Kluwer Arbitration Blog

Australian Arbitration Week Recap: International Arbitration in the Pacific—Reform and Capacity Building

Amy Cable, Erin Eckhoff (Ashurst) and Emma Garrett (Senior Assistant Editor) · Friday, October 18th, 2024 · ACICA

The Pacific region, with its rich tapestry of cultures and diverse political landscapes, presents both unique opportunities and formidable challenges for international arbitration. As nations within this region strive to attract foreign direct investment ("FDI") and foster economic growth, the role of arbitration becomes increasingly pivotal. On 17 October 2024, during the Australian Arbitration Week 2024, a distinguished panel of experts convened to discuss the current state and future prospects of international arbitration in the Pacific. This discussion underscored the critical need for ongoing reform and capacity building, while also highlighting the importance of cultural sensitivity and local engagement. From the trailblazing efforts of Fiji to the nuanced approaches of Tonga and the Solomon Islands, the conversation revealed a complex yet promising landscape for arbitration in the Pacific.

The session was introduced by Jeremy Chenoweth (Partner, Ashurst, Brisbane) and moderated by Erin Eckhoff (Senior Associate, Ashurst, Sydney) with a panel comprising of:

- Daniel Meltz AM (Barrister and Arbitrator, 12 Wentworth Selborne Chambers, Sydney; Expert Consultant, Asian Development Bank ("ADB"))
- Jon Apted (Partner, Munro Leys, Fiji)
- Rose Kautoke (Senior Crown Counsel, Attorney General's Office, Kingdom of Tonga)
- Ake Spiros Poa (In-House Counsel, Solomon Islands Electricity Authority; ACICA Pacific Islands Practitioner Scholarship recipient)

Setting the Scene

Mr Chenoweth gave the opening remarks and spoke to the wider agenda for reform in the Pacific region. Ms Eckhoff set the scene for the discussion, highlighting the regional diversity across the Pacific region and describing this both as a strength and a challenge when it comes to developing a cohesive framework for international arbitration. While there have been significant strides in recent years in the promotion of international arbitration in the region (for example, earlier this year Papua New Guinea ("PNG") adopted laws governing both international and domestic arbitrations; see here and here), there is room for further reform and capacity building across the region.

The Role of International Arbitration in the Pacific—The 'Why' Case

The encouragement of FDI is often cited as a key justification for the promotion and reform of international arbitration, in particular in developing countries and regions (see further here). Mr Meltz opened the discussion with his thoughts on the topic, describing FDI as the "invisible hand" of international arbitration reform; one of the key thoughts in a foreign investor's mind is "what happens if something goes wrong?", and where international arbitration is the chosen dispute resolution mechanism, investors will have the confidence that they will be able to enforce their rights later down the line. From a government perspective, Ms Kautoke noted that a primary aim behind the international arbitration reform in Tonga has been to encourage trade and investment, however this is balanced with the need to protect local businesses.

Fiji's international Arbitration Regime—A Trailblazer?

Ms Eckhoff noted that Fiji is generally considered to be a trailblazer for international arbitration in the region: it acceded to the New York Convention ("Convention") in 2010, enacted the International Arbitration Act in 2017, and in recent years, the Fijian High Court has granted multiple stay applications in favour of arbitration (see further here).

On the condition that he was speaking only from the Fijian perspective, Mr Apted explained that while there has indeed been an uptake of arbitration clauses in contracts with foreign investors, there remains a strong preference amongst local practitioners and businesses to seek vindication before the local courts. Secondly, cost is an important factor; not only is the cost of arbitration administered by certain institutions prohibitive, but also local practitioners may see their case load threatened by an alternative to the slow pace and the procedural complexities of the local courts, which they rely on for their business. On the flipside, he noted that the Fijian judiciary was amongst the strongest proponents of reform, precisely because of the need to lessen the workload of the courts.

Mr Apted concluded (and Mr Spiros Poa agreed) that there needs to be targeted outreach to local practitioners and businesses to educate them about what arbitration is and what it can offer. Echoing this, Mr Meltz noted that while there was significant input from the ADB at the outset of international arbitration reform in Fiji, capacity building needs to be ongoing.

Legislative Regimes Across the Region—The 'State of Play'

The authors note that the Pacific region lacks a unified legal framework for resolving cross-border commercial disputes through international arbitration—the Convention has been adopted, ratified, and applied inconsistently across the region.

Ms Kautoke summarised the state of play in Tonga. She explained that the Tongan International Arbitration Act 2020 was enacted in view of the pressing need to attract FDI. However, while the Act adopts the UNCITRAL Model Law with a number of additions, there is no legislation for domestic arbitration (as illustrated in two recent cases: *Fe'ao Vunipola v Tonga Rugby Union* and *Kacific Broadband Satellites International v Registrar of Companies et al.* (see further here and here)). Ms Kautoke added that these cases demonstrate why there must be a clear understanding of

what arbitration is. She noted that capacity building is a major challenge, and the Tongan government is open to seeing how it can further develop its expertise.

In the context of the (potentially) prohibitive cost of arbitration, Ms Eckhoff posed the question whether, in terms of an arbitral institution, there was a preference for something "closer to home." Mr Spiros Poa explained that, at least in the Solomon Islands, the general feeling is that having a local arbitral institution is not sustainable given the size of its economy. In his view, while a wider Pacific-based institution may be an option in the future, the general preference would be for well-known institutions with a track record. Mr Apted added that there is an opportunity for institutions such as ACICA to ensure they have individuals on their panel of arbitrators with not only the relevant experience and know-how but also a clear understanding of the cultural aspects that may be at play. Ms Kautoke and Mr Spiros Poa also emphasised that in order to make the arbitration experience positive for Pacific-based users, cultural sensitivity is key, from institutions and arbitrators alike.

Ms Eckhoff observed a leaning towards a Med-Arb process across the region, with PNG, for example, having encouraged mediation more generally through the enactment of the Alternative Dispute Resolution Rules 2022. Mr Spiros Poa explained that ADR is a familiar method of resolving disputes in the region; his experience in the Solomon Islands and PNG is that businesses are more comfortable resolving disputes in a less formal setting. Thus, a Med-Arb process or other hybrid system may be more appropriate.

Cultural and Political Landscape in the Pacific—The Role of Traditional Customs

Ms Kautoke explained that traditional customs play a significant role in resolving disputes across the Pacific region, and each jurisdiction takes a different approach according to their own culture and customs. She noted that where there is a foreign party with little understanding of the cultural aspects at play, this can present difficulties. Hence, there is a need for capacity building both "on the ground" and in respect of other stakeholders, including arbitrators, to develop understanding as to the relevant cultural aspects and landscape.

Mr Apted added that a "post-colonial cringe factor" is common across the Pacific region: he explained that there is a general fear of being judged or seen as provincial by foreign stakeholders (including arbitrators) who do not understand the local culture and customs. Additionally, he explained that Fijian clients have a general view that justice should be "for free," and paying fees to an arbitrator to decide a case does not sit well with this.

The Future of Disputes in the Pacific

To wrap up, Ms Eckhoff invited views from the panellists as to the types of disputes they see on the horizon in the region. Mr Spiros Poa's view, as an energy specialist, was that there will be plenty of disputes in the construction and mining industries, particularly those arising from engineering, procurement and construction contracts, and power purchase agreements, as well as the renewables sector.

Ms Eckhoff further noted that Pacific region jurisdictions do not feature heavily in the investor-

State dispute settlement (“ISDS”) space and queried whether there is a general consensus in the region not to enter into investment treaties which provide for ISDS by way of international arbitration. Mr Meltz noted that in his view this is a particularly sensitive topic from a sovereign risk point of view, with a sense of vulnerability coming from the developing economies across the region.

Concluding Remarks

The panel discussion highlighted the crucial role that cultural awareness plays in the development of international arbitration in the Pacific. Effective capacity building and reform efforts must consider local perspectives and traditional customs. It is essential for all stakeholders involved in international arbitration in the region—including foreign investors, legal practitioners, arbitral institutions, and arbitrators—to understand and appreciate the significance of culture and its nuanced differences across the Pacific region.

This concludes our coverage of Australian Arbitration Week 2024. More coverage of Australian Arbitration Week is available here.
