state arbitration and the Mauritius Convention.

Working Group II: arbitration and conciliation

Delcy Lagones de Anglim, Head of the LawAsia delegation to the recent UNCITRAL Working Group II meetings in New York, spoke about the work of the Group concerning the development of an instrument on enforcement of international commercial settlement agreements resulting from conciliation.

Working Group II has prepared two instruments — a model law and a convention — which will be reviewed at meetings in Vienna in October 2017. Delcy highlighted the increased worldwide awareness of the importance of mediation, with surveys indicating that 80 per cent of respondents would use a mediation clause if a convention was in place.

Despite the growth and popularity of mediation, as an experienced international mediator, Delcy still cautioned that some matters are not suitable for mediation and there will always be a need for other dispute resolution processes.

Khory McCormick, an Australian Government representative at the Working Group II meetings, observed that the Group was both professional and constructive and echoed the sentiments of other

speakers suggesting that mediation would make significant change to the arbitration market but that there would still be a need for other dispute resolution processes.

Working Group IV: electronic commerce

Alan Davidson from the University of Queensland spoke briefly about the UNLAWS intern work experience program, which has created opportunities for Australian law students to take part in Working Group meetings.

Alan has taken part in the deliberations of Working Group IV in relation to electronic commerce. In the future, members of Working Group IV will consider issues related to cloud computing, identity management and trust services.

Working Group VI: security interests

Bruce Whittaker, Australian Government representative to Working Group VI, spoke about the deliberations in relation to secured transactions. This Group was established in 2000 to establish a guide rather than a model law, however there was a change of approach in 2012 and the Group has now reverted to the development of a model law.

Principal Legal Officer from the Australian Financial Services Authority, Michael Piotrowicz, outlined behind-the-scenes work on risk management in respect of the current Personal Property Securities Register, that demonstrated both the strength and reliability of current data collection arrangements.

Dr Sheelagh McCracken, Professor of Finance Law at the University of Sydney and Convenor of the Working Group VI Expert Advisory Committee, outlined a comparative law project on security interests to be undertaken by the Committee. Sheelagh believes that the work of the Committee will prove a useful vehicle for harnessing Australian knowledge and experience in the field of personal property securities.

The Committee's initial focus is a comparative analysis of the Australian *Personal Property Securities Act 2009* (Cth) and the UNCITRAL model law on Secured Transactions adopted by UNCITRAL in July 2016. Both are examples of a legislative approach distinguished by its emphasis on the security function of a property interest rather than its form, and by its complex balancing of competing property interests. As Sheelagh explained, a comparative

examination can offer insights into how specific rules can better operate and hence, more generally, into how rules can be further refined.

Such insights can benefit jurisdictions currently modernising their secured transactions law. They also benefit practitioners in jurisdictions that already have this style of legislation, grappling with common issues.

Sheelagh noted that an important question facing the Expert Advisory Committee is whether in this field of secured transactions there may be a 'natural limit' to convergence of domestic trade laws. She pointed, for example, to differing legislative structures already in place in various jurisdictions, which impact on how the particular domestic legislation is interpreted. She also spoke of how this style of legislation cannot operate in a legal vacuum and must fit within the more general domestic commercial law landscape. This too may colour interpretation of what in some jurisdictions appears to be similar, and indeed in some circumstances, identical rules. In practical terms, this means that parties involved in cross-border transactions remain exposed to significant legal risk if they make assumptions as to the potential scope of a secured transactions law.

International trade law developments

The third and final seminar session included reflections on current international trade law developments.

Patricia Holmes from the Trade and Investment Law Branch in the Department of Foreign Affairs and

Trade spoke about current work concerning investor state disputes and in particular the proposal for a multilateral investment court developed by the European Union that is being considered in Geneva.

In March 2017, Ms Holmes and Professor Anthea Roberts from the Australian National University took part in a Working Group meeting where there had been considerable questioning of the work and operation of investor state dispute arrangements, particularly as there is currently no appeal mechanism.

It seems that some countries are enthusiastic about the proposal for a multilateral court, with a number of other countries raising various queries and questions about the proposal.

It is anticipated that UNCITRAL may take a position on the proposal at its meeting in July, and Australia will be involved in these discussions. Key issues in relation to the establishment of the multilateral court include cost, how any court would be structured, whether the court would be effective, and whether Australian investors would find it useful.

Susan Robertson from the Office of International Law within the Attorney-General's Department reported that international investment law is now a mainstream discipline. There is growing interest in how international investment law relates to the scope of state and regulatory power and in turn the role of foreign investment. Officials have observed that states need to put a great deal into specific free trade agreements. Australia is committed to efficient procedural rules and dispute mechanisms and the need to resolve trivial interlocutory matters

early in hearings. Officials are also aware that concerns have been raised about the impartiality of arbitrators. Australia's involvement in the first Phillip Morris case presented many challenges and means that Australia is now in a key position to shape future arrangements. The fact that the proceedings were both confidential and in private presented advantages and disadvantages, and so it makes sense to ask questions as to whether a completely new structure is needed and to take the opportunity to ponder the effectiveness of particular dispute mechanisms.

Close

Australian lawyers and officials are held in high esteem in international fora and processes within UNICTRAL and the Hague Conference. Model law and convention development has a long lead-time and progress at times seems slow. However, the importance of this policy work for both the rule of law and economic policy development and prosperity throughout the Asia Pacific region should not be underestimated.

Suzanne Howarth

INTERNATIONAL LAWYERS COMMITTEE, ACT LAW SOCIETY



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