

**Australia's Role in UNCITRAL, specifically its implementation of
UNCITRAL conventions and model laws**

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Supreme Court of Queensland***

I have been asked to talk about Australia's role in UNCITRAL, specifically its implementation of UNCITRAL conventions and model laws. Because of my own particular perspective as a judge and the limitations of time, I propose to concentrate mainly on the implementation of the conventions and model laws in the courts, but let me commence by saying something about Australia's role in this core legal body of the United Nations in the field of international trade law.

Australia's role in UNCITRAL

Australia has been elected as a member of UNCITRAL for most of the last 48 years with the exception of the periods between 1989 and 1995 and 2001 and 2004. Our membership was due to expire this year but in November last year we were re-elected to serve another term from June this year until 2022. There are 60 members of the organisation determined according to geographical regions with members elected for terms of six years by the General Assembly. There is a regional centre for Asia and the Pacific and an UNCITRAL National Coordination Committee for Australia ("UNCCA") about which you have just heard from Mr Tim Castle. The international law section of the Law Council of Australia has tried to keep Australian lawyers aware of its activities by hosting an international trade law symposium over one and a half days, each year in Canberra.

As the next speaker, Ms Clift, can tell you more authoritatively than I, as I am now referring to a paper on UNCITRAL and Australia prepared by her in 2014, we have been a constructive member from the very beginning of UNCITRAL and have often been able to play a catalytic or strategic role in international negotiations by virtue of our status as a small

* I thank my Associate, Ms Camille Boileau, for her research assistance in preparing this speech.

but highly developed country. That was certainly the view of Mr Pat Brazil in 1988 set out in Ms Clift's paper.

Others have referred to our "honest broker" image and common sense, pragmatic approach to negotiations as well as the sense of humour of the personalities who have represented us. Professor Sono, a former secretary of UNCITRAL, saw Australia as being uniquely placed as a common law country developing close ties with Asia and in the Asian region to contribute to the development of a new private international law.

Ms Clift also said in her paper, however, that sometime around the mid to late 2000s our participation tapered off in a number of working groups or became somewhat sporadic apart from the working group devoted to arbitration that seems to have attracted regular participation. She said that our involvement with cross-border insolvency, which had been significant at an early stage, ceased around December 2010. I shall have something more to say about that in due course in my role as a member of the Harmonisation of Rules Committee operating nationally amongst all the State Supreme Courts, the Territory Supreme Courts and the Federal Court.

She also points to the adoption of several key UNCITRAL texts as placing us in a good position to promote them because of our expertise with enactment and experience with use of them. We are also already engaged in projects in the regions through APEC and international and regional development banks where UNCITRAL texts might be relevant. She says that the best way to shape outcomes is by active participation in working group meetings where we act as "Australia" as an entity and member state. In that context, many governments send non-government officials as their delegates. She says it has been noted that Australia has been "missing in action" in recent years but I leave it to you and her to express your own views on that issue. It is something that falls outside my experience.

The conventions and model laws adopted by Australia

Let me turn then to the conventions and model laws that we have adopted.

The conventions we have ratified are those on the recognition and enforcement of foreign arbitral awards of 1958 (the New York Convention) and the United Nations Convention on Contracts for the International Sale of Goods of 1980 (the "CISG" or Vienna Convention).

We have also enacted domestic legislation based on the UNCITRAL model laws on international commercial arbitration of 1985 including the 2006 amendments, the model law on electronic commerce and the model law on cross-border insolvency.

We reported to the 49th session of UNCITRAL this year that there has been progress towards accession to the convention on transparency in treaty based investor-state arbitration and the convention on the use of electronic communications in international contracts. That is consistent with a speech given by Senator Brandis, the Commonwealth Attorney-General, in 2015 which appears to have proceeded on the basis that Australia was likely to ratify and accede to those conventions.

New York Convention

The convention on the recognition and enforcement of foreign arbitral awards does not seem likely to be one where there would be any reluctance to use it once implemented. There are sometimes difficulties in the enforcement of foreign awards, however, exemplified by the controversial decision of this Court in *Australian Granites Limited v Eisenwerk Hensel Bayreuth DIPL.-ING Burkhardt GmbH*¹ that, where disputers agreed to arbitration in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce, the model law scheduled to the *International Arbitration Act 1974* (Cth) did not apply. That decision has since been doubted in this Court in *Wagners Nouvelle Caledonie Sarl v Vale Inco Nouvelle Caledonie SAS*² and not followed in New South Wales by Ward J in *Cargill International SA v Peabody Australia Mining Ltd.*³ The 2010 amendments to the Act, by repealing s 21, have also made it clear that when parties choose arbitral rules they are not automatically opting-out of the operation of the Model Law.

CISG

Let me return to the CISG or Vienna Convention and speak about the practical implementation of it in these jurisdictions. It was adopted by the States and the Commonwealth by legislation passed in 1986 and 1987 that came into force on 1 April 1989. It has been described as “the uniform law convention with the greatest influence on the law of worldwide transport of commerce” and is now developing a critical mass of interpretative

¹ [2001] 1 Qd R 461.

² [2010] QCA 219.

³ (2010) 78 NSWLR 533.

jurisprudence that is readily available through resources on the web at UNCITRAL and Pace University, New York. Most of our major trading partners are contracting states with the notable exception of the United Kingdom.

It is used frequently in legal practice in continental Europe but less so on a day to day level in most Anglophone countries such as the United States, Canada, New Zealand and Australia at least so far as one can tell from the jurisprudence dealing with it. Many recent students interested in this area would be aware of it, particularly through the Willem C Vis International Moots, but, in spite of its potential application to a large number of contracts involving Australian companies engaging in international trade, there is little local jurisprudence dealing with it. At an earlier stage, by 2002, many lawyers appeared to have still been ignorant of it as was exemplified in the litigation in *Downs Investments Pty Ltd v Perwaja Steel*⁴ in this court where one of the parties was not aware that the appropriate statute was not the Queensland *Sale of Goods Act* but the *Sale of Goods (Vienna Convention) Act* until submissions in the case began.

From my inquiries, also, the lack of significant judicial or arbitral activity in Australia dealing with disputes under the convention may reflect a more general tendency to exclude its operation in the drafting of contracts for the international sale of goods. I am told that may be more common among the larger firms of solicitors.

One argument I have discussed previously is that the convention is particularly unsuited to CIF contracts for the sale of commodities and the need for speedy, certain remedies for buyers under such contracts.⁵

These perceived problems with the enforcement of remedies for breach of contract may have inhibited use of the convention locally. Nonetheless it may be more useful for some types of contracts than other legal regimes and solicitors drafting agreements should bear that in mind for fear of not providing the best service they can to their clients. Professor Luke Nottage,

⁴ [2002] 2 Qd R 462.

⁵ Justice J S Douglas, 'Arbitration of International Sale of Goods Disputes Under the Vienna Convention' Paper delivered at the Institute of Arbitrators and Mediators Australia National Conference 2006, Palm Cove, 27 May 2006; <http://jvl.sclqld.org.au/judicial-papers/judicial-profiles/profiles/jsdouglas/papers/1>.

for example, has criticised the approach of opting out of the convention as seeming to involve more of a gut reaction to its unfamiliarity rather than to the manner in which it may be used.⁶

Dr Lisa Spagnolo also said in an article published in 2009 that:

“[t]o date, only 12 Australian cases mention the CISG. The CISG was applicable law in only eight of those cases. Although other reasons have been suggested, the lack of CISG cases in Australia almost certainly reflects the prevalent practice in Australia of avoiding the CISG at the drafting stage by opting out within choice of law clauses, as indicated by anecdotal evidence. Australian lawyers are not alone. Similar opt out cultures exist elsewhere. Although empirical evidence varies, there is sufficient evidence to support a conclusion that opting out is prevalent in the US, probably less common but still frequent in Germanic nations, and less common again in China”.⁷

She went on to say:

“ ... lack of coverage in compulsory law school courses is compounded by a paucity of cases and a split of work between litigation and front-end (drafting) divisions within law firms, which ensures that most Australian lawyers have never once dealt with the CISG, unlike, by way of contrast, the vast majority of Germanic and Chinese lawyers. This makes two things likely: that unfamiliarity with the CISG explains much of the opt out culture in Australia; and that opt out rates in Australia are probably equal to, or higher than, in the US, a conclusion which accords with anecdotal evidence of Australian practice.”⁸

One can conclude, therefore, that, although the CISG has been implemented in Australia, it is not yet used nearly as frequently as it could be.

International Commercial Arbitration

⁶ L Nottage, Who’s Afraid of the Vienna Sales Convention (CISG)? A New Zealander’s view from Australia and Japan [2005] 36 VUWL Rev 815, 836-837.

⁷ L Spagnolo, The Last Outpost: Automatic CISG Opt Outs, Misapplications and the Costs of Ignoring the Vienna Sales Convention For Australian Lawyers (2009) 10(1) Melbourne Journal of International Law 141, 159-160.

⁸ L Spagnolo, The Last Outpost: Automatic CISG Opt Outs, Misapplications and the Costs of Ignoring the Vienna Sales Convention For Australian Lawyers (2009) 10(1) Melbourne Journal of International Law 141, 163.

The implementation of the model law on international commercial arbitration has attracted more local enthusiasm, particularly amongst those who wish to see Australia as a centre for international commercial arbitration.

One of the main bodies involved in that aspirational goal is the Australian Centre for International Commercial Arbitration. It has a Judges' Advisory Committee with members from the State Supreme Courts and the Federal Court. I am this court's representative. I am also this court's representative on the Harmonisation of Rules Committee which has been active in proposing amended rules of court to harmonise the treatment of international arbitrations around the country. They have been adopted by the Council of Chief Justices but have not yet been implemented in all of our jurisdictions.

ACICA is active in promoting Australia as a site for international arbitration. That result was advanced by the recent decision of the High Court in *TCL Air Conditioner (Zhongshan) Co Ltd v The Judges of the Federal Court of Australia*⁹ which decided that the model law regime was constitutional and consistent with the proper exercise of judicial power because the making of an arbitral award in a private arbitration did not involve an exercise of judicial power. Nor was the inability of the Federal Court to refuse to enforce an arbitral award on the ground of error of law repugnant to or incompatible with its institutional integrity.

That having been said, however, the numbers of international arbitrations conducted in Australia are significantly fewer than is the case in other local seats of arbitration such as Singapore and Hong Kong let alone when compared to seats such as London, New York, Geneva, Shanghai and Paris where the International Chamber of Commerce conducts many arbitrations under the CISG. Although the *TCL* decision has been praised as demonstrating that Australia is an arbitration friendly jurisdiction, Professor Nottage, again, has said that the saga associated with it would probably continue to cast a pall over Australia's attractiveness as an international arbitration venue, noting that there are few cases where Australia is the agreed seat for an international arbitration and that most judgments here involve enforcement of foreign awards or stays of proceedings in favour of foreign seats at arbitrations.¹⁰

⁹ (2013) 251 CLR 533.

¹⁰ L Nottage, *International Commercial Arbitration in Australia: What's New and What's Next?* (2013) 30 *Journal of International Arbitration* 465, 471.

A number of judges, including Chief Justice French, Chief Justice Allsop, Justice Keane and Justice Croft have, however, adopted a positive view of the Australian judiciary's changing attitude to international arbitration. The decisions are now shifting to the position of upholding agreements to arbitrate where possible, reflecting the amendments to the *International Arbitration Act* in 2010 implementing the 2006 amendments to the model law.¹¹

It will be necessary to withhold judgment on the effectiveness of the implementation of this model law in Australia as these changes work through the system. There are also reasonable arguments for further amendments to be made to the Act. Professor Nottage again, for example, argues that there is “no evidence yet of a broader ‘cultural reform’ that would make international arbitration speedier and more cost-effective” here and suggests a range of further topics for revision of the Act.¹²

Electronic commerce

The next model law I wish to focus on is that dealing with electronic commerce. It has been given effect in the *Electronic Transactions Act 1999 (Cth)* with each State and Territory enacting similar legislation. It deals with the formation of contracts by electronic means, the governance of performance of such contracts, the characteristics of valid electronic documents and the recognition of electronic signatures for legal information purposes and of computer generated evidence. It allows electronic commerce to fit into the same legal framework as paper based transactions and aims to put them on the same legal footing. The guiding principles of the model law and of the implementation legislation are to create functional equivalence between paper and e-commerce based systems and technological neutrality.

We have not given effect to the more recent 2001 UNCITRAL model law on electronic signatures which I gather is more sophisticated than the 1996 version, but not inconsistent with it. Some argue that we may stand to gain from enacting that model law as well as the

¹¹ See also, before the amendments, *Comandante Marine Corp v Pan Australia Shipping Pty Ltd* (2006) 157 FCR 45.

¹² Op cit, at pp 485-493. See also Diana Hu and Luke Nottage, “The International Arbitration Act Matters in Australia: Where to Litigate and Why (Not)” Sydney Law School Legal Studies Research Paper No 16/94 (November 2016).

one we have implemented while others assert the contrary. There seems to be little problem at the judicial level about the implementation of the model law we have enacted.¹³

Cross-border insolvency

That leaves the third model law we have adopted, that on cross-border insolvency.¹⁴

It seeks to create a modern and harmonised framework to address cross-border insolvency where an insolvent debtor has assets and/or creditors in more than one country. It does not contain substantive laws but rather offers a framework for administering cross-border insolvencies. It has been adopted through the *Cross-Border Insolvency Act 2008* (Cth) with some modifications. It does not require reciprocal adoption by any other State and applies regardless of whether the entity seeking relief resides in a State that has not adopted the model law. That omission of a reciprocal requirement has proved controversial and may explain why relatively few States have given effect to it.

The model law has a public policy exception which permits a court to refuse to take action if this would be “manifestly contrary to the public policy” of the State. There is some concern that this public policy discretion may be applied inconsistently across jurisdictions.

The Honourable J J Spigelman has also pointed out that a significant limitation of the model law is that it only applies to individual corporations rather than corporate groups.¹⁵ Other jurisdictions such as Canada, Great Britain and the United States have made more significant modifications to it in their domestic implementation than we have, which may assist us to benefit more directly from international jurisprudence arising from it.

Our scheme has been described as complex and confusing with cases potentially falling through gaps in the law. The key problem appears to be that the Act overlaps with the provisions of the *Corporations Act 2001* (Cth) leading to complexity, the potential for confusion and extra costs.¹⁶

¹³ See, eg, *Stellard Pty Ltd v North Queensland Fuel Pty Ltd* [2015] QSC 119 at [56]-[69].

¹⁴ There is a useful discussion of the application of the *Cross-Border Insolvency Act 2008* (Cth) in *Akers v Deputy Commissioner of Taxation* (2014) 100 ACSR 287, 293-301 at [27]-[70] by Allsop CJ for the Full Court of the Federal Court.

¹⁵ J Spigelman, *Cross-Border Insolvency: Cooperation or Conflict?* 83(1) *Australian Law Journal* 44, 46.

¹⁶ Gerard McCormack and Anil Hargovan, *Australia and the International Insolvency Paradigm*, (2015) 37 *Syd LR* 389.

The Harmonisation of Rules Committee has considered harmonised cross-border insolvency rules and the issuing of a practice note with the assistance of, among others, Professor Rosalind Mason from the Queensland University Law School, from whom you will also hear later in this conference. That project is still the subject of consideration by the committee and will then need to be considered by the Council of Chief Justices before implementation.

Inconsistency of judicial decisions interpreting UNCITRAL instruments

Let me conclude by briefly considering one of the problems associated with the implementation of conventions and model laws of this type designed to operate consistently internationally. The problem I wish to address is that which arises where courts interpret the provisions inconsistently in different jurisdictions.

There are criticisms, for example, of most of the Australian decisions made under the CISG, that they are inconsistent with international decisions. Dr Spagnolo's article to which I have already referred discusses them in some detail. She analyses a number of cases up until 2009. She is critical of a number of these, often on the basis that Australian courts were failing to apply the CISG as an autonomous body of law and rather were resorting to domestic common law principles. A good example is the decision of our Court in *Downs Investments Pty Ltd v Perwaja Steel Sdn Bhd*¹⁷ to which I referred earlier. In analysing both the first instance and appellate decisions in detail she generally favours the trial judge's views over those of the Court of Appeal, pointing out how the former has been referred to much more frequently in other jurisdictions and the latter criticised. She says:

“The quality of the trial decision was undermined by domestic terms such as 'acceptance of repudiation', reference to a domestic definition of repudiation, and two passing references to non-CISG cases. CISG formation provisions were not mentioned, despite extensive discussion of the facts of formation and modification. While far from ideal, the trial decision did encouragingly manage a reference to one US CISG case and one CISG text. At the international level, the trial decision was discussed widely, generally as a step in the right direction on certain points, and is still cited today, particularly regarding awards for additional costs associated with substitute transactions under art 75.

Unfortunately, the appeal decision was far more disappointing.

¹⁷ [2002] 2 Qd R 462.

...

[W]ithout reference to relevant authority, the Court decided there was no material difference 'between art 25 and the common law', and that the CISG 'adopts, at least to some extent, the common law concept of repudiation'. Such statements are not only incorrect, but are, at best, dangerous examples of viewing the CISG through 'domestic lenses'.

Unperturbed, the Court embarked upon the slippery slope of 'domestication', all the while chipping away at the uniformity of a law intended to be applied in the same way around the world. Despite efforts of CISG drafters to avoid such terms, it described the seller's entitlement to 'rescind', and cited two non-CISG (and therefore irrelevant) UK cases in support. The term 'avoidance' would have been more appropriate. As discussed above, art 64 allows the seller to avoid the contract when there is either a fundamental breach, or the buyer fails to pay the price or take delivery within an additional period set by the seller under art 63(1). The Court considered the latter basis satisfied, but determined a fundamental breach had already arisen in any event, due to the failure to open a letter of credit. While the relevant provisions were considered, CISG cases and commentary on this very issue were ignored.

Again, without reference to relevant authority, the Court concluded the 'only possible difference between the [Sale of Goods] Act and [the CISG] for present purposes is with respect to the calculation of damages'. Rather than seek guidance on those differences, it instead simply equated the right to consequential damages in art 74 with the common law test in *Hadley v Baxendale*.¹⁸

The criticism continues at some length by reference to CISG decisions and principles not referred to the Court, concluding:

"In summary, *Downs* itself is an excellent example of 'legal ethnocentricity'. It is interesting that the appeal decision, unlike the trial decision, was met almost unanimously with a diplomatic, or perhaps, stunned silence from international CISG academics."¹⁹

We should not despair too much, however, as, across many jurisdictions internationally, the same phenomenon occurs. I was told recently, for example, that the French judges regularly

¹⁸ L Spagnolo, *The Last Outpost: Automatic CISG Opt Outs, Misapplications and the Costs of Ignoring the Vienna Sales Convention For Australian Lawyers* (2009) 10(1) *Melbourne Journal of International Law* 141, 176-178.

¹⁹ L Spagnolo, *The Last Outpost: Automatic CISG Opt Outs, Misapplications and the Costs of Ignoring the Vienna Sales Convention For Australian Lawyers* (2009) 10(1) *Melbourne Journal of International Law* 141, 184.

disagree with the Germans on CISG principles, which may be unsurprising, but it does give rise to significant problems in implementation of these conventions and model laws consistently.

When I say “recently”, I am referring to my attendance at a congress of the International Academy of Comparative Law in Montevideo, Uruguay, where the Secretary-General of Unidroit, José Angelo Estrella Faria, addressed this topic. He believed that a possible solution to the problem would be for senior judges in a significant number of international jurisdictions to confer about the controversial areas of interpretation of these uniform laws. He suggested they could issue guidelines about how the problem areas should be addressed. It seems to me that such an approach would fall foul, in our jurisdiction at any event, of the strictures against the provision of advisory opinions. Nor would they be regarded as appropriate here where judicial independence is valued so highly.

There is already a CISG Advisory Council which describes itself in these terms:²⁰

“The CISG-AC is a private initiative which aims at promoting a uniform interpretation of the CISG. It is a private initiative in the sense that its members do not represent countries or legal cultures, but they are scholars who look beyond the cooking pot for ideas and for a more profound understanding of issues relating to the [Convention]...

...

In practical terms, the primary purpose of the CISG-AC is to issue opinions relating to the interpretation and application of the Convention on request or on its own initiative. Requests may be submitted to the CISG-AC, in particular, by international organizations, professional associations and adjudication bodies.”

I gather that its opinions are often relied on in European jurisdictions but less so in other countries.

It occurred to me that another approach that may be of use would be to set up a regime such as operates under s 78B of the *Judiciary Act* 1903 (Cth) in matters arising under the *Constitution* or involving its interpretation, requiring notice to be given to the Attorneys-General of the Commonwealth and of the States to give them a chance to intervene.

²⁰ See <http://cisgac.com/>

Where much of the expertise relating to the negotiation and understanding of these conventions may reside, for example, in the Office of International Law section of the Commonwealth Attorney-General's Department or among the members of UNCCA, it may be useful to create a similar obligation to notify at least the Commonwealth Attorney-General to permit discretionary intervention either by the Attorney-General or, perhaps, by UNCCA in a significant case arising under one of these international conventions to put submissions as an *amicus curiae* in an effort to maintain consistency not only within Australia but also between Australia and other jurisdictions in respect of the proper interpretation of the conventions and model laws.

Such an approach may help avoid the problem described by Dr Spagnolo in these terms:

“A pattern has emerged. Australian lawyers not only avoid the CISG in drafting, but when, against the odds, the CISG does govern a contract, counsel prefer to avoid it. However, ignorance is far from bliss. Counsel's approach almost invariably misleads the bench in one of two ways: the court is either lulled into application of the wrong law, or fails to grasp the CISG's preemptive quality and the need to interpret the CISG autonomously and internationally. As the rest of the world removes or at least peers over their 'domestic lenses' Australia risks becoming an increasingly isolated island of CISG ignorance. ... Written comments on the poor quality of Australian decisions are few. The parlous state of our decisions has seen very few of them drawn into CISG jurisprudence as sources cited by other courts, a sure sign of the regard in which they are held. The situation is one commonly discussed informally at conferences, especially when Australians are in attendance.”²¹

When I floated the possibility of such an interventionist regime by the Attorney-General past the Secretary-General of Unidroit he told me it would not work in his native jurisdiction of Brazil because the Ministry of Justice would run a mile from adopting such an advisory role even merely as an *amicus curiae*. It is an acknowledged problem, however, and not one limited to our jurisdiction.

Another approach may be to encourage the matters to be heard by specialist judges with an interest in the area such as I gather occurs in some jurisdictions. It will not always be

²¹ L Spagnolo, The Last Outpost: Automatic CISG Opt Outs, Misapplications and the Costs of Ignoring the Vienna Sales Convention For Australian Lawyers (2009) 10(1) Melbourne Journal of International Law 141, 212.

possible to make such arrangements with the demands that are placed on courts to manage their normal work.

It is worth addressing possible solutions to the problem from within UNCITRAL itself as well as at the local jurisdictional level to try to ensure that the admirable goal of these conventions of advancing international trade do not fall foul of individual jurisdictional variations.