

Third South Pacific International Arbitration Conference

***De-Risking Investment in the South Pacific Region through a World Class
International Arbitration Disputes Regime***

17 MARCH 2021

Yallamundi Rooms, Sydney Opera House and Virtual via Zoom

**Session 3C: Concurrent Breakout Session for Judges: IMPLEMENTATION OF THE
NEW YORK CONVENTION – JUDICIAL PERSPECTIVE**

*Moderator: Hon. Deputy Chief Justice Ambeng Kandakasi, Supreme and National Courts
of Justice of PNG*

*Speakers: Hon. Chief Justice James Leslie Bain Allsop, Federal Court of Australia; Hon.
Justice Anselmo Reyes, Singapore International Commercial Court; Hon. Acting Chief
Justice Kamal Kumar, Supreme Court of Fiji; Lord Chief Justice Michael Whitten QC,
Supreme Court of Tonga; Hon. Justice Jeffrey Shepherd, Supreme and National Courts of
Justice of PNG; Hon. Justice Duarte Tilman Soares, Court of Appeal, Timor-Leste; Julian
Cohen, Barrister and Arbitrator, Gilt Chambers*

Remarks
of
Michael Whitten QC
Lord Chief Justice of the Kingdom of Tonga

1. In 1967, Tonga enacted the *Reciprocal Enforcement of Judgments Act*. That Act defined 'judgment' as including arbitral awards which had become enforceable in the same manner as a judgment given by a court in the place the award was made.
2. Other than that, and despite a number of statutes referring incidentally to arbitration, until recently, Tonga has not had any legislation of its own to provide for or govern domestic or international commercial arbitrations.

3. In the 1995 decision of *Fletcher Construction Co Ltd v Montfort Bros* [1995] Tonga LR 142, which appears to be the only one of its kind, the Tongan Supreme Court was asked to enforce an arbitral award between parties to a building contract. Then Chief Justice Webster resorted to the English *Arbitration Act* of 1950 and the applicable English procedure Rules to find that the award there was final and binding and able to be enforced as a judgment of the Court.
4. In 2003, Tonga abandoned its adherence to English statutes, where they had been required, leaving only English common law and rules of equity, 'subject to such qualifications as local circumstances render necessary', to fill any so-called 'gaps' in the growing body of domestic legislation.
5. Since 2010, a raft of constitutional reforms have been described by some commentators as the Kingdom's path to democracy. Those reforms and their consequential effects on the legislature have been hoped to continue to advance Tonga's governance in a number of important respects, and to levels of or approaching other established rules based systems in many parts of the Pacific.
6. Despite its relatively small population of approximately 110,000 (excluding a much larger diaspora), Tonga's location affords it a certain geo-political significance in the Pacific. That significance is reflected, in part, by the levels of foreign aid, and bilateral and multilateral development support Tonga receives from more developed donor partners throughout the region. Yet, like many developing nations, Tonga's future sovereignty, economic prosperity and resilience to an ever-growing matrix of changes and challenges, is likely to depend, in large measure, upon its:
 - (a) level of commercial and other engagement with the proximate international community; and
 - (b) ability to foster and develop trading and investment relationships built on trust and a certain, stable and secure legal and regulatory environment.
7. To that end, on 12 June 2020, Tonga acceded to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958), thereby becoming the 164th State party to do so. It's accession was ratified on 10 September 2020.

8. On 3 March 2021, the Tonga *International Arbitration Act* came into force.
9. The Act goes beyond the minimum requirements of the New York Convention. It embodies a comprehensive, state-of-the-art legislative framework for international arbitration based on the UNCITRAL Model on International Commercial Arbitration 1985 as amended in 2006 (the “2006 Model Law”).
10. Examples include:
 - (a) a more detailed definition of an arbitration agreement (s.8, based on Article 7 of the 2006 Model Law, Option I);
 - (b) the separability of an arbitration clause from the other terms of the contract (s.19, based on Article 16 of the 2006 Model Law).
 - (c) the obligation on a court seized of a matter which is the subject of an arbitration agreement, to refer the parties to arbitration, unless the agreement is found to be null and void, inoperative or incapable of being performed (s.9, based on Article 8(1) of the 2006 Model Law);
 - (d) provisions for the granting and enforcement of interim measures (ss 21-31, based on Articles 17 and 17A-J of the 2006 Model Law); and
 - (e) empowering an arbitral tribunal to rule on its own jurisdiction.
11. The Tonga *International Arbitration Act* also contains provisions which supplement the Model Law and are:
 - (a) based on international best practice and recent trends and developments in the field; and
 - (b) adapted from leading arbitration seats in the region, including Australia, Hong Kong, and Singapore.
12. Such provisions include:
 - (a) the definition of an “arbitral tribunal” includes “an emergency arbitrator” (s.2, based on s.2(1) of the Singapore International Arbitration Act). This reflects most institutional arbitration rules which allow parties to obtain urgent

interim relief from an emergency arbitrator who can be appointed even before the constitution of the tribunal;

- (b) representation in arbitral proceedings (s.34, based on s.29 of the Australian International Arbitration Act). This is in line with the prevailing trend of recognising the parties' freedom to choose their representatives in international arbitration proceedings, and guarantees parties, particularly those based outside Tonga, that local restrictions on representation will not be imposed in the context of international arbitration proceedings;
 - (c) confidentiality of the arbitration proceedings is expressly guaranteed, subject to defined exceptions (s.45, based on s.18 of the Hong Kong Arbitration Ordinance). This reflects the substantial premium that parties who choose to arbitrate place on confidentiality; and
 - (d) the liability and immunity of arbitrators, their employees or agents, including, arguably, appointing authorities and arbitral institutions (s.18, based on s.28(1) of the Australian International Arbitration Act and s.25A of the Singapore International Arbitration Act). This reflects the importance placed by many modern arbitration regimes on the adjudicative character of the arbitrator's mandates.
13. The standard provisions from the Model Law reflect well-established international arbitration principles. The supplemental provisions now equip Tonga with an advanced and comprehensive legislative regime for international arbitration. The combination presents a more certain and supported legal environment for the conduct of international arbitration and the enforcement of international arbitration awards in Tonga.
 14. However, of course, the Act is only the first step towards implementation of the Convention in Tonga. There is much more to be done to achieve practical implementation and demonstrated efficacy.
 15. In order to access the economic benefits of commercial dealings based on the Convention and to establish and develop Tonga's reputation as having a predictable and effective supervisory statutory regime for the regulation of international arbitration and enforcement of arbitration agreements and awards

in accordance with the Convention, careful planning, design and determination will be required in undertaking key measures such as:

- (a) educating Government, businesses and lawyers in Tonga on the use of arbitration;
 - (b) promotion of the *Act* to businesses in Tonga and international investors;
 - (c) strengthening local institutional capabilities, i.e. among Tongan lawyers and the private sector to include arbitration clauses in commercial contracts and to resolve disputes by engaging in international arbitration proceedings in accordance with the Convention and the *Act*;
 - (d) incorporation of dedicated international arbitration rules within or alongside the existing Tonga Supreme Court Rules to enhance and simplify access to Tonga's courts for applications under the *Act*; and
 - (e) consideration of other elements within the allied regulatory framework such as foreign exchange control and foreign investment laws.
16. All of these, and more, will be instrumental in Tonga's ability to continue to successfully position itself as a certain and secure international trading partner and investment option in the Pacific.