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Mediating via Zoom – *Tania Sourdin*

Due to COVID-19, many Alternative Dispute Resolution processes are now conducted using technology that enables disputants to be physically remote. Popular videoconferencing platforms have been utilised by mediators, participants, service providers and courts. To date there has been little research relating to the impact of this shift on mediators or mediating parties. However, there is fairly extensive research material relating to impacts of remote conferencing on those engaged in court proceedings. As a result, some conclusions can be drawn about potential impacts on mediation processes. In addition, there is a wealth of relevant information about the impact of remote modes of interaction that exists outside the justice system, which can point to varying impacts related to vulnerability factors and demographic variables such as gender. This article explores this research and analyses how a shift to remote mediation processes can impact upon outcomes and perceptions of those engaged in mediation processes. 280

Jurisdiction and the Law Governing the Arbitration Agreement: An Australian Perspective and a Case for the Seat Theory – *Nolan Youngkwang Lee*

The law governing the arbitration agreement is fundamental as it determines the jurisdiction of the arbitral tribunal, yet it is often forgotten. This article examines the law governing the arbitration agreement – what it is, why we have it, and how important it is. It then introduces two opposing theories as to how to ascertain the law governing the arbitration agreement, the Host Theory and the Seat Theory, before making a case for the Seat Theory. After surveying the Australian case law surrounding this underrated area of law, this article points out that although, at first sight, Australian courts seem to subscribe to the Host Theory, a closer reading indicates that such a conclusion is questionable. The article concludes by encouraging parties to provide a Dialogue-style express choice of law governing the arbitration agreement, as opposed to a Kabab-Ji-style express choice. 294

The Defective or Pathological Arbitration Clause – *Dr Richard Manly QC*

Arbitration clauses drafted with inconsistent, ambiguous, or vague language are therefore defective or pathological. This may lead to disputes over the proper construction of the clause itself or inability to enforce an award. The clause may be so poorly drafted that it invalidates the arbitration agreement. At the very least, the defective drafting may create a

basis for extensive disputes over the meaning of the clause and how any arbitration would proceed. This article reviews a number of judicial approaches to the treatment of defective arbitration clauses. As to whether a particular clause can be salvaged or fails very much depends upon its proper construction. To assist drafters in avoiding the types of defects discussed in this article, reference is made to institutional guidelines for drafting together with model clauses which have been produced by a variety of arbitral institutions and in particular within Australia. 305

Enforcement of Foreign Awards in Australia: Never Under-Estimate the Primacy of the Arbitration Agreement – *Albert Monichino QC and Gianluca Rossi*

Recently, in *Hub Street Equipment Pty Ltd v Energy City Qatar Holding Co*, the Full Court of the Federal Court of Australia refused to enforce a foreign arbitral award as the arbitral tribunal was not constituted in accordance with the agreement of the parties. The Court held that the failure to constitute the arbitral tribunal in accordance with the agreement of the parties was fundamental to the jurisdiction of the tribunal and, accordingly, there was little, if any, scope for the Court to exercise its discretion to enforce the award notwithstanding that a ground for resisting enforcement had been made out under Art V of the New York Convention. In this article, we consider the Full Court's decision and the first instance decision which was successfully appealed, and set out the major principles and guidance emanating from the Full Court's decision in respect of the enforcement of awards. 321

The Concept of "Habitual Residence" under Indian Arbitration Law: Demystifying the Decision in Amway India Enterprises – *Aditya Suresh and Vivek Krishnani*

Under s 2(1)(f)(i) of the *India's Arbitration and Conciliation Act*, 1996, an arbitration is "international" where either party is an individual whose "habitual residence" is outside India. However, the Act does not address how such habitual residence is to be determined. This question assumes particular significance in light of how certain provisions of the Act restrict their application to domestic arbitrations alone. Recently, the Indian Supreme Court, in Amway India Enterprises v Ravindranath Rao Sindhia, delved into the interpretation of "habitual residence" in the context of a sole proprietorship whose proprietors resided in the United States but carried out all their business in India. This note analyses the court's decision in the backdrop of the UNCITRAL Model Law and preceding decisions of Indian courts on this point. Subsequently, this note proposes changes which would align the Indian approach with international standards and address the contemporary requirements of commercial arbitration. 331

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