

IN THE SUPREME COURT OF VICTORIA  
AT MELBOURNE  
COMMERCIAL AND EQUITY DIVISION  
COMMERCIAL COURT

Not Restricted

LIST G  
No. 03827 of 2010

ALTAIN KHUDER LLC

Plaintiff

v

IMC MINING INC

Firstnamed Defendant

and

IMC MINING SOLUTIONS PTY LTD  
(ACN 069 083 094)

Secondnamed Defendant

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JUDGE: CROFT J

WHERE HELD: Melbourne

DATE OF HEARING: 20 August, 28 September and 3 November 2010

DATE OF JUDGMENT: 28 January 2011

CASE MAY BE CITED AS: Altain Khuder LLC v IMC Mining Inc & Anor

MEDIUM NEUTRAL CITATION: [2011] VSC 1

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ARBITRATION - Recognition and enforcement of foreign arbitral award - Extent to which applicant for recognition and enforcement must establish existence of an arbitration agreement and a foreign arbitral award binding on the parties to the arbitration agreement in pursuance of which it was made - Extent of onus on a party resisting enforcement on the basis of the defences or grounds for resisting enforcement under the *International Arbitration Act 1974* (Cth) and the *Convention on the recognition and Enforcement of Foreign Arbitral awards*, New York, 1958 ("New York Convention") - Proper procedure, and appropriateness of *ex parte* application, applying for recognition and enforcement of foreign arbitral award under *Supreme Court (Miscellaneous Civil Proceedings) Rules 2008*, Order 9, and in accordance with *Practice Note 2 of 2010 - Arbitration Business: International Arbitration Act 1974* (Cth), ss 2D, 3(1), 8, 9 and 39; *New York Convention*, Articles II, IV and V.

*Dardana Ltd v Yukos Oil Co* (also known as *Petroalliance Services Co Ltd v Yukos Oil Co*) [2002] EWCA Civ 543, [2002] 2 Lloyd's Rep 326; *Aloe Vera of America Inc v Asianic Food (S) Pte Ltd and Another* [2006] 3 SLR(R) 174, [2006] SGHC 78; *Dallah Real Estate and Tourism Holding Company v Ministry of Religious Affairs, Government of Pakistan* [2010] 1 All ER 592 (Court of Appeal) and [2010] UKSC 46 (Supreme Court).

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APPEARANCES:

Counsel

Solicitors

For the Plaintiff

Mr P. Megens, solicitor

Mallesons Stephen Jaques

For the Firstnamed Defendant

No appearance

For the Secondnamed

Mr J. Digby QC with

Allens Arthur Robinson

Defendant

Mr N. McAtee

HIS HONOUR:

**Introduction and procedural matters**

- 1 This is an application brought by originating motion dated 14 July 2010 for enforcement of a foreign arbitral award dated 15 September 2009 at Ulaanbaatar City, Mongolia, being Case # 12/09 of the Mongolian National Arbitration Centre at the Mongolian National Chamber of Commerce and Industry ("the Award").

- 2 The Award named the parties and the Arbitral Tribunal as follows:

**Plaintiff**

Altain Khuder LLC, Mongolia  
Managing Director: Batdorj G.  
Address: Tenggeriin tsag Center  
Olympic Street 12,  
Sub-district (Khoroo) 1, Sukhbaatar District  
Ulaanbaatar, Mongolia  
Tel: 11-324930, 11-327991, 99086630

**Defendant**

IMC Mining Inc., Australia  
Director: Stewart Lewis  
Tel: 0412 862018  
Address: British Virgin Islands, of Level 40  
Riverside Centre, 123 Eagle Street  
Brisbane Qld, Australia  
Fax: 0732269101  
Tel: +61732269100, +6132269117  
Email: [lewiss@imcal.com.au](mailto:lewiss@imcal.com.au)

**Arbitral Tribunal**

Arbitrator selected by the Plaintiff: Erdenechuluun D.,  
Citizen of Mongolia, Lawyer  
Arbitrator appointed by the Defendant: Altangerel T.,  
Citizen of Mongolia, Lawyer

Presiding arbitrator: Idesh E,  
Citizen of Mongolia, Lawyer"

It will be noted that only the first defendant in these proceedings is named as a defendant to the arbitration though, as discussed further below, IMC Mining Solutions Pty Ltd, the second defendant in these proceedings, is the subject of an award against it "on behalf of IMC Mining Inc. Company of Australia".

- 3 This application was made by the plaintiff without notice to either of the defendants pursuant to Chapter II, Rule 9.04(1)(b) of the *Supreme Court (Miscellaneous Civil*

*Proceedings) Rules 2008 (Vic)* ("the Rules"). The Victorian Supreme Court's *Practice Note No 2 of 2010 (Arbitration Business)* provides:

"10. An application to enforce a foreign award pursuant to the *International Arbitration Act 1974* (Section 8), should, as far as possible, comply with the requirements of Chapter II, Rules 9.04 and 9.05 [of the Rules]. ...".

- 4 Paragraph 13 of *Practice Note No 2* provides for delivery of all affidavits, a copy of all exhibits, and a brief outline of argument in support of an application. These provisions were duly complied with in advance of the hearing of the plaintiff's *ex parte* application on 20 August 2010. As I indicated in the course of the hearing on that date, I had read and considered the material provided by the plaintiff prior to that hearing and, consequently, then invited the plaintiff's solicitor to take me through its submissions in support of the application, together with the supporting material as thought significant.
- 5 As a result of hearing the application on 20 August, I made orders for the enforcement of the Award, the subject of the application, and consequential orders in relation to interest and costs. I reserved to the defendants the right to apply to the court within 42 days after service of the order on them to set aside those orders. The effect of those orders was, consistently with the provisions of the *International Arbitration Act 1974* (Cth) ("the IAA"), the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (New York, 1958) ("the New York Convention") and the *UNCITRAL Model Law on International Commercial Arbitration* (1985, as amended in 2006) ("the Model Law"), to facilitate recognition and enforcement of the Award, but at the same time ensure that the defendants had a reasonable opportunity to be heard in opposition to the application.<sup>1</sup> Both the New York Convention and the Model Law are given effect to and applied in Australia, respectively, by, and subject to the provisions of, the IAA.

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<sup>1</sup> Apart from being a procedure available under the Rules, and in accordance with the *Practice Note*, this procedure is similar to that adopted and applied under the provisions of the English *Civil Procedure Rules* (2E Arbitration Proceedings), Part 62 – Arbitration Claims, Rule 62.18; as to which, see Harris, Planterose and Tecks, *The Arbitration Act 1996* (4<sup>th</sup> ed, Blackwell Publishing, London, 2007) 428 [101F] and 434 [103E], [103F]; and see *Gater Assets Ltd v Nak Naftogaz Ukrainiy* [2008] 1 All ER (Comm) (CA) 209, 228 at [74] (Rix LJ); and see *Aloe Vera of America Inc v Asianinc Food (S) Pte Ltd and Another* [2006] SGHC 78 (10 May 2006), [1] (High Court of Singapore, Prakash J).

- 6 The only response from the defendants was an application by the second defendant, IMC Mining Solutions Pty Ltd (“IMC Solutions”), an Australian registered company based in Brisbane. There was no response from the first defendant, IMC Mining Inc (“IMC Mining”), a company registered in the British Virgin Islands. The evidence indicated that IMC Mining also had premises in Australia, at the offices of IMC Solutions, in Brisbane. It also appears that at all relevant times Mr Stewart Lewis was the common director of IMC Mining and IMC Solutions.<sup>2</sup>
- 7 IMC Solutions applied by summons, dated 21 September 2010, to set aside the orders of 20 August 2010. This summons was heard, initially, on 28 September 2010. The grounds for the application by IMC Solutions were as follows:<sup>3</sup>
- “37. The grounds for IMC Solutions’ application are:
- a. That the Award is not, vis-à-vis IMC Solutions, a foreign award binding on the parties to the arbitration agreement in pursuance of which it was made.
- See sections 8(1) & (2) of the IAA and the *definitions* of ‘foreign award’ and “agreement in writing” in the IAA and the Convention.
- b. That, in the alternative, the arbitration agreement is not, vis-à-vis IMC Solutions, valid under the law of Queensland.
- See section 8(5)(b) of the IAA and clause 17.5 of the OMA.<sup>4</sup>
- c. That, in the alternative, IMC Solutions was not given proper notice of the appointment of the arbitrators or of the arbitration proceedings and / or was unable to present its case in the arbitration proceedings.
- See section 8(5)(c) of the IAA.
- d. That, in the alternative, the Award deals with a difference not contemplated by, or falling within the terms of, the submission to arbitration and / or contains a decision on a matter beyond the scope of the submission to arbitration.
- See section 8(5)(d) of the IAA.
- e. That, in the alternative, the composition of the Arbitral Tribunal and / or the arbitral authority was not in accordance with the agreement of IMC Solutions and was not, vis-à-vis IMC Solutions, in accordance with the law of Mongolia.

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<sup>2</sup> See, transcript (30 September 2010), p 10; and see paragraph 85, below.

<sup>3</sup> Second Defendant’s Outline of Submissions (3 November 2010), paragraph 37.

<sup>4</sup> A reference to the Operations Management Agreement: see below, paragraph 10.

See section 8(5)(e) of the IAA.

f. That, in the alternative, to enforce the Award would be contrary to public policy.

See section 8(7)(b) of the IAA."

8 IMC Solutions submitted that the plaintiff had, in making its *ex parte* application on 20 August 2010, failed in its duty of candour to the court that such an application required. Further, it submitted that in all the circumstances of the matter, the appropriate course for the plaintiff to have followed would have been to commence *inter partes* proceedings.

9 In relation to the duty of candour in these circumstances, IMC Solutions made reference to the following authorities:<sup>5</sup>

"21. The Plaintiff's duty was to bring material matters 'clearly' to the Court's attention. As noted in the *Arab Business* case [*Arab Business Consortium International Finance & Investment Co v Banque Franco-Tunisienne* [1996] 1 Lloyd's Rep 485; see also *Siporex Trade SA v Comdel Commodities Ltd* [1986] 2 Lloyd's Rep 428 at 437; *Parola v Parola* [2009] WASC 190] at 491, per Waller J:

The Judge who has to deal with an *ex parte* application is dependent on points which should be drawn to his attention being so drawn clearly. There should be no thought in the mind of those preparing affidavits that provided that somewhere in the exhibits or in the affidavit a point of materiality can be discerned, that is good enough.

22. As noted in *Siporex* at 437, the applicant must

summarise his case and the evidence in support of it ... [h]e must identify the crucial points for and against the application and not rely on general statements and the mere exhibiting of numerous documents. He must investigate the nature of the cause of action asserted and the facts ... which reasonably could or would be taken into account by the Judge in deciding ... the application."

10 It was submitted that the plaintiff had breached its duty of candour, in that it failed to clearly draw to the attention of the court "the threshold issue" raised by IMC Solutions in relation to the court's jurisdiction under s 8 of the IAA; which, it was said, depended on the plaintiff affirmatively establishing, and discharging the burden of proving, the applicability of sub-s 8(1) of that Act. The central issue in this respect was said to be the fact that the relevant agreement to arbitrate did not name

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<sup>5</sup> Second Defendant's Outline of Submissions (28 September 2010), paragraphs 21 and 22.

IMC Solutions as a party. The agreement to arbitrate is contained in a contract dated 13 February 2008 between the plaintiff and the first defendant, IMC Mining, styled the Operations Management Agreement ("the OMA"). The OMA includes terms whereby IMC Mining agreed to prepare mine plans, operations plans and budgets for a proposed iron ore mine at the Bulgan Altain Khuder Iron Project (also known as the Tayan Nuur Iron Ore Project), and to perform operational services in relation to that mine. Under the terms of the OMA, the plaintiff agreed to advance the sum of \$US6.2 million to IMC Mining for the purpose of carrying out specified obligations under the OMA. The dispute the subject of the arbitration was, in broad terms, a claim by the plaintiff that these obligations had not been performed and that, consequently, the plaintiff was entitled to be repaid these moneys.

11 Other, more particular, issues were raised by IMC Solutions, going to both its substantive argument in these proceedings, that the Award should not be enforced as not having satisfied the threshold requirement for the court's jurisdiction under sub-s 8(1) of the IAA, and also going to issues of candour in relation to the *ex parte* application made by the plaintiff on 20 August 2010. In this respect, IMC Solutions submitted that it was critical that the Award lists the parties to it as being only the plaintiff and IMC Mining. Further, it submitted that "on the face of the Award":<sup>6</sup>

- a. There is no indication that an application was made to add IMC Solutions as a party to the arbitration.
- b. There is no indication that an application was made to treat IMC Solutions as the "alter ego" of IMC [Mining] or that the Arbitral Tribunal considered any material before it, or argument, relevant to such a potential finding.
- c. There is no indication that an application was made to regard IMC [Mining] and IMC Solutions as conducting a common enterprise or that the Arbitral Tribunal considered any material before it, or argument, relevant to such a potential finding.
- d. There is no indication that an application was made to treat IMC [Mining] as the agent or representative of IMC Solutions in respect of the obligations under the OMA or in respect of the arbitration, or that the Arbitral Tribunal considered any material before it, or argument, relevant to such potential findings.
- e. There is no indication that an application was made to make an order

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<sup>6</sup> Second Defendant's Outline of Submissions (3 November 2010), paragraph 34.

against IMC Solutions in the arbitration or that the Arbitral Tribunal considered any material before it, or argument, relevant to such a finding.

f. There is no indication that any notice was given to IMC Solutions that any applications of the type noted in sub-paragraphs (a) - (e) had been made or were being considered or might be considered.

g. There are no findings of the type noted in sub-paragraphs (a) - (d)."

Notwithstanding the above, IMC Solutions noted that the Award contains an order that it pay to the plaintiff the sum charged against IMC Mining, in the amount of US\$5,903,098.20, plus the arbitration fee of US\$50,257.70.

12 These points were raised repeatedly by IMC Solutions at the hearings on 28 September 2010 and 3 November 2010. As I indicated in response, a number of times, I was, and am, of the view that the plaintiff quite properly instituted the proceedings under the IAA in accordance with the Rules and *Practice Note* to which reference has been made. I also indicated, a number of times, that I was satisfied that the plaintiff had discharged its duty of candour in the course of making the application on 20 August 2010, and that I was aware of the central threshold issue, as described and raised by IMC Solutions in relation to the application.

13 Additionally, and as I also indicated a number of times at these hearings, IMC Solutions was not prejudiced by the procedure adopted and the manner in which the plaintiff's application was pursued on 20 August 2010. For the reasons, developed further below, IMC Solutions was, as a result of the 20 August 2010 orders, merely placed in the position of needing to respond within the time limited or the orders would "self execute" to produce a judgment in favour of the plaintiff enforcing the Award. The procedure adopted did not have the effect of varying the operation and application of the IAA with respect to either of the defendants, IMC Mining or IMC Solutions.<sup>7</sup> Consequently, there was no prejudice to IMC Solutions; it, as did IMC Mining, had every opportunity to have its arguments with respect to the application and operation of the IAA heard and determined in the usual way provided an application was brought within the time limited by the orders of 20 August 2010.

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<sup>7</sup> As with the English procedure; see above, paragraph 5, particularly footnote 1.

IMC Solutions availed itself of this opportunity by issuing and pursuing its summons dated 21 September 2010.

14 More generally, IMC Solutions appears to have largely equated the procedure applied with something in the nature of an application for an interlocutory injunction,<sup>8</sup> or an application for the extension of something in the nature of a statutory injunction, such as a caveat affecting real property.<sup>9</sup> This appears clearly from the nature of the cases referred to in its submissions.<sup>10</sup>

15 However, in my view, it is not appropriate to equate the procedure applied in relation to this matter with something in the nature of an application for interlocutory injunctive relief. A more appropriate analogy with the procedure applied with respect to the present application, under Rule 9.04(1)(b) of the Rules, is with the long-accepted order *nisi* procedure whereby the order sought would become effective, absolutely, unless the party to whom the order was directed showed cause why the order should not be made absolute. This procedure is explained in *Daniell's Chancery Practice* as follows:<sup>11</sup>

"Where an order is made by which a particular act is to be done unless the other party shall within a certain time show cause to the contrary (which order is generally termed an order *nisi* (c)), the party obtaining the order must, after the expiration of the time limited by the order *nisi*, if no cause is shown, apply for another order to make absolute the previous order *nisi*. The application in this case requires no notice, but must be supported by the Registrars' certificate of no cause having been shown, and an affidavit proving the due service of the order *nisi*, either upon the party himself, when such service is required to be personal, or in the prescribed manner (d), where personal service is not required, or has been dispensed with (e). The application is by motion or in chambers."

16 The analogy with the order *nisi* procedure, as outlined above, is, of course, imperfect. It does, however, emphasise the difference with respect to applications for

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<sup>8</sup> See the reference to *Orpen v Tarentello* [2009] VSC 143 and *Siporex Trade SA v Comdel Commodities Ltd* [1986] 2 Lloyd's Rep 428 at 437, which were referred to in the Second Defendant's Outline of Submissions (28 September 2010), paragraph 20.

<sup>9</sup> See the reference to *Parola v Parola* [2009] WASC 190 in the Second Defendant's Outline of Submissions (28 September 2010), paragraph 20.

<sup>10</sup> See the Second Defendant's Outline of Submissions (28 September 2010), paragraphs 20-24; and note, particularly, the cases noted as having been referred to in the two preceding footnotes.

<sup>11</sup> (8<sup>th</sup> ed, 1914), 1347; and see *Hall v Nominal Defendant* (1966) 117 CLR 423.

interlocutory injunctions, and similar proceedings. In those proceedings, the interlocutory order has an immediate effect to the prejudice of the defendant; but here, that is not the case. The orders of 20 August 2010 were an "invitation" to the defendants to make its or their submissions in opposition to the orders sought by the plaintiff. They did not impose an obligation on or prejudice either of the defendants. They merely invited the defendants to appear before the court and argue their position in relation to the effect of the Award and its enforceability under the New York Convention, applying the provisions of the IAA. Clearly, the effect of the orders would be adverse to the interests of the defendants if they did nothing in response, as would be the position if the proceeding had been commenced by writ and statement of claim.

17 IMC Solutions did not accept this sort of analysis and said, rather, that there was a primary onus on the plaintiff in seeking enforcement of the Award to satisfy the following five requirements before the court should make an order under s 8 of the IAA. IMC Solutions submitted that it is only if:<sup>12</sup>

- "a. The applicant has placed admissible and probative relevant factual material before the Court upon which it *could* decide that there exists a foreign award binding on the parties to the arbitration agreement in pursuance of which it was made; and
- b. In an *ex parte* application, the applicant has explained to the Court the basis upon which the orders are sought and also any crucial points which are arguable against the application; and
- c. The applicant has highlighted to the Court any unclear and/or difficult point which arises for consideration or determination in relation to the application; and
- d. The Court has considered that material and is satisfied that it is appropriate to determine the issues on an *ex parte* basis; and
- e. The Court is satisfied that there exists a foreign award binding on the parties to the arbitration agreement in pursuance of which it was made,

that the Court should make an order under section 8 and, therefore, require the respondent to satisfy the Court why the award should not be enforced. The Second Defendant again refers to and relies upon its Submissions dated 28 September 2010 as to why the Orders made on 20 August 2010 are impugnable on the basis of how the Plaintiff's *ex parte* application was

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<sup>12</sup> Second Defendant's Outline of Submissions (3 November 2010), paragraph 61.

presented to the Court and as establishing further or alternative bases for setting aside the said Orders dated 20 August 2010."

In my view, this argument depends on the proper construction of the IAA, particularly sub-ss 8(1) and (5), and s 9 of that Act, and the corresponding provisions of the New York Convention – all of which are discussed in further detail below.

- 18 The plaintiff responded to these sort of arguments on the part of IMC solutions, in the following terms:<sup>13</sup>

"20. The Second Defendant overlooks the key point that the Arbitral Tribunal had already decided what the Second Defendant likes to call the 'threshold issue'. There was no non-disclosure by the Plaintiff. Further, as the Court properly concluded, the process prescribed by Rule 9.04 of Chapter II mandates that an award creditor may bring an *ex parte application* as a matter of course and an aggrieved award debtor may seek to set aside any enforcement order within the time period prescribed. This process was described by Lord Justice Rix in *Gater Assets Ltd v Nak Naftogaz Ukrainiy* [2008] 1 All ER (Comm) 209 as '*a highly summary and essentially quasi administrative proceeding*'<sup>14</sup> and '*it is plainly the intent of the New York Convention to make Awards to which they apply enforceable with ease and, subject to the narrowly confined exceptions, almost as a matter of administrative procedure*'<sup>15</sup> and it is '*intended to be mechanistic*'.<sup>16</sup> See also Moses LJ at p 238, para 95. It should also be noted that in *Gater Assets*, as here, one of the defences raised by the defendant after being served with the *ex parte* order giving leave to enforce the award was that there was no arbitration agreement."<sup>17</sup>

- 19 For the reasons advanced by the plaintiff with reference to the *Gater Assets* case, for the preceding reasons and for those which follow in relation to the onus with respect to a party resisting the recognition and enforcement of a foreign arbitral award, I am of the opinion that there is no substance in the issues raised by IMC Solutions with respect to the nature of the originating procedure adopted by the plaintiff and its conduct at the *ex parte* application on 20 August 2010. As indicated, the procedure was correctly adopted by the plaintiff and was, in any event, appropriate in the circumstances of this matter - and I have no criticism in this respect. It also follows that resolution of the substantive matter in dispute – the enforceability of the Award

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<sup>13</sup> Plaintiff's Outline of Argument (30 September 2010), paragraph 20.

<sup>14</sup> [2008] 1 All ER (Comm) (CA) 209 at 231, [72].

<sup>15</sup> [2008] 1 All ER (Comm) (CA) 209 at 228, [59].

<sup>16</sup> [2008] 1 All ER (Comm) (CA) 209 at 228, [74].

<sup>17</sup> [2008] 1 All ER (Comm) (CA) 209 at 216, [21].

under the New York Convention, applying the provisions of the IAA - disposes of all other matters raised by IMC Solutions, as the second defendant, in relation to the 20 August 2010 orders.

### **Background**

20 In May 2009, the plaintiff commenced arbitration proceedings against IMC Mining pursuant to clause 16 of the OMA. Arbitration proceedings were triggered under these provisions by the plaintiff in respect of disputes concerning compliance with the terms of the OMA in respect of the Tayan Nuur Iron Ore Project in Mongolia.

21 The arbitration proceedings were administered by the Mongolian National Arbitration Centre at the Mongolian National Chamber of Commerce and Industry. The arbitration involved something in the nature of a preliminary hearing on 24 July 2009. The extent of IMC Solution's involvement in this preliminary hearing is disputed, and is discussed further below.<sup>18</sup> At this stage, it will suffice to note that at the least, as between IMC Mining and the plaintiff, it was, as I have found, agreed that the Arbitral Tribunal had jurisdiction, the dispute would be resolved according to Mongolian law, and the arbitration hearing would be conducted in Ulaanbaatar City in the Mongolian language.<sup>19</sup>

22 Following a hearing on 15 September 2009, the Arbitral Tribunal made orders, as set out in the Award, against both the first and second defendants, IMC Mining and IMC Solutions, that:

- (a) the First Defendant pay the amount of US\$5,903,098.20 plus the arbitration fee amount of US\$50,257.70 to the Plaintiff; and
- (b) the Second Defendant is liable to pay, for and on behalf of the First Defendant, the amount of US\$5,903,098.20 plus the arbitration fee amount of US\$50,257.70 to the Plaintiff.

23 The Award has not been complied with to any extent by either of the defendants,

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<sup>18</sup> See paragraph 84.

<sup>19</sup> See paragraph 85, below.

IMC Mining or IMC Solutions. As these proceedings indicate, IMC Solutions, at least, does not intend to do so. The evidence indicates that the first defendant, IMC Mining, has not responded to correspondence addressed to its offices in the British Virgin Islands or, it seems, correspondence addressed to the offices of IMC Solutions which it occupied or occupies on some basis which is not entirely clear, in Brisbane (IMC Mining's address, as expressed in the Award, is said to be "British Virgin Islands", which is seemingly inconsistent with what follows: "of Level 40 Riverside Centre, 123 Eagle Street, Brisbane QLD Australia"). As indicated, the second defendant, IMC Solutions, has refused to comply with the Award for the reasons canvassed in this proceeding.

- 24 Both Mongolia and Australia have acceded to the New York Convention. Mongolia acceded to the Convention on 24 October 1994 and its provisions came into force in that country on 22 January 1995. Australia acceded to the Convention on 26 March 1975 and the Convention came into force in Australia on 24 June 1975.
- 25 Each contracting State is required by Article III of the New York Convention to recognise arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the articles that follow in the Convention. The conditions for enforcement contained in the New York Convention are reflected in substantially similar terms in ss 8 and 9 of the IAA.
- 26 In compliance with Article IV of the New York Convention and s 9 of the IAA, the first affidavit of Mr Batdorj, sworn 29 June 2010, exhibited:
- (a) a certified copy of the original award which has been translated into English and certified as a correct translation by Mr Enkhtuvshin Bulgan, Second Secretary, a Consular Official from the Mongolian Embassy in Australia;<sup>20</sup> and
  - (b) a copy of the original arbitration agreement which has been certified by an

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<sup>20</sup> Affidavit of Mr Gendenpil Batdorj (29 June 2010) Exhibit GB-46.

officer of the Consular Department – Ministry of Foreign Affairs and Trade, Mongolia.<sup>21</sup>

27 Under sub-ss 8(2) and 8(3) of the IAA, a foreign arbitral award may, if it complies with the requirements of the New York Convention and the corresponding provisions of the IAA, be enforced in a court of a State or Territory, or the Federal Court, respectively, as if the foreign arbitral award were a judgment or order of the relevant court. Following amendments made to the IAA by the *International Arbitration Amendment Act 2010* (Cth), sub-s 8(3A) of the IAA now provides that:

“The Court may only refuse to enforce the Final Award in circumstances mentioned in sub-ss (5) and (7)”.

28 Section 8 of the IAA makes provision for the recognition, and also enforcement, of a foreign arbitral award. The expression “foreign award” is defined in sub-s 3(1) as:

**“Foreign award** means an arbitral award made, in pursuance of an arbitration agreement, in a country other than Australia, being an arbitral award in relation to which the Convention applies.”

The reference to the “Convention” is a reference to the New York Convention.<sup>22</sup> The opening provision of s 8, which is headed “Recognition of foreign awards”, provides as follows:

“(1) Subject to this Part, a foreign award is binding by virtue of this Act for all purposes on the parties to the arbitration agreement in pursuance of which it was made.”

29 The grounds for refusing enforcement of a foreign arbitral award are quite limited. Sub-section 8(5) of the IAA sets out the more general grounds upon which enforcement may be refused, and sub-ss 8(7) and (7A) make provision with respect to refusal of enforcement on the ground that the subject matter of the difference between the parties is not arbitrable according to the laws in force in the State or Territory in which the court is sitting or that enforcement would be contrary to public policy. The latter includes circumstances where there is found to be a breach of the rules of natural justice in connection with the making of the award.

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<sup>21</sup> Affidavit of Mr Gendenpil Batdorj (29 June 2010) Exhibit GB-8.

<sup>22</sup> See IAA sub-s 3(1).

30 Section 9 of the IAA is a procedural provision in many respects, though it is, nevertheless, the critical procedural step which puts in train the enforcement provisions of the IAA. The principal provision is sub-s 9(1) which provides:

“(1) In any proceedings in which a person seeks the enforcement of a foreign award by virtue of this Part, he or she shall produce to the court:

(a) the duly authenticated original award or a duly certified copy; and

(b) the original arbitration agreement under which the award purports to have been made or a duly certified copy.”

Sub-section 9(2) provides a deeming provision with respect to authentication or certification of an award or copies of the award, respectively. Sub-sections 9(3) and (4) provide for certification of any translation of the award.

31 The arbitration agreement relied upon by the plaintiff is that contained in clause 16 of the OMA. The plaintiff provided a duly authenticated copy of the OMA and a duly certified copy of the Award. There is no doubt that the Award was purportedly made under the arbitration agreement contained in clause 16 of the OMA, so that the provisions of sub-s 9(1) of the IAA were complied with, at least formally. That is not, however, the end of the matter because IMC Solutions submitted that these provisions must be read with the more substantive provisions of sub-s 8(1) of the IAA. IMC Solutions submitted that the result of so doing was, in effect, to read into sub-s 9(1) the requirement that the relevant award be made against, and only made against, persons who are “... parties to the arbitration agreement in pursuance of which it was made”. Having regard to this position, I turn now to consider whether there is an arbitration agreement in the relevant sense affecting the second defendant, IMC Solutions, for the purpose of s 8 and the related provisions of the IAA and whether this is a matter which is to be determined by the enforcing court, this court in these proceedings, or the Arbitral Tribunal. I then consider onus of proof issues, estoppel and, finally, whether any defences or grounds for resisting enforcement are made out by the second defendant, IMC Solutions.

### **Is there an arbitration agreement?**

- 32 The arbitration agreement relied upon by the Arbitral Tribunal is contained in clause 16 of the OMA and is in the following terms:

**"16. DISPUTE RESOLUTION**

16.1 The resolution of any and all disputes under this Agreement shall first be addressed through good faith negotiations between Altain Khuder LLC and IMC Mining Inc. All disputes between Altain Khuder LLC and IMC Mining Inc arising under this Agreement shall be referred to and considered by arbitration in Mongolia according to Mongolian or Hong Kong law"

As noted previously, the OMA is expressed to be an agreement between the plaintiff and IMC Mining, which does not name IMC Solutions as a party.

- 33 In light of the above, the second defendant, IMC Solutions, contended that there is a "threshold issue" under sub-s 8(1) of the IAA in that these provisions require the plaintiff to satisfy the court that its requirements are satisfied before the plaintiff is entitled to seek to enforce the Award, as a "foreign award". It follows, the second defendant contended, that the plaintiff must bear the burden of proof in this respect. In relation to this "threshold issue", IMC Solutions asserted that the issue is whether there is a "foreign award" which is binding on IMC Solutions which has been made pursuant to an arbitration agreement in respect of which IMC Solutions is a party. The second defendant, IMC Solutions, maintained that it was never a party to the OMA and therefore there is no arbitration agreement in respect of which an arbitral award could be made against it. For the sake of clarity, I note that as I understand the position of the second defendant, IMC Solutions, its primary contention is that there is no "arbitration agreement" which affects it, rather than a contention that there is no "arbitration agreement" at all.

- 34 The plaintiff contended that the authorities in relation to similar or analogous provisions to sub-s 8(1) of the IAA, and more generally, indicate that the proper approach of an enforcing court is not to treat provisions of this nature as a threshold issue of the type argued for by IMC Solutions; and certainly not an issue casting any burden of proof on a party seeking enforcement, such as the plaintiff. In support of these submissions, the plaintiff made reference to a variety of decisions of courts in

other jurisdictions in the context of legislation which reflects the language of provisions such as sub-s 8(1). Focusing on the distinction drawn in the authorities between the operation of provisions which reflect sub-ss 8(1) and (5) of the IAA, the plaintiff submitted that these authorities clearly demonstrate that all that is required on the part of the plaintiff in order to effect enforcement of the Award is, in the present circumstances, to comply with the requirements of sub-ss 8(1) and 9(1) of the IAA by providing duly certified copies of the Award and the arbitration agreement, being the OMA containing the agreement to arbitrate contained in clause 16 of that agreement. It was submitted that nothing else is required and there was no obligation or onus on the plaintiff to prove the validity of the arbitration agreement for the purpose of obtaining orders from the court granting leave to enforce the award on the basis provided for in the orders of 20 August 2010.

35 Further, the plaintiff submitted that the authorities demonstrate that the burden is clearly on the second defendant, IMC Solutions, to prove to the satisfaction of the court any allegation made by it that the arbitration agreement does not bind IMC Solutions on the basis of one of the allowable defences or grounds for resisting enforcement under sub-ss 8(5) and 8(7) of the IAA. It was said that the submission by the second defendant, IMC Solutions, that there is an initial onus on the plaintiff under sub-s 8(1) of the IAA to prove the validity of the arbitration agreement has been consistently rejected by courts in various jurisdictions. Further, it was submitted that there is abundance of authority which confirms that the onus is on the award debtor to make out or prove any of the limited defences or grounds available to it under the New York Convention for resisting enforcement. It would follow that this applies to the provisions of sub-ss (5) and (7) of the IAA insofar as those provisions reflect the defences or grounds provided for under Article V of the New York Convention for resisting enforcement.

36 These submissions require reference to the legislative context of sub-s 8(1) of the IAA, which is provided by ss 2D, 8, 9 and 39 of that Act.

37 The objects of the IAA are set out in s 2D, as follows:<sup>23</sup>

**"Objects of this Act**

The objects of this Act are:

- (a) to facilitate international trade and commerce by encouraging the use of arbitration as a method of resolving disputes; and
- (b) to facilitate the use of arbitration agreements made in relation to international trade and commerce; and
- (c) to facilitate the recognition and enforcement of arbitral awards made in relation to international trade and commerce; and
- (d) to give effect to Australia's obligations under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards adopted in 1958 by the United Nations Conference on International Commercial Arbitration at its twenty-fourth meeting; and
- (e) to give effect to the UNCITRAL Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law on 21 June 1985 and amended by the United Nations Commission on International Trade Law on 7 July 2006; and
- (f) to give effect to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States signed by Australia on 24 March 1975."

The objects set out in paragraphs (a) to (e) are relevant in the present circumstances.

The reference to the Convention in (f), however, is to disputes of a different nature.

38 The objects of the IAA are to be given effect to by a court in accordance with the requirements of the provisions of s 39 of that Act. The relevant provisions of s 39 are as follows:

**"Matters to which court must have regard**

(1) This section applies where:

(a) a court is considering:

- (i) exercising a power under section 8 to enforce a foreign award; or

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<sup>23</sup> Objects which are reflected in the Explanatory Memorandum for the *International Arbitration Amendment Bill 2009* (House of Representatives), by which these provisions were added to the *International Arbitration Act 1974* (Cth); and the Second Reading Speech on this Bill by the Hon Robert McClelland MP, Attorney-General of the Commonwealth of Australia (House of Representatives, 25 November 2009)

- (ii) exercising the power under section 8 to refuse to enforce a foreign award, including a refusal because the enforcement of the award would be contrary to public policy; or
  - (iii) exercising a power under Article 35 of the Model Law, as in force under subsection 16(1) of this Act, to recognise or enforce an arbitral award; or
  - (iv) exercising a power under Article 36 of the Model Law, as in force under subsection 16(1) of this Act, to refuse to recognise or enforce an arbitral award, including a refusal under Article 36(1)(b)(ii) because the recognition or enforcement of the arbitral award would be contrary to the public policy of Australia; or
    - ...
    - ...
    - ...
- (b) a court is interpreting this Act, or the Model Law as in force under subsection 16(1) of this Act; or
- (c) a court is interpreting an agreement or award to which this Act applies; or
- ...
- (2) The court or authority must, in doing so, have regard to:
- (a) the objects of the Act; and
  - (b) the fact that:
    - (i) arbitration is an efficient, impartial, enforceable and timely method by which to resolve commercial disputes; and
    - (ii) awards are intended to provide certainty and finality.

..."

- 39 As ss 2D and 39 of the IAA indicate, the provisions of ss 8 and 9 of that Act must be interpreted and applied on the basis of the objects of the IAA, and having regard to the matters specified in s 39. Against this background, the relevant provisions of ss 8 and 9 are as follows:

## **"8 Recognition of foreign awards**

- (1) Subject to this Part, a foreign award is binding by virtue of this Act for all purposes on the parties to the arbitration agreement in pursuance of which it

was made.

(2) Subject to this Part, a foreign award may be enforced in a court of a State or Territory as if the award were a judgment or order of that court.

...

(3A) The court may only refuse to enforce the foreign award in the circumstances mentioned in subsections (5) and (7).

(4) Where:

(a) at any time, a person seeks the enforcement of a foreign award by virtue of this Part; and

(b) the country in which the award was made is not, at that time, a Convention country;

this section does not have effect in relation to the award unless that person is, at that time, domiciled or ordinarily resident in Australia or in a Convention country.

(5) Subject to subsection (6), in any proceedings in which the enforcement of a foreign award by virtue of this Part is sought, the court may, at the request of the party against whom it is invoked, refuse to enforce the award if that party proves to the satisfaction of the court that:

(a) that party, being a party to the arbitration agreement in pursuance of which the award was made, was, under the law applicable to him or her, under some incapacity at the time when the agreement was made;

(b) the arbitration agreement is not valid under the law expressed in the agreement to be applicable to it or, where no law is so expressed to be applicable, under the law of the country where the award was made;

(c) that party was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his or her case in the arbitration proceedings;

(d) the award deals with a difference not contemplated by, or not falling within the terms of, the submission to arbitration, or contains a decision on a matter beyond the scope of the submission to arbitration;

(e) the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(f) the award has not yet become binding on the parties to the arbitration agreement or has been set aside or suspended by a competent authority of the country in which, or under the law of which, the award was made.

(6) Where an award to which paragraph (5)(d) applies contains decisions on

matters submitted to arbitration and those decisions can be separated from decisions on matters not so submitted, that part of the award which contains decisions on matters so submitted may be enforced.

(7) In any proceedings in which the enforcement of a foreign award by virtue of this Part is sought, the court may refuse to enforce the award if it finds that:

- (a) the subject matter of the difference between the parties to the award is not capable of settlement by arbitration under the laws in force in the State or Territory in which the court is sitting; or
- (b) to enforce the award would be contrary to public policy.

(7A) To avoid doubt and without limiting paragraph (7)(b), the enforcement of a foreign award would be contrary to public policy if:

- (a) the making of the award was induced or affected by fraud or corruption; or
- (b) a breach of the rules of natural justice occurred in connection with the making of the award.

(8) Where, in any proceedings in which the enforcement of a foreign award by virtue of this Part is sought, the court is satisfied that an application for the setting aside or suspension of the award has been made to a competent authority of the country in which, or under the law of which, the award was made, the court may, if it considers it proper to do so, adjourn the proceedings, or so much of the proceedings as relates to the award, as the case may be, and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.

...

## **9 Evidence of awards and arbitration agreements**

(1) In any proceedings in which a person seeks the enforcement of a foreign award by virtue of this Part, he or she shall produce to the court:

- (a) the duly authenticated original award or a duly certified copy; and
- (b) the original arbitration agreement under which the award purports to have been made or a duly certified copy.

(2) For the purposes of subsection (1), an award shall be deemed to have been duly authenticated, and a copy of an award or agreement shall be deemed to have been duly certified, if:

- (a) it purports to have been authenticated or certified, as the case may be, by the arbitrator or, where the arbitrator is a tribunal, by an officer of that tribunal, and it has not been shown to the court that it was not in fact so authenticated or certified; or
- (b) it has been otherwise authenticated or certified to the satisfaction of the court.

..."

As indicated previously, Article IV of the New York Convention reflects the provisions of sub-s 9(1) of the IAA. Article V of the New York Convention contains provisions in relation to enforcement of foreign arbitral awards, provisions which are reflected in substantially the same terms in sub\_ss 8(5) and (7) of the IAA.

- 40 Reference was made by the plaintiff to the following statement by Gary B. Born in *International Commercial Arbitration*:<sup>24</sup>

"Article IV should not be interpreted as requiring the award-creditor to demonstrate the existence of a valid arbitration agreement, applicable to the parties' claims. Rather, Article IV is concerned merely with the presentation by the award creditor of the instrument purporting to be the agreement to arbitrate, with issues of validity and scope of the arbitration agreement being subject to the exceptions permitting non-recognition under Article V. That is made clear by the language of Article IV, which refers only to the award-creditor's obligation to 'supply' specified documents 'at the time of the application' (i.e., the arbitral award and the arbitration agreement), without suggesting that any affirmative showing must be made by the award-creditor as to the underlying legal validity of either; on the contrary, Article V(I)(a) makes it clear that questions as to the validity of the arbitration agreement are for the award-debtor to raise and prove."

The plaintiff submitted that Born's statement represents a summary of the position as supported by extensive authority and, further, that this is also an accurate statement of how ss 8 and 9 of the IAA are to be interpreted.

- 41 The plaintiff relied upon a number of authorities interpreting similar legislation in other jurisdictions, which was enacted to facilitate the recognition and enforcement of foreign arbitral awards for the purposes of the New York Convention. The first case relied upon was *Dardana Ltd v Yukos Oil Co* (also known as *Petroalliance Services Co Ltd v Yukos Oil Co*)<sup>25</sup> where Mance LJ said:

"10. I consider that the scheme of the Act is reasonably clear. A successful party to a New York Convention award, as defined in s 100(I) has a *prima facie* right to recognition and enforcement. At the first stage, a party seeking recognition or enforcement must, under s 102(1), produce the duly authenticated award or a duly certified copy and the original arbitration agreement or a duly certified copy. The arbitration agreement means an

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<sup>24</sup> Gary B. Born, *International Commercial Arbitration* (2009), 2705.

<sup>25</sup> [2002] EWCA Civ 543, [2002] 2 Lloyd's Rep 326. All references are to paragraph numbers in the medium-neutral citation.

arbitration agreement in writing, as defined in s 5. Once such documents have been produced, recognition or enforcement may be refused at the second stage only if the other party proves that the situation falls within one of the heads set out in s 103(2). The issue before us concerns the content of and relationship between the first and second stages. The first stage must involve the production of an award which has actually been made by arbitrators. Mr de Garr Robinson accepted that it would not, for example, be sufficient to produce an award which had been forged. However, it must be irrelevant at that stage that the award is as a matter of law invalid, on any of the grounds set out in s 103(2), since otherwise there would have been no point in including s 103(2). The award so produced must also have been made by arbitrators purporting to act under whatever is the document which is at the same time produced as the arbitration agreement in writing. That, it seems to me, is probably sufficient to satisfy the requirement deriving from the combination of s 100(l) and s 102(l) to produce 'an award made, in pursuance of an arbitration agreement'. The words 'in pursuance of an arbitration agreement' could in other contexts require the actual existence of an arbitration agreement. But they can also mean 'purporting to be made under'. Construed in the latter sense the overlap and inconsistency to which I have referred are avoided. Any challenge to the existence or validity of any arbitration agreement on the terms of the document on which the arbitrators have acted fails to be pursued simply and solely under s 103(2)(b).

11. Sections 100-104 of the 1996 Act give effect to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958. Articles I-V of that convention are not perhaps as clearly in favour of the conclusion that I have indicated as Mr de Garr Robinson would suggest. Articles I and II refer to two separate documents, namely an award and an agreement, and art. II requires the production of each as necessary to obtain recognition or enforcement. Once again, however, Art. V(l)(a) makes clear that, at all events where an agreement apparently complies with the requirements of Art. II, any challenge to its validity is a matter for the party resisting recognition and enforcement to raise and prove. Distinguished commentators on the Convention also take this view: see in particular van den Berg, *The New York Convention of 1958* (Kluwer), pp 250, 284 and 312 and 'The New York Convention of 1958, A Collection of Reports and Materials delivered at the ASA Conference held in Zurich on Feb. 2, 1996', para 106.

12. ... One cannot produce an agreement made otherwise than in writing. However, one can produce terms in writing, containing an arbitration clause, by reference to which agreement was (allegedly) reached, and one can produce a record of an arbitration agreement made in writing with (allegedly) the authority of the parties to it. That, it seems to me, is all that is probably therefore required at the first stage. That conclusion supports, rather than undermines, the further conclusion that, at the first stage, all that is required by way of an arbitration agreement is apparently valid documentation, containing an arbitration clause, by reference to which the arbitrators have accepted that the parties had agreed on arbitration or in which the arbitrators have accepted that an agreement to arbitrate was recorded with the parties' authority. On that basis, it is at the second stage, under s 103(2), that the other party has to prove that no such agreement was ever made or validly made.

...

15. ... Now, however, the standard procedure under Practice Direction - Arbitrations (*Civil Procedure 2001*, Vol. 2, Section 2B) is different. Unless the Court directs service on other parties under para 31.3, any application and order for recognition or enforcement is made without notice, with a proviso reflecting the respondent's right under para 31.9 to apply to set the order aside. By the time a respondent learns of the matter, therefore, it is too late for him simply to seek an adjournment of the actual application for recognition or enforcement. His only options are (a) to apply to set aside in England under s 103(2) and/or (b) to apply for a stay of the order for recognition or enforcement in England under s 103(5), pending determination of any application to set aside before the competent authority of the country (here Sweden) in which, or under the law of which, the award was made. A respondent may adopt the latter course alone and is under no duty to make any application to set aside in England. If a stay is granted and the foreign competent authority sets aside the award, the basis for the order recognizing or enforcing the award will have fallen away, and it can then be set aside on an application under s 103(2)(f)."

- 42 Having regard to the references by Mance LJ to the English legislation, the *Arbitration Act 1996*, it is helpful now to say something about these provisions. Section 100 of the English Act deals with New York Convention awards. Sub-section 100(1) is a provision which, in the context of s 100 to s 104 of the English Act fulfils the same function and is, in substance, in the same terms as sub-s 8(1) of the IAA. Sub-section 100(1) provides:

"In this Part a 'New York Convention award' means an award made, in pursuance of an arbitration agreement, in the territory or state (other than the United Kingdom) which is a party to the New York Convention."

It is true that sub-s 100(1) of the English Act does not use words which expressly stipulate that a foreign award is binding "on the parties to the arbitration agreement in pursuance of which it was made". Nevertheless, in the context of the English provisions, I am of the view that this is implicit to the extent that it is not provided for, and that the authorities which deal with the provisions of the English Act approach those provisions as though they bear substantially the same meaning as sub-s 8(1) of the IAA. The provisions of sub-sections 103(1) and (2) of the English Act are reflected in subss 8(3A) and (5) of the IAA, respectively.

- 43 Mance LJ in *Dardana Ltd v Yukos Oil Co*<sup>26</sup> also said that if a contrary approach was

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<sup>26</sup> [2002] EWCA Civ 543, [9].

adopted and the enforcing court was required to examine the validity of the award at the first stage of enforcement proceedings (under sub-s 8(1) and s 9 of the IAA as contended by the second defendant, IMC Solutions), this would lead to duplication and inconsistency with respect to the onus applicable in enforcement proceedings. In this respect, Mance LJ said:

"9. Mr Malek's submission that ss 100 and 102 can assist in the present situation would lead to a curious duplication and, moreover, an inconsistency in onus. On the one hand, the respondents [in this case, the award creditor] would have to prove the actual existence of a valid arbitration agreement in writing, before the award could be recognised or enforced. On the other hand, under s 103(2), recognition or enforcement 'may be refused' if the appellants [being the award debtor] could prove one of the matters there listed, which include the absence of any valid arbitration agreement."

In relation to s 102, to which Mance LJ referred, it should be noted that these provisions are in substance the same as the provisions contained in sub-ss 9(1) and (3). The provisions of sub-s 9(1) are set out above and in relation to sub-s 9(3) it need only be noted that this is a provision which requires a certified translation if the document produced pursuant to sub-s (1) is not in English. Sub-section 102(2) is in substantially the same terms as sub-s 9(3) of the IAA. Consequently, the same issues with respect to duplication and inconsistency would arise under the IAA provisions.

- 44 The question of what to do if the appellant in the *Dardana* case had not been able to show that one of the grounds for opposing enforcement of an award was made out was also addressed by Mance LJ. His Lordship indicated that the proper course was that the judgment debtor was to be considered to have failed to meet the burden of proof and that, as a consequence, the judgment debtor's "application to resist enforcement in this country would have been determined against them, for good and all".<sup>27</sup>
- 45 This question was also dealt with by his Honour Judge Chambers at first instance in *Dardana Ltd v Yukos Oil Co (No 1)*.<sup>28</sup> In this respect, his Honour said:<sup>29</sup>

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<sup>27</sup> [2002] EWCA Civ 543, [18].

<sup>28</sup> [2002] 1 Lloyd's Rep 225.

<sup>29</sup> [2002] 1 Lloyd's Rep 225, 229.

"31. The reason why I have been into all of this in some detail is because I think that the conclusion is fatal to Mr Malek's submission, including the proposition that I should allow the reasoning in *Cremer*.

32. Once it is apparent that the submission involves an acceptance that precisely the same challenge to jurisdiction may be mounted both before and after one comes to s 103(2) (Art V of the Convention), but that in the former case the burden of proof is on the claimant and in the latter upon the respondent, the situation becomes a nonsense. It means that despite it being universally recognised that the purpose of the Convention is to assist with the enforcement of awards and that, in most instances where objection can be raised, the onus of proof is placed firmly upon the party making the challenge, all that such a respondent would have to do would be to assert that there was no arbitration agreement binding upon the parties, for the burden then to be upon the holder of the award to show that there was. I decline to follow that course. Article V makes it clear that only the challenge at the behest of the party against whom the award is invoked can *only* be made as provided in Art V(1). In all essentials, s 103 of the 1996 Act reflects that requirement."

The plaintiff submitted that this statement of his Honour Judge Chambers accurately reflects the position of Australia under ss 8 and 9 of the IAA.

- 46 A similar approach to the question whether or not an "arbitration" agreement existed for the purposes of the New York Convention was adopted by Justice Prakash of the High Court of Singapore in *Aloe Vera of America Inc v Asianic Food (S) Pte Ltd and Another*;<sup>30</sup> adopting the approach of the Court of Appeal of Manitoba in *Proctor v Schellenberg*.<sup>31</sup> Referring to this decision, Prakash J said:

"17 The Court of Appeal of Manitoba, Canada, in the case of *Proctor v Schellenberg* [2003] 2 WWR 621 had to consider an argument that a party seeking to enforce a foreign arbitration award had not satisfied the requirement of para 1 of Art IV of the Convention to supply the court with the 'agreement in writing' referred to in Art II of the Convention. In the course of his judgment, Hamilton JA stated at [18]:

The requirements of para 1 of Article IV of the Convention are mandatory requirements that an applicant must satisfy on an application under the Act. The issue here is whether an agreement was supplied to the court by the applicant, as required by para 1(b) of Article IV of the Convention. To answer this, one must first determine what 'agreement in writing' means. In doing so, one must give meaning to the words 'shall include.' These words make it clear that the definition is not exhaustive. It is also clear that written documentation is required. My reading of the definition is that

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<sup>30</sup> [2006] 3 SLR(R) 174, [2006] SGHC 78 (10 May 2006). All references are to paragraph numbers in the medium-neutral citation.

<sup>31</sup> [2003] 2 WWR 621.

written documentation can take various forms, including an arbitral clause within a contract signed by both parties; an arbitration agreement signed by both parties; an arbitral clause within a contract contained in a series of letters or telegrams; or an arbitration agreement contained in a series of letters or telegrams. Because the definition is inclusive rather than exhaustive, the Legislature did not limit the definition to these articulated methods of documentation. What is important is that there be a record to evidence the agreement of the parties to resolve the dispute by an arbitral process. This flexibility is important in this day and age of changing methods of communication. In my view, communication by facsimile falls within the definition. This is in keeping with a functional and pragmatic interpretation of the definition to serve the Legislature's intent to give effect to arbitral awards granted in other jurisdictions in this era of interjurisdictional and global business.

With respect, I endorse the attitude taken by the Court of Appeal of Manitoba in the above judgment and agree that one must take a pragmatic approach towards the definitions in the Convention and the Act in order to give effect to arbitral awards granted outside Singapore."

- 47 The plaintiff in the *Aloe Vera* case, Aloe Vera of America Inc, took out an originating summons in the High Court of Singapore in order to obtain leave to enforce an arbitration award against Asianic Food and also against Chiew Chee Boon (also known as Steven Chiew), the second defendant. As noted in the judgment of Prakash J, "The application proceeded on an *ex parte* basis, as usual, and an order in terms was made against both defendants ..." <sup>32</sup> Mr Chiew applied to set aside the order, in relation to which Prakash J said:<sup>33</sup>

"7 Mr Chiew was upset to be named a party to the arbitration. He took the position that he was not a party to the Agreement and had not agreed to arbitration or to the laws of Arizona applying to him personally. He appointed a law firm called Sullivan Law Group to act on his behalf to object to the arbitration. On 21 July 2003, Sullivan Law Group sent a position statement to the Arbitrator in which it was made clear that Mr Chiew was not submitting to the jurisdiction of the Arbitrator and that he was not a party to the arbitration agreement. AVA's lawyers responded and submitted that Mr Chiew was a party to the arbitration agreement pursuant to cl 13.7 of the Agreement and/or that he was the *alter ego* of Asianic. On 1 August 2003, the Arbitrator made a preliminary order. He found that he had jurisdiction over Mr Chiew pursuant to cl 13.7 of the Agreement because Mr Chiew was properly a party to the arbitration under the broad definition found in cl 13.7 of the Agreement. He also stated that he had reached that result without deciding whether Mr Chiew was also properly before the tribunal under the *alter ego* claim."

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<sup>32</sup> [2006] SGHC 78 at [1].

<sup>33</sup> [2006] SGHC 78 at [7].

In this context, the argument arose as to whether or not there was an “arbitration agreement” which would provide a basis for enforcement. Having reviewed various provisions of the Singapore legislation, the *International Arbitration Act* (Cap 143A), and the Singapore High Court rules, Prakash J noted that the whole debate in the *Aloe Vera* case was what was meant by the expression “the arbitration agreement” in these provisions and what was required in terms of the requirement to produce “the arbitration agreement”. A similar argument was raised in this respect on behalf of Mr Chiew, who was resisting enforcement, as was raised by the second defendant, IMC Solutions, in these proceedings. As Prakash J noted:<sup>34</sup>

“21 Mr Loh submitted that in view of the requirement for a copy of the arbitration agreement to be produced, when AVA was seeking to enforce the Award the first hurdle it had to overcome was to prove to the court that there was a written arbitration agreement signed between it and Mr Chiew. If the court found that there was no written agreement to which Mr Chiew was a party then there would be no need to proceed further. In effect, what Mr Loh was saying was that there should be, at a very early stage of the enforcement process, a two-step substantive examination of the foreign award for the purposes of enforcement in Singapore. Not only would the court have to see duly authenticated copies of the arbitration agreement and of the award but it would also have to be satisfied that although the award was in terms made against the person against whom it was sought to be enforced, it had been correctly made against that person in that such person was *prima facie* a party to the arbitration agreement.”

48 Justice Prakash then considered a number of decisions of various courts in relation to the approach applied to enforcement of arbitral awards under the New York Convention. Having done so, her Honour concluded that the approach of the US District Court for the Southern District of New York in the case of *Sarhank Group v Oracle Corporation*<sup>35</sup> should be accepted as the proper approach. Prakash J said:<sup>36</sup>

“33 The case of *Sarhank Group v Oracle Corporation* (‘the Sarhank case’) was a particularly interesting one. It was first heard by the US District Court for the Southern District of New York (see Yearbook Comm Arb’n XXVIII (2003) p 1043) and then on appeal by the US Court of Appeals for the Second Circuit, reported at 404 F 3d 657 (2nd Cir, 2005). The facts were that in 1991, Sarhank Group (‘Sarhank’), an Egyptian corporation, entered into a contract with Oracle Systems, Inc (‘Systems’), which provided for arbitration in Egypt. Systems was a wholly owned subsidiary of Oracle Corporation (‘Oracle’). The contract was governed by Egyptian law. In 1997, a dispute

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<sup>34</sup> [2006] SGHC 78 at [21].

<sup>35</sup> 404 F3d 657 (second circuit, 2005).

<sup>36</sup> [2006] SGHC 78 at [33] and [34].

arose between Sarhank and Systems and Systems eventually terminated the contract. Sarhank then commenced arbitration proceedings against both Systems and Oracle at the Cairo Regional Centre for International Commercial Arbitration. Oracle objected to the arbitration, alleging that it was not a signatory to the contract. In 1991, the arbitral tribunal issued a unanimous decision against both Oracle and Systems. The arbitrators held that the arbitration clause in the contract between Sarhank and Systems was binding upon Oracle because Oracle was a partner with Systems in the relation with Sarhank. Oracle sought an annulment of the award before the Cairo Court of Appeal but the award was upheld.

34 Sarhank then sought enforcement of the Egyptian award before the US District Court for the Southern District of New York. The District Court granted enforcement. It dismissed Oracle's argument that the court should decide whether the arbitration agreement between the parties was valid in order to determine whether it had subject-matter jurisdiction to enforce the award under the Convention. The court reasoned that it was not asked to compel arbitration, in which case it would need first to decide whether the parties had agreed to arbitrate. Rather, the court was asked to enforce a foreign award in which the validity of the arbitration agreement had already been established under the laws of Egypt. The District Court concluded that in such a case it had original subject-matter jurisdiction under the Convention and turned to consider whether Oracle could establish any grounds for refusal of enforcement. I should note here that this decision was relied on by AVA below. The reasoning of the District Court was in line with that in the *Dardana* case ([31] *supra*) and this authority was relied on by the assistant registrar when he reached his decision.”

49 As a result of this analysis, Prakash J said:<sup>37</sup>

“47 Whilst I have noted Mr Chiew’s arguments that he was not a party to the arbitration agreement I do not think that it is correct for a court that is asked to enforce an award under the Convention to go behind the holding on the merits on this aspect that has been made by the Arbitrator except to the extent that this is permitted by the Convention grounds during the second stage of the enforcement process. It is indisputable that in holding that Mr Chiew was a party to the arbitration agreement, the Arbitrator was acting within his jurisdiction. It is an accepted principle of arbitration law that an arbitral tribunal has jurisdiction to determine whether a particular person is a party to an arbitration agreement. ...”

And in the same vein:<sup>38</sup>

“61. First of all, it should be remembered that under s 31(2) of the Act, it is the party who wishes the court to refuse enforcement of the award who has the burden of establishing that one of the grounds for refusal exists. Sub-section 2(b) calls on the challenger to establish that the arbitration agreement in question is not valid under the law to which the parties have subjected it. In this case, the arbitration agreement was subject to the law of Arizona and therefore Mr Chiew bore the burden of establishing that it was not valid

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<sup>37</sup> [2006] SGHC 78 at [47].

<sup>38</sup> [2006] SGHC 78 at [61].

under the law of Arizona and that under the law of Arizona the clauses of the agreement could not have any application to him. ...”

50 Sub-section 31(2) of the Singapore *International Arbitration Act* reflects the provisions of Article V of the New York Convention and is in similar terms to sub-s 8(5) of the IAA. Although the provisions of the Singapore *International Arbitration Act* differ from the provisions of the IAA, s 27 of the Singapore legislation defines the expression “arbitration agreement” as an agreement in writing of the kind referred to in para 1 of Article II of the New York Convention. Paragraphs 1 and 2 of Article II of the New York Convention read:

- “1. Each Contracting State shall recognise an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject-matter capable of settlement by arbitration.
2. The term ‘agreement in writing’ shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.”

51 Consequently, as with sub-s 100(1) of the English *Arbitration Act* 1996, to the extent that the express provisions do not repeat verbatim or substantially identically the provisions of sub-s 8(1) of the IAA, the meaning of these provisions is, in my view, in context the same in substance. Consequently, the approach of the Singapore High Court in *Aloe Vera* and the cases to which reference has been made in support of that approach, make these decisions very significant persuasive authority in support of the approach to the interpretation of sub-s 8(1) of the IAA for which the plaintiff argued. The result is that a party resisting enforcement of an award bears the burden of establishing a ground for resisting enforcement under sub-s 8(5); as is the position with respect to sub-s 31(2) of the Singapore legislation.

52 Further support for this approach is to be found in the decision of Sir Anthony Mason, sitting as a judge of the ultimate Court of Appeal in Hong Kong, in *Hebei Import & Export Corporation v Polytek Engineering Company Limited*.<sup>39</sup> Though this decision canvasses the difference between the approach that a supervising court and

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<sup>39</sup> [1999] 2 HKC 205.

an enforcing court should take in the context of an application made under the equivalent of sub-s 8(5)(c) of the IAA – that the party was not given proper notice of the appointment of the arbitrator and the like – and in the context of the public policy defence or ground for resisting enforcement of an award on the basis of sub-s 8(7)(b) (public policy) of the IAA – the approach, more generally, is significant in the present context. Sir Anthony Mason said:<sup>40</sup>

"Under the Ordinance and the Convention, the primary supervisory function in respect of arbitrations rests with the court of supervisory jurisdiction as distinct from the enforcement court (see s 44(5) of the Ordinance; art VI of the Convention; *Westacre Investments Inc v Jugoimport-SPDR Holding Co Ltd* [1998] 3 WLR 770 at 808). But this does not mean that the enforcement court will necessarily defer to the court of supervisory jurisdiction.

The Convention distinguishes between proceedings to set aside an award in the court of supervisory jurisdiction (arts V(I)(e) and VI) and proceedings in the court of enforcement (art V(1)). Proceedings to set aside are governed by the law under which the award was made or the law of the place where it was made, while proceedings in the court of enforcement are governed by the law of that forum. The Convention, in providing that enforcement of an award may be resisted on certain specified grounds, recognises that, although an award may be valid by the law of the place where it is made, its making may be attended by such a grave departure from basic concepts of justice as applied by the court of enforcement that the award should not be enforced.

It follows, in my view, that it would be inconsistent with the principles on which the Convention is based to hold that the refusal by a court of supervisory jurisdiction to set aside an award debars an unsuccessful applicant from resisting enforcement of the award in the court of enforcement. See *Firm P v Firm F* YB Comm Arbn II (1977) 241 (where a German Court of Appeal refused to enforce an award which had been declared to be enforceable by a United States District Court). Even if the proposition stated above should be subject to some limitations, it must apply to a case where the party resisting enforcement is doing so on the ground of public policy. That is because the ground is expressed in the Convention (art V(2)(b)) as 'contrary to the public policy of the country', that is, the country in which enforcement is sought. In the court of supervisory jurisdiction, the public policy to be applied would be a different public policy, namely that of the supervisory jurisdiction.

In *Paklito Investment Ltd v Klockner East Asia Ltd* [1993] 2 HKLR 39 Kaplan J expressed (at 48-49) the view that a party faced with a Convention award against him has two options. He can apply to the court of supervisory jurisdiction to set aside the award or he can wait to establish a Convention ground of opposition. In my view, such a party is not bound to elect between the two remedies, at any rate when, in the court of enforcement, he seeks to rely on the public policy ground, as the respondent did here.

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[1999] 2 HKC 205 at 229.

It follows also that a failure to raise the public policy ground in proceedings to set aside an award cannot operate to preclude a party from resisting on that ground the enforcement of the award in the enforcing court in another jurisdiction. That is because each jurisdiction has its own public policy.

What I have said does not exclude the possibility that a party may be precluded by his failure to raise a point before the court of supervisory jurisdiction from raising that point before the court of enforcement. Failure to raise such a point may amount to an estoppel or a want of bona fides such as to justify the court of enforcement in enforcing an award (see *Chrome Resources SA v Leopold Lazarus* YB Comm Arbn XI (1986) 538 at 538-542). Obviously an injustice may arise if an award remains on foot but cannot be enforced on a ground which, if taken, would have resulted in the award being set aside."

53 Sir Anthony Mason continued:<sup>41</sup>

"It has become fashionable to raise the specific grounds in s 44(2) (art V(1)(b)) which are directed to procedural irregularities, as public policy grounds (art V(2)(b)). There is no reason why this course cannot be followed. The principal difference between s 44(2) and 44(3), it is suggested, is that, under section 44(3), the court of enforcement can take the point of its own motion (AJ van den Berg *The New York Arbitration Convention of 1958*, p 299). If, what the respondent seeks to do is to raise a specific ground under section 44(2) under the guise of public policy, then it is only right that it should bear the onus of establishing that ground.

In some decisions, notably of courts in civil law jurisdictions, public policy has been equated to international public policy. As already mentioned, art V(2)(b) specifically refers to the public policy of the forum. No doubt, in many instances, the relevant public policy of the forum coincides with the public policy of so many other countries that the relevant public policy is accurately described as international public policy. Even in such a case, if the ground is made out, it is because the enforcement of the award is contrary to the public policy of the forum (AJ van den Berg *The New York Arbitration Convention of 1958*, p 298).

However, the objective of the Convention was to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards of which such agreements to arbitrate are observed and arbitral awards are enforced (*Scherk v Alberto-Culver Co* 417 US 506 (1974); *Imperial Ethiopian Government v Baruch-Foster Corp* 535 F2d 334 (1976) at 335). In order to ensure the attainment of that object without excessive intervention on the part of courts of enforcement, the provisions of art V, notably art V(2)(b) relating to public policy have been given a narrow construction. It has been generally accepted that the expression 'contrary to the public policy of that country' in art V(2)(b) means 'contrary to the fundamental conceptions of morality and justice' of the forum. (*Parsons and Whittemore Overseas Co Inc v Société Générale de l'Industrie du Papier RAKTA* 508 F2d 969 (2d Cir 1974) at 974 (where the Convention expression was equated to 'the forum's most basic notions of morality and justice'); see AJ van den Berg *The New York Arbitration Convention of 1958*, p 376; see also

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<sup>41</sup> [1999] 2 HKC 205 at 232.

*Renusagar Power Co Ltd v General Electric Company* YB Comms Arbn XX (1995) 681 at 697-702)).

The question then is whether the matters of which the respondent complains, namely the alleged refusal of the hearing and the communications to the chief arbitrator were contrary to the fundamental conceptions of morality and justice of Hong Kong. In this respect, the opportunity of a party to present his case and a determination by an impartial and independent tribunal which is not influenced, or seen to be influenced, by private communications are basic to the notions of justice and morality in Hong Kong.”

Sir Anthony Mason concluded that there had not been such a breach of notions of justice and morality in Hong Kong.<sup>42</sup>

54 Reference was also made by the plaintiff to the decision of the English Court of Appeal in *Gater Assets Ltd v Nak Naftogaz Ukrainiy*,<sup>43</sup> where Rix LJ commented:<sup>44</sup>

“The award debtor of a Convention award may be defending himself against enforcement, but he can only do [so] by destroying the formal validity of the award, either as a matter of substantive jurisdiction or serious irregularity or as a matter of public policy. His remedy, the burden of proof of which lies entirely on him, is to show that the award requires not to be enforced because it is not binding or is invalid, or is against public policy.”

55 This passage and the headnote to the *Gater Assets* case serves to emphasise that the remedy of an award debtor seeking to resist enforcement of an award is to show that the award “requires not to be enforced”, the burden of proof lying on the award debtor, because it was not binding, was invalid or was against public policy. This, in my view, is the nub of the approach of Sir Anthony Mason in the *Hebei* case.<sup>45</sup>

56 Reference was also made to the English Court of Appeal decision in *Dallah Real Estate and Tourism Holding Company v Ministry of Religious Affairs, Government of Pakistan* and also to the unsuccessful appeal to the Supreme Court of the United Kingdom.<sup>46</sup> *Dallah* was a case where a person, the Government of Pakistan, sought to avoid enforcement of an award made against it on the basis that it was not a party to the arbitration agreement. The case concerned an arbitral tribunal which applied “trans-

<sup>42</sup> See *Hebei Import & Export Corporation v Polytek Engineering Company Limited* (1999) 2 HK 205 at 233.

<sup>43</sup> [2008] 1 All ER (Comm) 209.

<sup>44</sup> [2008] 1 All ER (Comm) 209, [77].

<sup>45</sup> See above, paragraphs 52 and 53.

<sup>46</sup> [2010] 1 All ER 592 (CA); [2010] UKSC 46 (3 November 2010).

national law" for the purpose of determining whether there existed any relevant arbitration agreement between Dallah and the Government. In the course of applying the provisions of sub-s 103(2) of the English *Arbitration Act* 1996 and Article V of the New York Convention (provisions which correspond with or are reflected in the provisions of sub-s 8(5) of the IAA), the English courts found that the tribunal had been bound to apply French law to the issue in dispute.<sup>47</sup> In *Dallah*, there was no express choice of *lex arbitri*. The English court, having heard evidence from French law experts, determined that as a matter of French law the aggrieved party, the award debtor, was not a party to the arbitration agreement and took no part in the arbitration proceedings save under full reservations to make submissions as to why it was not a party to the arbitration agreement. Unusually, there was in that case no "law to which the parties had subjected it" and the court therefore had to apply the second limb of the test under Article V(1)(a) of the New York Convention; provisions reflected in paragraphs 103(2)(a) and (b) of the English *Arbitration Act* and paragraphs 8(5)(a) and (b) of the IAA. In other words, the court in this case was concerned with defences or grounds to enforcement, rather than application of provisions equivalent to sub-s 8(1) of the IAA (provisions reflected in sub-s 100(1) of the English *Arbitration Act*).

57 In the course of the Supreme Court appeal in *Dallah Real Estate and Tourism Holding Company v Ministry of Religious Affairs, Government of Pakistan*,<sup>48</sup> their Lordships were clearly of the view that the issue in dispute with respect to the existence of any relevant arbitration agreement was a matter to be raised by the party resisting enforcement of the award and in so doing that party carried the burden of establishing the legal and evidentiary bases relied upon. Thus, Lord Mance said:<sup>49</sup>

"12. The issue regarding the existence of any relevant arbitration agreement falls to be determined by the Supreme Court as a United Kingdom court under provisions of national law which are contained in the Arbitration Act 1996 and reflect Article V(1)(a) of the New York Convention. The parties' submissions before the Supreme Court proceeded on the basis that, under s 103(2)(b) of the 1996 Act and Article V(1)(a) of the Convention, the onus

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<sup>47</sup> See above, paragraph 43.

<sup>48</sup> [2010] UKSC 46.

<sup>49</sup> [2010] UKSC 46, [12].

was and is on the Government to prove that it was not party to any such arbitration agreement. This was so, although the arbitration agreement upon which Dallah relies consists in an arbitration clause in the Agreement which on its face only applies as between Dallah and the Trust. There was no challenge to, and no attempt to distinguish, the reasoning on this point in *Dardana Limited v Yukos Oil Company* [2002] EWCA Civ 543; [2002] 1 All ER (Comm) 819, paras 10-12, and I therefore proceed on the same basis as the parties' submissions."

Similarly, Lord Collins said:<sup>50</sup>

"72. The final award is a Convention award which *prima facie* is entitled to enforcement in England under the Arbitration Act 1996, section 101(2). The principal issue is whether the courts below were right to find that the Government has proved that on the proper application of French law (as the law of the country where the award was made, since there is no indication in the Agreement as to the law governing the arbitration agreement), it is not bound by the arbitration agreement. To avoid any misunderstanding, it is important to dispel at once the mistaken notion (which has, it would appear, gained currency in the international arbitration world) that this is a case in which the courts below have recognised that the arbitral tribunal had correctly applied the correct legal test under French law. On the contrary, one of the principal questions before all courts in this jurisdiction has been whether the tribunal had applied French law principles correctly or at all.

73. The main issue involves consideration of these questions: (a) the role of the doctrine that the arbitral tribunal has power to determine its own jurisdiction, or *Kompetenz-Kompetenz*, or *compétence-compétence*; (b) the application of arbitration agreements to non-signatories (including States) in French law, and the role of transnational law or rules of law in French law; (c) whether *renvoi* is permitted under the New York Convention (and therefore the 1996 Act) and whether the application by an English court of a reference by French law to transnational law or rules of law is a case of *renvoi*.

74. There is also a subsidiary issue as to whether, even if the Government has proved that it is not bound by the arbitration agreement, the court should exercise its discretion ('... enforcement *may* be refused ...') to enforce the award.

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92. This decision was applied in the international context, in connection with the enforcement of a CIETAC award, in *China Minmetals Materials Import and Export Co Ltd v Chei Mei Corp*n, 334 F3d 274 (3d Cir 2003) in which Minmetals, a Chinese corporation, sought to enforce a CIETAC award against Chei Mei, a New Jersey corporation. Chei Mei resisted enforcement on the ground that the contract containing the arbitration clause had been forged. The tribunal had held that Chei Mei failed to show that the contracts were forged, but that even if its signature and stamp had been forged, it had

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<sup>50</sup> [2010] UKSC 46, [72]-[74] and [92]; and see also [98], [104] and [126] (and as to [104] (Lord Collins), note its context arising from the discussion at [101]-[103]; all of which are set out below, paragraph 68).

taken various steps which confirmed its adherence to the arbitration agreement. The Court of Appeals for the Third Circuit decided that the court asked to enforce an award may determine independently the arbitrability of the dispute. After an illuminating discussion of the doctrine of compétence-compétence and kompetenz-kompetenz, it concluded (at 288, citing Park, *Determining Arbitral Jurisdiction: Allocation of Tasks Between Courts and Arbitrators* (1997) 8 Am Rev Int Arb 133, 140-142) that 'it appears that every country adhering to the competence-competence principle allows some form of judicial review of the arbitrator's jurisdictional decision where the party seeking to avoid enforcement of an award argues that no valid arbitration agreement ever existed.' The court said (*ibid*): 'After all, a contract cannot give an arbitral body any power, much less the power to determine its own jurisdiction, if the parties never entered into it.'"

The other members of the Supreme Court, Lords Hope, Saville and Clarke, agreed with the reasons given by Lord Mance and Lord Collins. In the present context, it is also helpful to note the following further comment in the judgment of Lord Saville:<sup>51</sup>

"153. Section 103(1) of the Arbitration Act 1996 provides that recognition and enforcement of a New York Convention Award '*shall not be refused except in the following cases.*' The following sub-sections set out the cases in question. Section 103(2) contains a number of these cases and provides that recognition or enforcement of the award may be refused if the person against whom it is invoked proves (so far as the case relevant to these proceedings is concerned) '*that the arbitration agreement was not valid under the law to which the parties subjected it or, failing any indication thereon, under the law of the country where the award was made.*' (Section 103(2) (b))." [emphases in original]

58 The plaintiff submitted that the decision in *Dallah* had no application to the present proceedings because, here, the parties specifically agreed that the particular law applicable to the agreement for the purposes of the arbitration was Mongolian or Hong Kong law, and ultimately Mongolian law was chosen. Consequently, it was said that:

- (a) the arbitration agreement is valid under that law, as verified by the Mongolian Court order;
- (b) there is no admissible evidence of it being invalid; and
- (c) in Professor Mendsaikhan Tumenjargel's evidence, he concedes that there are a number of bases under Mongolian law (although he mentions they are

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<sup>51</sup> [2010] UKSC 46, [153].

“controversial” and need to be decided on a “case by case basis”) under which the decision of the arbitral tribunal, the Award, can be justified. Professor Tumenjargel was the Mongolian law expert whose evidence was relied upon by the second defendant, IMC Solutions.

- 59 The plaintiff submitted that to the extent that the *Dallah* case might be said to allow for re-agitation of all issues which were before the arbitral tribunal and to allow new and further evidence to be led, that case should be regarded as having been wrongly decided. In particular, it was said that it makes a mockery of sections like sub-s 8(8) of the IAA because it would give rise to a situation where a party seeking to challenge an award in the supervising court has, in fact, less rights than if the same challenge were made in the enforcing court. In the former case, it has to provide security in the enforcing jurisdiction under sub-s 8(8) while the challenge is made in the supervising court. In the latter case, it need provide no security, and potentially has wider appeal rights. It was submitted that this cannot be what the Australian Parliament, and the framers of the New York Convention, had in mind. It was also said to be inconsistent with the decision of Justice Prakash in *Aloe Vera of America Inc v Asianic Food (S) Pte Ltd*.<sup>52</sup> It was also submitted that the approach adopted in *Aloe Vera of America Inc* is one which was also applied in *Svenska Petroleum Exploration v Government of the Republic of Lithuania*<sup>53</sup> by Nigel Teare QC and in the second *Svenska Petroleum* decision<sup>54</sup> by Gloster J; and that this approach is to be preferred to that in *Dallah's* case. The distinction between the role of the supervising and enforcing court is similarly made in the judgment of Reyes J in *A v R*.<sup>55</sup> In my opinion it is clear from the judgments of the members of the Supreme Court in *Dallah*, that it is a decision which supports the latter approach, would not permit the unconstrained reopening of issues which were before the arbitral tribunal, and does not support the second defendant's submissions in support of the existence of 'threshold issue' under the equivalent of sub-s 8(1) of the IAA, which would cast a burden of proving,

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<sup>52</sup> [2006] SGHC (10 May 2006), at [48] to [51].

<sup>53</sup> [2005] 1 Lloyd's Rep 515.

<sup>54</sup> *Svenska Petroleum Exploration AB v Government of the Republic of Lithuania & AB Geonlata* [2005] EWHC 2437, [2005] 1 Lloyd's Rep 515.

<sup>55</sup> [2010] 3 HKC 67.

substantively, the elements of these provisions on the plaintiff.<sup>56</sup> Rather, in my view, *Dallah* supports the plaintiff's position.

60 The second defendant, IMC Solutions, made extensive submissions on the evidence in relation to the conduct of the final arbitration hearing before the Arbitral Tribunal in Mongolia, which it said was in the absence of IMC Solutions, and in relation to the preliminary hearing of 24 July 2009 and other matters leading up to that final hearing. These submissions and the evidentiary matter to which reference was made were, however, premised on the basis that the application of the provision of sub-ss 8(5) and (7) of the IAA under which enforcement of a foreign arbitral award may be resisted only arises after the court has determined the "threshold question" that a foreign award exists binding on the parties to the arbitration agreement in pursuance of which it was made, under the provisions of sub-s 8(1) of the IAA. However, on the basis of the authorities to which reference has been made, and for the preceding reasons, I am of the opinion that there is no threshold issue of the type argued for by IMC Solutions. Consequently, having complied with section 9 of the IAA, the plaintiff faces no onus to establish that a foreign award exists binding on the parties to the arbitration agreement in pursuance of which it was made; either under the provisions of sub-s 8(1) of the IAA or as a result of the application of corresponding provisions of the New York Convention. On this basis, I turn now to consider the issue of onus of proof. Insofar as the evidentiary matters raised by IMC Solutions with respect to the threshold issue may be relevant to the operation of sub-ss 8(5) and (7) of the IAA, I have considered these matters in that context.

### **Onus of proof**

61 As indicated, it is, in my opinion, clear from the authorities that the onus of proving any of the defences or grounds against enforcement of a foreign arbitral award is borne by the person resisting enforcement.<sup>57</sup> In *FG Hemisphere Associates v Democratic*

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<sup>56</sup> See paragraph 57, above, and paragraphs 68 and 69, below; and see paragraph 64 below.

<sup>57</sup> See the authorities to which reference has been made (above, paragraphs 41 to 60) and the preceding reasons; and see also *National Oil Corp v Libyan Sun Oil Corp* 733 F Supp 800 at 813 (D Dell 1990); *Imperial Ethiopian Government v Baruch-Foster Corp* 535 F 2d 334 at 336 (5th Cir 1976); *Al Haddad Bros Enterprises Inc v M/S Agapi* 635 F Supp at 209 (D Dell 1986); affd 813 F 2D 396 (3D Cir 1981); and *Jacobs, International Commercial Arbitration in Australia, Law and Practice*, Vol 1 at 143.940).

*Republic of the Congo*,<sup>58</sup> Deputy High Court Judge Mayo, sitting in the Hong Kong Court of First Instance, said:<sup>59</sup>

“The regime under the New York Treaty [i.e. the New York Convention] is extremely onerous and a heavy burden is placed upon any party seeking to set aside an award.”

- 62 Similarly, in *Encyclopaedia Universalis SA v Encyclopaedia Britannica Inc*,<sup>60</sup> the court said that the burden on a party resisting enforcement of an arbitral award “is a heavy one”.
- 63 The plaintiff submitted that the “heavy onus” borne by the second defendant, IMC Solutions, in this proceeding is consistent with authority regarding the variable clarity and cogency of proof required in relation to certain facts in order to satisfy the civil standard of proof - proof on the balance of probabilities – in a particular case. In *Palios Meegan & Nicholson Holdings Pty Ltd & anor v Shore*,<sup>61</sup> Gray J set out the relevant principles relating to the civil burden of proof, as follows:<sup>62</sup>

“59. The standard of proof required in a civil case where serious allegations are made was discussed in *Rejzek v McElroy* where Barwick CJ, Kitto, Taylor, Menzies and Windeyer JJ identified the *Briginshaw* principle and observed:<sup>63</sup>

*‘... The “clarity” of the proof required, where so serious a matter as fraud is to be found, is an acknowledgment that the degree of satisfaction for which the civil standard of proof calls may vary according to the gravity of the fact to be proved: see *Briginshaw v Briginshaw*, per Dixon J; *Helton v Allen* per Starke J; *Smith Bros v Madden*, per Dixon J.*

But the standard of proof to be applied in a case and the relationship between the degree of persuasion of the mind according to the balance of probabilities and the gravity or otherwise of the fact of whose existence the mind is to be persuaded are not to be confused. The difference between the criminal standard of proof and the civil standard of proof is no mere matter of words: it is a matter of critical substance. No matter how grave the fact which is to be found in a civil case, the mind has only to be reasonably satisfied and has not with respect to any matter in issue in such a proceeding to attain that degree of certainty which is indispensable to the support of a conviction upon a criminal charge: see *Helton v Allen* per Dixon, Evatt and McTiernan JJ. ...’

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<sup>58</sup> [2008] HKCFI 906.

<sup>59</sup> [2008] HKCFI 906, [11].

<sup>60</sup> 403 F3d 85, 90 (2d Cir 2005).

<sup>61</sup> (2010) 108 SASR 31.

<sup>62</sup> (2010) 108 SASR 31, 36-7.

<sup>63</sup> *Rejzek v McElroy* [1965] HCA 46; (1965) 112 CLR 517 at 521-522.

[Footnotes originally omitted, and emphasis originally added]

60. Further observations were made in *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd*,<sup>64</sup> where the High Court explained that while the ordinary standard of proof in civil litigation, of proof on the balance of probabilities, applied even where the matter to be proved involved criminal conduct or fraud, the strength of the evidence necessary to establish a fact or facts on the balance of probabilities may vary according to the nature of what it is sought to prove. In particular, Mason CJ, Brennan, Deane and Gaudron JJ observed:<sup>65</sup>

'The ordinary standard of proof required of a party who bears the onus in civil litigation in this country is proof on the balance of probabilities. That remains so even where the matter to be proved involves criminal conduct or fraud. On the other hand, the strength of the evidence necessary to establish a fact or facts on the balance of probabilities may vary according to the nature of what it is sought to prove. Thus, authoritative statements have often been made to the effect that clear or cogent or strict proof is necessary 'where so serious a matter as fraud is to be found'. Statements to that effect should not, however, be understood as directed to the standard of proof. Rather, they should be understood as merely reflecting a conventional perception that members of our society do not ordinarily engage in fraudulent or criminal conduct and a judicial approach that a court should not lightly make a finding that, on the balance of probabilities, a party to civil litigation has been guilty of such conduct. As Dixon J commented in *Briginshaw v Briginshaw*:

"The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved ...".

There are, however, circumstances in which generalisations about the need for clear and cogent evidence to prove matters of the gravity of fraud or crime are, even when understood as not directed to the standard of proof, likely to be unhelpful and even misleading.'

[Footnotes originally omitted]"

- 64 The plaintiff submitted that, having regard to the essential nature of these proceedings as enforcement proceedings, coupled with the overriding pro-enforcement policy underpinning the IAA and the New York Convention, the second defendant, IMC Solutions, could only discharge its onus in the ordinary course of events in resisting an enforcement application by providing the court with clear, cogent and strict proof in relation to the exhaustive grounds listed under sub-

<sup>64</sup> *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 67 ALJR 170.

<sup>65</sup> *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 67 ALJR 170, 170-1.

ss 8(5) and (7) of the IAA. However, it was said that this does not mean, nor should it be taken to mean, that the second defendant is entitled to re-litigate the issues which have been decided by the Arbitral Tribunal, and which have been subsequently verified by the courts of Mongolia. The correctness of this approach is, in my opinion, indicated by the authorities to which reference has been made and in the context of the provisions of the IAA and the New York Convention, noting particularly the provisions of ss 2D and 39 of the IAA.<sup>66</sup> This approach is also supported in a number of other cases to which reference is now made.

- 65 In *Xiamen Xinjingdi Group Ltd v Eton Properties Ltd and Anor*,<sup>67</sup> the judgment of Reyes J indicates support for this approach, as appears from the following parts of the headnote:

**"Held, dismissing the application to set aside:**

(1) The court's role in an application for enforcement of a Mainland arbitral award under s 2GG of the Arbitration Ordinance (Cap 341) was essentially that of an overseer. The court would ensure that the arbitration was conducted fairly and in lending the means at the court's disposal, make the award effective. The court should not second-guess the award. The court should be as mechanistic as possible. *Norsk Hydro ASA v State Property Fund of Ukraine* [2002] EWHC 2120 (Comm) followed; *Walker v Rome* [1999] 2 All ER (Comm) 961; *Gater Assets Ltd v Nak Naftogaz Ukrainiy* [2008] EWHC 1108 (Comm) considered (paras 46-48).

(2) The court, when considering an application for enforcement of a Mainland arbitral award under s 2GG of the Ordinance, must be vigilant against attempts to go behind the award and re-argue matters which were either argued before the arbitrators or (if not) ought to have been argued before them, in the guise of dealing with questions of public policy. Each particular case must be scrutinised to see the extent to which (if at all) domestic public policy truly militated against (and was outraged by) the enforcement of a Mainland arbitral award. Unless an award was plainly incapable of performance such that it would be obviously oppressive to order a party to comply with it, the court could not, consistent with the mechanistic principle, hold that the award was contrary to public policy and refuse to convert the award into a judgment of the court. Where the best that could be said was that an award was arguably impossible, no compelling reasons for refusal of enforcement on public policy grounds could have been made out. Otherwise, the court would have to go behind the award, thereby allowing the re-opening of what the arbitrators had already decided. If a party to the arbitration genuinely believed that there was something impossible or somehow invalid about the award, then since the agreement as

<sup>66</sup> See above, paragraphs 37 and 38.

<sup>67</sup> [2008] 6 HKC 287.

to the seat of an arbitration was analogous to an exclusive jurisdiction clause, it was incumbent upon that party to challenge the award in the court of the seat of arbitration, which in the present case would be the court in Beijing. It could not be for the court of enforcement to second-guess how the arbitral tribunal or the court of supervision at the seat of arbitration might assess the relevant facts and law in determining whether the alleged impossibility was substantive or fanciful. *Hebei Import & Export Corp v Polytek Engineering Co Ltd* [1999] 2 HKC 205, [1999] 1 HKLRD 665; *A v B* [2007] 1 Lloyd's Rep 237; *C v D* [2008] 1 Lloyd's Rep 239 applied (paras 51-54, 58, 62, 69)."

66 Further, in *A v B*,<sup>68</sup> Colman J commented:

"111. At this point it is necessary to consider Swiss law and the consequences of the parties having designated Geneva as the seat of the arbitration. That part of their agreement had two consequences.

(i) Not only was the meaning of the terms of the arbitration agreement to be determined in accordance with Swiss law but so also was the effect of the alleged misrepresentation and duress or breach of the fiduciary duty on the enforceability of the arbitration agreement and the question whether, if proved, such misrepresentation, duress or breach of duty avoided the previous orders of the arbitrator;

(ii) Whether it should be the arbitrator or the court that decided in the first instance whether the arbitration agreement should be avoided *ab initio* or rescinded and, if the arbitrator, what right of recourse to the Swiss courts might be available to either party who wished to challenge the arbitrator's decision would be determined in accordance with Swiss law exclusivity in the Swiss courts, Geneva being the place of the seat of the arbitration. For an agreement as to the seat of an arbitration is analogous to an exclusive jurisdiction clause. Any claim for a remedy going to the existence or scope of the arbitrator's jurisdiction or as to the validity of an existing interim or final award is agreed to be made only in the courts of the place designated as the seat of the arbitration. It is thus not merely, as was stated by Lord Phillips in the Court of Appeal judgment in this case, that the 'natural consequence' of the arbitration agreement was that any issue as to the validity of the arbitration provisions would fall to be resolved in Switzerland according to Swiss law, but that it would be a breach of agreement to invite the courts of any other place to resolve such an issue or at least to order a remedy founded on such resolution. This analysis reflects international arbitration practice over the entire period since the coming into effect of the New York Convention. The provisions of Article V of that Convention rest on that basis. In *Naviera Amazonica Peruana SA v Compania Internacional de Seguros del Peru* [1988] 1 Lloyd's Rep 116 Kerr LJ observed at page 119:

'English law does not recognise the concept of a "de-localised" arbitration (see Dicey & Morris at pp 541, 542) or of "arbitral procedures floating in the transitional firmament, unconnected with any municipal system of law" (*Bank Mellat v Helliniki Techniki SA* [1984] QB 291 at p 301 (Court of Appeal)).

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<sup>68</sup> [2006] EWHC 2006 (Comm), [2007] 1 Lloyd's Law Reports 237.

Accordingly, every arbitration must have a “seat” or *locus arbitri* or forum which subjects its procedural rules to the municipal law there in force . . . *Prime facie*, i.e. in the absence of some express and clear provision to the contrary, it must follow that an agreement that the curial or procedural law of an arbitration is to be the law of X has the consequence that X is also the law of the “seat” of the arbitration. The *lex fori* is then the law of X and, accordingly, X is the agreed forum of the arbitration. *A further consequence is then that the courts which are competent to control or assist the arbitration are the courts exercising jurisdiction at X.*’

112. Accordingly, anything done by any party which was contrary to this second consequence of the agreement whereby supervisory jurisdiction was vested exclusively in the Swiss courts would in substance equally amount to a breach of the agreement to arbitrate. In such a case, the parties having agreed not only on the jurisdiction of the arbitral tribunal over their substantive disputes but also on the jurisdiction of the court of the seat over such issues as whether the arbitrator’s jurisdiction was wholly or partly impeached by the alleged fraud or duress or breach of professional duty, either party would be in breach of contract in litigating any such matters in the English courts. Just as an application for a foreign anti-suit injunction in the English courts in the face of a foreign exclusive jurisdiction clause is tested by the principles set out in *The El Amria* [1981] 2 Lloyd’s Rep 119 and *Donohue v Armco Inc* [2002] 1 Lloyd’s Rep 425: there must be strong ‘cause’ or ‘reasons’ in the interests of justice for the English courts to retain jurisdiction in the face of a contract to refer disputes to a foreign tribunal so also must an application directly to restrain a foreign arbitral tribunal from proceeding with the reference in circumstances where the courts of a foreign jurisdiction have been agreed to be exclusively vested with that function.”

67 Similarly, in *C v D*,<sup>69</sup> the English Court of Appeal noted:<sup>70</sup>

“[17] It follows from this that a choice of seat for the arbitration must be a choice of forum for remedies seeking to attack the award. As the judge said (at [27]), as a matter of construction of the insurance contract with its reference to the English statutory law of arbitration, the parties incorporated the framework of the 1996 Act. He added that their agreement on the seat and the ‘curial law’ necessarily meant that any challenges to any award had to be only those permitted by the 1996 Act. In so holding he was following the decisions of Colman J in *A v B* [2006] EWHC 2006 (Comm), [2007] 1 All ER (Comm) 591 and *A v B* (No 2) [2007] EWHC 54 (Comm), [2007] 1 All ER (Comm) 633 in the first of which that learned judge said (at [111]):

‘an agreement as to the seat of an arbitration is analogous to an exclusive jurisdiction clause. Any claim for a remedy going to the existence or scope of the arbitrator’s jurisdiction or as to the validity of an existing interim or final award is agreed to be made only in the courts of the place designated as the seat of the arbitration.’

That is, in my view, a correct statement of the law.”

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<sup>69</sup> [2007] EWCA Civ 1282, [2008] 1 All ER (Comm) 1001.

<sup>70</sup> [2007] EWCA Civ 1282, [17] (Longmore LJ).

68 Finally, reference should be made to the judgment of Prakash J in *Aloe Vera of America Inc v Asianic Food (S) Pte Ltd and Anor*<sup>71</sup> where, consistently with the approach indicated in the cases which have just been considered, her Honour said that she did not think it was correct for an enforcing court under the New York Convention “to go behind the holding on the merits on this aspect that has been made by the Arbitrator except to the extent that this is permitted by the Convention grounds during the second stage of the enforcement process”.<sup>72</sup> This position is, in my view, entirely consistent with the approach applied by the Supreme Court of the United Kingdom in *Dallah Real Estate and Tourism Holding Company v Ministry of Religious Affairs, Government of Pakistan*,<sup>73</sup> which is epitomised in the following passage from the judgment of Lord Collins:<sup>74</sup>

“100. Dallah relies in particular on international authorities relating to applications to annul awards on the basis that the matters decided by the arbitral tribunal exceeded the scope of the submission to arbitration: article V(1)(c) of the New York Convention; article 34 of the UNCITRAL Model Law. In *Parsons & Whittemore Overseas Co Inc v Soc Gén de l'Industrie du Papier*, 508 F2d 969 (2d Cir 1974) the Court of Appeals for the Second Circuit, in dealing with an attack on a Convention award based on Article V(1)(c), said (at p 976) that the objecting party must ‘overcome a powerful presumption that the arbitral body acted within its powers.’ That statement was applied by the British Columbia Court of Appeal, in a case under article 34 of the Model Law as enacted by the International Commercial Arbitration Act, SBC 1986: *Quintette Coal Ltd v Nippon Steel Corp* [1991] 1 WWR 219 (BCCA).

101. These cases are of no assistance in the context of a challenge based on the initial jurisdiction of the tribunal and in particular when it is said that a party did not agree to arbitration. Nor is any assistance to be derived from Dallah’s concept of ‘deference’ to the tribunal’s decision. There is simply no basis for departing from the plain language of article V(1)(a) as incorporated by section 103(2)(b). It is true that the trend, both national and international, is to limit reconsideration of the findings of arbitral tribunals, both in fact and in law. It is also true that the Convention introduced a ‘pro-enforcement’ policy for the recognition and enforcement of arbitral awards. The New York Convention took a number of significant steps to promote the enforceability of awards. The Geneva Convention placed upon the party seeking enforcement the burden of proving the conditions necessary for enforcement, one of which was that the award had to have become ‘final’ in the country in which it was made. In practice in some countries it was

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<sup>71</sup> [2006] SGHC 78.

<sup>72</sup> [2006] SGHC 78, [47]; and see this and the related passages from this judgment which provide further context; at paragraph 49, above; see also paragraphs 47 and 48.

<sup>73</sup> [2010] UKSC 46.

<sup>74</sup> [2010] UKSC 46, [100]-[104].

thought that that could be done only by producing an order for leave to enforce (such as an exequatur) and then seeking a similar order in the country in which enforcement was sought, hence the notion of ‘double exequatur’ (but in England it was decided, as late as 1959, that a foreign order was not required for the enforcement of a Geneva Convention award under the Arbitration Act 1950, section 37: *Union Nationale des Co-opératives Agricoles des Céréales v Robert Catterall & Co Ltd* [1959] 2 QB 44). The New York Convention does not require double exequatur and the burden of proving the grounds for non-enforcement is firmly on the party resisting enforcement. Those grounds are exhaustive.

102. But article V safeguards fundamental rights including the right of a party which has not agreed to arbitration to object to the jurisdiction of the tribunal. As van den Berg, *The New York Arbitration Convention of 1958* (1981) puts it, at p 265: ‘In fact, the grounds for refusal of enforcement are restricted to causes which may be considered as serious defects in the arbitration and award: the invalidity of the arbitration agreement, the violation of due process, the award *extra or ultra petita*, the irregularity in the composition of the arbitral tribunal or the arbitral procedure, the non-binding force of the award, the setting aside of the award in the country of origin, and the violation of public policy.’ In *Kanoria v Guinness* [2006] 1 Lloyd’s Rep 701, 706, May LJ said that section 103(2) concerns matters that go to the ‘fundamental structural integrity of the arbitration proceedings.’

103. Nor is there anything to support Dallah’s theory that the New York Convention accords primacy to the courts of the arbitral seat, in the sense that the supervisory court should be the only court entitled to carry out a re-hearing of the issue of the existence of a valid arbitration agreement; and that the exclusivity of the supervisory court in this regard ensures uniformity of application of the Convention. There is nothing in the Convention which imposes an obligation on a party seeking to resist an award on the ground of the non-existence of an arbitration agreement to challenge the award before the courts of the seat.

104. It follows that the English court is entitled (and indeed bound) to revisit the question of the tribunal’s decision on jurisdiction if the party resisting enforcement seeks to prove that there was no arbitration agreement binding upon it under the law of the country where the award was made.”

As Lord Mance makes clear, this is not an attack upon or a detraction from the principle of *Kompetenz Kompetenz*. It does not follow that this principle requires or implies that the exercise by an arbitral tribunal of the power or jurisdiction to determine the extent of its own jurisdiction is necessarily unreviewable by the courts under certain circumstances; such as in enforcement proceedings under the New York Convention.<sup>75</sup> In this respect, it is helpful to note the following passage from Fouchard, Gaillard and Goldman’s *International Commercial Arbitration*,<sup>76</sup> which Lord

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See [2010] UKSC 46, [20]-[26].

<sup>76</sup>

(1999) (Kluwer); the reference below being the first three sentences of paragraph 659 of that text.

Mance set out with approval:<sup>77</sup>

"Even today, the competence-competence principle is all too often interpreted as empowering the arbitrators to be the sole judges of their jurisdiction. That would be neither logical nor acceptable. In fact, the real purpose of the rule is in no way to leave the question of the arbitrators' jurisdiction in the hands of the arbitrators alone. Their jurisdiction must instead be reviewed by the courts if an action is brought to set aside or to enforce the award."

Lord Collins also discussed this issue and expressed similar views;<sup>78</sup> as did Lord Saville, though more briefly.<sup>79</sup>

69 The plaintiff submitted that the crucial and simple point is that the Arbitral Tribunal has already decided the issue that the second defendant, IMC Solutions, seeks to agitate in this proceeding and that it is not for the plaintiff to lead extensive and further evidence (as the second defendant suggests) as to the process and the reasoning that the Arbitral Tribunal went through in coming to its findings in the Award. The Award is, it was submitted, undoubtedly valid and binding under Mongolian law. It was said that to the extent that the second defendant disputes this proposition, its remedy was to go to the Mongolian courts. In light of these authorities, the position is, in my view, that a party seeking to resist enforcement of an award is not entitled to relitigate and revisit the issues the subject of the arbitration; a position made clear, for example, by Lord Collins in *Dallah Real Estate and Tourism Holding Company v Ministry of Religious Affairs, Government of Pakistan*.<sup>80</sup> Clearly, if this were permitted, the utility of international arbitration would be diminished markedly as a result of the cost and delay of, in effect, repetition of the arbitration proceedings again before an enforcing court. This would be very reminiscent of the former case stated procedure which afflicted domestic arbitrations by allowing this to occur until merits appeals were constrained significantly by, for example, the Australian uniform domestic arbitration legislation.<sup>81</sup> The problem would be even more acute with international arbitration where there may be a

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<sup>77</sup> [2010] UKSC 46, [22].

<sup>78</sup> [2010] UKSC 46, [79]-[83].

<sup>79</sup> [2010] UKSC 46, [158].

<sup>80</sup> [2010] UKSC 46, [101]; set out above, paragraph 68.

<sup>81</sup> Enacted in Victoria as the *Commercial Arbitration Act 1984* (Vic).

multiplicity of national courts involved; the supervising court of the arbitral seat and possibly more than one enforcing court, depending upon matters such as the location of the award debtor's assets. It would, of course, be intolerable if the law was that an award creditor could be required to relitigate matters which were the subject of the arbitration; possibly many times and in a multiplicity of courts, and with the possibility of inconsistent findings. Thus, as Lord Collins said, the New York Convention introduced a "pro-enforcement" policy for the recognition and enforcement of foreign arbitral awards by, among other things, limiting the extent to which courts could examine the findings of and procedures applied by arbitral tribunals. This policy and approach manifests itself in Article V of the Convention and, in Australia, in sub-s 8(5) of the IAA. Consequently, a party seeking to resist the enforcement of an award is entitled to rely on the grounds provided for in the Convention, and in the legislation applying its provisions, but is not entitled to venture further towards reconsideration of the findings, substantive or procedural, of the arbitral tribunal.

### **Estoppe**

- 70 It is clear from the judgment (in the Court of Appeal and the Supreme Court) in *Dallah Real Estate and Tourism Holding Company v Ministry of Religious Affairs, Government of Pakistan*<sup>82</sup> and other authorities that a ruling by a supervising court at the arbitral seat may also raise certain issue estoppels binding on the courts at the place of enforcement.
- 71 The question of estoppel in this context was considered in the Hong Kong High Court in *Jiangxi Provincial Metal & Mineral Import and Export Corporation v Sulanser Co Limited*,<sup>83</sup> a case where the defendant, which had itself participated in arbitration proceedings, subsequently sought to avoid enforcement of the arbitral award on the basis that there was no written agreement between the parties, that the China International Economic and Trade Arbitration Commission ("CIETAC") had no jurisdiction, and that the arbitration proceedings were contrary to the law of China.

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<sup>82</sup> [2010] 1 All ER 592 (CA); and [2010] UKSC 46.

<sup>83</sup> [1995] 2 HKC 373.

The defendant was, nevertheless, held to be bound by the arbitral award. In this context, Leonard J said:<sup>84</sup>

"The defendant wanted to call evidence as to Chinese law in order to show that the arbitration agreement was invalid. I ruled that the defendant was estopped from claiming in this court that the arbitration agreement was invalid.

The question of estoppel was discussed by Kaplan J, as he then was, in the case of *China Nanhai Oil Joint Service Corp Shenzhen Branch v Gee Tai Holdings Co Ltd* [1994] 3 HKC 375 at pp 384-387 of the judgment. I respectfully agree with what he said there and, just as Kaplan J felt able to apply the doctrine of estoppel to the conduct of the defendant in that case so I find that the doctrine applies here and it is not now open to the defendant to take a point as to the validity of the arbitration agreement in Chinese law. Not only the Wuhan Maritime Court but also the CIETAC Arbitration Tribunal, one of the members of which had been appointed by the defendant, held that the agreement was valid and the defendant then defended the claim on the merits.

An example of the application of the doctrine of issue estoppel in relation to arbitration is to be found in the decision of the Privy Council in *South British Insurance Co Ltd v Gauci Bros & Co* [1928] AC 352 where it was held that when an action on a contract has been dismissed upon a contention by the defendant that an award is a condition precedent to the right to sue, and the claim is then submitted to arbitration, the defendant is precluded from contending that the award is bad in that the arbitrators had not jurisdiction to construe the contract, but only to determine the sum (if any) due. See also *The Sennar (No 2)* [1995] 1 WLR 490 where it was held in the House of Lords that issue estoppel is applicable to an award resulting from arbitration proceedings. In the present case, the award was made by a tribunal with jurisdiction, was final and conclusive and was made on the merits."

72 The headnote of the decision of Reyes J in Hong Kong in the case of *A v R*<sup>85</sup> indicates a similar view and approach:

"(7) In summary, there was no injustice here which cried out for redress, or basis for refusing enforcement as a matter of public policy. What the respondent was trying to do was to re-open the dispute to enable it to argue points which ought to have been raised in the arbitration. That was an abuse of process. Either the arbitration or the Danish Court would have been a proper forum in which to take the penalty clause argument if it was thought that there was any validity to it. Given that the argument had not been so raised, this court should regard the respondent as now estopped from taking the point. The respondent found itself in its present predicament as a result of its own decisions as to the conduct of its defence in the arbitration. Its complaint could not by any stretch of the imagination qualify as a matter which 'shocked the conscience', and the test for the public policy ground

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<sup>84</sup> [1995] 2 HKC 373, 378-9.

<sup>85</sup> [2010] 3 HKC 67.

was not met here. *Hebei Import & Export Corp v Polytek Engineering Co Ltd* [1999] 2 HKC 205 considered (paras 33, 60-65)".

73 This approach was also approved by Prakash J in *Aloe Vera of America Inc v Asianic Food (S) Pte Ltd*,<sup>86</sup> an approach which is consistent with the distinction made between the role of the supervisory court and the enforcing court set out in the judgment of Sir Anthony Mason in *Hebei Import & Export Corp v Polytek Engineering Co Ltd*,<sup>87</sup> as quoted by Justice Prakash in the *Aloe Vera* case.<sup>88</sup>

74 On this basis, the correct approach is, in my view, clear from the following statement by Prakash J in *Aloe Vera of America Inc v Asianic Food (S) Pte Ltd*.<sup>89</sup>

"56 The fact that the Award may be final in Arizona does not therefore mean that Mr Chiew is excluded or precluded from resisting enforcement in Singapore. He may still resist enforcement of the Award provided that he is able to satisfy one of the Convention grounds under s 31(2) of the Act. The grounds on which enforcement of an award may be resisted under the Act, however, are not the same grounds that would entitle Mr Chiew to set aside the Award in the jurisdiction of the supervisory court. Whilst Mr Chiew's options may be cumulative, that does not mean that the bases on which the options may be exercised are or must be identical. Mr Chiew could have challenged the Award in Arizona on the basis that the Arbitrator had no jurisdiction to make the Award because Mr Chiew was not a party to the arbitration agreement. He may be able to resist enforcement here if he can establish that the arbitration agreement was 'not valid under the law to which the parties have subjected it' within the meaning of that phrase in s 31(2)( b). He is not, however, entitled to object to the initial grant of leave to enforce on the basis that the Arbitrator erred in holding that he was a party to the arbitration. As the enforcement court, I can only permit Mr Chiew to resist enforcement if he is able to establish one of the grounds set out in s 31(2) of the Act. Except to the extent permitted by those grounds, I cannot look into the merits of the Award and allow Mr Chiew to re-litigate issues that he could have brought up either before the Arbitrator or the supervisory court. As Mason NPJ also pointed out in the *Hebei* case, a party may be precluded by his failure to raise a point before the court of supervisory jurisdiction from raising that point before the court of enforcement. This is because failure to raise such a point may amount to an estoppel or a want of *bona fides* such as to justify the court of enforcement in enforcing an award. This, in fact, is what happened to the Government of Lithuania in the *Svenska Petroleum* case."

75 It was submitted that the judgments of the Court of Appeal in *Dallah Real Estate and*

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<sup>86</sup> [2006] SGHC 78, [51] and [52].

<sup>87</sup> [1999] 2 HKC 205.

<sup>88</sup> [2006] SGHC 78, [55].

<sup>89</sup> [2006] SGHC 78, [56].

*Tourism Holding Company v Ministry of Religious Affairs, Government of Pakistan*<sup>90</sup> indicate that there may be cases where the enforcing court would, under common law principles, be bound by an estoppel by record or an issue estoppel where the arbitral award has been tested and accepted in its home jurisdiction, the seat of the arbitration.<sup>91</sup> It was submitted that the present case is a case where estoppel applies and that, unlike the position in *Dallah's* case, the Award has been tested and verified by the courts of the arbitral seat. The evidence was that the courts of Mongolia, a civil law jurisdiction, having been asked to verify the award would, in approaching that task, act not merely as a "rubber stamp" for the evidence presented by one party, but satisfy themselves by proper inquiry that the requirements of the Mongolian civil code which are applicable have been made out.<sup>92</sup> The Mongolian courts verified the award.<sup>93</sup>

### **Grounds for resisting enforcement**

- 76 In addition to the position of the second defendant, IMC Solutions, that the Award is not binding on the basis that the plaintiff has failed to satisfy the "threshold issue" provided by sub-s 8(1) of the IAA, reliance was also placed on the provisions for resisting enforcement provided for in sub-ss 8(5) and (7) of the IAA, provisions which are reflected in Article V of the New York Convention. Consideration is now given to the provisions of sub-ss 8(5) and (7) relied upon by the second defendant, IMC Solutions, paragraph by paragraph of those sub-sections. As a general comment, it should be observed that the evidence relied upon by the plaintiff and the second defendant does, in many respects, impinge on the possible application of all these provisions (as do the submissions of these parties). Consequently, though the consideration of the evidence is set out provision by provision, with cross references, it should not be viewed in isolation, provision by provision,

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<sup>90</sup> [2010] 1 All ER 592 (CA). The Supreme Court refused leave to appeal in this case and, though not doubting the judgments below, did not find it necessary to deal with the estoppel issue, at least explicitly, on appeal.

<sup>91</sup> See [2010] 1 All ER 592 (CA), 609 at [47] and following (per Moore-Bick LJ), and p 620-4 at [84]-[90] (Rix LJ).

<sup>92</sup> See articles 40, 42 and 43 of the Mongolian Law on Arbitration which is contained in the *Business Laws of Mongolia* published by the National Legal Centre (Ulaanbaatar, 2008).

<sup>93</sup> See the affidavit of Gendenpil Batdorj (26 October 2010), paragraph 76.

*Section 8(5)(a) of the IAA: Party to Arbitration Agreement – that party, being a party to the arbitration agreement in pursuance of which the award was made, was, under the law applicable to him or her, under some incapacity at the time when the agreement was made*

- 77 The second defendant, IMC Solutions, submitted, as indicated previously, that it was not a party to the arbitration agreement in pursuance of which the Award was made. Rather, as I understand its submissions, it relied upon the defence or ground for resisting enforcement provided for in paragraph 8(5)(b) of the IAA. In any event, in the present circumstances, its submission that it was not a party to the relevant arbitration agreement is a matter which also arises in relation to the grounds specified in paragraph 8(5)(b) of the IAA and, accordingly, any issues raised by the second defendant in defence of enforcement which may be said to arise under paragraph 8(5)(a) of the IAA are dealt with with respect to the subsequent paragraph.

*Section 8(5)(b) of the IAA: Validity of Arbitration Agreement – the arbitration agreement is not valid under the law expressed in the agreement to be applicable to it or, where no law is so expressed to be applicable, under the law of the country where the award was made*

- 78 It is uncontroversial that the second defendant, IMC Solutions, is not expressly named as a party to the OMA, the agreement which contains, in clause 16, the agreement to arbitrate. The only defendant to these proceedings which is named is the first defendant, IMC Mining. Consequently, as indicated previously, with respect to the so-called “threshold issue” under sub-s 8(1) of the IAA, the question arises whether the second defendant, IMC Solutions, is a party to the arbitration agreement, or is estopped from denying that it is a party to the arbitration agreement. This is the issue to be determined in the context of these proceedings and sub-s 8(5)(b).

- 79 In addition to containing an arbitration agreement in clause 16, the OMA also contains a variety of provisions with respect to the iron ore project in which IMC Mining was involved as a party to this agreement and, as found by the Arbitral Tribunal, also IMC Solutions. In relation to the arbitration agreement, the point was made, and is probably desirably emphasised in the present context, that there is a presumption of “separability”; that an international arbitration agreement is

separable from the underlying commercial contract with which it is associated or is contained. Born states the position as follows:<sup>94</sup>

"... virtually all authorities have held that the separability presumption applies in the context of recognition actions, as do the choice-of-law rules and the principles of contract formation, validity and legality that apply in actions to enforce arbitration agreements. In addition, however, three further issues arise in connection with consideration of the validity or scope of the parties' arbitration agreement that have particular relevance in a recognition action. These concern the burden of proof of an agreement to arbitrate, the preclusive effect of an arbitral tribunal's jurisdictional award and issues of waiver." (footnotes omitted)

- 80 In relation to the applicable law, the second defendant argued against the application of the law of Mongolia as the *lex arbitri* on two bases. The first was that the arbitration agreement provisions contained in clause 16 of the OMA provided for Mongolian law or Hong Kong law as alternatives. It was submitted by the second defendant that Mongolian law had not been properly selected as the applicable law to the arbitration proceedings. Secondly, in terms of determining the validity of the arbitration agreement, it argued that as the OMA provides that the law applicable to that agreement is the law of Queensland, that is the law properly applied to determine the validity of the arbitration agreement as it might affect the second defendant. The consequences of this argument appear to be, on the basis of the second defendant's submissions, that either the Arbitral Tribunal failed to properly determine the issue according to and applying the law of Queensland or that this is a question for the enforcing court, in the context of the defence or ground for resisting enforcement raised by sub-s 8(5)(b) of the IAA, to determine in accordance with the law of Queensland. In my opinion this argument is not maintainable. It is noted that the second defendant disputes that there was any agreement for the purposes of clause 16 of the OMA to apply Mongolian law for the purposes of the arbitration,<sup>95</sup> and, of course, the second defendant says that it is not a party to the arbitration agreement contained in this clause. However, it is not put that the OAM, including clause 16, did not subsist, at least vis-à-vis the first defendant, IMC Mining. The authorities are clear that an arbitration agreement, contained in a broader agreement,

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<sup>94</sup> Born, above n 24, 2781.

<sup>95</sup> See below, paragraph 84.

is separable from the other terms of that agreement.<sup>96</sup> Consequently, this means that under clause 16 of the OMA the arbitral seat is Mongolia and the *lex arbitri* is, subject to the agreement of the parties, to be Mongolian or Hong Kong law.<sup>97</sup> In the absence of any agreement of the parties to the OMA this would leave the Arbitral Tribunal to determine the proper law to be applied to the remainder of the agreement according to choice of law rules applicable under the law of Mongolia. However, the parties have agreed that the law applicable to the agreement in this sense is the law of Queensland. Presumably under the Mongolian choice of law rules this agreement of the parties would be applied; but there is no evidence before the court on this issue. In any event, it is not an issue which is relevant to this application and need not be pursued. It is, nonetheless, important to note that the evidence of the Mongolian law expert relied upon by the second defendant, IMC Solutions, Professor Mendsaikhan Tumenjargel, indicates the question whether an entity that has not signed the relevant contract can be considered a party to an arbitration agreement contained in that contract is a matter for the law of Mongolia; the law agreed to be applicable to the agreement not being treated as of any relevance. Thus Professor Tumenjargel deposed:<sup>98</sup>

**"Question 1. Can an entity that has not signed the relevant contract be considered a party to an arbitration agreement contained in that contract?"**

8. In accordance with Article 11.1 of the Arbitration law, an arbitration agreement is a voluntary action/with some exceptions/ by the parties. An entity that is not the party who expressed its intentions is not binding or relied on the arbitration agreement. However, an entity that has a common interest with or connected to a signed party with respect of the subject matter of the dispute may have an interest to participate in arbitration.
9. An entity that has not signed the contract which contains arbitration agreement may not be a party to this arbitration agreement except in following cases:
  - a) If provided in the laws and international agreements (inter-governmental agreements), any person/entity must participate in arbitral proceedings as a party in accordance with Article 13.2 of Civil

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<sup>96</sup> See above, paragraph 79.

<sup>97</sup> As identified below, I have found that the parties agreed to the law of Mongolia as the *lex arbitri* (see paragraph 84); and in relation to the choice of law applicable in enforcement proceedings, see paragraphs 80 to 83, below.

<sup>98</sup> Statement of Mendsaikhan Tumenjargel (14 October 2010), paragraphs 8 to 14.

Procedure Code. There is no national legislation on compulsory arbitration after 1990. However, there are the following international agreements on compulsory arbitration:

- (i) 1972 Moscow Convention on the Settlement by Arbitration of Civil Law Disputing form Economic, Scientific and technical Co-operation;
  - (ii) General conditions for sale of goods between foreign trading organizations of Republic of Mongolia and Republic of China/1988/;
- b) If any entity wishes to be a party to an arbitration agreement and has the consent of both parties, the entity can be a party. That can be arisen from submission of new arbitration agreement in accordance with Articles 11.1 and 11.2 of Arbitration law and/or real action pursuant to Article 2.6 of Arbitration Rules.
- c) It is possible to become a party to an arbitration for an entity that is not a party to the arbitration agreement when the entity is being represented or being co-obligor and a subcontractor and an assignee under legal or contractual assignment or delegation of rights, or when implementing a contract in favour of third party according to civil law provisions. These legal rules will be clarified further.

**Question 2. If yes to Question 1, by what legal rules?**

10. The three cases, in which an entity that has not signed the relevant contract can be considered a party to an arbitration agreement contained in that contract, are mentioned in Section 9 of the Opinion where grounds for the first and second cases are clearly explained. However, the last case, which will be explained in detail in the following sections, can be created as stated by law (civil law) or contract.
11. *Agent/Representation.* Principal shall solely bear the responsibility for consequences from a contract contained an arbitration agreement made by Proxy/representative/agent within the mandate delegated by him/her (Article 63.2 of Civil Code) and there is no doubt with respect of the party to arbitration agreement from the principal. If a principal acknowledges/recognizes later a person that is acted without authorization as an agent, the principal shall be a party to the arbitration in accordance with Article 68 of Civil Code. If a principal gives a comprehension to the Proxy (Article 65 of Civil Code) that he has a proper proxy or mandate and that is ascertained, the principal shall be binding by the contract concluded by the Proxy. However, the comprehension issue is controversial and determined as case by case.
12. *Participation of several persons in one obligation/Co-obligors.* This issue is regulated in Articles 241 and 242 of Civil Code of Mongolia. To transfer rights and obligations is a main ground of participation of several persons in one obligation. Furthermore, there are other grounds of participation of several persons in one obligation: participation of a third party in the obligation, main contractor and

sub-contractor (Article 210 and 347) of Civil Code) are stated in Article 210 of Civil Code. Pursuant to Article 9.5 of the Company law of Mongolia, shareholders of a company shall jointly liable for the company's responsibility. However, it is still controversial under Mongolian laws whether any co-obligor or co-obligee whose interest is being affected by the conclusion of arbitration agreement by other co-obligors or co-obligees is to become a party to that arbitration agreement and that should be determined by case by case.

13. *Assignment/transfer of rights and obligation.* Assignment of rights and obligation shall be executed under the law or contract. Transferring under the contract is regulated in Articles 123, 124 of Civil Code. However, some contracts have special legal regulations with respect of transferring rights and obligation, for instances, transfer of rights and obligation to third party under a contract which is in favour of a third party (Article 210.4 of Civil Code), transfer of assignment to another person (Article 404 of Civil Code), pledge (Article 157.7 of Civil Code), guarantee (Article 465 of Civil Code), lawful inheritance under the law (Articles 521.1 and 522.1 of Civil Code), acquisition or merger of companies (Articles 19 and 20 of Company law), bankruptcy (Law on Bankruptcy) etc. If rights and obligations of contract are legally and fully transferred to an assignee, the assignee shall be a party to the arbitration as same as the assignor. If the transfer is a partial transfer, then it is a controversial and there is no practice yet, which will depend on whether an arbitration agreement is attributed to right or to obligation and whether the arbitration agreement has been transferred specifically.
14. *Contract in favor of third party.* The general regulations for this kind of contract are envisaged in Article 203 of Civil Code. Some special conditions and the rights and duties of Consignee in the Consignment contract (Article 390 of Civil Code) and insurance policy/contract in favour of third party (Article 441 of Civil Code). It is again controversial that if claiming right/lien was legally transferred to a third party, the party will be a direct party to the arbitration agreement and that will depend on whether an arbitration agreement is attributed to right or to obligation and whether the arbitration agreement has been transferred fully.

81 Similarly, in the course of discussing the choice of law rules applicable to arbitration agreements in enforcement proceedings, Born observed:<sup>99</sup>

"... As discussed above, the same choice-of-law rules that apply to the recognition and enforcement of arbitration agreements also apply in the context of the recognition and enforcement of arbitral awards under Article V: it would make no sense - and the Convention was never conceived - to require application of different choice-of-law standards at different stages of the arbitral process.

As also discussed above, it is essential to distinguish between the choice-of-law governing different aspects of the arbitration agreement. In particular,

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<sup>99</sup> Born, above n 24, 2782.

different choice-of-law rules apply to, and different substantive laws are potentially applicable to, the formation and substantive validity of arbitration agreements, the formal validity of arbitration agreements and the capacity of the parties to arbitration agreements.” (footnotes omitted)

- 82 Born’s discussion continues, noting that Article V(1)(a) of the New York Convention contains within its provisions conflict of law rules for selecting the law governing the substantive validity of the arbitration agreement made by the parties. In this respect, it should be kept in mind that paragraph 1(a) of Article V of the New York Convention may, in many respects, be treated as a conflation of paragraphs 8(5)(a) and (b) of the IAA.<sup>100</sup> Born says:<sup>101</sup>

“... Under Article V(I)(a) an award need not be enforced if the parties’ arbitration agreement ‘is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made’.”

And continuing:

“... Article V(I)(a) confirms (and requires) that the law governing the substantive validity of an international arbitration agreement is the law selected by the parties. That conclusion is consistent with contemporary acceptance of principles of party autonomy, both in national court decisions and other international arbitration instruments.” (footnotes omitted)

- 83 The clearest application of these principles is, as submitted by the plaintiff, to be found in the decision of Prakash J in the High Court of Singapore in *Aloe Vera of America Inc v Asianic Food (S) Pte Ltd & Anor.*<sup>102</sup> As has been noted, the facts and issues considered in the *Aloe Vera* case are relevantly similar to those raised in the present proceedings. It will be recalled that the submission made against enforcement in that case was that the person against whom the award was sought to be enforced was not a party to the agreement which contained the arbitration clause. Significantly with respect to the present issue, Prakash J said:<sup>103</sup>

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<sup>100</sup> The relevant provisions of the IAA are set out in paragraph 39, above. Article V(1)(a) of the Convention reads:

“(a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made ...”

<sup>101</sup> Born, above n 24, 2782.

<sup>102</sup> [2006] SGHC 78, [58] and following.

<sup>103</sup> [2006] SGHC 78, [62]-[63]; and see above, paragraphs 46 to 49.

"62. The same argument was brought before the assistant registrar who correctly held that the issue as to whether there was a valid arbitration agreement had to be determined on the basis of foreign law. He also recognised that Mr Chiew had the burden to adduce evidence to establish his contention. The assistant registrar found that Mr Chiew had failed to adduce such evidence. On the contrary, the evidence showed that Mr Chiew had signed the Agreement and was also active in running Asianic. The assistant registrar found support from the reasoning of the US District Court decision in the *Sarhank* case. Batts J who decided it at first instance stated:

'[T]he court has been asked to enforce an international arbitral award in which arbitrability has already been established under the laws of Egypt. ...

...

[T]he Convention ... does not sanction second-guessing the arbitrator's construction of the parties' agreement. ... It is well-settled that absent "extraordinary circumstances", a confirming court is not to reconsider the arbitrators' findings. ...

...

[The arbitrators'] conclusion of partnership under the contract is one of "constriction of the parties' agreement" and will not be reviewed by the Court, absent extraordinary circumstances. In the instant case, no such extraordinary circumstances exist.'

Whilst the decision of Batts J may have been reversed by the Court of Appeals, I respectfully agree with his observations which are in line with the general approach taken by an enforcement court to the decision of the arbitral tribunal in question. They are also consonant with the views of the court in the *Hebei* case which underline that the approach towards the decisions of foreign arbitral tribunals in Convention countries is to recognise the validity of the same and give effect to them subject to basic notions of morality and justice. The Court of Appeals in the *Sarhank* case took a different view, one that I hope will not be generally endorsed.

63. The only evidence that Mr Chiew adduced of the law of Arizona was contained in an affidavit filed by one Mr Steven Sullivan. Mr Sullivan was Mr Chiew's attorney in Arizona and, at the hearing below, it was conceded that Mr Sullivan was not acting as an expert but as an advocate for Mr Chiew. There was therefore no independent expert evidence from Mr Chiew on the law of Arizona as it applied to the Award. Also, as the assistant registrar found, Mr Sullivan's affidavit essentially contained a rehash of the arguments (based on Arizona laws, Arizona Rules of Civil Procedure and AAA rules) which were raised before the Arbitrator and, subsequently, adjudicated and rejected by the Arbitrator. Since Mr Chiew had not adduced expert evidence to show that the Arbitrator's findings are incorrect under Arizona law, I agree with the submission made by the plaintiff that there are no extraordinary circumstances warranting a review of the Award. I am not the supervisory court and cannot review the Arbitrator's decision in the same way that an Arizona court could. For me to refuse to enforce the Award on this ground, I would need to be satisfied that, under the law of Arizona, the arbitration agreement was invalid vis-à-vis

Mr Chiew and that the Arbitrator was not entitled to find that Mr Chiew was a party to the Agreement and the arbitration. No basis has been given to me for such a finding.” (footnotes omitted)

In this respect, Prakash J relied in part on the decision in *Hebei Import & Export Corporation v Polytek Engineering Company Limited*,<sup>104</sup> discussed above.<sup>105</sup>

- 84 It was also submitted by the plaintiff that the second defendant, IMC Solutions, admitted that the arbitration agreement was valid and binding against both it and the first defendant, IMC Mining. This was disputed by the second defendant.<sup>106</sup> An exhibit to the first Batdorj affidavit<sup>107</sup> contains what was said to be an agreement signed by the legal representatives of the first defendant, IMC Mining, and the plaintiff in the arbitration proceedings,<sup>108</sup> to the effect that the arbitration agreement was valid and that the dispute between the parties had been properly referred to the Arbitral Tribunal for determination. This document appears to be minutes or a record of the preliminary hearing of 24 July 2009. The second defendant, IMC Solutions, submitted that the nature of this document was not clear, and that it should not be assumed that it was an agreement on the part of either or both of the defendants with respect to the arbitration procedure or agreement. For the reasons that follow, I reject the submission that the nature and consequences of IMC Mining signing that document were unclear, particularly having regard to the nature of this document, which, in my view, is apparently a record of preliminary proceedings before the Arbitral Tribunal, which has been signed by the parties as a record of those proceedings and the agreements reached at those proceedings before the Arbitral Tribunal. IMC Solutions’ submission that signature by IMC Mining did not constitute an indication of IMC Mining’s acceptance of the document as a record of these proceedings is, in all the circumstances, simply implausible. Consequently, I accept the plaintiff’s submissions as to the nature of this document.

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<sup>104</sup> [1999] 2 HKC 205.

<sup>105</sup> See paragraphs 52 and 53.

<sup>106</sup> Second Defendant’s Outline of Submissions (28 September 2010), paragraph 13.

<sup>107</sup> Affidavit of Mr Gendenpil Batdorj (29 June 2010).

<sup>108</sup> In the first Batdorj affidavit, reference is made to documents said to be a minute or record of the preliminary hearing on 24 July 2009 signed by IMC Mining, which the plaintiff submits was also on behalf of IMC Solutions (see Exhibits GB-39 an English translation, and GB-40, being the original document in Mongolian).

85 The plaintiff further submitted that both defendants attended and were legally represented at this hearing, by virtue of the representative for IMC Mining acting for or on behalf of IMC Solutions.<sup>109</sup> As discussed further below,<sup>110</sup> this depends in part on an initial characterisation of the representative signing for IMC Mining acting for or on behalf of IMC Solutions, such that any signature or acceptance of the outcome of this hearing by IMC Mining was also given on behalf of IMC Solutions. The document referred to in the preceding paragraph, however, does not of itself shed light on the involvement or nature of any relationship of agency, alter ego, or any other form of relationship which the plaintiff argues IMC Mining agreed, assumed or entered into for and on behalf of IMC Solutions. Mr Stewart Charles Lewis, the present CEO of IMC Solutions, and the managing director of IMC Mining from 27 June 2007 to 4 September 2009, deposed that the document contained the signature of the first defendant's representative, Mr Bevan Jones, of IMC Mining, and that of its legal representative, Mr Bayartseteg of the Mongolian law firm Lehman, Lee & Xu ("Lehman"). Mr Lewis stated that these signatures were solely on behalf of IMC Mining, and not "on behalf of the Defendants" (as Mr Batdorj deposed to in the first Batdorj affidavit).<sup>111</sup> Mr Jones was appointed by Mr Lewis to manage the arbitration on IMC Mining's behalf. Mr Jones deposed that he attended this meeting on behalf of IMC Mining, and stated that he was not notified or made aware that any claim was made directly against IMC Solutions. Mr Jones exhibited a power of attorney, appointing Lehman, to act for and in relation to this preliminary hearing, and the arbitral proceedings generally, on behalf of IMC Mining.<sup>112</sup> The power of attorney contains very broad provisions with respect to Lehman's powers, together with more specific (but inclusive, rather than exclusive provisions) for "mediating communication with, raising questions from, exchanging information with and submitting explanations to the Client *and others*, when and where necessary" (emphasis added). No direct affidavit or other supporting evidence was provided by

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<sup>109</sup> See paragraph 100 of the Plaintiff's Further Submissions, dated 3 November 2010.

<sup>110</sup> See, particularly, paragraph 111 below.

<sup>111</sup> See paragraph 59 of the affidavit of Stewart Charles Lewis (14 October 2010); and paragraph 84 of the first Batdorj affidavit (29 June 2010).

<sup>112</sup> See exhibit BJ-4 to the affidavit of Bevan Jones (16 October 2010).

Lehman; which was surprising in all the circumstances, particularly having regard to the ambit of that firm's instructions and role, as apparently indicated by the power of attorney provisions.<sup>113</sup> Having regard to the onus of proof the second defendant must meet, particularly in the face of contrary evidence, and with reference to my findings below,<sup>114</sup> insofar as the evidence is inconsistent, I prefer the evidence of Mr Batdorj. In coming to this finding as to the preliminary hearing, I rely particularly on the first-hand nature of Mr Batdorj's evidence about the hearing, and the lack of similar directly responsive evidence adduced by the second defendant. It is apparent that Mr Batdorj attended the preliminary hearing in his capacity as the plaintiff's representative. By contrast, Mr Lewis, who assiduously denied the assertions that IMC Mining acted for or on behalf of IMC Solutions at this meeting, was not present at the meeting, and deposed that although he was "from time to time consulted about the progress", as he was not resident in Mongolia, he left the management of the arbitration "principally" to Mr Jones.<sup>115</sup> Furthermore, no direct evidence supporting Mr Lewis' denials, or evidence contrary to that of Mr Batdorj in this respect, was forthcoming from any of the then employees or contractors of either of the defendants who were present at the hearing. As the plaintiff submitted, nowhere does Mr Jones rebut the evidence of Mr Batdorj that he was acting for both defendants and support the evidence of Mr Lewis that he did not have authority, nor purport to act on behalf of, the second defendant, IMC Solutions. Furthermore, no evidence was led from the Mongolian law firm (Lehman) which represented IMC Mining at this hearing, which would have assisted in clarifying the scope of its representation, if any, of the second defendant. Consequently I find that at the preliminary hearing on 24 July 2009 it was agreed, amongst other things, that between IMC Mining, IMC Solutions, and the plaintiff:

- (a) The Arbitral Tribunal had jurisdiction to hear and determine the dispute;
- (b) The dispute shall be resolved according to Mongolian law;

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<sup>113</sup> And see paragraph 107, below.

<sup>114</sup> See below, beginning at paragraph 98.

<sup>115</sup> See paragraph 58 or the affidavit Mr Stewart Charles Lewis (14 October 2010).

- (c) The arbitration hearing shall be held in Ulaanbaatar City, Mongolia; and
- (d) The language of the arbitration shall be Mongolian.

86 The document referred to in the preceding paragraph also refers extensively to the IMC interest in Australia. In the context of this document and the circumstances more generally, it is, in my view, not entirely clear that this is a reference to the IMC Australian interest, that is, IMC Mining Solutions Pty Ltd. In other words, the effect of this document and the agreements reached was to resolve the question whether Mongolian or Hong Kong law would be the *lex arbitri*, but it does not necessarily confirm, contain or evidence an agreement that both defendants were parties to the arbitration proceedings.<sup>116</sup> Nonetheless, in the context of the other matters referred to with respect to the arbitration proceedings, its contents are consistent with this position.

87 As has been noted, there was, as the plaintiff submitted, no real dispute that the arbitration clause contained in clause 16 of the OMA constituted a valid arbitration agreement under Mongolian law. Also as noted, the second defendant, IMC Solutions, does not deny the existence of the agreement but, rather, submitted that the arbitration agreement does not bind it on the basis that it was never a party to the OMA.

88 The affidavits of Mr Gendenpil Batdorj<sup>117</sup> contain extensive and detailed evidence as to the basis on which the plaintiff submitted that the second defendant, IMC Solutions, is and was a party to the OMA; as to its substantive provisions and the arbitration agreement. The second defendant's Outline of Submissions helpfully summarises the basis for the plaintiff's application to enforce the Award against IMC Solutions,<sup>118</sup> as contained in the first Batdorj affidavit, namely the assertions that:

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<sup>116</sup> But see below in relation to my reasons for finding that second defendant's defence under sub-s 8(5)(c) of the IAA, that it did not have proper notice of the arbitration proceedings or the opportunity present its case in the arbitration proceedings, fails (see paragraph 98 and following).

<sup>117</sup> The first of which is dated 29 June 2010, and a subsequent responsive affidavit dated 26 October 2010.

<sup>118</sup> See paragraph 108 of the Second Defendant's Outline of Submissions (3 November 2010) which is substantially in the same terms as paragraph 25 of the Second Defendant's Outline of Submission (28 September 2010).

- “a. at all relevant times, IMC [Mining] and / or IMC Mongolia LLC (IMCM) acted as the agent or representative of IMC Solutions - [16];
- b. that IMC [Mining], IMC Solutions and IMCM conducted their business as a common enterprise - [16];
- c. ‘for all intents and purposes, it was [IMC Solutions] which was the proper party to the contract...and... the arbitration’ - [16];
- d. ‘that [IMC Mining] and/or [IMCM] was the alter ego of the second defendant’ - [17];
- e. ‘it was both [IMC Mining and IMC Solutions] who entered into the Agreement’ - [22]; and / or
- f. to the extent that IMC [Mining] executed the agreement, ‘it did so as a representative for IMC Mining Solutions’ - [22].”

The first Batdorj affidavit also contains numerous references to documents, business cards, websites, email signatures, email addresses and the like, that Mr Batdorj submits result in:<sup>119</sup>

“an abundance of evidence which confirms that the second defendant, IMC Mining Solutions Pty Ltd, was the 'controlling mind' behind the IMC Group's involvement in the project. Further, it is submitted that there is an abundance of evidence which confirms that IMC Mining Inc and IMC Mongolia LLC acted as agent or representative for IMC Mining Solutions Pty Ltd on the project and provided services to the Plaintiff on the project at the direction of, on behalf of, or at the request of, IMC Mining Solutions Pty Ltd.” Further, I verily believe that the evidence shows that IMC Mining Inc and IMC Mongolia LLC conducted their business as a common enterprise with IMC Mining Solutions Pty Ltd.”

The second defendant submitted in response that at no point did Mr Batdorj identify the material he relied upon in coming to his conclusion, and the only reference to evidence given to the Arbitral Tribunal showing a connection between IMC Mining and IMC Solutions was the statement that oral evidence was given “of the involvement of both defendants and their employees in the project”.<sup>120</sup> A further criticism was made that the plaintiff had made no attempt to identify or exhibit that evidence. Consequently, the second defendant submitted that:<sup>121</sup>

“the assertions noted above about the alleged findings of the Arbitral Tribunal and the basis for its alleged findings are wholly without foundation

<sup>119</sup> See paragraph 78 of the first Batdorj affidavit.

<sup>120</sup> See paragraph 77 of the first Batdorj affidavit. See also paragraphs 110 to 112 of the Second Defendant’s Outline of Submissions (3 November 2010).

<sup>121</sup> Paragraph 113 of the Second Defendant’s Outline of Submission (3 November 2010).

and are not probative of IMC Solutions' liability or amenability to the submission to arbitration under the contract that Altain Khuder asserted was relevant, or to whether IMC Solutions was given notice of an opportunity to be heard regarding claims against it, including that IMC Inc was acting as its agent or alter-ego at relevant times."

The crux of the second defendant's submissions seems to be that although the Batdorj affidavit contains voluminous references to what Mr Batdorj considers to be "an abundance of evidence" showing that IMC Solutions is a valid party, there is no evidence that this was put before the Arbitral Tribunal. The implication that follows is that the Tribunal did not receive or consider this evidence, and thus any finding by the Tribunal against IMC Solutions cannot be maintained. However, it must be remembered, as discussed above,<sup>122</sup> that the second defendant faces a "heavy" onus of proof to successfully resist the enforcement of the Award once the 'evidentiary' provisions of the IAA are satisfied, particularly in light of the pro-enforcement and pro-arbitration environment that the IAA and the Convention represent.

- 89 In response to the second defendant's submissions, the plaintiff referred to what it deemed a paucity of evidence presented by the second defendant, entitling the court, in its opinion, to draw the inference that evidence not adduced by the second defendant, would not have supported its case.<sup>123</sup> It submitted that despite the voluminous documentary material initially identified by the second defendant in these proceedings, the final affidavit material presented by the second defendant contains very little in the way of documentation, and as such, it can reasonably be inferred that the documents that were put before the court are "presumably [the second defendant's] high watermark".<sup>124</sup> It was further submitted that the second defendant, despite foreshadowing that further information was being sought from a number of potentially relevant parties, did not present evidence from key employees, lawyers or contractors, and in the present context, particularly those who were present at the arbitration and had (on the basis of the second defendant's assertions as to the true position) the ability to directly rebut the assertions made in

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<sup>122</sup> Paragraphs 61 and following.

<sup>123</sup> See Plaintiff's Further Submissions (3 November 2010), para 84.

<sup>124</sup> See Plaintiff's Further Submissions (3 November 2010), para 77.

the Batdorj affidavits.<sup>125</sup> Particular reference was made to the absence of any evidence given by Mr Pat Kelly, who worked full-time on the mining project and participated in drafting the OMA, which contained the arbitration clause, and was present at its execution; in addition to holding himself out as a representative of IMC Solutions at various times.<sup>126</sup> The plaintiff further submitted that the second defendant failed to provide an explanation as to why such affidavit material was not made available, nor seemingly relevant witnesses called.<sup>127</sup> Reference was also made to the second defendant's lack of particulars as to an unspecified dispute that arose with Lehman, the Mongolian law firm retained for the period of the arbitration, such that no evidence beneficial to the second defendant's case was adduced.<sup>128</sup> A more detailed review of the evidence is set out below.<sup>129</sup> At this stage, I note simply the direct nature of Mr Batdorj's evidence; given by a party who was employed by the plaintiff during the relevant period, and who attended the hearings in question, in contradistinction to the lack of any evidence adduced by the second defendant that directly contradicted the evidence of Mr Batdorj, or provide an objective basis establishing a contrary position.

90 Nevertheless, the Arbitral Tribunal clearly considered the effect of the provisions of the OMA and the question of the parties to that agreement. This is clear from various parts of the Award. At page 13-5 of the Award, the tribunal held that:

"The fact that Stewart Lewis, a management member of IMC Mining Solutions Pty Ltd signed the Operations Management Agreement for the Iron Ore Project dated 13 February 2008 on behalf of the Defendant proves that IMC Mining Solutions Pty Ltd has been involved in the project implementation from the very beginning."

At page 12-5 of the Award:

"IMC Mining Solutions Pty Ltd failed to direct the Defendant towards release and submission of project cost details and expenditure reports although Stewart Lewis, a management member of IMC Mining Solutions Pty Ltd

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<sup>125</sup> See Plaintiff's Further Submissions (3 November 2010), paras 78-9, 85.

<sup>126</sup> See the Plaintiff's Further Submissions (3 November 2010), para 85. The second defendant sought to characterise these representations of Mr Kelly as "mistakes"; a point that Mr Stewart Lewis – and notably, not Mr Kelly – seeks to explain in paragraphs 48, 106, 108, and 116 of his own affidavit)

<sup>127</sup> See Plaintiff's Further Submissions (3 November 2010), para 81.

<sup>128</sup> See Plaintiff's Further Submissions (3 November 2010), para 84.

<sup>129</sup> See paragraphs 96 and following.

signed the Operations Management Agreement or the Iron Ore Project dated 13 February 2008 on behalf of the Defendant."

The Defendants failure to release and submit an annual work report and cost expenditure report led the parties to repudiation of the Agreement. ... "

In addition to finding against the first defendant, IMC Mining, the tribunal, presumably reflecting its findings extracted above, made an order against IMC Solutions, in the following terms:

"IMC Mining Solutions Pty Ltd of Australia, on behalf of IMC Mining Inc. Company of Australia, pay the sum charged against IMC Mining Inc. Company of Australia pursuant to this Arbitral Award"

- 91 The Award was made by the Arbitral Tribunal on 15 December 2009. Article 40.3 of the *Mongolian Law on Arbitration* provides for an application to the Mongolian courts to set aside the award provided that any appeal to annul an arbitration award is submitted within three months from the date of acceptance of the award. Neither of the defendants made any application to annul the Award in accordance with Article 40.3 and, consequently, they are now out of time to make such an application. This means that the Award is not only binding, but is also final and unable to be challenged in the Mongolian courts. It was also submitted by the plaintiff that not only is the Award not able to be challenged in the Mongolian courts, but the Mongolian courts have in fact verified the Award and the findings of the Arbitral Tribunal. The first Batdorj affidavit exhibits an order from Judge L. Oyun, a judge of the Khan-Uul District Court (being a competent court of record in Mongolia) dated 23 November 2009 in which Judge L. Oyun verified the Award, concluding that it was a legitimate award under Mongolian law and is capable of being enforced in accordance with the New York Convention.<sup>130</sup> It was also noted that Judge L. Oyun's Order is expressed to be final.
- 92 Articles 40, 42 and 43 of the *Mongolian Law on Arbitration* provide for a verification process for arbitral awards. Under these provisions, the successful party who has an award made in its or their favour (the award creditor, in this case Altain Khuder, the plaintiff) may apply to the Mongolian courts to have the award verified if the other party or parties (the award debtor or debtors, in this case the defendants) do not pay

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<sup>130</sup> Affidavit of Gendenpil Batdorj (29 June 2010), Exhibit 49.

the award sum. Under Articles 42.7 and 43 of the *Mongolian Law on Arbitration*, the court can choose to make the verification order or not. It will verify the order if there are “good reasons” to do so.<sup>131</sup> One of the matters which the court will consider is whether any of the matters set out in Article 40 would justify the court not making the verification order.<sup>132</sup> It is significant in the present circumstances that the Article 40 provisions identified by Article 43 are those listed in Article 40.2, provisions which reflect in large part the provisions of paragraph 1 of Article V of the New York Convention; provisions which are, in turn, reflected in the provisions of sub-s 8(5) of the IAA.<sup>133</sup>

- 93 It follows from these provisions that before a court in Mongolia will make a verification order, it will, under the provisions of the *Mongolian Law on Arbitration*, consider whether there is a valid arbitration agreement and if the parties to the

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<sup>131</sup> See Article 42.7.

<sup>132</sup> See Article 43.

<sup>133</sup> The provisions of Article 40.2 of the *Mongolian Law on Arbitration* are as follows:

“**CHAPTER SEVEN**

**APPEAL TO ANNUL ARBITRATION AWARD**

**Article 40.Appeal to annul arbitration award**

...

40.2.A court of appeal has a right to annul arbitration award only on the following cases:

40.2.1.if one party to arbitration agreement did not have legal capability or, arbitration agreement was invalid under the laws of a state, agreed upon by parties, if not agreed upon so under the laws of Mongolia;

40.2.2.if arbitration panel failed to notify the parties concerned about the appointment of arbitrators and arbitration proceedings or failed to provide the parties with the opportunity to make explanations on appeal, refusal, statement and other evidencing documents;

40.2.3.if arbitration panel breached the procedure agreed upon by the parties on composing arbitration panel and arbitration proceedings;

40.2.4.if arbitration panel passed award on issues that are not relevant to arbitration agreement and if it not viable to separate such irrelevant parts in arbitration award from the other parts thereof and annul;

40.2.5.if a particular dispute has been proven as not subject to jurisdiction of an arbitration dispute;

40.2.6.if a particular arbitration award infringes interests and national security issues of Mongolia.

...“

Also of relevance are the provisions of Article 43:

“**CHAPTER EIGHT**

**ACCEPTANCE OF ARBITRATION AWARD AND ENFORCEMENT THEREOF**

...

**Article 43.Refusal to confirm or enforce arbitration award**

43.1.A court of appeal may refuse to confirm or write enforcement notification for arbitration award on the following cases:

43.1.1.circumstances, stipulated in the Article 40.2, are identified;

43.1.2.if arbitration award has not come into force for parties concerned, or a court of a state, where arbitration award is passed suspended or annulled that particular award.”

award received proper notice of the arbitration proceedings and had the opportunity to present their case.<sup>134</sup>

94 Reference has previously been made to the principles of estoppel which may be applicable in circumstances like the present.<sup>135</sup> More particularly, as to estoppel in relation to the raising of defences or grounds for resisting enforcement of a foreign award under the New York Convention, reference was made to the judgment of the English Court of Appeal in *Svenska Petroleum Exploration AB v Lithuania* (No.2).<sup>136</sup> In considering the circumstances in which a party may be estopped from relying on the ground that it was not a proper party to the arbitration agreement in the course of an enforcement application, the Court of Appeal agreed with the conclusion reached by Gloster J at first instance, who decided that, on the basis that the award in question in that case was no longer capable of being challenged in Denmark (the seat of the arbitration), the award finally determined the question of the tribunal's jurisdiction.<sup>137</sup> On the question of recognition, the Court of Appeal noted that ordinarily it would be open for an award debtor to rely on the limited defences or grounds for resisting enforcement prescribed in the New York Convention on an enforcement application notwithstanding a failure to challenge the award before the supervisory court, the court of the seat of the arbitration.<sup>138</sup> Nevertheless, because the court had earlier decided that the award should be recognised and there had been no challenge to that decision, the Court of Appeal agreed that the award in question was to be regarded as having finally disposed of the issue of jurisdiction. In the present case, it was submitted that as the Award has been verified by the Mongolian court as being validly made in accordance with Mongolian law, the same position should apply. It was also noted that there has been no challenge to this finding by the Mongolian court by either the first or the second defendants. A

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<sup>134</sup> See Articles 40.2.1 and 40.2.2.

<sup>135</sup> See above, paragraphs 70 to 75.

<sup>136</sup> [2007] QB 886; and see paragraph 59, above.

<sup>137</sup> [2007] QB 886 at 921, [103]; a position consistent with *Dallah Real Estate and Tourism Holding Company v Ministry of Religious Affairs, Government of Pakistan* [2010] UKSC 46.

<sup>138</sup> [2007] QB 886 at 921, [104]; c.f. *Dallah Real Estate and Tourism Holding Company v Ministry of Religious Affairs, Government of Pakistan* [2010] UKSC 64 at 103 (Lord Collins), which is out above, paragraph 68. *Dallah* is, however, significantly distinguishable in this respect as it was not a case where the courts of the arbitral seat had confirmed or verified the arbitral award.

similar approach has been taken in various other cases.<sup>139</sup>

95 In summary, the Arbitral Tribunal held that it had jurisdiction to make an award against the second defendant, IMC Solutions, and its award has been verified by the Mongolian courts; and neither the Award nor the court order verifying the Award had been or are now able to be challenged. Although the evidence presented in these proceedings as to the second defendant's involvement through IMC Mining might be said to be unclear, it is not the role of this court to review a finding of consent to arbitrate, or at the least, a finding of common enterprise, or some other relationship of legal responsibility, made by both the Tribunal and the reviewing, supervising, court in the arbitral seat.<sup>140</sup> Consequently, in these circumstances, it was submitted, an issue estoppel arises and IMC Solutions ought not now be able to try and re-open these or related issues for the sole purpose of resisting enforcement.

96 It was also submitted by the plaintiff that shortly before the arbitration commenced, the second defendant, IMC Solutions, instructed its solicitors to write to the Mongolian National Arbitration Centre in an effort to try and "deflect" the arbitration proceeding. It appears that Mr Stewart Lewis, a director of both the first and the second defendants,<sup>141</sup> resigned as a director of IMC Mining on 4 September 2009, and "[a]s a result, IMC [Mining] was unrepresented at the arbitration hearing", presumably as he instructed the first defendant and the legal representatives representing both defendants not to attend the final hearing before the Arbitral Tribunal on 15 September 2009.<sup>142</sup> It was suggested by the plaintiff that now that IMC Solutions has received a decision which is not favourable to it, "in a last ditch attempt to resist enforcement", it now seeks to re-open an issue that it could have raised at the final arbitral hearing but for its deliberate decision not to attend. It was submitted that it should not be allowed to do this.

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<sup>139</sup> See *Dallah Real Estate and Tourism Holding Company v Ministry of Religious Affairs, Government of Pakistan* [2010] 1 All ER 592 (CA), 621-22 at [85] (Rix LJ); *Hebei Import & Export Corp v Polytek Engineering Co Ltd* [1999] 2 HKC 205, [230] (Mason NPJ, Hong Kong Court of First Instance) and *Jiangxi Provincial Metcil & Mineral Import & Export Corp v Stilanser Co Ltd* [1995] 2 HKC 373, [378]-[379].

<sup>140</sup> See affidavit of Gendenpil Batdorj (29 June 2010), Exhibit GB-39.

<sup>141</sup> See above, paragraph 6.

<sup>142</sup> See paragraph 78 and 79 of the affidavit of Stewart Charles Lewis (14 October 2010)

97 The second defendant sought to justify its non-attendance at the final arbitral hearing on the basis that it was not safe for its personnel, or those of the first defendant, to remain in Mongolia. These reasons, the plaintiff submitted, were "colourful".<sup>143</sup> In any event, there is nothing in the evidence to suggest that the second defendant could not have obtained legal representation at the final arbitral hearing, whether by the Mongolian law firm formerly retained, or a newly retained firm. The same applies with respect to challenging the Award, or resisting its verification in the Mongolian courts.

98 For the preceding reasons, I am of the opinion that the evidence does not support the position that arbitration agreement is not valid and binding on the second defendant, IMC Solutions; either under the law expressed to be applicable to it or under the law of the country in which the Award was made. In both instances, this is the law of Mongolia. To the extent that it might be suggested that the evidence relied upon by the second defendant, IMC Solutions, does support this position, it cannot be regarded as uncontradicted by the evidence relied upon by the plaintiff, particularly that of Mr Batdorj whose evidence I accept in preference to the evidence relied upon by the second defendant for the reasons and to the extent indicated previously. In my view, this evidence, together the findings of the Arbitral Tribunal and the reviewing court in Mongolia, mean that, in any event, the second defendant, IMC Solutions, has failed to discharge the burden it bears in seeking to establish this defence or ground against enforcement. Additionally, the evidence of the second defendant's own Mongolian law expert is consistent with the position that the treatment of the second defendant as a party to the arbitration agreement was open under Mongolian law on the various bases discussed.<sup>144</sup> Moreover, I am of the opinion that the second defendant is, in any event, estopped from denying the validity of the arbitration agreement, and from denying that it is a party to the arbitration agreement as a result of the extent of its participation in the arbitration proceedings, and having regard to the unchallenged decision of the Arbitral Tribunal

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<sup>143</sup> See paragraph 75 of the Plaintiff's Further Submissions (3 November 2010).

<sup>144</sup> See paragraph 79.

as contained in the Award (in the particular circumstances of its participation in the arbitration proceedings; again, as discussed below).<sup>145</sup> For these reasons, the second defendant, IMC Solutions, has failed to establish this defence or ground for resisting enforcement.

*Section 8(5)(c) of the IAA: Lack of Proper Notice – that party was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his or her case in the arbitration proceedings*

99 The Mongolian law expert relied upon by the second defendant, IMC Solutions, Professor Mendsaikhan Tumenjargel, gave evidence that the *Mongolian Law on Arbitration* ensured that three principles were adhered to in arbitration. They were said to be as follows:<sup>146</sup>

"(a) Equal treatment of parties: the parties have entitled to participate with equality in the arbitration pursuant to Article 22.1 of the Arbitration Law.

(b) Right to be heard: each party shall be given a full opportunity of presenting their claim, refusal, evidence (Article 22.1 and Article 27 of the Arbitration Law). Unless the party making the application was given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case, the arbitration award shall be revoked (Article 40.2.2 of the Arbitration Law)

(c) Party autonomy: for instance, the parties may set up procedure of appointing arbitrators (Article 15.4 of the Arbitration Law), the parties may agreed mutually Rules of procedure in line with this law (Article 23.1. of the Arbitration Law).

31. According to Article 2.1 of Arbitration law, Civil Procedure Code is included in legislation on arbitration of Mongolia. Thus, issues that were not reflected in Arbitration Law are resolved in accordance with the regulation of Civil Procedure Code.

32. The principle and regulation mentioned in Section 31 and 32 of the Opinion shall be applied for the parties that a party to arbitration proceedings and for an entity that is treated as a party to arbitration proceedings. Thus,

- Arbitration tribunal is obliged to give notice of arbitration proceedings and any claims have been made against it to an entity that is treated as a party to arbitration.

33. Thus, if any entity that is treated as a party was handed the notice, the party has entitled to claim /in its own right/ on arbitration agreement and

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<sup>145</sup>

See paragraphs 99 and following.

<sup>146</sup>

Affidavit of Professor Mendsaikhan Tumenjargel (14 October 2010), paragraphs 30 to 33.

arbitrability of dispute under the Articles 20.3, 20.4 and 20.6 of Arbitration law and Article 18 of Arbitration Rules. Thus,

- Arbitration tribunal is obliged to provide that entity an opportunity to be heard on the question of whether it should be treated as a party to the arbitration.

100 Reference was also made by the second defendant to the text by Matti Kurkela, *Due Process in International Commercial Arbitration* and the statement that proper notice must at a minimum:

- inform that legal proceedings are pending;
- refer to the grounds for jurisdiction; and
- identify the parties.<sup>147</sup>

101 The second defendant was, of course, quite correct, in submitting that these are among the basic notions of procedural fairness long recognised in Australian courts.<sup>148</sup>

102 IMC Solutions, the second defendant, submitted that it was not sufficient, as it said the plaintiff asserted, for the court to determine that IMC Solutions and IMC Mining are, in reality, one and the same or that the latter is the agent of the former and say, therefore, that notice to IMC Mining of the substantive issues in dispute was effective as proper notice to IMC Solutions. Further, the second defendant submitted that these assertions with respect to notice, and the assertion that IMC Solutions ought to be found liable to the plaintiff in respect of claims made in the arbitration, ought to have been notified to IMC Solutions. Additionally, the second defendant said that it ought to have been provided with the materials relied upon as providing the basis of Arbitral Tribunal's jurisdiction that was being asserted, and that it ought to have been given the opportunity to be heard by the Arbitral Tribunal on both questions; jurisdiction and liability. It was submitted that the only way in which it

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<sup>147</sup> *Due Process in International Commercial Arbitration* (2010), 38. Kurkela also states (at 82): "in multi-party arbitration, it may be difficult or impossible to know at the initial stages whether the conflict concerns all or just some of the parties to the agreement; therefore, it is absolutely necessary to put all on notice and give them a reasonable opportunity to present their views, defences or claims." A position confirmed by sub-s 8(7A) of the IAA.

could be concluded that IMC Solutions was not required to be given notice of these matters would be on the basis of a finding by the court that IMC Solutions was not entitled to notice and an opportunity to be heard in relation to the substantive claims against it or that IMC Solutions and IMC Mining were one and the same entity or in an agency relationship.

103 The second defendant, IMC Solutions, submitted that no notice of either claim was provided to IMC Solutions and no opportunity was provided to it to argue its case in respect of either claim. Reference was made to the following parts of the affidavit of Mr Stewart Lewis, a director of IMC Solutions:<sup>149</sup>

"82. That is, at no stage prior to service of the orders of this Honourable Court of 20 August 2010 had IMC Solutions been informed or notified by the plaintiff or the arbitration tribunal, whether formally or informally, that:

- a. A claim had been made against it by Altain Khuder that;
  - i. at all relevant times, IMC Inc and / or IMCM acted as the agent or representative of IMC Solutions (First Batdorj affidavit at paragraph 16);
  - ii. that IMC Inc, IMC Solutions and IMCM conducted their business as a common enterprise (First Batdorj affidavit at paragraph 16);
  - iii. "*for all intents and purposes, it was [IMC Solutions] which was the proper party to the contract...and... the arbitration*" (First Batdorj affidavit at paragraph 16);
  - iv. "*that [IMC Inc] and/or [IMCM] was the alter ego of the second defendant*" (First Batdorj affidavit at paragraph 17);
  - v. "*it was both [IMC Inc and IMC Solutions] who entered into the Agreement*" (First Batdorj affidavit at paragraph 22); and / or
  - vi. to the extent that IMC Inc executed the agreement, "*it did so as a representative for IMC Mining Solutions*" (First Batdorj affidavit at paragraph 22).
- b. Altain Khuder had or were intending to make an application for an order from the arbitration tribunal that IMC Solutions pay any sum charged against IMC Inc in the arbitration;
- c. The arbitration tribunal were considering making an order that IMC Solutions pay any sum charged against IMC Inc in the arbitration.

83. Further, at no stage prior to that had IMC Solutions been given an

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<sup>149</sup> Affidavit of Mr Stewart Charles Lewis (14 October 2010), at [82]-[83].

opportunity to make oral or written submissions to the arbitration tribunal in relation to any such claims, applications or intended orders or to submit any evidence refuting the basis for such claims. Had IMC Solutions been given such an opportunity, it would have relied upon the matters discussed in and exhibited to this affidavit as demonstrating that the claims made by Mr Batdorj in his affidavit noted above were without foundation.”

104 It was further submitted that there is nothing in:

- (a) the documents filed by Altain Khuder in the arbitral proceeding,<sup>150</sup> which were, as noted, devoid of any mention of IMC Solutions;
- (b) the procedural steps taken by Altain Khuder in the arbitral proceeding, which were all conducted in the context of their claim against IMC Inc alone, and resulted in rulings from the Arbitral Tribunal naming IMC Inc as the only defendant and containing no reference to IMC Solutions;<sup>151</sup> and
- (c) the applications Altain Khuder made to the courts of Mongolia for the freezing of funds in IMC Inc’s Hong Kong bank account, for information concerning the moveable or immoveable property of IMC Inc or the seizure of the passports of IMC Inc’s officers;<sup>152</sup>

that could even be said ought to have put IMC Solutions “on inquiry” that the arbitration put them at risk or that an application was to be, or had been, made that they pay the amount of any award made against IMC Inc. Mr Lewis deposed that, “At no time had IMC Solutions even considered that it was at peril in the arbitration proceeding ...”.<sup>153</sup>

105 The plaintiff’s response to the evidence on behalf of the second defendant, IMC Solutions, in the form of the affidavits of Mr Stewart Lewis and Mr Bevan Jones, was that they were “both disingenuous and show a remarkable lack of candour”. It was said that the exhibits to both of these affidavits provide ample evidence of the role of

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<sup>150</sup> Exhibits GB-31 and 33 to the First Batdorj affidavit.

<sup>151</sup> Lewis affidavit at [66]-[67] and [70]-[73], exhibits GB-38 and 39 to the First Batdorj affidavit, and SCL-27 and 28 to the Lewis affidavit.

<sup>152</sup> Lewis affidavit (14 October 2010) at [63]-[64], [69], and [74]-[75] and exhibits SCL-26 and 29 to the Lewis affidavit.

<sup>153</sup> Lewis affidavit (14 October 2010) at [122].

the second defendant in the conduct of the arbitration and in relation to the performance of the OMA.<sup>154</sup> It was contended that both Mr Lewis and Mr Jones had been representing on the internet, as recently as two weeks prior to the hearing of this matter in the court on 3 November 2010, that the second defendant, IMC Solutions, was the moving party and the real contractor on the Tayan Nuur Iron Ore Project in Mongolia.<sup>155</sup> It was also submitted also that there is no direct credible evidence to support the second defendant's case that it was only a sub-contractor. In particular, reference was made in the evidence of Mr Batdorj<sup>156</sup> to the evidence of Mr Lewis that Mr Bevan Jones "was not, and never had been, employed by IMC Solutions or engaged by them as a contractor or consultant, and was not authorised to act for IMC Solutions". Mr Batdorj said that this was not correct and made reference to an exhibited document<sup>157</sup> entitled "Reporting of Resources / JORC Standard", under which the name "Bevan Jones / IMC Mongolia" appears. At the foot of each of its twenty-five pages an "IMC" firm graphic or logo appears, as well as the company name "IMC Mining Solutions Pty Ltd". Additionally, specific reference was made to the document titled: "IMC - Weekly Report for the WE 31-01-2009 to Altain Khuder LLC" bearing the name "IMC Mining Solutions Pty Ltd".<sup>158</sup> Although Mr Lewis did concede that the defendants, IMC Mining and IMC Solutions, and IMC Mongolia, did use a common logo, it was said that this was "no more than a common marketing approach of the companies".<sup>159</sup> This Weekly Report, on the other hand, appears to indicate more than merely a marketing aspect in relation to its use in common. In addition, the plaintiff submitted, the use of the term "IMC" in the "IMC Response to AKL Arbitration Claim" document constituted a reference to the second defendant, IMC Solutions.<sup>160</sup> If proven, this would indicate

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<sup>154</sup> Stewart Lewis (exhibits SCL-2, SCL-6, SCL-8, SCL-12, SCL-13, SCL-14, SCL-15, SCL-17, SCL-18, SCL-19, SCL-20, SCL-21, SCL-22, SCL-23, SCL-25, SCL-27, SCL-28 and SCL-29) and Bevan Jones (exhibits BJ-1 to BJ-8 inclusive).

<sup>155</sup> See affidavit of Gendenpil Batdorj (26 October 2010), [9] and [10] and [12]-[15] and Exhibits GB-54 and GB-55.

<sup>156</sup> See the second Batdorj affidavit (26 October 2010), paragraph 68.

<sup>157</sup> GB-55 to the second Batdorj affidavit.

<sup>158</sup> GB-56 to the second Batdorj affidavit.

<sup>159</sup> Affidavit of Stewart Charles Lewis (14 October 2010), paragraph 106(d).

<sup>160</sup> See paragraph 114 and 115 of the first Batdorj affidavit (29 June 2010); the document is exhibited as Exhibit GB-32.

that IMC Solutions was aware of, clearly had notice of, and was involved in the arbitration from an early stage in the arbitral process. On its face, the “IMC Response to AKL Arbitration Claim” document appears to indicate that the term “IMC” is used in a manner consistent with it being a reference to both defendants, IMC Mining and IMC Solutions. IMC Mongolia is referred to specifically, as is IMC Mining, on two occasions (under the heading “Item 2 – Establishment of IMC Mongolia”), in contradistinction to the use of “IMC” otherwise. The evidence of the way in which the IMC logo and brand were used, in my opinion, supports the suggestion that IMC Solutions and IMC Mining acted as some form of common enterprise or operated under some other relationship of legal responsibility (or are estopped from asserting otherwise).<sup>161</sup> Such a characterisation is consistent with the conclusion the plaintiff asks the court to draw, and is congruent with the evidence below.<sup>162</sup>

- 106 There was evidence that Mr Pat Kelly, a full-time consultant employed by IMC Mining, was significantly involved in the iron ore project and the drafting and performance of the OMA. Mr Lewis, in his affidavit, maintained on a number of occasions that Mr Kelly is not and was not engaged by the second defendant, IMC Solutions.<sup>163</sup> It is evident from his evidence that Mr Lewis was at pains to paint Mr Kelly as the moving mind of IMC Mining and not as a representative of the second defendant, IMC Solutions. Mr Jones did the same thing,<sup>164</sup> in spite of the fact that Mr Jones reported to Mr Kelly. It is also significant, in my view, that Mr Kelly did not provide an affidavit in these proceedings, even though he was a signatory to the OMA, which contains the arbitration clause, and was the director of mining operations on the iron ore project. Although Mr Kelly performed a central role in the account of both Mr Lewis and Mr Jones in relation to what happened with respect to the arbitration and was the author of many significant documents involved in many issues of significance for these proceedings, no information has been provided as to

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<sup>161</sup> See below, paragraph 110.

<sup>162</sup> See paragraphs 106-110.

<sup>163</sup> See, for example, paragraphs 20, 24, 27, 28, 48, 106(h), 108 and 116 of the affidavit of Mr Stewart Lewis (14 October 2010).

<sup>164</sup> See, for example, paragraphs 4 and 5 of Mr Bevan Jones’ affidavit (16 October 2010).

why Mr Kelly has not sworn an affidavit in these proceedings. Any references to Mr Kelly as an employee of IMC Solutions was simply described by Mr Lewis as "mistakes".<sup>165</sup>

- 107 The events surrounding the preliminary hearing before the Arbitral Tribunal on 24 July 2009 are also of some significance in relation to the present issue. It will be recalled that a document was apparently prepared as a record of the proceedings and agreements reached at the 24 July 2009 preliminary hearing.<sup>166</sup> Mr Jones signed this document which records the choice of Mongolian law, rather than the law of Hong Kong. Although both Mr Lewis and Mr Bevan Jones appear to seek to resile from any suggestion of an agreement to Mongolian law and to criticise that choice of law,<sup>167</sup> no explanation was provided by Mr Jones or anybody else as to why he signed the apparent record of minutes of the preliminary hearing of 26 July 2009, indicating the agreement of the parties to Mongolian law. Nor does he say why the Mongolian lawyers, half of both of the defendants, signed it.<sup>168</sup>
- 108 The second defendant sought to explain the departure of its personnel from Mongolia prior to the arbitration hearing on 15 September 2008. The plaintiff made submissions in relation to the state of the evidence in this respect as set out in the affidavits of Mr Jones and Mr Lewis.<sup>169</sup> In this respect, Mr Jones deposed that he managed the arbitration on behalf of IMC Mining until his employment ceased on 30 July 2009 but, as submitted by the plaintiff, nowhere does he rebut the evidence of Mr Batdorj that he was acting for both defendants and support the evidence of Mr Lewis that he did not have authority, nor purport to act on behalf of, the second defendant, IMC Solutions, in the arbitration.
- 109 An issue which might be said to go, at least in part, to the question of proper notice is the evidence in relation to the second defendant's knowledge of the making of the

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<sup>165</sup> See also paragraphs 85 and 89, above.

<sup>166</sup> See above, paragraph 84.

<sup>167</sup> See affidavit of Stewart Lewis (14 October 2010), at [73]-[74] and Bevan Jones' email contained in Exhibit SCL-28.

<sup>168</sup> See Exhibits GB-39 to the affidavit of Gendenpil Batdorj (29 June 2010).

<sup>169</sup> See Plaintiff's Further Submissions (3 November 2010), paragraph 75.

Award on 15 September 2009. This is also of significance in relation to the failure of the second defendant, IMC Solutions, or, for that matter, the first defendant, IMC Mining, to appeal to annul the arbitration award in the courts of Mongolia pursuant to Article 40 of the *Mongolian Arbitration Law*. In this respect, the plaintiff made the following submissions, referring to the affidavit of Mr Jones to which reference has previously been made:<sup>170</sup>

"76. It is not until paragraph 13 that Bevan Jones deals with the IMC Mining Solutions' allegations. It is interesting to note that he acknowledges that he is aware of the final award made in this matter 'at a date I cannot recall'. Presumably this refers to a date prior to 20 August 2010 (which is when Mr Lewis says he first became aware of the award when he was served with a copy as part of this proceeding (see Stewart Lewis, paragraph 82) - as otherwise Bevan Jones would have referred to the recent date. It appears Mr Bevan Jones concedes he was aware of the award at some time prior to 20 August 2010 which makes Stewart Lewis' assertion that he only became aware of the award on 20 August 2010 highly unlikely to be true. It is highly unbelievable that Bevan Jones would have known of the award prior to 20 August 2010 and not told Lewis. In fact the likelihood is that if he did know then he did tell Lewis. It is therefore unlikely that Lewis first knew of the award on 20 August 2010. He must have known of it well prior to then and in all probability when it was originally sent by courier to IMC in October 2009. Mr Lewis' assertion in paragraph B of his affidavit that from 4 September 2009 he rejected all communications directed at his Brisbane address to the First Defendant is hardly likely to be true. This evidence of Bevan Jones corroborates that the award was served on, and received by, the IMC Defendants. Bevan Jones then sets out a general series of denials in paragraph 13 about knowledge of certain general matters involving IMC Mining Solutions Pty Ltd in the arbitration. Despite the detail which the Plaintiff's witness, Mr Batdorj, deposes to in relation to these matters in the June affidavit, and the detail which Mr Stewart Lewis purports to know about these matters (and Stewart Lewis says he knows about these matters from Bevan Jones primarily), Bevan Jones himself does not directly rebut any of the detail or allegations made by the Plaintiff."

In this respect, and more generally, it is noted that the evidence is that the first defendant, in spite of its British Virgin Islands registration, is shown in a variety of documents as having the same office address in Brisbane as the second defendant. The second defendant's evidence was that it occupied separate space in its offices, but this is not apparent from any of the documents in which the Brisbane address for the first defendant appears. The evidence was also that the same applied to email addresses.

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See Plaintiff's Further Submissions (3 November 2010).

110 In light of the evidentiary matters already considered and the matters set out in the plaintiff's submissions, to which reference has been made, I accept them as an accurate analysis of the state of the evidence. I am also assisted by the extensive submissions extracted and summarised above,<sup>171</sup> which largely also apply to the issue of whether the second defendant received proper notice; particularly the evidence which goes towards establishing that IMC Solutions and IMC Mining were, for all intents and purposes treated as the same entity, or are estopped from asserting otherwise. In my view, on the basis of the lack of persuasive and complete evidence presented by the second defendant, and the fact that it bears the onus of establishing a defence or ground against enforcement of the Award, I accept the evidence of the plaintiff's witness, Mr Batdorj. I note, again, the direct and very specific nature of Mr Batdorj's evidence; given by a party who was employed by the plaintiff during the relevant period, and who attended the hearings in question. This stands in stark contradistinction to the lack of evidence adduced by the second defendant that directly and specifically challenged the evidence of Mr Batdorj, or provided an objective basis of proof of the contrary position. Thus, in the circumstances of the evidence presented, I am not satisfied that the second defendant has discharged the onus of proof it bears in resisting enforcement of the Award. Further, though the plaintiff does not bear the burden in this respect, on the basis of the evidence which I accept, it is, in my view, more probable than not that the second defendant was well aware of the nature and progress of the arbitration proceedings and was well able to present its case in the arbitration proceedings. As a result, it is not open to the defendant to rely on the defence or ground that it did not receive proper notice, nor a chance to be heard, given the state of the evidence, and the overall evidentiary onus it faces. Consequently, I am of the opinion that the second defendant, IMC Solutions, has failed to establish this defence or ground against enforcement.

*Section 8(5)(d) of the IAA: Award deals with extraneous matters – the award deals with a difference not contemplated by, or not falling within the terms of, the submission to arbitration, or contains a decision on a matter beyond the scope of the submission to arbitration*

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<sup>171</sup> See, particularly, paragraphs 89 and following.

111 The second defendant, IMC Solutions, submitted that the submission to arbitration was constituted by the plaintiff's claim document, which it responded to with a document headed "IMC Response to AKL Arbitration Claim".<sup>172</sup> It was said that neither refers to IMC Solutions and does not submit to arbitration any "difference" as to whether or not IMC Solutions should be ordered to pay the sum charged against IMC. Accordingly, it was submitted, that even if the court concludes that Arbitral Tribunal did decide that IMC Solutions was the proper party to the arbitration agreement and the arbitration and, therefore, that it was amenable to an order that it pay the sum charged against IMC Mining, such a decision would be manifestly beyond the scope of the submission to arbitration. Further, it was submitted that this is not the type of situation in which the court is being invited to "second-guess" the arbitrator's construction of the agreement between the parties or to usurp the arbitrator's role.<sup>173</sup> Rather, it was said, the situation in the present case involves the complete absence of any agreement between the parties on the submission of a dispute to arbitration followed by a "decision" by the Arbitral Tribunal that was in no way within the scope of the dispute submitted to it. It was submitted by the second defendant that, on this basis alone, the court ought to refuse to enforce the Award insofar as it relates to IMC Solutions.

112 In my opinion, the submissions and argument of IMC Solutions on this defence or ground for resisting enforcement is both unmeritorious and, in any event, circular. For the reasons indicated previously, it was, in my opinion, open to the Arbitral Tribunal under Mongolian law to find that the OMA and the arbitration agreement contained in clause 16 of that agreement applied to and extended to IMC Solutions. On that basis, IMC Solutions was a party to and bound by the arbitration agreement. Even if a proper construction of the submission to arbitration is that the dispute or difference as raised initially extended only to IMC Mining, the first defendant, it does not follow that as a result of the subsequent conduct of the arbitration

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<sup>172</sup> The documents, respectively, are exhibited to the affidavit of Gendenpil Batdorj (29 June 2010) as Exhibits GB-31 and GB-32.

<sup>173</sup> Referring to the discussion and cases set out in Allan Redfern & Anor, *Law and Practice of International Commercial Arbitration* (2004), 449-450.

proceedings the dispute or difference was not extended by agreement or applied as a result of an estoppel against IMC Solutions, the second defendant, as a result of its participation in the arbitration proceedings and, notably, in the preliminary hearing held on 24 July 2009.<sup>174</sup> As indicated previously, I am of the opinion that the second defendant has failed to establish that it was not involved in any relevantly significant way in the arbitration or that it was not a party to the arbitration agreement or the arbitration proceeding. Consequently, I am of the opinion that the second defendant, IMC Solutions, has failed to establish this defence or ground against enforcement.

*Section 8(5)(e) of the IAA: Composition of Arbitral Tribunal or Arbitral Procedure – the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place*

- 113 It was submitted by IMC Solutions that this defence or ground against enforcement was also available to it because it had no role in the selection of the Arbitral Tribunal<sup>175</sup> or the arbitral procedure. This submission was on the basis that IMC Solutions was not involved in any way in the arbitration and was not, for the reasons previously noted in these second defendant's submissions, a party to the arbitration agreement or the arbitration proceeding. As indicated previously, I am of the opinion that the second defendant has failed to establish that it was not involved in any relevantly significant way in the arbitration or that it was not a party to the arbitration agreement or the arbitration proceeding. Consequently, I am of the opinion that second defendant, IMC Solutions, has failed to establish this defence or ground against enforcement.

*Section 8(5)(f) of the IAA: Award note yet binding or set aside – the award has not yet become binding on the parties to the arbitration agreement or has been set aside or suspended by a competent authority of the country in which, or under the law of which, the award was made*

- 114 This defence or ground for resisting enforcement was not relied upon by the second

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<sup>174</sup> See above, paragraph 85.

<sup>175</sup> It is noted in the Second Defendant's Outline of Submissions (3 November 2010), at [185] that "...even IMC [Mining's] nominee for the Arbitral Tribunal was removed and replaced by someone else whom they did not nominate and objected to – see Lewis affidavit at [66], [68] and [71] and exhibit SCL-28 to the Lewis affidavit."

defendant, IMC Solutions.

*Section 8(7)(b) of the IAA: Enforcement of the Award would be contrary to public policy*

115 As submitted by the second defendant, IMC Solutions, the term “public policy” in the context of sub-s 8(7)(b) is the public policy of Australia. Reference was made in its submissions to the decision of McDougall J in *Corvetina Technology Ltd v Clough Engineering Ltd*,<sup>176</sup> where it was held that:<sup>177</sup>

“[the] very point of provisions such as s 8(7)(b) is to preserve to the court in which enforcement is sought, the right to apply its own standards of public policy in respect of the award.”

It was submitted that this is consistent with Article V(2)(b) of the New York Convention, which expressly refers to the public policy of the country where enforcement of the relevant award is sought. Further, it was submitted that sub-s 8(7A) makes it clear that the enforcement of an award would be contrary to public policy if “a breach of the rules of natural justice occurred in connection with the making of the award”.

116 On this basis, it was submitted that the second defendant, IMC Solutions, is entitled to avail itself of this defence or ground for resisting enforcement of the Award because, for the reasons advanced with respect to the defences or grounds for resisting enforcement available under sub-s 8(5) of the IAA, particularly sub-s 8(5)(c) (and also sub-ss 8(5)(d) and (e)), IMC Solutions was denied natural justice in the arbitration proceedings. The IMC Solutions complaint, as raised in other respects in its submissions, was that it was in no way, formally or informally, notified that the plaintiff had applied to the Arbitral Tribunal for an order requiring IMC Solutions to pay its sum charged against IMC Mining or that the Arbitral Tribunal was considering such an application. Consequently, it was said, IMC Solutions had no opportunity to put before the Arbitral Tribunal material in response to the material relied upon by the plaintiff in its application to the Tribunal, and no opportunity to address written or oral submissions to the Tribunal. For the reasons indicated

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<sup>176</sup> (2004) 183 FLR 317.

<sup>177</sup> (2004) 183 FLR 317, 322.

previously, I am of the opinion that the second defendant, IMC Solutions, has failed to establish that it was not involved in any relevantly significant way in the arbitration or that it was not a party to the arbitration agreement or the arbitration proceeding. Consequently, I am of the opinion that IMC Solutions, the second defendant, has failed to make out any basis for relying upon this defence or ground for resisting enforcement of the Award against it.

### **Summary and conclusions**

- 117 For the preceding reasons, I find that the plaintiff complied with the extent of its obligations under ss 8 and 9 of the IAA (and the corresponding provisions of the New York Convention) for the purpose of seeking enforcement of the Award against the second defendant, IMC Solutions, and that IMC Solutions failed to establish any defence or ground for resisting enforcement of the Award against it under the provisions of s 8 of the IAA or the corresponding provisions of the Convention.
- 118 Consequently, the second defendant's summons to set aside the orders of 20 August 2010 is dismissed.
- 119 I reserve the question of costs and will hear the parties further on this issue.