Regional International Arbitration Conference
12-13 February 2018
Westin Denarau Island, Nadi, Fiji

"Implementation of the New York Convention - Judicial Perspective"

by Chief Justice Anthony Gates, Fiji

Hon. Judges
Moderator Mr. Born
Distinguished Fellow Speakers
Members of the Bar
International Arbitrators
Representatives of Commerce and the Civil Service
and Interested Attendees

By 2pm on Sunday after the tropical depression over Fiji had eased, I ventured out on my afternoon walk. As I passed the Grand Pacific Hotel in Suva, GPH to us locals, thinking how imposing and tidy it all seemed, overlooking Albert Park where Kingsford-Smith had landed his small plane, and taken off again, I noticed various games of soccer being played. Suddenly I noticed at the edge of the ground along the line of stately Royal Palms a man with a stick herding 3 hens towards me. Was I mistaken then in thinking this was the Year of the Dog, not the Hen? Perhaps they were pets. He must have brought them down to the park in his car for an airing, and to allow them to scratch around, on the fine and verdant grass, so as, it is often said, to feed organically. I was quite taken aback by this spectacle. Never in my 40 odd years in Fiji had I seen such a thing in the capital city. A visitor to the 3rd world might have thought this was a typical scene, a flavour of local colour, a mix of urban and rustic. No it was not. It was indeed startling and unusual. So we must occasionally expect the unusual and respond without too much surprise.

It made me realise that a point so far not taken, or not resolved, in international arbitration may come before the courts in Fiji or in those of the South Pacific Islands. The courts will then have to resolve the apparent conflict between two principles, or perhaps between the International Arbitration Act and the local High Court Act. It could be that the point has not yet come to the attention of my fellow speakers Chief Justice Hwang of the DIFC courts in one of his essays or commentaries or of Professor Williams for resolution in his respected text book or of Judge Yang of China's Supreme Court in his experience. So we may have to anticipate the unusual, and if so we will have to do our best.

It is for this reason that UNCITRAL, ADB, ICCA and other interested bodies have arranged this Conference in our region. By bringing it here there is focus on the region, one of growing trade and involvement with other regions. In addition our judges last Friday were provided with a 1 day workshop on the New York Convention, and on our own new International Arbitration Act, ICCA, and its Judicial Guide book and were able to consider some of the jurisprudence. We are most grateful for this concerned assistance. I welcome it. Other countries in the region will follow no doubt with training and familiarisation in this aspect of international commercial law. It is too early to say how frequently we will be called upon to stay proceedings, provide emergency injunctive relief, remove an arbitrator, or to set aside an award. The main thing is we must be prepared and be ready to listen to argument, and to grant enabling orders or to proceed to enforcement of awards, if made out before us and considered appropriate.

On the New York Arbitration Convention website so far there are no decisions listed from Fiji, the Cooks or the Marshalls, the countries that are presently listed as contracting states. The Marshall Islands acceded in 2006, The Cooks in 2009, and Fiji in 2010. On that basis, there is much more work to be done to encourage all of the island states to accede, and to be prepared to handle such cases.

My colleague Sir David Williams proposes to address on Article II with regard to the definition of Arbitration Agreement, the meaning of "agreement in writing," and the phrase "or contained in an exchange of letters or telegrams." I am not sure what point of interest Chief Justice Hwang will address us on, but we can be sure it will be on points of jurisprudential interest from his vast operational and practice experience as a Specialist International Arbitrator.

I and many others in Fiji are grateful and indebted to UNCITRAL and ADB for focusing much attention on the small island states of the South Pacific. In particular we can be grateful for encouraging our developments along the path of accession, making necessary enactments, training and now this conference.

This week's Regional Conference in Nadi has brought many specialist speakers of distinction. For our part we will be sure to keep sending our Judges to conferences in this field. Some have already attended UNCITRAL's previously arranged conferences on Arbitration and Mediation. These contacts will continue. Fiji and the other island states will respond to all such overtures to the extent of their capacities and within their constraints.

Our own legal practitioners will need to be trained up, as with the judiciary, in order to make careful and authoritative submissions for their clients. No doubt for such cases overseas senior counsel will be briefed to attend as well. There should be no difficulty in obtaining temporary admission for such specialist counsel.

Fiji's International Arbitration Act 2017 received assent in September last year. Its commencement date is yet to be gazetted. Meanwhile the consequential High Court (Amendment) Rules 2018 are being discussed, and it is possible that they can be finalised and "made" by the end of this week, and gazetted shortly thereafter. They will bring a new Order 74 to our High Court Rules specially for International Arbitration.

In due course the Pacific Islands States will complete the New York Convention world map of states as signatories. They will become in line with, and connected with, the rest of the world as trading and business partners. This will provide the same system and procedure (largely speaking) for applications to court under the Convention and local Acts.

There are reasons for some suspicion from within the Region of a system that appears to remove from a state its jurisdiction to rule on matters normally to be decided within the state. In the 1980s the island states found that there was a great deal of illegal fishing going on within the various exclusive economic zones [EEZ]. The fish in these waters, though not oil, corresponded to assets. They were protected. A case was brought within the Solomons Courts involving a large American fishing vessel. Under powers in their Act, the Court ordered confiscation of the vessel. This was too much to endure for large scale commercial fishing companies, supported by their political allies. It was

suggested in a conference that island governments should change their legislation so that all foreign owners and captains were to be brought to and tried in the countries of the owning corporations. Such a proposal effectively would have taken away the power of the individual island states to prosecute the captains and owners of the offending vessels fishing within their EEZ waters. The proposals were not adopted and the island states remained, and remain, wary of such ideas.

International arbitration brings obvious advantages. Whilst the parties are right to seek specialised arbitrations with the depth of knowledge necessary for the subject-matter or complexity of the arbitration, I do not see that choice as a derogation of the sovereign jurisdiction and powers of State Courts.

It is said that the courts have generally shown a bias in favour of enforcement. That is understandable. If parties contract amongst themselves and agree within that contact to take all disputes concerning it to arbitration, then the courts will not rewrite the contract. Time and time again courts, with a few exceptions, have to enforce agreements that may not seem in retrospect clearly thought through or indeed wise. Yet they are to be enforced. So it is with arbitration.

But the judges must hear the applications without bias. If an exception is made out, then the applicant may be entitled to the advantage of the exception under the Act or by settled jurisprudence. Judges do not decide how a case is to be presented. They must await the way the case before them unfolds. If the arguments are meritorious they will succeed with them. But as experienced counsel well know, some law is long established. Occasionally even such can

be subject to a further improvement or refinement, which alters rights. I am glad to be in unison with Chief Justice Menon of Singapore in this view.

In some circumstances the parties may wish to go to mediation in response to a multi-tier dispute resolution clause. In Fiji we have now a Fiji Mediation Centre with accredited mediators. Much training has under-pinned the operation of this centre, whose success rate has been of the order of 75% so far. We wish to build on that facility. For mediation may result in substantial cost savings, and allow for swift healing of wounds in a trading relationship.

For the small island states like Fiji, international arbitration will have the advantages of speed, expertise, confidentiality, neutrality, and worldwide ease of enforceability of foreign arbitral awards. Realistically every government wishes to improve the prosperity of its people. A state needs to be connected with overseas trading partners and with substantial and genuine investors. All of Fiji's major trading partners have signed up.

It will take time for all of these things to come to the South Pacific countries. We are on the road. My task this afternoon is generally to be encouraging and to say the water is warm enough for swimming. The succeeding speakers will provide you with something more meaty to chew on pending the lunch break.

AHCT Gates
Chief Justice

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