Kluwer Arbitration Blog

Interviews with Our Editors: Lord Chief Justice Hon. Michael H. Whitten KC, Supreme Court of Tonga

Anne Wang (Assistant Editor for Asia-Pacific) · Wednesday, September 14th, 2022

Lord Chief Justice Hon. Michael H. Whitten KC has been the Lord Chief Justice of the Kingdom of Tonga since 2 September 2019. After gaining early broad experience in various areas of law, Chief Justice Whitten was called to the Queensland Bar in 1990 before moving to Victoria where he practised for more than 20 years in commercial litigation, specialising in building, construction, infrastructure and energy disputes. Chief Justice Whitten appeared in all jurisdictions and fora across Australia and took silk in 2015. He also appeared, as a barrister, in commercial arbitrations, both domestic and international, and expert determinations. Chief Justice Whitten is a Fellow of the Chartered Institute of Arbitrators and was a member of the Australian Bar Association's Arbitration committee until his appointment to the judiciary.

Chief Justice Whitten's work in Tonga has included consulting on the International Arbitration Bill, following Tonga's accession to the New York Convention on 12 June 2020. Kluwer Arbitration Blog has previously published a post highlighting the key provisions of Tonga's International Arbitration Act 21 of 2020 / Lao ki he Fakatonutonu Fakavaha'apule'anga – Lao Fika 21 'o e 2020 (the "Act") as well as the first two decisions mentioning the Act, both of which were handed down by Chief Justice Whitten.

It is therefore an immense privilege to be joined by Lord Chief Justice Whitten on Kluwer Arbitration Blog!

1. **Could you please share with us some of the defining moments in your career to date that led you to develop a practice in international arbitration? Could you also share with us your journey to becoming Lord Chief Justice of Tonga?**

At the start of my legal career in Queensland, I practised in all areas. When I moved to Victoria in 1996, where the Bar has a clerking system, I was fortunate enough to be accepted to List G, which was, and remains, one of Australia's leading commercial lists. Within a relatively short time, the majority of cases in which I was briefed involved building and construction law. That area developed into an interest, and eventually participation, in domestic and international arbitration work. One of my first major briefs in the latter (as then one of a number of junior counsel led by George Golvan KC) was in 2004 for an arbitration hearing in Hong Kong involving the Cheung Kong Centre.

In 2015, I (along with, I suspect, most barristers in Australia, New Zealand and elsewhere in the region) received an email calling for expressions of interest in appointment as the Lord Chief Justice of the Kingdom of Tonga. I was immediately curious, but the timing wasn't quite right. I felt I had 'unfinished business' in terms of work achievements at the Bar and my wife and I still had children at home. At that time, I was also avidly involved with both the Victorian and Australian Bar Association's arbitration committees in developing the arbitration market and opportunities for Australian advocates and arbitrators in the region.

In early 2019, some years after having taken silk and having just completed a long running trial in Western Australia (final appeals from which are soon to be heard by the High Court), the same email appeared. I reactively pressed send with my expression of interest not thinking much would come of it. About 20 minutes later, I received a reply asking for my CV. After pressing send again, I told my wife what had happened. For both of us, a mildly excited but silent anticipation followed.

After what seemed like an eternity, and I had begun to believe my initial expectation, I received a call from the then Chief Justice, Owen Paulsen, advising that I had been 'shortlisted' and that the Judicial Appointments and Discipline Panel (a Tongan Constitutional body of advisors to the King) would like to interview me. The first questions during my interview with the Panel members in Auckland, and my first glimpse into Tonga, were about religion and my views on the death penalty. Of all the topics for which I had endeavoured to prepare, those were not among them. Towards the end, I was asked about something on which I had necessarily introspected for some time. In answer to Harry Waalkens KC, the then Lord Chancellor, about why I wanted the job, the short answer, I said, was: to serve.

About six weeks later, Harry sent an email commencing with the word "Congratulations". Shortly after that, my wife and I flew to Tonga during the last week of Owen's tenure for a 'handover'. That week saw us emerge from the seeming romance of the looming adventure to the reality of the enormity of the task, including, not least, that under the Constitution, the Chief Justice is a multi-faceted role. We also realised that our understanding of the word 'service' was about to be redefined.

And so, after wrapping up my practice and our life in Melbourne, on 1 September 2019, I was sworn in before Cabinet. About 15 minutes later, I walked into court 1 and commenced my judicial experience as President of the Court of Appeal. Thankfully, I was accompanied by preeminent judges in the Hon. Ken Handley (New South Wales Court of Appeal, retired), Sir Peter Blanchard (Supreme Court of New Zealand, retired) and Richard White (New South Wales Court of Appeal, serving). For their example, wisdom and patience, I shall always be grateful.

2. **Aside from Fiji and the Cook Islands, Tonga is the only other Pacific Island country to enact legislation based on the UNCITRAL Model Law on International Commercial Arbitration. What has contributed to Tonga's success as a leader in international arbitration reform in the Pacific?**

While Tonga is among the first of the contracting States in the Pacific to manifest its accession to the New York Convention through enacting the *International Arbitration Act* 2020 ("***the Act***"), its true success in that initiative will be measured by the extent to which Government and the private sector engage in and with international arbitration. The catalyst, and indeed, imperative, for that

engagement, is foreign investment. While I do not presume to speak for the Legislative or Executive branches of Government, or for His Majesty, it would appear self-evident that Tonga's progress in this regard has been borne of the realisation that, like many developing countries in the region, attracting positive foreign investment is key to its economic future. Without that, Tonga will continue to be heavily dependent on the support of foreign development partners and remittances from family and friends throughout the Tongan diaspora. For a country whose population size is inverse to its apparent geopolitical significance in the Pacific, healthy development of its natural resources in areas such as tourism (where Fiji, among others, is a prime example), agriculture, seafood and subsea minerals, not to mention the extraordinarily high proportion of its population with tertiary qualifications, requires both domestic and foreign investment. Tonga's engagement with, and implementation of, the Convention principles serves to enhance its attraction to those investors.

3. **What further steps can be taken to effectively implement the New York Convention in Tonga? In your view, what role does the judiciary play in this regard?**

Firstly, the starting point for greater implementation must be the inclusion of arbitration agreements in relevant commercial and investment contracts. The terms of those provisions must either specify or at least reflect the UNCITRAL Model Law and Arbitration Rules to provide congruence with the Act.

Secondly, the facilitation of international arbitrations requires greater capacity-building both in terms of qualified and experienced arbitrators in the region and the establishment of institutional arbitration centres similar to SIAC, HKIAC and those in Korea, Japan and Shanghai. While the volume of arbitrations in Tonga are, at present, unlikely to necessitate or support the establishment of a dedicated centre for some time, a centre for Polynesia (with Suva being among the most obvious geographical candidates) is, in my view, demonstrably warranted.

The role of the judiciary in supporting international arbitration is prescribed by the Act (in Tonga and in comparable legislation elsewhere) as including giving effect to arbitration agreements, interim measures, assistance in taking evidence, appointment of arbitrators, determination of preliminary points of law, and, most importantly, setting aside or recognition and enforcement of awards. Further support has been demonstrated worldwide in jurisdictions where specialised arbitration courts, or at least, dedicated lists within existing superior courts, have been established.

4. **As covered in a previous blog post, we understand that the Asian Development Bank ("ADB") in cooperation with UNCITRAL provided technical assistance to Tonga in implementing its legislative framework for arbitration. What role has such technical assistance had in boosting knowledge about arbitration and its popularity in the region? What support could other stakeholders such as arbitral institutions provide?**

The ADB and UNCITRAL representatives were instrumental in the creation and passing of Tonga's *International Arbitration Act*. Gary Born and his cohort of advisors deserve special recognition for their work with the Tongan Government and other stakeholders in the work leading to accession and enactment.

As mentioned above, the presence and commitment of arbitral institutions in this region is, in my view, an important element to ensuring that the legislative initiatives become manifest in attracting foreign investment and providing proven support in facilitating international dispute resolution through arbitration (and Med-Arb) procedures. Institutions are also likely to attract qualified and experienced arbitrators to the region as well as providing education on the advantages of party autonomy including choice of law, forum and arbitral tribunal.

5. **Are there any emerging trends in the adoption of arbitration among businesses in the Pacific Islands and international investors, such as in the energy, construction or climate finance sectors?**

So far as Tonga is concerned, the first inklings of adoption (which, by definition, involves a confidential process and thus, in the absence of arbitral institutions, overt statistics are necessarily hard to come by) are by Government. A recent example was discussed in the decision of *Kacific Broadband Satellites International Ltd v Registrar of Companies* [2021] TOSC 93, involving an arbitration seated in Singapore between the Tongan Government and a satellite internet provider. I expect that the experience and outcome in that case, and others, either has, or will, inform the extent to which Government contracts with foreign suppliers will include arbitration agreements and their terms.

So far as matters coming before the Supreme Court would indicate, adoption of arbitration and therefore the application of the Act is still in its nascent stages. Where domestic arbitration agreements have been included, the general experience so far has been of the parties effectively waiving those agreements, mainly because of a perceived lack of any duly qualified and/or (truly) independent arbitrators in the Kingdom.

6. **In 2018, Justice Laki Niu became the first Tongan to be a member of the Supreme Court of Tonga in over a hundred years. Apex courts in many Pacific Island jurisdictions consist of a mix of foreign and local judges, in light of factors such as close family and community connections of local judges.[1] In the context of domestic and international arbitration, how important is it to increase the pool of local arbitrators, especially as more Pacific Island parties become users of arbitration? How might this be achieved?**

The answer to this question segues from the last. In any relatively small population, ensuring the independence of decision-makers (i.e. that he/she is not related in some way to anyone involved in the case) is often a challenge. It would appear to be part of the reason that successive Kings of Tonga have appointed foreign judges for over a century. For the same reason, any pool of arbitrators servicing Tonga and the Pacific will likely comprise a significant percentage of foreigners (or 'palangi'). That does not mean, however, that local practitioners (who have invaluable insights and experience as to local customs and expectations) should be overlooked in terms of training and capacity building. It does mean that choice, which is inherent in arbitration, will be critical.

7. **In the case of *Fe'ao Vunipola v Tonga Rugby Union*, Your Honour observed (at para. 107) that changes to arbitration laws "*insofar as they relate to domestic commercial arbitration, are yet to find their way into the Tongan legal framework*." Would the enactment of legislation on domestic arbitration be a desirable future step and what impact could this have on dispute resolution trends in Tonga domestically?**

Absolutely. Domestic arbitration legislation is a natural concomitant to the now established international framework. In most jurisdictions, the order of adoption has been the other way. The fact that international arbitration legislation has been enacted first in Tonga is a reflection of Government consciousness of the need to attract foreign investment by ensuring modern, consistent and well-established means of dispute resolution.

Within the Tongan domestic arena, a consciousness of (or appetite for) the advantages of alternative dispute resolution, whether by way of mediation or arbitration, appears to also be in its nascent stages. At present, mediation cannot be ordered by the Court without the consent of all parties. In my time in Tonga, and despite enthusiastic encouragement from the Bench, that consent has rarely been forthcoming. So far as I have been able to fathom, there are cultural attitudes at play in litigation in Tonga, including a war like mentality (possessed by parties, most of their lawyers, or both) which often tends to preclude just about any possibility of resolution prior to judgment. Incentives for party driven resolution have been slowly introduced by measures such as preliminary determination of pivotal issues and more significance being given to effective offers of compromise on questions of costs. Beyond that, greater enforcement by the Courts of arbitration agreements, where they exist (compare *Vunipola v Tonga Rugby Union Incorporated* [2021] TOSC 141), will have a positive impact on domestic dispute resolution in Tonga.

8. **Finally, what, in your view, is the biggest challenge and opportunity for arbitration in the Pacific Islands region?**

If the challenges (and there are many) can be ranked in order of magnitude, I think education is probably the 'biggest'. The advantages of arbitration must be known, and realised, before greater adoption can be expected.

A related requirement is trust. For that, enabling legislation (as per Fiji, the Cook Islands, and now, Tonga) is essential. So too is demonstrated preparedness by the Courts to enforce (where appropriate) foreign arbitral awards. The support of arbitration institutions and availability of experienced, independent arbitrators are also critical to developing confidence amongst stakeholders.

The opportunities for arbitration in the Pacific are untold and, so far, relatively untapped. That potential, however, is dependent upon, and will be measured by, the extent to which the above challenges are addressed. The inclusion of ADR regimes in contracts between trading parties engaging in and with the Pacific will be heavily informed by their level of confidence that, for instance, arbitration processes and outcomes will be efficient, effective and enforceable in the region.

Thank you, Lord Chief Justice Whitten, for taking the time to share your invaluable perspectives

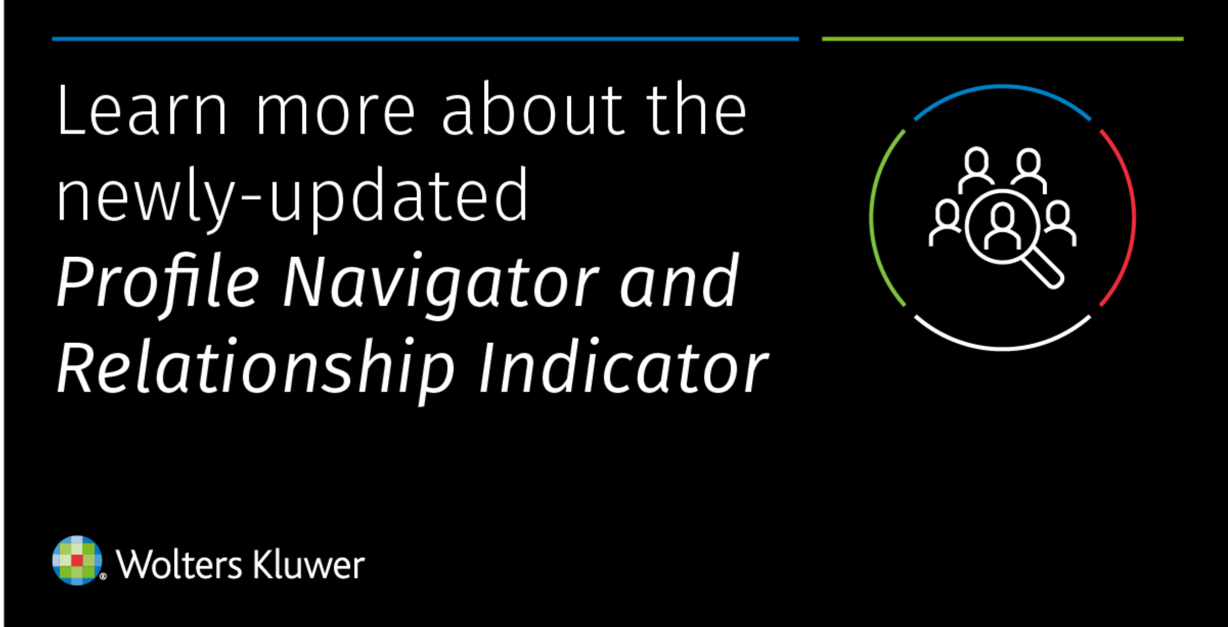
with our readers.

This interview is part of Kluwer Arbitration Blog's "Interviews with Our Editors" series. Past interviews are available here.

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.

Profile Navigator and Relationship Indicator
Includes 7,300+ profiles of arbitrators, expert witnesses, counsels & 13,500+ relationships to uncover potential conflicts of interest.

Learn how **Kluwer Arbitration** can support you.



References

?1 *See* Rosalind Dixon & Vicki Jackson, 'Hybrid Constitutional Courts: Foreign Judges on National Constitutional Courts' (2019) 57(2) *Columbia Journal of Transnational Law* 283, 308.

This entry was posted on Wednesday, September 14th, 2022 at 8:48 am and is filed under Courts, Domestic Courts, Interviews with Our Editors, National Courts, New York Convention, Pacific Islands, 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.