United Nations Day Lecture 2017

50 Years of UNCITRAL – What's Next? – Tim D. Castle

COMMENTARY

I am very grateful to have been invited to participate in such a significant commemoration today — the foundation of UNCITRAL now half a century ago. I am also very pleased to be asked to provide some commentary on Tim Castle's excellent overview of the range of critically significant projects and activities undertaken by UNCITRAL.

As has been demonstrated in Tim's paper, UNCITRAL is a United Nations agency which has had a profound input and influence on the development of commercial law, nationally and internationally. Moreover, as an organisation, UNCITRAL has been staggeringly effective, operating as it does with a small secretariat — willingly assisted in its work by national governments, a variety of special non-government organisations and individuals expert and experienced in their fields.

As indicated in Tim's paper, the United Nations and its agencies do not constitute something in the nature of a global legislature. Rather, the influence and success of the United Nations and its agencies flow from extensive discussion, consultation and consensus. Coupled with this approach is the international convention process and the "model law" process. Either model preserves national sovereignty in that for a convention or a model law to be rendered enforceable, it needs the accession or legislation of a local sovereign parliament.

UNCITRAL has generally opted for the "model law" model which, in many respects, provides more flexibility than the international convention model, as it does allow for local variations and tweaks in drafting which might more helpfully bring model law

provisions into synch with the style and substance of local legislation. Of course, it follows that too significant a local variation on model law provisions may, depending upon the variations, detract from the desirable effects of adopting the model law in the first place. However, this tends not to occur, if only because there is little point in second guessing a comprehensive model law which a country has decided to adopt — and if the model law is to be significantly "second guessed", then why adopt it in the first place?

Probably the most significant consideration, particularly having regard to the nature of the subjects of the various UNCITRAL model laws, is that the international commercial utility for a country in adopting an UNCITRAL model law may well be lost with too significant adopting provisions effecting local variations.

For example, Australia adopted the UNCITRAL Model Law on International Commercial Arbitration — both the 1985 version and the version as amended by UNCITRAL in 2006 — in the *International Arbitration Act* 1974 (Cth). Under s 16 of that Act, the Model Law has the force of law in Australia. The Commonwealth legislation contains some clarification provisions and also some additional provisions which it is thought would enhance the operation of the Model Law in Australia — and also go to making Australia a more attractive arbitration venue.

An example in this respect is s 18C of the Act which clarifies Article 18 of the Model Law, with a provision that, for the purposes of this Article "… a party to arbitral proceedings is taken to have been given a full opportunity to present the parties' case if the party is given a reasonable opportunity to present the party's case". This clarification provision is directed to resolving an ongoing debate as to the effect and ambit of Article 18 of the Model Law. Also, s 19 of the Act contains a declaration for the purposes of Article 17I, 34 and 36 of the Model Law — with respect to public policy — that an interim measure or award is in conflict with or is contrary to the public policy of Australia if (a) the making of the interim measure or award was induced or affected by fraud or corruption; or (b) a breach of the rules of natural justice occurred in connection with the making of the interim measure or award. It is actually not clear how helpful this clarification provision is, indeed, a whole seminar could be conducted on the extent of the "public policy" exception to recognition and enforcement of foreign

arbitral awards. In any event, the case law in Australia indicates that the public policy exception arises only where what has or has not occurred offends the deepest notions of fairness and justice in this country.

In relation to the additional provisions provided by the *International Arbitration Act*, it is sufficient to mention, by way of example, the provisions for confidentiality of arbitral proceedings and awards provided for in ss 23B to 23G, provisions which parties to the arbitration agreement may agree to opt out of under s 22(2).

Also, as Tim has discussed in more detail, the various international commercial subject areas in which UNCITRAL has developed a model law have, in that process, had the benefit of the pooling of expert knowledge in the particular field, both on substantive matters and matters of current international practice. UNCITRAL thus provides a forum — and it should be said a forum in which UNCITRAL and the secretariat provides very significant assistance and guidance — where this expertise and experience can, in an atmosphere of constructive discussion and consensus, lead to an instrument accepted internationally which may be legislated country by country, in much the same way as has occurred with the model law on international commercial arbitration.

I was fortunate to have very direct experience of this process, having attended the twice-yearly Working Group II UNCITRAL sessions for over five years where significant revisions and amendments were made to the Model Law on International Commercial Arbitration and where the UNCITRAL Commercial Arbitration Rules of 1976 were significantly revised. My initial impression of the working group process was that it was unduly slow and approaching the first working group session I attended, I naively thought that the agenda for the week — as each working group session is a full five day week — would easily be dealt with in the first day, or at least by lunch time in the second. I soon learnt that we would be struggling to finish the agenda by lunch time on the Friday, and that time would become very pressing towards the end of the week as matters needed to be resolved to provide a detailed report on the week's session which would then be provided to the UNCITRAL Commission itself and which would, in turn, form the basis of discussions and the agenda for the next scheduled session of Working Group II. I did, however, soon see the wisdom of this process.

As UNCITRAL is not a legislature, and nor is the United National General Assembly, unless real consensus is reached in relation to model law provisions, the model law would not be adopted by a significant number of countries and, as a result, its very purpose of providing an international and significantly uniform legislative scheme in the various specialist areas would be lost — hence the whole process would become relatively pointless. Not only did I see the wisdom of consensus from this perspective, but also because it allowed deep and informed discussion of significantly difficult issues with respect to aspects of the model law provisions.

I must say that I miss my UNCITRAL Working Group weeks since I was appointed to the Supreme Court, as not only did I meet leaders in the field internationally, but I also had the privilege and pleasure in listening to discussions and debates on issues which were addressed by these international leaders in the field. I learnt so much from those Working Group weeks. I should add, though, that I also learnt some other things — such as the Latin for paragraph and sub paragraph numbering of United Nations documents — a skill that would be abhorred now by legislative draftspeople in Australia — and the convenient device when all else fails on tackling a significant problem to leave matters to the "applicable law" — whether it be the *lex arbitri* or otherwise. I do not, however, make the latter comment in a disparaging way, because sometimes that really is the only way a matter can be dealt with.

Tim has also usefully outlined a number of facets of the *Convention on Contracts for the International Sale of Goods* on which I would like to make a brief comment. In particular, the exclusion of the operation of the CISG as a matter of course by Australian lawyers is of some concern, both because it may indicate a failure to consider the potential benefits of the CISG as compared to Australian contract law in the particular context, and because it prevents the development within the Australian legal profession of expertise in its operation. It will not always be practical to exclude the CISG, and indeed, it is not always desirable to do so, having regard to the particular needs of various clients. Without knowledge of the operation of the CISG and its potential benefits, Australian law firms, and by extension, Australian business, are at a disadvantage in the international marketplace, as the CISG may almost be akin to a foreign legal system in their eyes. In this way, UNCITRAL's marked success in developing truly international texts, such as the CISG, benefits States where relevant

expertise is developed, but disadvantages those who succumb to the temptation of domesticity and exclude the operation of those texts wherever possible. Importantly, UNCITRAL's maintenance of extensive materials is a significant aid to the development of competence in the various texts.

I think there is little more that I need say with respect to Tim's comprehensive overview of the nature and significance of the work of UNCITRAL. I can only add my strongest endorsement of the work of UNCITRAL and praise for all involved, the national delegates, the NGO observers and others taking part, national committees such as the UNCITRAL National Coordination Committee for Australia and many other individuals who believe in and support UNCITRAL's work providing, for example, project advice and keeping UNCITRAL abreast of domestic legislative and case law developments in relation to its various model laws. All this work is very important on a global scale, as the work of UNCITRAL which frees up and facilitates international trade and commerce contributes significantly to world GDP and provides the means for, among other things, addressing the north-south divide in the world.

Clyde Croft
24 October 2017