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IN THE SUPREME COURT OF TONGA
CIVIL JURISDICTION
NUKU'ALOFA REGISTRY

CV 28 of 2021

BETWEEN:

FE'AO VUNIPOLA Plaintiff (Respondent)

-and-

[1] TONGA RUGBY UNION INCORPORATED
[2] SIAOSI POHIVA
[3] PETER HARDING Defendants (Applicants)

Defendants' application for a stay of proceedings
Whether clause 31 of the TRU Constitution is enforceable?

RULING

BEFORE:	LORD CHIEF JUSTICE WHITTEN QC
Appearances:	Mr F. Vunipola by AVL from London
	Mrs A. Mailangi of counsel for the First and Third Defendants
	No appearance by the Second Defendant
Hearings:	21 July 2021 and 11 August 2021
Ruling:	26 August 2021

The application

1 The Defendants[1] have applied for a stay of these proceedings and enforcement of the dispute resolution provisions in clause 31 of the Constitution of Tonga Rugby Union Incorporated ("***TRU***").

2 At the conclusion of the hearings, the application was dismissed. A summary of reasons was provided. Given the apparent dearth of authority on the issues raised by this application, I indicated to the parties that I would provide full reasons in due course. These are those reasons.

Background

3 The TRU is an incorporated society pursuant to the *Incorporated Societies Act*.

4 At all relevant times, Mr Vunipola was the Vice-President of the TRU and its former interim CEO.

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[1] Mr Pohiva joined in the application but otherwise took no active part in prosecuting it.

30 AUG 2021

5 In 2012, the TRU succeeded the Tonga Rugby Football Union Incorporated[2] as the exclusive governing authority of the game of rugby union in the Kingdom and is also the affiliated member of the International Rugby Board.[3] The Members of the TRU include its Officers, Directors and Rugby Sub-Unions.[4]

6 Part VII of the TRU Constitution[5] provides for disciplinary action, dispute resolution and appeals.

TRU Constitution - dispute resolution provisions

7 Clause 31 of the TRU Constitution provides:

> **31 Dispute Resolution**
>
> (1) Any dispute involving a Member or one of its members, in relation to the interpretation or administration of this Constitution, regulations made under it or resolutions of the Board or the Union, shall be resolved only in the following manner:
>
> (a) legal opinion or legal advice of the Legal Counsel of the Union;
>
> (b) mediation; or
>
> (c) arbitration conducted by an Arbitration Panel.
>
> (2) For the avoidance of any doubt, no dispute or disagreement regarding the interpretation or application of this Constitution, or any regulations made under it, or resolutions of the Board or the Union shall be resolved in the Courts of the Kingdom, or any other competent judicial authority.
>
> [emphasis added]

8 Clause 32 provides, inter alia, for the appointment and process of an Arbitration Panel.

9 Clause 33 provides a right of appeal from any person not satisfied with the decision of the Disciplinary Committee or the Arbitration Panel to the Union's Appeal Tribunal.

History of proceedings

10 This proceeding is the latest in a series of disputes since 2016 between Mr Vunipola (and a number of others who support him) and the Board of the TRU and/or the TRU Sub-unions, amongst others, in which he alleges various breaches of the relevant Constitutions and other governance non-compliances. To understand the context in which the present application arose and is to be considered, it is necessary to understand something of the background to this and the other curial proceedings, all of which have been conducted in the face of clause 31.

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[2] Established in 1996.
[3] Clause 3(2).
[4] Clause 11.
[5] Formed on 28 April 2012 and amended on 21 June 2013.

11 In *Viliami Tonga & Ors v Tonga Rugby Football Union & Anor* (CV 15/2016, 3 October 2017) (***"Tonga v TRU"***), in which Mr Vunipola was the second Defendant, the Plaintiffs there sought and obtained a declaration that amendments made to the TRU's Constitution at an Annual General Meeting on 11 May 2016 were void on the grounds that requirements for such amendments under the Constitution had been contravened.

12 The most recent and related disputes commenced with proceeding CV 3 of 2020 (filed 13 March 2020) in which the Plaintiffs therein - Manu Mataele (a member of the TRU Board), Aisea Aholelei (then President of the TRU) and Siaosi Faka'osi (representative of the Tongatapu Sub-Union) – sued the TRU and Mr Vunipola for various breaches of the TRU Constitution by Mr Vunipola in his capacity as interim CEO, including failing to submit financial statements to the Board or to obtain audited accounts for the years 2016 to 2019 and excluding several persons, including the first and second Plaintiffs, from attending the AGM on 20 December 2019. Mr Vunipola denied those allegations.

13 Early in the course of that proceeding,[6] I raised the issue of clause 31 and whether, on the face of that provision, the proceeding was properly justiciable before the Court. Mr William Edwards, who appeared for the Plaintiffs referred to the decision in *Tonga v TRU*. At that stage, the Defendants' (in reality, Mr Vunipola's) position on the issue was unclear. Suffice to say, no application was filed for a stay of that proceeding and the issue was not then pursued.

14 Orders were made for the appointment of independent auditors to prepare audited financial statements for the TRU for the years 2016 to 2019. On 20 November 2020, the audited reports and auditor's Management Letter were presented. The auditors identified a number of anomalies in the management of the TRU's finances. The then Board, after considering the auditor's recommendations, decided to take no action against Mr Vunipola. Notwithstanding, Mr Vunipola disputed the auditor's findings. However, he did not seek to ventilate his complaints in any of the pleadings in that proceeding.

15 The balance of 2020 was taken up primarily with obtaining the audited statements and auditor's management letter. As a result, the issue of the justiciability of those proceedings before the Court in the face of clause 31 was not revisited until March 2021.

16 In the meantime, on 1 February 2021, Mr Vunipola and Mosese Huni (representative of Hihifo RFC) commenced proceedings CV 8 of 2021 against the Tongatapu Rugby Football Sub-Union and Manu Mataele (as President of the Tongatapu Sub-Union), Aisea Aholelei (director of Kolomotu'a Rugby Football Club and therefore director of the Tongatapu Sub-Union) and Mo'unga Felekaono (Vahe 'Uta Board Representative and also therefore a director of the Tongatapu Sub-Union). Mr Vunipola also purported to bring the proceedings in the name of

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[6] 24 February 2020.

the TRU in the absence of any Board resolution entitling him to do so. As a result, the TRU was removed as a Plaintiff in the proceeding. The remaining Plaintiffs (of whom only Mr Vunipola ever appeared) complained of various alleged breaches by the Board of the Tongatapu Sub-Union, as a result of which, it is contended, an annual general meeting held on 18 December 2019 was invalid and all decisions of that Board should be set aside, including, most relevantly, the election and appointment of Messrs Mataele, Aholelei and Felekaono as representatives. That, in turn, the Plaintiffs contend, must also invalidate the appointment of those representatives as members of the TRU Board. The Defendants in that proceeding have denied all allegations.

17 At the first directions hearing in proceeding CV 8 of 2021, orders were made requiring the parties to file submissions in that proceeding and CV 3 of 2020 on the justiciability of the proceedings in the face of clause 31 of the TRU's Constitution. It transpired that the Tongatapu Sub-Union's Constitution does not contain an equivalent provision to clause 31 of the TRU's Constitution.[7] Therefore, the clause 31 issue was confined to proceeding CV 3 of 2020.

18 On 22 March 2021, Mr Edwards filed submissions on the issue which may be summarised as follows:

18.1 since 2016, there have been a number of unsuccessful attempts to have various disputes and grievances involving Mr Vunipola submitted to the disciplinary procedures under the Constitution and arbitration as provided for by clause 31;[8]

18.2 Mr Vunipola obstructed the initiation of disciplinary proceedings and arbitration by use of his position as Vice President and interim Chief Executive Officer;

18.3 the TRU has not had a legal officer (or Counsel) for the purposes of clause 31(1)(a) or 32(1)(a);

18.4 of the dispute resolution procedures provided for in clause 31, only mediation could be pursued, but only if Mr Vunipola, as Vice President, referred the complaint to mediation, which he has refused to do;

18.5 the provision in clause 32(2) empowering an Arbitration Panel to regulate its own rules and procedures might be uncertain where there is no set procedure to follow;

18.6 the findings of Paulsen LCJ in *Tonga v TRU*, as referred to in paragraph 11 above (discussed further below);

18.7 by analogy to arbitration legislation in England and Australia, which provides for a stay of curial proceedings in the face of an arbitration

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[7] See Schedule B to the TRU's Constitution which summarises the standard clauses required for rugby sub union constitutions.

[8] Referring to the affidavit of Aisea Aholelei, filed 19 March 2021.

agreement unless the agreement is either void, inoperative, or incapable of being performed,[9] the lack of legal counsel for the TRU and uncertainty as to how arbitration under clause 31 could be pursued, meant that clauses 31 and 32 are incapable of being performed; and

18.8 therefore, the Supreme Court was the only suitable jurisdiction in which to ventilate the Plaintiffs' complaints.

19 Mr Vunipola submitted, in summary:[10]

19.1 this was the second time that Mr Edwards, as the Plaintiffs' counsel, had brought a Supreme Court action against the TRU;

19.2 therefore, any suggestion by the Plaintiffs, or their counsel, that the proceeding was nonjusticiable before the Court was "both unfair and wrong" and would result in injustice to the Defendants and prospective Board directors who "missed out" on election;

19.3 "the late President and former Prime Minister ['Akilisi Pōhiva] was not in favour of and was uncomfortable with arbitration and believed in Tongan cultural reconciliation. On hindsight, it really did not work here... ";

19.4 the time and cost implications of arbitration compared to Supreme Court proceedings should be carefully considered; and

19.5 World Cup Rugby is also "looking forward to the Supreme Court's adjudication on the case and view it as the only acceptable closure".

20 On 16 April 2021, directions were made in CV 8 of 2021 culminating in a trial date commencing 27 September 2021. On that day, Mr Harding informed the Court that a date for the TRU AGM had been set for 7 May 2021.

21 On 5 May 2021, Mr Vunipola commenced the instant proceeding, in which he alleges the following breaches of the TRU Constitution, in summary:

21.1 the Second Defendant tendered his resignation as President by email on 23 September 2020, at which point, pursuant to clause 13(7)(d) of the Constitution, his position was deemed vacant, but he went on to chair 15 board meetings and endorse "various important TRU documents";

21.2 given the President's position and his and the Board's knowledge of the challenge to the validity of the appointments of Manu Mataele and Aisea Aholelei (as representatives of the Tongatapu Sub-Union) in proceeding CV 8 of 2021, the endorsement by the President and the Board of the independent auditor's report and management letter constituted a "blatant conflict of interest" and breached clauses 16(1)(a), (b) and (q) of the Constitution in that they failed to manage and administer the affairs of the

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[9] Referring to *Bulkbuild Pty Ltd v Fortuna Well Pty Ltd & ors* [2019] QSC 173.
[10] 31 March 2021.

Union; failed to comply with and protect the Constitution; and failed to act in the best interests of the game of rugby union in the Kingdom;

21.3 by allowing Manu Mataele, Aisea Aholelei and Malu'afisi Falekaono to join the TRU Board of Directors whilst the validity of their membership is a subject of proceeding CV 8 of 2021, the President and the Board of Directors breached the same provisions of the Constitution;

21.4 Mr Harding, as the TRU's CEO, failed to comply with the notice provisions of clause 19(3), (4) and (5) of the Constitution for the calling of the AGM on 7 May 2021;

21.5 by passing 11 resolutions at meetings of the Board (which included the impugned Manu Mataele, Aisea Aholelei and Malu'afisi Falekaono) since 21 January 2021, the President and the Board of Directors breached the same provisions of clause 16 referred to above; and

21.6 the Tongatapu Sub-Union was not validly incorporated by that name prior to the TRU AGM on 7 May 2021, thereby rendering attendance at the AGM by its representatives "null and void".

22 Mr Vunipola seeks the following principal relief:

22.1 a declaration that the TRU AGM which was scheduled for 7 May 2021 be postponed until after the completion of CV 8 of 2021;

22.2 an order that Mr Harding send out the correct notification for the AGM;

22.3 an order that until the Tongatapu Sub-Union is properly incorporated, its representatives be prohibited from attending any TRU meetings;

22.4 an order that, before the TRU's next AGM, the Tongatapu Sub-Union have its Constitution regularized, be properly incorporated and that its committee call an AGM and conduct a new election;

22.5 an order authorising the World Rugby Observer to work with another independent party in calling a new Tongatapu Sub-Union AGM and election; and

22.6 an order authorising the World Rugby Observer to work with another independent party in calling the TRU AGM and to ensure the meeting is conducted "free from bias and impartiality" [sic].

23 Part of the relief sought by Mr Vunipola in this proceeding has been overtaken by events. As noted above, an annual general meeting of the TRU was scheduled for 7 May 2021. On 30 April 2021, in CV 8 of 2021, Mr Vunipola filed an application for an injunction to effectively prevent the AGM from proceeding on that date. The application was heard on the morning of 7 May 2021 and dismissed. The AGM therefore went ahead, and a number of officers were

elected. On that basis, the utility of some, if not all, of the relief sought by Mr Vunipola in the instant proceeding, as presently pleaded, remains unclear.[11]

24 Following the AGM, the Plaintiffs in CV 3 of 2020 sought leave to discontinue that proceeding on the basis that all their claims had essentially been satisfied. On 28 May 2021, leave was granted.

25 The Defendants in the present proceeding are yet to file a Statement of Defence. Instead, on 3 June 2021, they filed the current application for a stay of these proceedings, supported by an affidavit of Mr Harding. On 11 June 2021, directions were made for the filing of material in relation to the application.

26 On 2 July 2021, I raised with the parties, and directed that they file further submissions in relation to whether clause 31 constitutes an ouster of the Court's jurisdiction and, if so, whether it may be void as against public policy.

27 On 11 August 2021, after hearing and deciding the instant application, I also heard from the parties in relation to parts of Mr Vunipola's Statement of Claim. As a result, paragraphs 10 and 16 to 26 of the Statement of Claim were struck out as an abuse of process as the issues raised therein are already the subject of proceeding CV 8 of 2021 and the remaining claims in this proceeding were stayed pending the hearing and determination of proceeding CV 8 of 2021.

28 Whilst that might appear to be a partial (and possibly temporary) victory for the Defendants in this action, the outcome on their application to have the entire proceeding stayed by reason of clause 31 remains to be explained.

Applicants'/Defendants' submissions

29 On this application, the Defendants submitted, in summary, that:

29.1 it is "a matter of common sense" to utilise the clause 31 procedures, which were agreed to by all the members, to resolve the disputes the subject of this proceeding;

29.2 "if the parties have agreed to refer a matter to arbitration, a party who so wishes should be entitled to have the agreement upheld and to have the court stay the proceedings for that purpose..."[12];

29.3 if a stay is granted, it will set a precedent for future relevant disputes to be resolved in accordance with the procedures set out in the TRU Constitution;

29.4 the present proceeding may be distinguished from *Tonga v TRU* where:

29.4.1 the Defendants in that proceeding submitted to the jurisdiction of the Court whereas the Defendants here have not; and

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[11] A court will not interfere with a decision when it would be futile: *Schweikert v Burnell* [1963] NSWR 821; (1963) 80 WN (NSW) 1227.

[12] Citing *Lombard North Central PLC & Anor v GATX Corporation* [2012] EWHC 1067 at [15] in relation to principles underlying the UK *Arbitration Act* 1996.

29.4.2 the TRU did not then have a Legal Counsel whereas it now does; [13]

29.5 although the options in clause 31 for legal advice and mediation may be uncertain (consistent with Paulsen LCJ's decision), the provision in relation to arbitration, read together with clauses 32 and 33, is sufficiently certain.

29.6 even though clause 31 *does* have the effect of ousting the court's jurisdiction[14] and therefore "may be void" as against public policy, it should not be regarded as void in this case because:

29.6.1 any stay would only be temporary;

29.6.2 the Plaintiff had not shown any evidence of prejudice or injustice if the clause 31 procedures were invoked; and

29.6.3 a stay of the instant proceedings "would not deprive the Plaintiff any further recourse to the Courts should (he) be dissatisfied with the outcome of any arbitration panel or appeal tribunal hearing. The Court has discretion to make such orders to that effect as a matter of practice or procedure should it consider it appropriate despite the ouster clauses the Constitution may contain".

Respondent's/Plaintiff's submissions

30 Mr Vunipola submitted, relevantly, and in summary, that:

30.1 in *Tonga v TRU*, he did not seek a similar stay of those proceedings by reason of clause 31 because his counsel at the time did not advise him (although it is clear from the reasons for decision that the issue was raised) and he was not informed of the hearing date and therefore failed to attend to raise his defence;

30.2 recourse to the dispute resolution provisions would first require disciplinary proceedings to be instituted. As such, Mr Harding, as the third Defendant herein and in his role as the TRU's CEO, who would be required pursuant to clause 28(2) of the Constitution to institute any such disciplinary action, "would be compromised";

30.3 the current Board of the TRU is divided into two factions with Mr Vunipola and another being in the minority;

30.4 should the proceedings be stayed, the majority faction would dominate proceedings in appointing their own three-member disciplinary committee and regulating their own rules of procedure;

30.5 the disciplinary committee would therefore not be independent or transparent and any decision would be compromised;

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[13] Who was originally Mr Viliami Latu. On 28 July 2021, Mr Harding advised that Mrs Ane Tavo-Mailangi had been appointed.

[14] Referring to *Atkinson v Namale West Inc* [2010] FJHC 10 and *Scott v Avery* (1855) 5 HLC 811.

30.6 similarly, in relation to clause 33, the TRU Board would have the power to appoint two of the three members of the Appeal Panel which would "all but guarantee the success of the Defendants";

30.7 further, should a stay be granted, the resulting process from disciplinary action to the Appeal Tribunal would be a long one which would lack independence and transparency and result in compromised decisions;

30.8 given that the TRU is a recipient of public funds, coupled with the volatility and instability associated with the elections of its Board of directors, clause 31 should be avoided as an ouster clause; and

30.9 the independence of the judiciary is paramount in ensuring that the governance of rugby union in Tonga will "remain in safe hands".

Consideration

31 The issues for determination on this application include:

31.1 The proper approach to a stay application in a case of this kind.

31.2 Whether the decision in *Tonga v TRU* is a complete answer to this application.

31.3 If not, whether clause 31 is void for uncertainty.

31.4 Further and in any event, whether clause 31 ousts the jurisdiction of the Court and is therefore void as against public policy.

Approach

32 The Supreme Court has jurisdiction in all cases in Law and Equity arising under the Constitution and Laws of the Kingdom (except cases concerning titles to land and hereditary estates and titles).[15] That obviously includes contractual disputes.

33 As Paulsen LCJ observed in *Tonga v TRU*, the TRU Constitution is a contract between the TRU and its members which creates rights and obligations capable of both enforcement and waiver.[16] Members are bound by the society's rules, whatever those rules may be.[17] As a result, the Court has jurisdiction at law, in addition to s 21 of the *Incorporated Societies Act*,[18] to determine disputes between a society and member/s.[19]

34 An incorporated society must comply with statutory laws, court decisions and with its own constitution. Those obligations fall upon a society as an entity but are also

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[15] Constitution of Tonga, cl 90; Supreme Court Act, s 4.
[16] [37]
[17] *John v Rees* [1969] 2 All ER 274 at 298.
[18] Referred to in *Tonga v TRU*, ibid, and which provides that, on an application by a member of a society, if the Court is satisfied that an amendment to the rules of the society has not been duly made in accordance with its rules or the Act, it may in its discretion 'declare that alteration to be void in whole or in part', order that registration of any alteration be cancelled and give such directions and make such provisions as seem just in the circumstances of the case'.
[19] [33] citing 'Laws of Societies' by Mark von Dadelzen, 3rd Ed, LexisNexis ("**Dadelzen**") at p 55 and *Taumoepeau and ors v Sika and ors* (unreported Supreme Court, CV 43/2014, 11 May 2016, Paulsen LCJ).

shared by its officers and members. Acquiescence in non-compliance with the rules cannot validate what is otherwise invalid.[20] Actions against a society, its officers or members, may be taken where there has been a failure to follow the society's constitution.[21] A failure to comply with the constitution may lead to actions of the entity being held to be invalid on the grounds that they are ultra vires. Such invalidity will most commonly be declared in court proceedings based on contract or as a result of judicial review proceedings,[22] which may be brought by members of societies: *Silivenusi Taumoepeau, Tavake Fangupo, Taufa Fukofuka v Semisi Sika, Stan Moheloa, Tonga National Rugby League Incorporated* (unreported, Supreme Court of Tonga, CV 43/14, 15 June 16) at [57].[23]

35 However, the remedy of judicial review is not intended to avail Plaintiffs of the ability "to subject each and every administrative or operating decision... to review".[24] Public policy still suggests some limitation to exclude interference with associations of a wholly social nature or where it is clear that no legal relationships of any sort were intended between members: *Turner v Pickering* [1976] 1 NZLR 129 at page 141.[25]

36 In *Tonga v TRU*, Paulsen LCJ expressed concern about whether to interfere in the affairs of the TRU and acknowledged the Courts' reluctance to adjudicate on disputes involving the internal management of clubs.[26] In part, this is because of what is known as the rule in *Foss v Harbottle*,[27] which suggests that internal irregularities should be remedied by all within an entity. Further, the courts have traditionally been reluctant to intervene in the running of clubs by way of judicial review because members who consider their club or society is in breach of its rules may pursue a remedy in contract.[28] And so, even where a wrong is established or where an entity or its officers have acted improperly, the court may still decline to grant a remedy.[29]

37 However, where the error is serious, the courts will intervene. For instance, a court may order elections where they have not been conducted in accordance

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[20] *Apineru v Board of Trustees of the Congregational Christian Church of American Samoa in New Zealand (Porirua) Trust* (High Court, Wellington CIV 2003-485-713, 16 September 2004, Wild J) at [47].
[21] Dadelzen at p 58.
[22] Dadelzen at 4.4.1.
[23] Citing *Gibson v New Zealand Land Search and Rescue Dogs Inc* [2012] NZHC 1320 and *Finnigan v New Zealand Rugby Football Union (No 3)* [1985] 2 NZLR 181 (HC and CA).
[24] *Zaman v South Auckland Muslim Assn Inc* [2004] NZAR 559 at [22].
[25] Referred to by Paulsen LCJ in *Silivenusi Taumoepeau & ors v Semisi Sika & ors*, ibid.
[26] [42]
[27] (1843) 67 ER 189.
[28] *Hopper v North Shore Aero Club Inc.* [2007] NZAR 354 at [11] and [12] (CA) citing *Peters v Collinge* [1993] 2 NZLR 554 at 566
[29] e.g. *Flynn v University of Sydney* [1971] 1 NSWLR 857; *Swan v Massey University Students' Association* [1972] NZLR 985.

with the constitution (potentially making orders to facilitate regularising the affairs of a society[30]) or where proprietary rights are in issue.[31]

38 New Zealand courts have been prepared to intervene in the internal affairs of an incorporated society or club in cases involving a breach of the contract constituted by the rules, but normally only in limited circumstances such as disciplinary proceedings or the like, issues involving a licence or a right to make a livelihood with or in association with an incorporated society.[32]

39 In *Tonga v TRU*, Paulsen LCJ determined to 'interfere' in the affairs of the TRU principally because, on the evidence before him, the TRU had failed to comply with clear provisions in its Constitution concerning the requirements for and manner in which amendments could be made to its constitution, as a result of which, unlawful decisions had been made which significantly affected the rights of members.[33]

40 Clause 31 of the TRU constitution comprises an agreement between the TRU and its members for the resolution of disputes concerning, relevantly, the interpretation or administration of the Constitution or decisions of the Board, exclusively by legal opinion/advice, mediation or arbitration.

41 In other common law jurisdictions, such as the United Kingdom, Australia (its States and Territories) and New Zealand, applications for stays of curial proceedings in the face of enforceable arbitration agreements are expressly provided for by domestic commercial arbitration legislation. By and large, those provisions stipulate that the relevant court *shall* stay the proceedings before it unless it finds that the agreement is null and void, inoperative, or incapable of being performed.[34]

42 Those statutory provisions reflect the "trite proposition that parties may contract about anything and, subject to the principles of public policy and illegality, the agreement should be enforced unless there is some other vitiating factor such as mistake, misrepresentation or incapacity": *Badgin Nominees v Oneida Ltd* [1998] VSC 188 at [29]. In other words, parties who have made a contract should keep it: *Huddart Parker Ltd v The Ship Mill* [1950] 81 CLR 502 at 508-509. A contract may validly include an agreement to refer a dispute to ADR: *Coal Cliff Collieries v Sijehama Pty Ltd* (1991) 24 NSWLR 1 at 26.

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[30] *Taylor v Disabled Citizens Society Inc* (High Court, Auckland CIV 2006-404-2970, 25 July 2006, Williams J).
[31] *Khan v Ahmed and Hawke's Bay Mosque & Islamic Centre Trust (Inc)* [2008] NZAR 686 at [55]. Clause 11(2) of the TRU Constitution provides that its members have no right or interest in any of the TRU's funds or property.
[32] *Stratford Racing Club Inc v Adlam* [2008] NZAR 329 at [53]-[55] (CA).
[33] [43]
[34] E.g. Arbitration Act 1996 (UK), s 9(4); *Commercial Arbitration Act* 2011 (Vic), s 8; *Arbitration Act* (New Zealand) 1996, s 8.

43 Despite the recent introduction of the *International Arbitration Act* 2020,[35] and its similar stay provision in s 9, Tonga does not yet have any domestic commercial arbitration legislation which might govern the instant case.

44 Nonetheless, the Court has power, whether inherent or derived from the powers vested in or capable of being exercised by the High Court of Justice in England and Wales, to stay any proceedings before it, where it thinks fit to do so, either of its own motion or on the application of any person, whether or not a party to the proceeding.[36] The power to order a stay of proceedings is derived from the Court's inherent power to prevent abuse of its process: *Scott v Avery* (1856) 5 HLC 811; *WTE Co-Generation v RCR Energy Pty Ltd* [2013] VSC 314.

45 The general rule is that a court will not order specific performance of a dispute resolution clause, even though it may be enforceable: *Hooper Bailie Associated Ltd v Natcon Group Pty Ltd* (1992) 28 NSWLR 194, 210; *Aiton Australia Pty Ltd v Transfield Pty Ltd* [1999] NSWSC 996. The courts can, however, effectively achieve enforcement of an ADR clause by staying the proceedings until ADR takes place.

46 Accordingly, an approach has developed over many years by which the Court may exercise its inherent jurisdiction to stay proceedings which are brought in breach of an agreement to decide disputes by some other way: *Channel Tunnel v Balfour Beatty* [1993] AC 334.

47 In construing ADR agreements, the Court should strive to give effect to the intention of the parties as expressed, as requiring them to have their disputes decided in accordance with the procedures specified, and only in accordance with those procedures, unless there is something which clearly indicates to the contrary or there are good reasons for departing from them or there is something which clearly indicates that the ambit of the clause should be limited in some way: *Tonga v TRU*, ibid, at [38][37]; *PMT Partners Pty Ltd (in liquidation) v Australian National Parks and Wildlife Service* (1995) 184 CLR 301 at 311-2.[38]

48 The discretion not to grant a stay in order to allow a dispute resolution clause to be utilised "*requires substantial grounds*" more so than mere convenience and recognises that the starting point is the fact that the parties should, absent strong countervailing circumstances, be held to their bargain: *Incitec Ltd v Alkimos Shipping Corporation* (2004) 2006 ALR 558 per Allsop J at 565-6.

49 Another relevant principle, which reflects the general reluctance to intervene in the affairs of societies as referred to above, is that the Courts are reluctant to interfere, save on a strictly limited basis, at the instance of parties affected by

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[35] Also modelled of the UNCITRAL Model Law on International Commercial Arbitration, as adopted by the United Nations Commission on International Trade Law on 21 June 1985, and as amended by the United Nations Commission on International Trade Law on 7 July 2006.
[36] *Supreme Court Act* (Tonga), s 5(1), thereby incorporating s 49(3) of the *Supreme Court Act* 1981 (UK).
[37] Citing *Heli-Flight New Zealand Ltd v Massey University* (HC, Auckland, CIV 2005-404-4855, 30 November 2005.
[38] Cited in *1144 Nepean Highway Pty Ltd v Leigh Mardon Australasia Pty Ltd* [2009] VSC 226.

decisions of domestic tribunals to which there has been consensual submission, particularly sporting bodies: *Webb v Confederation of Australian Motor Sport Ltd* [2002] NSWSC 1075. Where the parties have agreed to have their disputes decided by domestic tribunals designated for the purpose, the Courts have been in the habit of respecting the agreement or, one might say, not countenancing a breach of it by one party wishing to desert it and to resort to the civil courts for resolution of a dispute that the tribunal was designed to decide.

50 Further, the Courts have been prepared to recognise that there are some kinds of dispute that are much better decided by non-lawyers or people who have a special knowledge of or expertise in the matters giving rise to the dispute than a lawyer is likely to possess. Again, the courts have been willing to understand that not every aspect of community life is conducted under the auspices of the State, that it is right that this should be so and that, sometimes, it is appropriate that State-appointed judges stay outside disputes of certain kinds which a private or domestic tribunal has been appointed to decide: *Australian Football League v Carlton Football Club Ltd* (1998) 2 VR 546 at 549. This is particularly so where any internal processes have not been exhausted: *Croatia Sydney Soccer Football Club Ltd v Soccer Australia Ltd* (unreported, NSWSC, Einstein J, 23 September 1997 at p 46).

51 It can therefore be seen that not only will the Courts generally hold parties to agreements between them to resolve their disputes outside the court system, unless there is good reason to do otherwise, but they are also reluctant to interfere in the proceedings of domestic tribunals, particularly sporting tribunals, where there are persons with special expertise available to determine the dispute, subject once again to the overriding proviso that the Courts will interfere if it is necessary to do justice between the parties: *Webb*, ibid, [23].

52 In determining whether or not to grant a stay, relevant considerations include whether: [39]

52.1 the disputes which are the subject of the proceeding sought to be stayed are within the scope of the contractual provision and which should be given a broad construction;[40]

52.2 the ADR clause is enforceable; and

52.3 any conditions precedent to the dispute resolution mechanism have been met.

53 However, a stay will not be granted if it would be unjust to deprive the Plaintiff of the right to have his claim determined judicially or if the justice of the case is against staying the proceeding. The party opposing the stay must persuade the Court that there are good grounds for the exercise of the discretion to allow the

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[39] Rachael Schmidt-McCleave and Julia Caldwell, LexisNexis Contract Law Conference, Wellington, August 2013.
[40] *ACD Tridon Inc v Tridon Australia Pty Ltd* [2002] NSWSC 896 at [113]-[136]; *Francis Travel Marketing Pty Ltd v Virgin Atlantic Airways Ltd* (1996) 39 NSWLR 160, 165.

action to proceed and so preclude the contractual mode of dispute resolution. The onus is a heavy one. The court should not lightly conclude that the agreed mechanism is inappropriate: *Zeke Services Pty Ltd v Traffic Technologies Ltd* [2005] 2 Qd R 563.

54 Other circumstances in which it may be appropriate to refuse a stay include where:[41]

54.1 it would result in a multiplicity of proceedings;

54.2 the procedure calls for expert determination but the dispute is inapt for determination by an expert because it does not involve the application of his special knowledge to his own observations or the area of dispute is outside the expert's field of expertise; or

54.3 the agreed procedures are inadequate for determination of the dispute that has arisen.

55 In the instant case, there is no issue that the alleged breaches of the TRU Constitution pleaded by Mr Vunipola fall within the scope of disputes provided for by clause 31. There is also no issue of any conditions precedent to be fulfilled before the procedures in the clause may be invoked. In that regard, I do not accept Mr Vunipola's submission that disciplinary proceedings (clauses 28 to 30) are necessary preconditions to invoking the dispute resolution procedures (clauses 31 to 33) where the relevant dispute/s, as here, may not necessarily amount to "serious breaches" of the Code of Conduct in Schedule A to the Constitution.

56 There are, however, issues as to the enforceability of clause 31 and, by extension, the further arbitration provisions in clauses 32 and 33.

57 In *WTE Co-Generation v RCR Energy Pty Ltd* [2013] VSC 314, Vickery J distilled from the authorities referred to therein, the following considerations on the enforceability of a dispute resolution clause:

57.1 Dispute resolution clauses should be construed robustly to give them commercial effect. The modern approach to the construction of commercial agreements is generally to endeavour to uphold the bargain by eschewing a narrow or pedantic approach in favour of a commercially sensible construction, unless irremediable obscurity or a like fundamental flaw indicates that there is, in fact, no agreement.

57.2 Honest businesspeople who approach a dispute about an existing contract will often be able to settle it. If businesspeople are prepared in the exercise of their commercial judgment to constrain themselves by reference to express words that are broad and general, but which nevertheless have sensible and ascribable meaning, the task of the court is to give effect to

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[41] Referring to *Dance With Mr D Ltd v Dirty Dancing Investments Pty Ltd* [2009] NSWSC 332.

and not to impede such solemn express contractual provisions. Uncertainty of proof does not detract from there being a real obligation with real content.

57.3 A dispute resolution clause in a contract, consistent with public policy in promoting efficient dispute resolution, especially commercial dispute resolution, requires that, where possible, enforceable content be given to contractual dispute resolution clauses.

57.4 The trend of recent authority is in favour of construing dispute resolution clauses where possible, in a way that will enable those clauses to work as the parties appear to have intended, and to be relatively slow to declare such provisions void either for uncertainty or as an attempt to oust the jurisdiction of the court.

57.5 The court does not need to see a set of rules set out in advance by which the agreement, if any, between the parties may in fact be achieved. The process need not be overly structured.[42] However, the process from which consent might come must be sufficiently certain to be enforceable. A contract which leaves the process or model to be utilized for the dispute resolution ill defined, or the subject of further negotiation and agreement, will be uncertain and unenforceable.

57.6 An agreement to agree to another agreement may be incomplete if it lacks the essential terms of the future bargain.

58 More specifically, and relevantly to the instant case, for an ADR agreement to be valid and sufficient to found a stay of curial proceedings, it must, relevantly: [43]

58.1 possess sufficient definition and certainty to enable the procedures to be meaningfully undertaken and enforced; and

58.2 not be an unlawful attempt to oust the jurisdiction of the Court.

59 The first requirement arose in *Tonga v TRU*.

Tonga v TRU

60 In that case, counsel for the Defendants (being practically Mr Vunipola) submitted, among other things, that the relief sought should not be granted

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[42] However, as observed in *Raskin v Mediterranean Olives Estate Limited & Ors*, supra, that observation was based on the decision of Warren J in *Computershare Ltd v Perpetual Registrars Ltd* [2000] VSC 233 which relevantly concerned the enforceability of an agreement to negotiate in good faith (a specified objective standard) to either resolve the dispute or to agree on a process to resolve all or at least part of the Dispute without arbitration or court proceedings (e.g., mediation, conciliation, executive appraisal or independent expert determination); the selection and payment of any third party to be engaged by the parties and the involvement of any dispute resolution organisation; any procedural rules; the timetable, including any exchange of relevant information and documents, and the place where meetings will be held.

[43] *Scott v Avery* (1855) 5 HLC 811; *Booker Industries Pty Ltd v Wilson Parking (Qld) Pty Ltd* (1982) 149 CLR 600: *Mineral Resources Ltd v Pilbara Minerals Ltd* [2016] WASC 338.

because the Plaintiffs had failed to utilise the dispute resolution procedures prescribed by clause 31.

61 Paulsen LCJ rejected that submission for two principal reasons. Firstly:

> *"[37] ... the Constitution encompass[es] the contract between the members and the TRU. It creates contractual rights and obligations capable of both enforcement and waiver. In full knowledge of clause 31 the Defendants have participated in this action, have responded to interlocutory proceedings, filed defences, attended directions conferences and presented a defence at trial. They have never sought to stay the action in reliance upon clause 31 despite the matter being raised directly with Counsel at a directions conference on 31 May 2016. It follows that the Defendants have agreed to submit the substantive dispute to the jurisdiction of the Court and waived any right to object on the basis of non-compliance with clause 31..."*[44]

62 Secondly, his Honour considered that it was:

> *"[39] ... not clear whether clause 31 contemplates a range of possible options for resolving disputes between members (or between members and the TRU) or is a multi-tiered dispute resolution process beginning with 'legal opinion or legal advice' and passing through mediation and arbitration. Regardless, except in relation to arbitration (for which there are processes set out in clause 32) there is no detail as to how the processes are to be engaged and implemented or for resolving disputes on matters of process between the parties should they arise. This is a very practical objection. ..."*

63 In my view, the above findings by Paulsen LCJ inform, but do not constitute a complete answer to, the present application for the following reasons:

63.1 the present case may be factually distinguished on two bases, namely:

63.1.1 the Defendants have not submitted to the jurisdiction of the Court by taking any formal step in the proceeding other than filing the present application and have therefore not waived their entitlement to seek to enforce the ADR procedures; and

63.1.2 the TRU now has legal counsel by whom the first ADR method provided by clause 31 of opinion/advice may be achieved;

63.2 the second and third Defendants here were not parties in *Tonga v TRU* such that no res judicata or issue estoppel can bind them to the earlier decision; and

63.3 in any event, given his Honour's earlier determination as to the Court's jurisdiction to grant the declaratory relief sought by reason of s 21 of the *Incorporated Societies Act*[45] and the fact that the Defendants there did not apply for a stay of those proceedings, Paulsen LCJ's analysis of whether clause 31 was void for uncertainty was, with respect, obiter dictum.

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[44] Citing *Williams & Kawharu on Arbitration*, LexisNexis, 2011 at 4.13-4,13.3, pages 120-122.
[45] [33]

Uncertainty

64 It is a first principle of the law of contracts that there can be no binding and enforceable obligation unless the terms of the bargain, or at least it's essential or critical terms, have been agreed upon. Therefore, where an essential or critical term is uncertain or expressly left to be settled by future agreement of the parties, there is no concluded contract.[46]

65 A contract can be uncertain in a number of ways: it may be vague, ambiguous, contradictory, meaningless or incomplete. Whatever the source of the problem, the contract must be so incapable of any definite or precise meaning that the Court is unable to attribute to the parties any particular contractual intention.[47]

66 The correct analysis begins and ends with the interpretation of the words used in the clause, construed in their context: *Royco Shipping Services Ltd v Matson South Pacific Ltd* [2021] TOSC 12 at [18] to [21].[48] Although there is some commonality of approach, different kinds of alternative dispute resolution clauses may involve differing approaches. The context in which the alternative dispute resolution clause appears, and is intended to operate, will always be a relevant consideration. General rules should be viewed with caution, and each case determined on its own facts[49].

67 The first issue raised by Paulsen LCJ in *Tonga v TRU* was that it was not clear whether clause 31 contemplates a range of possible options for resolving disputes between members (or between members and the TRU) or is a multi-tiered dispute resolution process beginning with legal opinion or advice and passing through mediation and onto arbitration.

68 In my respectful opinion, the use of the conjunctive 'or' after the second option, mediation, favours the first interpretation posited by his Honour. In other words, clause 31 confers on the parties to a dispute to which it applies a choice of resolution procedures. On a plain reading, it does not exclude the possibility of more than one procedure being employed, although one would reasonably expect that once arbitration is conducted, it would be difficult and unlikely (but not impossible) to revert to any of the other options thereafter.

69 However, the existence of that choice gives rise to the first symptom of uncertainty afflicting clause 31. Absent any agreement between the parties at the outset of their dispute about which ADR option they will undertake, and in the absence any prescribed procedure within the clause for deciding which option is to be selected, or in the case of more than one, the order in which they are to be undertaken, the clause fails at the first hurdle and is unworkable.

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[46] *Thorby v Goldberg* (1964) 112 CLR 597 at 607.
[47] *First Trade Consulting Pty Ltd v GRD Kirfield Ltd* [2006] WASCA 175 citing *Masters v Cameron* (1954) 91 CLR 353; *Anaconda Nickel Ltd v Tarmoola Australia Pty Ltd* (2000) 22 WAR 101 at [21] - [27] per Ipp J
[48] Citing *Public Service Commission v Public Service Tribunal* [2020] TOSC 63 at [92] and decisions referred to therein. See also *Wiebenga v 'Uta'atu* [2005] TOCA 5 at [8].
[49] *Raskin v Mediterranean Olives Estate Limited & Ors* [2017] VSC 94.

70 To illustrate, suppose here Mr Vunipola wished to go straight to arbitration but the TRU wished to seek the legal opinion of its counsel. How could that impasse be resolved? The potential solution suggested by Mrs Mailangi during argument that such an issue would be something the parties would have to agree on in the future runs headlong into the longstanding principle of the unenforceability of agreements to agree.

71 But even if the parties did, for example, agree to seek the opinion of the TRU's legal counsel, a second species of uncertainty arises by reason of the clause being wholly silent as to basic requirements such as who or how any issue/s arising from the dispute/s is/are to be framed for counsel's opinion; any timeframe within which the opinion is to be sought and provided; any procedure for evidence or submissions, if any, to be presented to counsel; and any other right to be heard generally. Most importantly, perhaps, the clause does not specify whether the opinion is to have any binding effect on the parties, without which, it can hardly be regarded as a method for 'resolving' the dispute. Without that, the utility of any legal opinion/advice is itself uncertain.

72 It is rare to see in a contractual dispute resolution provision reference to disputes being 'resolved' by the opinion or advice of counsel for one of the parties as opposed to, say, independent expert determination. It may well be that a legal opinion could provide a satisfactory result in cases between Members of the TRU (or their members, as defined in clauses 4 and 11 of the Constitution) rather than those involving the TRU itself or its Board. Otherwise, it is highly unlikely that a member who is disgruntled by a decision or action of the Board will be assuaged by the legal opinion of the TRU's counsel which may well have informed the decision or action of the Board in the first place. From a practical perspective, however, and putting aside for the moment the features of uncertainty discussed above, if, in the first instance, the parties agreed to seek the advice/opinion of the TRU's Legal Counsel, and one or other of them was dissatisfied with that opinion/advice, they could then agree to proceed to mediation or arbitration.

73 During submissions, Mrs Mailangi conceded, rightly with respect, that the agreement to mediate in clause 31 is relevantly uncertain. As Paulsen LCJ observed, there is no detail as to how the process is to be engaged and implemented or for resolving disputes on matters of process between the parties should they arise. Notwithstanding the general obligation implied by law in all contracts that each party agrees to do all such things as are necessary on his part to enable the party to have the benefit of the contract ("duty of cooperation"),[50] clause 31 is completely devoid of any detail which might enable mediation to be meaningfully undertaken and enforced.[51]

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[50] *Secured Income Real Estate (Australia) Limited v St Martins Investments Pty Ltd* (1979) 144 CLR 596 at 607.
[51] *Greinert v Jarrett* [2004] NSWSC 209 at [38]. See also *Cott UK Ltd v FE Barber Ltd* (1997) 3 All ER 540.

74 Agreements to mediate are not the same as agreements to negotiate or agreements to agree. Mediation follows a recognised process involving an independent third party (the mediator) to assist the parties in facilitating discussions between them with a view to resolving their dispute on their own terms. All that is required is that the procedural process be set out with sufficient certainty.

75 Here, however, clause 31 does not provide any process or procedure for the conduct of a contemplated mediation once (and if) the operation of the clause is triggered, including, but not limited to:

75.1 how mediation is to be commenced (e.g. by the CEO, with the consent of the parties, referring the dispute to mediation);

75.2 the appointment of a suitably qualified mediator;

75.3 any rules or procedures by which the mediation is to be conducted (e.g. by incorporating by reference the mediation rules of a recognised ADR institution):

75.4 any immunity of the mediator;

75.5 confidentiality; or

75.6 payment of the mediator's fees.[52]

76 As Giles J concluded in *Elizabeth bay Developments Pty Ltd v Boral Building Services Pty Ltd* (1995) 36 NSWLR 709 at 715, the agreement to mediate is so open-ended and unworkable that the "process to which the parties had committed themselves would come to an early stop when, prior to the mediation, it was asked what the parties had to sign and the question could not be answered".[53]

77 That lack of guidance for the process to be adopted invites discord and not accord between parties to the dispute. Any attempt therefore by the parties to embark upon a mediation pursuant to clause 31 would depend upon their further agreement as to the method to be employed and other variables referred to above. Such an agreement to agree must fail, and is unenforceable, for uncertainty.

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[52] In *Aiton Australia Pty Ltd v Transfield Pty Ltd* [1999] NSWC 996, Einstein J considered that it was not open to the court to imply a term that the parties would jointly share the reasonable remuneration of the mediator, because the suggested implied term was not so obvious that it would go without saying: see *Codelfa Construction Pty Ltd v State Rail Authority of NSW* (1981) 149 CLR 337.

[53] Compare *Hooper Bailie Associated Ltd v Natcon Group Pty* [1992] 28 NSWLR 194, where an agreement to conciliate certain aspects of a building dispute that had been referred to arbitration in order to accelerate the resolution of the dispute was upheld where the agreement gave precise details as to how the mediation/conciliation was to be conducted, identified the proposed conciliator, the issues which the conciliator should deal with and the order in which they should be addressed, with details as to the absence of lawyers, presence of experts and as to the general procedure to be followed.

Severance

78 The above analysis of the ADR agreement in relation to legal opinion and mediation does not, of itself, condemn the whole of clause 31.

79 An agreement that contains an uncertain non-essential term or combination of such terms may be saved by the Court simply severing the offending part or parts of the contract: *Fitzgerald v Masters* (1956) 95 CLR 420.[54] What is essential depends upon the intentions of the parties to be ascertained from the construction of the contract as a whole: *Zerza v Lapi* [1998] Tonga LR 149.[55] Severance can be used in cases where uncertainty stems from incompleteness as well as from ambiguity: *LMI v Baulderstone* [2001] NSWSC 886 at [35]. Sometimes it will be possible to sever a substantial portion of the agreement without affecting the main part of the agreement: e.g. *Life Insurance Co of Australia Ltd v Philips* (1925) 36 CLR 60; *Mercantile Credits Ltd v Comblas* (1982) 40 ALR 75.

80 This may be a simple matter in some cases, particularly if the uncertain words are mere verbiage or gibberish, in which case they can be simply ignored: *Nicolene Ltd v Simmonds* [1953] 1 QB 543; *Laybutt v Amoco Australia Pty Ltd* (1974) 132 CLR 57. More difficulty will arise, however, if the unclear words are an integral part of the agreement.

81 In my view, the references to resolution by legal opinion and mediation may be severed from clause 31. Given the apparent choice of ADR procedures, for the reasons stated above, it cannot be said that the parties intended that the two impugned procedures had to be availed of before a relevant dispute could be referred to arbitration.

The arbitration agreement

82 The result then is solely an agreement to arbitrate.

83 Clause 32 provides:

> **32 ARBITRATION PANEL**
>
> (1) An Arbitration Panel shall consist of three independent persons of good character who are well respected in the Kingdom, and who shall be nominated by the following persons:
>
> (a) The Legal Counsel of the Union, who shall be the Chairman of the Arbitration Panel;
>
> (b) The Member who is lodging the complaint; and
>
> (c) The Member who is the respondent.
>
> (2) The Arbitration Panel may regulate its own rules or procedure.

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[54] See also *Update Constructions Pty Ltd v Rozelle Child Care Centre* (1990) 20 NSWLR 251.
[55] See also *Whitlock v Brew* (No 2) [1967] VR 803 affirmed in the High Court (1968) 118 CLR 445.

(3) The Arbitration Panel may make the appropriate orders for payment of the costs of holding the arbitration hearing.

(4) The members of the Arbitration Panel shall be remunerated by the Union for their services.

84 The essential features or functions of a valid arbitration agreement include:[56]

84.1 a clause providing mandatory consequences for the parties such as that should a dispute arise, it shall (as opposed to may) be referred to arbitration. This is desirable because parties are not left uncertain as to the next step to take;

84.2 a clause excluding the intervention of local courts and the settlement of the dispute, *at least before the publication of an Award*, which speaks to the intrinsic nature of an arbitration clause which is to provide a means of resolving disputes by a process apart from court proceedings;

84.3 a clause which empowers the arbitrator to resolve disputes likely to arise between the parties, which is necessary to produce a final and binding Award which disposes of the dispute(s) between the parties; and

84.4 a clause implementing procedures which will lead (under the best conditions of efficiency and speed) to the publication of an enforceable Award which reflects the rationale which underpins arbitration as an alternative formal dispute resolution, namely, the process for the resolution of disputes in an efficient and speedy way compared to litigation but yet affording the parties the advantages of judicial enforcement.

85 As Paulsen LCJ alluded to in *Tonga v TRU*, and with which I respectfully agree, when read with clauses 32 and 33, the remaining arbitration agreement instigated by clause 31 is sufficiently certain. The referral is in mandatory terms. The nature and scope of disputes to be arbitrated is defined. The parties have agreed to a certain process for appointment of the members of the arbitral panel.[57] They have also provided for costs of the arbitration and remuneration of the arbitrators.

86 The fact that the parties have left it to the arbitrators on the Panel to regulate their own rules or procedure does not, of itself, render the agreement uncertain. Such a provision is not uncommon.

87 Party autonomy means that the parties should have the greatest possible degree of freedom to choose how they wish to resolve the dispute by arbitration. The

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[56] "The Defective or Pathological Arbitration Clause" by Dr Richard Manly QC, Chancery Chambers, Melbourne, August 2021, referring to the 1974 article "La clause d'arbitrage pathologique" by Frederic Eisemann, a long-standing Secretary General of the then Court of Arbitration at the ICC (now the International Court of Arbitration); and the decision of the Singapore High Court in *HKL Group Co Ltd v Rizq International Holdings Pte Ltd* [2013] SGHCR 5 at [18].

[57] Although the common procedure for appointing a three-member tribunal involves each party appointing one arbitrator, with the third being appointed either by the two party-appointed arbitrators or by an institution or nominee of an institution.

parties to an arbitration agreement may expressly agree on the procedure to be followed up the reference. Such an agreement will be enforced unless it is so contrary to fundamental principle is that it is treated as contrary to public policy. However, the parties rarely expressly agree a complete code of procedure, in which case, the procedure to be followed must be implied from the language of the arbitration agreement, the surrounding circumstances of the reference and any custom or trade practice which is incorporated into the arbitration agreement: *London Export Corpn Ltd v Jubilee Coffee Roasting Co Ltd* [1958] 1 All ER 494 at 497-498.[58]

88 The law applicable to the arbitration agreement will either be the law chosen by the parties or, in the absence of such a choice, the system of law with which the arbitration agreement is most closely connected: *Enka Insaat Ve Sanayi AS v OOO Insurance Company Chubb* [2021] 2 All ER 1.

89 The procedural law (often referred to as the 'curial law') governs the arbitration proceedings, namely, the conduct of the arbitration and the supervisory powers of the court: *James Miller & Partners Ltd v Whitworth Street Estates (Manchester) Ltd* [1970] 1 All ER 796. In the absence of any choice of law, the procedural law will be the law of the jurisdiction which is the seat of the arbitration: *C v D* [2008] 1 All ER (Comm) 1001.

90 As noted above, Tonga does not yet have any domestic arbitration legislation. However, provisions such as ss 35 and 46 of the recently introduced *International Arbitration Act* are examples of support for the principle of party autonomy. Section 35 provides:

> **35 Determination of rules of procedure**
>
> (1) Subject to this Act, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.
>
> (2) Failing such agreement, the arbitral tribunal may, subject to this Act, conduct the arbitration in such manner as it considers appropriate.
>
> (3) The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence.

91 Those procedural 'freedoms' are only qualified by provisions such as s 33 which requires that the parties be treated equally and be given a reasonable opportunity to present their cases, and otherwise that arbitrators must act fairly and impartially.

92 All arbitrations must be conducted in accordance with some form of arbitral rules. They can be chosen by the arbitrators themselves, as here, but it is preferable for the parties to specify which rules should be used. A basic choice is between arbitration under "institutional" rules and arbitration under *ad hoc* rules. In an ad

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[58] Referred to in Halsbury's Laws of England, 4th edition, volume 2, [671].

hoc arbitration, the parties themselves manage the arbitration which is conducted under rules adopted for the purpose of the specific arbitration, without the involvement of any arbitral institution. The parties can draw up the arbitral rules themselves, leave the rules to the discretion of the arbitrators or, as is more common, adopt rules specially written for ad hoc arbitration, for example, the UNCITRAL Rules.

93 Here, the parties' agreement to confer on the Arbitration Panel the power to regulate its own rules of procedure is not an (unenforceable) agreement to agree. That is because the choice of procedure is not left to the parties but rather those they will have appointed. It is implicit in the agreed mechanism for appointment that the parties will select the two other arbitrators as persons who are suitably qualified and that the Panel as a whole, or by majority, will be capable of agreeing on appropriate rules of procedure.

94 For those reasons, I am satisfied that the arbitration agreement is sufficiently certain.

95 The binding nature and finality of any award issued pursuant to clause 32 is then subject to an internal right of appeal in clause 33 before the Appeal Tribunal. It contains similar provisions for appointment of Tribunal members (albeit specifying different qualities and selector rights), self-regulation of rules of procedure, costs and remuneration.

96 The final subclause (6) provides that "the Appeal Tribunal's decision shall be final, and not appealable to any other competent authority".

97 However, that provision, together with similar language employed in clause 31, presents the next, and ultimate, question on whether clause 31 is enforceable.

Ouster

98 The common law rules relating to contracts contrary to public policy distinguished between contracts which were void and those which were illegal. At common law, there were three recognised categories of cases where the contract might be void but not illegal: contracts ousting the court's jurisdiction, contracts in restraint of trade and contracts prejudicing the freedom and security of marriage.

99 The rules of an association may provide that disciplinary matters and disputes amongst members be dealt with by a domestic tribunal or submitted to arbitration,[59] but any rule which purports to oust the jurisdiction of the courts will be invalid as contrary to public policy.[60]

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[59] *Ferry v Bonnin* (1889) 23 SALR 66; *Macqueen v Frackleton* (1909) 8 CLR 673; *Meyers v Casey* (1913) 17 CLR 90; *Murphy v O'Rourke [1921] St R Qd 72*; *Solicitor-General v Wylde* (1945) 46 SR (NSW) 83; 62 WN (NSW) 246; *Webb v Confederation of Australian Motor Sport Ltd*, ibid.

[60] Czarnikow v Roth, Schmidt & Co [1922] 2 KB 478; *Hyman v Hyman* [1929] AC 601, HL; *Re Wynn, Public Trustee v Newborough* [1952] 1 All ER 341; *Harbottle Brown & Co Pty Ltd v Halstead* [1968] 3 NSWR 493; *Webb v Confederation of Australian Motor Sport Ltd*, ibid.

100 The common law has maintained that parties to a contract may not, by their contract, oust the jurisdiction of the courts of law to resolve justiciable issues arising between them from the contract: *Touliki Trading Enterprises Ltd v Procorp Ltd* [1999] Tonga LR 216.[61] The basis of this head of public policy is the protection of a citizen's 'inalienable right' to have recourse to the court.[62] Also, the tension between party autonomy on the one hand, and judicial scrutiny on the other, recognises that the State has an interest not simply in the orderly processes of dispute resolution, but also in maintaining the uniformity of the commercial law.[63]

101 Illustrations of unenforceable ouster clauses include those which:

101.1 provide that any dispute shall be finally determined by a referee;[64]

101.2 relinquish the right to sue in a court of law;[65]

101.3 confer the exclusive power to determine the rights of members of a voluntary association on their own Tribunal;[66]

101.4 seek to prevent a party from having the court determine a question of law or examine procedural inadequacies in a determination made by a body named in the contract;[67] and

101.5 impose some detriment on a party who seeks to litigate.[68]

102 Further, a term of a contract can amount to an illegal ouster, although not expressed as such, if it operates as a strong disincentive to recourse to the Courts.[69] A partial exclusion of the jurisdiction of the Court (such as limiting the amount which could be recovered in a Court) is as unenforceable as a complete exclusion.[70]

103 In contrast, a clause which makes arbitration a *condition precedent* to legal action (a so-called *Scott v Avery*[71] clause) is not an ouster of jurisdiction.[72] That applies also to clauses providing for mediation or conciliation.[73] An ordinary arbitration clause by which the parties agree to submit disputes to arbitration is not against

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[61] See also *Doleman & Sons v Ossett Corporation* [1912] 3 KB 257 at 267-269; *Anderson v GH Mitchell and Sons Pty Ltd* (1941) 65 CLR 543 at 549 ; *Compagnie des Messageries Maritimes v Wilson* (1954) 94 CLR 577 at 586.
[62] Cheshire and Fifoot's 'Law of Contract" by Seddon and Ellinghaus, 8th Australian edition, LexisNexis Butterworths at [18.28] citing *Dobbs v National Bank* (1935) 53 CLR 643; *Brooks v Burns Philp Trustee Co* (1969) 121 Clr 432; *South Australian Railways Commissioner v Egan* (1973) 130 CLR 506.
[63] *CBI NZ Ltd v Badger Chiyoda* [1989] 2 NZLR 669 at 685-686.
[64] *South Australian Railways Commissioner v Egan* (1973) 130 CLR 506 at 513.
[65] *Felton v Mulligan* (1971) 124 CLR 385-6.
[66] *Harbottle Brown & Co Pty Ltd v Halstead* (1968) 88 WN (Pt 1) NSW 432.
[67] *Lee v Showmen's Guild of Great Britain* [1952] 1 All ER 1175.
[68] *Novamaze Pty Ltd v Cut Price Deli Pty Ltd* (1995) 128 ALR 540.
[69] *Novamaze Pty Ltd v Cut Price Deli Pty Ltd*, supra.
[70] *Brooks v Burns Philp Trustee Co* (1969) 121 CLR 432 at 438 but compare *Macqueen v Frackleton* (1909) 8 CLR 673; *Solicitor General v Wylde* (1945) 46 Special Referee (NSW) 83.
[71] (1865) 5 HL Cas 811.
[72] *Booker Industries Pty Ltd v Wilson Parking (Qld) Pty Ltd* (1982) 149 CLR 600.
[73] *Hooper Bailie Associated Ltd v Natcon Group Pty Ltd* (1992) 28 NSWLR 194.

public policy.[74] An agreement to submit disputes to arbitration does not, apart from statute, take from a party the power to invoke the jurisdiction of the Courts to enforce that party's rights by instituting an action to determine a dispute of a kind that the parties have agreed should be arbitrated.[75] Such a clause does not purport to preclude action in the Courts, and a failure to resort to arbitration may therefore constitute an actionable breach of contract.[76]

104 In the present case, the references in subclause (1) that relevant disputes "shall be resolved only" in accordance with the three methods specified and in subclause (2) that "no dispute ... shall be resolved in the Courts of the Kingdom", plainly have the effect of purporting to exclude or 'oust' the jurisdiction of the Courts in the determination of any relevant dispute between the TRU and its Members or between any of its Members.

105 In addition, the arbitration option, culminating in subclause 33(6) with the decree that the Appeal Panel's decision "shall be final, and not appealable to any other competent authority", clearly evinces an intention for there to be no scope for supervision or review by the Court.

106 Notwithstanding that the standard phrase that an arbitrator's award shall be 'final and binding' has been held not to oust the court's jurisdiction,[77] such a characterisation, absent legislation covering the field, has always been subject to the common law exception to the general rule whereby an arbitrator's award could be set aside by a Court exercising supervisory jurisdiction for error of law on the face of the record, excess of the terms of reference, and misconduct, technical or otherwise. An exemption to that exception lay where the parties to an arbitration agreement specifically agreed to submit a question of law for the determination of an arbitral tribunal. In that scenario, the arbitral award determining such a question of law bound the parties and was enforceable by action in a common law court whether or not an error of law appeared on the face of the arbitral award. [78]

107 As noted above, the law relating to private arbitration in other common law justifications has, since 1854, been the subject of substantial legislative change, including changes in the extent to which judicial intervention may detract from the finality of an arbitrator's award. Those changes, insofar as they relate to domestic commercial arbitration, are yet to find their way into the Tongan legal framework.

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[74] *Compagnie des Messageries Maritimes*, ibid.
[75] *TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia* (2013) 251 CLR 533 at [76].
[76] *Mantovani v Carapelli SpA* [1980] 1 Lloyd's Rep 375.
[77] In *Jones v Sherwood Computer Services plc* [1992] 2 All ER 170, CA, it was decided that appointing an expert (stated not to be an arbitrator) to resolve a dispute which was to be 'conclusive and final and binding for all purposes' was a valid clause and the outcome could not be disputed in the court unless it was clear on the face that the expert had acted fraudulently or otherwise improperly, mistake being an inadequate reason to intervene. However, expressions such as 'final and binding' cannot purport to exclude the court's jurisdiction with respect to questions of law: *Penrith District Rugby League Football Club Ltd v Fittler* (1996) 40 AILR ¶5-087.
[78] *TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia*, ibid, at [35], [36].

108 For those reasons, I am of the view that, on its proper interpretation, clause 31:

108.1 has the effect of seeking to oust the jurisdiction of the Courts of the Kingdom;

108.2 is contrary to public policy; and

108.3 is therefore void.

109 I conclude by addressing Mrs Mailangi's suggestion set out in paragraph 29.6 above to the effect that the Court could make orders allowing any party who might be dissatisfied with the outcome of the ADR processes to then seek relief from the Court. Such a course would go beyond any implication of terms of the parties' 'agreement', although what is suggested would conflict the express terms of clause 31 and therefore be impermissible. Otherwise, and for the same reason, the submission in fact amounts to asking the Court to rewrite clause 31, which (in the absence of a claim for rectification[79]) the Court cannot do: *Alstom Ltd v Yokogawa Australia Pty Ltd & Anor (No 7)* [2012] SASC 49 at [123].

Result

110 For those reasons, the Defendants' application is dismissed.

111 As the Plaintiff is self-represented, my provisional view is that there should be no order as to costs (i.e. costs lie where they fall). If any party considers that a different order is appropriate, they are to file an application with any supporting affidavit/s and submissions within 7 days of the issue of this ruling.

NUKU'ALOFA
26 August 2021

SUPREME COURT TONGA

M. H. Whitten QC
LORD CHIEF JUSTICE

[79] For a discussion on which, see *Royco Shipping Services Ltd v Matson South Pacific Ltd* [2021] TOSC 12 and e.g. *James Adam Pty Ltd v Fobeza Pty Ltd* [2020] NSWCA 311.