Australian Government

Attorney-General's Department

Civil Law Division

Keynote Address by David Fredericks for UNCITRAL Australia Seminar
29 May 2015, 4 National Circuit

Outlook for Harmonisation of Commercial Laws in the Emerging Global and Regional Environment

I would like to start by acknowledging the Ngunnawal people who are the traditional custodians of the land on which we meet and pay my respects to their elders, past and present.

I am very excited to be here this morning, and for the department to be co-hosting this inaugural UNCITRAL Australia symposium. I'm sure the Program will facilitate some excellent discussion.

I too would like to welcome Chief Justice Allsop, Justice Gleeson and Justice Perram of the Federal Court of Australia; the UNCITRAL Coordination Committee for Australia; Joao Ribeiro from the UNCITRAL Regional Centre for Asia and the Pacific; Ms Roselyn Gwaibo from the PNG Department of Justice and the Attorney-General; and, representatives from other government departments, the private sector and academia.

I am very pleased to be given this opportunity to address you, and to provide my perspective on the benefits of harmonising international commercial law and its importance not only for the status of our legal system but also our economic performance in the Asia Pacific region.

As the global and regional environment for commercial transactions becomes increasingly interconnected, the concept of borders defining the nation state loses its significance as a barrier to the movement of goods, services, capital and people. It makes sense, then, that our legal infrastructure should be harmonised to facilitate ease of transacting in a global economy that is otherwise increasingly integrated.

Modern information technologies - especially the internet, sophisticated global transport networks and world-wide banking systems - have all contributed to the need for legal infrastructure that responds rapidly, and in unison. The need for legal systems to accommodate cross-border commercial activities is an opportunity to expand markets, to attract new business and skills and to boost economic growth.

All of this is facilitated by the targeted work done by UNCITRAL's 6 working groups in developing and harmonising international trade law. For this reason, Australia has recognised UNCITRAL as an important stakeholder for many years, and we greatly value the work being done internationally and also in the Asia Pacific Region.

UNCITRAL's work finds expression in a number of areas of concern for the Government, from international arbitration, to insolvency, electronic commerce and personal property securities.

The establishment of the Regional Centre for Asia and the Pacific in South Korea also signalled a new and welcome focus on bringing the entire Asia-Pacific region into the global economy, by encouraging the harmonisation of commercial laws. Initiatives that facilitate economic growth, freer markets and enhance stability in our region benefit the Australian economy and our security.

Today I'll be focusing on three key benefits of harmonisation in international commercial law:

- Global competitiveness of Australia's legal services markets;

- Greater accessibility of global markets; and,
- Development of neighbouring markets.

Global competitiveness of Australia's legal services market

In 2013, the Attorney-General's Department conducted a study into why some jurisdictions experience better outcomes when trying to attract investment and interest in their legal services sector[1]. In particular, we wanted to understand how some jurisdictions, like Singapore and Hong Kong, have established themselves as preferred jurisdictions for cross-border transactions and dispute resolution.

In recent years, Singapore and Hong Kong have joined traditionally successful legal services markets like New York and London as being attractive commercial dispute resolution destinations.

The study aimed to identify the characteristics that make a jurisdiction an attractive commercial destination, and to identify possible characteristics common to all of the aforementioned jurisdictions.

Using some detailed statistical analysis and surveys, the Department found that these jurisdictions feature a particularly well developed substantive commercial law that is characterised by clear rules and principles which reflect prevailing international commercial standards and usages.

The rules and principles espoused in these jurisdictions enshrine a commitment to contractual freedom and party autonomy – administrative interference in these jurisdictions is minimal. The presence in these jurisdictions of internationally recognised and renowned legal institutions ensures a constant drive towards optimising these jurisdictions' commercial law regimes.

We also found that the reviewed jurisdictions have a consistent and rounded approach to the drafting and design of laws governing international commercial transactions. Private international law rules and principles are an essential element of this approach. UNCITRAL plays a key role in facilitating the ease, uniformity and familiarity of these legal systems by providing model laws and treaties that shape legal infrastructure in efficient, practical and user-friendly directions.

For business and individuals alike, a harmonised commercial law provides answers to important questions such as which court can exercise jurisdiction over a dispute or which law will apply. Knowledge of, as well as clarity and certainty around, the rules in this area can therefore enable parties to adequately assess the legal risks involved in particular cross-border transactions or relationships. A well-developed private international law regime improves:

- market competitiveness, with flow-on effects for consumers;
- the predictability in the outcomes of disputes;
- transactional effectiveness, efficiency and accuracy; and,
- the resolution of cross-border disputes.

It also reduces:

- cross-border transactions and litigation risks;
- regulatory distortions in international trade and commerce; and,
- the risks associated with enforcing awards or judgments, including prohibitive costs associated with the vindication of rights.

A relevant example is the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958* (known as the New York Convention) which, by ensuring the enforceability of foreign arbitral awards, began a shift in attitudes towards alternative dispute resolution in commercial transactions. The Convention, developed by UNCITRAL's Arbitration and Conciliation working group, opened up an opportunity for early movers to establish themselves as preferred service providers for this alternative mechanism.

The Convention has been adopted by 155 States Parties, including - amongst the usual players like the US and UK - Bangladesh, the Democratic Republic of Congo, Kyrgyzstan, Lichtenstein, Uganda and

[1] R Wilkins AO and T John, "Australian Private International Law: Facing Outwards," in A Dickinson, M Keyes and T John, *Australian Private International Law for the 21st Century* , 2014 at p5.

Uzbekistan. Clearly, the New York Convention is one of the most widely adopted and most successful international instruments to come out of the UN. We'll have more discussion on arbitration later, but I wanted to highlight the strategic importance of the Convention in making Singapore and Hong Kong 'hubs' of arbitration in the Asia-Pacific region.

The Singaporean Government was able to capitalise on the new dispute resolution landscape and build an arbitration "hub" in the Asia-Pacific region by taking a three-pronged approach. The Government established the Singapore International Arbitration Centre in July 1991, followed by the enactment of the *International Arbitration Act* in 1994, incorporating the UNCITRAL Model law on Commercial Arbitration. The third part of the Singaporean approach involved a conscious effort by the Singaporean government to promote the use of arbitration to resolve domestic and international disputes, and by incorporating arbitration clauses into some of its own international, regional and bilateral agreements and contracts.

Clearly there are lessons in Singapore's lead-by-example approach and the Government's ready incorporation of UNCITRAL's model instruments for our Government as we look to support and develop the international competitiveness of our legal service providers.

Over the past decade Australia has been progressively reforming its international arbitration system, to ensure Australia has an attractive regulatory regime for international business. The Government is particularly committed to ensure that Australia is seen as a regional economy that is 'open for business'. The Government has been very supportive of plans to establish Sydney and Melbourne as centres for international commercial arbitration, and continues to provide the infrastructure for State Governments to implement this initiative.

In 2010, the Federal Government introduced reforms to the *International Arbitration Act 1974*, which is based on the UNCITRAL Model Law and implements Australia's obligations under the 1958 New York Convention. These reforms ensured that Australia has a comprehensive and clear framework governing both domestic and international arbitration seamlessly.

That legislation provided a solid foundation upon which the NSW Government launched the Australian International Disputes Centre in 2010, which provides a premier one stop international ADR service and dispute resolution facility in Sydney. A similarly equipped centre was launched by the Victorian Government in Melbourne in March 2014.

The Government continues to monitor the operation of the Act to ensure that international arbitration conducted in Australia is consistent with international best practice. The Government is currently considering legislative amendments to streamline provisions for the enforcement of foreign arbitral awards.

Accessibility of global markets

Harmonisation also makes doing business much easier for our Australian traders looking to break into overseas markets. In markets that now simultaneously exist online all over the world, transaction costs are high for entrepreneurs looking to monitor and comply with all of the different regulatory regimes they may come into contact with.

Harmonisation reduces the costs of negotiation involved in international transactions and can also potentially eliminate questions of jurisdiction and the law of the contract, which can otherwise create significant barriers to trade for small businesses. Further, if everyone has the same rules and standards, there is less scope for policy choices that are made on illegitimate grounds, or that rely on a high degree of discretion.

UNCITRAL's continuing work on the regulatory regimes surrounding the international sale of goods, most importantly manifesting in the UN Convention on Contracts for the International Sale of Goods, otherwise known as the Vienna Convention, which has been some of its most influential work to date. The Vienna Convention is one of the most broadly adopted of all UNCITRAL's texts, having 83 States Parties including Australia, and it contributes significantly to introducing certainty in commercial exchanges and decreasing transaction costs.

Having commercial laws that are consistent with countries like the US and China also invites foreign businesses into our market – creating diversity in the supply of goods and services and healthy competition for our domestic businesses. Competition leads to innovation, growth and increased choice, all positive outcomes for the Australian consumer. Without the harmonising principles contained in instruments like the Vienna Convention, building these efficiencies into our economy would be much more difficult.

Development of neighbouring economies

Finally, UNCITRAL's work has a truly global reach, having 60 elected member states representing Africa, Asia, Eastern Europe, Latin America, the Caribbean, Western Europe and the Pacific region. This is especially significant because it is expressly within UNCITRAL's mandate to take into account the "interests of all peoples, and particularly those of the developing countries, in the extensive development of international trade."[2]

For this reason, it is important that UNCITRAL's goal of the harmonisation of commercial law is distinct from the unification of laws. Whilst unification can be described as reducing all discrepancies between the national legal systems of nations with a zero margin for differences, harmonisation allows nations to adapt model laws and conventions to their domestic needs. Harmonisation is the process of reducing, so far as desirable and possible, the discrepancies between the national legal systems by encouraging states to adopt common principles of law.

This distinction is especially significant for developing countries, where differences in their levels of economic, social and legal infrastructure may necessitate slight deviations from the prescribed model laws or conventions that UNCITRAL produces.

By taking a flexible approach, UNCITRAL is inclusive and encourages more developing countries to enter the fold. It is politically important that states at all levels of economic development are well represented in this process of formulating rules governing international trade.

UNCITRAL's longstanding commitment to provide technical assistance to developing countries is a crucial part of this imperative, and ensures that Conventions and model laws are not only implemented, but interpreted correctly. UNCITRAL's technical assistance program also provides opportunities for technical experts and practitioners from all over the world to sharpen their skills in new and practical environments.

The benefits for Australia in the harmonisation assistance that UNCITRAL provides to developing countries are clear. Developing countries are the future for international trade – providing new markets for Australian business, and new foreign investments in Australia. It is in our interests that UNCITRAL simplifies the legal disparities that exist between Australian commercial law and that of the developing world, so that the path to these new opportunities is smoother for all of us.

Concluding remarks

UNCITRAL makes an undeniably important contribution to international commercial transactions by working to modernise and harmonise commercial law.

We're fortunate to have the UNCITRAL National Coordination Committee for Australia to advocate for UNCITRAL's efforts domestically. The Committee consists of an expanding group of influential and forward thinking practitioners and academics, who make outstanding contributions to the dialogue around commercial law in their private work.

It will be a privilege to hear some of you speak today on your experiences and opinions regarding the progress of UNCITRAL's working groups, and the future of international commercial law.

Best wishes to everyone for a successful symposium today.

[2] General Assembly Resolution 2205 (XXI).