Kluwer Arbitration Blog

2024 Year in Review: Australia, New Zealand and the Pacific Islands

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Continuing with the trend of previous years, 2024 saw continued development throughout the region. In Australia, we saw an influx of meaningful, pro-arbitration court decisions, in the Pacific Islands, we saw the strengthening of legal frameworks, and in New Zealand, we saw a clarification of public policy considerations. We delve into these standout developments and more below.

Australia

Cases

In 2024, Australia's apex court, the High Court of Australia ("High Court"), delivered three judgments concerning international arbitration.

In *Carmichael Rail Network Pty Ltd v BBC Chartering Carriers GmbH & Co KG* [2024] HCA 4, the High Court upheld a stay of proceedings in the Federal Court of Australia ("Federal Court") in favour of a London Maritime Arbitrators Association arbitration seated in London. As discussed in this post, the decision provided guidance on the applicable standard of proof in assessing whether an arbitration agreement is null and void for the purposes of section 7(5) of the *International Arbitration Act 1974* (Cth), while underscoring the continued confidence of the Australian judiciary in international arbitration.

In *Tesseract International Pty Ltd v Pascale Construction Pty Ltd* [2024] HCA 24, the High Court determined, by a 5:2 majority, that domestic proportionate liability statutes apply to arbitration. In this post, the authors concluded that the majority's analytical approach should be viewed as pro-arbitration in that it emphatically respected the principle of party autonomy and the international origins of Australia's domestic arbitration statutes.

In *CBI Constructors Pty Ltd v Chevron Australia Pty Ltd* [2024] HCA 28, the High Court upheld a decision of the Court of Appeal of Western Australia which set aside an interim award dealing with an issue of liability on the basis that the tribunal was *functus officio*, having issued an earlier interim award dismissing "*all issues of liability*". As concluded in this post, the decision upholds

party autonomy and the consensual basis of arbitration, while providing a timely reminder that although bifurcation can be a useful procedural tool, care must be taken in the process.

Turning to state courts, in *Icon Si (Aust) Pty Ltd v Australian Nuclear Science and Technology Organisation* [2024] NSWSC 324, the Supreme Court of New South Wales held that a post-dispute contractual amendment to waive compliance with expert determination in a multi-tiered dispute resolution clause did not render the arbitration agreement "*inoperative*" or "*null and void*" under section 8(1) of the *Commercial Arbitration Act 2010* (NSW). In *SFP Events Pty Ltd v Little Swamp II, Inc & Anor* [2024] QSC 132 the Supreme Court of Queensland took a practical approach to contract formation despite a missing signature, and ultimately ordered a stay of proceedings in favour of arbitration on the basis that the arbitration agreement was contained in a "*fully executed*" contract.

In investment arbitration, we saw the next episode in the ongoing enforcement saga involving Spain and Infrastructure Services ("the investors"). Following the High Court's 2023 decision (discussed here), the investors obtained *ex parte* orders requiring officials from the Spanish Consulate to be examined before the Federal Court and produce documents identifying Spanish assets in Australia. Spain sought to set aside the orders and the investors countered that the application be conditioned on the provision of security for costs by Spain. Spain argued that conditioning its attempt to vindicate consular immunities conferred by the *Consular Privileges and Immunities Act 1972* (Cth) was an affront to the immunities. The Federal Court rejected that argument in *Infrastructure Services Luxembourg S.a.r.l. v Kingdom of Spain (security for costs)* [2024] FCA 234. The Full Federal Court refused leave to appeal in *Kingdom of Spain v Infrastructure Services Luxembourg Sa.r.l. (Security for Costs)* [2024] FCAFC 113 and Spain was required to post security. However, the Full Court made clear that the assertion of immunity was premature and it remained open to the consular officials to invoke immunity upon being called for examination.

The Spanish saga, as well as the increasing number of ongoing investment treaty disputes Australia is facing, highlight the significance of the energy transition to arbitration. The increased regulatory attention on ESG issues and "*greenwashing*", and the arbitrability of such disputes from an Australian perspective were discussed in this post.

Events

Key events in Australia in 2024 included Australian Arbitration Week ("AAW") and the Melbourne Arbitration Symposium.

AAW was the premier event on the Australian arbitration calendar. The Blog kicked off coverage of the week with an interview with Judith Levine, who commenced as President of the Australian Centre for International Commercial Arbitration ("ACICA") in June 2024. Events held during AAW considered topics including inferences, presumptions, and burdens of proof in international arbitration and trends and developments in Asia's energy sector and their relevance to arbitration in Australia.

ACICA hosted the inaugural Melbourne Arbitration Symposium in August, which was well-timed to allow for significant discussion of the High Court decisions in *Tesseract* and *Chevron v CBI*. The event raised funds for ACICA's Pacific Islands Practitioner Scholarship Program, which was

awarded for the first time in 2024. Continued development of arbitration within the Pacific was also a topic of discussion at AAW, as discussed further below.

The Pacific Islands

Legislation and Treaties

2024 saw significant strides in the Pacific region, from new arbitration legislation in Papua New Guinea ("PNG") to Vanuatu joining the Permanent Court of Arbitration ("PCA").

In February 2024, PNG became the fifth jurisdiction in the region to reform its arbitration framework, joining the Cook Islands, Palau, Fiji and Tonga. PNG passed the Arbitration (International) Act 2024 and the Arbitration (Domestic) Act 2024 which came into effect on 15 July 2024. Relevantly, the Arbitration (International) Act 2024, which replaces the pre-independence Arbitration Act 1951 and gives effect to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958, signals PNG's commitment to improving its arbitration landscape and to promoting international trade in the region.

In another significant development, on 11 August 2024, Vanuatu became the 123rd Contracting Party to the PCA and the second nation in the region to do so after Fiji. This marks critical progress for dispute resolution in Vanuatu, which has been historically cast as an offshore finance centre or "tax haven", as it signifies a dedication to fostering a stable environment for international commerce and trade and the peaceful settlement of cross-border disputes. This also comes in the wake of the Vanuatu-led initiative at the International Court of Justice for an Advisory Opinion on the Obligations of States relevant to climate action, which recently concluded its public hearing on 13 December 2024.

Cases

Despite these significant milestones, development of international arbitration jurisprudence in the region has been slow. The Fijian case of *Housing Authority v Top Symphony* of 2023 remains the most recent published judgment on international arbitration in the region. Nevertheless, it signifies the ability of courts in the Pacific region to apply international law and practice on international arbitration. As discussed here, in that case, the High Court of Fiji granted a stay of legal proceedings pending arbitration, and confirmed that, consistent with international jurisprudence, non-compliance with tiered pre-arbitral dispute resolution mechanisms is an issue that falls within an arbitrator's purview.

Events

At AAW, prominent practitioners from the Pacific region participated in a panel on International Arbitration in the Pacific—Reform and Capacity Building ("South Pacific Panel"). Among other things, the South Pacific Panel observed that despite the reforms to encourage international arbitration, uptake has been slow, noting that effective capacity building and reform efforts must

take into account local perspectives and traditional customs. AAW also covered various topics of relevance to the Pacific region, including trends and developments in the energy sector, which, as highlighted at the South Pacific Panel, is likely to be one of the key areas for international arbitration disputes in the Pacific.

Looking Forward

In line with the observations at AAW's South Pacific Panel, governments in the region have noted the poor uptake of international arbitration. For instance, in its recently released National Development Plan 2025-2029 and Vision 2050 ("NDP"), the Fijian government highlighted that despite efforts to adopt ADR measures such as international arbitration to relieve pressure on the judicial system, there continues to be a backlog in cases because those measures have been poorly taken up by litigants and lawyers in the country. In the NDP, the Fijian government states that it plans to adopt measures to support and encourage arbitration in the next four years.

New Zealand

Cases

As with the Pacific Islands, New Zealand also saw limited notable jurisprudence in 2024, bar one judgment. In May 2024, the High Court of New Zealand ("NZHC") handed down its decision in *Bathurst Resources Limited v LMCHB Limited* [2024] NZHC 1058. In this decision, the NZHC considered whether an international arbitration costs award could be set aside due to a conflict with public policy under Article 34 of the UNCITRAL Model Law ("Model Law"), reflected in New Zealand in the Arbitration Act 1996.

The NZHC ultimately declined to set aside the costs award. In delivering judgment, the NZHC ruled that arbitrators exercised discretion when making costs decisions, and were not bound by prior court decisions on costs in related, but distinct, litigation proceedings. While the NZHC considered such court decisions highly persuasive for arbitrators, it ultimately ruled that an arbitrator's failure to follow those decisions would not alone amount to a breach of public policy. Moreover, the NZHC emphasised that a conflict with public policy due to a breach of natural justice turns only on matters of procedural fairness rather than the arbitrator's conclusion on the merits.

Looking Forward

What can we expect from 2025 and beyond? We have already had a sneak peek into the upcoming year with an interview from a prominent New Zealand arbitrator, Sir David Williams KC. Sir David observed that while distance might prevent Australia and New Zealand from becoming global arbitration hubs like Singapore or London, both jurisdictions "*play an important regional role*" and can still perform a similar role as hubs for the Pacific region. Relatedly, Sir David also saw potential for ADR processes in the Pacific region, as they could incorporate mechanisms with elements of traditional customs and lore.

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