Kluwer Arbitration Blog

2022 Year in Review: Australia, New Zealand and the Pacific Islands

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Introduction

In 2022, we witnessed the growth of efforts to understand and promote the use of arbitration across Australia, New Zealand and the Pacific Islands. These efforts largely took the form of empirical studies and reports, as well as the resumption of in-person events. Legal and policy developments in both commercial and investor-state arbitration have also continued through the work of judiciaries and legislatures. In this post, we highlight some of the key progress in the region last year.

Australia

Law Reform / Development

ACICA's Reflections Report published in 2022 highlights that over the past decade, Australia has established itself as a "*modern, progressive arbitral jurisdiction with a large and cohesive arbitration community*". This sentiment is also reflective of Australia in 2022.

In 2022, ACICA has continued to support the development of arbitration within Australia by launching a new survey to gather information in an attempt to foster a greater understanding of evidence in international arbitration and consequently use this data to advance arbitration practice in Australia (and abroad).

In the face of climate change, a common theme throughout 2022 across the globe has been renewable energy and green arbitration. This was also reflected in Australia via discussion of arbitration's role in disputes concerning the decommissioning of oil and gas assets as Australia transitions to other energy resources. It is important that such conversations are taking place to ensure that arbitration is able to cater to the ever-changing disputes landscape and the various challenges that come with it. It also assists stakeholders by preparing them for matters prior to any dispute arising by outlining these projected challenges and issues.

In addition, we saw how Australia's domestic arbitration legislation and its alignment with the

Model Law is not only ensuring uniform decisions across states and territories but also assisting in Australia's ability to contribute to international jurisprudence and pave the way to establishing itself as a hub for international arbitration. Still, there is room for improvement. In a recent interview with this blog, Caroline Kenny KC expressed the need for the Australian Government to provide more support to international commercial arbitration in order for it to be able to compete with other Asia-Pacific seats.

Events

The year 2022 saw a new wave of in-person events in Australia following the last few years of COVID-19 restrictions. These events often continued to cater for virtual attendance, manifesting an inclusive and timely shift to the modern arbitration world. Discussions centred around many of the current prominent themes in the arbitration community, including technology arbitration, emergency arbitration, expert evidence, foreign investors and government policy on investor-state arbitration. These discussions demonstrated the adaptability of arbitration and showcased the benefits of arbitration to its users while ensuring that Australia remains up to date with new trends and developments.

Case Law Developments

Last year a number of decisions rendered by Australia's judiciary reflect the pro-arbitration stance of Australian courts. Among others, these included:

- In *Lee v Lin & Anor* [2022] QCA 140, the Supreme Court of Queensland upheld that a dispute resolution clause providing for "final settlement by a single arbitrator" was in fact an arbitration agreement.
- In *WCX M4-M5 Link AT Pty Ltd v Acciona Infrastructure Projects Australia Pty Ltd (No 2)* [2022] NSWSC 505, the Supreme Court of New South Wales determined that even though the negotiations and expert determinations mentioned in a multi-tiered dispute resolution clause had not taken place, the arbitration agreement was still operative.
- In *Power and Water Corporation v ENI Australia B.V* [2022] WASC 376, the Supreme Court of Western Australia stayed judicial proceedings and referred them to arbitration where a party had brought such proceedings on the basis that the arbitration agreement permitted application to the courts for urgent declaratory relief and an urgent declaration of breach of contract had been sought. Essentially, the Court determined that as the arbitration was being conducted in accordance with ACICA's Expedited Rules, the arbitration proceedings would be sufficiently expeditious.

Additionally, the Full Court of the Federal Court of Australia in *Instagram Inc v Dialogue Consulting Pty Ltd* [2022] FCAFC 7 looked at the competence-competence principle when deciding whether an arbitral tribunal should exclusively be able to determine whether a right to arbitrate has been waived. This Court's decision evidenced that whilst the principle permits a tribunal to determine its own jurisdiction, courts will nevertheless retain discretion to exercise this power in totality in appropriate circumstances, i.e., finally determine the question and not just come to a preliminary view on the tribunal's jurisdiction.

Developments to watch in 2023 will include the result of appeals from the 2021 decision of the Supreme Court of Western Australia in *Chevron Australia Pty Ltd v CBI Constructors Pty Ltd* [2021] WASC 323 ("Chevron"). There, the Court was confronted with issues regarding the challenge to an arbitral award on grounds that the tribunal inadvertently rendered itself *functus officio* by a decision to bifurcate issues of liability and quantum. More detailed insights on Chevron can be found here and here.

New Zealand

Arbitration Survey

The New Zealand arbitration scene saw several notable developments in 2022. The year saw the release of the inaugural New Zealand Arbitration Survey Report ("Arbitration Survey"), along with case law developments and insights gained from arbitration events and seminars.

The Arbitration Survey was compiled by leading New Zealand arbitrators Royden Hindle and Dr Anna Kirk in collaboration with the New Zealand Dispute Resolution Centre. It reflects responses from 56 arbitrators comprising 213 appointments.

The survey highlights that while the majority of arbitrations conducted in New Zealand remain domestic, a not insignificant percentage (15%) are international arbitrations. The industry expectation is that growth of international arbitration will continue as New Zealand-seated arbitration clauses become increasingly embedded into commercial contracts.

Finally, the Arbitration Survey made clear that work remains to be done in promoting diversity in arbitration, with 93% of respondents identifying as New Zealand European, and only 13% of arbitrators appointed being women.

Statutory class action and litigation funding regimes

On 22 June 2022 New Zealand's Te Aka Matua o te Ture | Law Commission published its final report on the possible regulation of class action and litigation funding in New Zealand. The final report was the outcome of the Commission's initial review in 2019. Of note was the Commission's finding that no further regulation was required for arbitration clauses that served to prevent claimants from opting into a class action (or required them to opt out of a class action) in favour of pursuing their claim through arbitration.

The Commission's finding was made on the basis that the New Zealand Arbitration Act 1996 contains special protections for consumers. The Commission also noted that evident policy is to discourage consumer arbitration, given the likelihood of inequality of bargaining power, standard form contracts, and the absence of true consent.

Events

As with elsewhere in the world, 2022 saw the return of in-person arbitration events in New

Zealand. The Arbitrators' and Mediators' Institute of New Zealand ("AMINZ") hosted events such as Arbitration Day, and a Gala Dinner (in place of the annual AMINZ Conference). Additionally, the New Zealand International Arbitration Centre launched its Young Practitioners' Group. While the theme of these events remained peripherally focused on the impact of COVID-19, emphasis was firmly on how New Zealand can maximise its potential as a stable seat for arbitration, and promote the industry to the next generation of practitioners. Nicole Smith, the newly appointed president of AMINZ provided her insights on these topics and more in her interview with this blog in June 2022.

Enforcement and Recognition

In late 2021, the New Zealand High Court issued its decision in *Sodexo Pass International SAS v Hungary* [2021] NZHC 371 ("Sodexo"), which effectively functions as New Zealand's counterpart to the Australian Federal Court's decision in *Kingdom of Spain v Infrastructure Services Luxembourg SARL* [2021] FCAFC 3 ("Infrastructure Services"). These decisions identified the conceptual distinction between enforcement, recognition, and execution of arbitral awards in the context of the application of State immunity. However, they are unlikely to represent the last judicial word on the issue, with the High Court of Australia's appellate judgment in Infrastructure Services expected in 2023.

This will be a space to watch, with the High Court of Australia likely to pronounce its views on issues around immunity and with the (in)famous Achmea decision affecting the enforcement of extra-EU arbitral awards involving European parties.

Pacific Islands

In 2022, this blog's coverage of ongoing arbitration reforms in the Pacific Islands continued, highlighting how international arbitration can be an instrument of economic development.

In jurisdictions that have already ratified the New York Convention and passed legislative reforms, discussion has turned to the effective implementation of arbitration, including through greater capacity building. These themes and other reflections on emerging trends, challenges and opportunities were shared in our interview with the Lord Chief Justice of Tonga, Hon. Michael H. Whitten KC.

One example of capacity building is ACICA's five-part hybrid webinar series on conducting arbitration in the Pacific, held in collaboration with Hemmant's List. Session 1 provided an update on the state of play in the Pacific and an overview of when Pacific parties should arbitrate. Session 2 discussed the mechanics and best practice for Pacific parties when commencing an arbitration.

ACICA's engagement with the Pacific will no doubt grow as its webinar series continues in 2023. According to ACICA's Reflections Report, over the past decade, ACICA's cases have involved parties from Papua New Guinea and Fiji, and 2% of arbitrations were seated in Papua New Guinea. Similar statistics emerged from SIAC's Annual Report which revealed that across 469 new cases in 2021, 4 parties originated from Fiji, 2 from Tonga and 1 from Vanuatu.

Law societies and associations also collaborated to promote alternative dispute resolution in the region at the LAWASIA ADR Conference in Denarau, Fiji on 9-10 September. The conference attracted 52 delegates from 10 jurisdictions, and covered topics such as online dispute resolution, international commercial arbitration and emerging mechanisms for dispute prevention.

It remains to be seen whether momentum for arbitration reform in other Pacific jurisdictions will build as in-person meetings become possible once more, strengthening the potential for on-the-ground engagement with key stakeholders. As noted during ACICA's series, Nauru and Samoa have expressed some interest in pursuing reforms. Work may also resume in Papua New Guinea where a draft Arbitration Bill was introduced in 2019. There may also be an appetite to modernise or create frameworks for domestic arbitration, as the focus to date has been on international arbitration reforms.

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