Commentary on Tim Castle's paper on UNCITRAL – Ian Govey AM

Tim has prepared a very comprehensive and insightful paper on everything UNCITRAL, in particular its aims, working methods and its work, as well as Australia's participation and the instruments it has adopted.

I thought I could most usefully contribute today by talking briefly about my perspective from having been involved with UNCITRAL as an officer of the Attorney-General's Department (AGD).

Having regard to Tim's relative youth, I thought that my involvement would have long preceded his. So I was surprised to learn that his first exposure to the UN was in 1978. I have been beaten by a year because in 1979 I started work in the International Trade Law Section of AGD – which was responsible for our UNCITRAL membership and consideration of its instruments.

I had 3 subsequent periods of involvement with UNCITRAL:

- From 1984 to 1988 as head of the International Trade Law and IP Branch
- While at the Australian Embassy in Washington DC from 1988 to 1991
- I was pleased to become involved again, albeit from a bit of a distance, when I was Deputy Secretary responsible for the civil law areas of AGD from 2000 to 2010. During this time, I was able to increase our involvement in some of UNCITRAL's activities, especially our participation in the working group dealing with international dispute resolution.

Over the years I attended a few Working Group meetings, both in Vienna and New York, and one annual session in Vienna.

That leads me to the first of the 4 topics I wanted to touch on - which is Australia's involvement in UNCITRAL's work.

The second topic is Australia's membership of UNCITRAL, the third is Australia's adoption of UNCITRAL's instruments and the fourth is UNCITRAL itself as an organisation. Tim has of course dealt in some detail with all of these topics, but hopefully I can supplement what he has said by looking at these matters from a slightly different perspective.

1. Australian involvement

At the risk of sounding like someone yearning for the 'good old days', I do think that it has become harder over the years for AGD to be as actively involved in UNCITRAL's work as it once was. For many years Australia was represented at the annual meetings by the Solicitor-General, accompanied by a Departmental officer. Extensive briefing for the meetings was prepared over several weeks by a small team of Departmental lawyers, relying significantly on external consultations with academics, private lawyers and business. AGD attended many, probably most, of UNCITRAL's Working Group meetings, with the New York meetings often serviced by the Department's officer at the Australian Embassy in Washington DC.

Over subsequent years the Solicitor-General has ceased to be involved and the unit responsible for PIL has become much smaller and has a reduced travel budget. However, the Department continues to be involved to the extent it can, especially in the dispute resolution work.

However, in some respects the most significant Departmental activity in recent years has been in interacting with external bodies that have an interest in UNCITRAL's work.

One of these bodies is ACICA (the Australian Centre for International Commercial Arbitration) a not-for-profit company, which promotes Australia as a venue for international arbitrations and the use of Australian arbitrators to conduct international arbitrations. (I should declare an interest at this point because for several years I have been a director of ACICA and a member of its governing executive.) Over the last 10 years or so, ACICA representatives have attended quite a number of meetings of the Working Group on dispute resolution. The ACICA representatives have been able to bring to bear many years' experience in the conduct of international arbitration. Even if I am not entirely objective given my links with them, I don't think there is any doubt that they have done a great job of representing Australia at these meetings.

The creation and work of UNCAA has also enabled Australia to be much more involved generally with UNCITRAL and its work than would have otherwise been possible. Tim and his UNCCA colleagues have been very active in liaising with the Department, with stakeholders interested in its work, and with UNCITRAL itself.

2. Australian membership

Australia was one of the 29 foundation members of UNCITRAL. Although it was set up in under a resolution of the UN General Assembly in December 1966, its first members did not come on board until 1968.

Since then Australia has been a member for all but 8 or 9 of the possible 49 years. There are now 60 members and our membership is drawn from a group of countries which goes by the strange acronym of WEOG (Western Europe and Others). I am not sure if it is still the case, but Australia was originally part of a sub-group that also included Canada, NZ and Ireland, and that provided one member. It is a reflection of just how active and interested we were as a member country that we managed to persuade the other countries, primarily Canada, not to contest Australia's re-election.

This continued for 21 years, notwithstanding that giving at least Canada a turn would have been the normal way these things work. Canada finally insisted on replacing Australia from 1989, but Australia was back only 6 years later for another stint, that continued until 2001.

Our current period of membership runs from 2004 until 2022. However, non- membership does not impede a country from fully participating in UNCITRAL's work as an observer, because observers can attend and speak at meetings.

Australia's membership of UNCITRAL has been complemented by our involvement with 2 other bodies working in the field – the Hague Conference on Private International Law and UNIDROIT (the International Institute for the Unification of Private Law). It was interesting for me to observe, having attended some meetings of all 3 bodies, just how involved Australia was, given our size and for the most part how much our contribution was valued.

3. Adoption of UNCITRAL instruments

It would be fair to say that, notwithstanding the extent of our involvement in the work of all 3 PIL bodies, our record of implementing their instruments was not great.

Given the extent of the Commonwealth's external affairs power, it was not a problem of legislative power, but rather of political will and priority. Some, but not all of the explanation for this rests with our federal system. Even with the legislative power there has been an understandable reluctance to use Commonwealth powers to legislate in areas which have traditionally been covered by State law. The Vienna sale of goods Convention was a good example of an instrument whose subject-matter was governed almost entirely by State law.

However, in the case of the Vienna Convention, State concerns about Commonwealth intrusion into their areas of activity were overcome by the mechanism for implementation The then AG said to the States that he was willing for State law to implement the Convention, but if the States did not do so within a reasonable timeframe the Commonwealth would enact its own legislation. This approach had the desired impact!

Over the years Australia's record in implementing PIL instruments in the trade law area has improved, although more could be done. As Tim has mentioned, 3 model laws have been implemented:

- the 1985 model law on international commercial arbitration has been incorporated in the International Commercial Arbitration Act 1974

- the 1996 model law on electronic commerce has been implemented into Australian legislation in all jurisdictions (albeit, in a not entirely satisfactory manner, especially given the lack of uniformity in its application)

- the 1997 model law on Cross Border Insolvency has been adopted in the Cross-Border Insolvency Act 2008.

And of course, Australia has signed (on 18 July 2017) the 2014 Mauritius Convention which is designed to achieve greater transparency in the handling of disputes arising out of treaties concluded after 1 April 2014. AGD is hoping that the legislation to implement this convention will be enacted in 2018.

4. UNCITRAL as an organisation

I think on any score UNCITRL can be regarded as highly successful, even though in some areas the level of implementation of its instruments could be greater.

With 88 parties (Cameroon being the most recent) the Vienna Sales Convention is no doubt UNCITRAL's greatest success. Its work on international dispute resolution has also been acclaimed with its arbitration rules and conciliation rules widely used. Many countries have adopted the model arbitration law and the signs are good for the adoption of the Mauritius Convention.

Reaching consensus on the text of any instrument is almost always incredibly hard, given the different national laws that provide a starting point and given the inevitable

personalities of the key negotiators. Persuading responsible Ministers and legislators to implement the text of an instrument adopted by a UN body brings its own challenges, notwithstanding the very real advantages of uniformity in the field of international trade law. The advantages are all the greater for a country like Australia that relies greatly on international trade.

Some of UNCITRAL's most important work has been in assisting countries with a less sophisticated legal system to modernise their laws and adopt UNCITRAL instruments. This not only helps the countries themselves to have a legislative infrastructure that supports international commerce, it assists their trading partners because of the framework it provides for overseas parties including Australians doing business in those countries.

The UNCITRAL secretariat has done an excellent job over the years. It is quite small by UN standards, comprises expert lawyers and has managed to avoid much of the international politics that has been a feature of some other UN agencies. The level of cooperation and coordination with other PIL bodies operating in the field (primarily, the Hague Conference on PIL and UNIDROIT) has been especially commendable and this has avoided duplication in their work.

Interestingly, former AGD lawyers have worked in the Secretariats of all 3 bodies for quite a few years.

UNCITRAL's work in our region has been greatly assisted with the setting up of an UNCITRAL regional centre in South Korea in January 2012. I understand that UNCCA has been able to liaise closely with this Centre. It is a sign of the Centre's success that an announcement was made in July at the 50th annual meeting in New York that a second centre is to be set up in Cameroon so that the work of promoting UNCITRAL's work in Africa can be enhanced.

Conclusion

Over the last 50 years UNCITRAL has done a great job in delivering on its mandate to work toward the harmonisation of international trade law, especially in relation to countries with less developed legal systems. It is very much in Australia's interest that this work continue and that Australia is actively involved in it. It is especially important to ensure that our participation is informed by the knowledge and experience of those working in the areas of law that UNCITRAL is working in.

In this context I would like to acknowledge the great work Tim did in setting up UNCCA and as its inaugural chair. As I have already said, UNCCA has played a critical role in promoting UNCITRAL's work in Australia and in increasing our participation in their meetings.

I am not being critical of AGD, but it is fair to say that the balance of Australia's involvement with UNCITRAL has shifted over recent years to the private sector and this has made UNCCA's work even more important

Holding this event is a further contribution promoting UNCITRAL and I certainly join Tim in hoping that it can be an annual event.

UNCCA's success justifies all the hard work that Tim and his colleagues have put into it and I wish it continued success for the future.