ReSolution: In Brief

NZIAC's Director visits APRAG President and colleagues in Jakarta

Following NZIAC's recent admission as a member to APRAG, our Executive Director Catherine Green is this week in Jakarta meeting with APRAG's President Mr Husseyn Umar. Mr Umar is also the Chairman of Badan Arbitrase Nasional Indonesia (BANI). NZIAC would like to thank Mr Umar for his warm hospitality. NZIAC firmly believes that close and positive collaboration between APRAG members across the region can only lend itself to the development of more effective and relevant arbitration services throughout the Asia Pacific Region. We very much look forward to working with our APRAG colleagues.

At the same time, Ms Green has also met with Chartered Arbitrator Karen Mills and her colleagues Rizki Karim, Rininta Ayunina, Iswahjudi A Karim, and Mirza Karim of law firm Karim Syah. Ms Mills is a panellist with NZIAC sitting on our Arbitration, Arb-Med, and Mediation panels. Her practice is diverse with a wealth of experience in aviation, banking and finance, building and construction, commercial, energy, financial services, insurance, information technology, maritime, shareholder and securities, treaty, oil and gas, and mining disputes. The strength of NZIAC's services is underpinned by the experience and quality of those panellists who choose to work with us. NZIAC would also like to take this opportunity to thank Ms Mills and her colleagues for their warm hospitality in hosting our Executive Director in Jakarta this week.

California eases restrictions on foreign counsel in international arbitrations

On 18 June 2018 California Governor Jerry Brown signed into law Senate Bill (SB) 766, Representation by Foreign and Out-of-State Attorneys. The bill clarifies that foreign (not licensed in the United States) and out-of-state (ie, licensed in a US jurisdiction, but not in California) attorneys can represent parties in international arbitrations in California, subject to certain conditions. The bill will take effect from 1 January 2019.

Global Pound Conference report published

The Global Pound Conference series - a unique and ambitious initiative to inform how civil and commercial disputes are resolved in the 21st century - brought together more than 4,000 people at 28 conferences in 24 countries across the globe in 2016 and 2017.

The project focuses on the needs of Users (both corporate and individual) of civil and commercial dispute resolution services, and in doing so, it has prompted a much needed global conversation about how conflict can and should be managed in the 21st Century.

Herbert Smith Freehills, global founding sponsor of the series, collaborated with PwC and IMI (International Mediation Institute) to produce a report that identifies key insights that emerge from the extensive voting data collected during the series. With a focus on the needs of corporate users of dispute resolution, this ground-breaking report challenges the traditional and fundamental notions of what clients want and how lawyers should represent them in a dispute.

The report identified four key global themes:

• Efficiency is the key priority of parties in choice of dispute resolution processes.

Efficiency means different things to different stakeholders but this throws down a challenge to the way in which traditional dispute resolution processes meet the needs of the Parties seeking dispute resolution services. Finding the most efficient way to resolve a dispute may not always be the fastest or cheapest but it requires thought and engagement to bring appropriate resolution in acceptable timeframes and at realistic costs.

• Parties expect greater collaboration from advisors in dispute resolution.

Parties using dispute resolution services seek greater collaboration from their external lawyers when interacting with them and their opponents. This represents a potential challenge to traditional notions of how lawyers should represent clients in disputes.

• Global interest in the use of pre-dispute protocols and mixed-mode dispute resolution (combining adjudicative and non-adjudicative processes).

As global understanding of and interest in non-adjudicative dispute resolution processes grows, there is near universal recognition that Parties to disputes should be encouraged to consider processes like mediation before they commence adjudicative dispute resolution proceedings and that non-adjudicative processes like mediation or conciliation can work effectively in combination with litigation or arbitration.

• In-house counsel are the agents to facilitate organisational change. External lawyers are the primary obstacles to change.

The data shows a broad consensus that in-house counsel should encourage their organisations to consider their dispute resolution options more carefully, including using non-adjudicative processes like mediation and conciliation. External lawyers are reported to be – and perceive themselves to be – resistant to change, but a new generation of in-house counsel will challenge this resistance.

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Disclosure of arbitral apointments in related or overlapping references

In *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451 the court indicated that it is "generally desirable" to disclose any matter that can give rise to a 'real' danger of bias. In *Guidant LLC v Swiss Re International SE* [2016] EWHC 1201, the court acknowledged that fears over inside knowledge were a legitimate concern, while at the same time recognising that a common arbitrator does not, in itself, justify an inference of apparent bias; "[s]omething more is required."

In *Halliburton Company v Chubb Bermuda Insurance Ltd* [2018] EWCA Civ 817, the English Court of Appeal considered whether it is possible for an arbitrator to accept multiple appointments with overlapping reference and one common party, without giving rise to doubts over impartiality and, at what point should an arbitrator disclose these further appointments – if at all?

The Court dismissed the appeal, stating that, on the facts of the case, there was no real possibility that the arbitrator was biased when viewed from the perspective of a "fair minded and informed observer".

Nevertheless, the Court confirmed the position under English law (and best practice in international arbitration) that "disclosure should be given of facts and circumstances known to the arbitrator which...would or might give rise to justifiably doubts as to his impartiality".

Court of Appeal considers question of confidentiality in respect of settlement agreement reached in FDR mediation

In *McKay v The Commissioner of Inland Revenue* [2018] NZCA 138, the Court of Appeal recently considered the privilege and confidentiality of a settlement agreement reached under the Family Dispute Resolution Act 2013 (**FDRA**).

The Appellant appealed the High Court judgment which found that an agreement produced through mediation (the **Mediated Agreement**) under the FDRA was not privileged and/or confidential and was therefore available for the Commissioner of Inland Revenue to use when making an assessment under the Child Support Act (the **CSA**).

The Court found the High Court was correct in concluding that s 14 of the FDRA does not confer privilege on the Mediated Agreement. It agreed with the High Court's observation that the underlying purpose of the privilege conferred by s 14(2) was to encourage parties engaged in settlement negotiations to speak freely, and to facilitate out of court resolution.

The Court did not accept the Appellant's further submission that the terms of the Mediated Agreement were confidential. The Mediated Agreement did not contain any agreement between the parties to that effect and there was nothing in the statutory scheme to justify inferring it. The fact that the contents of the Mediated Agreement may be included in the FDR outcomes form prepared by the FDR provider and subsequently given to the Family Court under s 13 of the FDRA provides clear indication that the document is not confidential to the parties. The Court reached that conclusion even though there may have been a misunderstanding of the legal position about confidentiality on the part of the Appellant.

The Court found section 40 of the Care of Children Act 2004 (COCA) to be a further indication that mediated outcomes are not privileged. In essence, section 40 is to the effect that parenting and guardianship agreements cannot be enforced under COCA, but some or all the terms of those agreements may be embodied in court orders.

Singapore Convention

At the 51st session of the United Nations Commission on International Trade Law (**UNCITRAL**) on 26 June 2018, the final drafts for a Convention on the Enforcement of Mediation Settlements and corresponding Model Law were approved. A resolution to name the Convention the 'Singapore Mediation Convention' (the **Convention**) was also approved.

The Convention has now been published. It will be signed in Singapore on 1 August 2019 and will come into effect six months after at least three states have ratified it.

The aim of the Convention is to implement an international regime for the enforcement of mediated settlement agreements - similar to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the **New York Convention**). The purpose of the Convention is to simplify the enforcement processes for mediated settlement agreements relating to international commercial disputes and to encourage the use of mediation as an international dispute resolution process for cross border disputes, with all its well-known cost efficiencies and relational benefits.

The Convention carves out consumer, personal, household, family, inheritance and employment disputes from its jurisdiction, and those that have been recorded and are enforceable as an arbitral award and thus governed by the New York Convention.

There are various procedural requirements for the underlying settlement agreement to qualify for enforcement under the Convention. There are also grounds for refusing to grant relief listed in the Convention. These include the incapacity of the parties, invalidity of the settlement agreement, serious breach of mediator standards, mediator bias, and public policy.