Kluwer Arbitration Blog

2023 Year in Review: Australia, New Zealand and the Pacific Islands

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2023 was another year of growth for arbitration in Australia, New Zealand, and the Pacific Islands. It saw developments in investment arbitration and disputes relating to climate change, efforts to improve gender and cultural diversity, debate and guidance on the use of artificial intelligence, and pro-arbitration jurisprudence. We explore some of these key themes below.

Australia

Cases

Australia's investment arbitration jurisprudence made particular strides in 2023. As anticipated in our 2022 Year in Review, the High Court of Australia handed down the much-anticipated judgment in *Kingdom of Spain v Infrastructure Services Luxembourg S.à.r.l. & Anor* [2023] HCA 11. The Court held that Spain was not subject to foreign State immunity and was therefore bound by the jurisdiction of Australian courts to recognise and enforce an ICSID award. This decision was discussed in detail here and has overwhelmingly been reported on with much enthusiasm by the international arbitration community with its pro-arbitration stance. In a similar vein, the Federal Court of Australia in *CCDM Holdings, LLC v Republic of India* (No 3) [2023] FCA 1266 found that, amongst other things, by way of contracting to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention"), India had waived its sovereign immunity and was therefore subject to the jurisdiction of Australian courts.

2023 also saw development with respect to the anticipated wave of incoming investment arbitrations concerning climate change. This blog post discussed the likely size and complexity of these disputes. Australia now finds itself responding to multiple arbitrations brought by the mining company, Zeph Investments. The second such arbitration was discussed here and arises from the Queensland Government's decision to grant an environmental offset to a competitor of the claimant over land in which the claimant's subsidiary had coal exploration permits. The case remains in its early stages, with Australia's challenge to the claimant's nominated co-arbitrator being dismissed in September 2023. A third arbitration is likely to be initiated by Zeph Investments in early 2024, after it filed a notice of intention to commence arbitration in October 2023. These

arbitrations will contribute to the growing body of cases arising out of new measures introduced by States to combat climate change and may affect public and political sentiment towards investment arbitration in Australia.

Turning to commercial arbitration, the Court of Appeal in Western Australia delivered its verdict in *CBI Constructors Pty Ltd v Chevron Australia Pty Ltd* [2023] WASCA 1. As noted in this blog post, the Court confirmed that "*courts have the conclusive authority to determine the jurisdiction of arbitral tribunals*" and that the tribunal had rendered itself *functus officio*. Leave to appeal this decision has however been granted by the High Court of Australia, so this case will be one to watch out for again in the coming year.

Events

Diversity has been a hot topic over the last few years. It continued to be an important point of discussion for the Australian arbitration community in 2023, as we saw two panel discussions on the topic, run by the Australian Centre for International Commercial Arbitration (ACICA) and ACICA 45 respectively, and the launch of the ACICA Diversity Committee. We were pleased to provide a platform to bring attention to this ongoing dialogue and look forward to covering new initiatives and ideas as they develop.

Otherwise, Australia played host to many other events, which focused on a range of interesting topics. These included the UNCITRAL National Coordination Committee for Australia (UNCCA) seminar in Canberra exploring the New York Convention in its 65th year, and the first GAR Live event in Sydney, examining topics such as persuading an arbitral tribunal and the use of artificial intelligence. As always, Australian Arbitration Week was the pinnacle of the events calendar, covering various topics such as the growth of arbitration within the health and life sciences sector, the development of sports arbitration in Australia, and lessons learned in major project disputes. During Australian Arbitration Week, we also interviewed The Hon Wayne Martin AC KC, who provided many valuable insights, including his stance on Australia's presence and future in international arbitration. Finally, a roadshow was held in Melbourne, Perth, and Sydney to promote the launch of the ACICA Evidence in International Arbitration Report, covered in this blog post.

New Zealand

Judicial Developments

In April 2023, the New Zealand High Court, in *Maritime Mutual Insurance Association v Silica Sandport* [2023] NZHC 793, granted a rare anti-suit injunction in favour of arbitration. Here, a Guyana-incorporated entity, Silica, filed proceedings in the Guyanese courts in an insurance dispute following the loss of Silica's barge which capsized in international waters. Silica's contracts of insurance with the Maritime Mutual Insurance Association contained an arbitration clause referring any disputes to arbitration in Auckland or London. The Association applied to the New Zealand courts for interim and permanent anti-suit injunctions restraining Silica from continuing the litigation on the basis of the arbitration clause.

The New Zealand High Court upheld the arbitration clause and issued the injunctions against the

Guyanese proceedings. The Court concluded that it was "highly probable" that the choice of forum clause giving jurisdiction to arbitration seated in Auckland or London had been contractually agreed, and that there were no strong reasons to refuse relief.

This decision illustrates the willingness of the New Zealand courts to play an interventionist role in private international law cases where appropriate – particularly to uphold the parties' contractual agreement to arbitrate.

In *Foundation Village Ltd v Growing Spaces Ltd* [2023] NZHC 2638, the Court was required to determine whether a mandatory injunction constituted an 'interim measure' in the context of New Zealand's Arbitration Act 1996. Schedule 1 of the Act specifies the instances when the Court may intervene in an arbitration to grant injunctive relief to preserve the position pending resolution by arbitration. The issue was where the jurisdiction of the Court lies in circumstances where the parties had referred their dispute to arbitration, but prior to commencement, one of the parties had sought urgent injunctive relief which if granted, would have disposed of the case. The Court ultimately held that it would be inconsistent with the purpose of the Act for the Court to rely on general or residual powers to grant injunctive relief that does not fall within the provisions of the Act, and which ultimately nullifies the jurisdiction of the arbitrator.

Finally, in December, the Courts released the Guidelines for use of generative artificial intelligence in Courts and Tribunals which guide lawyers, lay litigants, and the judiciary on the limitations of AI, ethical issues, and ensuring accountability and accuracy. Although the Guidelines do not directly apply to arbitration, they may serve as a source of inspiration to New Zealand arbitrators and counsel.

Events

The Arbitrators' and Mediators' Institute of New Zealand (AMINZ) Conference returned in August 2023 for a full three-day programme, with seminars focusing on a range of emerging alternative dispute resolution topics. One seminar focused on the practical and ethical impacts of AI in dispute resolution, including issues and opportunities on both sides of the bench, such as the use of AI as a "fourth arbitrator" or replacement tribunal secretary, and the use of generative AI by counsel in conducting research and preparing submissions. The issues were similar to those dissected by this blog post.

The interplay between expert evidence and third-party litigation/arbitration funders was also canvassed. The session focused on practical steps counsel can take at the early stages of a dispute to engage with quantum issues to assess the true value of a dispute and the likely commercial outcomes to ensure that 'the game is worth the candle'.

Discussion also turned to whether the criteria for granting leave to appeal an arbitral award has recently been expanded (or is being applied inconsistently) by New Zealand's Courts, and what the impact of an increased willingness to review arbitral decisions means in terms of the presumed finality of arbitral awards.

Pacific Islands

Cases

2023 saw continued evidence of the use of international arbitration by Pacific parties. Statistics released by the Singapore International Arbitration Centre (SIAC) revealed that one party from Fiji and one from the Marshall Islands were involved in new cases it handled in 2022. Fijian law was also applied as a governing law. Similarly, the London Court of International Arbitration (LCIA) Annual Casework Report indicated that parties originating from Samoa and the Marshall Islands appeared in cases in 2022. News also emerged that an arbitration agreement exists in an allegedly forged contract at the centre of a dispute between the Republic of Vanuatu and Unimed Glory SA. The dispute, which concerns the sale of mackerel fishing rights, has spawned cases before the Supreme Court of Vanuatu and the Court of Appeal of England and Wales.

Multiple stay applications in favour of arbitration were granted by the High Court of Fiji. One such decision was *Housing Authority v Top Symphony SDN BHD* [2023] FJHC 301, in which a stay was granted pursuant to section 12 of the Fijian International Arbitration Act 2017. The plaintiff, a Fijian statutory body, brought court proceedings alleging it had validly terminated its contract with the defendant, a Malaysian construction contractor, because the defendant had repudiated the contract. The plaintiff argued that the arbitration clause in the contract, which provided for SIAC Rules, was also repudiated. The Court granted the defendant's stay application, referring to the principles of separability, competence-competence, and party autonomy.

Initiatives to Support Arbitration

Access to judgments is invaluable for building awareness of judicial attitudes to arbitration in the region. It is therefore relevant to highlight the work of the Pacific Islands Legal Information Institute (PacLII), which collects and publishes free legal materials from 20 Pacific Island jurisdictions. PacLII is currently funded through to mid-2024 thanks to the Australian Government. The Vanuatu Declaration, adopted at a recent summit, calls for support to secure PacLII's longer-term future.

Support for arbitration in the Pacific continues in other forms. The ACICA launched its Pacific Island Practitioner Scholarship, funded through profits from the 2018 ICCA Congress hosted in Sydney. The "Conversations with ICC Australia" series discussed the topic of "The rule of law and arbitration in the South Pacific". The Law Council of Australia International Law Section's annual essay competition explored "The Efficacy of Existing Cross Border Dispute Resolution Mechanisms in the South Pacific Region".

Finally, Pacific Island states have been playing a leading role in establishing dispute resolution procedures relating to climate change. The ICCA Panel of Experts, tasked with developing the Paris Agreement Draft Conciliation Annex, includes representatives of Tuvalu and Papua New Guinea. Vanuatu sponsored the panel's briefing for States prior to COP28. With continued awareness and support, we expect the use of dispute resolution mechanisms such as arbitration and conciliation to rise in prevalence in the Pacific Islands.

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