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Papua New Guinea's New Arbitration Regime: A Catalyst to Make PNG an Arbitration Friendly Destination

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On 20 February 2024, Papua New Guinea (“PNG”) passed a dual-track legislative regime regulating arbitration (“New Arbitration Regime”), with the *Arbitration (International) Act 2024* (“IAA”) governing international arbitration and a separate *Arbitration (Domestic) Act 2024* (“DAA”) governing domestic arbitration. The New Arbitration Regime will come into operation upon the publication of a notice in the Gazette.

The New Arbitration Regime marks a significant development in PNG and aims to increase PNG’s attractiveness as a venue for international and domestic arbitration.

Work on the New Arbitration Regime started in 2018, through the establishment of a Technical Working Committee. The initial proposal was for a single Act covering international and domestic arbitration. However, it was not until this year, following a six-year process and recent major political and socio-economic turmoil, that the New Arbitration Regime finally received the Legislature’s approval, taking the form of two separate Acts.

The New Arbitration Regime replaces PNG’s pre-independence *Arbitration Act 1951*, which was based on the United Kingdom’s antiquated and long-repealed *Arbitration Act 1889*.

With the enactment of the New Arbitration Regime, PNG will have a legislative regime to give effect to the *United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958* (“New York Convention”) which PNG acceded to in 2019.

Key Features of the New Arbitration Regime

The IAA and DAA are drafted substantially in conformity with the UNCITRAL Model Law on International Commercial Arbitration (1985) with amendments adopted in 2006 (“Model Law”), and the New York Convention.

Some of the salient but not unusual features of the New Arbitration Regime include the doctrine of separability,¹⁾ competence-competence,²⁾ limited court intervention,³⁾ and finality and enforcement of awards.⁴⁾ Moreover, the definition and form of an arbitration agreement in both the DAA and

IAA adopt Article 7 (Option I) of the Model Law which captures the writing requirement, following the New York Convention's approach.

However, there are also some notable differences between the DAA and the IAA. The DAA's objectives, as set out in section 2, seem to be aligned with PNG's new [ADR Rules 2022](#) and seek to address the common problem of lengthy delays in the court process by promoting arbitration and clarifying the degree of court intervention in the arbitral process. The IAA's main objectives are, inter alia, to promote international consistency of arbitral regimes based on the Model Law and to facilitate the recognition and enforcement of foreign arbitral awards under the New York Convention.

The IAA applies to international arbitration, which is defined under section 5(3) and adopts Article 1(3) of the Model Law. However certain provisions⁵⁾ only apply if the seat of arbitration is in PNG.

The DAA applies to all domestic arbitrations, meaning arbitrations which do not fall under the IAA, except where another statute provides for arbitration, or another mechanism for dispute resolution. In such situations, the other statute prevails over the application of the DAA. Under the DAA, the Court may, of its own motion or with the consent of the parties, refer a matter for resolution by arbitration that is not already the subject of an arbitration agreement.⁶⁾ This process is broadly referred to as 'court annexed arbitration'. This is an unusual inclusion, albeit not strange in PNG, considering the similarity of such process to court annexed mediations under the ADR Rules.

Notable Differences Between the New Arbitration Regime and the Model Law

There are some variations in the New Arbitration Regime, as compared to the Model Law, that practitioners should take note of:

- **Ability of Courts to intervene in proceedings brought in breach of an arbitration agreement:** Whereas under the Model Law, the referral is dependent on a party's request, under the New Arbitration Regime, the Courts may on their own motion refer the matter to arbitration.⁷⁾
- **Limitation period:** Under the New Arbitration Regime, the six-year statutory limitation period for commencing legal proceedings under the *Frauds and Limitations Act 1988* or any other applicable laws also applies to arbitral proceedings.⁸⁾
- **Legal representation:** In domestic arbitrations, parties may be self-represented or be represented by a duly qualified legal representative in PNG⁹⁾ whereas in international arbitrations, parties may be self-represented or be represented by a duly qualified legal practitioner from any legal jurisdiction of that party's choice.¹⁰⁾ In the latter, there is no requirement for the legal practitioner to hold a practising certificate under the *Lawyers Act 1986*, except in arbitration-related court proceedings. In such court proceedings, the *Attorney General Act 1989* would apply,¹¹⁾ presumably for the purposes of enabling the Attorney General to grant a certificate that a lawyer practising outside the country is authorized to appear before PNG Courts.¹²⁾
- **Application of Section 5 of the *Claims By and Against the State Act 1996* ("CBSA"):** Under section 5(1) and (2) of the CBSA, a claimant is required to give notice of its intention to make a claim against the State (a) within six months after the occurrence out of which the claim arose; or

(b) within six months after a claimant becomes aware of a breach where the case involves a breach of contract; or (c) within the period extended by the Attorney General or the Court. Under the New Arbitration Regime, section 5 of the CBSA applies to all domestic arbitrations under the DAA, where the State is a party unless the contract between the parties otherwise provides.¹³⁾ On the other hand, section 5 of the CBSA does not apply to all international commercial arbitrations against the State under the IAA.¹⁴⁾

- **Codification of the principles of confidentiality and privacy:** PNG's confidentiality and privacy provisions¹⁵⁾ are substantially similar to section 18 of the [Hong Kong Arbitration Ordinance](#), except they include an additional exception that allows for publication, disclosure or communication pursuant to an order from an arbitral tribunal.

The IAA also adopts other features of modern arbitration legislation not found in the Model Law, including: (i) an expanded definition of “arbitral tribunal” to include an emergency arbitrator;¹⁶⁾ (ii) a provision on liability and immunity of arbitrators, appointing authorities and arbitral institutions;¹⁷⁾ and (iii) a provision clarifying that the public policy grounds upon which an award may be refused recognition or enforcement include fraud, corruption or where an award is repugnant to general principles of humanity.¹⁸⁾

Potential Amendments

However, the IAA, although only recently passed, could benefit from amendments as some provisions do not seem to be consistent with each other. For instance, section 7, titled “Arbitrability of Dispute”, provides that any dispute that the parties have agreed to submit to arbitration under an arbitration agreement is arbitrable, unless it is contrary to public policy. However, section 58(3) adds a further caveat on arbitrability by providing that an award may be set aside if: (a) the subject matter is not capable of determination by arbitration under the law of PNG; or (b) the award is contrary to public policy. Although there appears to be no restrictions on arbitrability in PNG law at present, it may be that section 58(3)(a) was included to cover future restrictions (in which case section 7 would need to be amended to include a reference that a dispute may not be arbitrable under PNG law).

Concluding Remarks

Presently, PNG Courts source guidance from the principles of English common law, only as they stood on PNG's Independence Day in 1975.¹⁹⁾ Thus, much of the ‘pre-arbitration reform’ case law from England still forms part of PNG law, subject to the Courts’ right to decide that it would be inappropriate to the circumstances of PNG to adopt old English cases to resolve a case before it. Going forward, PNG Courts in the New Arbitration Regime era will be heavily reliant on jurisprudence from other jurisdictions that have adopted the Model Law. Importantly, the Courts will have a duty to develop the local jurisprudence under the New Arbitration Regime where old and new practices have diverged. For example, in *State v Downer Construction (PNG) Ltd*, the Supreme Court held that section 5 notices under the CBSA are not applicable to domestic nor international arbitration proceedings.

Over the years, PNG has failed to attract more foreign investment and trade because of the inefficiencies in contract enforcement which is essential for creating a business-friendly environment (see e.g., observations by the Supreme Court in *Bluewater International Ltd v Mumu*). Indeed, an efficient justice system is fundamental to reducing business risks and improving the business climate in emerging market economies. The New Arbitration Regime presents an opportunity to promote international trade and commerce, by creating a robust arbitration framework that offers an alternative means of resolving complex commercial disputes using a confidential, neutral and efficient process that leads to enforceable arbitral awards.

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References

- ?1 DAA, s. 25(2); IAA, s. 24(2).
- ?2 DAA, s. 25(1); IAA, s. 24(1).
- ?3 DAA, s. 10; IAA, s. 9.

- ?4 DAA, s. 59(1); IAA, s. 59(1).
- ?5 IAA, ss. 14, 35, 36, 37, 48, 59, 60, 61 and 62.
- ?6 DAA, s. 7.
- ?7 DAA, s. 15(1); IAA, s. 14(1).
- ?8 DAA, s. 11; IAA, s. 10.
- ?9 DAA, s. 40.
- ?10 IAA, s. 39.
- ?11 The reference to “Paragraph (c)” in IAA, s. 39(4) seems to refer to IAA, s. 39(3)(c).
- ?12 Attorney General Act 1989, ss. 7(g) and 15.
- ?13 DAA, s. 5.
- ?14 IAA, s. 4.
- ?15 DAA, s. 49; IAA, s. 49.
- ?16 IAA, s. 2(1).
- ?17 IAA, s. 23.
- ?18 IAA, s. 62.
- ?19 PNG Constitution, sch. 2.2.

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