SUPREME COURT OF VICTORIA

COURT OF APPEAL

S APCI 2011 0017

IMC AVIATION SOLUTIONS PTY LTD — Appellant

v

ALTAIN KHUDER LLC — Respondent

JUDGES:	WARREN CJ and HANSEN JA and KYROU AJA
WHERE HELD:	MELBOURNE
DATE OF HEARING:	29-30 March 2011
DATE OF JUDGMENT:	22 August 2011
MEDIUM NEUTRAL CITATION:	[2011] VSCA 248
JUDGMENTS APPEALED FROM:	*Altain Khuder LLC v IMC Mining Inc & Anor* [2011] VSC 1 (Croft J) *Altain Khuder LLC v IMC Mining Inc & Anor (No 2)* [2011] VSC 12 (Croft J)

ARBITRATION AND AWARDS – Enforcement of foreign arbitral award – Application for enforcement order – *International Arbitration Act 1974* (Cth) s 8(2) – Applicant must discharge evidentiary onus on prima facie basis that: (1) award was made by foreign arbitral tribunal granting applicant relief against respondent; (2) award was made pursuant to an arbitration agreement; (3) applicant and respondent both parties to arbitration agreement – *Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs of the Government of Pakistan* [2011] 1 AC 763, considered – Mere provision of arbitration agreement and arbitral award insufficient to discharge evidential onus where respondent does not appear as party to either document on its face – *International Arbitration Act 1974* (Cth) s 9(1) – Applicant failed to discharge prima facie evidential onus that respondent party to arbitration agreement – Application for enforcement order ought to have been rejected.

ARBITRATION AND AWARDS – Enforcement of foreign arbitral award – Application for enforcement order – Once applicant's evidential onus discharged then respondent has legal onus of satisfying Court that application should be refused – Respondent's ability to resist enforcement limited to grounds in *International Arbitration Act 1974* (Cth) ss 8(5), (7) –

Standard of proof – Balance of probabilities – Respondent denying that it is proper party to arbitration agreement must do so pursuant to *International Arbitration Act 1974* (Cth) s 8(5)(b) – Had Court been satisfied that prima facie evidential onus discharged, whole of evidence indicated that respondent not a party to arbitration agreement – Defences pursuant to ss 8(5)(b), (c) and 7(b) made out – Application for enforcement order ought to have been rejected.

ARBITRATION AND AWARDS – Foreign arbitral awards – Foreign law – Court not bound by finding of arbitral tribunal or foreign court that respondent party to arbitration agreement or arbitral award – Court not bound by finding of arbitral tribunal or foreign court that respondent given proper notice of arbitration – Court may itself consider questions of foreign law applicable to dispute.

ARBITRATION AND AWARDS – *International Arbitration Act 1974* (Cth) – Enforcement of foreign arbitral awards – Meaning of 'pro-enforcement policy' – *International Arbitration Act 1974* (Cth) ss 2D, 3, 8, 9, 39.

ESTOPPEL – Enforcement of foreign arbitral awards – Whether respondent who fails to challenge jurisdiction of arbitral tribunal or resist award in supervisory jurisdiction estopped from resisting enforcement in Australia – Respondent who denies being party to arbitration agreement not obliged to participate in arbitration or take any steps in supervisory jurisdiction – *Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs of the Government of Pakistan* [2011] 1 AC 763.

PRACTICE AND PROCEDURE – Enforcement of foreign arbitral award – Application for enforcement order – Should proceed inter partes when extrinsic evidence required to establish respondent a party to arbitration agreement.

COSTS – Proceeding to enforce foreign arbitral award – Ordinary principles apply – Unsuccessful attempt to resist enforcement order by award debtor does not of itself constitute special circumstances justifying award of indemnity costs.

EVIDENCE – Enforcement of foreign arbitral award – Application for enforcement order – Evidence in support of application – Objections to admissibility of evidence should be ruled on at time made – *Dasreef Pty Ltd v Hawchar* [2011] HCA 21 (22 June 2011).

APPEARANCES:	Counsel	Solicitors
For the Appellant	Mr G J Digby QC with Mr N McAteer	HopgoodGanim Lawyers
For the Respondent	Mr H Foxcroft SC with Mr P Megens, solicitor	Mallesons Stephen Jaques

WARREN CJ:

1 This is an appeal against a decision of a judge of the Trial Division to order the enforcement of a foreign arbitral award made in favour of the respondent and against the appellant.

2 The appeal concerns the interpretation of the *International Arbitration Act 1974* (Cth) (the 'Act'), which provides a mechanism for enforcing foreign arbitral awards. The critical issue is how the Act applies in a situation where the alleged award debtor is not expressly named as a party to the arbitration agreement pursuant to which the award was made.

3 This matter is unusual. It required this Court to decide an issue which is ordinarily uncontroversial in enforcement proceedings. The unique circumstances of this case have made a complex investigation into that issue unavoidable. However, as I will explain in my reasons, in all but the most unusual cases, applications to enforce foreign arbitral awards should involve only a summary procedure.

4 For reasons that will follow, the learned judge erred in his interpretation of the Act. Accordingly, I would allow the appeal.

Background

5 The respondent, Altain Khuder LLC ('Altain') is a mining company incorporated in Mongolia. The appellant, formerly known as IMC Mining Solutions Pty Ltd and now called IMC Aviation Solutions Pty Ltd ('IMC Solutions'), is a company incorporated in Australia with a registered office at Level 40, Riverside Centre, 123 Eagle Street, Brisbane. IMC Solutions shared its office with IMC Mining Inc ('IMC Mining'), a company incorporated in the British Virgin Islands. Mr Stewart Lewis was, at all material times, the CEO and a director of IMC Solutions and was, from the date of its incorporation (27 June 2007), until 4 September 2009, managing director of IMC Mining.

6 On 13 February 2008, a contract called the Operations Management

Agreement (the 'OMA') was executed. The OMA named 'ALTAIN KHUDER LLC' and 'IMC MINING INC, a company incorporated in the British Virgin Islands, of Level 40, Riverside Centre, 123 Eagle Street, Brisbane' as parties. The proper identity of the party named as 'IMC MINING INC' in the OMA was disputed. Altain contended that 'IMC MINING INC' was not a reference to IMC Mining, but to IMC Solutions. Be that as it may, the OMA does not contain any express reference to IMC Solutions.

7 Pursuant to the OMA, Altain appointed 'IMC MINING INC' as 'Operations Manager' of the Tayan Nuur iron ore mine in the South West of Mongolia. The OMA contained the following dispute resolution clause:

> 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

8 The precise nature of IMC Solutions' involvement in the Tayan Nuur mine is also disputed. However, IMC Solutions contends it was performing work on the mine as a sub-contractor pursuant to a 'Consulting Services Agreement' executed with IMC Mining some time after 13 February 2008.

The arbitration

9 In early 2009, a dispute arose concerning the provision of services to Altain. In a memorandum dated 5 March 2009 addressed to 'IMC Mining Inc', Altain purported to terminate the OMA with immediate effect. On 12 May 2009, Altain commenced arbitral proceedings against 'Australian "IMC Mining Inc" company' for USD6.2 million paid pursuant to the OMA, and for unliquidated damages. On 2 July 2009, Altain filed an additional claim, also against '"IMC Mining Inc" company of Australia', for USD320,577. On 24 July 2009, '"IMC Mining Inc" company of Australia' filed a counter-claim against Altain for USD1 million. Neither the claims nor the counter-claim make any express references to IMC Solutions.

10 On the same day, the arbitral tribunal (the 'Tribunal') conducted a preliminary hearing and published its rulings in a document entitled 'CASE DISPUTE RESOLUTION PROCEDURE'. The document refers to the parties to the arbitration as 'G. Batdorj, director of "Altain Khuder" Co,. Ltd, Mongolia' as 'Claimant' and '"IMC Mining Inc" company of Australia' as 'Respondent'. The document states that 'the case shall be resolved according to legislation of Mongolia' and that '[t]he Arbitration Proceeding shall be held in Mongolian language'. The document does not expressly refer to IMC Solutions.

11 On 15 September 2009, the Tribunal conducted the arbitration and published its award (the 'Award'). No IMC personnel attended the arbitration. The only parties named in the award are 'Altain Khuder LLC, Mongolia' as 'Plaintiff' and 'IMC Mining Inc., Australia' as 'Defendant'. The address of the 'Defendant' was stated to be 'British Virgin Islands, of Level 40, Riverside Centre, 123 Eagle Street Brisbane Qld, Australia'. The written reasons in the fifteen-page Award make five references to IMC Solutions. The first three are on page 12:[1]

> Thus, the misunderstanding arisen between the Parties during their performance under the Operations Management Agreement for the Iron Ore Project grew deeper and the Defendant no longer submitted its performance reports to the Plaintiff. At the same time, the Operations Manager of the Defendant failed to cooperate with the geology and other staff professionals of the Plaintiff to have its reports approved. Nonetheless, neither Defendant, nor IMC Mining Solutions Pty Ltd presented project cost details and budget expenditure reports.
>
> 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, signed the Operations Management Agreement for the Iron Ore Project dated 13 February 2008 on behalf of the Defendant.
>
> The Defendants failure to release and submit annual work report and cost expenditure report led the Parties to repudiation of the Agreement. Upon its receipt of the Notice of Termination by the Plaintiff dated 5 March 2008, the Defendant informed the Plaintiff of its termination of the Agreement

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1 All errors in the excerpted parts of the parties' documents are original.

12 On the following page, the Award states:

> None of the Defendant or IMC Mining Solutions Pty Ltd supplied project cost details or expenditure reports to the Plaintiff properly. Nor did they issue or sign a document, whereby they reviewed their performance under the Agreement.
>
> 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.

13 The final order of the Tribunal on page 14 is in the following terms:

> Pursuant to Article 34, Article 35, and Article 37 of Law on Arbitration of Mongolia and Article 42 and Article 44 of Arbitration Rules, it is AWARDED as follows:
>
> 1. IMC Mining Inc. Company of Australia Pay to Altain Khuder LLC of Mongolia, the sum of US$5903098.2 (five million nine hundred three thousand ninety eight point two dollars) to remedy the Statement of Claim by the Claimant;
>
> 2. The arbitration fee paid by Altain Khuder LLC of Mongolia, the sum of US$60212 (sixty thousand two hundred twelve United States Dollars), remains as the arbitral deposit. The arbitration fee against the remedy of US$5903098.2 (five million nine hundred three thousand ninety eight point two dollars), the sum of US$50257.7 (fifty thousand two hundred fifty seven point seven dollars), is payable by IMC Mining Inc. Company of Australia and is transferable to Altain Khuder LLC of Mongolia.
>
> 3. *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.*
>
> 4. This Award is final and binding. [Emphasis added].

14 On 23 October 2009, Altain applied to the Khan-Uul District Court to verify the Award. On 23 November 2009, the court made the following order:

> L. Oyun, as a judge of Khan-Uul district court, received a request on 23rd October, 2009 from the Claimant: "Altain Khuder" LLC in regards to verifying the arbitral award charged against the Defendant: IMC Mining Inc Company.
>
> …
>
> I satisfied the request to be legitimate.

> It should be noted the Arbitral award is enforceable pursuant to the New York Convention, 1958.
>
> In accordance with the provision 184.3 of the article 184, and 123.1 of article 123 of the Civil Procedure Code, it is
>
> 1. Verify the Award #77 of the Mongolian National Arbitration Center at the Mongolian National Chamber of Commerce and Industry dated 15 September, 2009.
>
> 2. Note that the Award is to be enforced in accordance with the New York Convention, 1958.
>
> 3. Aware that there is no right to appeal on the Judge Order.

15 I observe that the Award appears to render unarguable the respondent's position that the words 'IMC MINING INC' in the OMA are in fact a reference to IMC Solutions. Certainly, the Tribunal does not appear to have approached its decision on this basis.

Enforcement proceedings in the Supreme Court of Victoria

16 On 14 July 2010, Altain filed an originating motion in the Trial Division seeking enforcement of the Award against IMC Mining and IMC Services. Pursuant to Practice Note No. 2 of 2010, Altain did not serve this motion on either IMC Solutions or IMC Mining and a hearing was conducted *ex parte*. On 20 August 2010, the trial judge made orders for the enforcement of the Award against both IMC Mining and IMC Solutions in the amount of USD5,903,098.20 plus the arbitration fee of USD50,257.70, interest and costs calculated on a party and party basis. Provision was made for either of the defendants to apply to set aside the order within 42 days of service.

17 On 21 September 2010, IMC Solutions applied to set aside the order insofar as it applied to itself. Its application was principally founded upon its assertion that it was not a party to the arbitration agreement in pursuance of which the Award was made. The learned judge heard that application on 30 September, and 4, 5 and 12 November 2010. On 28 January 2011, his Honour dismissed the application and published reasons. However, in expectation that an appeal would be filed against

his decision, his Honour stayed that order insofar as it concerned IMC Solutions until 4.00 pm 4 February 2011. Altain then applied for an order that IMC Solutions pay its costs on an indemnity basis. On 3 February 2011, the learned judge granted that application and provided reasons (the 'First Costs Decision'), but his Honour also stayed the orders until 4.00 pm 4 February 2011.

18 On 3 February 2011, IMC Solutions filed a summons seeking leave to appeal the original *ex parte* decision, the decision to refuse to set that original decision aside and the First Costs Decision. The Court of Appeal having nominated a return date of 11 February 2011, IMC Solutions applied to the learned trial judge for a further stay of his Honour's enforcement decision and the First Costs Order until the date of return. His Honour dismissed that application and ordered IMC Solutions to pay Altain's costs on an indemnity basis (the 'Second Costs Decision').

19 Subsequently, this Court granted IMC Solutions leave to appeal all of the decisions of the learned judge below, and stayed those orders until the determination of the appeal.

20 The appeal was heard on 29 and 30 March 2011.

Estoppel by prior decision of a supervisory court

21 Before turning to the issue of statutory construction, it is necessary to consider the threshold question of whether IMC Solutions is estopped from resisting enforcement on the basis that it is not a party to the arbitration agreement. The learned judge held that IMC Solutions was:

> 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 as contained in the Award (in the particular circumstances of its participation in the arbitration proceedings; again, as discussed below).[2]

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2 *Altain Khuder LLC v IMC Mining Inc* [2011] VSC 1, [98].

22 As that passage demonstrates, his Honour's decision regarding estoppel was based on a factual finding that IMC Solutions participated in the arbitration proceeding. This finding relied heavily on the two affidavits of Mr Batdorj filed by Altain.[3] During the hearing of the application to resist enforcement of the Award, IMC Solutions raised a series of objections to the admissibility of evidence contained in those affidavits. His Honour declined to rule on those objections at the time they were raised, but indicated that he would do so later. Counsel for IMC Solutions concurred with this approach.[4] For reasons that are unclear, his Honour did not rule on those objections at a later stage of the hearing, or address the issue of admissibility in his reasons for judgment. The objections were not pressed, and counsel appear to have been content to allow the hearing to conclude without the objections being revisited.

23 My overview of the Batdorj affidavits indicates that many, if not most, of these objections were strongly arguable. At critical points in the two affidavits, the deponent asserts his opinion and draws conclusions rather than simply describing the events of which he had first hand knowledge.[5] It was a necessary precondition to relying upon these affidavits that the judge address the objections raised by IMC Solutions. The failure of the judge to do so means that his Honour's decision on the issue of estoppel was determined, at least in part, on the basis of inadmissible evidence. Therefore, it must be set aside.

24 I express no view on the existence of an estoppel. However, having ruled upon the admissibility of the disputed evidence, the judge should have determined whether an estoppel existed on the following basis.

25 First, it was unnecessary to decide on the choice of law rules applicable to any of the various types of estoppel that may have been relevant in this case. It is settled

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3 Ibid [85], [88]–[89], [98], [108], [110].

4 Transcript (4 November 2010) 21. A detailed description of the manner in which this material was dealt with below is set out below at [208]-[217] in the joint judgment of Hansen JA and Kyrou AJA.

5 See for example [72] of the affidavit dated 29 June 2010.

law that a party that wishes to rely on foreign law in Australian courts must plead and prove it.[6] Otherwise, the court will assume that the foreign law is identical to the law of the forum.[7] Neither party suggested in their pleadings or submissions that the question of estoppel is governed by Mongolian law or the law of a jurisdiction other than Victoria. Accordingly, that question fell to be determined in accordance with Australian principles of common law and equity.

26 Secondly, in accordance with those ordinary Australian principles, the award debtor's conduct in respect of the arbitration proceeding and any relevant proceedings brought before the courts of the supervisory jurisdiction may have given rise to an issue estoppel, estoppel by convention or some other established category of estoppel. The Act contains nothing to suggest that it was intended to exclude the application of ordinary principles of estoppel.[8]

27 Thirdly, the manner in which estoppel has been used to preclude an alleged award debtor from resisting enforcement in other jurisdictions was not determinative. Australian principles of estoppel are not necessarily identical to those applicable in other jurisdictions.

Construction of sections 8 and 9 the Act

28 It is necessary to determine who bears the onus of proving whether IMC Solutions is a party to the arbitration agreement. This is a question of construction of the Act, particularly ss 8 and 9.

29 The Act implements the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* ('New York Convention') which the Act attaches as a Schedule. Sections 8 and 9 relevantly provide:

8 Recognition of foreign awards

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6 *Regie National des Usines Renault SA v Zhang* (2002) 210 CLR 491, [70]–[71].

7 *Neilson v Overseas Projects Corporation of Victoria Ltd* (2005) 223 CLR 331, [116].

8 See *Dallah Real Estate & Tourism Co v Ministry of Religious Affairs of the Government of Pakistan* [2011] 1 AC 763 ('*Dallah*').

(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).

…

(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.

…

(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.

…

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.

…

(5) A document produced to a court in accordance with this section is, upon mere production, receivable by the court as *prima facie* evidence of the matters to which it relates.

30 Section 39 requires a court which is considering exercising a power under section 8 to enforce or refuse to enforce a foreign award, interpreting the Act, or interpreting an agreement or award to which the Act applies, to 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.

31 The objects of the Act referred to in s 39(2)(a), are set out in s 2D as follows:

> (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 [New York Convention] …

32 Finally, s 3 provides the following relevant definitions of terms used in Part 2:

> (1) In this Part, unless the contrary intention appears:
>
> ***agreement in writing*** has the same meaning as in the Convention.
>
> ***arbitral award*** has the same meaning as in the Convention.
>
> ***arbitration agreement*** means an agreement in writing of the kind referred to in sub article 1 of Article II of the Convention.
>
> …
>
> ***Convention*** means the [New York Convention]…
>
> …
>
> ***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.
>
> …
>
> (4) For the avoidance of doubt and without limiting subsection (1), an agreement is in writing if:
>
> (a) its content is recorded in any form whether or not the agreement or the contract to which it relates has been concluded orally, by conduct, or by other means; or
>
> (b) it is contained in an electronic communication and the information in that communication is accessible so as to be usable for subsequent reference; or

(c) it is contained in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other.

(5) For the avoidance of doubt and without limiting subsection (1), a reference in a contract to any document containing an arbitration clause is an arbitration agreement, provided that the reference is such as to make the clause part of the contract.

33 IMC Solutions' submission on the construction of ss 8 and 9 can be summarised as follows. Section 8(1) imposes a jurisdictional 'threshold requirement' that the award creditor needs to discharge before an award can be enforced under the Act. The award creditor needs to satisfy the enforcing court, on the balance of probabilities, that the award sought to be enforced is binding under s 8(1). This requires the award creditor to prove that the award debtor is a party to the arbitration agreement in pursuance of which the award was made. It is only after the award creditor has discharged this legal onus that s 8(3A) then places the onus on the award debtor to establish one of the limited defences in sub-s (5) and (7) if the award debtor wishes to resist enforcement. Section 9(1) merely describes the procedure for enforcement and does not detract from the onus imposed by s 8(1).

34 In contrast, Altain's submission, which was accepted by the learned judge below, was as follows. Section 8(1) must be read subject to s 8(3A) and s 9(1). There is no legal onus on the award creditor to prove the elements of s 8(1). The award creditor can enforce the award by simply producing the two documents referred to in s 9(1). Further, the 'agreement' referred to in s 9(1) need not name the award debtor as a party. Once the award creditor has produced the two documents, the onus falls on the award debtor to establish one of the defences in sub-s (5) and (7). The defence that an award debtor was not a party to the arbitration agreement can be made only under s 8(5)(b), by arguing that the award is not 'valid' as against that award debtor. The award debtor carries the legal burden of establishing this.

35 Both parties made extensive reference to international authorities. Insofar as the Act implements an international treaty, Australian courts will, as far as they able,

construe the Act consistently with the international understanding of that treaty.[9] Uniformity also accords with the Act's stated purpose to facilitate the use of arbitration as an effective dispute resolution process.[10]

36 No Australian court and few foreign courts have considered the present issue.[11] Most of those foreign courts have held that whether an award debtor is a party to the relevant arbitration agreement falls to be considered as a defence under their equivalent to s 8(5)(b), rather than as a threshold issue.[12] Senior counsel for the respondent submitted, in the broad, that these decisions were determinative of the approach that this Court should take to construing the Act.

37 Ultimately, this Court is required to construe an Australian statute. That process must be performed in accordance with established principles of Australian statutory interpretation. International case law may be useful and instructive, but it cannot supersede the words used in the Act. The weight to be accorded to such authority will depend upon the similarity of the language used in foreign statutes being construed to the terms of the Act.

38 Applying the principles of statutory interpretation binding upon this Court, I am unable to accept Altain's position for four reasons.

39 First, Altain's construction would render s 8(1) superfluous. It should be rejected because an alternative construction is open which gives that section meaning and effect.[13] I will set out that alternative construction later in my reasons.

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9 *Rocklea Spinning Mills Pty Ltd v Anti-Dumping Authority* (1995) 56 FCR 406, 421.

10 Section 2D.

11 Eg, *Dardana Ltd v Yukos Oil Co* [2002] 1 All ER (Comm) 819 ('*Dardana*'); *Aloe Vera of America Inc v Asianic Food (S) Pte Ltd and Another* [2006] SGHC 78 ('*Aloe Vera*'); *Dallah* [2011] 1 AC 763 ('*Dallah*'); *Sarhank Group v Oracle Corp*, 404 F3d 657 (2nd Cir, 2005); *Javor v Francoeur* (2003) 13 BCLR (4th) 195.

12 Eg, *Dardana* [2002] 1 All ER (Comm) 819*; Dallah* [2011] 1 AC 763*; Aloe Vera* [2006] SGHC 78.

13 Pearce and Geddes set out the large number of authorities to this effect at ¶2.26 of *Statutory Interpretation* (7th ed, 2011). As Griffith CJ observed in *Commonwealth v Baume* (1905) 2 CLR 405, 414 this was held to be an accepted common law rule as early as 1688:

40 Secondly, s 8(1) cannot be read subject to s 8(3A). Sub-section 8(3A) was enacted to reverse decisions holding that, in addition to the defences set out in sub-s (5) and (7), the enforcing court has a residual discretion to refuse enforcement on other grounds.[14] In my view, it is most unlikely that the enactment of s 8(3A) was intended to radically modify the overall scheme of the enforcement provisions of the Act. Further, it is clear that before the award creditor can enforce the award, it must at least produce the documents required by s 9(1). The award debtor can therefore 'resist enforcement' by arguing that the documents produced by the award creditor do not meet the description set out in s 9(1).[15] It follows that, contrary to the absolute language in which s 8(3A) is expressed, the award debtor can resist enforcement on a ground other than the grounds in ss 8(5) and 8(7). In my view, s 8(3A) simply circumscribes the defences on which the award debtor can rely to resist enforcement once the award creditor has discharged some preliminary burden. Section 8(3A) says nothing about what that preliminary burden is.

41 Thirdly, since an award is only binding on the parties to the arbitration agreement pursuant to which it was made, it must be possible for the award debtor to resist enforcement on the ground that it is not a party to that agreement. Sections 8(5) and 8(7) make no express provision for raising such a defence. Section 8(5)(b) allows an award debtor to resist enforcement on the grounds that the arbitration agreement is "not valid" under the relevant law. Yet an arbitration agreement pursuant to which the award was made may be perfectly valid without the award debtor being a party to it. The question of whether a contract is valid and the question of whether a person is a party to that contract are treated as distinct issues by the common law. It is artificial to frame an argument that a person is not a party to an agreement as an argument that the agreement is not valid vis-à-vis that person.

> In *The King v. Berchet* a case decided in 1688, it was said to be a known rule in the interpretation of Statutes that such a sense is to be made upon the whole as that no clause, sentence, or word shall prove superfluous, void, or insignificant, if by any other construction they may all be made useful and pertinent.
> (footnotes omitted)

14 Revised Explanatory Memorandum, International Arbitration Amendment Bill 2010, 7.

15 Cf *Aloe Vera* [2006] SGHC 78, [27].

In my opinion, Altain's construction of s 8(5)(b) does violence to the words of s 8(5)(b).

42 In support of its construction, Altain pressed upon this court two United Kingdom decisions, *Dardana* and *Dallah*, in which Altain's reading of the equivalent provision in the *Arbitration Act 1996* (UK), s 103(2)(b), was accepted. This Court is confined in the weight which it is able to accord to those decisions by the terms of the Australian Act. Section 8(1) makes a foreign arbitral award 'binding by virtue of this Act … on *the parties to the arbitration agreement* in pursuance of which it was made' [emphasis added], not on the parties to the award. In contrast, s 101(1) of the United Kingdom Act provides that 'an award shall be recognized as binding' not on the parties to the applicable arbitration agreement, but 'on the persons as between whom it [the award] was made'. To the extent that those contrasting provisions compel differing results, this Court is required to give effect to the Act rather than follow *Dardana* or *Dallah*.

43 Finally, it is unnecessary to interpret ss 8 and 9 in the manner advocated by Altain in order to achieve the objects of the Act, which are, broadly speaking, to facilitate the expeditious and economical enforcement of foreign arbitral awards in Australian courts. As I will explain in detail, a more harmonious and coherent interpretation is available which fully achieves these objectives. For the reasons set out below, my conclusions in respect of that interpretation may be summarised as follows:

1. The words 'arbitration agreement' in s 8(1) mean 'purported or apparent arbitration agreement'.

2. Section 8(1) requires the award creditor to show, on the balance of probabilities, that:

    i. there is a purported or apparent arbitration agreement;

    ii. the award creditor and award debtor are parties to that agreement; and

    iii. there is an award made against the award debtor in pursuance of that agreement.

3. The words 'arbitration agreement' in s 9(1)(b) means an agreement of the kind referred to in s 8(1), i.e. a purported or apparent arbitration agreement to which the award debtor and the award creditor are parties.

4. Section 9(5) assists the award creditor to establish the elements of s 8(1).

5. The expression 'prima facie evidence' in s 9(5) means evidence that, in the absence of contrary evidence, is conclusive proof of the relevant fact.

6. The effect of s 9(5) is that, in the absence of contrary evidence, the mere production of the two documents referred to in s 9(1) is always sufficient to establish the elements of s 8(1) on the balance of probabilities.

7. The award creditor must satisfy the enforcing court that the two documents it has produced in purported compliance with s 9(1) meet the description of ss 9(1)(a) and 9(1)(b). Normally, the documents will speak for themselves and the award creditor will not need to do anything other than simply produce the documents.

8. In the unusual case where the arbitration agreement does not expressly name the award debtor as a party, the agreement will not, on its face, be an agreement of the kind referred to in s 9(1)(b). In that case the award creditor will need to lead extrinsic evidence to show, on the balance of probabilities, that the award debtor is a party to the arbitration agreement pursuant to which the award was made.

9. Leaving aside the grounds under ss 8(5) and 8(7), enforcement of a foreign arbitral award will usually follow a brief, summary procedure. This does not mean that the enforcing court is failing to act judicially. Rather, it means that the Act assists the award creditor through an evidentiary deeming provision in s 9(5). The effect of the deeming provision is that the mere production of the original arbitration agreement and the original award (or duly certified copies of these documents) will normally be sufficient to discharge the burden the Act places on the award creditor.

10. Once s 8(1) is satisfied, the award debtor may only resist enforcement of the award by relying on one of the grounds in ss 8(5) and 8(7).

11. To establish a defence under s 8(5) the award debtor must prove any facts constituting the defence (including, where applicable, the content of foreign law) on the balance of probabilities.

12. The difficulty of proving a defence pursuant to s 8(5) will depend on the particular defence relied upon. While the standard of proof that applies to the defences under s 8(5)(a)–(e) is the normal civil standard, the onus placed on the award debtor in respect of those defences can be properly described as a heavy onus. In accordance with ss 2D and 39, the court's general starting position is that most arbitral tribunals properly discharge their duties and correctly determine their

> jurisdiction and that most arbitral awards, subject to formal requirements, should be enforced. The defences in s 8(5)(a)–(e) constitute allegations that are serious. An enforcing court will not be persuaded lightly that it is more likely than not that such an allegation is correct.

44 This interpretation accords with the language, text and structure of the Act, as well as its purposes, for the following reasons.

45 Section 8(5)(b) states that the court may 'refuse to enforce the award' if the award debtor proves that the 'arbitration agreement is not valid'. It is clear that the words 'arbitration agreement' in s 8(5)(b) cannot mean an actual valid arbitration agreement, otherwise it would be a contradiction to say that the 'arbitration agreement' is not valid. It follows that 'arbitration agreement' in s 8(5)(b) means a purported or apparent arbitration agreement. It is unlikely that Parliament intended the words 'arbitration agreement' to have one meaning in s 8(5)(b) and a different meaning elsewhere in s 8. It follows that the words 'arbitration agreement' in s 8(1) also mean an apparent or purported arbitration agreement. This is consistent with the pro-enforcement policy of the Act.[16] Further, there is nothing anomalous about s 8(1) making an award made in pursuance of a possibly invalid arbitration agreement 'binding'. This is because section 8(1) is expressed to be '[s]ubject to this Part'. An award made in pursuance of a purported agreement is only 'binding' subject to Part II of the Act, which includes a defence of invalidity in s 8(5)(b).

46 The words 'prima facie evidence' in s 9(5) can have two possible meanings. The first meaning is 'evidence' that is sufficient to make a finding of fact open.[17] The second meaning is 'evidence' that, in the absence of contrary evidence, is conclusive proof of a fact.[18] As *Cross on Evidence* points out, when the words 'prima facie

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16 The New York Convention is widely recognised in international arbitration circles as having a 'pro-enforcement' policy: see, eg, *Dallah* [2011] 1 AC 763, [101] (Lord Collins); International Council for Commercial Arbitration, *ICCA's Guide to the Interpretation of the 1958 New York Convention* (2011) xi.

17 JH Heydon, *Cross on Evidence* [Service 135, April 2011], ¶1600.

18 Ibid, ¶1605.

evidence' are used in a statute, they usually have the second meaning.[19] Given the objects of the Act, I conclude that Parliament intended the words 'prima facie evidence' in s 9(5) to have that stronger second meaning.

47 Section 8(1) sets out the circumstances in which a foreign award is binding under the Act while ss 8(5) and 8(7) deal with defences to enforcement. Section 8(1) is analogous to a provision establishing the elements of a cause of action. One would ordinarily expect such a provision to impose a legal burden of proof on the plaintiff in respect of each element. Further, it is clear that an award debtor can resist enforcement of the award on the ground that it is not a party to the arbitration agreement. As I have already explained, to treat this ground for resisting enforcement as falling within the invalidity defence in s 8(5)(b) would be to seriously strain the language of s 8(5)(b).

48 Once it is understood that 'arbitration agreement' in s 8(1) means a 'purported or apparent agreement', and that s 9(5) provides a powerful aid to the award creditor, it becomes possible, consistently with the objects of the Act, to give s 8(1) a natural reading which imposes a threshold legal burden. As the award debtor will appear, absent exceptional circumstances, as a party on the face of the arbitration agreement, ordinarily, the award creditor will easily discharge this legal burden.

49 It follows from accepting that s 8(1) requires the party-hood of the award debtor to be established as a threshold issue by the award creditor, that an assertion by an award debtor that it is not a party to the arbitration agreement will be treated differently by the courts to an attempt by an award debtor to rely on any of the grounds set out in ss 8(5) and (7). It also follows that in the former case, the onus is on the award creditor to prove, on the balance of probabilities, that the award debtor is a party, whereas in the latter case the award debtor bears the onus of making out one of the grounds for resisting enforcement.

50 At first glance, it may appear strange to elevate the question of party-hood to

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[19] Ibid.

a threshold issue above other vitiating factors related to jurisdiction, such as validity, which are addressed as defences for which the award debtor bears the onus of proof. This position is not anomalous. Rather, it reflects a sensible policy decision by the legislature to place the onus on the award debtor to impugn the agreement or the award where the documents presented to the court pursuant to s 9(1) appear regular on their face, but to require the award creditor to explain an apparent irregularity on the face of the documents. The cumulative effect of ss 8(1), (3A), (5) and (7) and 9(1) and (5) is to encourage the use of arbitration and the recognition of foreign awards by creating a legislative presumption of regularity founded upon documentary proof. That presumption guards against the unnecessary risk and expense to an award creditor should they be required to re-litigate issues in Australian courts already decided by an arbitral tribunal. It guards against the risk that award debtors will seek to avoid their obligations by exploiting the inherent difficulty and expense associated with foreign enforcement. It is a necessary consequence of such a policy decision, and not a form of inconsistency or unfairness, that questions of prima facie irregularity be dealt with differently from questions of regularity that are not readily apparent on the face on the documents.

51 However, where an award debtor does not appear on the face of the arbitration agreement, but is a party to the award, the award and any decision of a supervisory court verifying that award will be a factor relevant to the decision whether the award debtor is a party to the arbitration agreement pursuant to which it was made. The reasoning process by which the tribunal has concluded that they are a party, the terms in which the award describes the award creditor and their liability, and the nature of the verification process will, amongst other factors, affect the weight to be accorded that document.

52 It is necessary to explain in greater detail the standard of proof required to satisfy the court that a defence set out in s 8(5) has been made out. There is nothing in the language of the Act to suggest that s 8(5) intended to impose a standard of proof different from the usual civil standard on the award debtor. Nevertheless, it is

uncontroversial that the cogency of evidence required to discharge the civil standard of proof will depend upon the issue sought to be proved. [20]

53 Sections 8(5)(a)–(e) require the enforcing court to be satisfied that a foreign award is tainted by either fraud or vitiating error on the part of the arbitral tribunal. Given that the Act declares arbitration to be 'an efficient, impartial, enforceable and timely method by which to resolve commercial disputes', the enforcing court should start with a strong presumption of regularity in respect of the tribunal's decision and the means by which it was arrived at. The enforcing court should treat allegations of vitiating irregularity as serious. A correspondingly heavy onus falls upon the award debtor if it wishes to establish such an allegation on the balance of probabilities. Furthermore, the conduct of the parties to the agreement at each of the various stages prior to an enforcement order being sought in these courts, and its consistency with the defence subsequently asserted, will be a relevant fact to consider when deciding whether that burden has been discharged to the necessary standard.

Indemnity Costs

54 As I would allow the appeal, I need not determine how costs should have been awarded. However, were it necessary to do so, my view would be as follows.

55 A decision to award indemnity costs against an unsuccessful party is dependant upon there being 'circumstances of the case … such as to warrant the Court … departing from the usual course' of awarding costs on a party and party basis.[21] Such a departure will only be countenanced in the presence of special circumstances.[22] Unsuccessfully resisting enforcement of a foreign arbitral award is not an established category of special circumstances in Australia. However, as Harper J observed in *Ugly Tribe Co Pty Ltd v Sikola*, '[t]he categories of special

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20 *Briginshaw v Briginshaw* (1938) 60 CLR 336, 362 (Dixon J).

21 *Colgate Palmolive Co v Cussons Pty Ltd* (1993) 46 FCR 225, 233. See also, *Hazeldene's Chicken Farm Pty Ltd v Victorian WorkCover Authority (No 2)* (2005) 13 VR 435.

22 *Australian Electoral Commission v Towney (No 2)* (1994) 54 FCR 383, 388.

circumstances are not closed'.[23]

56 In Hong Kong, the decision of Reyes J in *A v R* has formed the basis for a number of decisions in which the failure to successfully resist the enforcement of a foreign arbitral award has been treated as justifying departure from the ordinary orders as to costs.[24] That decision was based upon three considerations. First, award creditors should be entitled to expect that enforcement courts will enforce awards made in their favour and applications to resist enforcement should be exceptional. Secondly, unsuccessful award debtors would be in breach of their overarching obligations under the Hong Kong Civil Justice Reform ('CJR') to assist the court in achieving just, cost-effective and efficient resolution of disputes. Thirdly, the losing award debtor should bear the full costs consequence of bringing an unsuccessful application to dissuade them from pursuing 'unmeritorious challenges.'

57 The learned judge below found that such considerations applied with equal force in Victoria, 'both from an arbitration perspective and also from the perspective of legislation such as that contained in the *Civil Procedure Act* and in the Hong Kong CJR.'[25] Therefore, failure to successfully resist a foreign arbitral award by an award debtor should be treated as a category of special circumstances in which indemnity costs may be awarded against that party by a Victorian court. Nevertheless, his Honour stated:

> It should be … stressed that the finding of a category of special circumstances in this context does not mean that it would follow, inexorably, that a special costs order would be made. The award of costs is discretionary and the exercise of that discretion depends on the particular circumstances. Nevertheless in an arbitration context that discretion should be exercised against the backdrop of the considerations discussed.[26]

58 Insofar as his Honour mistakenly characterised the substantive decision

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23 *Ugly Tribe Co Pty Ltd v Sikola* [2001] VSC 189, [8].

24 [2009] 3 HKLRD 389, 400-401 [67]-[72]. See also, *Wing Hong Construction Ltd v Tin Wo Engineering Co Ltd* [2010] HKEC 918; *Taigo Ltd v China Master Shipping Ltd* [2010] HKCFI 530 [13]-[16].

25 First Costs Decision, [20].

26 First Costs Decision, [21].

which he was required to make as an application to resist enforcement of the Award by IMC Solutions pursuant to ss 8(5) and (7), his Honour's understanding of the basis on which the discretion as to costs should be exercised, and the considerations relevant to that decision, was erroneous. It is unnecessary for me to express a view on whether the approach of Reyes J in *A v R* should be followed in Victoria. What is clear, however, is that the terms and objects of the Act will be a relevant factor to be considered when exercising the discretion to award costs.

The arbitration business practice note

59 Finally, at present, arbitration business in the Trial Division of this Court is governed by Practice Note No. 2 of 2010. Paragraph 10 of that Practice Note states:

> 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.

60 Rule 9.04 is concerned with enforcement of an arbitration award, whilst r 9.05 is concerned with endorsement and service of the enforcement order. Under r 9.04(b), unless the Court otherwise orders, an application for leave to enforce an award as a judgment or order of the Court may be made without notice to any person.

61 Where a party seeks to enforce a foreign arbitral award, and it is necessary to lead extrinsic evidence to establish that the documents on which they rely satisfy the requirements of s 9(1), the judge should ordinarily direct the award creditor to give notice to the award debtor, and the enforcement proceedings should proceed *inter partes*. Practice Note No. 2 of 2010 should be amended to reflect this clarification.

Disposition of the appeal

62 IMC Solutions was not named as a party on the face of the OMA. Therefore, as a threshold issue, Altain had the legal burden of establishing before the trial judge, on the balance of probabilities, that IMC Solutions was a party to the arbitration agreement in pursuance of which the Award was made. The learned judge fell into error by placing the onus of proof on IMC Solutions. Accordingly, the issue of whether IMC Solutions was a party to the arbitration agreement needs to be re-decided again according to law. The issue of whether the respondent was estopped from resisting enforcement in Australia also falls to be re-decided.

63 The parties invited the Court, in the event that this appeal was successful, to re-decide the application for enforcement rather than remit the matter to the Trial

Division. Without the benefit of any rulings on the admissibility of the large volume of extrinsic material relied upon by the respondent to support its enforcement application, such an invitation essentially required this Court to embark upon the time-consuming process of re-conducting a trial at first instance. In my view, this was inappropriate in the circumstances of this appeal. Nevertheless, the majority having accepted that burdensome invitation, it is unnecessary for me to express a concluded view on the manner in which this appeal ought to have been disposed.

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TABLE OF CONTENTS

Introduction and summary

64 In this judgment, the following expressions have the meanings stated:

Act	*International Arbitration Act 1974* (Cth)
Additional Claim Document	Altain's additional written claim dated 2 July 2009 against '"IMC Mining Inc" company of Australia'.
Altain	Altain Khuder LLC
Arbitration Agreement	Clause 16.1 of the OMA.
Award	The award of the Tribunal made on 15 September 2009.
CEO	chief executive officer.
Claim Document	The document dated 11 May 2009 by which Altain commenced an arbitration proceeding and filed a written claim with the MNAC.
Convention	The *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* adopted in 1958 by the United Nations Conference on International Commercial Arbitration.
ex parte order	The order made on 20 August 2010 granting leave to Altain to enforce the Award as a judgment of this Court.
First Costs Decision	The costs decision made on 3 February 2011: *Altain Khuder LLC v IMC Mining Inc [No 2]* [2011] VSC 12 (3 February 2011).
IMC Response Document	A document headed 'IMC Response to AKL Arbitration Claim' filed with the MNAC on 16 June 2009.
IMCM	IMC Mining Inc.
IMCM Power of Attorney	The power of attorney dated 16 June 2009 executed by IMCM in favour of Bevan John Jones.
IMCS	IMC Aviation Solutions Pty Ltd, previously known as IMC Mining Solutions Pty Ltd
Interim Award	The interim award published on 10 July 2009 removing the arbitrator that had been appointed by '"IMC Mining Inc" Company of Australia', and directing that a new arbitrator be appointed by the chairman of the MNAC.
Lehman	Lehman, Lee & Xu, a Mongolian law firm.
MNAC	Mongolian National Arbitration Center.
Mongolian District Court	Khan-Uul District Court of Mongolia.
Mongolian District Court Order	The order of the District Court of Mongolia dated 23 November 2009.

Mr Batdorj's affidavits	Mr Batdorj's first affidavit and Mr Batdorj's second affidavit.
Mr Batdorj's first affidavit	The affidavit affirmed by Gendenpil Batdorj on 29 June 2010.
Mr Batdorj's second affidavit	The affidavit affirmed by Gendenpil Batdorj on 26 October 2010.
Mr Jones' affidavit	The affidavit affirmed by Bevan John Jones on 21 October 2010.
Mr Jones' Powers of Attorney	The powers of attorney dated 16 June 2009 executed by Mr Jones in favour of two lawyers of Lehman.
Mr Lewis' affidavit	The affidavit sworn by Stewart Charles Lewis on 14 October 2010.
Mr O'Donahoo's affidavit	The affidavit sworn by Ian Peter Scott O'Donahoo of Allens Arthur Robinson on 18 October 2010.
OMA	The operations management agreement dated 13 February 2008 executed by Altain and IMCM in relation to the Project.
Practice Note	Supreme Court of Victoria, Practice Note No 2 of 2010, 'Arbitration Business'.
Preliminary Hearing	The preliminary hearing conducted by the Tribunal on 24 July 2009.
Preliminary Hearing Document	The document executed by the Tribunal on 24 July 2009 in relation to the Preliminary Hearing.
Professor Tumenjargal's opinion	The expert opinion dated 14 October 2010 of Professor Mendsaikhan Tumenjargal in relation to Mongolian law.
Project	Tayan Nuur Open Cut Iron Ore Project in Mongolia.
Rules	*Supreme Court (Miscellaneous Civil Proceedings) Rules 2008* (Vic)
Second Costs Decision	The costs decision made on 4 February 2011.
Subcontract	The contract between IMCM and IMCS to which reference is made at [88] below.
Substantive Decision	*Altain Khuder LLC v IMC Mining Inc* (2011) 246 FLR 47.
Tribunal	The three arbitrators at the MNAC that made the Award.
UK Act	*Arbitration Act 1996* (UK) c 23.

65 This appeal against orders made by a judge in the Trial Division raises important questions about the *International Arbitration Act 1974* (Cth) ('Act'), including the nature of the jurisdiction of Australian courts in enforcing foreign arbitral awards, the onus on the award creditor in seeking leave to enforce an arbitral award, the onus on the award debtor in seeking to resist such enforcement, and the basis for the award of costs in such proceedings.

66 The orders were made on 28 January, and 3 and 4 February 2011, respectively in a proceeding commenced by originating motion filed on 14 July 2010 in which the respondent, Altain Khuder LLC ('Altain'), sought leave to enforce as a judgment of this Court a foreign arbitral award ('Award') against IMC Mining Inc ('IMCM') and the appellant, IMC Aviation Solutions Pty Ltd, which was previously known as IMC Mining Solutions Pty Ltd ('IMCS').

67 The Award was made on 15 September 2009 by three arbitrators ('Tribunal') at the Mongolian National Arbitration Center ('MNAC'). The Award required IMCM and IMCS to pay to Altain the amount of $US5,903,098.20 and an arbitration fee of $US50,257.70; the terms of the Award are set out at [108] below. The Award was made pursuant to cl 16.1 of an operations management agreement that was executed by Altain and IMCM on 13 February 2008 ('OMA') in relation to the Tayan Nuur Open Cut Iron Ore Project in Mongolia ('Project').

68 Clause 16.1 of the OMA contained an arbitration agreement ('Arbitration Agreement') as follows:

> **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.

69 On 20 August 2010, pursuant to the originating motion, Altain applied to the judge ex parte for leave to enforce the Award as a judgment of this Court. The judge granted leave and ordered that there be judgment for Altain in accordance with the terms of the Award, as follows:

(a) that IMCM pay the amount of US$5,903,098.20 plus the arbitration fee amount of US$50,257.70 to Altain; and

(b) that IMCS is liable to pay, for and on behalf of IMCM, the amount of US$5,903,098.20 plus the arbitration fee amount of US$50,257.70 to Altain,

together with interest under the *Penalty Interest Rates Act 1993* and an order that IMCM and IMCS pay Altain's costs of the proceeding on a party and party basis ('ex parte order'). The judge further ordered that IMCM and IMCS may apply within 42 days after service of the order to set aside the order, and stayed enforcement of the Award until the expiration of that time or determination of an application to set aside.

70 On 21 September 2010, IMCS filed a summons seeking the setting aside of the orders in so far as they related to it, and a range of other orders including security and a stay on enforcement of the Award pending determination of the summons. The summons came on for hearing before the judge on 30 September when, after some discussion, it was adjourned and was heard by him over three days in November 2010. IMCM made no such application.

71 On 28 January 2011, the judge, in accordance with reasons he published that day ('Substantive Decision'),[27] dismissed IMCS's summons, reserved the question of costs, and stayed enforcement of the Award until 4 pm on Friday 4 February 2011 or further order.

72 Then, having heard counsel on the matter of costs on 31 January 2011 and having also received written submissions, on 3 February the judge ordered, in accordance with reasons he published that day ('First Costs Decision')[28] that IMCS pay Altain's costs on an indemnity basis, and stayed that order until 4 pm on Friday 4 February or further order.

73 The above orders for a stay until 4 pm on 4 February were made on the basis that IMCS would act with due expedition to seek to be heard in the Court of Appeal on that day for a continuation of the stays. Although papers had been filed, and the Court of Appeal had made procedural directions, the matter was not heard in the Court of Appeal on 4 February. In that situation, on 4 February IMCS sought from

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27 *Altain Khuder LLC v IMC Mining Inc* (2011) 246 FLR 47.

28 *Altain Khuder LLC v IMC Mining Inc [No 2]* [2011] VSC 12 (3 February 2011).

the judge an extension of each stay for seven days but the judge, considering that IMCS had not acted with what he considered due expedition in the circumstances, refused to extend either stay and ordered IMCS to pay Altain's costs of the application on an indemnity basis ('Second Costs Decision').[29] In short reasons given at the conclusion of argument, the judge stated that he based the Second Costs Decision on two matters, namely, the reasons in the First Costs Decision and the reasons given earlier that day for refusing to extend the stays which reasons, it would appear, were concerned with the ongoing procedure to which Altain was being put in enforcing the Award.

74 As it transpired, only seven days later, on 11 February 2011, the Court of Appeal granted a stay of execution of the judgment and the costs orders. The stays have been continued until the hearing and determination of this appeal. In that situation, no question is now raised as to the judge's refusal to extend the stay. The only attack made upon the orders of 3 and 4 February is on the award of costs on an indemnity basis. The Court of Appeal has granted leave to appeal from those orders and from the orders of 28 January 2011.

75 For the reasons that follow, the appeal should be allowed and, in so far as they relate to IMCS, the impugned orders set aside.

The International Arbitration Act and the New York Convention

(a) The International Arbitration Act

76 Both Australia and Mongolia have acceded to the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* that was adopted in 1958 by the United Nations Conference on International Commercial Arbitration ('Convention').[30] The

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29 The judge did not publish separate reasons for the Second Costs Decision.

30 The Convention is generally known as the 'New York Convention'.

Act gives effect to Australia's obligations under the Convention, which is set out in Schedule 1 to the Act.

77 The following provisions of the Act are relevant to this appeal:

2D 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; …

Part II – Enforcement of foreign awards

3 Interpretation

(1) In this Part, unless the contrary intention appears:

agreement in writing has the same meaning as in the Convention.

arbitral award has the same meaning as in the Convention.

arbitration agreement means an agreement in writing of the kind referred to in sub article 1 of Article II of the Convention.

…

Convention means 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, a copy of the English text of which is set out in Schedule 1.

…

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.

…

(4) For the avoidance of doubt and without limiting subsection (1), an agreement is in writing if:

(a) its content is recorded in any form whether or not the agreement or the contract to which it relates has been concluded orally, by conduct, or by other means; or

(b) it is contained in an electronic communication and the information in that communication is accessible so as to be usable for subsequent reference; or

(c) it is contained in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other.

(5) For the avoidance of doubt and without limiting subsection (1), a reference in a contract to any document containing an arbitration clause is an arbitration agreement, provided that the reference is such as to make the clause part of the contract.

…

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.

(3) Subject to this Part, a foreign award may be enforced in the Federal Court of Australia 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).

…

(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.

…

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.

…

(5) A document produced to a court in accordance with this section is, upon mere production, receivable by the court as *prima facie* evidence of the matters to which it relates.

…

Part V – General matters

39 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

(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

…

(b) a court is interpreting this Act …; or

(c) a court is interpreting an agreement or award to which this Act applies; or

…

(2) The court … 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.

(b) The New York Convention

78 The following provisions of the Convention are relevant to this appeal:

ARTICLE I

…

2. The term 'arbitral awards' shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted.

…

ARTICLE II

1. Each Contracting State shall recognize 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.

…

ARTICLE III

Each Contracting State shall recognize 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 following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.

ARTICLE IV

1. To obtain the recognition and enforcement mentioned in the preceding article, the party applying for recognition and enforcement shall, at the time of the application, supply:

(a) The duly authenticated original award or a duly certified copy thereof;

(b) The original agreement referred to in article II or a duly certified copy thereof.

…

ARTICLE V

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

(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; or

(b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

(c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(d) 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

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

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

(b) The recognition or enforcement of the award would be contrary to the public policy of that country.

Facts

79 Set out below is an outline of relevant facts based largely on the contemporaneous documentary evidence that was before the trial judge.

(a) Events preceding the arbitration

80 IMCS was incorporated on 4 May 1995.[31] At all relevant times, Stewart Charles Lewis was a director and the chief executive officer ('CEO') of IMCS, the registered office of which was located at Level 40, Riverside Centre, 123 Eagle Street, Brisbane, Australia.

81 Altain was incorporated in Mongolia on 10 November 2006. At all relevant times, Bazar Radnaarbazar (known as 'Mr Bazar') was the CEO and chairman of Altain.

82 IMCM was incorporated in the British Virgin Islands on 27 June 2007. Mr Lewis was the managing director of IMCM until he resigned as a director on 4 September 2009.

83 In November 2007 and January 2008, Mr Lewis met representatives of Altain to discuss the Project.

84 On 29 January 2008, IMCS submitted to Altain a 'Proposal to Complete a Mine Operations Development Plan for [the Project]'.

85 On approximately 10 February 2008, a draft of the OMA was provided to Altain.

86 On 10 February 2008, Altain provided to Mr Lewis by email Mr Bazar's written comments on the draft OMA. The first comment was that the parties to the

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[31] Prior to 22 January 2007, the company was known by different names. The changes in name are not material.

agreement were to be 'Altain Khuder LLC' and 'IMC Mining Inc'. The seventh comment proposed wording for a dispute resolution clause which was in the terms set out at [68] above.

87 On 13 February 2008, Altain and IMCM executed the OMA pursuant to which Altain appointed IMCM as the operations manager for the Project. We have already referred to cl 16.1 of the OMA at [68] above. It will be recalled that cl 16.1 referred to the parties by their full names; that is, it referred to 'Altain Khuder LLC' and 'IMC Mining Inc'. Other relevant provisions or features of the OMA were as follows:

(a) The parties to the OMA were described as '**ALTAIN KHUDER LLC** a company incorporated in Mongolia (**Altain Khuder**)' and '**IMC MINING INC**, a company incorporated in the British Virgin Islands, of Level 40, Riverside Centre, 123 Eagle Street, Brisbane, Australia (**IMC**)'.

(b) Clause 1.2 defined 'Operations Manager' as 'IMC Inc' and stated that that company was 'responsible for the operations management of the [Project]'.

(c) Clause 5 set out the obligations of 'IMC' under the OMA, including the appointment of an 'IMC Operations Manager' and an 'IMC Director' and the provision of services by IMC's 'existing Brisbane-based geologists and mining engineers'.

(d) Clause 13.2 stated:

> IMC may Deal With any or all of its rights and obligations under and in connection with this agreement in favour of a Related Body Corporate (including, for example, IMC Mining Inc, a company incorporated in the British Virgin Islands) that executes a covenant in favour of Altain Khuder to observe and perform IMC's obligations under this agreement to the extent of the Dealing.

(e) Clause 15.4 stated that the address for service of 'IMC Inc' was 'Level 40, Riverside Centre, 123 Eagle Street, Brisbane, Australia'.

(f) Clause 17.3 provided that the agreement was 'exclusively for the benefit of the Parties and [did] not vest any benefits or rights or create any obligations or duties towards any Third Party'. Clause 1.2 defined 'Third Party' as any person 'other than the Parties or Related Bodies Corporate of the Parties';

(g) Clause 17.7 was an 'entire agreement' clause.

(h) The execution clause for IMCM stated, '**EXECUTED** by **IMC MINING** in accordance with section 127 of the Corporations Act 2001'.

88 Some time after 13 February 2008, IMCS and IMCM executed a 'Consulting Services Agreement' pursuant to which IMCS undertook to perform some of IMCM's obligations under the OMA ('subcontract').

89 On approximately 13 February 2008, Patrick Kelly was appointed as the 'IMC Director' under the OMA and, on 21 July 2008, Bevan John Jones was appointed as the 'IMC Operations Manager'.

90 On 11 March 2008, Gendenpil Batdorj was appointed as the managing director of Altain.

91 On 21 April 2008, IMC Mongolia LLC was incorporated in Mongolia.

92 During the course of 2008, IMCM sent invoices to Altain for work performed on the Project. The invoices were paid.

93 On 30 January 2009, Altain sent a letter to IMCM directing it to cease performing all tasks and services under the OMA due to IMCM's 'default actions'. On the same day, Altain sent a letter to IMCM directing it to cease work on a resource estimate report. The second letter was addressed to IMCM even though it was in response to an email from the principal associate geologist of IMCS.

94 On 5 March 2009, Altain sent a memorandum to IMCM stating that the OMA was terminated with immediate effect.

95 On 20 April 2009, IMCM sent a letter to Altain responding to Altain's memorandum of 5 March 2009. The letter stated that, by that memorandum, Altain had repudiated the OMA and that IMCM elected to terminate the OMA on the basis of Altain's repudiation.

(b) Commencement of the arbitration and events leading to the Award

96 On 12 May 2009, Altain commenced an arbitration proceeding before the MNAC by filing a written claim dated 11 May 2009 ('Claim Document'). The Claim Document contained the following relevant provisions or features:

(a) The parties to the claim were described as follows:

> **Claimant:**
>
> 'Altain Khuder' Co,. Ltd of MONGOLIA
>
> …
>
> **Respondent:**
>
> Australian 'IMC Mining Inc' company
> Address: British Virgin Islands, of Level 40,
> Riverside Centre, 123 Eagle Street, Brisbane Qld, Australia

(b) The 'Claim requirement' was described as: 'To pay back USD 6.2 million transferred according to "Operation Management agreement" and compensate all damages to the client (subscriber).'

(c) The first paragraph under the heading 'Content of the claim' stated:

> 'Operation Management Agreement for the Tayannuur Open Cut Iron Ore Project' was established between 'Altain Khuder' Co Ltd of Mongolia and 'IMC Mining Inc' Company of Australia on 13 Feb, 2008.

(d) The subsequent paragraphs under the heading 'Content of the claim' set out the history of dealings between Altain and 'IMC Mining Inc Company'. It was alleged that Altain had complied with its obligations under the OMA by transferring $US6.2 million to 'IMC Mining Inc Company'; that 'IMC Mining Inc Company' had breached its obligations under the OMA; that Altain had cancelled the OMA; and that the claim was being brought pursuant to cl 16 of the OMA.

(e) There was no reference to 'IMC Solutions Pty Ltd' in the Claim Document.

97 On 16 June 2009, IMCM executed a power of attorney in favour of Mr Jones ('IMCM Power of Attorney'). The IMCM Power of Attorney relevantly provided:

> IMC Mining INC located at Level 40, Riverside Centre, 123 Eagle Street, Brisbane, Australia ('**Client**') hereby appoints Bevan Jones, Operations Manager, IMC Mining INC and Vice President IMC Mongolia LLC, located at Park View Residence, Room #200, Chingis Avenue, 1st Horoo, Sukhbaatar District, Ulaanbaatar, Mongolia as my representative (the 'Agent'). The Agent shall have full power and authority to act on behalf of as its legal representative in the Territory of Mongolia. The Agent's powers shall include, but are not limited to:
>
> …
>
> - mediating communication with, raising questions from, exchanging information with and submitting explanations to the Client and others, when and where necessary;
>
> - if considered necessary by the Client taking part in arbitration and/or court review proceedings …[32]

98 On 16 June 2009, Mr Jones executed two powers of attorney ('Mr Jones' Powers of Attorney'), each of which was in favour of a lawyer in the Mongolian firm, Lehman, Lee & Xu ('Lehman') and otherwise in the same terms. The lawyers were Mr Baatar and Ms Bayartsetseg. Mr Jones' Powers of Attorney relevantly provided:

> I, Bevan Jones, authorised Agent for IMC Mining Inc located at Level 40 of Riverside Center, 123 Eagle Street, Brisbane, Australia hereby appoint [name of lawyer], Lehman, Lee & Xu, Lehman, Lee & Xu, Marco Polo Place, Building 5/3, Jamiyan Gunni Street, Suites 3-1, Ulaanbaatar, Mongolia as my Attorney-in-fact (the 'Agent'). The Agent shall have full power and authority to act on behalf of as my legal representative in the Territory of Mongolia. The Agent's powers shall include, but are not limited to:
>
> …
>
> - mediating communication with, raising questions from, exchanging information with and submitting explanations to the Client and others, when and where necessary;
>
> - if considered necessary by the Client taking part in arbitration and/or court review proceedings …[33]

99 On 16 June 2009, IMCM nominated an arbitrator for the arbitration.

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32 Quoted as in the original.

33 Quoted as in the original.

100 Also on 16 June 2009, a document headed 'IMC Response to AKL Arbitration Claim' was filed with the MNAC ('IMC Response Document'). The key provisions and features of the IMC Response Document were as follows:

(a) The first five paragraphs of the document stated:

> IMC is a company that is internationally recognised as a firm of integrity and ability within the mining sector. IMC are presently doing work for many of the top mining companies in the world.
>
> As an example, IMC are one of the preferred consultants for Vale, BHP Billiton, Rio Tinto and numerous other firms.
>
> IMC's business has continued to grow even through the difficult financial times of the past six months, this is a result of IMC's reputation for delivering clients needs and our reputation for excellence in mining.
>
> In accordance with IMC's business practice of the past 20 years, IMC undertook the work for AKL in a professional manner and met all requirements regarding our deliverables.
>
> At the time of AKL repudiating IMC's contract, the Tayan Nuur mine was in production while the various reports and procedures that were required from IMC were completed at the time AKL suspended the works.

(b) The name 'IMC Mining Inc' first appeared on page 3 of the document in the context of a discussion of the establishment of IMC Mongolia LLC. The first three paragraphs under the heading 'Item 2 – Establishment of IMC Mongolia' were as follows:

> IMC established IMC Mongolia in May 2008 to execute the works as required under the Operations Management Agreement. It was impossible for IMC Mining Inc to be able to establish itself in Mongolia without creating a separate entity.
>
> IMC Mongolia was appointed under clause 13 – Assignment to act on behalf of IMC Mining Inc.
>
> Under clause 5.1 IMC is required to employ a team of Mongolian staff to manage the project.

(c) On page 7 of the document, 'IMC' was described as the 'Operations Manager' and reference was made to the performance by 'IMC' of 'its requirement under the agreement'.

(d) The final page of the document contained the following statements:

> AKL have not followed the correct dispute resolution process and have not adequately outlined IMC claimed deficiencies and given a suitable period to remedy them. AKL did not engage IMC in good faith negotiations, instead going straight to contract Repudiation and then Arbitration.
>
> …
>
> The IMC business in Mongolia has suffered significantly due to the handling of the Project by AKL and the repudiation of the Operations Agreement without due cause.
>
> IMC believes that AKL still has outstanding accounts as submitted under the Operations Management Agreement of approximately $3.2M.
>
> IMC reserves the right to counterclaim against AKL for any damages or outstanding accounts during the arbitration proceedings.
>
> [*Signed*]
>
> Signed by Agent Bevan Jones
>
> 2009-06-16

101 On 2 July 2009, Altain filed an additional written claim against '"IMC Mining Inc" company of Australia' ('Additional Claim Document'). The claim was for repayment of $US320,577 in additional expenses allegedly incurred by Altain 'due to non performance of "Operations Management agreement"'. The Additional Claim Document did not refer to IMCS.

102 On 7 July 2009, the arbitrators (being three in number who by then had been appointed to hear the matter) heard an application by Altain for the removal of the arbitrator nominated by IMCM. Mr Jones and Mr Bataar attended the hearing.

103 On 10 July 2009, an interim award was published removing the arbitrator that had been appointed by '"IMC Mining Inc" Company of Australia', and directed that a new arbitrator be appointed by the chairman of the MNAC ('Interim Award'). The Interim Award did not refer to IMCS. A replacement arbitrator was duly appointed.

104 On 24 July 2009, the Tribunal conducted a preliminary hearing ('Preliminary Hearing') and published a document in relation to that hearing ('Preliminary Hearing Document'). The key provisions and features of the Preliminary Hearing Document were as follows:

(a) The document was relevantly headed, 'Case Related to "IMC Mining Inc" Company of Australia claimed by "Altain Khuder" Co,. Ltd of Mongolia'.

(b) The 'Claimant' was described as '"Altain Khuder" Co,. Ltd' and the 'Respondent' was described as '"IMC Mining Inc" company of Australia'.

(c) Under the heading 'Preliminary Meeting', the document stated:

> The arbitral tribunal discussed on the case related to 'IMC Mining Inc' Company of Australia claimed by 'Altain Khuder' Co,. Ltd of Mongolia by its preliminary meeting dated on 24 July, 2009, determined whether this case is related to arbitral jurisdiction, and negotiated on the case dispute resolution procedure.

(d) Under the heading 'Case Jurisdiction', the document stated:

> The Arbitral tribunal hereby decided that this case is the case related to the arbitration based on the Section 1 of Article 6 and Section 1 of Article 11 of the Law on Arbitration of Mongolia, and arbitration clause stated in the 'Operation Management Agreement for the Tayannuur Open Cut Iron Ore Project' concluded between 'Altain Khuder' Co,. Ltd of Mongolia and 'IMC Mining Inc' Company of Australia on 13 Feb, 2008.

(e) Under the heading 'Applicable Law for Dispute Resolution and Arbitration Proceeding', the document stated:

> 5.1 The case shall be resolved according to legislation of Mongolia by adhering to the Section 3 of Article 34 of the Law on Arbitration. For the case resolution the norms of conflict shall be considered and an arbitration award shall be based on the norms of Civil law of Mongolia.
>
> 5.2 It is decided that the Law on Arbitration, Rules of the Mongolian National Arbitration Center, Civil Code and other relevant regulations shall be adhered, the evidences to the case be examined and adversary principle be guided to the arbitration proceeding.

(f) The document stated that the arbitration would take place in Ulaanbaatar city and would be conducted in the Mongolian language. It summarised Altain's claim and the 'counter explanation dated on 16 June, 2009' of 'the respondent' and set out the parties' entitlement to file documents in support of their respective claims.

(g) The document referred to 'the IMC Mining Inc Operations Management agreement' and to correspondence from 'IMC Mining Inc' to Altain.

(h) Under the heading 'Others', the document stated, 'The Arbitral tribunal has the right to resolve all of the issues arisen from the claim and application delivered by the parties and right to resolve the required additional issues for to make the Arbitration award'.

(i) The document stated that 'the respondent has right to bring a counter claim'.

(j) The document was signed by the three arbitrators, by two persons next to the words 'Representative of the Claimant', and by Mr Jones and Mr Baatar next to the words 'Representative of Respondent'.

(k) The document did not refer to IMCS.

105 On 24 July 2009, '"IMC Mining Inc" company of Australia' filed a counterclaim for $US1 million on the basis that Altain had terminated the OMA 'without any grounds and reasons' and that this had caused 'huge business losses' to 'the respondent'. The document was signed by Mr Baatar as 'Accredited Representative'; it did not refer to IMCS.

106 On 7 September 2009, HopgoodGanim, the Australian solicitors for IMCS, sent a letter to the MNAC. The letter relevantly stated:

> We act for IMC Mining Solutions Pty Ltd of Level 40, Riverside Centre, 123 Eagle Street, Brisbane, Queensland, Australia.
>
> Our client is aware of IMC Mining Inc's involvement as a party to the above arbitration proceedings.
>
> Our client has asked us to formally advise you that it holds concerns regarding the capacity of IMC Mining Inc to repay outstanding advances from our client in excess of AUD$500,000. We further advise that without our client's support, which our client is unable to agree to provide in the circumstances, our client considers that IMC Mining Inc may not have capacity to meet the future costs of and incidental to the arbitration proceedings.
>
> In the light of this information, should you need to contact that party, please direct your correspondence to IMC Mining Inc at its address at: IMC Mining Inc, P.O. Box 3340, Road Town, Tortola, British Virgin Islands.

107 The Tribunal held a hearing on 8 September 2009. Mr Liotta of Lehman attended the hearing. Later that day, he sent an email to Mr Lewis which he also forwarded to the MNAC and HopgoodGanim, in which he stated:

> During the 10:00 hearing we explained to the arbitrators that Lehman, Lee & Xu Mongolia no longer represents IMC Mining Inc. They deliberated for about fifteen minutes in closed chambers and upon conclusion informed us that they will give IMC Mining Inc, seven (7) days within which to appoint legal counsel (or appear personally). Following the seven days, they will hold the hearing with or without IMC's presence.
>
> I did not withdraw our work product which consists of our legal argument, document list, and ten (10) binders as organized by us according to relevance; all of which have undergone court certification. The arbitrators stated that since this case is such a high value case they will continue to review the evidence we have submitted and use it to make their overall decision.
>
> I highly suggest that you contact the … [MNAC] by end of day today so as to arrange for your prompt representation at next week's hearing.

(c) The Award

108 On 15 September 2009, the Tribunal conducted the arbitration hearing. Neither IMCM nor IMCS were represented at the hearing. On the same day, the Tribunal published the Award. The key features of the Award, which contained the reference '#77', were as follows:

(a) The Award comprises 15 pages and is signed by the arbitrators.

(b) The Award was headed 'Case # 12/09 charged against IMC MINING INC., Australia filed by ALTAIN KHUDER LLC, Mongolia'.

(c) The Award described the 'Plaintiff' as 'Altain Khuder LLC, Mongolia' and the 'Defendant' as 'IMC Mining Inc, Australia' and stated that the Tribunal posted the Claim Document to 'Defendant IMC Mining Inc of Australia' on 21 May 2009.

(d) The Award summarised the procedural history of the arbitration; the claims of the 'Plaintiff' against 'IMC Mining Inc' under the OMA; the defence of the 'Defendant' dated 16 June 2009; and the counterclaim of the 'Defendant' dated 24 July 2009.

(e) Paragraphs 2.17 and 2.18 of the Award stated:

> The arbitral hearing was commenced as it was arranged on 8 September 2009; however, the Defendant's Attorneys-in-fact withdrew from their representation to act as the Attorneys-in-fact of the Defendant on the grounds that the Defendant declined the service. To satisfy Defendant's right to attend the arbitral hearing, the hearing was postponed to 15 September 2009.
>
> The Defendant was informed of the date of the renewed arbitral hearing by the law firm previously hired by the Defendant to act on its behalf and the Mongolian National Arbitration Center through email and a reference letter.

(f) Under the heading 'Case Jurisdiction', the Award stated:

> Considering Article 6.1 and Article 11.1 of the Law on Arbitration of Mongolia and the agreement on arbitration reached by and between Altain Khuder LLC and IMC Mining Inc. under the Operations Management Agreement for the Tayan Nuur Open Cut Iron Ore Project dated 13 February 2008, the Arbitral tribunal awards that the dispute falls within the jurisdiction of the Arbitration.
>
> No complaints or comments were raised by the Parties regarding the arbitration jurisdiction.

(g) Then followed a heading, 'FIVE. RATIONALE FOR THE ARBITRATION AWARD', in which 'IMC Mining Inc. Company of Australia' was referred to as 'the defendant' and which concluded on page 12 with the first and second references to IMCS, viz:

> Thus, the misunderstanding arisen between the Parties during their performance under the Operations Management Agreement for the Iron Ore Project grew deeper and the Defendant no longer submitted its performance reports to the Plaintiff. At the same time, the Operations Manager of the Defendant failed to cooperate with the geology and other staff professionals of the Plaintiff to have its reports approved. Nonetheless, neither Defendant, nor IMC Mining Solutions Pty Ltd presented project cost details and budget expenditure reports.
>
> 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, signed the Operations Management Agreement for the Iron Ore Project dated 13 February 2008 on behalf of the Defendant.
>
> The Defendants failure to release and submit annual work report and cost expenditure report led the Parties to repudiation of the Agreement. Upon its receipt of the Notice of Termination by the

> Plaintiff dated 5 March 2008, the Defendant informed the Plaintiff of its termination of the Agreement.[34]

(h) Then, on page 12 under the heading, 'SIX. CONCLUSION BY THE ARBITRAL TRIBUNAL', the Tribunal set out its conclusions. Again, the word 'Defendant' appears in the singular throughout this section. But towards the end of the conclusions, the third, fourth and fifth references to IMCS appear on page 13, viz:

> None of the Defendant or IMC Mining Solutions Pty Ltd supplied project cost details or expenditure reports to the Plaintiff properly. Nor did they issue or sign a document, whereby they reviewed their performance under the Agreement.
>
> 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.

(i) Following those references, the key findings of the Tribunal are set out on pages 13 and 14, viz:

> Supported by the Statement of Claim by the Plaintiff, Statement of Defense by the Defendant, testimonials of witnesses, and evidences collected in the file, it has been established that the Defendant failed to fulfill its obligations borne under Article 5 and Article 7 of the Operations Management Agreement for the Iron Ore Project dated 13 February 2008 and to present the deliverables to the Plaintiff properly.
>
> Therefore, the arbitral tribunal awards that the Statement of Claim by Altain Khuder LLC is justifiable for a Remedy by the Defendant pursuant to Clause 227.3 of the Civil Code of Mongolia. However, it is awarded that US$617478.8, the amount paid for the services rendered and works completed by the Operations Manager, should be deducted from the Amount claimed by the Plaintiff in its Statement of Claim and to be remedied by the Defendant.

(j) Under the heading 'Arbitral Award', the Award stated:

> Pursuant to Article 34, Article 35, and Article 37 of Law on Arbitration of Mongolia and Article 42 and Article 44 of Arbitration Rules, it is AWARDED as follows:
>
> 1. IMC Mining Inc. Company of Australia Pay to Altain Khuder LLC of Mongolia, the sum of US$5903098.2 (five million nine

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[34] Quoted as in the original.

hundred three thousand ninety eight point two dollars) to remedy the Statement of Claim by the Claimant;

2. The arbitration fee paid by Altain Khuder LLC of Mongolia, the sum of US$60212 (sixty thousand two hundred twelve United States Dollars), remains as the arbitral deposit. The arbitration fee against the remedy of US$5903098.2 (five million nine hundred three thousand ninety eight point two dollars), the sum of US$50257.7 (fifty thousand two hundred fifty seven point seven dollars), is payable by IMC Mining Inc. Company of Australia and is transferable to Altain Khuder LLC of Mongolia.

3. 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.

4. This Award is final and binding.

(d) Verification of the Award by the Mongolian District Court

109 On 23 October 2009, Altain applied to the Khan-Uul District Court ('Mongolian District Court') to verify the Award. On 23 November 2009, Judge Oyun made order number 3392 ('Mongolian District Court Order'), which relevantly stated:

> L. Oyun, as a judge of Khan-Uul district court, received a request on 23rd October, 2009 from the Claimant: 'Altain Khuder' LLC in regards to verifying the arbitral award charged against the Defendant: IMC Mining Inc Company.
>
> …
>
> I satisfied the request to be legitimate.
>
> It should be noted the Arbitral award is enforceable pursuant to the New York Convention, 1958.
>
> In accordance with the provision 184.3 of the article 184, and 123.1 of article 123 of the Civil Procedure Code, it is
>
> 1. Verify the Award #77 of the Mongolian National Arbitration Center at the Mongolian National Chamber of Commerce and Industry dated 15 September, 2009.
>
> 2. Note that the Award is to be enforced in accordance with the New York Convention, 1958.

3. Aware that there is no right to appeal on the Judge Order.[35]

(e) Letter of demand

110 On 2 December 2009, Altain sent a letter of demand to IMCS. The letter was signed by Mr Batdorj. The letter stated that the Tribunal 'heard and discussed the case charged against IMC Mining Inc., Australia and filed by Altain Khuder LLC of Mongolia and … released the Award #77 on September 15, 2009'. The letter did not say that the Tribunal had held that IMCS was a party to the Arbitration Agreement or the arbitration proceeding.

Enforcement proceeding in the Trial Division of this Court

111 On 14 July 2010, Altain filed in the Trial Division, but did not serve on IMCM or IMCS, an originating motion seeking an order enforcing the Award against IMCM and IMCS as a judgment or order of this Court. The application was made ex parte in accordance with the procedure discussed at [132] below. In support of the application, Altain filed:

(a) an affidavit of Gendenpil Batdorj affirmed on 29 June 2010 ('Mr Batdorj's first affidavit');

(b) certified copies of the Award and the Arbitration Agreement;[36] and

(c) a number of other affidavits which are not relevant to the appeal.

112 The trial judge heard Altain's ex parte application on 20 August 2010. His Honour stated that he accepted the material that was relied upon by Altain 'as prima facie evidence at this stage for the purposes of [the] application'[37] and made the ex parte order. As mentioned earlier, pursuant to the ex parte order, there

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35 Quoted as in the original.

36 The copies of the Award and the Arbitration Agreement were exhibited to Mr Batdorj's first affidavit. The Award had been translated into English and both documents had been authenticated and certified as required by s 9 of the Act.

37 Transcript of Proceedings, *Altain Khuder LLC v IMC Mining Inc* (Supreme Court of Victoria, Croft J, 20 August 2010) 13.

was judgment against IMCM and IMCS for the awarded sums of $US5,903,098.20 and $US50,257.70, together with interest and party and party costs, provision for IMCM and IMCS to apply to set aside the order within 42 days of service of the order, and a stay on enforcement of the Award until the expiration of the 42-day period or the determination of any application to set aside the order made within that period.

113 On 21 September 2010, IMCS filed a summons to set aside the ex parte order in so far as that order related to IMCS. In support of its application, IMCS filed the following documents:

(a) an affidavit of Stewart Charles Lewis sworn on 14 October 2010 ('Mr Lewis' affidavit');

(b) an affidavit of Bevan John Jones affirmed on 21 October 2010 ('Mr Jones' affidavit');

(c) an affidavit of Ian Peter Scott O'Donahoo of Allens Arthur Robinson sworn on 18 October 2010 ('Mr O'Donahoo's affidavit');

(d) an expert opinion dated 14 October 2010 of Professor Mendsaikhan Tumenjargal, which answered several questions relating to the circumstances in which Mongolian law permitted a non-signatory to an arbitration agreement to be considered a party to that agreement ('Professor Tumenjargal's opinion'); and

(e) a number of other affidavits, including further affidavits sworn by Mr O'Donahoo, which are not relevant to the appeal.

114 Altain filed a further affidavit of Mr Batdorj affirmed on 26 October 2010 ('Mr Batdorj's second affidavit').

115 IMCS's application was heard by the judge on 30 September 2010 and 4, 5 and 12 November 2010.

Judgments below

116 On 28 January 2011, the trial judge published the Substantive Decision and dismissed IMCS's application to set aside the ex parte order. His Honour stayed the enforcement of the Award and the ex parte order, in so far as they affected IMCS, until 4.00pm on 4 February 2011. This time was selected in the expectation that IMCS would promptly file a summons in the Court of Appeal seeking leave to appeal and a further stay, and that the summons would be heard by the Court of Appeal 'no later than … 4 February [2011]'.[38]

117 The Substantive Decision is discussed below under the grounds of appeal. For present purposes, it is sufficient to summarise his Honour's key conclusions as follows:

(a) Altain had used the correct procedure in obtaining the ex parte order and had discharged its duty of candour in the course of making its application for the ex parte order.[39]

(b) Section 8(1) of the Act does not give rise to a threshold requirement that a foreign arbitral award exists that is binding on the parties to the arbitration agreement in pursuance of which it was made. Consequently, once the award creditor complies with s 9 of the Act, s 8(1) does not impose on it an onus to establish that such a requirement has been satisfied.[40]

(c) The onus of proving any of the defences or grounds against enforcement of a foreign arbitral award is borne by the person resisting enforcement.[41]

(d) The onus of proving any of the grounds listed in s 8(5) or (7) of the Act is a 'heavy' one, particularly in the light of the pro-enforcement and pro-arbitration environment that the Act and the Convention represent.[42]

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38 Transcript of Proceedings, *Altain Khuder LLC v IMC Mining Inc* (Supreme Court of Victoria, Croft J, 28 January 2011) 10.

39 Substantive Decision, 54 [12], 56 [19].

40 Substantive Decision, 76 [60].

41 Substantive Decision, 76 [61].

42 Substantive Decision, 76 [61]-[62], 95 [88].

(e) A person seeking to resist enforcement of a foreign arbitral award is not entitled to re-litigate the issues that were the subject of the arbitration. Such a person is entitled to rely on the grounds provided for in the Convention, and in legislation applying its provisions, but is not entitled to venture further towards reconsideration of the findings, substantive or procedural, of the arbitral tribunal.[43]

(f) A ruling by a supervising court at the arbitral seat may raise an issue estoppel binding on the courts at the place of enforcement.[44]

(g) The Preliminary Hearing Document was signed by the parties as a record of the preliminary hearing that the Tribunal conducted on 24 July 2009 and the agreements that were reached at the hearing.[45] At the Preliminary Hearing, Mr Jones acted for IMCM and IMCS, and he signed the Preliminary Hearing Document on behalf of both companies. It was agreed, among other things, that between IMCM, IMCS and Altain, the Tribunal had jurisdiction to hear and determine the dispute, and the dispute would be resolved according to Mongolian law.[46]

(h) The Tribunal held that it had jurisdiction to make an award against IMCS, and the Award was later verified by the Mongolian District Court as the supervising court. IMCS did not challenge the Award or the Mongolian District Court Order in the Mongolian courts. It is not the role of the Supreme Court of Victoria, as the enforcement 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 Mongolian District Court.[47]

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43 Substantive Decision, 82-3 [69].

44 Substantive Decision, 83 [70].

45 Substantive Decision, 92 [84].

46 Substantive Decision, 93 [85].

47 Substantive Decision, 99 [95].

(i) The evidence did not support the position that the Arbitration Agreement was not valid and binding on IMCS under Mongolian law. The evidence of Mr Batdorj was to be preferred to the evidence adduced by IMCS for the following reasons: Mr Batdorj's evidence was direct evidence from an employee of Altain who attended the hearings in question; the evidence of Mr Jones and Mr Lewis did not directly contradict Mr Batdorj's evidence; IMCS failed to adduce evidence from Mr Kelly (the IMC Director under the OMA) and the lawyers from Lehman. The evidence of Mr Batdorj and the findings of the Tribunal and the Mongolian District Court meant that IMCS had failed to discharge the burden of establishing the defence in s 8(5)(b) of the Act.[48]

(j) As a result of its participation in the arbitration proceeding, and having regard to its failure to challenge the Award in the Mongolian courts (in the particular circumstance of it having participated in the arbitration proceeding), IMCS was estopped from denying the validity of the Arbitration Agreement or that it is a party to the Arbitration Agreement.[49]

(k) The evidence that IMCM and IMCS shared a common logo and brand supported the suggestion that they acted as some form of common enterprise or operated under some other relationship of legal responsibility, or were estopped from asserting otherwise.[50]

(l) On the basis of the evidence that went towards establishing that IMCM and IMCS were for all intents and purposes treated as the same entity, or were estopped from asserting otherwise, it was more probable than not that IMCS was well aware of the nature and progress of the arbitration proceeding and was well able to present its case in the proceeding. IMCS did not discharge the onus of proving that it did not receive proper notice or a chance to be

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48 Substantive Decision, 92-3 [85], 96 [89], 100 [98].

49 Substantive Decision, 100 [98].

50 Substantive Decision, 104 [105].

heard and, accordingly, had not established the defence in s 8(5)(c) of the Act.[51]

(m) It was open to the Tribunal under Mongolian law to find that the OMA and the Arbitration Agreement in cl 16.1 of the OMA 'applied to and extended to' IMCS. On that basis, IMCS was a party to and bound by the Arbitration Agreement. IMCS 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. Accordingly, it failed to establish the defences in s 8(5)(d), (e) and (7)(b) of the Act.[52]

(n) As Altain had complied with the extent of its obligations under ss 8 and 9 of the Act, and IMCS had failed to establish any defence or ground for resisting enforcement of the Award against it, IMCS's application to set aside the ex parte order was dismissed.[53]

118 On the day that the Substantive Decision was published, 28 January 2011, Altain applied for an order that IMCS pay its costs on an indemnity basis. On 3 February 2011, the judge published the First Costs Decision in which he granted Altain's application. His Honour's reasons are discussed at [323] to [332] below. His Honour's order dated 3 February 2011 also provided for a stay of that order until 4.00pm on 4 February 2011.

119 On 3 February 2011, IMCS filed a notice of appeal, a summons seeking leave to appeal from the orders of 28 January 2011 and a stay of the ex parte order, and a summons seeking leave to appeal from and a stay of the 3 February 2011 order. Initially, the Court of Appeal Registry made the summonses returnable on 'a date to be fixed' but later the parties were notified that they would be heard on 11 February 2011, and they were. As mentioned earlier, on 4 February 2011, IMCS applied to the trial judge for an extension of the stay orders that were made on 28 January 2011 and

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51 Substantive Decision, 106 [110].

52 Substantive Decision, 107-8 [112]-[115].

53 Substantive Decision, 109 [117]-[118].

3 February 2011, however, his Honour dismissed the application and ordered IMCS to pay Altain's costs of the application on an indemnity basis. His Honour's reasons are referred to below at [333] to [334].

Leave to appeal to the Court of Appeal

120 This Court granted IMCS leave to appeal against the Substantive Decision, the First Costs Decision and the Second Costs Decision, and stayed enforcement of the ex parte order – in so far as it affected IMCS – and the indemnity costs orders until the hearing and determination of the appeal. The Court also ordered IMCS to provide security for Altain's costs of the appeal.

Grounds of appeal

121 IMCS's further amended notice of appeal relied on 17 grounds of appeal. Prior to the hearing of the appeal, IMCS identified the key issues arising from the grounds of appeal as follows:

(a) Whether Altain had the onus of proving that the Award was binding upon IMCS as a party to the Arbitration Agreement in pursuance of which the Award was made (ground 3).

(b) Whether this Court, as the enforcement court, can determine for itself whether the Tribunal had jurisdiction in respect of IMCS (grounds 5 and 9).

(c) Whether the Tribunal determined its own jurisdiction by finding that IMCS was a party to the Arbitration Agreement (ground 4).

(d) Whether IMCS consented to arbitrate (ground 7).

(e) Whether it was open to IMCS to rely on the defence that it did not receive proper notice of its inclusion in the Award and an opportunity to be heard (grounds 2 and 10).

(f) Whether there was admissible evidence concerning the practice and procedure of Mongolian courts in 'verifying' an arbitral award (ground 6).

(g) Whether IMCS was estopped from denying that it was a party to the Arbitration Agreement or the arbitration (grounds 8 and 11).

(h) Whether the trial judge erred in awarding indemnity costs against IMCS (grounds 16 and 17).

122 We will discuss each of these issues in turn.

123 There were five further grounds of appeal, grounds 1, 12, 13, 14 and 15. Ground 1 alleged that Altain had not discharged its obligation of candour during the ex parte hearing on 20 August 2010; IMCS did not press this ground. Ground 12 attacked the judge's finding that IMCS had not established the ground under s 8(5)(c) of a lack of notice; this ground is considered together with ground 10. That leaves grounds 13, 14 and 15 which require little elaboration in light of the reasons that follow: see at [343] to [346] below.

124 It is also convenient to note that ground 2 was not confined to grounds 10 and 12. That is because it was concerned with evidentiary matters that underlie the appeal generally. Ground 2 attacked the failure of the judge to rule on objections of IMCS to the admissibility of, or the weight to be given to, Mr Batdorj's affidavits. A consequence of this failure was that IMCS requested this Court to rule on the objections, rather than remit the matter to the Trial Division for that purpose.

Ground 3: Onus of proving that IMCS was a party to the Arbitration Agreement

125 The onus issue requires a determination of which of two competing interpretations of s 8 of the Act is correct. The first interpretation – as advanced by IMCS – is that s 8(1) imposes a legal onus on the award creditor to prove, as a threshold jurisdictional matter, that the award debtor is a party to the arbitration agreement in pursuance of which the award was made. The second interpretation – as advanced by Altain – is that, once the award creditor complies with the evidentiary requirements of s 9 of the Act, s 8(5) and s 8(7) impose a legal onus on the award debtor to establish one of the grounds set out in those provisions.

(a) Preliminary observations on the interpretation of the Act

126 A number of observations may be made about the Act which are relevant to the resolution of the issue of onus.

127 First, s 39(2) of the Act provides that, in interpreting the Act, the Court must have regard to its objects; the fact that arbitration is an efficient, impartial, enforceable and timely method by which to resolve financial disputes; and the fact that awards are intended to provide certainty and finality.[54] The objects of the Act, which are set out in s 2D, include that the Act seeks to facilitate the recognition and enforcement of arbitral awards made in relation to international trade and commerce, and to give effect to the Convention.

128 Secondly, the Act, and the Convention, reflect what is often described as a 'pro-enforcement bias'[55] or policy. What that means is this. The Act, and the Convention, recognising the role and importance of arbitration in international trade and commerce and the certainty and finality of awards, has simplified the procedure for enforcing foreign arbitral awards while also limiting the grounds upon which the enforcement of such an award may be resisted and placed the onus of establishing those grounds upon the party resisting enforcement.[56] In *Redfern and Hunter on International Arbitration*,[57] it is said of the expression 'a pro-enforcement bias' that it 'means that whilst it may be possible to challenge an arbitral award, the available options are likely to be limited.' Sir Anthony Mason has described the objective of the Convention as being 'to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the

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54 Section 39(2) of the Act also provides that the Court is to have regard to the same matters when considering exercising the power under s 8 to enforce an award or to refuse to do so, and in interpreting an agreement or an award.

55 *Parsons & Whittemore Overseas Co Inc v Societe Generale de L'Industrie du Papier (Rakta),* 508 F 2d 969, 973 (2nd Cir, 1974) ('*Parsons*').

56 *Parsons*, 508 F 2d 969, 973 (2nd Cir, 1974); *Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs of the Government of Pakistan* [2011] 1 AC 763, 836 [101] ('*Dallah*').

57 Nigel Blackaby et al, *Redfern and Hunter on International Arbitration* (Oxford University Press, 5th ed, 2009) 588 [10.09].

standards by which agreements to arbitrate are observed and arbitral awards are enforced.'[58]

129 The Act's pro-enforcement policy is relevant to the interpretation of particular provisions of the Act. Hence, in *Parsons & Whittemore Overseas Co Inc v Societe Generale de L'Industrie du Papier (Rakta)*,[59] it was held that the public policy ground of resistance to the enforcement of an award was to be given a narrow construction as meaning contrary to the basic notions of morality and justice of the forum. That is consistent with the attainment of the objects of the Act and the Convention.[60] It would be inappropriate, however, for this Court to give to a provision of the Act a meaning which is not supported by the words used by the Parliament, construed in accordance with conventional principles of statutory interpretation, for the purpose of giving effect to the pro-enforcement policy.[61]

130 Thirdly, as the Act gives effect to the Convention, decisions of overseas courts on the meaning of provisions of domestic legislation that adopt the wording of the Convention may be of assistance in the interpretation of the Act. Apart from promoting comity, there are obvious advantages in consistency in the interpretation of legislation that gives effect to an international convention.[62] In that regard, however, it will be important to note any relevant differences in the legislation of another jurisdiction.

131 Fourthly, although s 3(1), (4) and (5) of the Act provides a broad definition of 'arbitration agreement', it is an essential requirement that the Agreement be in writing or evidenced in writing.

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58 *Hebei Import & Export Corp v Polytek Engineering Co Ltd* [1999] 2 HKC 205, 232 ('*Hebei*').

59 508 F 2d 969, 974 (2nd Cir, 1974).

60 *Hebei* [1999] 2 HKC 205, 232-3.

61 Cf *Ryder v Booth* [1985] VR 869, 870-1, 877.

62 *Rocklea Spinning Mills Pty Ltd v Anti-Dumping Authority* (1995) 56 FCR 406, 421.

132 Fifthly, the Act does not set out the procedures to be followed by this Court in relation to applications for enforcement of foreign arbitral awards. Those procedures are set out in O 9 of the *Supreme Court (Miscellaneous Civil Proceedings) Rules 2008* (Vic) ('Rules') and Practice Note No 2 of 2010, 'Arbitration Business' ('Practice Note'). The Rules and the Practice Note provide for a two-stage process. Stage one usually involves the making of an ex parte application for leave to enforce the award. If leave is granted, an order is made which gives effect to the award as a judgment of this Court and stays the enforcement of the award for the purpose of giving the award debtor an opportunity to apply to the Court to set aside the order. Stage two occurs only if an application is made to set aside the order. If such an application is made, stage two involves an inter partes hearing of the application. The two-stage model has been adopted in other Convention countries.

133 Where an application for leave to enforce a foreign arbitral award is made with notice to the award debtor and the award debtor attends the hearing to oppose the application, the Court will decide whether to make an order after it hears from both parties. The Court's decision will depend on the matters that each party must prove and whether it has discharged its onus of proof.

(b) Matters to be proved by the award creditor on a prima facie basis

134 As the party invoking the Court's jurisdiction, the award creditor has an evidential onus of satisfying the Court, on a prima facie basis, that it has jurisdiction to make an order enforcing a foreign arbitral award. Section 9 of the Act assists the award creditor to discharge the evidential onus. If prima facie proof is established to the Court's satisfaction pursuant to s 8(2), the Court may make an order enforcing the award, subject to the order being set aside upon application by the award debtor.

135 In our opinion, at stage one, the award creditor must satisfy the Court, on a prima facie basis, of the following matters before the Court may make an order enforcing the award:

(a) an award has been made by a foreign arbitral tribunal granting relief to the award creditor against the award debtor;[63]

(b) the award was made pursuant to an arbitration agreement; and

(c) the award creditor and the award debtor are parties to the arbitration agreement.

136 The above analysis is supported by *Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs of the Government of Pakistan*,[64] in which Lord Mance JSC said that the scheme of the Convention gives 'limited prima facie credit to apparently valid arbitration awards based on apparently valid and *applicable* arbitration agreements'.[65]

137 Where an award expressly states that it has been made in favour of the award creditor against the award debtor pursuant to an arbitration agreement and that agreement names the award creditor and the award debtor as parties, upon production of the arbitration agreement and the award in accordance with s 9(1), the award creditor would, by virtue of s 9(5), establish its prima facie entitlement to an order enforcing the award.[66] It should be borne in mind that, by virtue of s 3(4) of the Act, the expression 'arbitration agreement' has a wide meaning.

138 Compliance with s 9(1) of the Act will not always provide sufficient prima facie evidence to satisfy the Court that leave should be granted for the enforcement of a foreign arbitral award. This will be so, in particular, where, on the face of the arbitration agreement and the award, the person against whom the award was made was not a party to the arbitration agreement. If the arbitration agreement and the award are the only evidence presented to the Court, that evidence would be

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63 For present purposes, we put aside the effect of an assignment of the benefit of an award.

64 [2011] 1 AC 763.

65 [2011] 1 AC 763, 813 [30] (emphasis added). See further below at [184].

66 Section 9(5) of the Act gives prima facie evidential status to an arbitration agreement and to an arbitration award that are produced to the Court pursuant to s 9(1). Section 9(1) is silent in relation to whether the award debtor is a party to the arbitration agreement.

insufficient to invoke the Court's jurisdiction under s 8(1) and (2) to enforce a foreign arbitral award 'on the parties to an arbitration agreement in pursuance of which it was made'.

139 The above discussion may be illustrated by an example. If the named parties to an arbitration agreement were X and Y, and an award was made in favour of X against Z, production of the arbitration agreement and the award would not suffice for the making of an ex parte order for the enforcement of the award even if the award stated that it was made pursuant to the arbitration agreement. This is because, even though the award purported to have been made under the arbitration agreement, the contents of those documents do not provide any evidence that Z was a party to the arbitration agreement.

140 Where the contents of the arbitration agreement and the award do not provide prima facie evidence of the matters set out at [135] above, the Court, rather than proceeding ex parte, should require the award creditor to give notice of the proceeding to the award debtor and the proceeding should continue on an inter partes basis. This approach is supported by the observation of Rix LJ in *Gater Assets Ltd v Nak Naftogaz Ukrainiy*[67] that, 'where the judge feels unable on the evidence before him to enforce an award summarily and without notice … he will direct service of the claim form and decline to make any enforcement order.'[68]

141 The enforcement court's function at stage one has been described as 'highly summary and essentially quasi-administrative',[69] 'mechanistic'[70] or as 'mechanistic as possible'.[71] Altain's submissions placed emphasis on these expressions as indicating the proper approach at stage one. The submissions lead us to observe that

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67 [2008] 1 All ER (Comm) 209 ('*Gater*').

68 *Gater* [2008] 1 All ER (Comm) 209, 232 [74].

69 *Gater* [2008] 1 All ER (Comm) 209, 231 [72].

70 *Gater* [2008] 1 All ER (Comm) 209, 232 [74]; *Aloe Vera of America Inc v Asianic Food (S) Pte Ltd* [2006] 3 SLR (R) 174, 193 [42] ('*Aloe Vera*'); *Denmark Skibstekniske Konsulenter A/S I Likvidation v Utrapolis 3000 Investments Ltd* [2010] 3 SLR 661, 670 [22] ('*Utrapolis*').

71 *Xiamen Xinjingdi Group Ltd v Eton Properties Ltd* [2008] 6 HKC 287, 296 [47].

such adjectives are potentially unhelpful because they may be misunderstood – or, as here, misused – as suggesting that the enforcement court is entitled to act, or does act, robotically. At all stages of the enforcement process, courts perform a judicial function and, accordingly, must act judicially. To act robotically is not to act judicially. At stage one, the court must carefully review the award and the arbitration agreement that are filed pursuant to s 9(1) of the Act and determine whether those documents, whether considered alone or in combination with other evidence, satisfy the prima facie evidential requirements set out at [135] above.

142 On the appeal, Altain initially submitted that, at stage one, an award creditor is automatically entitled to an ex parte order for enforcement of the award without doing any more than filing the award and the arbitration agreement in accordance with s 9(1) of the Act, and resisted the notion that an award creditor is subject to any onus of proof. Ipso facto as it were, upon compliance with s 9(1), an award creditor is entitled to an ex parte order for the enforcement of the award. The legal onus then fell upon the award debtor to persuade the Court to set aside the order on the basis of one of the grounds in s 8(5) or (7).

143 During the course of argument, however, Altain acknowledged that if the arbitration agreement and the award produced to the Court pursuant to s 9(1) do not, on their face, disclose that the award debtor was a party to the arbitration agreement in pursuance of which the award was made, it would be open to the Court to refuse to make an ex parte order and to require that the application for leave to enforce the award proceed inter partes. This was so, it was said, because the Court must be satisfied on a prima facie basis that it is appropriate to make an enforcement order.

144 In our view, where a judge determines that the documents filed in accordance with s 9(1) of the Act do not satisfy the prima facie evidential requirements set out at [135] above and orders that the application for enforcement proceed inter partes, at the inter partes hearing, the evidential onus would be on the award creditor to

adduce evidence, in addition to the arbitration agreement and the award, to satisfy the Court of those prima facie evidential requirements.

145 Once the award creditor establishes a prima facie entitlement to an order enforcing a foreign arbitral award, if the award debtor wishes to resist such an order, it can do so only by proving 'to the satisfaction of the Court' one of the matters set out in s 8(5) or (7) of the Act. This follows from s 8(3A), (5) and (7). If the award debtor fails to satisfy the Court of one of the matters set out in s 8(5) or (7), the award creditor would be entitled to an order enforcing the award.

146 In practice, in an inter partes hearing, both parties will usually adduce evidence and make submissions on all the issues in dispute. That does not mean, however, that the legal onus will immediately be on the award debtor to prove one of the matters in s 8(5) or (7). That will occur only if the award creditor discharges the evidential onus of adducing prima facie evidence of the matters set out at [135] above.

147 The award creditor's evidential onus remains important in an inter partes hearing because, at the conclusion of the award creditor's evidence, the award debtor could make a 'no case submission' seeking the dismissal of the proceeding on the basis that the award creditor has not established a prima facie case. The fact that such a course may be infrequent because of the potential risks that may be involved if the award debtor elected not to call evidence, does not gainsay the possibility.

148 Where an inter partes hearing proceeds in the normal way, the Court will decide the issues in dispute by determining whether each party's evidence was sufficient to discharge the onus falling on that party.

149 The fact that s 8(5) and s 8(7) of the Act do not expressly include a ground that the award debtor was not a party to the arbitration agreement in pursuance of which the award was made, gives rise to the question of whether s 8(1), s 8(3A), s 8(5) and s 8(7) apply differently in relation to onus where the award debtor denies being a

party to the arbitration agreement. In particular, the question arises whether, in such a case, s 8(3A), s 8(5) and s 8(7) are subject to s 8(1).

(c) Parties' submissions on whether s 8(3A), s 8(5) and s 8(7) are subject to s 8(1)

150 IMCS submitted that s 8(1) is a threshold jurisdictional provision – or a 'condition of entry' provision – that was unaffected by s 8(3A), s 8(5) and s 8(7), and that the legal onus was on the award creditor to satisfy the Court that the award debtor was a party to the arbitration agreement in pursuance of which the award was made. According to IMCS, unless s 8 is interpreted in this manner, an award debtor that was not the subject of the arbitration agreement would be left without any effective avenue of defending itself because s 8(5) and s 8(7) do not include, as one of the grounds of resisting enforcement of an award, that the award debtor was not a party to the arbitration agreement.[72]

151 Altain submitted that s 8(3A) must be given effect according to its terms. It contended that, consistent with well established international practice, the expression 'the arbitration agreement is not valid' in s 8(5)(b) is wide enough to include the ground that the award debtor was not a party to the arbitration agreement. When s 8(5)(b) is understood in this way, Altain submitted, it would not make sense, and would create duplication and an inconsistency in onus, to read s 8(3A) as being subject to s 8(1). This was so, it was said, because the imposition of an onus on the award creditor to prove that the award debtor was a party to the arbitration agreement would be incompatible with s 8(5)(b), which imposes the onus on the award debtor to prove that it was not a party to the arbitration agreement.[73]

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[72] IMCS contended that its construction of s 8 is supported by *Commonwealth Development Corporation v Montague* [2000] QCA 252 (27 June 2000) [3] ('*Montague*'); *Peter Cremer GmbH & Co v Co-operative Molasses Traders Ltd* [1985] ILRM 564, 573 (Supreme Court of Ireland) ('*Cremer*'); *Javor v Francoeur* (2003) 13 BCLR (4th) 195, 202-3 [13]-[23], [26], [28] (Supreme Court of British Columbia) ('*Javor*'); and *Sarhank Group v Oracle Corporation*, 404 F 3d 657, 662-3 (2nd Cir, 2005) ('*Sarhank*').

[73] Altain contended that its construction of s 8 is supported by *Dardana Ltd v Yukos Oil Co* [2002] 1 All ER (Comm) 819, 825-8 [9]-[15] (England and Wales Court of Appeal) ('*Dardana*'); *Aloe Vera* [2006] 3 SLR (R) 174, 196 [47], 200 [56] (Supreme Court of Singapore – High Court); *Gater* [2008] 1 All ER (Comm) 209, 232-3 [77] (England and Wales Court of Appeal); *Dallah* [2011] 1

152 Although the interpretations of s 8 that IMCS and Altain have urged upon the Court seek to accommodate the statement in s 8(1) that an award is only binding on the parties to the arbitration agreement in pursuance of which it was made, the competing interpretations have a different impact on the question of onus. Under IMCS's interpretation, the legal onus would be on the award creditor, whereas, under Altain's interpretation, once the award creditor has complied with s 9(1), the legal onus would be on the award debtor to satisfy the Court of one of the grounds in s 8(5) or (7).

(d) Decision on whether s 8(3A), s 8(5) and s 8(7) are subject to s 8(1)

153 A number of considerations support the view that s 8(3A), s 8(5) and s 8(7) are subject to s 8(1), and that the award creditor has the legal onus of proving that the award debtor was a party to the arbitration agreement in pursuance of which the award was made.

154 First, unlike court proceedings, arbitration proceedings are consensual. Only parties to an arbitration agreement are bound by an arbitral award.

155 Secondly, it is a general principle of law that the party that seeks to invoke the jurisdiction of the Court has the onus of satisfying the Court that it has jurisdiction to grant the relief sought.

156 Thirdly, s 8(1) appears prominently in the scheme of s 8. This is not surprising, as it defines the subject matter of Part II of the Act, namely, that by virtue of the Act, a foreign arbitral award is binding on 'the parties to the arbitration agreement in pursuance of which it was made'. In thus identifying that which is binding, s 8(1) limits the Court's jurisdiction pursuant to s 8(2) to enforcing a foreign arbitral award against a party to the arbitration agreement in pursuance of which it was made.

AC 763, 804-5 [12], 836 [101] (Supreme Court of the United Kingdom); and *Utrapolis* [2010] 3 SLR 661, 670 [22], 671-2 [26] (Supreme Court of Singapore – High Court).

157 Fourthly, s 9(1) and s 9(5) are evidentiary provisions which cannot derogate from the jurisdictional requirements of s 8(1).

158 Fifthly, the grounds upon which the Court may refuse to enforce a foreign arbitral award – which, according to s 8(3A), are exclusively set out in s 8(5) and (7) – do not expressly include the ground that the award debtor was not a party to the arbitration agreement in pursuance of which the award was made. Unless s 8(5)(b) is read as including such a ground, an award debtor that is the subject of an ex parte order granting leave to enforce the award would be in the invidious position of not being able to resist enforcement of the award under s 8(5) or (7) notwithstanding that it would be able to make out a strong case that it was never a party to the arbitration agreement.

159 Logically, the expression 'the arbitration agreement is not valid' in s 8(5)(b) may be inapt to accommodate the ground that a person is not a party to the arbitration agreement. This is because a person that seeks to establish that he or she is not a party to an agreement may have no legal or factual basis for impugning the validity of the agreement. The agreement may be valid as between the parties to it, and simply not apply to any person that is not a party to it. A person who establishes that he or she is not a party to an arbitration agreement does not thereby establish that the arbitration agreement is not valid.

160 Sixthly, a reading of s 8(5) as a whole indicates that the provision assumes that the question of whether the person resisting the enforcement of the award was a party to the arbitration agreement in pursuance of which the award was made has already been resolved against that person. This is evident from s 8(5)(a), which refers to 'a party to the arbitration agreement', and s 8(5)(f), which refers to 'the parties to the arbitration agreement'. If these provisions are read literally, the grounds covered by them are only available to parties to the arbitration agreement. It is not clear why these provisions should be so confined if it is the

intention of the Act to permit a person that alleges that he or she is not a party to an arbitration agreement to resist enforcement of the award under s 8(5).

161 On the other hand, there are a number of considerations that support the view that s 8(3A), s 8(5) and s 8(7) are not subject to s 8(1), and that the award debtor has the legal onus of proving that it was not a party to the arbitration agreement in pursuance of which the award was made.

162 First, s 8(3A) is clear and unequivocal: 'The court may only refuse to enforce the foreign award in the circumstances mentioned in subsections (5) and (7).' Had Parliament intended that s 8(3A) be subject to s 8(1), it could easily have said so. Section 8(1) itself contains a 'subject to' qualification. The fact that there is no such qualification in s 8(3A) indicates that that provision was not intended to be subject to s 8(1).

163 Secondly, if s 8(3A) is to be subject to s 8(1), confusion would be created as to how s 8(1) would operate in conjunction with s 8(3A), s 8(5) and s 8(7). Where a person sought to resist enforcement of a foreign arbitral award on a number of grounds, it would create unnecessary complexity and uncertainty if the onus lay with that person in relation to all grounds other than the ground that he or she was not a party to the arbitration agreement.

164 Thirdly, it would be anomalous to elevate the question of whether a person was a party to an arbitration agreement to an important threshold jurisdictional issue, and not to accord the same status to other issues which can also be regarded as jurisdictional. If s 8(1) is to be regarded as a jurisdictional provision, then all the requirements of that section must equally be regarded as jurisdictional. The section refers to 'a foreign award' and an 'arbitration agreement', and implicitly requires that the award and the agreement be valid.[74] This implication is confirmed when

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74 *Dallah* [2011] 1 AC 763, 827 [68].

one has regard to the fact that awards made under invalid arbitration agreements can be set aside under s 8(5).

165 It cannot be said that the ground that the award debtor was not a party to the arbitration agreement in pursuance of which the award was made is more significant than, for example, the ground that the arbitration agreement pursuant to which the award was made was not valid. There is no reason to think that an award debtor has greater justification to be aggrieved because it maintains that it was not a party to the arbitration agreement than an award debtor that maintains that the arbitration agreement was invalid because it was forged or obtained by fraud. If the forgery or fraud are not apparent on the face of the arbitration agreement, and an ex parte order is made to enforce the award, the award debtor would have the onus under s 8(5)(b) to persuade the Court that the arbitration agreement was a forgery or was obtained by fraud. There is no justification for adopting a different approach where, on the face of the arbitration agreement, the award debtor was a party to that agreement.

166 Fourthly, the ordinary and natural meaning of the expression 'the arbitration agreement is not valid' is that the arbitration agreement is of no legal effect under the relevant law.[75] A person who asserts that he or she is not a party to an arbitration agreement is, in substance, asserting that the arbitration agreement is of no legal effect as against him or her. Accordingly, s 8(5)(b) may be taken to include the ground that the award debtor was not a party to the arbitration agreement in pursuance of which the award was made.

167 Fifthly, if s 8(5)(b) imposes a legal onus on the award debtor to establish that it was not a party to the arbitration agreement in pursuance of which the award was made, duplication and an inconsistency in onus would arise if s 8(1) is interpreted as

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[75] See *Dardana Ltd v Yukos Oil Co* [2002] 1 Lloyd's Rep 225, 229 [28] and *Dallah Real Estate & Tourism Holding Co v Ministry of Religious Affairs, Government of Pakistan* [2009] 1 All ER (Comm) 505, 553-5, which are the first instance decisions in the proceedings determined in *Dardana* and *Dallah*.

imposing a legal onus on the award creditor to prove that the award debtor was a party to the arbitration agreement.

168 Sixthly, s 8(5)(b) of the Act is not confined to parties to the arbitration agreement. The fact that the expression 'a party to the arbitration agreement' is used in s 8(5)(a) and (f) indicates that the expression 'party' is used in the other paragraphs of s 8(5) to describe simply the person seeking to resist enforcement of a foreign arbitral award.

169 Regarding the matter overall, the considerations supporting the view that s 8(3A), s 8(5) and s 8(7) are not subject to s 8(1) are more compelling than the considerations supporting the opposite view. To interpret the Act in a manner that treated the issue of whether a person was a party to an arbitration agreement as standing outside the legislative scheme that applies to all other grounds of impugning an award, would fly in the face of the express language in s 8(3A) that the Court may only refuse to enforce a foreign award in the circumstances mentioned in s 8(5) and (7).

170 Similarly, it would fly in the face of the carefully enacted statutory scheme to impose a legal onus on the award creditor to prove that the award debtor was a party to the arbitration agreement in pursuance of which the award was made, while placing the legal onus on the award debtor to prove other grounds which are implicitly covered by s 8(1), such as the validity of the award and the arbitration agreement. It is neither logical nor consistent with the language of the Act to elevate the importance of privity of contract over the importance of the validity of the contract.

171 In relation to the question of whether s 8(5)(b) extends to the ground that the award debtor was not a party to the arbitration agreement, we respectfully agree with the approach that has been adopted in the United Kingdom.

172 In *Dallah*, Lord Collins JSC said that, notwithstanding that para 1(a) of art V of the Convention – which is reflected in s 8(5)(b) of the Act – deals expressly only with the case where the arbitration agreement is not valid, 'the consistent international practice shows that there is no doubt that it also covers the case where a party claims that the agreement is not binding on it because that party was never a party to the arbitration agreement.'[76] In support of this proposition, Lord Collins JSC referred to *Dardana Ltd v Yukos Oil Co*.[77] In that case, Mance LJ said that '[i]t is clear, and was effectively common ground before us, that [the UK equivalent of s 8(5)(b) of the Act] is one vehicle enabling the present appellants to challenge the recognition and enforcement of the Swedish award, by maintaining that they never became party to the [arbitration agreement].'[78]

173 It follows from the above discussion that, once the Court is satisfied on a prima facie basis that the award debtor was a party to the arbitration agreement in pursuance of which the award was made, under s 8(5)(b) the legal onus is on the award debtor to prove that it was not a party to that agreement.

174 This interpretation of the Act promotes the objects of the Act as required by s 39 of the Act and s 15AA of the *Acts Interpretation Act 1901* (Cth).

175 The cases upon which IMCS relied do not persuade us to adopt the interpretation of s 8 for which it advocated. IMCS relied principally upon *Peter Cremer GmbH & Co v Co-operative Molasses Traders Ltd*,[79] *Javor v Francoeur*,[80] *Sarhank Group v Oracle Corporation*[81] and *Commonwealth Development Corporation v Montague*.[82]

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76 [2011] 1 AC 763, 828 [77]. See also at 849-50 [155] (Lord Saville JSC).

77 [2002] 1 All ER (Comm) 819.

78 *Dardana* [2002] 1 All ER (Comm) 819, 825 [8].

79 [1985] ILRM 564.

80 (2003) 13 BCLR (4th) 195.

81 404 F 3d 657 (2nd Cir, 2005).

82 [2000] QCA 252 (27 June 2000).

176 In *Cremer*, the Supreme Court of Ireland considered whether the award debtor and the award creditor had entered into a binding contract containing an arbitration clause. The issue arose when the award creditor applied in Ireland to enforce an award made in the United Kingdom. Finlay CJ, with whom Hanchy and Griffin JJ agreed, held that the application fell to be determined by reference to the definitions of 'award' and 'arbitration agreement' in the *Arbitration Act 1980* (Ireland). He went on to say that, before the court 'is to enter upon consideration of that application it must first be satisfied that the document or decision sought to be enforced is, within the meaning of [the Irish Arbitration] Act, an award made in pursuance of an arbitration agreement within the meaning of that Act'.[83] Having decided that the parties had made an arbitration agreement and that the award was made in accordance with that agreement, the Court went on to decide, in the alternative, that the defence under the Irish equivalent of s 8(5)(e) of the Act was not established.

177 In *Javor*, an arbitrator in the United States accepted jurisdiction over Francoeur on the basis that he was the alter ego of the company that had signed the arbitration agreement, and made orders against him. Holmes J of the Supreme Court of British Columbia refused to enforce the award against Francoeur on the basis that he was never a party to the arbitration agreement. His Honour based his decision on the definition of 'party' in the *International Commercial Arbitration Act*, RSBC 1996, c 233, which he held also applied to the *Foreign Arbitral Awards Act*, RSBC 1996, c 154.[84] The former Act defined 'party' as 'a party to an arbitration agreement'. His Honour stated that he was advised by counsel that there was no authority on the issue.[85]

178 In *Sarhank*, an Egyptian arbitration tribunal made an award against Oracle Systems Inc and its parent, Oracle Corporation, even though only the former had signed the arbitration agreement. The United States Court of Appeals for the Second Circuit refused enforcement in accordance with para 2(a) of art V of the Convention

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83 *Cremer* [1985] ILRM 564, 573.

84 *Javor* (2003) 13 BCLR (4th) 195, 202 [15], 203 [26], [28].

85 *Javor* (2003) 13 BCLR (4th) 195, 202 [14].

on the basis that, under American law, whether a party has consented to arbitration is an issue to be decided by the court in which enforcement of the award is sought according to general principles of domestic contract law. The Court remitted the proceeding to the District Court to determine whether Oracle Corporation had consented to arbitration.[86]

179 For the reasons set out at [162] to [174] above, we decline to follow *Cremer*, *Javor* and *Sarhank* in so far as they suggest that the award creditor has a legal onus to establish the validity of a foreign arbitral award or an arbitration agreement, including that the award debtor is a party to the arbitration agreement.[87]

180 The approach that we have adopted is consistent with highly persuasive international jurisprudence on the Convention. We refer, in particular, to *Dardana* and *Dallah*.

181 In *Dardana*, Mance LJ stated:

> 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 [the UK equivalent of s 8(5) of the Act], that the other party has to prove that no such agreement was ever made or validly made.[88]

182 His Lordship declined to follow *Cremer* on the basis that the Irish Supreme Court had not considered the Irish equivalent of s 8(5)(b) of the Act and because that Court's approach resulted in 'the overlap and inconsistency of onus'.[89]

183 In *Dallah*, Lord Mance JSC noted that the parties in that case proceeded on the basis that, under s 103(2)(b) of the *Arbitration Act 1996* (UK) c 23 ('UK Act') and para

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86 *Sarhank*, 404 F 3d 657, 661-3 (2nd Cir, 2005).

87 In *Aloe Vera*, Prakash J followed *Dardana* and either distinguished or declined to follow *Cremer*, *Javor* and *Sarhank*. Her Honour's decision was subsequently followed by Ang Saw Ean J in *Utrapolis*.

88 [2002] 1 All ER (Comm) 819, 826 [12].

89 *Dardana* [2002] 1 All ER (Comm) 819, 827 [13].

1(a) of art V of the Convention, the onus was on the award debtor to prove that it was not a party to the arbitration agreement, and that '[t]here was no challenge to, and no attempt to distinguish, the reasoning on this point in *Dardana*'.[90]

184 We accept that the provisions of the UK Act that were considered in *Dardana* and *Dallah* differ in important respects from the provisions of the Act. In particular, the UK Act contained a broad definition of 'agreement in writing' and s 101(1) of the UK Act – the equivalent of s 8(1) of the Act – contained the words '[an] award shall be recognised as binding on the persons as between whom it was made' rather than the words '[an] award is binding … on the parties to the arbitration agreement in pursuance of which it was made'. However, *Dardana* and *Dallah* were not based solely on those features of the UK Act but were decided in the context of the UK Act and the Convention as a whole, including the objects of the UK Act. While the above differences justify our conclusion that, at stage one, there is an evidential onus on the award creditor to prove the matters set out at [135] above, they do not warrant our preferring the reasoning in *Cremer*, *Javor* and *Sarhank* to the reasoning in *Dardana* in relation to the legal onus. In our opinion, the reasoning in *Dardana* upon which we have relied better reflects the wording, structure and purpose of s 8 of the Act as a whole, as discussed at [162] to [174] above.

185 There is nothing in *Montague* that requires a different approach to the interpretation of s 8 of the Act. That case involved an appeal to the Queensland Court of Appeal by an award debtor, Montague, against an order of the District Court granting leave to an award creditor to enforce a costs award that was made by an arbitrator in New Zealand. In separate brief judgments, Thomas JA and Ambrose and Fryberg JJ dismissed the appeal on the basis that, although Montague was not a party to the contract containing the arbitration clause, the terms of reference that he and the contracting parties signed during the arbitration constituted a separate arbitration agreement for the purposes of the Act. Pursuant to the terms of

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90 *Dallah* [2011] 1 AC 763, 804-5 [12]. See also at 836 [101] (Lord Collins JSC).

reference, the signatories agreed that the arbitrator would decide whether he had jurisdiction in relation to the dispute and over which parties, and who should pay the costs of the arbitration. The arbitrator decided that he did not have jurisdiction to determine Montague's claims because Montague was not a party to the contract, and awarded costs against him.

186 Their Honours did not discuss the competing interpretations of s 8 of the Act that are set out at [125] above and did not expressly state on whom the onus of proof lay. However, their Honours' reasons are consistent with a finding that Montague had not discharged his onus of rebutting the award creditor's prima facie evidence that Montague was a party to the arbitration agreement in pursuance of which the award of costs was made, namely, the terms of reference.

187 As will be seen later in this judgment,[91] in the unusual circumstances of the present case, the outcome of the appeal would have been the same if we had concluded that s 8(3A), s 8(5) and s 8(7) are subject to s 8(1) of the Act and that Altain had the legal onus of proving that IMCS was a party to the Arbitration Agreement.

(e) Standard of proof under s 8(5) and (7)

188 Section 8(5) states that the party against whom enforcement of a foreign award is sought must prove 'to the satisfaction of the court' one of the grounds set out in that section. It does not, however, state the standard of proof.

189 The trial judge held that IMCS had a 'heavy' onus to establish the grounds in s 8(5) or (7).[92] In arriving at this conclusion, his Honour relied on statements made in *F G Hemisphere Associated LLC v Democratic Republic of the Congo*[93] and *Encyclopaedia Universalis SA v Encyclopaedia Britannica Inc*.[94] In *F G Hemisphere*, Deputy High Court

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91 See below [260]-[261].

92 See above [117](d).

93 [2008] HKCFI 906 (22 October 2008) (Hong Kong Court of First Instance) ('*F G Hemisphere*').

94 403 F 3d 85 (2nd Cir, 2005) ('*Encyclopaedia Universalis*').

Judge Mayo said, 'The regime under the New York Treaty is extremely onerous and a heavy burden is placed upon any party seeking to set aside an award.'[95] And in *Encyclopaedia Universalis*, the burden on a party resisting enforcement was stated to be 'a heavy one'.[96]

190 The judge further held, again accepting a submission of Altain, that having regard to the enforcement nature of the proceeding coupled with the overriding pro-enforcement policy underpinning the Act and the Convention, IMCS could only discharge its onus in resisting enforcement by providing the Court with 'clear, cogent and strict proof' of the grounds in s 8(5) and (7).[97]

191 On the appeal, Altain submitted that the judge was correct to conclude that in resisting enforcement the onus of proof on IMCS was 'very high' and that 'clear, cogent and strict proof' was required. IMCS, however, submitted that his Honour erred in these conclusions and in approaching determination of IMCS's application on that basis.

192 It is readily apparent that several difficulties lie in the path of his Honour's reasoning. The first difficulty is that the Act neither expressly nor, in our opinion, by necessary intendment provides that the standard of proof under s 8(5) and (7) is anything other than the balance of probabilities, as one would expect in a civil case. Section 8(5) requires proof 'to the satisfaction of the Court' whereas s 8(7) refers to a finding. But in either case, it is on the balance of probabilities. It is thus seen that the legislature has adopted different language in these provisions, which serves to emphasise not only the deliberate use of language but also the absence of language such as 'heavy onus', 'extremely onerous and a heavy burden', and 'clear, cogent and clear proof'. The true position, in our view, is that what may be required, in a particular case, to produce proof on the balance of probabilities will depend on the

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95 [2008] HKCFI 906 (22 October 2008) [11].

96 403 F 3d 85, 90 (2nd Cir, 2005).

97 Substantive Decision, 78-9 [65].

nature and seriousness of that sought to be proved. It is evident that what his Honour has done is read into s 8(5) and (7) qualifications the effect of which is, and could only be, to raise the barrier to an evidentiary higher level of satisfaction than s 8(5) or (7) on their terms would require. In short, the Act does not warrant, let alone require, the qualifications his Honour found or, indeed, a standard other than that of the balance of probabilities. Indeed, on the appeal Altain conceded as much.

193 The second major difficulty concerns the holding that clear, cogent and strict proof was required. The judge derived the expression from a South Australian case, *Palios Meegan and Nicholson Holdings Pty Ltd v Shore*[98] in which Gray J discussed the principles relating to the civil burden of proof where serious allegations are made.[99] It was not a case under the Act, but in the course of his reasons Gray J quoted a passage in the plurality judgment in the High Court in *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd*[100] where their Honours, noting that 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 is sought to be proved, said, '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"'.[101] Their Honours then went on to observe that the standard of proof in such cases remained the balance of probabilities and referred to *Briginshaw v Briginshaw*.[102]

194 Immediately after referring to these passages his Honour noted and accepted the submission of Altain that IMCS was required to provide 'clear, cogent and strict proof' to satisfy its onus under s 8(5) and (7). Apart from the matters referred to above, there are difficulties with this. First, even if the general reference to the proof that may be required of an allegation of fraud was apt in this case, the High Court's

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98 (2010) 108 SASR 31.

99 (2010) 108 SASR 31, 36-7 [59]-[60].

100 (1992) 67 ALJR 170.

101 (1992) 67 ALJR 170, 171 (citations omitted).

102 (1938) 60 CLR 336.

language was 'clear or cogent or strict'. But his Honour changed that to the conjunctive 'clear, cogent and strict', seemingly pitching the level of proof even higher. Not merely was the language inapt but, secondly, the reference was inappropriate being addressed to proof of fraud.

195 In the above discussion we have not overlooked the judge's reference, and Altain's in their submissions, to the enforcement nature of the proceeding and the pro-enforcement policy in the Act. The former is covered by the above discussion, while the latter is covered by the discussion at [128] to [129] above. The fact is that the Act operates according to its terms properly construed in context and having regard to the objects and purposes expressed in s 2D and s 39(2).

(f) Application of the onus principles to the present case

(i) The trial judge should not have made the ex parte order against IMCS

196 The trial judge was correct to make the ex parte order against IMCM. For the reasons set out at [140] above, however, his Honour erred in making the ex parte order against IMCS. This is because it was not apparent, on the face of the Arbitration Agreement, that IMCS was a party to that agreement. His Honour should have ordered that IMCS be given notice of Altain's application for enforcement of the Award and that the application be heard inter partes.

197 Far from facilitating the speedy enforcement of a foreign arbitration award, as required by the Act, the procedure that his Honour adopted created duplication in that the issue of whether IMCS was a party to the Arbitration Agreement had to be considered by reference to extensive evidence at both stages of the enforcement process. In addition, the procedure adopted by his Honour inevitably resulted in IMCS alleging that Altain had failed to discharge its duty of candour in relation to the affidavit material that it filed in support of the ex parte application. This allegation was debated at considerable length before his Honour, constituted ground 1 in the notice of appeal to this Court and featured prominently in the written submissions before this Court. Ultimately, while the allegation was not formally abandoned, it was not pressed.

198 The duty of candour that is owed to the Court by a party seeking ex parte relief and by the lawyers acting for that party is well established. As IMCS did not press the allegation that Altain had failed to discharge its duty of candour, we observe only that the duty is of fundamental importance to the administration of justice and that parties and their lawyers must be scrupulous in ensuring that the duty is fully discharged.

199 In the present case, it was inappropriate for his Honour to embark upon an ex parte consideration of the extensive affidavit material that was filed by Altain for the purpose of identifying a connection between the Arbitration Agreement and IMCS, in circumstances where no such connection appeared on the face of the Arbitration Agreement. Further, the issue of whether IMCS was a party to the Arbitration Agreement should not have been resolved ex parte on the basis of inadmissible and unreliable affidavit material.[103] As not all of the matters set out at [135] above were established on a prima facie basis on the face of the Arbitration Agreement and the Award that were filed in accordance with s 9(1) of the Act, Altain's application for enforcement of the Award against IMCS should have proceeded inter partes.

200 At the inter partes hearing, an evidential onus would have been on Altain to establish the matters set out at [135] above on a prima facie basis. IMCS would not have had the legal onus to establish one of the grounds set out in s 8(5) or (7) unless Altain established the matters set out at [135] above on a prima facie basis with the assistance of s 9(5). This issue is discussed further below.

(ii) Evidence relevant to the enforcement of the Award and objections to the evidence

201 At the ex parte hearing on 20 August 2010, the critical evidence that was before the judge in support of Altain's application for leave to enforce the Award as a judgment of this Court was Mr Batdorj's first affidavit. That affidavit exhibited the key contemporaneous documents to which we have already referred. At the subsequent hearing of IMCS's application to set aside the ex parte order, the judge had before him additional affidavit evidence, including, in particular, Mr Lewis' affidavit, Mr Jones' affidavit, Mr O'Donahoo's affidavit, Mr Batdorj's second affidavit and Professor Tumenjargal's opinion.

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[103] The affidavit material is analysed in detail below.

202 Mr Batdorj's first affidavit is of critical importance in this appeal, as it provided the evidentiary basis for most of the trial judge's findings of fact in favour of Altain. Accordingly, it is necessary for us to set out in considerable detail those parts of Mr Batdorj's first affidavit that are relevant to the issues on the appeal. In doing so, we do not overlook the other parts of the affidavit.

203 The relevant parts of Mr Batdorj's first affidavit, with our footnoted comments, are as follows:[104]

> 16 At all relevant times on the project, both the First Defendant and/or IMC Mongolia LLC acted as agent, or the representative, for the Second Defendant on the project and provided services to the Plaintiff on the project at the direction of, on behalf of, or at the request of, the Second Defendant. Further, I verily believe that the First Defendant and IMC Mongolia LLC conducted their business as a common enterprise with the Second Defendant. For all intents and purposes, it was the Second Defendant which was the proper party to the contract in question and also a proper party to the arbitration and through its representatives it participated in the arbitration, although it then tried to distance itself from the project and the proceedings.
>
> 17 Further, and/or alternatively, at all relevant times the First Defendant and/or IMC Mongolia LLC was the alter ego of the Second Defendant on the project. The Second Defendant was involved in the day to day running of the First Defendant and/or IMC Mongolia LLC's participation in the project.
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> 22 The named IMC entity on the first page of the Operations Management Agreement is 'IMC Mining Inc', purportedly being the First Defendant but its identity is not clear. The Agreement is signed by Mr Stewart Lewis simply on behalf of 'IMC Mining' in accordance with Section 127 of the *Corporations Act* 2001. In any event, it was both Defendants who entered into the Agreement. To the extent that IMC Mining Inc purportedly executed the Agreement, it did so as representative for IMC Mining Solutions Pty Ltd.[105]
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> 23 It was always contemplated that the IMC companies based at 123 Eagle Street, Brisbane, Australia would be involved in the administration of the Agreement and would have certain rights and obligations under the Agreement. This is confirmed in clause 15.4 of the Agreement, which sets out the contact details for sending notices

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104 Where a part of a paragraph is relevant, only that part is reproduced. We have not included ellipses to indicate the parts that have been omitted, except where a sentence has been partially reproduced.

105 Mr Batdorj was appointed as managing director of Altain a month after the OMA was executed. See above at [87] and [90].

under the Agreement to IMC, being Level 40, Riverside Centre, 123 Eagle Street, Brisbane, Queensland 4000. This is the same address as that given for the registered office details for IMC Mining Solutions Pty Ltd …

24 A further example of IMC Mining Solutions Pty Ltd being contemplated in the Agreement is found in clause 13.2 …[106]

46 The introduction of IMC Mining Inc through the Operations Management Agreement did not suggest to us that IMC Mining Solutions Pty Ltd was not bound to perform the Agreement. We treated the two IMC companies as one and the same, as they acted on the project (as I shall describe below), and used the same 'IMC' employees on a regular basis. Under Mongolian Law, that is the same as the role of representatives, which is recognized under Article 65 of the Mongolian Civil Code, or as a third party contract relationship recognized under Article 203 of the Mongolian Civil Code. That is how the Arbitral Tribunal saw it on the evidence presented.

47 Further, as far as the Plaintiff was concerned, IMC Mining Solutions Pty Ltd and IMC Mining Inc amounted to the same economic reality and the commercial interests of IMC Mining Solutions Pty Ltd was the primary driver behind the activities carried out by IMC Mining Inc and IMC Mongolia LLC on the project. The Plaintiff formed this view throughout the course of the project (including the period leading up to the execution of the Operations Management Agreement) based on:

…

(l) IMC Mining Solutions Pty Ltd participation and interest in the outcome of the arbitration proceeding, until it withdrew and sought to hide behind IMC Mining Inc.

48 The Plaintiff was at various times provided with various business cards of IMC employees who would be involved on the project on behalf of the IMC Group.[107]

50 That IMC Mining Solutions Pty Ltd was the principal IMC entity on the project and continued to carry out its obligations under the Operations Management Agreement, either directly, or through its representatives, is confirmed by the following examples.[108]

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106 Clause 13.2 is set out above at [87](d).

107 The business cards of Mr Lewis, Mr Jones, Mr Hamilton, Mr Grove, Mr Barton, Mr Kelly, Mr Haynes and Mr Sharpe were exhibited to Mr Batdorj's first affidavit. The company name and contact details on each business card were those of IMCS.

108 The examples that are described in the affidavit are: a report by IMCS to Deutsche Bank in relation to the Project; documents showing that various employees of IMCS attended the Project site in Mongolia on a number of occasions; a letter from National Australia Bank to the Mongolian Foreign Investment and Foreign Trade Agency confirming that the accounts of IMCS were in order; weekly reports from IMC Mongolia LLC to Altain; a monthly report from IMCM to Altain, the text of which stated that it was the 'first formal monthly report from IMC Mining Solutions Pty Ltd'; a summary report from 'IMC' to Mr Bazar; a document

71 Further evidence that IMC Mining Inc conducted its business as a common enterprise with IMC Mining Solutions Pty Ltd and in fact was the representative for IMC Mining Solutions Pty Ltd on the project is contained in a memorandum from Mr Pat Kelly to Mr Bazar dated 2 February 2009. The memorandum is titled 'Statement of Accounts – Tayan Nuur' and purportedly sets out the payments received by IMC Mining Inc on the project as at 2 February 2009 and where those funds have been spent/allocated.

72 The notable thing about this document is that it was signed by Mr Pat Kelly, in his capacity as 'Director – Mining Operations, IMC Mining Solutions Pty Ltd.' I verily believe that this document further evinces that IMC Mining Solutions Pty Ltd was in control of the financial matters on the project for the IMC Group and oversaw the receipt and allocation of funds on the project, and in fact was the contracting party.

73 Further evidence of the Second Defendant's involvement and control over the performance carried out by the First Defendant on the Project is evidenced by the Power of Attorney dated 16 June 2009 which was executed by Mr Stewart Lewis.[109]

77 Further, at the hearing the Plaintiff gave further oral evidence of the involvement of both Defendants and their employees in the project. This convinced the Arbitral Tribunal that the Second Defendant was the proper party to the contract and the proper party to the arbitration.[110]

78 In the premises, it is submitted that there is 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.

79 Ultimately, it was evidence of this nature and the evidence given at the hearing that persuaded the Arbitral Tribunal in the arbitration proceeding to make a finding that the Second Defendant, IMC Mining Solutions Pty Ltd, is liable to pay, for and on behalf of IMC Mining Inc, the amount of US$5,903,098.20 plus the arbitration fee amount of

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showing the organisational structure of 'IMC'; and weekly reports from IMCS to Altain. These documents are exhibited to the affidavit. The affidavit also refers to a visit to IMCS's Brisbane offices by representatives of Altain.

109 The relevant parts of the IMCM Power of Attorney are set out above at [97]. IMCS is not mentioned in the document.

110 The Award is described above at [108]. It does not say that the Tribunal concluded that IMCS was the proper party to the OMA and the proper party to the arbitration.

US$50,257,70 to the Plaintiff. Given their conduct on the project and their involvement in the arbitration, both Defendants were on clear notice that this was the Plaintiff's case in the arbitration.

80 [D]isputes arose between the Plaintiff and the Defendants concerning the performance (or non-performance as the case may be) of the Defendants' obligations on the project. The Plaintiff brought a number of complaints against the IMC Group in the arbitration …[111]

87 The first Defendant, on behalf of the Defendants, nominated Mr Ganbold Dogsom as their nominated arbitrator …[112]

90 Mr Bevan Jones attended the preliminary hearing [on 7 July 2009] on behalf of the Defendants. Mr B Baatar was the Defendants' legal counsel at the preliminary hearing and made submissions on behalf of the Defendants at the hearing.

96 Mr Bevan Jones attended the preliminary hearing [on 24 July 2009] on behalf of the Defendants. Ms B Bayartsetseg was the Defendants' legal counsel at the preliminary hearing and made submissions on behalf of the Defendants at the hearing.[113]

99 The original written decision [ie the Preliminary Hearing Document] was signed by the Arbitrators and representatives for each of the parties, including representatives of the Defendants. The written decision was signed by Ms Bayartsetseg on behalf of the First Defendant, in its capacity as agent or representative of the Second Defendant.[114]

100 Notably, the parties agreed and provided their mutual consent at the 24 July 2009 preliminary hearing that the arbitral dispute would be determined according to Mongolian law.

101 Further, the Second Defendant through its representative, the First Defendant, recognised the jurisdiction of the Arbitral Tribunal over the disputes concerning the Agreement by, among other things:

(a) Filing a response document dated 16 June 2009. In this document, the Defendants confirmed their intent to participate, through the First Defendant, in the arbitration

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111 As is apparent from [96] and [101] above, Altain's claim documents do not refer to IMCS.

112 Exhibited to the affidavit is a letter with the 'IMC' logo addressed to the Tribunal which stated: 'The "IMC Mining Inc" Company placed in Australia, Brisbane, Level 40, Riverside center, 123 Eagle Street is choosing Ganbold Dogsom as its arbitrator in case claimed by "Altain Khuder" LLC.' The address on the letter, which was signed by Mr Jones as 'Operating Director', was Level 40, Riverside Centre, 123 Eagle Street, Brisbane.

113 The Preliminary Hearing Document does not mention IMCS.

114 As is apparent from [104](j) above, the Preliminary Hearing Document was signed by Mr Jones and Mr Baatar as representatives of the 'Respondent', that is, IMCM. IMCM was not described as either the agent or the representative of IMCS.

process and to put on evidence (refer to exhibit '**GB-32**');[115]

(b) Attending a preliminary arbitral hearing on 7 July 2009 (refer to exhibit '**GB-38**');[116]

(c) Filing a counterclaim document dated 24 July 2009 (refer to exhibit '**GB-34**');[117]

(d) Attending a further preliminary hearing on 24 July 2009 and signing off on the written decision of the Arbitral Tribunal with respect to the future conduct of the arbitration proceeding (refer to exhibits '**GB-39** and **40**');[118] and

(e) Filing evidence in the proceeding (refer to exhibits '**GB-42** to **GB-44**').[119]

103 [T]he Defendants were represented through the First Defendant and were given the opportunity to, and did, attend and make submissions at the preliminary hearing on 7 July 2009 and at the further preliminary hearing on 24 July 2009.

104 Exhibits '**GB-39**' and '**GB-40**' confirm that Ms B Bayartsetseg signed the written decision to acknowledge the matters contained in the written decision on behalf of the Defendants. Ms Bayartsetseg was their legal practitioner representative.[120]

105 On or about 13 August 2009, the Defendants' legal representative, Mr B Baatar, sent a letter to … the MNAC confirming that both he and Ms B Bayartsetseg would be representing the Defendants at the arbitration hearing.[121]

106 On or about 14 August 2009, the Defendants sent a letter to the MNAC, requesting that the hearing be set down for 19 August 2009 be postponed.[122]

107 The letter confirms that [IMCM] was preparing documents and evidence that it intended to file in the arbitration proceeding and that

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115 The IMC Response Document is summarised at [100] above.

116 Exhibit 'GB-38' is the Interim Award. It makes no reference to IMCS.

117 As is apparent from [105] above, the counterclaim was filed by IMCM and does not refer to IMCS.

118 Exhibits 'GB-39' and 'GB-40' are the English and Mongolian versions, respectively, of the Preliminary Hearing Document. See above n 114.

119 Exhibits 'GB-42' to 'GB-44' are the letters from IMCM to the MNAC, which are described in paras 106 to 112 of Mr Batdorj's first affidavit. The letters do not refer to IMCS.

120 See above nn 114 and 118.

121 The letter dated 13 August 2009 was signed by Mr Baatar on behalf of IMCM and did not mention IMCS.

122 The letter dated 14 August 2009 was signed by Mr Baatar and Ms Bayartsetseg on behalf of IMCM and did not mention IMCS.

the volume of these documents comprised approximately 3,000 pages.

108 On or about 18 August 2009, a further letter was sent to the MNAC on behalf of the Defendants.[123]

109 Shortly before the hearing, the Defendants' legal representatives ceased to act for the Defendants. To accord the Defendants with procedural fairness and to satisfy the Defendants' right to attend the arbitral hearing, the Arbitral Tribunal postponed the hearing to 15 September 2009.

110 On 8 September 2009, Mr J Liotta of Lehman, Lee & Xu Mongolia sent an email to Mr Stewart Lewis at imcal.com.au, which was copied in to Mr Bevan Jones, which stated the following …[124]

112 Mr Liotta's email confirms that the Defendants were put on notice that the hearing would commence on 15 September 2009 with or without them.[125]

113 [T]he Defendants did not attend the hearing despite being given a clear opportunity to do so.

114 Further, the documents filed by the Defendants in the arbitration proceeding confirm the commonality on the project of IMC Mining Solutions Pty Ltd and IMC Mining Inc. For example, the response document dated 16 June 2009, filed on behalf of IMC Mining Inc (refer to Exhibit '**GB-32**') contains the following statements.[126]

115 The response document dated 16 June 2009 confirms that IMC Mining Inc is to be read as including IMC Mining Solutions Pty Ltd for the purpose of the arbitration hearing. The statements made by IMC Mining Inc in its response document could only have been truthful if they can be attributed to IMC Mining Solutions Pty Ltd. For the purpose of the arbitration hearing, as with the project itself, the interests of IMC Mining Inc and IMC Mining Solutions Pty Ltd were one and the same.

116 The purported control which IMC Mining Solutions Pty Ltd exerted over IMC Mining Inc for the purpose of the arbitration proceeding is borne out in HopgoodGanim's letter to the … MNAC … dated 7 September 2009. In that letter, they stated …[127]

117 This was a belated attempt by IMC's Australian lawyers to draw a distinction between the two Defendants, which was made when they

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123 The letter dated 18 August 2009 was signed by Ms Bayartsetseg on behalf of IMCM and did not mention IMCS.

124 Mr Liotta's email is set out above at [107]. It refers only to IMCM.

125 See above n 124.

126 The affidavit refers to parts of the IMC Response Document which are said to relate to IMCS rather than IMCM. The IMC Response Document is summarised above at [100].

127 The letter from HopgoodGanim to the MNAC is set out above at [106].

no doubt realised the fact that the First Defendant was inserted as the representative of the Second Defendant, in an ad hoc and confused manner so as to try and create the impression of difference when in fact there was no difference.

118 This letter was seen for what it is – an attempt by IMC Mining Solutions Pty Ltd to stymie the arbitration proceeding by writing to the … MNAC, putting [it] on notice that IMC Mining Inc was all but insolvent and financially dependent on IMC Mining Solutions Pty Ltd and trying to draw a distinction between the two Defendants which had not been there on the project.

124 Ultimately, the Arbitral Tribunal was persuaded by the nature of the relationship between the First and Second Defendants on the project and, in particular, the intimate, and continuing, involvement of the Second Defendant on the project from the outset, that the First and Second Defendants were both in fact bound by the contract and subject to the arbitration agreement and both were parties to the arbitration. The Arbitral Tribunal held on page 13-15 of the Final Award: …[128]

125 The fact that the Arbitral Tribunal clearly came to the view that the Second Defendant had obligations under the Operations Management Agreement is confirmed on page 12-15 of the Final Award where the Tribunal held …[129]

127 Further, the Second Defendant was given an opportunity through the First Defendant to have its case heard at the arbitration hearing. In fact, the Second Defendant communicated directly with the MNAC and acknowledged that it was aware of the First Defendant's involvement in the arbitration proceeding and left the conduct of the matter to the First Defendant (refer to exhibit **GB-45**).[130] However, the Arbitral Tribunal saw the correspondence and facts for what they were – an attempt by the Second Defendant to distance itself from the First Defendant in the proceeding and to try to create the impression of a difference when there was no difference.

128 The Arbitral Tribunal was convinced by the abundance of documentation and other evidence which demonstrates both the First and the Second Defendants' intimate involvement throughout the course of the Defendants' engagement on the project, that the First and the Second Defendants were both involved in the contract, the project and the dispute and, notably, the First Defendant was the representative for the Second Defendant.

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128 The relevant part of the Award is set out above at [108](h). The Award does not state that IMCM and IMCS are both bound by the OMA and subject to the Arbitration Agreement. Nor does it say that both companies were parties to the arbitration.

129 The relevant part of the Award is set out above at [108](g). The Award does not state that IMCS had obligations under the OMA.

130 Exhibit 'GB-45' is HopgoodGanim's letter dated 7 September 2009 to the MNAC. See above [106].

204 The relevant parts of Mr Lewis' affidavit may be summarised as follows:

(a) The OMA accurately sets out the parties to the OMA, namely, Altain and IMCM.

(b) Mr Jones and other staff were employees of IMCM in relation to the Project. Mr Jones was not, and never had been, employed by IMCS or engaged by IMCS as a contractor or consultant and was not authorised to act for IMCS. His business card was inaccurate.

(c) IMC Mongolia LLC was incorporated in Mongolia as a wholly-owned subsidiary of IMCM.

(d) IMCM utilised a project room provided by IMCS at IMCS's Brisbane office.

(e) The 'Statement of Accounts – Tayan Nuur' document that is referred to in paras 71 and 72 of Mr Batdorj's first affidavit erroneously described Mr Kelly as the 'Director – Mining Operations' of IMCS. Mr Kelly's business card was also inaccurate. Mr Kelly was not employed by or contracted to IMCS for the Project.

(f) Contrary to the many references to 'the Defendants' – in the context of the arbitration – in Mr Batdorj's first affidavit, only IMCM was represented and filed documents in the arbitration proceeding.

(g) Mr Jones managed the arbitration on behalf of IMCM. The IMCM Power of Attorney was executed to enable Mr Jones to perform this role as IMCM's agent. Mr Jones, in turn, appointed Mr Bataar and Ms Bayartsetseg of Lehman as IMCM's agent in relation to the arbitration.

(h) The IMC Response Document was signed by Mr Jones on behalf of IMCM. The document referred to IMCM and the capabilities of the IMC Group as a whole upon which IMCM could draw.

(i) Mr Bataar had no authority to act on behalf of IMCS.

(j) Neither Mr Jones nor Mr Baatar had authority to act on behalf of IMCS at the Preliminary Hearing.

(k) On or about 29 July 2009, IMCM learned that an application was to be made for the confiscation of the passports of IMCM's officer for the duration of the

arbitration and until any damages awarded against IMCM were paid. As a result, Mr Jones left Mongolia on 30 July 2009.

(l) Upon Mr Lewis' resignation as a director of IMCM on 4 September 2009, IMCM stopped utilising the project room at IMCS's office in Brisbane and all mail addressed to IMCM was returned or refused.

(m) IMCS learned the outcome of the arbitration when the ex parte order was served.

(n) At no time was Mr Lewis given any reason to expect that an award would be made against IMCS. At no stage prior to the service of the ex parte order had IMCS been informed or notified by Altain or the Tribunal, whether formally or informally, that:

(i) a claim had been made against IMCS by Altain that:

- at all relevant times, IMCM or IMC Mongolia LLC, or both of them, acted as the agent or representative of IMCS;
- IMCM, IMCS and IMC Mongolia LLC conducted their business as a common enterprise;
- for all intents and purposes, it was IMCS that was the proper party to the contract and the arbitration;
- IMCM or IMC Mongolia LLC was the alter ego of IMCS;
- both IMCM and IMCS entered into the OMA; or
- to the extent that IMCM executed the OMA, it did so as a representative for IMCS;

(ii) Altain had or was intending to make an application for an order from the Tribunal that IMCS pay any sum charged against IMCM in the arbitration; or

(iii) the Tribunal was considering making an order that IMCS pay any sum charged against IMCM in the arbitration.

(o) At no stage prior to the service of the ex parte order had IMCS been given an opportunity to make oral or written submissions to the Tribunal in relation to any such claims, applications or intended orders or to submit any evidence

refuting the basis for such claims.

(p) IMCS was never given an opportunity to recognise or dispute the Tribunal's jurisdiction and never recognised the Tribunal's jurisdiction.

(q) IMCS was at no time a party to the OMA, had no obligations under it and was not a party to, and took no part in, the arbitration.

(r) At all relevant times, neither IMCM nor IMC Mongolia LLC acted as the agent or representative of IMCS.

(s) IMCM, IMCS and IMC Mongolia LLC did not conduct their business as a common enterprise.

(t) Neither IMCM nor IMC Mongolia LLC was the alter ego of IMCS.

(u) The OMA was based on a pro forma IMCS document and this explains some anomalies, such as cl 13.2 and the IMCM execution clause.

(v) IMCM and IMCS used a common logo for common marketing purposes. They did not share any employees. The common email addresses reflected the recent origin of IMCM.

(w) IMCS's involvement in the Project was pursuant to the subcontract. IMCS provided some reports direct to Altain as a matter of expediency.

(x) IMCS did not participate in the arbitration in any way and, accordingly, it did not withdraw from the arbitration or seek to hide behind IMCM.

205 The relevant parts of Mr Jones' affidavit may be summarised as follows:

(a) Between 21 July 2008 and 30 July 2009, Mr Jones was employed by IMCM as an operations manager on the Project. He reported to Mr Kelly.

(b) Mr Lewis instructed Mr Jones to manage the arbitration on behalf of IMCM and was appointed as IMCM's agent under the IMCM Power of Attorney for this purpose.

(c) Mr Jones managed the arbitration on behalf of IMCM until his employment with IMCM ceased on 30 July 2009. In doing so, Mr Jones:

(i) appointed Mr Baatar and Ms Bayartsetseg of Lehman to act on behalf of IMCM in the arbitration and executed Mr Jones' Powers of Attorney

for this purpose; and

(ii) attended the preliminary hearings on 7 and 24 July 2009.

(d) On 29 July 2009, Mr Jones was informed by Lehman that a request had been made for the seizure of his passport.

(e) At no time prior to the date that Mr Jones became aware of the making of the Award was he notified or made aware, from the documents and information he received in relation to the arbitration, that:

(i) any claim was made in the arbitration or otherwise, that IMCM or IMC Mongolia LLC had at any time acted as the agent, representative or alter ego of IMCS or that those entities had at any time conducted their business as a common enterprise;

(ii) any claim was made in the arbitration or otherwise that IMCS was a party to the OMA or was involved or represented in the arbitration;

(iii) Altain made or intended to make an application for an order from the Tribunal that IMCS pay any sum charged against IMCM in the arbitration;

(iv) the Tribunal was considering making an order that IMCS pay any sum charged against IMCM in the arbitration; or

(v) IMCS was given an opportunity to make oral or written submissions to the Tribunal in relation to any claims, applications or intended orders that concerned it, or to submit any evidence refuting the basis for such claims.

206 Mr O'Donahoo previously acted as IMCS's solicitor. Mr O'Donahoo's affidavit stated that a dispute had arisen with Lehman and that Lehman had not provided to Mr O'Donahoo documents from its files that he had requested. Mr O'Donahoo's affidavit also stated that he had not received a response to his letter of 16 September 2010 to the MNAC in which he sought details from the Tribunal's files of any notices that were sent by the Tribunal or the MNAC to IMCS relating to the arbitration proceeding; any opportunity that was given to IMCS to make oral or

written submissions to the Tribunal in the proceeding; or any application to join IMCS as a party to the arbitration proceeding.

207 Mr Batdorj's second affidavit commented on parts of Mr Lewis' affidavit, Mr Jones' affidavit and Mr O'Donahoo's affidavit. Many of those comments reiterated statements in Mr Batdorj's first affidavit, were in the nature of submissions or dealt with matters which are not directly relevant to the central issues of whether IMCS was a party to the Arbitration Agreement or became a party to the arbitration proceeding either by consent or by order of the Tribunal. The parts of Mr Batdorj's second affidavit that are potentially relevant, and that do not in substance or in terms repeat statements in Mr Batdorj's first affidavit, may be summarised as follows:

(a) Paragraphs 9 to 15 referred to the contents of a 'zoominfo' profile of IMCS and an undated PowerPoint presentation entitled 'Reporting of Resources JORC Standard', which Mr Batdorj downloaded from the internet. The two items contained statements about IMCS's business operations and roles in various projects, including the Project, which were said to be inconsistent with Mr Lewis' affidavit and Mr Jones' affidavit. The cover page of the PowerPoint presentation stated, 'Bevan Jones, IMC Mongolia, IMC Mining Solutions Pty Ltd'.

(b) Although paras 22, 35 and 54 do not state anything new, they are partially reproduced below to illustrate the types of comments that Mr Batdorj made:

> 22 I also note that Mr Lewis deposes that IMC Mining Inc operated out of the Australian offices of IMC Mining Solutions Pty Ltd for the purpose of the Tayan Nuur Project in Mongolia. This confirms the ongoing and pivotal involvement of IMC Mining Solutions Pty Ltd in the transaction and the Australian connection on the project and that IMC Mining Inc and IMC Mining Solutions Pty Ltd were involved in the project as one company or at times interchangeably. The IMC entities were often simply described (collectively and/or in their own right) as 'IMC' throughout the project correspondence. As far as Altain Khuder was concerned, whenever it was dealing with 'IMC' or 'IMC Mining Inc' it was also dealing with IMC Mining Solutions Pty Ltd. The Defendants held this out to be the case.
>
> 35 [I]t is not correct to say that it was agreed that the Operations

> Management Agreement would be concluded between Altain Khuder and IMC Mining Inc. … [I]t was always contemplated that IMC Mining Solutions Pty Ltd would be bound by the Operations Management Agreement and to the extent that the agreement purports to have been signed by IMC Mining Inc, it did so as representative or agent for IMC Mining Solutions Pty Ltd.
>
> 54 It was clearly understood that IMC Mining Solutions Pty Ltd was part of the arbitration proceedings and was a party to those proceedings. This was acknowledged and accepted in the documents filed by the Defendants in the arbitration proceedings. It was clearly understood by all parties (including the Arbitral Tribunal) that claims were being made against IMC Mining Solutions Pty Ltd and IMC Mining Inc and responses were filed in those proceedings on behalf of those entities.

(c) Paragraph 36 stated that Altain did not know about the subcontract prior to receiving Mr Lewis' affidavit.

(d) Paragraph 80 relevantly stated:

> 80 The Arbitral Tribunal found that the IMC entities involved in the project were all part of the same group of companies and that IMC Mining Inc represented itself and IMC Mining Solutions Pty Ltd. Further, the correspondence exchanged throughout the course of the project and in the arbitration proceedings also confirm that the parties, being the Plaintiff and both Defendants and also the Arbitral Tribunal, treated the IMC entities as one entity.

(e) Paragraphs 113 and 114 relevantly stated:

> 113 It is simply not correct to say that IMC Mining Solutions Pty Ltd did not know that it was a party to the arbitration proceedings and it was not given an opportunity to make oral or written submissions to the Arbitral Tribunal. It was a party to the proceedings, it made extensive submissions to the Arbitral Tribunal and then it made the decision late in the piece not to attend the final hearing but rather to retreat to Australia where it thought it would be immune from any award or finding made by the Arbitral Tribunal.
>
> 114 Further, the Final Award has been ratified by the Mongolian courts and as part of that process the court has satisfied itself that IMC Mining Solutions Pty Ltd was a proper party to the arbitration agreement and arbitration proceedings and had a proper opportunity to be heard and to present its case.[131]

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[131] As is apparent from [109] above, the Mongolian District Court Order does not refer to IMCS.

208 At the hearing of its application to set aside the ex parte order, IMCS objected to the admissibility of significant parts of Mr Batdorj's affidavits on the basis that they constituted hearsay or opinion, or were misleading. The objections were contained in written lists.

209 The hearsay ground or the opinion ground, or each of them, was relied upon in respect of all of the parts of the paragraphs of Mr Batdorj's first affidavit that are quoted at [203] above, except the following sentences: the first sentence down to 'IMC Mining Inc' and the second sentence of para 22; the second sentence following 'Agreement' and the third sentence of para 23; para 72; the first sentence of para 77; the second sentence of para 80; the first sentence of para 99; para 107; the second sentence of para 124; and the second sentence of para 127. It should also be noted that the misleading ground was relied upon in respect of a number of the paragraphs quoted at [203] above, often in relation to the use of the expression, 'the Defendants' but also with the opinion ground in the objection to paras 99-101, 103, 113-118, 127 and 128.[132]

210 The hearsay ground or the opinion ground, or each of them, was relied upon in respect of all of the parts of the paragraphs of Mr Batdorj's second affidavit that are quoted at [207] above.

211 IMCS objected to the admissibility of a number of other paragraphs in Mr Batdorj's affidavits. It is not necessary to set them out for the purposes of this judgment. That they are not set out does not reflect that we consider them to lack substance. We do note that there is much commonality in the basis of the objections to admissibility.

212 After the hearing of the appeal concluded, IMCS filed amended lists of objections together with copies of Mr Batdorj's affidavits marked to show the parts

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[132] Where IMCS objected to specific words in a paragraph which implicated IMCS – such as the words 'both defendants' – we have treated the objection as extending to the whole paragraph. We have done so on the basis that the paragraph would not apply to IMCS if the words in question were deleted.

subject to the former and additional objections. This provision of additional grounds of objection arose as a result of IMCS's counsel saying that there were additional grounds, and doubtless out of a concern that, if this Court or a trial judge on remitter was to rule on the objections, all proper objections should be ruled on. We consider, however, that IMCS should be confined to the objections taken before the judge.

213 Whether it was because of the number of objections and that the judge and Altain were only then provided with the lists, IMCS's counsel stated that he thought it not practical or sensible to ask the judge to hear argument about the objections. But if the judge was against an objection to admissibility, he should take it into account in determining the weight to be given to that part of the affidavit.

214 Altain's counsel responded that while he had no objection to IMCS arguing about matters of weight, there was no basis for the objections to admissibility. As to Mr Batdorj's first affidavit, it was before the Court on the ex parte application, reference was made to it at the hearing on 30 September 2010 and IMCS had filed Mr Lewis' affidavit in opposition. Hence, Mr Batdorj's first affidavit had been admitted and it was now too late to make objection to it. Altain had satisfied the Court at stage one, the parties were now at stage two and IMCS had the 'very heavy onus' of proving its defence.

215 In his response, IMCS's counsel observed that the hearing on 30 September 2010 was preliminary and Altain had not sought to tender or rely upon its affidavits. Further, IMCS's 28 September 2010 submissions had objected to the admissibility of Mr Batdorj's first affidavit and, in addition, the submissions foreshadowed objections to admissibility.

216 The judge then said that the objections having been raised:

> the issue now is how do I deal with these objections. If I went through them individually I'd end up holding a subsidiary hearing of the matter. Is the appropriate and convenient course to note your objections, Mr Digby, so that … it can't be said against you, that you've accepted, or let the evidence in without objection and that the issues in relation to admissibility and weight are dealt with in the course of the hearing of this matter and proceed on that

basis.[133]

217 Senior counsel for IMCS agreed with his Honour while Altain's position remained the same. The judge rejected Altain's submission that objection could not now be had to Mr Batdorj's first affidavit, stating that this was the first time that the affidavit was fully addressed inter partes, and added that it was appropriate to approach both affidavits on the basis outlined. However, his Honour did not hear argument on or deal with the issue of admissibility in the course of the hearing. Notwithstanding this, in the Substantive Decision he accepted Mr Batdorj's evidence, which he described as 'first-hand' and 'very specific', in preference to evidence of IMCS's deponents.[134] This was in the absence of cross-examination, and without ruling on the objections in the written lists or the objection to relevance referred to below.

218 Notwithstanding the way in which IMCS's counsel approached the matter, his Honour should have ruled on the objections, and done so promptly in order that the parties knew the extent of the admissible evidence before final addresses. In *Aktiebolaget Hässle v Alphapharm Pty Ltd*,[135] it was stated that 'Parties should know, before addresses are taken, the final state of the evidence, whether the trial be by judge and jury or a judge alone.'[136] It makes no difference that, in the present case, the evidence was on affidavit and there was no cross-examination. There is a procedure in the conduct of litigation at common law and that is normally an opening followed by the admission of evidence in the course of which objections are dealt with followed by addresses. If a judge follows the regular course of ruling on objections without deferring the ruling, unless in the circumstances that may appropriately be done, the parties are in the position, following the ruling, to

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133 Transcript of Proceedings, *Altain Khuder LLC v IMC Mining Inc* (Supreme Court of Victoria, Croft J, 4 November 2010) 21.

134 See, for instance, Substantive Decision, 92-3 [85], 94-5 [88], 95-6 [89], 100 [98], 105 [108], 106 [110].

135 (2002) 212 CLR 411.

136 (2002) 212 CLR 411, 443, [77] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

consider their position and how they ought best frame their submissions. Here, as the parties did not know what the admissible evidence was, they had to address on the basis that all objections were rejected. Bearing in mind that IMCS's objections went root and branch to Altain's evidence, the determination of the objections was critical and, to the extent they had favoured IMCS, must have affected the content of the submissions.

219 It has long been the general rule that 'a party is entitled to have questions of admissibility determined as they arise'.[137] The High Court has recently affirmed this general rule in *Dasreef Pty Ltd v Hawchar*.[138] In *Dasreef*, it was stated in the plurality judgment that:

> As a general rule, trial judges confronted with an objection to admissibility of evidence should rule upon that objection as soon as possible. Often the ruling can and should be given immediately after the objection has been made and argued. If, for some pressing reason, that cannot be done, the ruling should ordinarily be given before the party who tenders the disputed evidence closes its case. That party will then know whether it must try to mend its hand, and opposite parties will know the evidence they must answer.
>
> It is only for very good reason that a trial judge should defer ruling on the admissibility of evidence until judgment.'[139]

220 A consequence of the failure to rule on the objections to admissibility was that on the appeal the parties and this Court were deprived of the benefit of such rulings. This was unsatisfactory. Instead of counsel being able to submit why a particular ruling was wrong, or the contrary, there was no ruling. Thus counsel was left in the position of asking this Court to engage in the exercise that his Honour ought have discharged.[140]

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137 *International Harvester Co of Australia Pty Ltd v McCorkell* [1962] Qd R 356, 358 (Philp J).

138 [2011] HCA 21 (22 June 2011) [19]-[20] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ) and [83] (Heydon J) ('*Dasreef*').

139 [2011] HCA 21 (22 June 2011) [19]-[20]. See also *TKWJ v The Queen* (2002) 212 CLR 124, 152 [87] (McHugh J); Justice J D Heydon, 'Reciprocal Duties of Bench and Bar' (2007) 81 *Australian Law Journal* 23, 27-8; J R Forbes, 'Inadmissible Evidence: Objections Well Taken and Rulings Well Made' (1984) 13 *University of Queensland Law Journal* 197.

140 As to the Court of Appeal being asked to consider a matter without the benefit of a decision of a trial judge, see the observation in *Collins v Black* [1995] 1 VR 409, 419. Although expressed in a different context, the observation is apt.

221 Moreover, we do not agree that it would have been an onerous or unnecessarily time consuming task to have ruled on the objections. Furthermore to have engaged in the task was no more than the performance of an ordinary function in the conduct of a trial. The grounds of objection were few in number and applied to similar statements in Mr Batdorj's affidavits. Once a decision had been made on the initial paragraphs that were the subject of objection, it would have been readily apparent that the same reasoning would determine the outcome of the remaining objections. In any event, even if the process required extensive time and effort by his Honour, that process should have been undertaken so that the issues in the proceeding could be resolved on the basis of admissible evidence.

222 In our opinion, all of IMCS's objections to which we have referred at [209] and [210] above were well founded and should have been upheld. The parts of the affidavits that were the subject of objection on the ground of hearsay set out Mr Batdorj's conclusions without setting out the source of knowledge or the factual basis for those conclusions. The parts of the affidavits that were the subject of objection on the ground of opinion merely set out Mr Batdorj's impressions, opinions, interpretations of events or documents, submissions or speculative comments. In particular, Mr Batdorj speculated about the views, findings and reasons of the Tribunal without identifying any document or oral statement that set out those views, findings and reasons.

223 The parts of the affidavits of Mr Batdorj to which objection was made should not have been admitted as evidence and his Honour should not have placed any reliance on them. The remaining parts of the affidavits comprised a description of dealings between the parties and a large number of exhibits, including most of the primary documents to which we have already referred.

224 It is important to note a further objection to the admissibility of Mr Batdorj's affidavits which IMCS initially took (in written and oral submissions) to his first affidavit at the hearing on 30 September 2010 and repeated (in written and oral

submissions) to both affidavits at the hearing in November. The objection was put in this way.[141] It commenced with the statement that the basis for Altain's application to enforce the Award against IMCS were the assertions in Mr Batdorj's first affidavit that:

> a. at all relevant times, IMC Inc and/or IMC Mongolia LLC (*IMCM*) acted as the agent or representative of IMC Solutions – [16];
>
> b. that IMC Inc, 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 Inc] and/or [IMCM] was the alter ego of the second defendant – [17];
>
> e. *'it was both [IMC Inc and IMC Solutions] who entered into the Agreement'* – [22]; and /or
>
> f. to the extent that IMC Inc executed the agreement, *'it did so as a representative for IMC Mining Solutions'* – [22].[142]

225 IMCS's outline then stated that the bulk of Mr Batdorj's first affidavit addressed matters which Altain asserted constituted evidence that supported these assertions, Mr Batdorj summarising this evidence at para 78 of his affidavit. IMCS then referred to the statements about the findings of the Tribunal and the basis for those findings at paras 77, 79, 118, 124, 125, 126 and 128. It was then pointed out that Mr Batdorj did not say that the material he referred to and relied upon for his conclusions summarised at para 78 was put before the Tribunal. The only possible exception was his statement at para 77 that 'at the hearing the Plaintiff gave further evidence of the involvement of both defendants and their employees in the project', but as to this Mr Batdorj did not identify or exhibit that evidence.

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141 Outline of submissions dated 28 September 2010, para 25-31, repeated in substance in the outline of submissions dated 3 November 2010.

142 Emphasis in original.

226 Accordingly, it was submitted, the assertions about the findings of the Tribunal and their basis, were 'wholly without foundation and not probative of [IMCS's] liability or amenability to the submission to arbitration under the contract'.

227 Altain contended that for several reasons IMCS's submissions should be rejected. Summarising them from the written and oral submissions they were: the evidence in Mr Batdorj's first affidavit was that the Tribunal had decided that IMCS was a proper party to the arbitration agreement, and the arbitration and in which it had participated; the evidence in Mr Batdorj's affidavits favoured the conclusion that an award (as made) 'could be and has been made', and IMCS had no direct evidence to substantiate otherwise,[143] the inference from this being that Mr Batdorj's evidence was admissible. Further, Mr Batdorj said he had attended the hearings. It was further said that the purpose of Mr Batdorj's first affidavit was to explain how the Award came to be made against IMCS.

228 His Honour referred to this objection at para 88 of the Substantive Decision, but did not rule upon it. Rather, he said that the implication was that the Tribunal did not receive or consider the 'evidence' in Mr Batdorj's affidavit with the consequence that any finding by the Tribunal against IMCS could not be maintained. The judge found the answer to this in the 'heavy' onus that confronted IMCS in successfully resisting enforcement of the Award 'once the "evidentiary" provisions of the [Act] are satisfied, particularly in light of the pro-enforcement and pro-arbitration environment that the [Act] and the Convention represent.'[144]

229 With respect, that was no answer to IMCS's submission. It was not a question of an implication that the Tribunal did not receive or consider this 'evidence' of Mr Batdorj. The question was whether, as IMCS submitted, there was no admissible evidence as to what relevantly was before the Tribunal. That was right or it was wrong. Either way, there was the answer (although subject to the other objections),

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143 Outline of submissions dated 30 September 2010, para 13.

144 Substantive Decision, 95 [88].

and that is how the judge should have approached the matter. But he did not do so, evidently on the basis that IMCS could not satisfy the 'heavy' onus of proof, for he then went on at para 89 to refer to what Altain submitted was a paucity of evidence presented by IMCS, at the end of which he referred favourably to 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 [IMCS] that directly contradicted the evidence of Mr Batdorj, or provide an objective basis establishing a contrary position.

230 The judge fell into error in dealing with IMCS's objection in this way. In the first place, he was wrong not to have ruled on the objection. It seems that he considered that Mr Batdorj should be regarded, by inference, as having deposed that all that he set out was put before the Tribunal. But his reasoning was not exposed beyond what the judge said which critically was that Mr Batdorj said that he attended the hearings. In the second place, IMCS's onus had nothing to do with whether Mr Batdorj had given admissible evidence. In the third place, the objection was correct and should have been upheld with the offending parts deleted.

(iii) No prima facie evidence that IMCS was a party to the Arbitration Agreement

231 As the evidence before the trial judge consisted entirely of affidavits and the exhibits to those affidavits, without any cross-examination of any deponent, it was common ground before us that, in relation to assessing the facts, our position now is substantially the same as that of his Honour at the trial.

232 It is not necessary for us to express a view on whether IMCS would have succeeded if Altain's application for enforcement had been heard inter partes and, at the conclusion of Altain's evidence, IMCS had made a no case submission. As both parties adduced evidence and made detailed submissions on all issues at the hearing of IMCS's application to set aside the ex parte order, the question of whether Altain

had satisfied its evidential onus and, if it had done so, the question of whether IMCS had satisfied its legal onus fell to be determined on the whole of the evidence.

233 We have considered all the evidence that was adduced at the trial. Most of the conflict in the evidence relates to the meaning or effect of documents and underlying events rather than to the existence of the documents or the occurrence of the events. Neither party alleged that any contemporaneous document was forged or otherwise not genuine.[145] In these circumstances, it is appropriate to give considerable weight to the contents of the contemporaneous documents in resolving any conflict in the affidavit material. This is particularly so in relation to documents filed with, or created by, the Tribunal.

234 Having considered all the evidence, we cannot see any basis upon which the judge could have been satisfied, on a prima facie basis, that IMCS was a party to the Arbitration Agreement. This is so even if his Honour had rejected all of IMCS's objections to the admissibility of Mr Batdorj's affidavits.

235 The key documents – the OMA, the Claim Document, the Additional Claim Document, the Interim Award, the Preliminary Hearing Document and the Award – refer only to IMCM as a party to the Arbitration Agreement. None of the documents that are known to have been filed with the Tribunal by Altain – including the Claim Document and the Additional Claim Document – contain any reference to IMCS. Similarly, of all the documents that are known to have emanated from the Tribunal and the Mongolian District Court, only the Award refers to IMCS.

236 Although the Award refers to IMCS and directs it to pay to Altain the amounts payable by IMCM, it does not say that IMCS was a party to the Arbitration Agreement or that the direction for payment was made against IMCS in the capacity of a party to the Arbitration Agreement or to the arbitration proceeding. On the

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[145] The only possible exception relates to Altain's description of the subcontract as a 'recent invention'. Although we accept Altain's contention that there was no evidence that the subcontract was disclosed to Altain prior to this proceeding, we reject its contention that the subcontract was a recent invention.

contrary, the words 'on behalf of IMC Mining Inc Company of Australia' in the Award suggest that the direction for payment was made against IMCS in some other, unspecified capacity.

237 The judge did not, in terms, say that he was satisfied – whether on a prima facie basis or otherwise – that IMCS was a party to the Arbitration Agreement. As appears from [117] above, his Honour made the following findings: that at the Preliminary Hearing, Mr Jones represented IMCM and IMCS, and signed the Preliminary Hearing Document on behalf of both companies; that at the Preliminary Hearing, it was agreed as between Altain, IMCM and IMCS that the Tribunal had jurisdiction to determine the dispute; that the Tribunal held that it had jurisdiction to make an award against IMCS on the basis of consent to arbitrate or, at the least, on the basis of a finding of common enterprise or some other relationship of legal responsibility; and that IMCS had 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.

238 It is apparent from [237] above that his Honour's findings that IMCS was represented at the Preliminary Hearing by Mr Jones and that Mr Jones signed the Preliminary Hearing Document on its behalf significantly informed his ultimate conclusions. His Honour made the following statements about the Preliminary Hearing and the Preliminary Hearing Document:

> 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. As discussed further below, this depends in part on an initial characterisation of the representative signing [the Preliminary Hearing Document] 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 [Preliminary Hearing Document], 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,

[Ms] 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). 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. 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 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. 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, 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. 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;

(c) The arbitration hearing shall be held in Ulaanbaatar City, Mongolia; and

(d) The language of the arbitration shall be Mongolian.[146]

239 With great respect to his Honour, even if IMCS's objections to the admissibility of Mr Batdorj's affidavits are ignored, the evidence adduced at the trial could not support findings that IMCS was represented at the Preliminary Hearing or that IMCS had consented to become a party to the arbitration.

240 Contrary to his Honour's finding, Mr Lewis and Mr Jones gave direct evidence on these issues. As at 24 July 2009, Mr Lewis was a director and the CEO of IMCS, and he was the managing director of IMCM. He deposed that neither Mr Jones nor Mr Baatar[147] had authority to act on behalf of IMCS at the Preliminary Hearing or otherwise to act for that company. Mr Jones deposed that he was instructed by Mr Lewis to manage the arbitration on behalf of IMCM; that he was appointed IMCM's agent under the IMCM Power of Attorney for this purpose; and that he attended the Preliminary Hearing in the course of managing the arbitration on behalf of IMCM. Both Mr Lewis and Mr Jones had personal knowledge of the scope of Mr Jones' authority. Mr Jones' statement that he was authorised to manage the arbitration on behalf of IMCM, coupled with his further statement that he was not made aware that IMCS was involved in the arbitration, constitutes direct evidence that he did not represent IMCS in the arbitration.

241 The evidence of Mr Lewis and Mr Jones was supported by three contemporaneous documents: the IMCM Power of Attorney, Mr Jones' Powers of Attorney and the Preliminary Hearing Document. Pursuant to the IMCM Power of Attorney, IMCM appointed Mr Jones as its attorney in relation to the arbitration. Pursuant to Mr Jones' Powers of Attorney, Mr Jones appointed Mr Baatar and Ms Bayartsetseg from Lehman as his attorneys in relation to the arbitration. The Preliminary Hearing Document was signed by Mr Jones and Mr Baatar as representatives of IMCM, and it did not make any reference to IMCS.

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146 Substantive Decision, 92-3 [85] (citations omitted) (emphasis in original).

147 His Honour erred in stating that Mr Jones and Ms Bayartsetseg signed the Preliminary Hearing Document. That document was signed by Mr Jones and Mr Baatar.

242 This was direct and cogent evidence that IMCS did not participate in the Preliminary Hearing and did not consent to its becoming a party to the arbitration. Mr O'Donahoo's affidavit explained the absence of any evidence from Lehman on the basis that a dispute had arisen with that firm.

243 The evidence of Mr Lewis is not only consistent with all the available contemporaneous documents that were filed with, or emanated from, the Tribunal, but it is also entirely plausible because it accords with common sense. In circumstances where IMCS was not a party to the OMA and Altain made a claim only against IMCM, IMCS had nothing to gain by consenting to becoming a party to the arbitration. Indeed, it would have been foolhardy for IMCS to place itself voluntarily in a position where an award could be made against it.

244 The only evidence in support of the contention that IMCS was represented at the Preliminary Hearing and that IMCS consented to becoming a party to the arbitration consisted of Mr Batdorj's affidavits. In those affidavits, Mr Batdorj sets out his conclusions that both IMCS and IMCM were represented at the Preliminary Hearing. However, those parts of Mr Batdorj's affidavits which refer to IMCS's alleged involvement in the Preliminary Hearing constitute inadmissible hearsay and opinion evidence. But even if that evidence were taken into account, it is so inherently unreliable that it could not be a sound basis for refusing to accept at face value the contents of the contemporaneous documents, such as the Preliminary Hearing Document.

245 Much of Mr Batdorj's evidence was not relevant to the critical issues before his Honour, namely, whether IMCS was a party to the Arbitration Agreement (whether by being a party to the OMA or otherwise) or a party to the arbitration proceeding (whether by consent, by order of the Tribunal or otherwise). The basic theme of Mr Batdorj's affidavits is that, on the basis of IMCS's business cards and other documents, and IMCS's conduct throughout its pre- and post-OMA dealings with Altain, Altain had formed certain beliefs. Those beliefs included: that IMCS

was a party to the OMA; that Altain's claims in the arbitration extended to IMCS; that IMCS was a party to, and was represented at, the arbitration; and that the Tribunal shared Altain's beliefs. Whether Altain actually held these beliefs and whether it was open to Altain to hold them were not issues in this proceeding. The critical issues before his Honour to which we have referred could only be determined objectively on the basis of reliable evidence of what the parties and the Tribunal said and did in relation to those issues.

246 The most reliable evidence of what the parties said and did in relation to whether IMCS was a party to the Arbitration Agreement or to the arbitration proceeding are the parties' agreements and their written communications with each other and the Tribunal. The most reliable evidence of what the Tribunal said and did are the documents created by the Tribunal. As we have discussed already, the documentary evidence unequivocally points to IMCS not being a party to the Arbitration Agreement or to the arbitration proceeding.

247 Our opinion that Mr Batdorj's affidavits are misdirected is borne out by the fact that, although he refers to, and quotes from, numerous documents, he does not identify with any precision the documents that were tendered before the Tribunal and does not indicate what, if anything, the Tribunal said about them. The only indications given by Mr Batdorj about the evidence that was before the Tribunal at the final hearing on 15 September 2009 are two statements in paras 77 and 79, respectively, of Mr Batdorj's first affidavit. The first statement is that Altain 'gave further oral evidence of the involvement of IMCS and IMCM and their employees in the project'. The second statement is that 'it was evidence of this nature and the evidence given at the hearing' that persuaded the Tribunal to find that IMCS was liable to Altain.

248 In substance, the parts of Mr Batdorj's affidavits that deal with the issues of whether IMCS was a party to the OMA, the Arbitration Agreement or the arbitration proceeding are more in the nature of submissions rather than direct evidence of what

Mr Batdorj saw or heard. Indeed, in para 78 of Mr Batdorj's first affidavit, Mr Batdorj uses the expression 'it is submitted'. When those parts of the affidavits are considered in the light of the contemporaneous records upon which Mr Batdorj purports to rely, it is apparent that many statements are inaccurate, unsubstantiated, inherently improbable or of little, if any, probative value. We have provided examples in footnotes 143 to 168 above.

249 Despite Mr Batdorj's repetitive and vehement assertions that Altain's claim before the Tribunal extended to IMCS and that the Tribunal regarded IMCS as a party to the arbitration proceeding, he has not exhibited a single contemporaneous document which substantiates these assertions. Mr Batdorj's own letter of demand dated 2 December 2009 to IMCS states that the Tribunal 'heard and discussed the case charged against IMC Mining Inc., Australia and filed by Altain Khuder'.[148]

250 In all the circumstances, we are of the opinion that it was not open to the judge to prefer Mr Batdorj's evidence to the evidence of Mr Lewis and Mr Jones, supported as their evidence was by the critical contemporaneous documents.

251 Although no affidavit was sworn by any lawyer at Lehman, all the contemporaneous documents point to Lehman acting only for IMCM in the arbitration. Those documents include Mr Jones' Powers of Attorney, the Preliminary Hearing Document, the letters to the Tribunal from Mr Baatar and Ms Bayartsetseg dated 13, 14 and 18 August 2009,[149] and Mr Liotta's email dated 8 September 2009 to Mr Lewis.[150] His Honour was not entitled to draw any adverse inference from the absence of any affidavit from any lawyer at Lehman because the absence of that evidence was explained. But even if an inference was open, it could only have been an inference that the evidence of such a lawyer would not have assisted IMCS. The absence would not have permitted a positive inference that lawyers from Lehman

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148 See above [110].

149 The letters are discussed in paras 105-8 of Mr Batdorj's first affidavit and at nn 121 to 123 above.

150 See above [107].

attended any hearing of the Tribunal on behalf of both IMCM and IMCS. This is particularly so in relation to the Preliminary Hearing because Mr Bataar signed the Preliminary Hearing Document solely as a representative of IMCM.

252 The judge's emphasis on the words 'and others' as they appear in Mr Jones' Powers of Attorney is curious. The relevant provisions of Mr Jones' Powers of Attorney are set out at [98] above. It is clear from the context that Mr Jones conferred power on Mr Baatar and Ms Bayartsetseg to communicate with 'the Client' – which, in this context, meant either Mr Jones or IMCM – 'and others'. The reference to 'others' could not sensibly be read as an authority to represent persons other than 'the Client'.

253 The judge also referred[151] to documents such as business cards, website extracts and email addresses which were exhibited to Mr Batdorj's first affidavit in support of the following 'submissions' of Mr Batdorj: that IMCS was the 'controlling mind' behind the IMC Group's involvement in the Project; that IMCM acted as IMCS's agent or representative on the Project and provided services to Altain on behalf of IMCS; and that IMCM and IMCS conducted their business as a common enterprise. These 'submissions' do not constitute evidence, let alone direct or probative evidence. Moreover, there is no evidence that the documents and submissions were relied upon before the Tribunal or that the Tribunal accepted the submissions.

254 On the appeal, Altain submitted that the contemporaneous documents provided sufficient proof that IMCS was a party to the Arbitration Agreement. In particular, Altain relied on the following:

(a) IMCS and IMCM were part of the 'IMC' group of companies. There was substantial evidence that demonstrated that the names of the companies were used interchangeably. An example of this was the IMC Response

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151 Substantive Decision, 94-5 [88].

Document.[152] The first four paragraphs of the IMC Response Document, which referred to IMC's business and clients in the previous 20 years, could only refer to IMCS because IMCM was not incorporated until 27 June 2007. Further, although IMCM was incorporated in the British Virgin Islands, it used the same Brisbane street address, email address and telephone number as IMCS.

(b) IMCS was a party to the OMA notwithstanding that it was not expressly named. This was because, as stated in (a) above, the IMC company names were often used interchangeably. In addition, cl 13.2 of the OMA referred to IMCM as a 'related body corporate',[153] which only made sense if IMCS, rather than IMCM, was the party to the OMA.

(c) IMCS participated in the arbitration and was represented by Mr Jones and the lawyers from Lehman. Mr Jones and Mr Baatar signed the Preliminary Hearing Document on behalf of IMCM and IMCS. By virtue of the signing of the Preliminary Hearing Document, IMCS submitted to the jurisdiction of the Tribunal as a party to the Arbitration Agreement.

(d) At all stages of the arbitration proceeding, IMCS participated as a party. It was only on 7 September 2009, when HopgoodGanim wrote to the MNAC, that a distinction was sought to be drawn between IMCM and IMCS.

255 We have already discussed the Preliminary Hearing and the Preliminary Hearing Document.

256 We accept that the evidence to which Altain referred disclosed that the names of companies in the IMC group were sometimes used interchangeably, that a generic 'IMC' letterhead was often used, that various individuals used business cards that suggested they were employees of IMCS, and that IMCM used the same Brisbane street address, email address and telephone number as IMCS. In themselves, these matters do not necessarily have any bearing on whether IMCS was a party to the

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152 See above [100].

153 See above [87](d).

Arbitration Agreement or to the arbitration proceeding. For example, it is not necessarily unusual for a company to have a place of business in a jurisdiction other than the jurisdiction in which it was incorporated or has its registered office, or for two associated companies to share resources. In any event, what is relevant is whether these matters were relied upon before the Tribunal and, if they were relied upon, what conclusions the Tribunal reached in relation to them. There was simply no evidence before his Honour that these matters were before the Tribunal or that the Tribunal reached any conclusions in relation to them.

257 We also accept that some provisions of the OMA are confusing. Considered as a whole, however, the OMA could not sensibly be read as being between Altain and IMCS. In any event, it is clear from the Award that the Tribunal did not interpret it in this manner.

258 As for the IMC Response Document, it is clear on its face that this document was prepared hurriedly[154] and that, while some of the background information was about the IMC group as a whole rather than about IMCM in particular, the substantive discussion about performance of the OMA related to IMCM. The document did not contain anything which could have given the impression that IMCS, as distinct from IMCM, was a party to the Arbitration Agreement. The fact that the document was signed by Mr Jones as 'Agent' on the same day that he was appointed as IMCM's 'Agent' under the IMCM Power of Attorney strongly indicates that it was submitted on behalf of IMCM. More importantly, it is clear from the Preliminary Hearing Document and the Award that the Tribunal regarded the IMC Response Document as having been filed by IMCM.[155]

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154 This is evident from the heading and pages 2 and 4. Unlike the heading to IMCM's counterclaim, the heading to the IMC Response Document does not refer to the MNAC or to the parties to the arbitration. The text on page 2 contains the statement: 'Bevan, we know about [Altain's] lack of solvency from the last time I visited in September 2008 but unless you have more recent corroboration I would leave it out.' Page 4 states: 'Table to be inserted.'

155 See above [104](f), [108](d)

259 In any event, having regard to all the documents that Altain filed with the Tribunal and all the Tribunal's documents, it is clear that both Altain and the Tribunal considered that the sole respondent (or defendant) to the arbitration was IMCM. The Award itself draws a clear distinction between IMCM as the defendant to the arbitration proceeding and IMCS as an entity that was involved in the implementation of the Project.[156]

260 On the basis of the evidence as a whole, the only conclusion that his Honour could have reached at the inter partes stage was that IMCS was not a party to the Arbitration Agreement. As Altain had an evidential onus of persuading his Honour, on a prima facie basis, that IMCS was a party to the Arbitration Agreement in pursuance of which the Award was made, his Honour should have found that Altain had failed to discharge that onus and should have dismissed its application for an enforcement order against IMCS.

261 If the above conclusion is wrong, the legal onus would have been on IMCS to establish, on the balance of probabilities, one of the grounds in s 8(5) or (7) of the Act. Under s 8(5)(b), IMCS would have had the legal onus of proving by reference to Mongolian law that it was not a party to the Arbitration Agreement. For the reasons discussed below under grounds 5 and 9, grounds 2, 10 and 12 and ground 15, we are of the opinion that, if IMCS had a legal onus, that onus was discharged in relation to the grounds in s 8(5)(b), (c) and (7)(b).

Grounds 5 and 9: This Court's power to determine Tribunal's jurisdiction over IMCS

262 The jurisdictional issue relates to the ambit of s 8(5)(b) of the Act, which empowers this Court to refuse to enforce a foreign arbitral award if the arbitration agreement in pursuance of which it was made was not valid under the law expressed in the agreement. More specifically, the questions for determination on

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156 See above [108](c), (g), (h), (i) and (j). See also above [236].

the appeal are whether this Court, as the enforcement court, has jurisdiction to determine for itself whether:

(a) the Tribunal had made findings of fact that enabled it to exercise jurisdiction over IMCS; and

(b) the Tribunal had jurisdiction over IMCS.

263 As appears from [117](e) above, the judge determined that, while a person seeking to resist enforcement of a foreign arbitral award is entitled to rely on the grounds provided for in the Act, he or she is not entitled to venture further towards reconsideration of the findings, substantive or procedural, of the arbitral tribunal.

264 On the appeal, Altain submitted that, as the Tribunal had determined that IMCS was a party to the Arbitration Agreement and that it had jurisdiction to make the Award against both IMCM and IMCS, this Court did not have jurisdiction to consider those issues for itself. This was particularly so in the present case, it was submitted, because the Award had been verified by the Mongolian District Court and was final under the law of Mongolia.

265 IMCS submitted that this Court has jurisdiction to consider for itself the question of whether, under Mongolian law, IMCS was a party to the Arbitration Agreement and amenable to the jurisdiction of the Tribunal.

266 The nature of the enforcement court's power to consider for itself questions relating to the foreign arbitral tribunal's jurisdiction was considered by Lord Mance and Lord Saville JJSC in *Dallah*.

267 Lord Mance JSC said:

> Neither article V(I)(a) [of the Convention] nor section 103(2)(b) [of the UK Act] hints at any restriction on the nature of the exercise open, either to the person resisting enforcement or to the court asked to enforce an award, when the validity (sc existence) of the supposed arbitration agreement is in issue. The onus may be on the person resisting recognition or enforcement, but the language enables such person to do so by proving (or furnishing proof) of the non-existence of any arbitration agreement. This language points strongly to ordinary judicial determination of that issue. …

…

> The tribunal's own view of its jurisdiction has no legal or evidential value, when the issue is whether the tribunal had any legitimate authority in relation to the [award debtor] at all. This is so however full was the evidence before it and however carefully deliberated was its conclusion. It is also so whatever the composition of the tribunal …[157]

268 Lord Saville JSC said:

> The starting point in this case must be an independent investigation by the court of the question whether the person challenging the enforcement of the award can prove that he was not a party to the arbitration agreement under which the award was made. The findings of fact made by the arbitrators and their view of the law can in no sense bind the court, though of course the court may find it useful to see how the arbitrators dealt with the question. Whether the arbitrators had jurisdiction is a matter that in enforcement proceedings the court must consider for itself.[158]

269 With respect, we agree with the observations of Lord Mance and Lord Saville JJSC. To the extent that the trial judge's observations[159] differed from their Lordships' observations, his Honour fell into error.

270 Accordingly, this Court can determine for itself not only whether the Tribunal made crucial findings of fact that enabled it to exercise jurisdiction over IMCS, but also whether the Tribunal had jurisdiction over IMCS.

271 As we have already discussed, s 8(5)(b) of the Act permits an award debtor to resist enforcement of the foreign arbitral award on the basis that the arbitration agreement in pursuance of which the award was made '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'. In the present case, the Tribunal decided that the arbitration would be governed by the law of Mongolia.[160]

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157 *Dallah* [2011] 1 AC 763, 812-13 [28], [30].

158 *Dallah* [2011] 1 AC 763, 850 [160].

159 Substantive Decision, 83 [69], 99 [95]. See also above [117](e) and (h).

160 See above [104](e).

272 It will be recalled from [166] and [171] to [172] above that the words 'the arbitration agreement is not valid' in s 8(5)(b) of the Act include the ground that the award debtor was not a party to the arbitration agreement.

273 The questions whether IMCS was a party to the Arbitration Agreement and whether it became subject to the jurisdiction of the Tribunal must be considered in accordance with the law of Mongolia.

274 The only evidence about Mongolian law that was adduced at the trial was Professor Tumenjargal's opinion. That opinion set out the following circumstances in which Mongolian law permitted a non-signatory to an arbitration agreement to be considered a party to that agreement:

> 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.
>
> …
>
> 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. …
>
> 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 a 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.
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> …
>
> 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-obligers.* 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-obligers 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 instance, 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 favour 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.[161]

275 Professor Tumenjargal's opinion then set out the following circumstances in which a non-party to an arbitration can be the subject of an arbitration award:

[161] Quoted as in the original.

15. There can be two types of non-arbitration party: (i) an entity that ought to be a party to the arbitration but has not participated in the arbitration (due to unawareness of arbitration and/or refusal to be a party to arbitration), and (ii) an entity that is not a party from the beginning of the arbitration.

16. In the former instance, an entity that is not a party to the arbitration is possible to subject to an award of the arbitration if it was properly notified of the arbitration.

17. In the latter instance, arbitral tribunal have no power to make a decision or a binding award which affects directly (of course it is difficult to determine direct or indirect) legitimate interests of the entity that is not a party to an arbitration. This is reflected in Article 13.3 (Non-arbitral disputes) of Civil Procedure Code, Article 11.1 (Set out the nature of arbitration agreement) and Article 40.2.4 and 40.2.5 (Setting aside arbitral award) of Arbitration law.

18. If arbitral tribunal determine that arbitration would affect or have a direct effect to the non-arbitral party, then arbitral tribunal may revoke the arbitration agreement and/or involve that party in the arbitration as a third party. In accordance with Article 29 of Civil Procedure Code, arbitral tribunal may take measure to give a person who can be affected the opportunity to take part in the arbitration proceedings as a third party upon request of a party or its initiative under consent of the parties. … [162]

276 Professor Tumenjargal's opinion then set out the applicable tests for determining whether the circumstances described in paras 11, 12, 13 and 14 of the opinion applied. The tests in respect of paras 11 and 12 were explained as follows:

23. There are following applicable test to ascertain the requirements of relevant rules relating to Agent/Representation mentioned in … Section 11 of the Opinion … have been satisfied:

    a) Ascertain whether the relation between Proxy and Principal to be regulated by proxy or law.

    b) Ascertain whether any rights or obligations will arise for the Proxy in accordance with the law and its restriction/limitation.

    c) Ascertain whether any rights or obligations will arise for the Proxy in accordance with the contract (writing requirements for authorization) and its limitation. There are no regulations and practice on power/authorization for conclusion of an arbitration agreement.

24. The followings are the test criteria for determining whether the conditions for applicable rules in 'relations regarding participation of

[162] Quoted as in the original.

several parties in an obligation' mentioned in … Section 12 of the Opinion … :

a) Define whether the relations between parties are regulated either by contractual means or in accordance with laws, specify if parties are co-obligator or partial obligator, or obligator;

b) Identify the conditions, requirements, scope and restrictions for undertaking or assigning to joint obligations;

c) If by contractual means, consider how the conditions, requirements, scope and restrictions for undertaking or assigning to joint obligations are identified.

277 Professor Tumenjargal's opinion contained the following discussion of the procedural requirements for making a non-signatory to an arbitration agreement a party to that agreement or the subject of an arbitration award:

30. Arbitration Law of Mongolia ensures that the following 3 principles to adhere in the arbitration:

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 the 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 a 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 a 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)

…

32. The principle and regulation mentioned in Section 30 … of the Opinion shall be applied for the parties who is a party to arbitration proceedings and for an entity that is treated as a party to arbitration proceedings. Thus,

- Arbitral tribunal is obliged to give a 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 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.
>
> …
>
> 35. In the case stipulated in Section 32 and 33 of the Opinion the arbitral tribunal is obliged to give that entity an opportunity (in its own right) to participate in the arbitration.[163]

278 On the appeal, neither party questioned the accuracy of Professor Tumenjargal's opinion. Indeed, both parties sought to rely on that opinion to advance their respective cases.

279 Altain submitted that there were multiple bases under Mongolian law upon which the Tribunal was entitled to conclude that IMCS was a party to the Arbitration Agreement. By directing IMCS to make a payment to Altain, it was said, the Tribunal obviously decided that IMCS was a party to the Arbitration Agreement. Under Mongolian law, the Tribunal was not obliged to give any reasons for this decision in the Award, which was now final.[164] Altain contended that IMCS's real complaint was that the Award did not give sufficient reasons for the Tribunal's decision. That was not a basis for setting aside the Award, according to Altain, either under Mongolian law or under Australian law.[165]

280 IMCS submitted that none of the bases set out in Professor Tumenjargal's opinion for treating a non-signatory to an arbitration agreement as a party to the agreement applied in the present case. In any event, IMCS contended, even if one of the bases was applicable, Professor Tumenjargal's opinion made it clear that a non-signatory to an arbitration agreement could not be found to be a party to the agreement unless the non-signatory was given notice that such a finding was

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163 Quoted as in the original.

164 In support of this proposition, Altain referred to several provisions of the 'Law of Mongolia on Arbitration'.

165 *Sherlock v Lloyd* [2010] VSCA 122 (28 May 2010).

proposed to be made and an opportunity to be heard on the issue. In the present case, according to IMCS, the evidence established that it was not given any such notice.

281 In our opinion, it is clear on the face of the Award that the Tribunal did not decide that IMCS was a party to the Arbitration Agreement. Throughout the Award, the Tribunal maintained a clear distinction between IMCM, as the party to the Arbitration Agreement and the respondent to the arbitration claim, and IMCS. As set out at [108] above, the only references to IMCS in the Award, prior to the direction that IMCS pay an amount to Altain, related to the non-provision of project cost details and expenditure reports to Altain, and IMCS's involvement in the project implementation from the 'very beginning'. These statements constitute findings of fact the correctness of which was not disputed by IMCS before us. For example, IMCS conceded that it was involved in the Project from the outset but contended that it was involved as a subcontractor.

282 More importantly, the Tribunal's statements are not followed by any findings that would establish its jurisdiction over IMCS. The Tribunal did not find that IMCS was a party to the OMA or that it had breached the OMA; each finding of breach was expressly made against IMCM only. Nor did the Tribunal expressly or impliedly find that IMCM was the alter ego, agent, or representative of IMCS, or that IMCS and IMCM were a single entity.

283 The last paragraph of the Award, in which the Tribunal directed IMCS to pay an amount of money to Altain, indicates that the direction was not made to IMCS as a party to the Arbitration Agreement. Rather, the language used by the Tribunal may suggest that IMCS, as an associate of IMCM, was being treated as in the nature of a guarantor of IMCM's obligations under the OMA. But this is speculation because the Tribunal does not identify that or any other relevant capacity, or foundation, for the Award. Whatever the capacity the Tribunal had in mind, it is tolerably clear that it was not that of a party to the Arbitration Agreement.

284 We reject Altain's contention that IMCS's real complaint relates to the inadequacy of the Tribunal's reasons. There may have been some force in this contention if the Tribunal had found that IMCS was a party to the Arbitration Agreement but gave no reasons for that finding. It is abundantly clear, however, that the Tribunal did not make such a finding.

285 All the documents that the Tribunal created in the course of the arbitration, including the Award, carefully documented all critical issues, such as the identity of the parties to the arbitration, the subject matter of the arbitration, the history of dealings between the parties that gave rise to the arbitration, IMCM's breaches of the OMA, the law applicable to the arbitration, and the source of the Tribunal's jurisdiction to conduct the arbitration. If the Tribunal had made a decision that IMCS was a party to the Arbitration Agreement, it is overwhelmingly likely that it would have documented that decision. The fact that the Tribunal did not do so indicates that it never made such a decision.

286 The trial judge did not, in terms, find that the Tribunal had determined that IMCS was a party to the Arbitration Agreement. His Honour merely held that it was open to the Tribunal under Mongolian law to find that the OMA and the Arbitration Agreement in cl 16.1 of the OMA 'applied to and extended to [IMCS]'.[166] His Honour's statement that '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 Mongolian District Court]'[167] implies that such findings were made by the Tribunal and the Mongolian District Court. However, nowhere in the Substantive Decision does his Honour conclude that such findings were made. The source of the statement is the Preliminary Hearing Document.[168]

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166 Substantive Decision, 107 [112]. See above [117](m).

167 Substantive Decision, 99 [95]. See above [117](h).

168 In the Substantive Decision (at 99 n 140), reference is made to exhibit 'GB-39' to Mr Batdorj's first affidavit, which is the Preliminary Hearing Document.

287 Furthermore, the evidence before the trial judge did not establish with any specificity the documentary and other evidence that was adduced before the Tribunal.[169] Accordingly, it was not possible for his Honour to determine whether it was open to the Tribunal to decide that IMCS was a party to the Arbitration Agreement if the Tribunal had turned its mind to that issue.

288 Even if the conclusion set out at [281] above is wrong, for the reasons we have already explained, this Court has jurisdiction to decide for itself whether IMCS was a party to the Arbitration Agreement under Mongolian law as stated in Professor Tumenjargal's opinion. In view of our conclusion at [297] below, we will deal in brief terms with the substantive issues arising under Mongolian Law.

289 In para 9(b) of his opinion, Professor Tumenjargal states that a non-signatory to an arbitration agreement may become a party to the agreement with the consent of both parties. Mr Lewis gave evidence that IMCS was never a party to the OMA, had no obligations under it and was not a party to, and took no part in, the arbitration. He also gave evidence that IMCS did not, at any stage, recognise the Tribunal's jurisdiction. Mr Jones gave evidence that, prior to the publication of the Award, he was not made aware of any claim that IMCS was a party to the OMA or was involved in the arbitration. Mr Liotta's email of 8 September 2009 to Mr Lewis indicated that, until Lehman ceased to act in the arbitration, it represented only IMCM. Notwithstanding the assertions contained in Mr Batdorj's affidavits that IMCS was regarded by the Tribunal as a party to the Arbitration Agreement and to the arbitration proceeding, none of the Interim Award, the Preliminary Hearing Document or the Award stated or implied that IMCS consented to becoming a party to the Arbitration Agreement or that the parties to the arbitration at any time extended beyond Altain and IMCM. Accordingly, IMCS has established on the balance of probabilities that it did not consent to becoming a party to the Arbitration Agreement.

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[169] See above [247].

290 In paras 11 and 23 of his opinion, Professor Tumenjargal explained how a principal can become a party to an arbitration agreement through the actions of his or her authorised proxy, representative or agent. Mr Lewis gave evidence that the parties to the OMA were Altain and IMCM, and that IMCM did not act as an agent or a representative of IMCS. His evidence was supported by the terms of the OMA, which names the parties as Altain and IMCM without reference to any agency, and the subcontract between IMCM and IMCS. Notwithstanding the assertions in Mr Batdorj's affidavits that IMCM executed the OMA as the agent or representative of IMCS, the objective evidence upon which he relied is not a sufficient basis to depart from the terms of the OMA. The absence of evidence from Mr Kelly, who, according to the trial judge,[170] participated in the drafting of the OMA and was present at its execution, could not support an inference that IMCM entered into the OMA as the agent or representative of IMCS. Accordingly, IMCS has established on the balance of probabilities that IMCM did not enter into the Arbitration Agreement as the agent or representative of IMCS.

291 In paras 12 and 24 of his opinion, Professor Tumenjargal explained how all co-obligors can become parties to an arbitration agreement that is executed by only one of them. The evidence discussed at [290] above, which establishes on the balance of probabilities that IMCM did not enter into the OMA as the agent or representative of IMCS, also establishes that IMCM and IMCS were not co-obligors. IMCM alone contracted to provide services to Altain and was assisted in the provision of those services by IMCS, IMC Mongolia LLC and other companies. The absence of a direct contractual relationship between Altain and IMCS, whether under the OMA or otherwise, is confirmed by the fact that, when it terminated the OMA, Altain gave notice of termination to IMCM only. Altain did not give any notice of termination to IMCS, whether under the OMA or any other contract.

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170 Substantive Decision, 95-6 [89].

292 Paras 13 and 14 of Professor Tumenjargal's opinion are not relevant to the present case.

293 It follows that none of the bases set out in Professor Tumenjargal's opinion for IMCS becoming a party to the Arbitration Agreement was applicable. Even if we had been satisfied that one of those bases was applicable, according to Professor Tumenjargal's opinion, the Tribunal could not lawfully treat IMCS as a party to the Arbitration Agreement without first giving it notice of any proposal to treat it as a party to the Arbitration Agreement and an opportunity to make submissions on the issue.

294 As stated at [204](n) above, Mr Lewis deposed that no notice was received by IMCS that Altain had made a claim against it; that Altain was intending to apply to the Tribunal for any order against it; or that the Tribunal was considering making any order against it. Mr Jones gave similar evidence.[171] Although Mr Batdorj asserted repeatedly that IMCS was given notice that the Tribunal was treating it as a party to the Arbitration Agreement and to the arbitration proceeding, these assertions are not supported by any of the contemporaneous documents. His assertions cannot be regarded as admissible evidence, let alone probative evidence.

295 The trial judge held that IMCS had failed to establish that it was not involved in any relevantly significant way in the arbitration,[172] and that it was more probable than not that IMCS was well aware of the nature and progress of the arbitration proceeding and was able to present its case in the proceeding.[173] It appears that these findings were based on his Honour's earlier finding that IMCS had been represented by Mr Jones and Mr Baatar at the Preliminary Hearing, and had agreed

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171 See above [205](e).

172 Substantive Decision, 107 [112]. See also above [117](m).

173 Substantive Decision, 106 [110]. See also above [117](l).

that the Tribunal had jurisdiction to hear the dispute.[174] For the reasons that we have already given, these findings were not open to his Honour.

296 In the Award, the Tribunal observed that the Claim Document and notice of the arbitration hearing had been served on 'the Defendant', namely, IMCM.[175] Had the Tribunal given any notice to IMCS, it surely would have noted this in the Award. The absence of any reference to IMCS being served with any document strongly indicates that no document connected with the arbitration was served on it.

297 We are satisfied on the balance of probabilities that the procedural requirements set out at paras 30, 32, 33 and 35 of Professor Tumenjargal's opinion for making a non-signatory to an arbitration agreement a party to that agreement or the subject of an arbitral award were not complied with in relation to IMCS. Accordingly, under Mongolian law, IMCS did not become a party to the Arbitration Agreement and was not subject to the Tribunal's jurisdiction. It follows that the Arbitration Agreement was not valid – in the sense of being legally effective as against IMCS – and that IMCS has discharged its legal onus to establish the ground set out in s 8(5)(b) of the Act for resisting enforcement of the Award against it.

Ground 4: Did the Tribunal find that IMCS was a party to the OMA?

298 Under cover of ground 4, IMCS submitted that the trial judge erred in finding as a matter of fact that the Tribunal had determined that it had jurisdiction to make an award against IMCS on the basis that IMCS had consented to the arbitration or that there was a common enterprise between IMCS and IMCM or that there was some other relationship of legal responsibility.

299 As discussed at [286] above, the judge did not, in terms, make any of the findings of fact set out at [298] above.

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174 Substantive Decision, 92-3 [85]. See also above [117](g).

175 See above [108](c) and (e).

300 At [281] to [285] above, we concluded that the Tribunal did not make a finding that IMCS was a party to the Arbitration Agreement. To the extent that his Honour made a contrary finding, he fell into error because such a finding was not open on the evidence.

301 In any event, even if the Tribunal had found that IMCS was a party to the Arbitration Agreement or that there was some other basis under Mongolian law for it to assert jurisdiction over IMCS, this Court has considered this question for itself and has concluded that IMCS has discharged its onus to establish the ground set out in s 8(5)(b) of the Act for resisting enforcement of the Award against it.[176]

[176] See above [289] to [297].

Ground 7: Did IMCS consent to arbitrate?

302 We have already discussed this issue at [289] above.

Grounds 2, 10 and 12: Did IMCS receive proper notice?

303 Under cover of grounds 10 and 12, IMCS submitted that, in the light of the totality of the evidence and having regard to IMCS's objections to the admissibility of Altain's evidence, the trial judge erred in finding that it was not open to IMCS to rely on the defence or ground in s 8(5)(c) of the Act, namely, that it did not receive proper notice of the arbitration proceeding or was not given an opportunity to be heard in the arbitration proceeding.[177]

304 Under cover of ground 2, IMCS submitted that the trial judge erred in failing to determine IMCS's objections to the admissibility of Mr Batdorj's affidavits.

305 We have already considered these issues. At [293] to [297] above, we concluded that IMCS did not receive notice of any proposal that it be treated as a party to the Arbitration Agreement or the arbitration proceeding. At [208] to [230] above, we concluded that the judge should have ruled on IMCS's objections.

306 It follows that IMCS has discharged its onus to establish the ground set out in s 8(5)(c) of the Act for resisting enforcement of the Award against it.

Ground 6: Nature of judicial verification of an award under Mongolian law

307 Under cover of ground 6, IMCS submitted that the judge erred in finding that the courts of Mongolia had satisfied themselves by proper inquiry that the requirements of the Mongolian Civil Code applicable to the Award had been made out because there was no expert evidence before this Court on Mongolian law relating to judicial verification of arbitral awards.

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177 Substantive Decision, 106 [110]. See also above at [117](l).

308 The relevant passages in the Substantive Decision are as follows:

> 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. The Mongolian courts verified the award.
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> …
>
> 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. It was also noted that Judge L. Oyun's Order is expressed to be final.
>
> 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 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. 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. 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 [Act].[178]

309 It is clear from the above passages that the only specific finding that his Honour made about what the Mongolian courts did in relation to the Award, as distinct from what they would be expected to do in relation to awards generally, related to the fact and terms of the Mongolian District Court Order. His Honour accurately described that order. Accordingly, ground 6 must fail.

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[178] Substantive Decision, 85-6 [75], 97 [91]-[92] (citations omitted).

Grounds 8 and 11: Estoppel

310 As set out at [117] above, the trial judge made the following statements and findings in relation to estoppel:

(a) a ruling by a supervising court at the arbitral seat may raise an issue estoppel binding on the courts at the place of enforcement;[179]

(b) IMCS is 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 proceeding, and having regard to its failure to challenge the Award in the Mongolian courts (in the particular circumstances of its participation in the arbitration proceeding);[180]

(c) the evidence of use by IMCM and IMCS of a common logo and brand supported Altain's suggestion that they acted as some form of common enterprise or operated under some other relationship of legal responsibility, or are estopped from asserting otherwise;[181] and

(d) on the basis of the evidence that went towards establishing that IMCM and IMCS were for all intents and purposes treated as the same entity, or are estopped from asserting otherwise, it was more probable than not that IMCS was well aware of the nature and progress of the arbitration proceeding and was well able to present its case in that proceeding. IMCS did not discharge the onus of proving that it did not receive proper notice or an opportunity to be heard and, accordingly, did not establish the defence in s 5(8)(c) of the Act.[182]

311 The precise nature of the estoppels that his Honour found and the factual and legal bases for them are not clear.

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179 Substantive Decision, 83 [70].

180 Substantive Decision, 100 [98].

181 Substantive Decision, 103-4 [105].

182 Substantive Decision, 106 [110].

312 Altain's submissions clarify how the matter is put. Altain's written outline stated that the judge found two different estoppels, namely an issue estoppel and estoppel by conduct. The former was based on the Mongolian court having verified the award and IMCS not having challenged that finding. The latter was based on the extent of IMCS's participation in the arbitration proceeding and not having challenged the Award. As to the failure to challenge the Award in the Mongolian courts, Altain referred to the observation of Lord Collins JSC in *Dallah* that the option of challenging an award in the supervising courts of the seat of arbitration and resisting enforcement of an award in the enforcing court 'are not mutually exclusive, although in some cases a determination by the court of the seat may give rise to an issue estoppel or other preclusive effect in the court in which enforcement is sought'.[183] Altain also referred to the observation of Sir Anthony Mason in *Hebei*,[184] following a discussion of the roles of a supervising court and an enforcement court, that:

> 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 … 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.[185]

313 In Altain's oral submissions it was said that there were three estoppels, an estoppel that arose as a matter of fact, estoppel of record or issue estoppel. As to the factual estoppel or estoppel by conduct, the following was submitted. Factual estoppel was based on IMCS's conduct in participating in the arbitration proceeding in the capacity of a party. Having so participated and without complaining about the jurisdiction of the Tribunal, IMCS allowed the Tribunal to assume jurisdiction

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183 *Dallah* [2011] 1 AC 763, 835 [98]. Altain also referred to *Aloe Vera* [2006] SGHC 78, 197-8 [51]-[52].

184 [1999] 2 HKC 205.

185 *Hebei* [1999] 2 HKC 205, 230.

over it. Altain conceded that in such circumstances IMCS would have become a party to the arbitration and accordingly there was no room for an estoppel.

314 Estoppel by record was said to be constituted by the judge's finding that at the Preliminary Hearing on 24 July 2009 IMCS submitted to the jurisdiction of the Tribunal and signed the record of that hearing. When queried as to whether these matters were merely factors relevant to the alleged estoppel by conduct, Altain submitted that they could be regarded as distinct in that at the very latest IMCS became a party to the arbitration at the Preliminary Hearing.

315 The issue estoppel was that identified above.

316 There is no substance in these submissions.

317 In so far as the alleged estoppels are based on his Honour's finding of fact that IMCS participated in the arbitration proceeding, was represented at the Preliminary Hearing and agreed to the Tribunal's jurisdiction, we have already concluded that these findings were not open on the evidence.[186] In our opinion, the evidence does not support any other factual basis for the alleged estoppels.

318 In so far as the alleged estoppels were said to arise from IMCS's failure to apply to the Mongolian courts to set aside the Award, they are based on an error of law.

319 The question whether an estoppel may arise when a person seeking to resist enforcement of a foreign arbitral award has not sought to challenge the award in the courts of the seat of arbitration was considered in *Dallah*. Lord Mance JSC stated:

> In its written case Dallah also argued that the first partial award gave rise, under English law, to an issue estoppel on the issue of jurisdiction, having regard to the [award debtor's] deliberate decision not to institute proceedings in France to challenge the tribunal's jurisdiction to make any of its awards. This was abandoned as a separate point by Miss Heilbron in her oral submissions before the Supreme Court, under reference to the [award debtor's] recent application to set aside the tribunal's awards in France. But,

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[186] See above [239].

> in my judgment, the argument based on issue estoppel was always doomed to fail. A person who denies being party to any relevant arbitration agreement has no obligation to participate in the arbitration or to take any steps in the country of the seat of what he maintains to be an invalid arbitration leading to an invalid award against him. The party initiating the arbitration must try to enforce the award where it can. Only then and there is it incumbent on the defendant denying the existence of any valid award to resist enforcement.[187]

320 With respect, we agree with Lord Mance JSC's observations.

321 In the present case, IMCS, which denied that it was a party to the Arbitration Agreement, was not obliged to participate in the arbitration proceeding or to apply to the Mongolian courts to set aside the Award. In the circumstances of this case, IMCS's failure to take these steps cannot give rise to an estoppel precluding it from denying that it was a party to the Arbitration Agreement or from challenging the validity of that agreement in this Court.

322 Grounds 8 and 11 are made out.

Grounds 16 and 17: Indemnity costs orders

323 At [72] and [73] above, we referred to the First and Second Costs Decisions. Grounds 16 and 17 attack the costs orders on the basis that no special circumstances existed that could warrant ordering costs on an indemnity basis. The grounds do not otherwise attack the orders that IMCS pay costs. The consequence of that is that if IMCS failed on its preceding grounds of appeal it submitted to orders for costs but on a party and party basis. As it happens, by reason of our above conclusions, IMCS succeeds and both costs orders will be set aside with consequential orders including as to costs. In the circumstances it is not strictly necessary to deal with grounds 16 and 17. However, lest we be wrong in our conclusions, and because we heard full submissions, it is appropriate that we consider the matter.

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187 *Dallah* [2011] 1 AC 763, 810 [23]. See also at 834-5 [98] (Lord Collins JSC).

324 In the First Costs Decision, the judge referred to the usual rule that is applied by Australian courts, namely, that costs are ordered to be paid on a party and party basis unless there are special circumstances in a particular case that warrant the exercise of the court's discretion to order costs on a different basis.[188]

325 Special circumstances may be found where, for instance, the unsuccessful party has made serious unfounded allegations, pursued the proceeding for an ulterior purpose, wasted the Court's time, committed a contempt of court or engaged in some other improper conduct.[189] But in each case it is a question to be determined in the light of the particular facts and circumstances. It should also be noted that r 63.28 of the Rules provides that costs in a proceeding which are to be taxed shall be taxed on a party and party basis, a solicitor and client basis, an indemnity basis or such other basis as the Court may direct. Any basis of assessment under which a party may recover costs greater than party and party is regarded as a special order requiring the existence of circumstances that warrant its making. An order for costs as between solicitor and client is just as much an order requiring special circumstances for an exercise of judicial discretion as is an order for costs on an indemnity basis, the only difference between those bases being in relation to the person who bears the onus of establishing reasonableness or unreasonableness as the case may be; see r 63.30 and r 63.30.1.

326 Before his Honour, IMCS submitted that there were no special circumstances in the present case that warranted an award of indemnity costs. Altain submitted that the fact that IMCS was unsuccessful in resisting the enforcement of a foreign arbitral award was sufficient to establish special circumstances.

327 His Honour referred to the decision of Reyes J of the Hong Kong Court of First Instance in *A v R*[190] and to subsequent decisions in that jurisdiction, including

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188 *Colgate-Palmolive Co v Cussons Pty Ltd* (1993) 46 FCR 225, 232-4.

189 *Ugly Tribe Co Pty Ltd v Sikola* [2001] VSC 189 (14 June 2001) [7]; *Talacko v Talacko* [2009] VSC 579 (11 December 2009) [45]-[52].

190 [2009] 3 HKLRD 389.

the decisions of Saunders J in *Wing Hong Construction Ltd v Tin Wo Engineering Co Ltd*[191] and *Taigo Ltd v China Master Shipping Ltd*,[192] which applied *A v R*. In *A v R*, Reyes J said:

> Parties should comply with arbitration awards. A person who obtains an award in his favour pursuant to an arbitration agreement should be entitled to expect that the court will enforce the award as a matter of course.
>
> Applications by a party to appeal against or set aside an award or for an order refusing enforcement should be exceptional events. Where a party unsuccessfully makes such application, he should in principle expect to have to pay costs on a higher basis. This is because a party seeking to enforce an award should not have had to contend with such type of challenge.
>
> Further, given the recent introduction of Civil Justice Reform (CJR), the court ought not normally to be troubled by such type of application. A party unmeritoriously seeking to challenge an award would not be complying with its obligation to the court under O.1A r.3 to further the underlying objectives of CJR, in particular the duty to assist the court in the just, cost-effective and efficient resolution of a dispute.
>
> If the losing party is only made to pay costs on a conventional party-and-party basis, the winning party would in effect be subsidising the losing party's abortive attempt to frustrate enforcement of a valid award. The winning party would only be able to recover about two-thirds of its costs of the challenge and would be out of pocket as to one-third. This is despite the winning party already having successfully gone through an arbitration and obtained an award in its favour. The losing party, in contrast, would not be bearing the full consequences of its abortive application.
>
> Such a state of affairs would only encourage the bringing of unmeritorious challenges to an award. It would turn what should be an exceptional and high-risk strategy into something which was potentially 'worth a go'. That cannot be conducive to CJR and its underlying objectives.
>
> Accordingly, in the absence of special circumstances, when an award is unsuccessfully challenged, the Court will henceforth normally consider awarding costs against a losing party on an indemnity basis.[193]

328 The judge concluded that it appeared 'to be the settled principle in Hong Kong that the Court of First Instance will generally award indemnity costs against an unsuccessful party in an application to challenge or resist enforcement of an arbitral

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191 (Unreported, Hong Kong Court of First Instance, Saunders J, 3 June 2010) [8]-[14].

192 [2010] HKCFI 530 (17 June 2010) [13]-[16].

193 [2009] HKLRD 389, 400-1 [67]-[72].

award.'[194] The judge then noted that Altain submitted that the Hong Kong approach should be applied because (a) IMCS had unsuccessfully sought to set aside the enforcement orders, and (b) the *Civil Procedure Act 2010* (Vic) strengthened the analogy with the Hong Kong approach. What was analogous was the overarching purpose in s 7 of the *Civil Procedure Act* 'to facilitate the just, efficient, timely and cost-effective resolution of the real issues in dispute' and the overarching obligation of a party directed to achieving that purpose.

329 Furthermore, the judge noted, Altain submitted that IMCS knew, or should have known, that its prospects of success were limited by the narrow grounds in the Act and the onerous burden to establish them. As to this, the judge referred to IMCS's repeated but failed submission that Altain lacked candour in the ex parte hearing, to IMCS's threshold issue being un-supportable, and that IMCS found itself in a predicament 'as a result of its own decisions as to its participation, or otherwise, in [the arbitration] proceedings.'[195]

330 The judge then noted that IMCS submitted that the Hong Kong approach should not be followed, that it would 'turn on its head' the settled approach to the award of costs in Victoria, and indeed Australia, on the basis of the statement of principles by Harper J in *Ugly Tribe Pty Ltd v Sikola*.[196]

331 His Honour then stated:

> It is made very clear by Harper J and the other authorities to which reference was made in *Ugly Tribe Co Pty Ltd v Sikola* that the categories of special circumstances are not closed. In my view, the considerations which moved Reyes J and Saunders J in the Hong Kong cases, to which reference has been made, apply with equal force in Victoria, both from an arbitration perspective and also from the perspective of legislation such as that contained in the *Civil Procedure Act* and in the Hong Kong CJR.
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> It should, however, be stressed that the finding of a category of special circumstances in this context does not mean that it would follow, inexorably, that a special costs order would be made. The award of costs is discretionary

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194 First Costs Decision, [14].

195 First Costs Decision, [18].

196 [2001] VSC 189 (14 June 2001).

> and the exercise of that discretion depends on the particular circumstances. Nevertheless in an arbitration context that discretion should be exercised against the backdrop of the considerations discussed.[197]

332 On the basis of the above considerations, his Honour ordered IMCS to pay Altain's costs on an indemnity basis.

333 The judge's order of 4 February 2011 by which IMCS was ordered to pay, on an indemnity basis, Altain's costs of IMCS's unsuccessful application for an extension of the stay of the ex parte order, was based on similar considerations. At the hearing of IMCS's application for an extension of the stay, his Honour said:

> I think the costs order should be made on the same basis as the costs orders on 3 February in favour of the plaintiff for the reasons indicated in that judgment and also having regard to my reasons today for rejecting the stay.[198]

334 His Honour's ruling for rejecting the stay is not included in the transcript. His reasons, however, are apparent from the discussion preceding the ruling. In essence, his Honour stated the following: that he granted an extension of the stay of the ex parte order until 4.00pm on 4 February 2011 on the expectation that IMCS would file with the Court of Appeal an application for a stay by 28 January 2011 and that the Court of Appeal would hear the application on 4 February 2011; and that, in filing its application for leave to appeal and a stay on 3 February 2011, IMCS had failed to act urgently and had failed to ensure that the Court of Appeal was placed in a position to be able to hear the stay application on 4 February 2011.

335 With great respect to his Honour, we can find nothing in the Act or in the nature of the proceedings that are available under the Act which of itself warrants costs being awarded against an unsuccessful award debtor on a basis different from that on which they would be awarded against unsuccessful parties to other civil proceedings.[199] Accordingly, his Honour acted on a wrong principle[200] in embracing

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197 First Costs Decision, [20]-[21] (citation omitted).

198 Transcript of Proceedings, *Altain Khuder LLC v IMC Mining Inc* (Supreme Court of Victoria, Croft J, 4 February 2011) 57.

199 The matters set out in s 8(10) of the Act, which are preconditions to the making of an order for costs in certain circumstances, are consistent with the usual rule set out at [324] above.

the approach that has been adopted by the Hong Kong Court of First Instance. We note also that the *Civil Procedure Act 2010* was not in force when his Honour heard this proceeding. Even if it were in force, it would not have warranted the order he made.

336 In proceedings under the Act, as in other civil proceedings, costs will ordinarily be awarded against the unsuccessful party on a party and party basis unless the successful party can establish special circumstances. The principles for determining the existence of special circumstances are well established. Special circumstances, if they exist, are found in the facts of the case at hand, and the exercise of the judicial discretion is not otherwise conditioned on whether those facts are comprehended by a category of case or cases in which a special order has been made. The fact that an award debtor fails to establish a ground for resisting enforcement of a foreign arbitral award cannot, of itself, constitute special circumstances. Nor can a finding that the award debtor's case was 'unmeritorious' if all that is meant by that expression is that the award debtor failed to persuade the Court to accept his or her evidence and submissions.[201]

337 In the present case, had his Honour been correct in refusing to set aside the ex parte order for the reasons given by him, there would have been nothing special about the circumstances of the proceeding – including the conduct of IMCS and its submissions – that would have warranted the making of an indemnity costs order.

338 We are also of the view that there was nothing special about the circumstances in which his Honour decided to refuse to extend the stay of the ex parte order that warranted the making of the indemnity costs order of 4 February 2011.

339 On 3 February 2011, IMCS filed with the Court of Appeal a notice of appeal and applications for leave to appeal (if leave be required) from the orders of

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200 *House v The King* (1936) 55 CLR 499, 505.

201 *Parsons*, 508 F 2d 969, 978 (2nd Cir, 1974).

28 January 2011, and the orders of 3 February 2011 and a stay of those orders, with supporting documentation. That was within four business days of the publication of the Substantive Decision. The Court of Appeal Registry marked IMCS's summonses as to be heard on 'a date to be fixed'. It was, of course, for the Court of Appeal to determine in the light of apparent urgency when the applications would be heard. Neither IMCS nor Altain, nor the judge, could control that. In our opinion IMCS acted reasonably in approaching his Honour for an extension of the stay when it was not able to secure a hearing before the Court of Appeal prior to the expiry of the stay at 4 pm on 4 February 2011.

340 Furthermore, the transcript of the hearing discloses that it was anticipated that the Court of Appeal would hear the matter on 11 February 2011, a mere seven days later. Not only is that what happened but, on 11 February the Court of Appeal stayed execution under the judgment of 28 January 2011 and the costs order of 3 February 2011 and on 2 March 2011 the stay was extended to include the order made on 4 February 2011.

341 In our opinion, attending only to relevant considerations, his Honour ought to have extended the stay for a further seven days as IMCS sought.

342 In any event, as IMCS has succeeded on the appeal, all of the costs orders made below will be set aside.

Remaining grounds of appeal

343 As mentioned at [197] above, IMCS did not press ground 1, namely, that Altain had not discharged its obligation of candour during the ex parte hearing on 20 August 2010.

344 Although grounds 13, 14 and 15 were not abandoned, they were not listed in IMCS's 'Key Issues' document. Accordingly, they can be dealt with very briefly.

Those grounds alleged that, by reason of the errors set out in grounds 7, 8, 10 and 11, the trial judge erred in finding that IMCS had not discharged its onus of establishing:

(a) under s 8(5)(d) of the Act, that the Award deals with a difference not contemplated by, or falling within, the submission to arbitration, or contained a decision on a matter beyond the scope of the submission to arbitration (ground 13);

(b) under s 8(5)(e) of the Act, that the composition of the Tribunal or the arbitral procedure was not in accordance with the parties' agreement or the law of Mongolia (ground 14); and

(c) under s 8(7)(b) of the Act, that enforcing the Award would be contrary to public policy (ground 15).

345 As we have concluded that IMCS was not a party to the Arbitration Agreement and did not submit to the arbitration, grounds 13 and 14 are not engaged.

346 In relation to ground 15, s 8(7A)(b) makes it clear that the enforcement of a foreign 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. We have already concluded that the Tribunal made the Award without giving prior notice to IMCS that it proposed to make any order against it.[202] In these circumstances, the Tribunal breached the rules of natural justice and, accordingly, enforcement of the Award in Australia would be contrary to public policy.[203] Ground 15 is made out.

Conclusion and proposed orders

347 For the above reasons, we would allow the appeal and set aside all the orders made below in so far as they relate to IMCS.

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[202] See above [293]-[297].

[203] Para 2(b) of art V of the Convention makes it clear that the public policy that is relevant under s 8(7)(b) is the public policy of the country in which an award is sought to be enforced. In the present case, the public policy of Australia is applicable.