

Tonga Accedes to the New York Convention

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On 12 June 2020, the Kingdom of Tonga ("**Tonga**") acceded to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the "**Convention**"), being the 164th state party to do so. In the context of the Pacific region, Tonga is the 6th state to accede to the Convention after the Marshall Islands, the Cook Islands, Fiji, Papua New Guinea and, most recently, Palau, where the Convention entered into force on 29 June 2020.

Tonga does not currently have any legal framework for arbitration, and its accession to the Convention is a landmark development which should improve the ease of doing business in Tonga and lead to increased confidence from foreign investors.

Background

Tonga is a Polynesian sovereign state and archipelago consisting of 169 islands in the South Pacific Ocean and with a population of approximately 100,000 people. Tonga's main trading partners include New Zealand, the United States, Hong Kong and Japan. Its main exports include agricultural crops and fish.

In the 2020 Doing Business report published by the World Bank, Tonga ranked

103rd of 190 countries in the ease of doing business rankings (and 98th in relation to enforcing contracts specifically), dropping twelve positions from 2019. Historically, Tonga has attracted very little Foreign Direct Investment. Factors reported to have deterred foreign investment include the state's vulnerability to external shocks, the lack of infrastructure, unpredictable government policies and limited access to certain regions of Tonga.

Tonga is a constitutional monarchy, assisted by a Privy Council appointed by the monarch. Tonga's court system consists of the Land Court, the Magistrates' Court, the Supreme Court, and the Court of Appeal.[fn]Clause 84 of the Constitution of Tonga.[/fn] The Court of Appeal is the highest court in Tonga except in respect of appeals from the Land Court on matters concerning hereditary estates and titles. Such appeals are heard by the Privy Council. Judges in Tonga are appointed by the monarch.

Sources of law in Tonga include acts of the Tongan Legislative Assembly, and the rules of English common law and equity. In effect, the law in Tonga incorporates the rules of English common law and equity, but English statutes do not have the effect of law in Tonga.[fn]ADB, "Reforming Pacific Contract Law" (August 2009) at page 7.[/fn]

Arbitration in Tonga

Tonga does not have any legal framework for domestic or international arbitration, except for arbitration in respect of certain investment disputes.[fn]ADB, "Promotion of International Arbitration Reform for Better Investment Climate in the South Pacific" (November 2016) at [5]; ADB, "Transforming Tonga" (2008) at page 46; Colin Ballantine, "Opening Oceania: Reforming International Arbitration Regimes Across the Pacific Islands" at page 2.[/fn] Section 16(1) of Tonga's Foreign Investment Act 2002 states that "The provisions of the Arbitration Act 1996 (UK) shall apply to any arbitration under this Act." Section 2 of the Reciprocal Enforcement of Judgments Act 1988 defines "judgment" to include an arbitral award.

The Asian Development Bank ("**ADB**") previously reported that the absence of an effective arbitration regime in Tonga adds to the costs and uncertainty associated

with business agreements as well as the resolution of disputes that arise over them.[fn]ADB, “Transforming Tonga” (2008) at page 4.[/fn] It also highlighted that the lack of any basis for enforcing overseas arbitration awards in Tonga increases risk for foreign investors, and recommended that Tonga establishes an effective arbitration regime and adopts an arbitration act to address these issues.[fn]ADB, “Transforming Tonga” (2008) at page 9.[/fn]

In 2017, in the context of a workshop co-hosted by the ADB, the Government of Tonga expressed its intention to become a signatory to the Convention, recognising that the Convention’s core objective is to “*facilitate dispute resolution (...) between international companies*” and that “*international arbitration through the Convention has proven an attractive incentive for foreign investors worldwide.*”

Accession to the Convention

The Government of Tonga deposited the instrument of accession with the Secretary-General of the United Nations on 12 June 2020. The Convention will therefore enter into force for Tonga on 10 September 2020, 90 days after the instrument of accession on 12 June 2020 (pursuant to Article XII(2) of the Convention).[fn]Article XII(2) of the New York Convention.[/fn]

Tonga’s accession to the Convention is subject to the “commercial reservation” qualification provided for under Article I(3) of the Convention, whereby the Convention only applies to differences arising out of legal relationships, whether contractual or not, that are considered commercial under the national laws of Tonga. The “commercial reservation” has been exercised by around 30% of signatory states to the Convention.

Following its accession, Tonga will now need to enact arbitration legislation which will establish a regulatory framework for international arbitration and give effect to the Convention. As for template legislation, Tonga may look to other states in the Pacific region such as Fiji, which enacted its International Arbitration Act in 2017, and Papua New Guinea, which has recently published an Arbitration Bill. Both of these pieces of legislation are based on the UNCITRAL Model Law on International Commercial Arbitration and incorporate some developments in international arbitration best practices (such as express provisions dealing with the confidentiality of arbitration proceedings and the enforcement of emergency

arbitrator awards) which even more established arbitration jurisdictions have not yet adopted. Given the international arbitration reform which is underway in the region, it is to be hoped that Tonga will be able to enact the necessary implementing legislation relatively quickly.

Implications for Trade and Foreign Investment

The accession to the Convention is an important step for Tonga, in line with the Government's aims to encourage private sector development, increase trade and attract foreign investors. Consistent with the Convention's track record in facilitating cross-border enforcement of international arbitration awards, it is expected that the Convention will provide greater certainty for foreign investors as well as lower the costs associated with international investment and dispute resolution in Tonga.

Enactment of effective arbitration legislation in Tonga will be essential for Tonga to reap the full benefits of the Convention. Equally important will be schemes to promote awareness of international arbitration best practices amongst the local legal and business communities. It is hoped that the recent accessions of Tonga and Palau to the Convention will encourage more Pacific island states to join and participate in international arbitration reform across the region.