

**THIRD SOUTH PACIFIC INTERNATIONAL ARBITRATION CONFERENCE
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Implementation of the New York Convention in Papua New Guinea



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Arbitration reform in PNG

Legislative background: PNG Arbitration Act 1951 ("the Act"):

- based on long repealed and antiquated English *Arbitration Act 1889*
- only governs domestic arbitration.
- has many deficiencies, for example
 - provides that an arbitral award may be enforced in the same manner as a judgment or order of the National Court – but with no procedure or regime for so doing.
 - no provision for interest to be payable on an arbitral award
 - permits an award to be set aside for arbitrator's "misconduct", which opened the door to de facto appeals to National Courts through judicial review applications

Legislative background: PNG Court Rules

- PNG Court Rules do not currently remedy the deficiencies:
 - The Act provides for the Chief Justice to make Rules, but no Rules have ever been published
 - Division 8 of Order 14 of *National Court Rules* (NCR) does have some procedural rules, but they only apply to arbitrations which have been expressly ordered to arbitration by the Court under Section 13 of the Act.
 - The procedural rules in NCR do not apply to circumstances where parties have voluntarily submitted to arbitration before litigation.

Papua New Guinea's accession to New York Convention

- The need for reform of arbitration law recognised by PNG Government in early 2018.
- Policy submission approved by National Executive Council (NEC) on 18 October 2018
- PNG became 160th nation signatory to *New York Convention* on 17 July 2019.

Arbitration Technical Working Committee

- The PNG Arbitration Technical Working Committee (ATWC) established in early 2018.
- The ATWC comprises members of PNG Judiciary, representatives of the First Legislative Counsel, Dept of Justice and Attorney-General, Dept of Foreign Affairs, Dept of Treasury, Dept of Commerce & Industry, Dept of National Planning & Monitoring and Investment Promotion Authority as well as specialist arbitration counsel to the ADB.
- The ATWC commenced the drafting of new *Arbitration Bill* for PNG in consultation with ADB & UNCITRAL and international arbitration experts in April 2018.
- The draft *Arbitration Bill* combines both international and domestic arbitration
- An extensive public consultation process was undertaken in November 2019 to obtain input on the draft *Arbitration Bill* from the private and public sectors with assistance of ADB

Present status of Arbitration Bill

- The *Arbitration Bill* is presently with the State Solicitor's Office of PNG waiting for a Certificate of Necessity (CON) to be issued.
- When the CON is issued, a submission will be sent by the Attorney-General to the NEC for its approval and for formal drafting instructions to be sent by the NEC to the First Legislative Counsel.
- The formal Bill will then be forwarded by the First Legislative Counsel back to the NEC for presentation to Parliament for 3 readings and enactment

The objectives and purposes of the draft Arbitration Bill 2021

- To implement PNG's treaty obligations under the New York Convention.
- Based on *UNCITRAL Model Law* of 1985 but adapted to PNG circumstances.
- Designed to conform with best modern international law practice.
- Introduces a new regime to promote consistency between international and domestic arbitrations in PNG.
- To increase the attractiveness of PNG as a venue for international and domestic arbitration, including recognition and enforcement of arbitral awards based on the Model Law.
- The Bill redefines and clarifies basis on which arbitral awards can be set aside.

Principal Features of Arbitration Bill

- Section 4(4) of *Arbitration Bill* defines an arbitration as domestic if it is not international under Section 4(3).
- Section 3 – Application of *Claims By And Against the State Act 1996*- unless parties otherwise agree:
 - Section 5 Notice under CBAS Act applies to all domestic arbitration where State is a party
 - where the State is a party to an international arbitration, provisions of Section 5 of CBAS Act do not apply. A party is to give notice in writing to designated officer.

- Section 59(1) – subject to Section 61, an arbitral award, irrespective of where it is made, shall be recognised by PNG Courts as binding and shall be enforced.

- Section 61(1)(a) – recognition or enforcement of an award, irrespective of country in which award made, may only be refused on grounds of :
 - incapacity of parties

 - breach of due process

 - deals with matters outside scope of arbitration agreement

 - lack of jurisdiction of arbitral tribunal

 - award not yet binding on the parties under the law of the country where award was made

- Section 61(1)(b) – a PNG Court can refuse recognition or enforcement of arbitral award wherever made if the Court finds that:
 - The subject matter of the dispute is not capable of settlement by arbitration under the law of the other country where award was made; or
 - Recognition or enforcement of the arbitral award would be contrary to public policy of the State.

- Section 62 – an arbitral award is contrary to public policy of the State if
 - it was induced by fraud or corruption, or
 - if it is repugnant to general principles of humanity.

Role of National Court

- Under the new regime for international and domestic arbitrations in PNG:
 - the National Court will exercise a supervisory role if required by parties during the course of the arbitration process prior to making of arbitral award.
 - Upon making of the final arbitral award, no right of appeal or judicial review in traditional sense.
 - Arbitral award may only be set aside under Section 58 of the *Arbitration Bill* if the same grounds as are set out in Sections 61 and 62 for refusing recognition or enforcement also apply.

➤ ***National Court Practice Note 2 of 2018***

- ADR Service is National Court Registry for arbitrations (voluntary) pending future establishment of PNG's arbitral institutions
- Registrar of National Court may approve request of parties to arbitration to use Court facilities and Registry services
- ADR Service to maintain regularly updated list of domestic and international arbitrators and arbitration institutions
- Arbitration files registered with ADR Service are confidential – not accessible to public
- Notice of Arbitration Claim to set out agreement between the parties as to procedural matters

Implementation of PNG Arbitration Act when enacted

- UNCITRAL and ADB will assist with implementation of new *PNG Arbitration Act*.
- Technical assistance by UNCITRAL Secretariat and ADB will include:
 - training workshops for Judges
 - awareness and training workshops for lawyers and government agencies
 - on-line access to international court decisions and arbitral awards relating to UNCITRAL legislative texts