

25 September, 2017

International Arbitration Alert

International Arbitration Group Assists Fiji in Adoption of UNCITRAL Model Law on International Commercial Arbitration

1. On 15 September 2017, the Parliament of the Republic of Fiji enacted the International Arbitration Act 2017 (the “Act”). The Act implements the United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards 1958 (the “New York Convention”), which Fiji ratified on 27 September 2010. It enacts a comprehensive, state-of-the-art legislative framework for international arbitration based on the UNCITRAL Model on International Commercial Arbitration 1985, with amendments adopted in 2006 (the “Model Law”). It also incorporates international best practices in international commercial arbitration, including provisions adapted from the Australia International Arbitration Act, the Hong Kong Arbitration Ordinance and the Singapore International Arbitration Act.

2. The government of Fiji was supported in the drafting of the Bill by an international team from the Asian Development Bank (“ADB”) and UNCITRAL. Gary Born, chair of Wilmer Cutler Pickering Hale and Dorr LLP’s International Arbitration Group, was one of two expert consultants appointed by the ADB for the project and was assisted by Jonathan Lim, senior associate. Born and Lim are also supporting the ADB in a broader technical assistance project, in collaboration with UNCITRAL, through its Regional Centre for Asia and the Pacific, which aims to promote international arbitration reform in the South Pacific.¹

Purpose and Scope of the Act

3. The purpose of the Act is to promote greater foreign direct investment in Fiji by improving the investment climate and boosting investor confidence. It improves the existing legislative framework governing international arbitration in Fiji by implementing Fiji’s core commitments under the New York Convention to enforce arbitration agreements and arbitral awards. This brings Fiji’s international arbitration legislation in line with leading international arbitration jurisdictions such as Hong Kong, London, Paris, and Singapore as well as Fiji’s major trading partners.

4. The Act applies to international arbitration only. After it comes into effect, the Act will replace the existing Fiji Arbitration Act 1965 in respect of “international” arbitrations within the meaning of section 4(3) of the Act. In other words, the Act will apply if: one of the parties is not domiciled in Fiji; the place of arbitration is outside of Fiji; a substantial part of the obligations of the commercial relationship are to be performed outside Fiji; or the place with which the subject

¹ See Asian Development Bank, “Promotion of International Arbitration Reform for Better Investment Climate in the South Pacific,” available at: <https://www.adb.org/projects/50114-001/main>.

matter of the dispute is most connected is outside Fiji. The existing Fiji Arbitration Act 1965, which is based on the 1950 English Arbitration Act, will continue to apply to domestic arbitration.

Key Provisions of the Act

5. The Act fully adopts the Model Law, although it does not restrict its application to “commercial” arbitrations, consistent with Fiji’s commitments under the New York Convention.² The Model Law is designed as a template for States that are revising or adopting new legislation concerning international commercial arbitration. It provides a legislative framework that is supportive of international commercial arbitration, limits judicial interference in the arbitral process, and recognises the autonomy of the parties to shape the arbitral process. Nearly 100 States and territories have enacted legislation that is based on the Model Law. It is said to reflect “worldwide consensus on key aspects of international arbitration practice.”³

6. The Act incorporates the 2006 amendments to the Model Law, including a more detailed definition of an arbitration agreement at section 11 (based on Article 7 of the Model Law, Option I) and provisions on the granting and enforcement of interim measures at sections 23 to 33 (based on Articles 17 and 17A-J of the Model Law). Section 12 obliges Fijian courts to refer parties to arbitration if the court is seized of a matter which is the subject of the arbitration agreement, unless it finds that the arbitration agreement is null and void, inoperative or incapable of being performed (based on Article 8(1) of the Model Law). Section 22 provides that an arbitral tribunal may rule on its own jurisdiction, and that an arbitration clause that forms part of a contract is separable from the other terms of that contract (based on Article 16 of the Model Law).

7. These provisions of the Act reflect well-established international arbitration principles. Their enactment will create a more favourable and standardised legal environment for the conduct of international arbitration and the enforcement of international arbitration awards in Fiji.

8. The Act also supplements the Model Law based on international best practices, in line with recent trends and developments in the field. It contains provisions adapted from arbitration legislation in leading seats of arbitration in the region and internationally, including Singapore, Hong Kong, and Australia. These include:

- a. A definition of an “arbitral tribunal” at section 2 that includes “an emergency arbitrator”. This allows the enforcement of orders or awards by emergency arbitrators (based on Section 2(1) of the Singapore International Arbitration Act). This reflects that most institutional arbitration rules now allow parties to obtain urgent interim relief by seeking interim measures from an emergency arbitrator who can be appointed even before the constitution of the tribunal.
- b. A provision that expressly guarantees the confidentiality of the arbitration proceedings, subject to defined exceptions, at section 45 (based on Section 18 of the Hong Kong Arbitration Ordinance). This reflects the substantial premium that parties who choose to arbitrate place on confidentiality.
- c. A provision that expressly deals with the liability and immunity of arbitrators, appointing authorities and arbitral institutions at section 21 (based on Section 28(1) of

² Fiji acceded to the New York Convention without making the “commercial” reservation and therefore its Convention obligations are to enforce all foreign awards under the Convention, regardless of whether or not they are “commercial.”

³ UNCITRAL, *Introduction to 1985 Model Law*, available at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html.

the Australian International Arbitration Act and Section 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.

d. A provision on representation in arbitral proceedings at section 35 (based on Section 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 to parties, particularly those based outside Fiji, that local restrictions on representation will not be imposed in the context of international arbitration proceedings.

e. A provision clarifying that an interim measure or award may be refused enforcement on public policy grounds where it is affected by fraud or corruption, or where a breach of the rules of natural justice has occurred in connection with the making of the award (based on Sections 8(7A) and 19 of the Australian International Arbitration Act). This provides additional clarity to parties and judges in construing the public policy ground for refusing enforcement.

9. With the new Act, Fiji has one of the most advanced and up-to-date legislative regimes for international arbitration in the region,⁴ if not internationally. The Act promises to enhance Fiji's reputation as a place for international arbitration and business, and can serve as a template for arbitration reform in other Pacific Island States.

⁴ Fiji and the Cook Islands are the only Pacific Island States that have both acceded to the New York Convention and adopted the Model Law. Fiji is the 24th State in the Asia Pacific region to adopt the UNCITRAL Model Law.

For more information on this or other matters, contact:

Gary Born +44 (0)20 7872 1020 gary.born@wilmerhale.com

Jonathan Lim +44 (0)20 7872 1044 jonathan.lim@wilmerhale.com

Wilmer Cutler Pickering Hale and Dorr LLP is a Delaware limited liability partnership. WilmerHale principal law offices: 60 State Street, Boston, Massachusetts 02109, +1 617 526 6000; 1875 Pennsylvania Avenue, NW, Washington, DC 20006, +1 202 663 6000. Our United Kingdom office is operated under a separate Delaware limited liability partnership of solicitors and registered foreign lawyers authorized and regulated by the Solicitors Regulation Authority (SRA No. 287488). Our professional rules can be found at www.sra.org.uk/solicitors/code-of-conduct.page. A list of partners and their professional qualifications is available for inspection at our UK office. In Beijing, we are registered to operate as a Foreign Law Firm Representative Office. This material is for general informational purposes only and does not represent our advice as to any particular set of facts; nor does it represent any undertaking to keep recipients advised of all legal developments. © 2017 Wilmer Cutler Pickering Hale and Dorr LLP