Kluwer Arbitration Blog

2021 in Review: Australia, New Zealand and the Pacific Islands

Nick Papadimos · Friday, January 14th, 2022

Last year saw positive movements in Australia, New Zealand and the Pacific Islands to better promote the use of arbitration in the region. Arbitral institution rules were modernised and domestic legal frameworks were introduced all to stimulate arbitration activity. The year also saw a sharp focus on the benefits of empirical studies to understand how arbitration is being used, recent trends, and where improvements can be made.

This post highlights some of the key arbitration-related developments in 2021.

Australia

Australian Arbitration Report

In March 2021, the findings of Australia's first empirical study on the use of commercial arbitration were released in the Australian Arbitration Report (**Report**). The Report outlines the results of a survey of 111 respondents covering 223 unique domestic and international arbitrations involving Australian parties, projects, or expertise between 2016 and 2019.

Some of the key insights of the Report include:

- The highest number of reported domestic and international arbitration cases was in the construction, engineering and infrastructure industries, accounting for almost 50% of all reported arbitrations.
- The ICC, SIAC, and UNCITRAL arbitration rules were the most frequently used for international arbitrations, with almost three times as many reported international cases under the UNCITRAL rules as under the Australia Centre for International Commercial Arbitration (**ACICA**) rules. The most common arbitration rules used for domestic arbitrations were those of the Resolution Institute, ACICA, and UNCITRAL.
- Singapore was the most frequently recommended and included arbitration seat for international arbitration contract clauses, followed by London and Hong Kong.
- There remains significant room for improvement in achieving gender diversity in arbitrator appointments and in unlocking greater efficiency in arbitral proceedings.

The Report provides valuable insights on the nature and extent of arbitration activity across Australia. Importantly, it also lays the foundation for more detailed research to come – setting a benchmark that future trends and developments in arbitration activity in Australia can now be measured against.

ACICA's new Arbitration Rules

Along with the appointment of a new President in 2021, ACICA had a busy year releasing an updated version of its Arbitration Rules and Expedited Arbitration Rules in 2021. The rules apply to arbitrations commenced from 1 April 2021.

The rules have been updated since their previous iteration in 2016 to reflect best practice in international arbitration and to reduce costs and delays. Among others, the key changes include:

- Introducing an express provision for the commencement of a single arbitration dealing with claims under multiple contracts.
- Requiring tribunals to raise with the parties the possibility of using mediation or other alternative dispute resolution mechanisms.
- Requiring the disclosure of third-party funding agreements.

The new rules are a welcome change to enhance the arbitration experience for all users, a core focus of the institution.

News Media and Digital Platforms Mandatory Bargaining Code

In March 2021, the Australian Parliament introduced a world-first News Media and Digital Platforms Mandatory Bargaining Code (**Code**).

The Code seeks to support the sustainability of the Australian news media sector by addressing bargaining power imbalances between Australian news businesses and digital platforms (such as Facebook and Google) in the payment for news content shared online. The Code only applies to digital platforms explicitly designated by the Australian Government.

One of the main elements of the Code is the use of compulsory arbitration to resolve disputes, after a failed mediation. Where the parties cannot agree on the remuneration to be paid for news content to be shared on the digital platform, the Code requires the parties to engage in the novel system of "final offer arbitration" (otherwise known as "baseball arbitration"). This system allows each party to submit their final offer to an arbitral tribunal which then determines the remuneration amount.

Despite dismissing strong initial opposition to the Code, the Australian Government has not yet designated any digital platforms to participate in the Code. It remains unclear why this is the case. However, commercial content agreements are reported to have been concluded by Facebook and Google with Australian news businesses outside of the Code.

A review of the Code is expected in early 2022.

Australian case law developments

Last year saw important case law developments at Australia's intermediate appellate court level for both investor-state and international commercial arbitrations.

In February 2021, the Full Court of the Federal Court of Australia published its decision in *Kingdom of Spain v Infrastructure Services Luxembourg S.à.r.l.* [2021] FCAFC 3. The Court upheld an appeal against a decision to recognise and enforce two awards of ICSID against a foreign State under Australia's *International Arbitration Act 1974* (Cth) (**IAA**). The Court's decision provides useful clarity on the distinction between the 'recognition' of an arbitral award, and its 'enforcement' and 'execution', and why that distinction matters in response to claims of foreign state immunity from ICSID awards in Australia. A detailed summary of the decision is available here.

In June 2021, the decision of *Hub Street Equipment Pty Ltd v Energy City Qatar Holding Company* [2021] FCAFC 110 was handed down by the Full Court of the Federal Court of Australia. The Court considered an appeal against a decision to enforce an arbitral award under Australia's IAA that was brought primarily on the basis that the constitution of the tribunal was improper. The Court provided useful guidance on a range of matters, including re-iterating the applicable standard of proof for a party seeking to oppose the enforcement of a foreign award under section 8(5) and (7) of the IAA. The Court also considered the bounds of judicial discretion to enforce an arbitral award, where a ground to refuse enforcement is established under section 8(5) of the IAA.

New Zealand

In New Zealand, foundations were laid in 2021 for several important arbitration-related developments to come in 2022.

Statutory class action and litigation funding regimes

In 2019, New Zealand's Te Aka Matua o te Ture | Law Commission began its review into whether, and to what extent, class action and litigation funding should be explicitly regulated in New Zealand. The Law Commission released an Issues Paper in December 2020 outlining its "preliminary view" that litigation funding and a statutory class action regime were both desirable. It requested public feedback over the first quarter of 2021 on this view, and the scope and design of any regulation.

The Law Commission is currently reviewing the submissions received and is preparing a final report, which is expected to be released in the first half of 2022.

Arbitration was not expressly cited in the terms of reference of the review. However, it is referenced throughout the Issues Paper, particularly in comparative analysis of class action and third-party funding regulations in jurisdictions such as Singapore, Hong Kong and the United Kingdom.

This year should reveal whether (and, if so, how) any regulatory responses proposed by the Law Commission will specifically address international and domestic arbitration in New Zealand.

New Zealand Arbitration Survey

The New Zealand Dispute Resolution Centre is currently analysing the results of a 2021 survey about the practice of arbitration in New Zealand.

The New Zealand Arbitration Survey asked arbitrators to respond to a series of questions about their demographics, background and experience, and the number and kind of arbitrations undertaken in New Zealand in the 2019 to 2020 period.

The responses will feed into a report detailing the findings of the survey – although an expected release date is not yet known.

The Pacific Islands

Over the past five years, the South Pacific has seen ongoing efforts to promote arbitration reforms to spur economic growth and development and encourage a more investor-friendly climate.

There are currently six Pacific Island States that have acceded to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards ('New York Convention'). Three of those States acceded to the Convention in the past three years – Papua New Guinea (2019), Palau (2020) and Tonga (2020).

In Tonga, 2021 saw the commencement of a domestic legislative framework based on the UNCITRAL Model Law, albeit with some key differences that contributors to this blog have highlighted. These reforms follow similar efforts by Fiji in the enactment of its International Arbitration Act 2017, and by Papua New Guinea with its draft Arbitration Bill 2019 (which has not yet passed its National Parliament).

Back in November 2016, the Asian Development Bank outlined its regional technical assistance support to promote international arbitration reform in the South Pacific. Among other initiatives, this led to the Third South Pacific International Arbitration Conference held in Sydney, Australia in March 2021 – which was described as the "culminating event" of the regional technical assistance. The conference explored the topic of de-risking investment in the South Pacific through a world-class international arbitration disputes regime.

The above arbitration reform efforts and developments also run parallel to broader trade and investment initiatives to strengthen economic development in the region. In December 2020, the Pacific Agreement on Closer Economic Relations Plus ('PACER Plus') entered into force – a multilateral trade and development agreement involving Australia, New Zealand, and six Pacific Island States (Samoa, Kiribati, Tonga, Solomon Islands, Niue and Cook Islands). Three additional States (Nauru, Tuvalu and Vanuatu) have signed but have yet to ratify the agreement. All Pacific Islands Forum members (18 in total) have been encouraged to join.

In short, momentum is building in the South Pacific to establish and modernise the practice of arbitration. It will be exciting to watch this region over the years to come as it actively pursues the economic benefits and investor confidence to be gained from arbitration reform.

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