

The Republic of Palau Accedes to the New York Convention

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On 31 March 2020, the Republic of Palau (“Palau”) became the 163th state to accede to the United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards 1958 (the “Convention”).^[fn]The authors were engaged by the Asian Development Bank (“ADB”) as part of a team of experts to advise on Palau’s accession to the Convention and continue to assist the ADB with the drafting of Palau’s international arbitration legislation. This is part of a broader technical assistance project promoting international arbitration reform in the South Pacific overseen by the ADB’s Office of the General Counsel’s Law and Policy Reform Program and led by Christina Pak, principal counsel at the ADB. The project includes other countries in the South Pacific such as Fiji, Papua New Guinea, Samoa, Timor Leste and Tonga.^[/fn] Pursuant to Article XII (2) of the Convention, it will enter into force for Palau on 29 June 2020, 90 days after the deposit of its instrument of accession. Palau’s accession to the Convention has been previously reported here.

Palau becomes the 5th state in the Pacific region to accede to the Convention, after Fiji, the Cook Islands, the Marshall Islands and Papua New Guinea. As recognized in the Joint Resolution to ratify the Convention passed by the Palau House of Delegates on 27 January 2020, this significant development sends a powerful signal to potential trading partners and investors that Palau is committed to enforcing and respecting the rights of foreign parties doing business in Palau.

Background

Palau is a small island state with slightly over 20,000 people, located in the Northern Pacific, roughly between the Philippines and Guam. Originally the subject of competing claims by Spain, Germany and then Japan, in 1947, after the Second World War, Palau became a part of the United Nations Trust Territory of the Pacific Islands administered by the United States. Palau became independent in 1994, although the United States still provides financial aid and undertakes responsibility for Palau's defence under a Compact of Free Association.

Palau's legal system is modelled after that of the United States. Palau has a federal system with sixteen states, but the national government retains all powers not expressly delegated to individual state governments. Under Section 303 of the Palau National Code, the "rules of the common law, as expressed in the restatements of the law approved by the American Law Institute and, to the extent not so expressed, as generally understood and applied in the United States, shall be the rules of decisions in the courts of [Palau]." Palauan courts therefore often look towards United States jurisprudence for guidance, although they are not bound to do so in every case, particularly where a local statute applies, and Palauan law has developed in a number of independent directions.

Arbitration in Palau

Palau does not currently have an arbitration law in place that sets out a legal framework for supervising arbitration proceedings that are seated in Palau, or that regulates the enforcement of international arbitration agreements or foreign arbitral awards. However, arbitration is referred to under several discrete laws as a method of dispute resolution. For instance, Section 861 of the Palau National Code sets out an arbitration procedure for labour disputes between crew members and vessel owners and provides for the enforcement of such arbitral awards. Section 7 of the Petroleum Act also sets out an arbitration procedure for disputes between the holder of a license issued pursuant to this Act and the national or state governments in Palau.

In the absence of a statutory framework, Palauan courts have applied United

States arbitration law principles, pursuant to Section 303 of the Palau National Code, in their resolution of arbitration-related issues. Thus, for example, in *Haruo v Resort Trust, Inc.*, 17 ROP 234 (2010), the Palauan Supreme Court applied United States case law to determine whether the defendant's participation in litigation and delay in seeking arbitration constituted a waiver of its right to arbitrate under an arbitration agreement.

Accession and Next Steps

Following accession, Palau will need to establish a predictable and effective supervisory statutory regime that regulates international arbitration and provides for the enforcement of arbitration agreements and arbitral awards in accordance with the terms of the Convention. The application of United States case law is an imperfect solution, particularly given that much of that case law is based on the United States Federal Arbitration Act, which has no equivalent in Palau. Without an arbitration statute, for example, Palau lacks clear statutory guidance for courts on when they are required to refer disputes subject to an international arbitration agreement to arbitration, including the definition of an "arbitration agreement." Palau also lacks statutory provisions that provide guidance to courts on the permissible grounds for refusal of enforcement of an arbitral award.

A modern international arbitration statute that is based on international best practices will go some way towards fulfilling Palau's objectives of attracting international commerce and foreign investment. The UNCITRAL Model Law on International Commercial Arbitration is a tested and well-established model for legislative reform. It is a modern and comprehensive legislative template and is the easiest way for states to assure all parties and arbitration practitioners about the quality of its arbitration legislation. A number of Palau's larger neighbours, including Fiji and Papua New Guinea, have recently adopted, or are in the process of adopting, legislation based in the UNCITRAL Model Law.

Since the most recent revision of the UNCITRAL Model Law in 2006, there have been a number of significant trends and developments in international arbitration. Palau should also consider a number of modifications, based on international best practices and consistent with the UNCITRAL Model Law, including (i) provisions expressly dealing with the liability and immunity of arbitrators, appointing

authorities and institutions; (ii) provisions addressing representation in arbitral proceedings; (iii) provisions expressly setting out an obligation of confidentiality and the exceptions thereto; and (iv) provisions permitting the enforcement of orders or awards made by emergency arbitrators. All of these modifications have been included in Fiji's International Arbitration Act 2017 and the recently published Papua New Guinea Arbitration Bill 2019 (not in force yet), which are both based on the UNCITRAL Law and provide a template for legislative reform in Palau.

Throughout this process, policy considerations specific to Palau and its unique environment should not be overlooked. Particularly given the importance of the scuba diving and snorkelling tourism sector and the fishing sector to Palau's economy, careful consideration must be given to the environmental impacts of foreign investment. At the same time, these considerations will need to be balanced against the importance of ensuring a stable and predictable business environment for foreign investment, which can contribute to the flourishing of Palau's economy and investments in climate adaptation mechanisms.

Future Directions

Palau's accession to the Convention is a very welcome step. This opens the door for future work, including the development of a statutory arbitration regime, to ensure Palau enjoys the economic benefits that should come with its accession to the Convention. Meanwhile, the authors and the Asian Development Bank will continue to assist Palau as it works to strengthen local institutional capabilities and to educate businesses and lawyers on the use of arbitration. This will ensure that Palauan businesses and lawyers reap the potentially significant benefits of Palau's accession to the Convention.