Kluwer Arbitration Blog

M?l? e lelei, Tonga International Arbitration Act 2020!

Michael Wietzorek (Taylor Wessing) · Sunday, December 12th, 2021 · YIAG

The Kingdom of Tonga is dedicated to furthering the development of arbitration. A little more than a year ago, this blog published a post reporting that Tonga had acceded to the New York Convention on 12 June 2020. The New York Convention came into force for Tonga on 10 September 2020, and exactly three months later – on 10 December 2020 – the Legislative Assembly passed the International Arbitration Act 21 of 2020 / Lao ki he Fakatonutonu Fakavaha'apule'anga – Lao Fika 21 'o e 2020, which came into force on 3 March 2021.[1)] The Act is modelled on the UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006. According to the Lord Chief Justice Michael Whitten QC of the Supreme Court of Tonga, it also contains provisions "adapted from leading arbitration seats in the region, including Australia, Hong Kong, and Singapore". This post highlights some of the differences between the Act and the Model Law and analyses two recent decisions of the Supreme Court of Tonga.

The Tongan International Arbitration Act and the UNCITRAL Model Law

There are some key differences between the Act and the UNCITRAL Model Law.

Section 9(1) and (2) of the Act, dedicated to the situation of an arbitration agreement and a substantive claim before a court, are an adoption of Article 8 of the Model Law. Yet the Act contains two additional subsections. Notably, it clarifies that if the court refuses to refer the parties to arbitration, any provision of the arbitration agreement that an award is a condition precedent to the bringing of legal proceedings in respect of any matter (this type of agreement is known as a Scott v Avery clause) shall have no effect in relation to those proceedings.

The Model Law contains no equivalent to section 10 of the Act, which is dedicated to the death, bankruptcy, or winding up of a party. In any of these events, unless otherwise agreed by the parties, an arbitration agreement shall not be discharged and may be enforced by or against the representatives of that party. This provision, however, does not affect the operation of any law under which the death of a person extinguishes a cause of action.

By virtue of section 18 of the Act, an arbitrator, their employee, or their agent is not liable for anything done or omitted in the actual or purported discharge of their functions as arbitrator unless the act or omission is shown to have been in bad faith. This section does not affect any liability

incurred by an arbitrator by reason of their resignation. It is apparently inspired by section 28(1) of the Australian International Arbitration Act 1974 (Cth) and section 25A of the Singapore International Arbitration Act.

Section 34 of the Act stipulates that a party may appear in person before an arbitral tribunal and be represented by themselves or any other person of that party's choice – a provision apparently inspired by, but less detailed than section 29(2) of the Australian International Arbitration Act 1974 (Cth).

Section 44 of the Act allows the parties to apply to the court to determine any question of law arising in the course of the proceedings which the court is satisfied substantially affects the rights of one or more of the parties. This appears to be a remnant of the "Statement of Case", previously contained in section 21 of the English Arbitration Act 1950, which was abolished in England in 1979 for good reasons. The new Tongan provision is a lot less severe than its English predecessor. The right is subject to the parties' agreement, the arbitral tribunal's permission, and the court's satisfaction (i) that the determination of the question is likely to produce substantial savings in costs and (ii) that the application was made without delay.

Section 45 of the Act contains a provision on confidentiality apparently inspired by section 18 of the Hong Kong Arbitration Ordinance.

Sections 59 and 60 of the Act closely resemble Articles 35 and 36 of the Model Law on recognition and enforcement, with the notable exception that section 59(2) sets forth that a corresponding application must be made no later than six years from the date of the award.

Then, section 61 of the Act contains specific regulations on the evidence a party has to submit when applying for the recognition and enforcement of an arbitral award. These regulations may be seen as somewhat contradicting to those of section 59 of the Act. For example, section 59(3) of the Act sets forth that the party relying on an award or applying for its enforcement shall supply the original award or a copy thereof. Whilst this provision alone may be construed to mean that a simple copy of the award would suffice and that the arbitration agreement does not have to be submitted, section 61(1) of the Act requires a party to produce the duly authenticated original award or a duly certified copy and the original or a duly certified copy of the arbitration agreement under which the award purports to have been made.

Another example is section 59(4) of the Act, which states that if the award is not made in the English language, the court may request the party to supply a translation thereof. This provision alone may be construed to mean that if the court is able to read the award in its original language, it may refrain from requesting a translation. Yet, sections 61(3) and (4) of the Act set forth that if a document or part of a document is written in a language other than English, there shall be produced with the document a translation, in English, of the document or that part, as the case may be, certified to be a correct translation.

First Decisions mentioning the Tongan International Arbitration Act

The Supreme Court of Tonga so far has handed down two published decisions which make reference to the Act.

The case of *Fe'ao Vunipola v Tonga Rugby Union* concerned the question of whether the court should stay its proceedings based on an arbitration clause contained in the Constitution of the Tonga Rugby Union. In that context, the court confirmed that the Act, and especially section 9 (which is modelled on Article 8 of the Model Law) do not apply to domestic arbitration, for which Tonga continues to have no legislation. Thus, the court derived the power to stay its proceedings by relying on numerous foreign cases, such as the English case of *Scott v Avery* and the Supreme Court of Victoria case of *Australian Football League v Carlton Football Club*. In its decision, the Supreme Court of Tonga pointed out that while not directly applicable, some provisions of the Act were examples of support for the principle of party autonomy in arbitration.

The court ultimately declined to stay its proceedings since the arbitration clause had "…the effect of purporting to exclude or 'oust' the jurisdiction of the Courts…", an argument ultimately based on the infamous English case of *Czarnikow v Roth*, as followed in Tonga by the case of *Touliki Trading Enterprises v Procorp*[2)]. It is commendable that in its decision, the Supreme Court of Tonga specifically pointed to the further need for reform:

> "…the law relating to private arbitration in other common law [jurisdictions] has, since 1854, been the subject of substantial legislative change, including changes in the extent to which judicial intervention may detract from the finality of an arbitrator's award. Those changes, insofar as they relate to domestic commercial arbitration, are yet to find their way into the Tongan legal framework." (at para. 107)

The case of *Kacific Broadband Satellites International v Registrar of Companies et al.* concerned an application to restore the company Tonga Satellite Limited to the Tongan Register of Companies. One circumstance in which such an application may be granted is where the company was a party to legal proceedings. Kacific had commenced arbitral proceedings pursuant to the Arbitration Rules of the Singapore International Arbitration Centre prior to being removed from the register and before the Act had come into force. The Supreme Court of Tonga confirmed that arbitral proceedings were such "legal proceedings". In this context, the Supreme Court of Tonga pointed out that in spite of no Tongan domestic arbitration legislation, the court had already in the past given effect to domestic arbitral awards, such as in the case of *Fletcher Construction v Montfort Bros*[3)].

Conclusion and Outlook

The International Arbitration Act 2020 certainly is an important step in Tonga's efforts to modernise its arbitration legislation. At the same time, the English heritage still appears to be very present, as shown by various recent references to cases such as *Scott v Avery* and *Czarnikow v Roth* or, implicitly, to the "Statement of Case". The first two Tongan decisions mentioning the Act have shown what the next step for Tonga should be: Enacting legislation on domestic arbitration.

To make sure you do not miss out on regular updates from the Kluwer Arbitration Blog, please subscribe here. To submit a proposal for a blog post, please consult our Editorial Guidelines.

References

?1 The words “M?l? e lelei” in the headline are a common greeting in Tongan, usually translated as “Hello”.

?2 [1999] Tonga LR 216, 223

?3 [1995] Tonga LR 142

This entry was posted on Sunday, December 12th, 2021 at 8:47 am and is filed under Australia, Hong Kong, Singapore, Tonga, UNCITRAL Model Law
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.