Kluwer Arbitration Blog

2019 in Review: Australia, New Zealand and the Pacific

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2019 has seen a series of important arbitration-related developments for Australia, New Zealand and the Pacific. This post highlights selected key arbitration developments in these States from the past 12 months. It focuses on several domestic arbitration law reform efforts and on important developments in respect of investor-State arbitration.

Domestic Arbitration: Legal Developments and Reforms

2019 saw some important developments in the region related to domestic arbitration laws. In New Zealand, for example, a law reform process culminated in a series of reforms to update New Zealand's Arbitration Act. As commentators on the Blog have noted, this reform process was more modest than initially anticipated. For example, reforms related to the arbitration of trust disputes had been canvassed for inclusion as part of this process, but were ultimately removed from the amendments to the Arbitration Bill as adopted. Nevertheless, key issues associated with the arbitration of trust disputes have now been addressed through a separate Trusts Act, which received Royal assent in July (but is yet to take effect).

Meanwhile in Australia, 2019 has seen reform of sports arbitration laws, in response to the recommendations of the Wood Review into Australia's "sports integrity arrangements". The Review noted that most sports integrity issues in Australia are referred variously to in-house dispute resolution tribunals, the Court of Arbitration for Sport, or *ad hoc* tribunals. It observed that this "fragmented approach risks inconsistency and unpredictability in outcomes for the large range of issues that might need resolution". As such, one of the core recommendations of the Review was the establishment of a National Sports Tribunal. Accepting this recommendation from the Review, the Australian Government resolved to establish a National Sports Tribunal to hear alleged anti-doping rule violations and other sporting disputes. Legislation to this effect was introduced into Parliament in February 2019, but lapsed when the Australian federal election was called. The legislation was subsequently reintroduced and received Royal assent in September. The Act creates a central arbitration body to which private parties (and sporting bodies) may refer sporting disputes. The Tribunal has an Anti-Doping Division, a General Division, and an Appeals Division.

A further important domestic development occurred in Australia in May, when the Australian High Court issued a ruling relevant to the interpretation of arbitration clauses, holding that ordinary principles of contractual interpretation would apply to commercial contracts containing arbitration clauses. Organisations in Australia have also continued efforts throughout the year to boost the

appeal of commercial arbitration in Australia.

States in the Pacific have also engaged in domestic arbitration reforms this year. In particular, in July Papua New Guinea ("PNG") acceded to the New York Convention, with the Convention taking effect for PNG from October 2019. That State has also announced its intention to develop and release a draft Arbitration Bill to modernise its existing domestic arbitration law. These developments have followed efforts by the Asian Development Bank to promote arbitration reform in the region, and to improve arbitration capacity in the South-Pacific. Separately, in December 2019, Fiji's Acting Prime Minister and Attorney-General announced plans to establish a Pacific International Mediation and Arbitration Centre in Fiji. In conjunction with this proposal, Fiji has also noted its intention to ratify the Singapore Convention on International Settlement Agreements Resulting from Mediation in 2020.

Finally, international and domestic disputes involving stakeholders from Australia, New Zealand and the Pacific are likely to keep arbitration in the news and on the political agenda for these States into 2020. In November 2019, for example, Pakistan filed a request for annulment of the $US 5.84 billion award in favour of Tethyan Copper Company under the Australia-Pakistan bilateral investment treaty. This dispute sparked broader interest earlier this year in light of the quantum of the award, which as some commentators noted was equivalent to a loan package agreed between the IMF and Pakistan to respond to Pakistan's economic difficulties and support its economic reform program. Domestically, sugar cane farmers in Australia have this year been preparing for arbitration under the Mandatory Sugar Code of Conduct, in respect of an ongoing dispute with a Chinese-owned mill. Australia's airline industry is also pushing for regulations to provide for the arbitration of pricing and service disputes, calls which the Australian Government has thus far resisted. Disputes over striking air traffic controllers in Fiji have also involved referrals to arbitration this year.

Investor-State Arbitration

In my post wrapping up regional developments in 2018, I noted that both Australia and New Zealand were grappling with questions associated with the future of investor-State dispute settlement in their treaty practice. This year saw the continuation of these debates in both States, and particularly in Australia given Australia's conclusion of three new treaties providing investment protections: Hong Kong (signed March 2019), Indonesia (signed March 2019), and Uruguay (signed April 2019). The conclusion of these treaties has foreshadowed the termination of some (but not all) of Australia's existing agreements with these States. Each of these treaties was referred to Australia's parliamentary Joint Standing Committee on Treaties ("JSCOT") for review prior to ratification. The Committee delivered its report on the Hong Kong and Indonesia treaties in October 2019, and on the Uruguay treaty in December 2019. Each of these reports acknowledged the Government's efforts to reform Australia's investment treaties to provide "explicit procedural and substantive safeguards for investor-state dispute settlement". The Committee recommended that binding treaty action be taken in respect of each treaty. Hong Kong has since announced that the Australia-Hong Kong treaty will enter into force in January 2020. Australia also appears to have ratified the treaty with Indonesia. Australia's free trade agreement with Peru, also providing investor-State dispute settlement, is due to enter into force in February 2020.

Australia has also this year been exploring ratification of the UN Convention on Transparency in

Treaty-based Investor-State Arbitration (which it signed in July 2017). This Convention is linked to the Transparency Rules developed by UNCITRAL's Working Group II, with both being designed to enhance the scope for procedural transparency and participation in investor-State arbitration proceedings. Australia's envisaged ratification of the Convention was the subject of a favourable JSCOT report in December 2019, with the Committee recommending the ratification of the Convention in light of its capacity to "provide an efficient mechanism to modernise and update the transparency provisions in Australia's network of older-style bilateral investment treaties and FTAs".

The rest of the region has been less prolific in the conclusion of treaties providing for investor-State arbitration this year. However, both New Zealand and Australia remain involved in negotiations for free trade agreements with the European Union, and both States are also still engaged in the negotiations of the Regional Comprehensive Economic Partnership (which Australia has indicated will be signed in 2020). Both Australia and New Zealand have also signalled their intention to negotiate free trade agreements post-Brexit with the United Kingdom. These negotiations, and others, have helped to keep issues related to the future of investor-State arbitration on the agenda.

New Zealand has this year been less active in pursuing reforms to investor-State arbitration than might have been expected. New Zealand is, for example, yet to release its draft "ISDS Protocol", which as I explained last year has been proposed as a means of addressing the impact of investor-State dispute settlement on the rights and interests of the M?ori. New Zealand has completed an initial consultation on what the Protocol might contain, and is now drawing on that feedback to prepare the draft Protocol. In November 2019, New Zealand's Trade for All Advisory Board released a report concerning the direction of New Zealand's future trade policy. That report noted the lack of progress in respect of the Protocol (and New Zealand's broader ISDS-reform agenda), observing as follows:

> As part of its trade and investment policy, the Government has decided to oppose the inclusion of Investor-State Dispute Settlement (ISDS) in FTAs … It is, therefore, surprising that New Zealand has not engaged more in international processes to reform arbitration provisions in investment treaties. The same lack of engagement in the United Nations Commission on International Trade Law (UNCITRAL) is also surprising, given our country's broader interests in arbitration.

This therefore remains an area to watch into the coming year. The release of a Protocol would, in particular, be of significance – not just for New Zealand, but also to other States with indigenous populations given the likelihood of increasing intersections and tensions between indigenous interests and investment arbitration.

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