Re Solution: In Brief

South Pacific Regional International Arbitration Conference – Denarau Fiji

We were delighted to be invited to attend the inaugural South Pacific Regional International Arbitration conference which took place on 12-13 February 2018, in Denarau, Fiji.

The conference titled "The Dawn of International Arbitration in the South Pacific" was jointly organised by the Asian Development Bank (**ADB**), the United Nations Commission for International Trade Law (**UNCITRAL**) Regional Centre for Asia and the Pacific, and the Fiji Government. The Conference was supported by ADB's regional technical assistance titled "Promotion of International Arbitration Reform for Better Investment Climate in the South Pacific" executed through the Office of the General Counsel's Law and Policy Reform Program.

The purpose of the conference was to inform South Pacific Island states about international dispute resolution best practice, the need for modern model law-based arbitration legislation, the benefits and advantages of states being signatories to the New York Convention, and to assist the South Pacific Island States in developing their international dispute resolution capabilities.

Gary Born, Chair of the International Arbitration practice group at Wilmer Cutler Pickering Hale and Dorr LLP gave the conference's keynote address following an opening address by the Solicitor-General of Fiji and the General Counsel of the Asian Development Bank, Christopher Stephens.

The conference was well attended by government representatives, senior judicial officers, and private sector participants from 11 South Pacific Island States, including Fiji, Kiribati, Papua New Guinea, Samoa, Timor Leste, the Solomon Islands, and Tonga.

The conference was part of a broader technical assistance project that aims to promote accession to the New York Convention and international arbitration law reform in the South Pacific region. Additional Pacific Island states are in the process of examining the reform of international arbitration legislation in the region – it really is "The Dawn of International Arbitration in the South Pacific" and NZIAC is delighted to be an integral part of that process.

Trans-Pacific Partnership deal finally concluded

On 23 January 2018, senior government officials from 11 countries – Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore and Vietnam – reached agreement on the final Comprehensive and Progressive Agreement for Trans-Pacific Partnership (**CPTPP**) in Tokyo, Japan.

The CPTPP will eliminate more than 98% of tariffs in a trade zone with a combined GDP of $13.7 trillion. While President Donald Trump recently announced a new 30% protectionist tariff on imports of solar cell, he noted, in a speech delivered at the 2018 World Economic Forum in Davos, that the US would consider re-joining the CPTPP if "it is in the interests of all".

Minister for Trade and Export Growth, the Hon David Parker, says the CPTPP represents a fairer deal for New Zealanders than the earlier TPP agreement. It satisfies the five conditions

the Labour-led Government set down for a revised TPP which included increased market access for exports, upholding the Treaty of Waitangi, protecting the Pharmac model, and preserving the right to regulate in the public interest. It also narrowed the scope to make Investor State Dispute Settlement claims.

Mr Parker says "The CPTPP will provide New Zealand exporters with preferential access for the first time into Japan, the world's third-largest economy and our fifth-largest export market. It will also be New Zealand's first FTA relationship with Canada (our 13th largest export market), Mexico (21st), and Peru (46th),".

The Minister has this week welcomed the release of the text of the CPTPP saying "Public scrutiny of trade agreements is welcome and important. We've been publishing detailed information about the CPTPP since November, and now people can see the full legal text for themselves." The full text of the CPTPP is available online at https://www.mfat.govt.nz/en/about-us/who-we-are/treaties/cptpp

The trade agreement will create new opportunities for international trade, including preferential access for the first time to Japan, Canada, Mexico and Peru.

The Ministry of Foreign Affairs and Trade has also just released the National Interest Analysis of the CPTPP, which assesses the likely costs and benefits for New Zealand of entering into the Agreement. The Analysis suggests the CPTPP could be worth up to $4 billion a year to the New Zealand economy once fully implemented. The National Interest Analysis is available online at https://www.mfat.govt.nz/cptpp.

The New Zealand government is currently in negotiations with other signatories to the CPTPP over 'side letters' that effectively remove countries' obligations to specific elements that they object to. New Zealand has already negotiated a side letter with Australia to exempt investors from either country invoking the controversial investor-state dispute settlement (**ISDS**) provisions.

The ISDS provisions have been of particular concern to New Zealand with the Green Party leader, James Shaw, saying the ongoing existence of ISDS clauses, even if watered down as claimed by David Parker, meant the Greens could not support the agreement.

It is expected that the CPTPP will be signed in Santiago, Chile, on 8 March 2018.

Mexico signs ICSID Convention

On 11 January 2018, Mexico became the 162nd country to sign the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States (**ICSID Convention**).

The ICSID Convention is a multilateral treaty which entered into force in 1966. It is designed to facilitate investments between countries by providing an independent platform for the conciliation and arbitration of investment disputes. The International Centre for Settlement of Investment Disputes (**ICSID**) is recognised as one of the world's leading institutions for the settlement of investment-related disputes.

The next step for Mexico is the ratification of the ICSID Convention which will require the approval of the Mexican Senate. Thirty days after the date of deposit of the instrument of

ratification, the Convention will enter into force. Once Mexico ratifies the Convention, it will be the 154th country to do so.

Mexico's decision to sign the ICSID Convention has been viewed generally as confirming its commitment to welcome foreign investments. It will certainly foster an atmosphere of confidence among current and future Mexican investors and is likely to stimulate a larger flow of investments into the country, particularly as Mexico is one of the signatories to the Comprehensive and Progressive Trans-Pacific Agreement (**CPTPP**).

Mexico is New Zealand's 21st largest export market

SIAC proposal for consolidation of arbitration proceedings between arbitral institutions

On 19 December 2017, the Singapore International Arbitration Centre (**SIAC**) released a proposal on cross-institution cooperation and consolidation of arbitral proceedings conducted under different arbitral rules (Proposal).

Currently, the arbitration rules of most arbitral institutions (including those of NZIAC and NZDRC) contain provisions for consolidation of arbitral proceedings into a single arbitration under certain conditions. These consolidation provisions typically require, among other things, that the parties' arbitration agreements are 'compatible'. A necessary element of compatibility is that the arbitration agreements refer to the same institutional arbitral rules.

The Proposal involves adoption of a protocol permitting the cross-institution consolidation of arbitrations subject to different institutional arbitration rules (eg, SIAC and New Zealand International Arbitration Centre (**NZIAC**) arbitration rules). The Protocol sets out the framework for the review of consolidation applications when two or more arbitration institutions are involved and which would govern which institution would administer the consolidated proceedings.

Under the Proposal, the consolidation protocol would form part of the arbitration rules of the participating institutions.

On the face of it the Proposal is a welcome initiative in terms of inter-arbitral institution cooperation and addressing the risk of inconsistent awards arising out of concurrent proceedings in different jurisdictions and time and cost implications for parties involved in multiple proceedings, however there would seem to be some inherently challenging obstacles to its efficacy, and ultimately, to its acceptance and adoption - none the least of which are the key issues of party autonomy and certainty (of jurisdiction, procedural rules, composition of tribunal, time for award, tribunal fees, administrative costs, enforcement etc) that are fundamental tenets of modern commercial arbitration.

While the Proposal suggests that a deeming provision be included in the rules of the participating institutions, such form of party 'consent' may come as some surprise to parties who find themselves required to arbitrate under a different institution and under quite different rules and on different terms to those they signed up for when they entered into the underlying contract or transaction.

Where parties to related contracts or sets of transactions have agreed at the outset of those contracts/transactions to arbitrate under different institutional arbitration rules, they can of course agree to vary those agreements and enter into a new agreement when disputes arise, for those disputes to be determined in a single dispute resolution process. On the other hand, arbitration is a creature of contract and a party is entitled to exercise the rights it originally negotiated for and to decline any offer to consolidate proceedings, which election a party might make for many and varied (strategic and important) reasons.

There are other obvious challenges to be resolved including the procedures and mechanisms for determining which institution should take the conduct of the consolidated proceedings and thus which rules (and fees) would apply to the arbitration (even more so where more than two institutions are involved). The Proposal suggests a number of alternatives including first, that a **joint committee** be appointed from members of the Courts or Boards of the concerned arbitral institutions which would be mandated to decide the applications, with a specific committee being appointed for each application, and second, that arbitral institutions could adopt a consolidation protocol providing that **one institution** would be authorised to determine any cross-institution consolidation application based on its own **consolidation rules**.

The Proposal suggests a number of criteria that might be used to determine the administering institution including: where the number of proceedings to be consolidated is odd, the institution with the larger number of proceedings in the consolidation application can retain administering authority; the institution with a higher aggregate value of disputes will administer the consolidated proceeding; time of commencement; and the institutions could agree on a division of cases based on the type of dispute (corporate,

shipping, construction etc) or the nationality or domicile of the parties.

It is at least arguable that the level of engagement required in the administration and exercise of such decision making procedures would simply add another layer of complexity and cost to the arbitration process and cause delay – two of the very evils the Proposal seeks to avert, and which, coupled with the uncertainty and reduced party autonomy that characterise the Proposal, may ultimately militate against its wide adoption.

It remains to be seen what level of support/uptake the Proposal achieves. SIAC invited comments on its Proposal by 31 January 2018. At this stage at least, and notwithstanding the fact that limitations on consolidation can cause difficulties for parties to multiple contracts/transactions, the Proposal involves fundamental matters of principle such that neither NZIAC nor NZDRC believe the Proposal is presently a good fit for their innovative administrative procedures and rules.