ReSolution in Brief

Locked down and locked out?

Unfortunately, three community cases of COVID-19 were detected in South Auckland over the weekend of 13 and 14 February leading the Government to impose an alert level 3 lockdown on the Auckland region.

If you are facing a commercial lease dispute due to COVID-19 restrictions, the government continues to fully fund arbitration and mediation services for eligible parties who are in dispute about the payment of rent and outgoings where the tenant has experienced a material loss of revenue during a lockdown period. We are open to receive your application and we remain available to assist with any enquiries. Give us a call - our team at NZDRC is ready to help you.

Auckland University wins ICC Mediation Competition

New Zealand's University of Auckland took victory in the 16th edition of the ICC International Commercial Mediation Competition. The other finalists were: Bulgaria's University of Sofia which was runner-up, the University of New South Wales which took third place, and Brooklyn Law School from the United States in fourth place.

The team comprising Andrew O'Malley Shand, Arianna Bacic, Britney Clasper and Bronwyn Wilde, and their coaches Isabelle Kwek and Matthew Jackson was sponsored by Shortland Chambers and beat 47 other teams to win the ICC International Commercial Mediation Competition for the third year running.

University of Auckland coach, Matthew Jackson, said "We are incredibly proud of how the team has represented the University of Auckland, New Zealand, and their supporters. Moreover, it has been rewarding to see how the team has grown and learnt from each round during ICCMW. The final round was a delight to witness and we congratulate Sofia University on their performance."

New Mediation Law enacted in Vietnam

On 16 June 2020, the National Assembly passed the Law on Mediation and Dialogue at Court (the **Law**). Coming into force from January 2021, the Law builds an effective legal framework for mediation and dialogue at court for agencies, organisations and individuals. Additionally, the Law emphasies the State's policy of encouraging parties to settle civil cases and matters and administrative lawsuits through mediation and dialogue at court.

It formalises the pilot program that has been in place in some provinces since 2018, including detailed provisions on the selection of a mediator, procedures for mediation, as well as procedures for recognising the outcome. The court's decision on recognition of a successful mediation is legally

effective and cannot be appealed unless the parties' agreement violates any of the grounds for recognition under the new law. It also contains specific regulations on confidentiality. To help implement the new law, the Supreme Court has issued a new circular which is also now in effect. This requires the court to notify plaintiffs regarding their right to opt for mediation and to designate a mediator for each case.

Sierra Leone joins New York Convention

Sierra Leone has deposited an instrument of accession to the Convention on Recognition and Enforcement of Foreign Arbitral Awards 1958 (the **New York Convention**), becoming the 166th jurisdiction to do so. The Convention requires contracting states to recognise and enforce arbitral awards made in other contracting states in the same way they would for a domestic award, subject to certain limited exceptions. The Convention entered into force in Sierra Leone on 26 January 2021.

IBA Rules on taking of evidence revised

The International Bar Association (**IBA**) has announced a revision of its Rules on the Taking of Evidence in International Arbitration, the first update in over a decade.
On 17 December 2020, the IBA adopted new rules on the Taking of Evidence in International Arbitration (**Rules**). The new Rules were published on 17 February 2021. The new Rules are applicable to all arbitrations commenced after 17 December 2020, in which the parties agree to apply the IBA Rules.

The Rules are widely used in international arbitration to govern the use of document production and evidence presentation, especially where parties come from diverse legal systems.

The Rules were published in 1999 and first revised in May 2010. In 2015, the IBA Arbitration Guidelines and Rules Subcommittee conducted a worldwide survey on the use of the IBA arbitration practice guidelines and rules, including the IBA Rules of Evidence. The results of the survey were published in a report in 2016. The report showed that the majority of the respondents were generally satisfied with the IBA Rules of Evidence and noted that a revision may be considered on the ten-year anniversary of the Rules.

In 2019, the IBA Guidelines and Rules Subcommittee established a Task Force comprising more than 30 international arbitration practitioners from both civil- and common-law backgrounds. The Task Force studied the need for any revisions to the IBA Rules of Evidence. Given the general satisfaction with the 2010 version of the Rules, the Task Force proposed a limited number of changes.

The new Rules include provisions regarding remote hearings (including the use of hybrid hearings), tribunal consultation on cybersecurity and data protection, document production and the use of translation. Documents that are produced in response to a Request to Produce do not need to be translated, but documents that are submitted to the tribunal do need to be translated into the language of the arbitration. The new Rules also include provision for second round witness statements and expert reports where new factual developments occur that could not have been addressed in a previous witness statement/report, and the exclusion of illegally obtained evidence.

UNCITRAL Working Group III issues report on 39th session

UNCITRAL's Working Group III, which is considering reform of investor-state dispute settlement (**ISDS**), has released its report on the 39th session, which was held in Vienna in October last year. The working group focused on possible reform of dispute prevention, mitigation and mediation; treaty interpretation by State parties; security for costs and frivolous claims; multiple proceedings and counterclaims; and a multilateral instrument on ISDS reform. An agreed work and resourcing plan will be presented for approval at the next session, and if accepted, will be presented to UNCITRAL as the working group's plan. The working group also released the latest draft of its working papers on the "Selection and Appointment of ISDS tribunal members" and "Appellate mechanism and enforcement issues." The working group is due to meet again in Vienna in February with provision being made for members who are unable to attend in person due to COVID-19 related travel restrictions, to attend remotely via an online platform.

COVID-19 Not enough to suspend payment of rent by oyster shuckers under commercial lease in Ireland

The recent case of *Oyster Shuckers Limited T/A KLAW (1) v Architecture Manufacture Support (EU) Limited and Wooi Heong Tan* [2020] IEHC 527 tested the argument of whether COVID-19 can be seen as a frustrating event allowing for the suspension of rent under the commercial lease. Mr Justice Mark Sanfey in his judgment commented on the unfortunate state of affairs that the tenant was in, brought about by COVID-19. The judge however noted that no specific reasons were given to substantiate the plaintiff's contention that it would be unconscionable to evict the Tenant in the midst of a "global pandemic". The judge commented that a valiant effort was put forward by counsel for the plaintiff in its interpretation of the "rent suspension" clause however the judge commented that the Demised Premises was not "destroyed or damaged" making it "unfit for occupation or use". He noted that to interpret the clause in the manner being proposed would do "violence" to the meaning of the actual words in the clause in the lease. He rejected the argument of frustration noting the obligation to pay rent was a fundamental part of the contract and could only be set aside under the "rent suspension" clause.

UK Court of Appeal addresses expert's duties and conflicts of interest

In *Secretariat Consulting PTE Ltd, Secretariat International UK Ltd and Secretariat Advisors LLC v A Company* [2021] EWCA Civ 6, the Court of Appeal dismissed an appeal against the TCC's decision in *A Company v X, Y and Z* [2020] EWHC 809 (TCC) and found that, on the facts, there was a conflict of interest where an expert organisation was acting for and against the same client on two separate but concurrent arbitrations concerning the same project and same/similar subject matter.

The Court of Appeal's decision has significant implications, not only for delay and quantum experts specialising in construction disputes, but also litigation and arbitration support/expert service providers of other disciplines. The judgment contains a useful analysis of when conflicts can arise in related cases and the circumstances in which a large organisation offering expert or litigation support services may find itself conflicted.

This is the first Court of Appeal authority that directly addresses the issue of whether an expert owes a fiduciary duty of loyalty to his/her client. In the present case, it was not considered necessary to determine this point due to the existence of a contractual obligation to avoid conflicts of interest. However, it was suggested that, depending on the nature of services provided and/or particular wording of the relevant expert retainer, a court may find that an expert is bound by a fiduciary duty of loyalty.