ReSolution:In Brief

CPTPP underway - New Zealand to see the benefits of the CPTPP with tariff cuts for our exporters from 30 December 2018

Australia has become the sixth country to ratify the Comprehensive and Progressive Trans Pacific Partnership (**CPTPP**) Agreement, after Japan, Singapore, Mexico, New Zealand and Canada triggering the 60 day countdown to entry into force of the Agreement on 30 December 2018 and the first round of tariff cuts.

Minister for Trade and Export Growth David Parker said the threshold to bring the deal into effect was crossed when Australia notified New Zealand today, as Depositary for the CPTPP, that it had completed its domestic procedures to ratify the Agreement.

The CPTPP marks the first free trade deal for New Zealand with Japan, the third largest economy in the world, as well as with Mexico and Canada – both G20 countries. The remaining countries yet to ratify are Brunei Darussalam, Chile, Malaysia, Peru and Vietnam. Other countries have also expressed formal interest in negotiating accession to the CPTPP, including Colombia, Korea, and the United Kingdom.

The CPTPP markets are collectively home to 480 million consumers and make up 13.5 per cent of world GDP.

With the CPTPP coming into force, it is inevitable that with the significant opportunities and the resultant increase in international trade and commerce, there will be a correlative increase in the number of disputes between parties to those cross-border transactions, and it is essential that those contracting parties have access to prompt, efficient, and cost effective dispute resolution mechanisms and services.

New Zealand is a modern, dynamic country with an open economy and business environment with strong respect for diversity; it is politically stable and has excellent infrastructure, communication, technology, and a supportive legal environment that underpins the efficacy of international dispute resolution; and it is highly respected globally as an independent and lawful jurisdiction for international arbitration and mediation.

With New Zealand's well developed and trusted legal system, world class infrastructure, and 'safe nation' status, and NZIAC's new Rules, NZIAC is ideally positioned to become the Trans-Pacific Region's premier forum to handle the expected growth in complex, cross-border commercial and investment disputes in the region.

The following arbitration clause should be included in contracts where the parties wish to have any future disputes resolved by Arbitration under the New Zealand International Arbitration Centre's Arbitration Rules:

"Any dispute or difference arising out of or in connection with this contract, or the subject matter of this contract, including any question about its existence, validity or termination, shall be referred to and finally resolved by arbitration in accordance with the Arbitration Rules of the New Zealand International Arbitration Centre."

Parties to an existing dispute that have not incorporated the NZIAC Model Clause into a prior agreement may agree to refer that dispute to Arbitration under the NZIAC Arbitration Rules by signing the Arbitration Agreement in the form found at Appendix 2 to those Rules.

No more 'moonlighting' for International Court of Justice Judges

The International Court of Justice (**ICJ**) is the principal judicial organ of the United Nations (**UN**).

It was established by the United Nations Charter in June 1945 and began its activities in April 1946. The seat of the Court is at the Peace Palace in The Hague (Netherlands). Of the six principal organs of the United Nations, it is the only one not located in New York. The Court has a twofold role: first, to settle, in accordance with international law, legal disputes submitted to it by States (its judgments have binding force and are without appeal for the parties concerned); and, second, to give advisory opinions on legal questions referred to it by duly authorized United Nations organs and agencies of the system. The Court is composed of 15 judges elected for a nine-year term by the General Assembly and the Security Council of the United Nations. Independent of the United Nations Secretariat, it is assisted by a Registry, its own international secretariat, whose activities are both judicial and diplomatic, as well as administrative. The official languages of the Court are French and English. Also known as the "World Court", it is the only court of a universal character with general jurisdiction.

The Court is regulated by the ICJ Statute, which provides in its Article 16 that "*no member of the Court may exercise any political or administrative function, or engage in any other occupation of a professional nature*".

In a report published by the International Institute for Sustainable Development **(IISD)** titled "Is 'Moonlighting' a Problem? The role of ICJ Judges in ISDS", researchers Nathalie Bernasconi-Osterwalder and Martin Dietrich Brauch analysed the contents of several public databases of Investor State Dispute Settlement **(ISDS)** cases, and found that ICJ judges had sat as arbitrators in roughly 10% of all known ISDS cases during their tenure. At least seven judges at the ICJ at the time of publishing (and 13 former judges) had worked (or were working at the time of the report) as arbitrators in treaty-based ISDS cases during their terms at the ICJ. This in the context first, that the ICJ pays each judge a tax free annual salary of roughly US$173,000 (as of 2016), plus a post-adjustment allowance for living and working in the Netherlands and after leaving the court, judges receive an annual pension equal to 50 per cent of the annual base salary and second, that between 1 August 2017 and October 2018, the Court's docket has remained extremely full in what has been a particularly busy and productive period for the Court.

Putting aside for one moment the basic issue of the prohibition on ICJ judges "*engaging in any other occupation of a professional nature*" ICJ judges acting as arbitrators raises other obvious issues and conflicts including none the least, their perceived/actual independence and impartiality in circumstances where there is a risk that their personal economic interests might be affected by their decisions and, that taking private arbitration appointments must impact on the time they can dedicate to the court's extremely full caseload.

On 25 October 2018, the President of the ICJ, His Excellency Mr Abdulqai A Yusuf, addressed the UN General Assembly and took the opportunity to discuss, "*in the spirit of transparency*", the question of "*extrajudicial activities that Members of the Court occasionally undertake, in particular, in the field of international arbitration*" saying:

The Court is cognizant of the fact that, while the judicial settlement of disputes offered by the Court is enshrined in the Charter, States may, for several reasons, be interested in settling their disputes by arbitration. In such instances, Members of the Court have sometimes been called upon by States to sit on the arbitral tribunals in question dealing in some cases with inter-State disputes while in others with investor-State disputes ¾ a testament, of course, to the high esteem in which the Court's Judges are held by the international community.

Over the years, the Court has taken the view that, in certain circumstances, its Members may participate in arbitration proceedings. However, in light of its ever-increasing workload, the Court decided a few months ago to review this practice and to set out clearly defined rules regulating such activities. As a result, Members of the Court have come to the decision last month that they will not normally accept to participate in international arbitration. In particular, they will not participate in investor-State arbitration or in commercial arbitration....

H.E. Yusuf emphasised, *it is essential to place beyond reproach the impartiality and independence of Judges in the exercise of their judicial functions ... I cannot stress enough that any participation of Members of the Court in such inter-State arbitrations is subject to the strict condition that their judicial activities take absolute precedence.*

Queen's Counsel appointments

We are delighted that Attorney-General David Parker has this week announced the appointments of 10 Queen's Counsel including NZDRC and NZIAC mediation panelist, Maria Dew.

Maria graduated with an LLB from the University of Otago in 1987 and an LLM from Victoria University in 1999. She was admitted to the Bar in 1987 and joined the Christchurch firm RA Young Hunter & Co. She moved to Wellington in 1989 and worked for Morrison Morpeth doing civil litigation. In 1991 Maria Dew travelled to the United Kingdom and worked first as a construction litigation solicitor and then as a prosecution solicitor working under the former Financial Services Act 1986 (UK). In 1993 she returned to Wellington and to Morrison Morpeth as a senior associate and then moved to the Bank of New Zealand as in-house counsel in employment law. In 1998 she moved to Auckland. She joined the independent bar in 2000, first at Princess Chambers and then at Bankside Chambers. She specialises in employment law. Since 2013 Maria Dew has been the Deputy Chair of the Health Practitioners Disciplinary Tribunal and in 2017 she was elected to the Council of the New Zealand Bar Association.

The other newly appointed Silks are: Paul Dale, Vivienne Crawshaw, Belinda Sellars, and Robert Hollyman from Auckland; James Rapley and Anthony Wilding from Christchurch; Andru Isac from Wellington; Margaret Stevens from Dunedin; and Fiona Guy Kidd from Invercargill. Congratulations to all.

Australia amends International Arbtiration Act

The Commonwealth Parliament has passed amendments to the International Arbitration Act 1974 (Cth) incorporating the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration into Australian law, clarifying the requirements for the enforcement of foreign awards, defining competent courts for the purpose of enforcing awards or obtaining interim measures, and modernising the provisions governing arbitrators' powers to award costs in international commercial arbitration proceedings by providing more flexibility to arbitrators to award costs in line with international practice.

The omnibus Civil Law and Justice Legislation Amendment Bill (Cth) received Royal Assent on 25 October 2018 and the amendments commenced the following day.