

RECENT DEVELOPMENTS IN THE ENFORCEMENT OF FOREIGN ARBITRAL AWARDS IN AUSTRALIA

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1 Introduction

As Allsop J observed in *Comandate Marine Corp. v Pan Australia Shipping Pty Ltd*,¹ disputes arising from commercial bargains are unavoidable and part of the activity of commerce itself. The existence of such disputes and the means by which they are resolved can also amount to a hidden cost of the underlying transaction. This is especially so in relation to international trade, where the actual and apprehended risks and uncertainties associated with the enforcement of the parties' obligations in foreign and unfamiliar legal systems represent both a potential impediment or barrier to trade and a potential source of additional transactional costs.² For these reasons, it has been said that 'an ordered efficient dispute resolution mechanism leading to an enforceable award or judgment by the adjudicator, is an essential underpinning of commerce'.³

With a view to avoiding, or at the very least minimising, the above costs, risks and uncertainties, commercial parties often deal with the possibility of the occurrence of disputes between them and the means by which such disputes are resolved in advance in the terms of their agreement. In the context of international commerce, this is most commonly done by the parties choosing arbitration as their agreed method of dispute resolution. The many advantages of the use of commercial arbitration as a means of resolving disputes in lieu of curial litigation, in particular between the participants of international trade and commerce, are so well known and documented⁴ as not to need repeating here.

Despite those advantages which are associated with the conduct of the arbitral process itself, an arbitral award, if it is not honoured, is unlikely to be of any value to the party who has obtained it,⁵ unless it can be enforced, in particular in the place where the party against whom the award has been obtained⁶ is located and/or has its assets. This is especially so of awards obtained in the context of international trade and commerce, which may need to be enforced in countries other than where the award creditor is located or the award was obtained.

Principal amongst the recognised advantages of international commercial arbitration is the ability and greater ease with which an arbitral award (once obtained) may be enforced, in particular internationally and in comparison to the enforcement of a judgment of a court.

This is in large measure a consequence of both the provisions of the *New York Convention*⁷ (*Convention*) and its widespread adoption throughout the world.⁸ The *Convention* has been described as one of the single most important pillars on which the edifice of international arbitration rests.⁹

In broad terms, the *Convention's* operation is two-fold. First, it facilitates the recognition and enforcement of arbitration agreements, in particular by ensuring that the parties to such agreements are not able to circumvent their bargain by pursuing their claims before the courts.¹⁰ Secondly, and relevantly for present purposes, the *Convention* facilitates the enforcement of an award that is the product of the parties' agreement to arbitrate their disputes. This is

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¹ *Comandate Marine Corp. v Pan Australia Shipping Pty Ltd* (2006) 157 FCR 45, [192].

² Luke Nottage and Richard Garnett, *International Arbitration in Australia* (2010) v-vi; *Ibid* [192].

³ *Comandate Marine Corp. v Pan Australia Shipping Pty Ltd* (2006) 157 FCR 45, [192].

⁴ See *Fiona Trust & Holding Corp v Privalov* [2008] 1 *Lloyd's Law Reports* 254, [6]; Patrick Keane, 'Judicial support for arbitration in Australia', (2010) 34 *Australian Bar Review* 1.

⁵ The award creditor.

⁶ The award debtor.

⁷ *Convention for the Recognition and Enforcement of Arbitral Awards (New York Convention)*, 1958, 330 UNTS 38.

⁸ As at the date of this paper, there are 146 signatories to the Convention – see UNCITRAL, *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (2012) <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html>.

⁹ J G Wetter, 'The present status of the International Court of Arbitration of the ICC : an appraisal' (1990) 91 *Am Rev of Int'l Arb* 58.

¹⁰ *Convention for the Recognition and Enforcement of Arbitral Awards (New York Convention)*, 1958, 330 UNTS 38, art II. In Australia, this is given effect to by *International Arbitration Act 1974* (Cth) s 7.

by the operation of arts III, IV and V of the *Convention* and their implementation as part of the domestic law of those countries that have adopted the *Convention*.

It has been said in this second respect that the *Convention* introduced a ‘pro-enforcement’ bias or policy for the recognition and enforcement of arbitral awards.¹¹ In their recent joint judgment in *IMC Aviation Solutions Pty Ltd v Altain Khuder LLC*¹² Hansen JA and Kyrou AJA described that bias or policy in the following terms:

What that means is this. ... 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.¹³

Provisions for the recognition and enforcement of arbitral awards in similar terms to those of the *New York Convention* are also to be found in arts 35 and 36 of the *UNCITRAL Model Law*¹⁴ and thereby in the domestic law of the more than 70 countries that have now adopted the *Model Law* as their curial or procedural law of arbitration. A similar pro-enforcement bias or policy can also be seen to lie behind these provisions and their inclusion in the *Model Law*.

In *Comandate Marine Corp. v Pan Australia Shipping Pty Ltd* Allsop J referred to the significance of the *Convention* and *Model Law* in the following terms:

The recognition of the importance of international commercial arbitration to the smooth working of international commerce and of the importance of enforcement of the bilateral bargain of commercial parties in their agreement to submit their disputes to arbitration is reflected in the provisions of both the *New York Convention* and the *Model Law*.¹⁵

Australia is a signatory to both the *New York Convention* and *Model Law* and the provisions of both the *Convention* and *Model Law* have been incorporated into Australian domestic law. This is through the provisions of the *International Arbitration Act 1974* (Cth) (IAA). As Hansen JA and Kyrou AJA also noted in their joint judgment in *IMC Aviation Solutions Pty Ltd v Altain Khuder LLC*, the pro-enforcement bias or policy of the *New York Convention* is also recognised and reflected in Australia in the IAA and its provisions.¹⁶

The enforceability of arbitral awards, and the ease or otherwise with which such awards may be enforced, are important factors in assessing the utility and success of international commercial arbitration as a dispute resolution mechanism, in particular in the context of international commerce and trade.

More specifically, the enforceability of foreign arbitral awards *in Australia*, and the ease or otherwise with which such awards may be enforced *in Australia*, are likely to be of interest not only to those who may have obtained an award which has not been honoured and who are looking to enforce it against the assets of the award debtor held anywhere in the world, including in Australia, but also to foreign parties (and their lawyers) who are contemplating doing business with an Australian resident and who are, in that context, considering whether or not to agree to the resolution of disputes by commercial arbitration and the utility and likely success of such an agreement in the event that a dispute arises.

The past few years have seen a reinvigoration of commercial arbitration in Australia and a strong push for its promotion as a means of commercial dispute resolution. This is especially in the context of international trade and commerce. This is not only by those with a vested interest in the success of arbitration,¹⁷ but also from government at both the State and Federal levels, which has resulted in a number of changes to the existing legislative regime governing commercial arbitration in Australia.

¹¹ *Dallah Real Estate & Tourism Holding Co v the Ministry of Religious Affairs, Government of Pakistan* [2011] 1 AC 763, [101] (Lord Collins); see also *Parsons & Whittemore Overseas Co Inc v Societe Generale de L'Industrie du Papier (RAKTA)* (1974) 508 F 2d 969, 973.

¹² *IMC Aviation Solutions Pty Ltd v Altain Khuder LLC* (2011) 253 FLR 9.

¹³ *Ibid* [128]; see also the comments of Warren CJ at [45] fn 16 to similar effect.

¹⁴ *UNCITRAL Model Law on International Commercial Arbitration*, 2006, 330 UNTS 40.

¹⁵ *Comandate Marine Corp. v Pan Australia Shipping Pty Ltd* (2006) 157 FCR 45, [193].

¹⁶ *IMC Aviation Solutions Pty Ltd v Altain Khuder LLC* (2011) 253 FLR 9, [128].

¹⁷ Such as the parties to international agreements, their lawyers and would be arbitrators.

There has also been a shift in the approach of the Australian judiciary to the enforcement of international arbitration agreements, both (a) in promoting and giving effect to the freely entered into bargain of the parties, including via the adoption of a benevolent and encouraging approach to consensual alternative non-curial dispute resolution such as arbitration¹⁸ and (b) in confining the intervention of the Australian courts as organs of the State to the minimum necessary to ensure the integrity of the arbitral process.¹⁹ This shift has been in recognition of the public interest in international arbitration and its promotion and has resulted in the adoption of a pro-arbitration attitude by Australian courts.

Whilst for the most part these developments have been directed at or had the effect of enhancing and promoting Australia's position as a centre for dispute resolution, in particular in the Asia-Pacific region, they have also included developments which impact upon the enforcement of foreign arbitral awards in Australia, and which have been reflected in a pro-enforcement bias.

This paper addresses two aspects of the latter developments:

- a) the first is recent legislative changes which have sought to enhance the enforcement of foreign arbitral awards in Australia;
- b) the second is the judgment of the Court of Appeal of the Supreme Court of Victoria in *IMC Aviation Solutions Pty Ltd v Altain Khuder LLC* and its potential implications for the enforcement of foreign arbitral awards in the future, especially in light of criticism which the judgment has received.

However, before addressing those issues, there are some preliminary observations I wish to make both by way of background and also as an introduction to the framework of arbitration law in Australia (especially for the benefit of those who may not be familiar with it).

2 Background to Arbitration Law in Australia

2.1 The Legislative Framework Generally

There are two main components to the legislative regime governing commercial arbitration in Australia. This is as a consequence of Australia's federal system of government.

The first is the *International Arbitration Act 1974 (Cth) (IAA)*. This is an Act of the Commonwealth Parliament which (as its name implies) is directed at international commercial arbitration.²⁰

In particular, the IAA:

- a) implements Australia's obligation to enforce and recognise foreign arbitration agreements and arbitral awards under the *New York Convention*. This is done through pt II of the IAA, the provisions of which in effect repeat the terms of that *Convention* and thereby introduce those terms into Australian domestic law. A copy of the *Convention* appears as sch 1 to the IAA;
- b) has, since 1989, implemented and given force to the *Model Law* as the primary arbitral law that governs the conduct of international commercial arbitrations taking place in Australia. This is done through pt III of the IAA, and in particular s 16 which provides that (subject to the provisions of that Part) the *Model Law* has the force of law in Australia. The *Model Law* appears as sch 2 to the IAA; and
- c) implements Australia's obligations under the *ICSID Convention*.²¹ This is through the provisions of pt IV of the IAA. A copy of that *Convention* also appears as sch 3 to the IAA.²²

¹⁸ *Comandate Marine Corp. v Pan Australia Shipping Pty Ltd* (2006) 157 FCR 45, [165] and [192].

¹⁹ Keane, above n 4, 2.

²⁰ That is, arbitration where the parties to the arbitration agreement reside or have their places of business in different countries (see for example the definition in *UNCITRAL Model Law on International Commercial Arbitration*, 2006, 330 UNTS 40, art 1(3)).

²¹ *Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID)*, 1965, 575 UNTS 159.

The second component is the *Commercial Arbitration Acts* of each of the Australian States and Territories.

Since 1984 and up until relatively recently,²³ these Acts were in the form of substantially uniform legislation, which had been enacted by each of the State and Territory governments between 1984 and 1990 (the uniform Acts).²⁴ These uniform Acts were generally applicable to and governed domestic commercial arbitrations and commercial arbitration agreements. In particular, they applied to and governed commercial arbitrations and arbitration agreements governed by the laws of that State or Territory, and commercial arbitrations conducted in that State or Territory. But their application was not expressly confined to domestic arbitration and on occasions the uniform Acts have also been applied to both international commercial arbitrations and international commercial arbitration agreements.

2.2 The Framework for the Enforcement of Foreign Arbitral Awards in Australia

Since 1990, the framework for the enforcement of foreign arbitral awards in Australia has been exclusively in the provisions of the *IAA*.

Although the uniform Acts, when they were initially enacted, also contained provisions that facilitated the recognition and enforcement of foreign arbitral awards and agreements through the implementation of the *New York Convention*,²⁵ these provisions were subsequently repealed.²⁶ This was on the basis that the *Convention* was given effect to by the *IAA* which covered the field and the State and Territory provisions were therefore considered to be inconsistent with the *Commonwealth Act*, in the terms of s 109 of the *Constitution*.²⁷ This also coincided with the Federal Government's adoption and implementation of the *Model Law* as the law governing international commercial arbitration throughout Australia,²⁸ and which also contains within arts 35 and 36 provisions for the recognition and enforcement of arbitral awards. The exclusivity of the *IAA* over State and Territory law is reinforced by s 12 of the *IAA*.

Where a foreign award is one to which the *New York Convention* applies, then enforcement of that award would be pursuant to pt II of the *IAA*.²⁹ In particular, it would be pursuant to the framework that is set out in ss 8 and 9 of the *IAA*, which in effect repeats and (subject to the comments that follow) thereby incorporates into Australian domestic law the content of arts III, IV and V of the *New York Convention*.

Prior to the amendments to the *IAA* discussed below, the scheme of pt II of the *IAA* was (broadly speaking) as follows.

Section 8 of the *IAA* provides for the recognition and enforcement of a '*foreign award*' as defined in s 3(1) of the *Act*. This is an award made outside Australia and to which the *Convention* applies, either because:

- a) the award was made in a country which is a party to the *Convention*; or

²² *International Arbitration Act 1974* (Cth) (*IAA*). Insofar as this paper deals with the enforcement of foreign arbitral awards in Australia, it only does so in the context of pt II and (to a lesser extent) pt III of the *IAA*; it does not address the enforcement of *ICSID* awards under pt IV (especially ss 33 and 35) of the *IAA*.

²³ See page 21 of this paper, s 3.5.

²⁴ Namely the *Commercial Arbitration Act 1984* (NSW); *Commercial Arbitration Act 1984* (Vic); *Commercial Arbitration Act 1990* (Qld); *Commercial Arbitration Act 1985* (WA); *Commercial Arbitration and Industrial Referral Agreements Act 1986* (SA); *Commercial Arbitration Act 1986* (Tas); *Commercial Arbitration Act 1985* (NT); and *Commercial Arbitration Act 1986* (ACT). For a history of the development of the uniform Acts, see Doug Jones, *Commercial Arbitration in Australia* (2011) [1.210].

²⁵ For example in *Commercial Arbitration Act 1984* (NSW) ss 56-59.

²⁶ In New South Wales, this was by the *Commercial Arbitration (Amendment) Act 1990* (NSW).

²⁷ See the Explanatory Note to the *Commercial Arbitration (Amendment) Bill 1990* (NSW) 4.

²⁸ By the *International Arbitration Amendment Act 1989* (Cth) which introduced pt III into the *IAA*.

²⁹ I leave to one side the possibility of enforcement of an award under the general law, either by bringing an action (or suing) on the award or the implied promise in the arbitration agreement that the award would be honoured (*Brali v Hyundai Corp* (1988) 15 NSWLR 734, 743E) or by reliance upon the award as a defence to a claim brought in proceedings before a court.

- b) the award creditor seeking to enforce the award is domiciled or ordinarily resident in Australia or a *Convention* country.³⁰

Section 8(1) of the *IAA* provides that a foreign award to which pt II of the *IAA* applies is binding for all purposes on the parties to the arbitration agreement pursuant to which that award was made.³¹

Prior to the amendments discussed below, s 8(2) of the *IAA* provided that such an award may be enforced³² in a Court of a State or Territory, and as if it were an award made in that State or Territory and in accordance with the law of that State or Territory.³³ Section 9 of the *IAA* identified and facilitated the matters that an award creditor needed to prove in support of an application for the enforcement of a foreign award,³⁴ namely proof of both the award to be enforced and the arbitration agreement pursuant to which that award was purportedly made. Similarly, s 10 of the *IAA* facilitated proof of matters relating to the *Convention* and the connection of the parties or arbitration to the *Convention*.

Sections 8(5) and 8(7) of the *IAA* set out the grounds on which an application for the enforcement of an award may be refused by the Court. The grounds listed in sub-ss (5) and (7) are essentially the same as the grounds found in arts V(1) and V(2) respectively of the *Convention*. Where an award dealt with matters that were both within and beyond the scope of the submission to arbitration that produced the award, and it was possible to separate those two elements, s 8(6) of the *IAA* provided that the award may still be enforced in respect of those matters that were within scope.³⁵

Section 8(8) of the *IAA* provides that a Court may adjourn proceedings before it for the enforcement of a foreign award if the Court is satisfied that an application for the setting aside or suspension of that award has been made to a competent authority in the country of which or under which the award was made. This provisions must be read in conjunction with s 8(5)(f) of the *IAA*, which provides that an award may not be enforced where it 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, the award was made. The effect of s 8(8) is thereby to allow proceedings for the enforcement of an award to be adjourned whilst an appeal or review of that award under the law governing it runs its course, in case that results in the dismissal or setting aside of the award and thereby provides a ground on which the enforcement of the award may be later resisted. In such circumstances, s 8(8) also empowers the Court to order the party seeking the adjournment to provide the award creditor with suitable security (if sought).³⁶

Where the foreign arbitral award that is sought to be enforced is not one to which the *New York Convention* applies, then an application for its recognition and enforcement may nevertheless be made pursuant to arts 35 and 36 of the *Model Law*. These two Articles, which comprise ch VIII of the *Model Law*, are in substantially the same terms and to the same effect as arts III, IV and V of the *New York Convention* and (subject to the comments that follow) ss 8 and 9 of the *IAA*.³⁷ The potential breadth of the application of arts 35 and 36 is recognised and reinforced by the terms of both art 1(2)³⁸ and art 35(1)³⁹ of the *Model Law*. As a practical matter, the award need only to have been made pursuant to an international arbitration as defined in art 1(3) of the *Model Law*.

Given the widespread adoption of the *New York Convention*, it is likely that a foreign award may be capable of enforcement under both that *Convention* (and thereby pt II of the *IAA*) as well as under ch VIII of the *Model Law*.

³⁰ *International Arbitration Act* 1974 (Cth) s 8(4).

³¹ Consistent with the obligations imposed by art III of the *Convention*.

³² *International Arbitration Act* 1974 (Cth) s 3(2) provides that in this regard *enforcement* of an award includes recognition of the award as binding for any purpose.

³³ See the *Commercial Arbitration Act* of the State or Territory in which it was being enforced. The effect of this provision is discussed on page 14 of this paper.

³⁴ Consistent with art IV of the *Convention*.

³⁵ And even if that part of the award that was beyond scope was unenforceable.

³⁶ Consistent with art VI of the *Convention*.

³⁷ These are also the same grounds on which awards made in Australia pursuant to international arbitration agreements governed by the *Model Law* may be set aside – see *UNCITRAL Model Law on International Commercial Arbitration*, 2006, 330 UNTS 40, art 34.

³⁸ Which provides that the provisions of arts 35 and 36 are not limited to arbitrations conducted in Australia, unlike the bulk of the provisions in the *Model Law*.

³⁹ Which provides for the recognition and enforcement of an arbitral award ‘irrespective of the country in which it was made’.

Although bearing in mind that the relevant provisions of the *Model Law* are based on those of the *Convention* and the resultant consistency between these two regimes, it should not make any difference under which regime the award is enforced. The outcome should be the same either way.⁴⁰

Nevertheless, s 20 of the *IAA* provides that in such circumstances, the provisions of ch VIII of the *Model Law* are not to apply to the award. Accordingly, to the extent that both the provisions of pt II of the *IAA* and the *Model Law* apply to a foreign arbitral award, the former prevails and an application for enforcement of that award must be made under pt II of the *IAA*.

Given the widespread adoption of the *Convention*, and its preference over the *Model Law* where both apply, applications for the enforcement of a foreign award in Australia are most likely to be made under pt II of the *IAA* rather than arts 35 and 36 of the *Model Law*. Part II is therefore likely to be the more prevalent and important source for enforcing foreign awards in Australia. But that is not to say that arts 35 and 36 have no work to do at all.⁴¹

3 The Recent Legislative Changes

3.1 The Changes to the *International Arbitration Act 1974* (Cth)

On 21 November 2008, the Attorney General for the Commonwealth announced a review of the *IAA* by the Federal Government. The announcement was accompanied by the release of a Discussion Paper which was the subject of widespread consultation and submissions by interested parties.⁴²

The stated intention behind the review was the promotion of Australia as a place for international arbitration.⁴³ More particularly, the objects of the review were to consider whether the *IAA* should be amended:

- to ensure that it provides a comprehensive and clear framework governing international arbitration in Australia;
- to improve the effectiveness and efficiency of the arbitral process while respecting the fundamental consensus basis of arbitration; and
- to consider whether to adopt ‘best-practice’ developments in national arbitration law from overseas.⁴⁴

However, this was not intended to be a wholesale review of the *IAA* or its operation. Rather, the Discussion Paper identified eight key questions which were to be addressed, along with any related matters.

The review culminated in the Commonwealth Parliament passing on 17 June 2010 the *International Arbitration Amendment Act 2010* (Cth) (*Amending Act*). This contained a number of amendments to the *IAA*. These were set out in sch 1 of the *Amending Act*, which (consistent with the expressed intention of the review) was headed ‘Encouraging international arbitration’. The *Amending Act* was assented to on 6 July 2010 and it is from that date that the majority of these amendments took effect.⁴⁵

In broad terms, the amendments to the *IAA* introduced by the *Amending Act* fell into four categories:

- amendments to the application of the *IAA* and the *Model Law*, including in particular the adoption of the 2006 amendments to the *Model Law*;
- amendments concerning the interpretation of the *IAA*;

⁴⁰ Although for the reasons discussed more fully below, there are may be some differences in Australia as a practical matter, including as to the Courts in which an application for enforcement might be made under art 35 (see page 22 of this paper – ‘3.6 An Apparent Lacuna?’).

⁴¹ As to which see page 22 of this paper (‘3.6 An Apparent Lacuna’).

⁴² A copy of the Discussion Paper can be found at [http://www.ag.gov.au/Documents/Review of the International Arbitration Act 1974 - Discussion Paper.pdf](http://www.ag.gov.au/Documents/Review%20of%20the%20International%20Arbitration%20Act%201974%20-%20Discussion%20Paper.pdf)

⁴³ Attorney General’s Department, *Review of the International Arbitration Act 1974*, Discussion Paper, (2008), [4].

⁴⁴ *Ibid* [2].

⁴⁵ See *International Arbitration Amendment Act 2010* (Cth) (*Amending Act*) pt 2.1.

- amendments to provide additional option provisions to assist the parties to a dispute that is governed by the *Model Law*; and
- miscellaneous amendments to improve the operation of the IAA.⁴⁶

A key area of focus of the review was the enforcement of foreign arbitral awards.⁴⁷ Of the four categories listed above, the second and fourth contained changes to the IAA relevant to that issue. These changes were essentially threefold:

- first, the *Amending Act* introduced some specific amendments to the legislative framework established by pt II of the IAA to better facilitate enforcement of foreign arbitral awards under the *Convention* and to address some concerns about the operation of the then existing framework;
- secondly, the IAA was amended to include the imposition of an express obligation on Australian Courts to have regard to the objects of and intention behind the IAA in exercising the powers conferred by the *Act*, including powers relating to the enforcement of foreign awards; and
- thirdly, the Australian courts in which foreign arbitral awards could be enforced was expanded to include the Federal Court of Australia.

The following paragraphs contain an outline of the nature of these amendments, the circumstances which gave rise to them and their likely effect.

3.2 Changes to the Legislative Framework for Enforcement under Part II

These changes were introduced through a number of amendments to s 8 of the IAA,⁴⁸ both by way of the addition of some new sub-sections,⁴⁹ as well as amendments to existing provisions within that section.⁵⁰

These amendments apply to all proceedings to enforce a foreign award to which pt II applies brought on or after the commencement of the *Amending Act*,⁵¹ and irrespective of either the date of the award or of the arbitration agreement pursuant to which the award was made. As a result, these amendments apply to awards made both before and after 6 July 2010, so long as the proceeding for the enforcement of the award is commenced after that date.⁵²

The particular amendments made were as follows.

First, there was added to s 8 a new sub-section (3A), which provided:

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

The purpose of this amendment was to make clear that where an application had been made for the enforcement of a foreign award under pt II of the IAA, the Court seised of that application may *only* refuse to enforce that award on the grounds and in the circumstances identified in ss 8(5) and 8(7) of the IAA.⁵³

⁴⁶ See the Explanatory Memorandum to the *International Arbitration Amendment Act 2010* (Cth), 1., For a more detailed account of all of the amendments to the IAA including those not discussed in this paper see Albert Monichino, 'Arbitration Reform in Australia: Striving for International Best Practices' (2010) 29 *The Arbitrator and Mediator* 29; Peter Megans and Adam Peters, 'International Arbitration Amendment Act 2010 (Cth) – Towards a New Brand of Australian International Arbitration' (2011) 30 *The Arbitrator and Mediator* 43.

⁴⁷ Megans and Peters, above n 46, 48.

⁴⁸ *International Arbitration Amendment Act 2010* (Cth), sch 1.

⁴⁹ In particular, sub-ss 3A, 7A, and 9 to 11 inclusive.

⁵⁰ In particular, sub-ss 2-3.

⁵¹ That is, after 6 July 2010.

⁵² In the case of the newly added ss 8(9)-8(11), these provisions will also apply to proceedings commenced and adjournments granted before 6 July 2010 (see page 12 of this paper below).

⁵³ Explanatory Memorandum to the *International Arbitration Amendment Act 2010* (Cth), [42].

This addition was thought necessary as a result of a concern expressed during the review of the *IAA* that courts did not always treat the grounds for refusal of the recognition and enforcement in ss 8(5) and 8(7) of the *IAA* as being exhaustive.⁵⁴

This concern arose in particular from a suggestion in the judgment of the Supreme Court of Queensland in *Re Resort Condominiums International Inc*⁵⁵ that, whilst the general rule is that a valid foreign award is usually enforced if all the conditions are satisfied, the Court nevertheless has under s 8 of the *IAA* a general or residual discretion to refuse to enforce a foreign award, quite apart from the specific grounds listed in ss 8(5) and 8(7) of the *IAA* and even in circumstances where those grounds are not made out. Three reasons were given in support of the existence of this discretion, namely (a) the statement in s 8(2) that a foreign award ‘may’ be enforced by a Court, which was said to be suggestive of the existence of a discretion in that Court; (b) reference to US authority⁵⁶ in which it had been held that defences to an application to enforce a foreign award were not limited to specific matters referred to in the Convention; and (c) the omission of the word ‘only’ from s 8(5) of the *IAA*, in contrast to its inclusion in art V of the Convention.

This aspect of the judgment in *Resort Condominiums* has been widely criticised. The existence of such a general and residual discretion is inconsistent with both the intention and operation of art V of the *New York Convention*, which sets out the grounds on which recognition and enforcement of a foreign arbitral award may be refused under the Convention and upon which ss 8(5) and 8(7) are based. Those grounds were intended to be exhaustive, so that enforcement of a foreign award may *only* be refused under the Convention if one or more of the specified grounds is made out. This is evident from the language of art V, especially its use of the words ‘only if’ (which, as the Court observed in *Resort Condominiums*, had not been repeated in s 8(5) of the *IAA* when it was enacted). The reason why the defences are regarded as exhaustive is two fold. First a major purpose and objective of the Convention was to encourage the recognition and enforcement of awards by decreasing the scope for obstruction by national courts and laws. Secondly, the Convention was intended to be a uniform code and applied by the States giving effect to the Convention uniformly. The intrusion of peculiarly domestic principles or a residual discretion that would allow such principles to apply would be inconsistent with these two goals.⁵⁷

Although this suggestion in *Resort Condominiums* of the existence of a residual discretion was obiter, and by the time of the review of the *IAA* this aspect of the judgment had not been followed elsewhere,⁵⁸ there nevertheless remained a concern that this suggestion might be taken up by other courts in Australia in the future. Accordingly, s 8(3A) was added with the intention of removing that possibility by re-asserting the exhaustive nature of the limited grounds on which an Australian court could refuse to recognise or enforce a foreign arbitral award under s 8 of the *IAA*, consistent with the intention and operation of the *New York Convention*. The effect of this addition is therefore to remove the uncertainty that is inherent in the recognition of a Court having a general or residual discretion to refuse enforcement of an award beyond the limited grounds otherwise specified in the *IAA*. It also restores greater certainty and finality to an arbitral award that is sought to be enforced in Australia by reason of the limited grounds on which its enforcement might be refused, consistent with the intention and terms of the Convention, which pt II of the *IAA* was (after all) intended to give effect to.

In *Uganda Telecom Ltd v Hi-Tech Telecom Pty Ltd*,⁵⁹ in a judgment delivered after the 2010 amendments had taken effect, Justice Foster of the Federal Court of Australia left open whether prior to those amendments there had been a general discretion in the Court to refuse to enforce a foreign award under s 8(5) of the *IAA*. However, his Honour stated that the amendments effected by the amending Act ‘make clear that no such discretion remains’ following those amendments.

⁵⁴ Explanatory Memorandum to the *International Arbitration Amendment Act 2010* (Cth), [41].

⁵⁵ *Re Resort Condominiums International Inc* [1995] 1 Qd R 406, 426-427.

⁵⁶ See *Dworkin-Cosell Interair Courier Services Inc v Avraham* (1989) 728 F Supp 156.

⁵⁷ Richard Garnett and Michael Pryles, ‘Recognition and Enforcement of Foreign awards under the New York Convention in Australia and New Zealand’ (2010) 25(6) *Journal of International Arbitration* 899, 904.

⁵⁸ In *Corvetina Technology Ltd v Clough Engineering Ltd* [2004] NSWSC 700, [10] MacDougall J referred to *Resort Condominiums* and the possibility of a general discretion, but expressed no concluded view as to whether it existed.

⁵⁹ *Uganda Telecom Ltd v Hi-Tech Telecom Pty Ltd* (2011) 277 ALR 415, [132] (*‘Uganda Telecom’*).

It was not necessary for this amendment also to be made in pt III of the *IAA*, in particular in relation to the grounds on which an arbitral award may be refused recognition or enforcement under the *Model Law*. This is because art 36 of the *Model Law*,⁶⁰ which has force of law in the terms in which it appears in the *Model Law*, expressly provides that recognition and enforcement of an award may be refused ‘only’ if one or more of the grounds set out in art 36(1)(a) or (b) is satisfied. Accordingly, it is clear from the terms of art 36 itself (and as it has effect under Australian law) that the grounds on which an award may be refused recognition or enforcement under the *Model Law* are exhaustive.

The addition of s 8(3A) to the *IAA* was a consequence of both the manner in which the provisions of the *New York Convention* were given effect to by the *IAA* when it was originally enacted (namely by paraphrasing the text of the *Convention* when drafting the sections of the *Act*), and the legislature’s failure when doing so to use the exact language of the *Convention* (and in particular of art V in this context).⁶¹ It is unlikely that such an amendment and the concern that gave rise to it would have occurred if the provisions of the *Convention* had been incorporated into Australian law in the same way in which the *Model Law* later was (namely by declaring that the provisions of the *Convention* have force of law in Australia).

Secondly, the *Amending Act* introduced a new s 8(7A) into the *IAA*. This was in clarification of s 8(7)(b) of the *IAA* pursuant to which an Australian court may refuse to recognise or enforce a foreign award under pt II of the *IAA* if it finds ‘that to enforce the award would be contrary to public policy’.⁶² This new sub-section provided that:

(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.

This provision was added to ensure consistency with Australia’s adoption of the *Model Law* and in particular the application of the ‘public policy’ defence as (inter alia) a ground for refusing to enforce a foreign award under art 36 of the *Model Law*. This is because, in conjunction with the *Model Law*’s incorporation into Australian domestic law in 1989,⁶³ s 19 of the *IAA* was enacted for the purposes of providing clarification of the meaning of the phrase ‘public policy’ in the context of (inter alia) art 36. Section 19 was introduced at that time in essentially the same terms as the new s 8(7A). At that time, the legislature decided not to make an equivalent amendment to (or in respect of) the public policy grounds in s 8(7) of the *IAA*. This was notwithstanding that the grounds on which an award could be set aside or its enforcement refused under arts 34 and 36 of the *Model Law* were based on and largely identical to art V of the *Convention* and thereby ss 8(5) and 8(7) of the *IAA*. The Explanatory Memorandum to the *Act* by which the *Model Law* and s 19 were introduced⁶⁴ stated that this decision was made:

so as to avoid any possible inference that the term ‘public policy’ which is referred to in the *New York Convention* does not contain those elements.

However, in the Explanatory Memorandum to the *Amending Act* in 2010, it was said that despite this earlier explanation, the application of s 19 of the *IAA* had the potential to lead to the misinterpretation of the public policy ground in s 8 of the *IAA*.⁶⁵ It could, for instance, lead to a suggestion that the considerations identified in s 19 for the purposes of the *Model Law* do not apply to s 8 or a claim that the enforcement of an award should be refused pursuant to s 8(7)(b) of the *IAA*, given the absence within pt II of the *IAA* of a provision in the same or similar terms to s 19.

⁶⁰ See art V of the *New York Convention* on which it is based.

⁶¹ This allowed, for instance, the Court in *Resort Condominiums* to draw a distinction between the operation of s 8(5) and art V because of the omission from the former of the word ‘only’.

⁶² This sub-section reflects art V(2)(b) of the *New York Convention*.

⁶³ By amendment to the *IAA* through the *International Arbitration Amendment Act 1989* (Cth).

⁶⁴ Namely the *International Arbitration Amendment Act 1989* (Cth).

⁶⁵ Explanatory Memorandum to the *International Arbitration Amendment Act 1989* (Cth), [51].

Accordingly, it was decided to replicate the terms of s 19 within pt II of the *IAA* and apply them to the public policy ground in s 8(7)(b).⁶⁶

On its face, this may not appear to be an amendment which enhances the enforcement of foreign awards or which is therefore pro-enforcement. After all, it identifies two situations in which the enforcement of a foreign award may be refused by Australian courts. However, the intention behind this addition was to remove both the potential for future uncertainty as to the operation of s 8(7)(b) and the potential for s 8(7)(b) to be construed inconsistently with the corresponding provision of the *Model Law* by reason of the earlier enactment of s 19. To this end, the amendment provides additional certainty as to when a foreign award may and may not be enforced under s 8(7)(b) and thereby the finality of the award. In this sense, this amendment is consistent with the pro-arbitration and pro-enforcement intentions underlying the 2010 amendments generally.

Moreover, it is doubtful that s 8(7A) in its current terms detracts from either the existing ground on which enforcement may be refused found in s 8(7)(b) of the *IAA* or the corresponding provision in art V(2)(b) of the *Convention*:

- a) in relation to the former, the newly added s 8(7A) purports to be declaratory of what the position is under Australian law. Even in the absence of this new sub-section,⁶⁷ it is likely that Australian courts would have found that the enforcement of an award obtained in the circumstances specified in either paragraphs (a) or (b) of s 8(7A) would be contrary to public policy in Australia in any event;
- b) further, the enforcement of a foreign award obtained in those circumstances is also likely to be found to be contrary to public policy within the meaning of art V(2)(b) of the *New York Convention* and therefore for the purposes of that *Convention*. This is bearing in mind that art V refers to the public policy of the enforcement State (which in the present context would be Australia) and even if one accepts that this defence to enforcement (both in the *Convention* and when legislated domestically) should be given an international rather than domestic dimension and should therefore be construed narrowly and in a more limited sense.⁶⁸

It may also be observed that provisions to similar effect to s 8(7A) and s 19 of the *IAA* can also be found in the arbitration laws of New Zealand⁶⁹ and other countries in this region.⁷⁰ Section 8(7A) is not an entirely parochial provision.

Even if the public policy exception under art V and thereby s 8(7)(b) of the *IAA* were to be construed in the narrow manner that has been suggested in some of the authorities, so that enforcement of an award should only be denied on public policy grounds where enforcement would violate the most basic notions of morality and justice,⁷¹ it is nevertheless likely that the circumstances provided for in paragraphs (a) and (b) of the newly added s 8(7A) would be found by an Australian court to satisfy that test even without the addition of this provision.

But even if the circumstances identified in paragraphs (a) and (b) of s 8(7A) do go beyond the public policy defence in art V of the *New York Convention* and that the addition of s 8(7A) therefore represents an expansion of that defence and thereby the grounds on which an Australian Court might refuse to enforce a foreign award, it is not a significant expansion. It is also hardly surprising that the Australian legislature would consider that an award obtained in those circumstances should not be enforced in Australia, consistent with Australian public policy. Even if the addition of s 8(7A) were to be viewed in this way, it does not represent a significant or substantial shift away from the current pro-arbitration and pro-enforcement policy otherwise evident in Australia of late. Moreover, as already suggested, to the extent that the addition of this provision adds some certainty to the identification of the

⁶⁶ Ibid.

⁶⁷ Leaving aside the possible argument identified in page 10 of this paper, s 3.2 above.

⁶⁸ See for instance the discussion of the scope of this defence in Alan Redfern and Martin Hunter, *Redfern and Hunter on International Arbitration*, (2009) [11.103]-[11.120].

⁶⁹ *Arbitration Act 1996* (NZ), art 36(3) sch 1.

⁷⁰ See Simon Greenberg, Christopher Kee, and J Weermantry, *International Commercial Arbitration – An Asia-Pacific Perspective* (2011) [9.183] fn 248.

⁷¹ *Parsons Whittemore Overseas Co Inc v Societe Generale de l'Industrie du Papier (RAKTA)*, (1974) 508 F 2d 969, 973; *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA* [2006] 1 SLR 507.

circumstances in which an award might be set aside under s 8(7)(b) of the *IAA*, that is still consistent with the intention behind the recent reforms.

Thirdly, the amending Act also introduced three new sub-sections in elaboration of s 8(8) of the *IAA*, which (as noted earlier) provides that an Australian court may adjourn enforcement proceedings before it where it is satisfied that an application for the setting aside or suspension of an arbitral award has been made in the country in which, or under the law of which, the award was made (consistent with art VI of the *New York Convention*).

The purpose of both art VI and s 8(8) of the *IAA* is to ensure that enforcement of an award does not occur where that award, in time, may be unenforceable.⁷² They are intended to preserve the status quo in order to enable an application to set aside or suspend the award to be made in the country where it was made or whose law governs the arbitration. In *ESCO Corporation v Bradken Resources Pty Ltd*⁷³ Foster J said that s 8(8) was:

intended to protect the position of a party in Australia against whom enforcement of a foreign arbitral award is invoked under s 8 of the *IAA* in circumstances where (sic) a *bona fide* application for the setting aside or suspension of the award has been made to a competent authority of the country in which, or under the law of which, the award was made provided that the Court is satisfied, having taken account of all relevant facts and circumstances in the exercise of its discretion, that an adjournment of the enforcement proceedings is justified.

In the course of the review of the *IAA*, it was said that the application of s 8(8) of the *IAA* had the potential to be used to frustrate the enforcement of a foreign award in Australia where the party opposing enforcement commences action in the country where the award was made on spurious grounds or with the sole intention of delaying enforcement. It was also said that s 8(8) did not provide an adequate mechanism for a party seeking enforcement of an award to have an adjournment lifted where the proceedings in the other country have been resolved or have not been prosecuted in good faith and with due dispatch.⁷⁴

With a view to addressing these concerns, the *Amending Act* introduced three new sub-sections into s 8, immediately after s 8(8) in the following terms:

- (9) A court may, if satisfied of any of the matters mentioned in subsection (10), make an order for one or more of the following:
 - (a) for proceedings that have been adjourned, or that part of the proceedings that has been adjourned, under subsection (8) to be resumed;
 - (b) for costs against the person who made the application for the setting aside or suspension of the foreign award;
 - (c) for any other order appropriate in the circumstances.
- (10) The matters are:
 - (a) the application for the setting aside or suspension of the award is not being pursued in good faith; and
 - (b) the application for the setting aside or suspension of the award is not being pursued with reasonable diligence; and
 - (c) the application for the setting aside or suspension of the award has been withdrawn or dismissed; and
 - (d) the continued adjournment of the proceedings is, for any reason, not justified.
- (11) An order under subsection (9) may only be made on the application of a party to the proceedings that have, or a part of which has, been adjourned.

The effect of these provisions is to allow the Court to order proceedings that have been adjourned under s 8(8) to be resumed when one of the four circumstances listed in s 8(10) occurs.⁷⁵ In addition the Court is expressly empowered to make orders for costs against the person who made the application for setting aside or suspension of the award in the foreign country,⁷⁶ as well as any other orders the Court thinks appropriate in the circumstances.⁷⁷ These newly

⁷² Explanatory Memorandum to the *International Arbitration Amendment Act 1989* (Cth), [55]. (Especially bearing in mind s 8(5)(f) of the *IAA*).

⁷³ *ESCO Corporation v Bradken Resources Pty Ltd* (2011) 282 ALR 282; [2011] FCA 905, [62] ('*ESCO*').

⁷⁴ Explanatory Memorandum to the *International Arbitration Amendment Act 1989* (Cth), [56].

⁷⁵ *International Arbitration Act 1974* (Cth) s 8(9)(a).

⁷⁶ *International Arbitration Act 1974* (Cth) s 8(9)(b).

added provisions apply from 6 July 2010 and irrespective of whether the enforcement proceedings were adjourned under s 8(8) before or after that date.⁷⁸

In *ESCO Corporation v Bradken Resources Pty Ltd* Foster J said of these amendments that they:

[56] ... give the Court significant power to monitor and supervise the enforcement proceeding during any period of adjournment granted under subs.(8).

[57] These provisions recognise the need for the Court to keep a close and active eye on the progress of foreign proceedings which will have underpinned any adjournment granted under subsection (8).

Whilst the introduction of these three new sub-sections does not amount to a significant change to the existing framework for the enforcement of foreign awards under pt II, they nevertheless do go some way to facilitating the role played by s 8(8) of the *IAA*, in particular by ameliorating the possible impact (adversely to the interests of the award creditor) that an application for an adjournment of proceedings commenced under s 8(8) to enforce an award might otherwise have. The introduction of these provisions is therefore consistent with the pro-enforcement policy of both the *New York Convention* and the *IAA*.

The judgment of Foster J in *ESCO Corporation v Bradken Resources Pty Ltd* was the first to consider an application for an adjournment under s 8(8) since the 2010 amendments to the *IAA*. Although that case did not involve the operation of ss 8(9) to 8(11) directly,⁷⁹ his Honour's judgment nevertheless provides useful guidance in relation to the approach to be taken by the Australian courts in considering whether to grant an adjournment under s 8(8) of the *IAA*.⁸⁰ In particular, his Honour approved of the approach that had been taken in relation to the corresponding provision in England⁸¹ and further said in this regard (consistent with the adoption of a pro-enforcement bias):

85. The discretion to adjourn an enforcement proceeding pursuant to s 8(8) of the *IAA* is a wide one. But it has to be exercised against the background that a foreign arbitral award is to be enforced in Australia unless one of the grounds in s 8(5) of the *IAA* is made out by the party against whom the award is sought to be enforced or unless the public policy of Australia requires that the award not be enforced. The pro-enforcement bias of the *Convention* and its domestic surrogate, the *IAA*, requires that this Court weigh very carefully all relevant factors when considering whether to adjourn a proceeding pursuant to s 8(8) of the *IAA*. The discretion must be exercised against the obligation of the Court to pay due regard to the objects of the *IAA* and the spirit and intendment of the *Convention*.

In that case, Foster J granted the stay of the enforcement proceedings in Australia that had been sought by the award debtor to allow proceedings which had commenced in the United States in relation to the award to run their course, including any appeals. Moreover, his Honour granted that stay on condition that security be provided to the award creditor who was seeking to enforce the award.

In that latter regard, the judgment also identifies the principles relevant to determining what is 'suitable security' for the purposes of s 8(8):

71. What is 'suitable security' in any given case will depend upon all of the circumstances under consideration in that case. The concept covers:

- (a) The quantum of the security;
- (b) The type of security;
- (c) The terms and conditions upon which the security is to be provided, including the circumstances in which it might be called upon by the enforcing party.

72. Factors to be considered by the Court when ordering security would include the subject matter of the award; the history of the parties' dealings (especially with each other) since the making of the award; the enforcing party's

⁷⁷ *International Arbitration Act 1974* (Cth) s 8(9)(c).

⁷⁸ *International Arbitration Amendment Act 1989* (Cth), pt 2 sch 1.

⁷⁹ The principal application in that case was for an adjournment of the enforcement proceedings pending the determination of proceedings challenging the award in the United States.

⁸⁰ Especially *International Arbitration Act 1974* (Cth) [76]-[85].

⁸¹ Especially *Soleh Boneh International Ltd v Government of the Republic of Uganda* [1993] 2 Lloyd's Law Reports 208; *Dardana Ltd v Yukos Oil Co.* [2002] 2 Lloyd's Law Reports 36; and *IPCO (Nigeria) Limited v Nigerian National Petroleum Corporation* [2005] EWHC 726.

prospects of enforcing the award; and the potential for the party against whom enforcement is sought to resist enforcement by, for example, applying to suspend or set aside the award in the jurisdiction where it was made.

73. 'Suitable' is a word which calls into play a wide range of discretionary factors. The discretion to order security, like the discretion to adjourn enforcement proceedings, must be exercised by having regard to the objects of the IAA and the rationale underlying the *Convention*.⁸²

In that case, the features of the security which Foster J ordered the award debtor provide as a condition of the adjournment granted included:⁸³

- that the security should be in a form which can be readily accessed by the award creditor should it become entitled to the benefit of the security;⁸⁴
- the amount of the security was to be the balance of the monies due under the award, although it did not include interest;
- the award creditor was to be able to have access to the security immediately upon the award becoming a judgment of the court (assuming that the enforcement proceeding were ultimately successful);
- the security should also be expressed to cover the amount of the legal costs ordered to be paid by the award debtor under the award and any judgment based on the award whenever obtained;
- the security was to be expressed to expire on the earliest of certain dates that had been earlier specified by the parties.⁸⁵

It can be seen that where an adjournment of enforcement proceedings is sought under s 8(8), the price of that adjournment may be a relatively high one. But this is again consistent with the pro-enforcement policy that now underlies both the relevant legislation and its application by the Australian courts.

Fourthly, s 8(2) of the IAA in its original form was repealed and replaced by a new sub-section in the following slightly amended terms:

- (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.

Prior to this amendment, s 8(2) had provided that (subject to the provisions of pt II of the IAA), a foreign award may be enforced in a court of a State or Territory 'as if the award had been made in that State or Territory in accordance with the law of that State or Territory'. This was typically interpreted to mean that an application for enforcement of a foreign award made to a State or Territory court pursuant to s 8 of the IAA must be made under or in accordance with the *Commercial Arbitration Act* of that State and Territory⁸⁶ rather than directly under the IAA.⁸⁷ The effect of s 8(2) was therefore treated as equating a foreign award with a domestic award for the purposes of its enforcement.⁸⁸

This in turn gave rise to a concern that if the award was being enforced pursuant to that State or Territory law, this might be seen to provide the State and Territory Courts with a basis to decline to enforce the award on any grounds available under the legislation of that State or Territory (including in particular the *Commercial Arbitration Act* of that State or Territory), in addition to the limited grounds specified in s 8 of the IAA.⁸⁹ This is especially to the extent that the State and Territory legislation was not based on the provisions of the *New York Convention* (as was

⁸² This is especially since the amendments to the IAA introduced in 2010 including the second category of the amendments referred to in page 7 of this paper, s 3.1 above and discussed in more detail in s 3.3 of this paper.

⁸³ *ESCO Corporation v Bradken Resources Pty Ltd* (2011) 282 ALR 282, 90.

⁸⁴ Such as a letter of credit or irrevocable bank guarantee provided by a major Australian trading bank or other financial institution acceptable to the parties.

⁸⁵ Namely the posting of a bond in respect of the award in the US proceedings, the date of the determination of the US Court of Appeals determination of the challenge to the award, payment being made by the award debtor in satisfaction of the award and any accrued interest at the applicable US federal rates or the parties reaching agreement to the effect that any outstanding monetary obligations under the Award are satisfied.

⁸⁶ See, for example, *Commercial Arbitration Act* 1984 (NSW) s 33.

⁸⁷ Explanatory Memorandum to the *International Arbitration Amendment Act* 1989 (Cth) [26].

⁸⁸ Richard Garnett and Michael Pryles, 'Recognition and Enforcement of foreign Awards under the New York Convention in Australia and New Zealand' (2010) 25 *Journal of International Arbitration* 899, 902; *Brali v Hyundai Corporation* (1988) 15 NSWLR 734, 743.

⁸⁹ Explanatory Memorandum to the *International Arbitration Amendment Act* 1989 (Cth) [26].

the case at that time) and may have therefore included grounds going beyond those recognised by the *Convention* and thereby pt II of the *IAA*. If an Australian court were to adopt that position, then it would be inconsistent with both the operation of the *Convention* and the intention underlying pt II of the *IAA*. Accordingly, s 8(2) was amended in the manner identified above so as to remove any reference to State and Territory law and the enforcement of a foreign award being in accordance any State or Territory law, so that any application for enforcement even in the State or Territory courts would only be governed by the provisions of the *IAA*.

Fifthly, the *Amending Act* also made a minor textual change to s 8(4) of the *IAA*, although this did not significantly effect the operation of that sub-section or result in any different operation.

Finally, the *Amending Act* also made a number of slight amendments to s 3 of the *IAA*. These included the addition of two new sub-ss 3(4) and 3(5) clarifying the definition of an ‘*agreement in writing*’ for the purposes of pt II of the *IAA*.⁹⁰ In particular, these new provisions were intended to make clear that the phrase ‘*agreement in writing*’ was for the purposes of pt II to be given an expansive interpretation that takes into account modern means of communication, based on both the definition of ‘*agreement in writing*’ contained within the 2006 amendments to the *Model Law*⁹¹ and the 1996 iteration of the *Model Law*.⁹²

These amendments to s 3 are not confined in their operation to s 8 and apply to pt II generally. They are therefore also relevant to s 7 and an application under that section for a stay of proceedings brought contrary to an arbitration agreement.

Whilst these amendments do not directly affect the mechanism by which foreign awards are enforced under pt II of the *IAA*, they are nevertheless potentially relevant indirectly, insofar as only awards made pursuant to an ‘*agreement in writing*’ may be enforced under pt II. These amendments expand the types of agreements for arbitration that now fall within that concept, including potentially agreements which might not have been caught under the earlier definition. This expanded definition includes inter alia agreements recorded in any form and whether or not that agreement or the contract to which it relates had been concluded orally, by conduct or other means; agreements contained in an electronic communication; and an agreement contained in an exchange of a statement of claim and statement of defence in which the existence of the agreement is alleged by one party and not denied by the other.

The foregoing amendments to s 8 and s 3 of the *IAA*, do not, either individually or combined, represent a major change to the framework within which foreign awards are enforced under pt II of the *IAA*. But to the extent that these changes were made, this was with the intention of both better facilitating the enforcement of foreign awards under pt II and limiting the grounds on which enforcement may be resisted, consistent with the intention behind and operation of the *New York Convention*. Moreover, these changes are also likely to achieve that intention and thereby result in an improvement in the means of enforcement of such awards.

3.3 Need to Have Regard to the Objects of the Act

The second category of amendments made to the *IAA* by the *Amending Act* arose from concerns raised during the review of the *IAA* that Australian courts did not have sufficient guidance when interpreting the *IAA*, particularly with regard to the principles that underpin arbitration and the international aspect of the operation of that *IAA*.⁹³

In response to these concerns, these amendments were directed at ensuring that Australian courts had regard to the primary purpose and objects of the *IAA* when exercising the powers and discretions conferred by the *Act*. This was with a view to ensuring that those courts exercised those powers and discretions consistently with the pro-arbitration and pro-enforcement policy that underlies the *IAA*.

⁹⁰ See *International Arbitration Amendment Act 1989* (Cth), pt 1 sch 1 item 4.

⁹¹ Which were also adopted by way of the 2010 amendments for the purposes of pt III of the *IAA*.

⁹² Explanatory Memorandum to the *International Arbitration Amendment Act 1989* (Cth) [17] – [20]. In the same vein, there was also added to s 3(1) definitions of the expressions ‘data message’ and ‘electronic communication’ which were used in the newly added s 3(4).

⁹³ Explanatory Memorandum to the *International Arbitration Amendment Act 1989* (Cth) [177].

There are two aspects to this second category. The first is the insertion into the *IAA* of a new s 2D which set out the objects of the *IAA*:

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; and
- (e) to give effect to the *UNCITRAL Model Law on International Commercial Arbitration* adopted by the United Nations Commission on International Trade Law on 21 June 1985 and amended by the United Nations Commission on International Trade Law on 7 July 2006; and
- (f) to give effect to the *Convention on the Settlement of Investment Disputes between States and Nationals of Other States* signed by Australia on 24 March 1975.

Relevantly for present purposes, these objects include the facilitation of the recognition and enforcement of arbitral awards made in relation to international trade and commerce and the giving of effect to Australia's obligations under the *New York Convention*. It was said of these objects and this new s 2D that:

These objects stress the importance of arbitration in facilitating international trade and commerce and the fact that the Act is giving effect to three international instruments.⁹⁴

The second aspect is the addition to the *IAA* of a new pt V, including a new s 39 which identifies those matters to which Australian courts must now have regard both (a) when exercising powers or functions under the *IAA* or *Model Law* or an arbitration agreement or award to which the *IAA* applies and (b) when interpreting provisions relevant to the *IAA* and its application, including provisions of the *IAA* and the *Model Law* or of an agreement or award to which the *IAA* applies.⁹⁵ Relevantly, for present purposes this expressly includes 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 policy⁹⁶

The newly added s 39(2) of the *IAA* sets out the specific obligation on the Court in those circumstances in the following terms:

- (2) The court or authority must, in doing so, have regard to:
 - (a) the objects of the Act; and
 - (b) the fact that:
 - (i) arbitration is an efficient, impartial, enforceable and timely method by which to resolve commercial disputes; and
 - (ii) awards are intended to provide certainty and finality.

The reference in s 39(2)(a) to the objects of the *Act* is a reference to the objects listed in s 2D. The '*fact*' referred to in s 39(2)(b)(ii) is of particular relevance to the obligations imposed by s 39(2) in the context of the enforcement of arbitral awards.

⁹⁴ Explanatory Memorandum to the *International Arbitration Amendment Act 1989* (Cth) [179].

⁹⁵ Explanatory Memorandum to the *International Arbitration Amendment Act 1989* (Cth) [8] and [176].

⁹⁶ *International Arbitration Act 1974* (Cth) s 39(1). It also includes where the Court is exercising power under arts 35 and 36 of the *Model Law*.

These amendments took effect from 6 July 2010 and apply to inter alia the exercise of any power by a Court (including under s 8) or the performance of any function or interpretation of the *IAA* or any award by a Court on or after that date.⁹⁷ This includes in the context of proceedings (including enforcement proceedings) that have already been commenced prior to that date.⁹⁸

Sections 2D and 39 are not limited in their application to pt II of the *IAA*, and apply to the *IAA* generally, including in relation to the application of the *Model Law* and thereby the recognition and enforcement of awards under arts 35 and 36 of the *Model Law*. In that latter context, the *Amending Act* (via its adoption of the 2006 amendments to the *Model Law*) also resulted in the addition of art 2A of the *Model Law* which provides that:

- (a) in the interpretation of the *Model Law* regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith and
- (b) questions concerning matters governed by the *Model Law* which are not expressly settled in it are to be settled in conformity with the general principles on which the *Model Law* is based.

Whilst there is no similar express provision in either pt II of the *IAA* or the *New York Convention*, insofar as pt II of the *IAA* implements an international treaty, Australian courts will, as far as able, construe the provisions of that Part consistently with the international understanding of that treaty.⁹⁹ Such uniformity has also been said to accord with the *IAA*'s stated purpose (in the newly added s 2D) to facilitate the use of arbitration as an effective dispute resolution process.¹⁰⁰

Since the introduction of these provisions, Australian courts have acknowledged the need to comply with the obligation laid down by s 39(2) both in considering applications for the enforcement of a foreign award and in interpreting ss 8 and 9 of the *IAA* in that context or that purpose.¹⁰¹ Although, as discussed later in this paper, arguably, the outcome of the *Altain Khuder* litigation suggests that the obligations imposed by s 39 and the application of that section can still give rise to differing outcomes.

3.4 The Courts in Which an Application for Enforcement Might Be Made

The third change that was introduced to the framework within which foreign awards may be enforced under pt II of the *IAA* at this time and as part of the review was to expand those courts in Australia to which an application for enforcement of a foreign arbitral award under pt II of the *IAA* might be made and so as expressly to include the Federal Court of Australia (*the Federal Court*).

Prior to 2010, the only Courts which pt II of the *IAA* expressly conferred jurisdiction on to enforce foreign arbitral awards under the *New York Convention* were the courts of a State or Territory. This was pursuant to s 8(2) of the *IAA*.

As a result, an application to enforce a foreign award to which the *Convention* applied would normally be made to the Court of the State or Territory of Australia in which the award debtor was present or in which it had assets against which it might be hoped the award could be enforced. If it was wished to enforce the award in more than one State or Territory within Australia, then either separate applications for enforcement would have to be made in each State or Territory, or alternatively once an application for enforcement of the award had been successfully made in one State or Territory by having the award recorded as a judgment of that Court, an application could be made to have that judgment recognised and enforced in the other States and Territories.¹⁰²

⁹⁷ *International Arbitration Amendment Act 1989* (Cth) pt 2 sch 1 item 34.

⁹⁸ *Uganda Telecom Ltd v Hi-Tech Telecom Pty Ltd* (2011) 277 ALR 415, [13]-[14] and [10].

⁹⁹ *IMC Aviation Solutions Pty Ltd v Altain Khuder LLC* (2011) 253 FLR 9, [35] (Warren CJ); *Comandate Marine Corp. v Pan Australia Shipping Pty Ltd* (2006) 157 FCR 45, [191].

¹⁰⁰ *IMC Aviation Solutions Pty Ltd v Altain Khuder LLC* (2011) 253 FLR 9, [35] (Warren CJ).

¹⁰¹ See for example *Uganda Telecom Ltd v Hi-Tech Telecom Pty Ltd* (2011) 277 ALR 415, [12]-[15] and [126]; *IMC Aviation Solutions Pty Ltd v Altain Khuder LLC* (2011) 253 FLR 9, [30]-[31] and [127] (Warren CJ, Hansen JA and Kyrou AJA); see also *Altain Khuder LLC v IMC Mining Inc & Anor* (2011) 246 FLR 47, [38] (Croft J).

¹⁰² For instance pursuant to the *Service and Execution of Process Act 1992* (Cth) s 105.

In such situations, it would of course be easier if the award could be recognised and enforced in the Federal Court, in particular as a judgment of that Court, which would be enforceable and recognised in each of the Australian States and Territories without the need for any further or separate application.

However, prior to 2010, there was no express conferral by the *IAA* of such jurisdiction on the Federal Court. This was essentially for historical reasons.¹⁰³ But notwithstanding the absence of any express conferral, at least since 1997 the Federal Court arguably had jurisdiction to deal with matters arising under pt II of the *IAA* under s 39B(1A)(c) of the *Judiciary Act* 1903 (Cth),¹⁰⁴ which provides that the original jurisdiction of the Federal Court includes jurisdiction in any matter:

arising under any laws made by the Parliament, other than a matter in respect of which a criminal prosecution is instituted or any other criminal matter.

It was presumably on this basis that the Federal Court entertained an application for the enforcement of a foreign award and directed the entry of judgment against the award debtor for the amount of that award under s 8 of the *IAA* in *China Sichuan Changhong Electric Company Ltd v CTA International Pty Ltd*¹⁰⁵ in March 2009, before any of the amendments discussed below were made.¹⁰⁶

The Discussion Paper released by the Commonwealth Attorney General as part of the review of the *IAA* stated that it was proposed to clarify the Federal Court's jurisdiction under pt II of the *IAA*, as well as to confer upon the Federal Court concurrent jurisdiction with the State and Territory Supreme Courts under pt III and pt IV of the *Act*.¹⁰⁷

These amendments were initially made by the *Federal Justice System Amendment (Efficiency Measures) Act (No. 1)* 2009 (Cth) with effect from 7 December 2009.¹⁰⁸ In relation to the enforcement of foreign arbitral awards under pt II of the *IAA*, the amendments introduced a new s 8(3) to the *IAA* which provided:

(3) Subject to this Part, a foreign award may, with the leave of the Federal Court of Australia, be enforced in the Federal Court of Australia as if the award were a judgment or order of the Federal Court of Australia.

This sub-section was subsequently repealed and overwritten by the *Amending Act* with the introduction of a new s 8(3) in the following terms:

(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.

This latter amendment, which applies to proceedings to enforce a foreign award brought on or after 6 July 2010,¹⁰⁹ maintained the earlier conferral of concurrent jurisdiction on the Federal Court for the enforcement of foreign awards under pt II of the *IAA*. However, it removed the requirement contained within the earlier provision that enforcement of the award be with the leave of the Court.¹¹⁰ This change was made to ensure consistency with similar amendments that the *Amending Act* also made to s 8(2) of the *IAA*.¹¹¹ Although it would seem that the only practical consequence of this amendment was to change the form of the relief that should now be sought in an application for enforcement made under pt II, and so as to delete the former requirement seeking leave.¹¹² The

¹⁰³ The Federal Court was not created until 1976, two years after the *IAA* was originally enacted. Although s 8 of the *IAA* when first enacted contemplated and provided for the conferral of jurisdiction for the enforcement of foreign awards on a then proposed new federal court, that provision did not apply to the Federal Court of Australia and prior to the developments discussed in this paper no attempt was made by the legislature to include an express conferral of jurisdiction by the *IAA* on the Federal Court of Australia after it had been created.

¹⁰⁴ See by analogy *Adsteam Harbour Pty Ltd v the Registrar of the Australian Register of Ships* [2005] FCA 1324, [3]-[6]; see also Allsop J, 'Federal jurisdiction and the jurisdiction of the Federal Court of Australia in 2002' (2002) 23 *Australian Bar Review* 29, 33.

¹⁰⁵ *China Sichuan Changhong Electric Company Ltd v CTA International Pty Ltd* [2009] FCA 397.

¹⁰⁶ Although the application in that case ended up being ex parte (there having been no appearance by the award debtor) and the question of the Court's jurisdiction was not raised or addressed directly in the judgment (other than to refer to the wide definition of 'court' in s 3 of the *IAA*).

¹⁰⁷ Attorney General's Department, *Review of the International Arbitration Act 1974*, Discussion Paper, (2008), s H.

¹⁰⁸ See *Federal Justice System Amendment (Efficiency Measures) Act (No. 1)* 2009 (Cth) sch 2 item 2.

¹⁰⁹ *International Arbitration Amendment Act* 2010 (Cth) pt 2 sch 1 item 29.

¹¹⁰ *Uganda Telecom Ltd v Hi-Tech Telecom Pty Ltd* (2011) 277 ALR 415, [9].

¹¹¹ See Explanatory Memorandum to the *International Arbitration Amendment Act* 2010 (Cth) [32].

¹¹² *Uganda Telecom Ltd v Hi-Tech Telecom Pty Ltd* (2011) 277 ALR 415, [6]-[9]; and *Uganda Telecom Ltd v Hi-Tech Telecom Pty Ltd* (no.2) [2011] FCA 206, [5].

appropriate way for the Federal Court to recognise and enforce a foreign award is for the Court to enter judgment or make orders which reflect the terms of that award.¹¹³

The conferral of concurrent jurisdiction on the Federal Court assists with Australia wide enforcement of foreign arbitral awards.¹¹⁴ It also potentially promotes competition between the Federal Court and the State Supreme Courts as a venue for the enforcement of foreign awards, especially having regard to differences between these courts in relation to the procedures associated with an enforcement application, the costs of and associated with such an application and the time it would usually take for the Court to hear and determine that application. For these reasons, the conferral of concurrent jurisdiction on the Federal Court for the purpose of enforcing foreign awards was therefore not in itself controversial.

However, what was controversial was a proposal raised by the Commonwealth Attorney General in his Discussion Paper that the Federal Court of Australia be given exclusive jurisdiction for all matters arising under the IAA and that the State and Territory Courts have their existing jurisdiction in that regard removed.¹¹⁵ It was suggested that one advantage of this proposal 'is that it may lead to more consistent jurisprudence in applying the Act'.¹¹⁶

This suggestion arose (in part at least) out of a concern that there had in the past been a number of what were considered to be aberrant judgments in the arbitration field which gave rise to potential conflicts between decisions in different States and in different court structures. It was suggested that if all applications in relation to international commercial arbitration through out Australia were made to the one Court, then that may assist in reducing such inconsistencies.

However, this proposal was rejected by many of those who provided submissions as part of the review. In particular, it received staunch opposition from the Chief Justices of each of the State and Territory Supreme Courts who provided a joint submission directly on this issue, calling for the rejection of the proposal. Amongst the reasons given in that submission was first a rejection of the assertion that the conferral of exclusive jurisdiction on one Court was necessary to produce 'a more consistent jurisprudence'. Rather, it was said in response that the application of the principle in *Australian Securities Commission v Marlborough Gold Mines Ltd*¹¹⁷ and the role of the High Court as the ultimate court of appeal will ensure 'consistent jurisprudence' in this aspect of the law, even where there is concurrent jurisdiction. 'There is no reason to think that that can be achieved only by giving exclusive jurisdiction to the Federal Court'. Secondly, the submission also stated that some judges of the State and Territory courts have 'considerable expertise' in this field, which continues to be deployed in judicial decisions with respect to domestic arbitration. 'It would not assist Australia's position in relation to international arbitration if the law with respect to domestic arbitration develops in a significantly different manner'.

In the end, the proposal to confer exclusive jurisdiction on the Federal Court was not pursued. The reasons given by the Attorney General for the Commonwealth were:

Since the discussion paper was released, the states and territories have evidenced an intention to adopt the *Model Law* as the basis for redrafting the commercial arbitration acts that apply to domestic arbitration in Australia.

This should result in a more uniform scheme at both the Commonwealth and state and territory level.

Over time, applying the model law to both domestic and international arbitration should result in a more consistent interpretation of its provisions.

Given the intention to adopt the *Model Law* in this way, the government has decided not to proceed with the conferral of exclusive jurisdiction on the Federal Court of Australia at this time.

¹¹³ *Uganda Telecom Ltd v Hi-Tech Telecom Pty Ltd* (no.2) [2011] FCA 206, [13]; *Traxys Europe SA v Balaji Coke Industry Pvt Ltd* (no. 2) [2012] FCA 276 [65]-[75].

¹¹⁴ The position is similar to the conferral of jurisdiction under the *Admiralty Act* 1988 (Cth).

¹¹⁵ Attorney General's Department, *Review of the International Arbitration Act 1974*, Discussion Paper, (2008), s H.

¹¹⁶ *Ibid.*

¹¹⁷ *Australian Securities Commission v Marlborough Gold Mines Ltd* (1993) 177 CLR 485, 492 namely, that both a single judge and intermediary appellate court of a State Court should not depart from an interpretation placed on Australian legislation by another Australian intermediate appellate court, unless convinced that that interpretation is plainly wrong; see also *Cargill Insurance SA v Peabody Australia Mining Ltd* (2010) 78 NSWLR 533; [2010] NSWSC 887, [48]-[53].

The government understands the benefits that consistent jurisprudence would bring the facilitation of international arbitration in Australia.

The government therefore encourages all courts to adopt procedures that ensure international arbitration cases are heard by judges with particular expertise in this area – and there are certainly a number of very talented judges throughout Australia.

One possibility of achieving this could be by having a specialist international arbitration lists in the respective courts.¹¹⁸

Following the express conferral of concurrent jurisdiction upon it, the Federal Court has established in its registry in each State and Territory an Arbitration Coordinating Judge who has general responsibility for the management of proceedings brought before the Court pursuant to the provisions of the IAA. A proceeding filed in the Federal Court under the IAA or seeking the exercise by the Court of the jurisdiction and powers conferred on the Court by the IAA will, when commenced, ordinarily be listed before the Arbitration Coordinating Judge of the State or Territory in which the proceeding is commenced, for directions.

Similar specialist lists for the conduct of proceedings commenced under the IAA, as well as the State commercial arbitration legislation, are also maintained by the Supreme Court of New South Wales¹¹⁹ and Victorian Supreme Court.¹²⁰

The Federal Court has also promulgated a Practice Note (ARB 1) in relation to proceedings commenced in the Court under the IAA. The current version of that Practice Note is dated 1 August 2011.¹²¹ This Practice Note is to be read in conjunction with the provisions of Part 28 div 28.5 of the *Federal Court Rules* 2011 which contain a number of rules governing certain procedural aspects of proceedings commenced pursuant to the jurisdiction conferred upon the Court by the IAA. Of these, r 28.44 is of particular relevance to what is required to be filed with the Court by an award creditor in conjunction with the commencement of proceedings to enforce an award under s 8(3) of the IAA.

Similarly, the Supreme Court of New South Wales has also issued a Practice Note setting out the case management procedures for proceedings commenced in its Arbitration List, including in the exercise of the Court's jurisdiction under the IAA.¹²² This is with the intention of achieving a just, quick and cheap disposal of those proceedings.¹²³ There is also a similar Practice Note for proceedings brought in the Supreme Court of Victoria,¹²⁴ which has a similar goal.

It is beyond the scope of this paper to discuss the specific procedural requirements that must be satisfied in order to pursue a claim for the enforcement of a foreign award under s 8 in the Federal Court or the other courts of the Australian States and Territories. But it is possibly worthwhile making some general observations in this regard.

First, despite the conferral of concurrent jurisdiction on both the Federal Court and State Courts, there is no uniformity in the procedures to be adopted and rules to be applied in pursuing a claim for enforcement across these Courts. Nor is there uniformity in the Practice Notes that each of the Courts have adopted. Although there are some common elements, such as the need to produce the award being enforced and arbitration agreement pursuant to which it was made,¹²⁵ there are also differences. For instance:¹²⁶

¹¹⁸ Commonwealth, *Parliamentary Debates*, House of Representatives, 25 November 2009, 12791-92 (Robert McClelland).

¹¹⁹ Namely the Arbitration List, within the Court's Equity Division.

¹²⁰ Arbitration List G of the Commercial Court of the Victorian Supreme Court.

¹²¹ Although despite having been reissued over a year after the amendments to the IAA referred to in page 17 (s 3.4) of this paper were made, para 5 of the current Practice Note still refers to s 8(3) in the terms in which it was originally enacted (rather than in its current terms) and thereby to the need for the leave of the Court to enforce a foreign award (which leave is no longer required as Foster J noted in *Uganda Telecom*).

¹²² Supreme Court of New South Wales, *Practice Note No SC Eq 9– Arbitration List* issued 13 February 2012 (this supersedes an earlier Practice Note that had been issued on 15, December 2009). This Practice Note applies to proceedings commenced in the Court under both the *International Arbitration Act* 1974 (Cth) and the *Commercial Arbitration Act* 2010 (NSW).

¹²³ *Ibid* 5.

¹²⁴ Supreme Court of Victoria, *Practice Note No 2 of 210*, 2010.

¹²⁵ As a consequence of the requirements of *International Arbitration Act* 1974 (Cth) s 9(1).

¹²⁶ This list is not intended to be exhaustive.

- in the Victorian Supreme Court, the initial application for enforcement may be made by the award creditor *ex parte*¹²⁷ whereas in New South Wales, the application for enforcement must be served on the award debtor who will be given an opportunity to be heard before any order is made or judgment entered. That is also the procedure that has been adopted by the Federal Court¹²⁸ although the Rules contemplate that the application for the enforcement of an award may be made ‘without notice’ to any person;¹²⁹
- in the Federal Court, the application for enforcement would be made in the first instance by an Application supported by affidavit. In the Supreme Court of New South Wales, the application is made by way of Summons in a form that complies with the requirements of para 9 of Practice Note SC Eq 9. That Summons need not be accompanied at that time by the documents required by s 9 of the IAA. The Practice Note goes on to provide that within 14 days of service of the Summons, the defendant must file its Arbitration List Response, identifying inter alia any defences it wishes to raise to the plaintiff’s claim and the issues raised by those defences. A directions hearing is then held before the Arbitration List judge to determine how best to determine the plaintiff’s claim.

Secondly, there are also differences in the Rules of the different Courts as to when that Court’s process can be served overseas¹³⁰ and whether or not that can only be done with the prior leave of the Court.¹³¹ This may be relevant to the enforcement of arbitral awards against award debtors who are not themselves present or ordinarily resident in Australia¹³² but have assets in Australia which the award creditor wishes to have recourse against for the purposes of enforcing the award.

In some areas of the law, the Federal Court and State Courts have been able to develop uniform rules and procedures, and the possibility of this being achieved in relation to arbitration proceedings (including in relation to the enforcement of foreign arbitral awards) has been mooted. It is therefore an area in which there may be reform in the future, consistent with the current pro-arbitration policy underlying the above reforms.

Thirdly, it may be necessary for an award creditor to comply with the obligations imposed by both the *Civil Dispute Resolution Act 2011* (Cth) and those provisions of the *Federal Court Rules* which give effect to the requirements of that Act before commencing enforcement proceedings in the Federal Court.¹³³ These obligations include, in effect, attempting to settle a claim or narrow the issues, before proceedings are commenced on that claim. There are potential consequences, including costs consequences, to a party (and its legal advisors) who fail to comply with these obligations (where they apply) without a reasonable excuse.¹³⁴ Although similar legislation has also been enacted in some States,¹³⁵ it has either been repealed or is currently not yet in force, with the result that there is no corresponding requirement which must be met before enforcement proceedings are brought in courts of those States.

Finally in this regard, the establishment of specialist arbitration lists within the Courts for handling proceedings commenced pursuant to that Court’s jurisdiction under the IAA has been with the intention of enhancing the quality, certainty, efficiency and cost effectiveness of arbitration proceedings, including proceedings for the enforcement of

¹²⁷ As occurred in *IMC Aviation Solutions Pty Ltd v Altain Khuder LLC* (2011) 253 FLR 9, [16].

¹²⁸ Including presumably in its Victorian Registry.

¹²⁹ Federal Court of Australia, *Federal Court Rules* (2011) Pt 28 r 28.44(3). ‘Without notice’ is defined in the Rules.

¹³⁰ See, for example, in New South Wales, para (t) of sch 6 to the *Uniform Civil Procedure Rules (UCPR)* authorises service of an originating process issued out of the Supreme Court overseas where the proceedings are commenced to enforce in New South Wales an arbitral award where ever made. There is however no equivalent provision in pt 10 r 10.42 of the *Federal Court Rules* 2011 and it would therefore be necessary for the award creditor to argue that the claim for enforcement of the award is a cause of action arising in Australia (*Brali v Hyundai Corporation* (1988) 15 NSWLR 734) and rely upon that head.

¹³¹ For example, it is not necessary to obtain the leave of the Supreme Court of New South Wales before originating process is served overseas (*UCPR* pt 11 r 11.2) although leave is required before any further step is taken in the proceedings if there is no appearance by the defendant following service (*UCPR* pt 11 r 11.4). In contrast, in the Federal Court it is still necessary for the leave of the Court to be obtained under the *Federal Court Rules* 2011 before an Application that has been issued out of the Court can be served overseas (see pt 10 r 10.43(1)(a) and (2)).

¹³² And therefore cannot be served personally within Australia.

¹³³ See Federal Court of Australia, *Federal Court Rules* (2011) pt 8 r 8.02 which requires a party commencing proceedings to which the Act applies to file a Genuine Steps Statement complying with s 6 of the Act and outlining the steps that have been taken to try and resolve the dispute before the proceedings were commenced.

¹³⁴ This includes potential consequences for the legal representatives of the parties including as to costs – see for example *Superior IP International Pty Ltd v Ahearn Fox Patent and Trade Mark Attorneys* [2012] FCA 282 [31]-[47] (Reeve J).

¹³⁵ Including New South Wales and Victoria.

foreign awards. This is consistent with both (a) the pro-arbitration and pro-enforcement policy underlying the *IAA* and the enforcement of awards under the *IAA* and (b) the emphasis on the certainty and finality of an arbitral award. However, that goal has not necessarily been achieved by all Courts.¹³⁶ Acknowledging that the recent amendments to the *IAA* are intended to encourage and promote enforcement of awards (including in a speedy and efficient manner) and accepting that those amendments have the potential for achieving that goal, delays in the determination of applications for the enforcement of a foreign award which have been brought pursuant to the amended provisions of the *IAA* can nevertheless still detract from both this objective and the eventual utility of those amendments. Moreover, depending on the length of the delay, it can also potentially prejudice the award creditor and the recovery of its successful award, thereby undermining the utility and benefits of the parties' choice to pursue resolution of disputes arising between them by arbitration.

3.5 Changes to the Domestic Commercial Arbitration Acts

In 2010, the Attorneys General for the States and Territories agreed to reform their domestic commercial arbitration legislation, by replacing the then existing uniform Acts with a new uniform *Commercial Arbitration Act* based on the provisions of the *Model Law*.¹³⁷ This was for a number of reasons:

- first, the *Model Law* reflected the accepted world standards for arbitrating commercial disputes and that it was therefore thought appropriate that its provisions be adopted and applied to domestic arbitration,¹³⁸
- secondly, an aim of the new laws was to ensure that commercial arbitration delivered on its promise to be a quicker, cost effective and less formal option for resolving disputes than litigation; and
- thirdly, there was also a desire to ensure that arbitration laws applicable in each State and Territory aligned with the Commonwealth's international arbitration laws and its application of the *Model Law*.¹³⁹

The New South Wales Government took the lead in developing the model Bill and was the first to pass the new legislation, namely the *Commercial Arbitration Act* 2010 (NSW). That Act was assented to on 28 June 2010 and came into operation on 1 October 2010. Similar legislation has or is in the process of being passed by the other States and Territories.¹⁴⁰

The changes introduced by this legislation do not impact on the enforcement of foreign awards directly or the framework for the enforcement of such awards identified earlier in this paper. But this new State and Territory legislation may indirectly bear on the question of enforcement inasmuch as it contains provisions that serve to reinforce that the enforcement of such awards is a matter for the *IAA* and not State or Territory legislation.¹⁴¹

In particular, s 1(1) of the new legislation provides that this legislation applies to 'domestic commercial arbitrations'. This phrase is defined in s 1(3) of the legislation and so as to exclude an arbitration to which the *Model Law* as given effect by the *IAA* applies. Having regard to the terms of art 1(1) of the *Model Law*, this effectively means that the new legislation does not apply to international commercial arbitrations, including any international commercial arbitrations conducted in any of the Australian States or Territories.

This has also been reinforced by the amendments made to pt III of the *IAA* by the *Amending Act* and in particular:

- a) the repeal of the former s 21 of the *IAA* which permitted the parties to an international arbitration agreement to agree to the settlement of any dispute between them other than in accordance with the *Model Law* and

¹³⁶ In particular the Federal Court of Australia.

¹³⁷ For a history of the reform of the domestic arbitration legislation, see Doug Jones, *Commercial Arbitration in Australia*, (2011) [1.240]-[1.270]; Albert Monichino 'Arbitration Reform in Australia: Striving for International Best Practice' (2010) 29 *The Arbitrator and Mediator* 29, 40-41; Albert Monichino 'International arbitration in Australia – 2010/2011 in review' (2011) 22 *Australasian Dispute Resolution Journal* 215, 216-17.

¹³⁸ As the then Chief Justice of the Supreme Court of New South Wales, the Hon JJ Spigelman AC, stated in an address at the opening of Law Term Dinner in 2009, the adoption of the *Model Law* as the domestic arbitration law would send a clear signal to the international arbitration community that Australia is serious about a role for the centre for international commercial arbitration.

¹³⁹ Attorney-General of NSW Greg Smith, 'Address' (Speech delivered at the NSW Bar Association ADR Workshop, 28 August 2010).

¹⁴⁰ See Albert Monichino, 'International arbitration in Australia – 2010/2011 in review' (2011) 22 *Australasian Dispute Resolution Journal* 215, 216. Since then the Victorian Act has also now come into effect in November 2011.

¹⁴¹ And consistently with the intention behind the amendments to s 8(2) of the *IAA* discussed above.

- b) the substitution of a new s 21 which provides that if the *Model Law* applies to an arbitration the law of a State or Territory (including its laws relating to arbitration) is not to apply to that arbitration.

This new section was inserted to make clear that the *Model Law* covers the field for the purpose of international commercial arbitration covered by the *Model Law*. To this end, it was intended to complement the amendments to pt II of the *IAA* designed to remove any role for State and Territory law in enforcing and recognising foreign arbitral awards under the *New York Convention*.¹⁴²

Whilst ss 35 and 36 of the new State and Territory legislation provide for the enforcement of arbitral awards and in terms largely similar to and drawn upon arts 35 and 36 of the *Model Law*, consistently with what is set out above, those sections only apply to awards made pursuant to a domestic arbitration agreement.¹⁴³ Accordingly, they are not available for the enforcement of foreign awards or awards made in an international commercial arbitration including such an award made in another State.

3.6 An Apparent Lacuna?

The provisions of pt II of the *IAA* do not apply to the enforcement of every award obtained in an international commercial arbitration. In particular, pt II does not apply in two situations:

- a) the first is where the award is made in Australia. This is notwithstanding that Australia is a *Convention* country and even where one or both of the parties are resident in *Convention* countries. This exclusion arises because pt II of the *IAA* only applies to the enforcement of a *foreign award* which is defined in s 3(1) of the *IAA* as an award made in a country other than Australia. Even the operation of s 8(4) of the *IAA* is limited to the enforcement of a *foreign award*;
- b) the second is where the award is not an award to which the *New York Convention* applies, for instance because it was not made in a *Convention* country and the party seeking to enforce the award is not domiciled or ordinarily resident in Australia or a *Convention* country.¹⁴⁴

If an award made in either of the above situations is to be enforced in Australia then that application would be made pursuant to art 35 of the *Model Law*. Similarly, any attempt by the award debtor to resist the enforcement of such an award in Australia would be governed by art 36. For the reasons already stated, it would not be open to the award creditor in either situation to apply to enforce such an award under the new State and Territory *Commercial Arbitration Acts*. This is so even in respect of an award made in that State or Territory, where that award was made in the context of an international commercial arbitration or an arbitration subject to the *Model Law*.

Where an award is to be enforced under art 35, in which Australian court should the application for enforcement be made? As will be apparent from the comments that follow, the answer to this question is not apparent from the terms of the *IAA* itself. Indeed, there appears to be a lacuna in this regard in the express provisions of the *IAA*. However, for the reasons explained below, this lacuna is more apparent than real and does not mean that an application cannot be made at all for the enforcement of an award under art 35 in Australia.

Article 35 of the *Model Law* provides that an award shall be enforced subject to the provisions of arts 35 and 36 of the *Model Law* upon an application in writing ‘to the competent court’. Similarly, art 36(1)(a) provides that recognition or enforcement of an award may be refused upon the party against whom the award is invoked furnishing to ‘the competent court’ proof of the matters set out in sub-paragraphs (i) to (v) of that Article.

Whilst art 2 of the *Model Law* defines a ‘court’ as a body or organ of the judicial system of a State, there is however no definition in either the *Model Law* or *IAA* of the phrase ‘a competent court’, in particular for the purposes of or as it is used in arts 35 and 36.

¹⁴² Explanatory Memorandum to the *International Arbitration Amendment Act 2010* (Cth) [117].

¹⁴³ Although as noted earlier, in each State these sections will apply to such awards irrespective of the State or Territory in Australia in which that award was made, and therefore facilitate the enforcement of domestic awards in another State or Territory.

¹⁴⁴ Cf *International Arbitration Act 1974* (Cth) s 8(4).

Article 6 of the *Model Law* contemplates the specification by Contracting States when adopting the *Model Law* of a particular court or other authority for the exercise of certain functions referred to in the *Model Law*. But this is expressly limited to arts 11(3), 11(4), 13(3), 14, 16(3) and 34(2) of the *Model Law*. In Australia these courts are identified in s 18(3) of the *IAA*. However neither art 6 nor s 18(3) specifically apply to arts 35 or 36 of the *Model Law* or the enforcement of arbitral awards pursuant to those Articles. Nor do they specify which courts are *competent courts* for that purpose.

Although s 22A of the *IAA* also contains a definition of ‘court’ which refers to both the Federal Court and Supreme Court of the States and Territories, the application of that definition is limited to the purposes of the provisions contained within div 3 of pt III of the *IAA*. Division 3 contains the additional provisions that the parties to an international arbitration agreement subject to pt III of the *IAA* and thereby the *Model Law* may opt in or opt out of. Neither div 3 nor s 22A have any application to arts 35 and 36 of the *Model Law* or the enforcement of arbitral awards pursuant to those Articles.

In short, there appears to be within the *IAA* itself no express reference to the particular court or courts which are *competent courts* for the purposes of art 35 of the *Model Law* and to which an application for the enforcement of an award should be made under that Article. Nor does there appear to be any such reference in any other Commonwealth legislation.

In particular, there is within the *IAA* no express conferral upon either the Federal Court or the courts of the States and Territories of jurisdiction to entertain applications under arts 35 and 36 of the *Model Law*.¹⁴⁵ Yet s 39(1)(a)(iii) and (iv) of the *IAA* expressly contemplates the exercise by a ‘court’¹⁴⁶ in Australia of the powers conferred by arts 35 and 36 and that some Australian court must have jurisdiction.

Interestingly, the existence of such a jurisdiction in the Federal Court is not referred to or recognised in paragraph 2 of its Practice Note (ARB 1) which lists the jurisdiction conferred upon the Court under the *IAA*. Similarly, the various applications that might be made to the Federal Court under the *IAA* listed in div 28.5 of the *Federal Court Rules* 2011 do not refer specifically to or envisage an application for the enforcement of an award under art 35. The only applications for the enforcement of an award envisaged by div 28.5 of the Rules are those made pursuant to s 8 and s 35¹⁴⁷ of the *IAA*.¹⁴⁸

Despite both the above omissions and the absence of an *express* conferral of jurisdiction on the Federal Court to entertain an application for the enforcement of an arbitral award under art 35 of the *Model Law* within the *IAA* or any other Commonwealth legislation, that is not to say that the Federal Court of Australia does not have jurisdiction to entertain an application under art 35 of the *Model Law*. It does under s 39B(1A)(c) of the *Judiciary Act*, the terms of which appear are quoted in section 3.4 of this paper above.¹⁴⁹ This is the conclusion that Justice Rares reached speaking extra-judicially in an address to the New South Wales Bar Association in September 2011 entitled ‘The Federal Court of Australia’s International Arbitration List’.¹⁵⁰ This was also the conclusion which Justice Murphy (of the Federal Court) subsequently reached in *Castel Electronics Pty Ltd v TCL Air Conditioner (Zhongshan)* [2012] FCA 21.

Presumably any application made to the Federal Court for the enforcement of an award under art 35 should be made in the same way and complying with the same requirements that apply to an application for enforcement under

¹⁴⁵ Cf *International Arbitration Act* 1974 (Cth) s 18(3) which expressly confers jurisdiction on both the Federal Court and State and Territory courts in relation to applications to set aside an award under art 34 of the *Model Law*.

¹⁴⁶ *International Arbitration Act* 1974 (Cth) s 8 defines ‘court’ to mean any court in Australia, including the Federal Court and a court of a State or Territory.

¹⁴⁷ Namely the enforcement of an ICSID award.

¹⁴⁸ Although the absence of any reference in the Federal Court’s Practice Note or Rules to that Court having jurisdiction under or for the purposes of applications made under arts 35 and 36 of the *Model Law* might be thought to indicate or confirm that the Court has no such jurisdiction, an argument to that effect was rejected by Murphy J in *Castel Electronics Pty Ltd v TCL Air Conditioner (Zhongshan)* [2012] FCA 21, [56].

¹⁴⁹ In the same way that the Court had jurisdiction under pt II of the *International Arbitration Act* 1974 (Cth) s 8(3).

¹⁵⁰ Steven Rares, *The Federal Court of Australia’s International Arbitration List* (2011) Federal Court of Australia

<http://www.fedcourt.gov.au/aboutct/judges_papers/speeches_raresj18.html>.

s 8(3) of the *IAA* (given the absence of any express provisions in this regard in both the Federal Court's Practice Note (ARB 1) and div 28.5 of the *Federal Court Rules* 2011).

Similarly, the State Courts would also seem to have jurisdiction to entertain applications under arts 35 and 36 of the *Model Law*, despite the absence of any express conferral of such jurisdiction under the *IAA*. This is pursuant to s 39(2) of the *Judiciary Act*, which provides that the several courts of the States shall within the limits of their respective jurisdictions as to locality, subject matter or otherwise have federal jurisdiction in all matters in which the High Court has original jurisdiction or in which original jurisdiction can be conferred upon the High Court, except to the extent that the High Court is to have exclusive jurisdiction in respect of those matters. The original jurisdiction of the High Court is found in ss 75 and 76 of the *Constitution*. Relevantly, for present purposes, s 76(ii) provides that the additional jurisdiction that may be conferred upon the High Court includes jurisdiction 'in any matter ... arising under any laws made by the [Commonwealth] Parliament'. Moreover, this jurisdiction is not one that is invested upon the High Court exclusively.¹⁵¹ Accordingly, like the Federal Court, the State courts are also invested with federal jurisdiction in respect of matters arising under Commonwealth legislation. In this respect, s 39(2) operates to confer jurisdiction on the State Courts in much the same way s 39B(1A)(c) does for the Federal Court. An application to enforce or challenge an award under arts 35 and 36 of the *Model Law* is, it is submitted, a matter arising under the laws of the Commonwealth (namely the *IAA*) for the purposes of both sections (this is especially also where both arts 35 and 36 have force of law under the *IAA*).¹⁵² In any event, even in the absence of an express conferral of jurisdiction by the *IAA* (or some other Commonwealth Act), if an issue arose in the context of proceedings before a State or Territory Court as to whether an award subject to the *Model Law* should be recognised,¹⁵³ then that Court would (subject to art 36) be bound by art 35 to recognise that award notwithstanding the absence of any express conferral of jurisdiction upon that Court for the purposes of art 35.

4 IMC AVIATION SOLUTIONS PTY LTD v ALTAIN KHUDER

The recent judgment of the Court of Appeal of the Supreme Court of Victoria in *Altain Khuder* has been criticised as being out of step with both (a) the *New York Convention* and the way in which it has been applied overseas and (b) the pro-arbitration and pro-enforcement policy and approach underlying the above legislative changes which have been adopted by the Australian courts in the context of arbitration. But for the reasons that follow, it is respectfully submitted that some of this criticism has perhaps been overstated.

4.1 Background to the Judgment

This case arose out of a dispute under an Operations Management Agreement (OMA) between Altain Khuder LLC (Altain Khuder) and IMC Mining Inc (IMC Mining). Altain Khuder was a mining company incorporated in Mongolia. IMC Mining was a company incorporated in the British Virgin Islands. It had an office in Brisbane, which was also the registered office of an Australian incorporated company IMC Mining Solutions Pty Ltd (IMC Solutions).¹⁵⁴ Pursuant to the OMA, Altain Khuder appointed IMC Mining as operations manager of the Tayan Nuur iron ore mine in south west Mongolia.

A dispute subsequently arose concerning the provision of engineering services to Altain Khuder under the OMA. In a memorandum addressed to IMC Mining, Altain Khuder purported to terminate the OMA. It also commenced arbitration proceedings in Mongolia in respect of this dispute. This was pursuant to a dispute resolution clause in the OMA which provided for all disputes under the OMA to be referred to arbitration in Mongolia according to Mongolian or Hong Kong law.

¹⁵¹ See *Judiciary Act* 1903 (Cth) s 38.

¹⁵² In *Castel Electronics Pty Ltd v TCL Air Conditioner (Zhongshan)* [2012] FCA 21. Murphy J at [42] – [54] rejected the arguments of the respondent to the effect that applications under arts 35 and 36 of the *Model Law* did not involve a 'matter' and did not arise under a federal law for the purposes of s 39B of the *Judiciary Act* 1903. The same reasoning would equally apply to s 39(2). But although the respondent had also argued in that case that the State and Territory courts did not have jurisdiction to enforce or challenge awards under arts 35 and 36, Murphy J found at [38] and [81] it unnecessary to make any finding in that regard, in the course of disposing of the issue before him, namely whether the Federal Court had jurisdiction. Accordingly, the issue of the jurisdiction of the State Courts was left open in that case.

¹⁵³ For instance where the award has been sued on or has been pleaded in defence of a claim.

¹⁵⁴ The following recitation of the facts is drawn largely from *IMC Aviation Solutions Pty Ltd v Altain Khuder LLC* (2011) 253 FLR 9, [5]–[20] (Warren CJ).

In September 2009 the arbitral tribunal in Mongolia rendered an award which provided inter alia that IMC Mining was liable to pay USD\$5 903 098.20 to Altain Khuder. The only parties named in the award were Altain Khuder and IMC Mining.

In the body of the award, there were five references to IMC Solutions. However, the precise nature of that company's involvement in the Tayan Nuur mine was in issue in the Victorian proceedings, as was the precise identity of the party to the OMA which was named as 'IMC Mining Inc.' and the extent if any of the participation of IMC Solutions in the arbitration.

Notwithstanding that IMC Solutions was not itself named as a party to either the OMA or the Award, para 3 of the award nevertheless provided:

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.

On 23 October 2009 Altain Khuder applied to the Khan-Uul District Court in Mongolia to verify the award 'charged against the Defendant IMC Mining Inc Company'. On 25 November 2009, that court ruled that it was satisfied that the request for verification was legitimate and that the award was enforceable under the *New York Convention*.¹⁵⁵

On 14 July 2010, Altain Khuder filed an application in the Supreme Court of Victoria seeking enforcement of the award against both IMC Mining and IMC Solutions. That application came before Croft J.¹⁵⁶ The application was initially heard ex parte after which orders were made for the enforcement of the award against both IMC Mining and IMC Solutions. Provision was then made for either of those parties to apply to set aside the order within 42 days.

On 21 September 2010, IMC Solutions applied to set aside the above orders insofar as they applied to itself.¹⁵⁷ That application was principally founded upon its assertion that it was not a party to the arbitration agreement in pursuance of which the award had been made.¹⁵⁸ That application was heard over a number of days between August and November 2010. In a judgment delivered on 28 January 2011, Croft J dismissed the application.¹⁵⁹

In a subsequent judgment delivered on 3 February 2011, Croft J ordered IMC Solutions to pay Altain Khuder's costs of the proceedings on an indemnity basis.¹⁶⁰ In a third judgment, his Honour dismissed an application by IMC Solutions for a stay of his earlier orders pending the hearing of its application for leave to appeal to the Court of Appeal. He also ordered IMC Solutions to pay the costs of that application on an indemnity basis.¹⁶¹

IMC Solutions was subsequently granted leave to appeal all of the above judgments. The appeal was heard on 29 and 30 March 2011. In a judgment handed down on 22 August 2011, the Court of Appeal allowed the appeal and set aside the orders that had been earlier made by Croft J as against IMC Solutions, both in permitting the enforcement of the award against IMC Solutions and as to costs.¹⁶²

Altain Khuder appears not to have sought special leave to appeal to the High Court of Australia from the judgment of the Court of Appeal. Accordingly, the judgment of the Court of Appeal represents, for the moment at least, the last word on the issues raised in this case.

4.2 The Issues Raised by the Court of Appeal's Judgment

There are a number of issues raised by the Court of Appeal's judgment relevant to the enforcement of arbitral awards under pt II of the IAA. These include:

¹⁵⁵ *IMC Aviation Solutions Pty Ltd v Altain Khuder LLC* [2011] 253 FLR 9, [14].

¹⁵⁶ A judge of the Supreme Court of Victoria and the Court's Arbitration List judge.

¹⁵⁷ IMC Mining did not appear in the enforcement proceedings and the order that Altain Khuder eventually obtained against it was not disturbed by the subsequent appeal.

¹⁵⁸ Cf *International Arbitration Act 1974* (Cth) s 8(1).

¹⁵⁹ *Altain Khuder LLC v IMC Mining Inc & Anor* (2011) 246 FLR 47.

¹⁶⁰ *Altain Khuder LLC v IMC Mining Inc & Anor* (no 2) [2011] VSC 12.

¹⁶¹ *Altain Khuder LLC v IMC Mining Inc & Anor* (no 3) [2011] VSC 105.

¹⁶² *IMC Aviation Solutions Pty Ltd v Altain Khuder LLC* (2011) 253 FLR 9.

- who bears the onus of proving or disproving whether an award debtor is a party to the arbitration agreement pursuant to which the award that is being sought to be enforced was made, where that is disputed or in issue;
- whether an award debtor can be estopped from disputing that it is a party to the arbitration agreement pursuant to which the award was made and if so in what circumstances;
- the standard of proof that is required in order for an award debtor to establish a defence to the enforcement proceeding under ss 8(5) or 8(7) of the IAA; and
- the circumstances in which indemnity costs should be awarded in the context of an application for the enforcement of an award.

Dealing with each of these issues in turn:

4.2.1 The Onus of Establishing Whether a Party to the Arbitration Agreement

In allowing the appeal, the Court of Appeal accepted the submissions of IMC Solutions that it was not a party to the arbitration agreement pursuant to which the award in question had been made and overturned the judgment and findings of Croft J to the contrary.

In this regard, the Chief Justice of the Court (Warren CJ) found that Croft J had fallen into error in the approach that his Honour had taken in determining this question and that as a result his finding that IMC Solutions was a party to the arbitration agreement should be set aside. The errors that Croft J was found to have made were first on the issue of onus (which is discussed in more detail below) and secondly in both admitting evidence which IMC Solutions had objected to (much of which the Chief Justice found to be inadmissible) and then relying upon that evidence in making the findings that his Honour did.

Ordinarily, in those circumstances, Warren CJ would have ordered that the proceedings be referred back to the trial judge for re-hearing. However, that proved unnecessary here as the majority of the Court of Appeal (Hansen JA and Kyrou AJA), who had also found that Croft J had erred in the approach that he had taken in determining this question, were prepared to take up the invitation of the parties that in the event that the appeal was allowed the Court of Appeal should itself decide this factual question having regard to the material that was before Croft J. As a result of their detailed analysis of that evidence, the majority concluded that IMC Solutions was not a party to the OMA or thereby the arbitration agreement in it.

Ultimately, that question and the majority's finding were factual ones, which turned on the particular facts of that case, the evidence of those facts that had been adduced at the hearing before Croft J and the admissibility¹⁶³ of that evidence. In this regard, the judgment and findings of the majority are of limited utility for future purposes. Moreover, on the view of the evidence taken by the Court of Appeal, the finding that IMC Solutions was not a party to the OMA or arbitration agreement is (perhaps) not surprising.

What is of greater potential significance for future cases,¹⁶⁴ are the comments and conclusions of the Court of Appeal on the issue of onus where an award debtor against whom an award has been obtained and against whom an application has been brought in Australia to enforce the award, disputes that it is a party to the arbitration agreement pursuant to which that award was made.

In this regard, at first instance, IMC Solutions had submitted that there was a threshold issue under s 8(1) of the IAA which required the award creditor who was seeking to enforce the award to satisfy the Court that the award was one to which s 8 applied, including one made pursuant to an arbitration agreement to which the award debtor was a party or otherwise bound.¹⁶⁵ However Croft J rejected that submission, instead holding that there was no threshold issue of the type contended and that an award creditor who is seeking to enforce an arbitral award does not bear the onus of establishing that the award debtor is a party to the arbitration agreement. According to Croft J, once it has

¹⁶³ Or perhaps more relevantly (according to the Court of Appeal) the inadmissibility.

¹⁶⁴ And what has been the subject of the recent criticism of the judgment of the Court of Appeal.

¹⁶⁵ *Altain Khuder LLC v IMC Mining Inc & Anor* (2011) 246 FLR 47, [33]-[35].

complied with s 9 of the *IAA* and produced the award and arbitration agreement to the Court, an award creditor does not have the onus of establishing that a foreign award exists binding on the parties to the arbitration agreement in pursuance of which it was made, either under the provisions of s 8(1) of the *IAA* or as a result of the application of the corresponding provisions of the *New York Convention*.¹⁶⁶

If the award debtor disputes that it is a party to the arbitration agreement pursuant to which the award was made, then Croft J held that it is the award debtor who bears the onus of establishing this. That is because, according to his Honour, this is a defence to the application for enforcement under s 8(5)(b) of the *IAA*. As such, it is a matter on which the award debtor bears the burden of proof. In this particular case, Croft J was not satisfied that IMC Solutions had discharged this onus on the evidence before him, and accordingly dismissed its application to set aside his earlier ex parte orders enforcing the award against it.

However, this approach was rejected by all three members of the Court of Appeal, although not with one voice as to where the onus lay.

At the outset of what has been described as a commendably concise judgment, the Chief Justice noted¹⁶⁷ that the question as to who bears the onus of proving whether the award debtor is a party to the arbitration agreement is a question of construction of the *IAA* and in particular ss 8 and 9. In this regard, her Honour observed the obligation imposed upon the Court by s 39(2) of the *IAA*. She also referred to the appropriateness of the Court having regard to international authorities where (as here) the relevant statutory provisions implement an international treaty,¹⁶⁸ although found ultimately that the Court was required to construe an Australian statute and whilst international case law may be useful and instructive in that regard, it cannot supersede the words used in the legislation.¹⁶⁹

In applying these principles of statutory construction, Warren CJ was unable to accept the position advanced by Altain Khuder (and which had found favour with Croft J at first instance). This was essentially for four reasons:

- first, it would render s 8(1) of the *IAA* superfluous;¹⁷⁰
- secondly, s 8(1) cannot be read subject to s 8(3A) of the *IAA*. Section 8(3A) simply circumscribes the defences on which the award debtor may rely to resist enforcement once the award creditor has discharged some preliminary burden but says nothing about what that burden might be;¹⁷¹
- thirdly, since an award is only binding on the parties to an 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 such a defence. It is artificial to run an argument that a person is not a party to the arbitration agreement as an argument that the agreement is not valid vis-à-vis that person within s 8(5)(b) of the *IAA*. To construe s 8(5)(b) in this way does violence to the words of that provision;¹⁷² and
- fourthly, it is not necessary to construe ss 8 and 9 in this way in order to achieve the objects of the *IAA*. Rather, her Honour found that a more ‘harmonious and coherent’ interpretation was available which fully achieved these objectives.

In relation to the third of the above reasons, Warren CJ distinguished the judgments in *Dardana Ltd v Yukos Oil Co*¹⁷³ and *Dallah Real Estate & Tourism Co. v Ministry of Religious Affairs of the Government of Pakistan*¹⁷⁴ on which Altain Khuder had relied and which Croft J had followed at first instance. This was on the grounds that there was a difference between the language of s 8(1) and the corresponding English provision. In particular, s 8(1) of the *IAA* provided that a foreign award was binding ‘on the parties to the arbitration agreement in pursuance to which it was made’ whereas s 10 of the *English Act* provided that an award was binding as between the parties to the award.

¹⁶⁶ Ibid [60].

¹⁶⁷ *IMC Aviation Solutions Pty Ltd v Altain Khuder LLC* (2011) 253 FLR 9, [28].

¹⁶⁸ Ibid [35].

¹⁶⁹ Ibid [37].

¹⁷⁰ Ibid [39].

¹⁷¹ Ibid [40].

¹⁷² Ibid [41].

¹⁷³ *Dardana Ltd v Yukos Oil Co* [2002] 1 All ER 819.

¹⁷⁴ *Dallah Real Estate & Tourism Co. v Ministry of Religious Affairs of the Government of Pakistan* [2011] 1 AC 763.

Warren CJ found that to the extent that these contrasting provisions compelled different results, the Court was required to give effect to the language of the IAA, rather than follow the English decisions.¹⁷⁵

Under the construction of s 8 of the IAA favoured by the Chief Justice,¹⁷⁶ the starting point for the proper approach to take to the enforcement of arbitral awards under s 8 is that s 8(1) requires the award creditor to show, on the balance of probabilities, that:

- there is a purported or apparent arbitration agreement;
- the award creditor and award debtor are parties to that agreement; and
- there is an award made against the award debtor in pursuance of that agreement.

Section 9 of the IAA assists the award creditor in discharging that onus. In particular the effect of s 9(5) is that in the absence of evidence to the contrary, the mere production of the two documents referred to in s 9(1)¹⁷⁷ will always be sufficient to establish the elements of s 8(1) on the balance of probabilities. Normally, these documents will speak for themselves and the award creditor will not have to produce anything more.

But in the unusual case of where the award debtor is not expressly named as a party to the arbitration agreement then, according to the Chief Justice, the agreement itself will not on its face be of an agreement within s 9(1)(b) of the IAA. In that case, the award creditor will need to lead extrinsic evidence to show on the balance of probabilities that the award debtor is in fact a party to that agreement pursuant to which the award was made.

If the award creditor fails to adduce that evidence, then it will not have discharged the onus it bears under s 8(1) and the application for enforcement would be dismissed. On the other hand, if the award creditor is able to adduce such evidence and thereby discharge the onus it bears, then the burden shifts onto the award debtor to establish one or more of the grounds found in ss 8(5) or 8(7) of the IAA if it is to successfully persuade the Court to refuse to enforce the award.

In embracing the above approach, the Chief Justice rejected the submission (accepted by Croft J below) that in the context of an application for the enforcement of an award under the *New York Convention* and thereby pt II of the IAA, where an award debtor disputes that it is a party to the arbitration agreement pursuant to which the award was made, this arises as a defence under s 8(5)(b) of the IAA. This was notwithstanding that this was the approach that had been taken by most of those foreign courts that had looked at this issue.¹⁷⁸ Rather, her Honour found that 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 that provision.¹⁷⁹

In short, her Honour concluded at [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.

The majority in the Court of Appeal however took a different view on this issue, being one which did not go as far as that expressed by Warren CJ but which also imposed a potentially more stringent onus on the award creditor than under the approach that Croft J had taken.

¹⁷⁵ *IMC Aviation Solutions Pty Ltd v Altain Khuder LLC* (2011) 253 FLR 9, [42].

¹⁷⁶ *Ibid* [43].

¹⁷⁷ Namely the award and arbitration agreement.

¹⁷⁸ *IMC Aviation Solutions Pty Ltd v Altain Khuder LLC* (2011) 253 FLR 9, [36].

¹⁷⁹ *Ibid* [41]; see also page 27 of this paper, s 4.2.1.

In a significantly longer judgment than that of the Chief Justice, the majority agreed at the outset that the answer to this issue turned on the construction of s 8 of the *IAA* and which of the competing interpretations put was correct.¹⁸⁰ In this regard, the majority made some preliminary observations as to the obligation imposed by s 39(2); the pro-enforcement bias or policy of the *Convention* and the *IAA* and its relevance; the utility of overseas judgments given that the *IAA* is giving effect to an international convention and the reasons for this; the broad definition of the phrase ‘an agreement in writing’ in s 3 of the *IAA*; and finally that the *IAA* is silent as to the procedures to be followed by the Court in relation to applications for the enforcement of foreign awards and the fact that in Victoria the relevant rules and Practice Note provide for a two stage process.¹⁸¹

Applying these considerations, the majority found (similarly to Warren CJ) that under the *IAA* there was an obligation upon an award creditor to satisfy the Court of certain matters at the outset,¹⁸² namely that:

- an award has been made by a foreign arbitral tribunal granting relief to the award creditor against the award debtor;
- the award was made pursuant to an arbitration agreement; and
- the award creditor and award debtor are parties to that arbitration agreement.

However, unlike Warren CJ, the majority found that the award creditor only had to satisfy the Court of these matters on a prima facie basis. Under the Chief Justice’s approach, the onus on the award creditor was to prove these matters on the balance of probabilities. According to the majority, their approach was supported by a statement of Lord Mance in *Dallah* that the scheme of the *Convention* gives limited prima facie credit to apparently valid arbitration awards based on apparently valid and applicable arbitration agreements.¹⁸³

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 to that agreement, then according to the majority, 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.¹⁸⁴

However, compliance with s 9(1) 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, for instance, where the person against whom the award is made does not appear on the face of the arbitration agreement. If in those circumstances the arbitration agreement and award are the only evidence presented to the court, then that evidence would be insufficient to invoke the court’s jurisdiction under s 8(1) and 8(2)¹⁸⁵ to enforce a foreign award ‘on the parties to an arbitration agreement in pursuance of which it was made’ as the words of s 8(1) contemplate.¹⁸⁶

According to the majority, two consequences flow from the above. The first is of more general application, namely the need for the award creditor to produce extrinsic or other evidence beyond the award and agreement themselves, in order to establish on a prima facie basis that the award debtor is a party to or bound by the arbitration agreement. The second is of more limited application, in particular applying to the two stage approach taken to the enforcement of arbitral awards in Victoria.¹⁸⁷ That is where the contents of the arbitration agreement and the award do not provide prima facie evidence of the three matters set out in the bullet points on the previous page (section 4.2.1), 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.¹⁸⁸ Where in those circumstances a judge

¹⁸⁰ *IMC Aviation Solutions Pty Ltd v Altain Khuder LLC* (2011) 253 FLR 9, [125]. Although the majority adopted a hybrid of the competing views put.

¹⁸¹ *Ibid* [126] – [133]. (Much of which is consistent with what Warren CJ had said).

¹⁸² *Ibid* [135].

¹⁸³ *Ibid* [136].

¹⁸⁴ *Ibid* [137].

¹⁸⁵ In the case of a court of State and Territory, or s 8(3) of the *IAA* in the case of the Federal Court.

¹⁸⁶ *IMC Aviation Solutions Pty Ltd v Altain Khuder LLC* (2011) 253 FLR 9, [138].

¹⁸⁷ This is not directly applicable to proceedings in the Supreme Court of New South Wales or the Federal Court (in accordance with its current practice).

¹⁸⁸ *IMC Aviation Solutions Pty Ltd v Altain Khuder LLC* (2011) 253 FLR 9, [140]. This is generally what would happen in the Supreme Court of New South Wales and Federal Court any way.

determines that the documents filed in accordance with s 9(1) of the IAA do not satisfy the prima facie evidential requirements set out in the three bullet points on the previous page 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.¹⁸⁹

Once the award creditor has established a prima facie entitlement to an order enforcing a foreign arbitral award,¹⁹⁰ then according to the approach of the majority of the Court of Appeal, if the award debtor wishes to resist such an order, it can do so only by proving 'to the satisfaction of the Court' one or more of the grounds set out in ss 8(5) or 8(7) of IAA. This follows from ss 8(3A), 8(5) and 8(7) of that Act. If the award debtor fails to satisfy the court of one or more of those grounds, the award creditor would be entitled to the order enforcing the award.¹⁹¹

Beyond the prima facie burden that they found an award creditor must discharge at the outset, the majority were not prepared to find (as the Chief Justice had) that the award creditor has a *legal onus* to establish the validity of a foreign award or arbitration agreement, including that the award debtor is a party to the arbitration agreement. This was for the reasons set out at paras [162]-[174] and [179] of the judgment of the majority.

In particular, the majority concluded that the considerations supporting the view that ss 8(3A), 8(5) and 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 (in effect as a ground for resisting enforcement) were more compelling than the considerations supporting the contrary view.¹⁹² According to the majority, to treat the issue of whether a person was a party to an arbitration agreement as standing outside of the legislative scheme that applies to all other grounds of impugning an award would fly in the face of the express language of s 8(3A) of the IAA¹⁹³ that the Court may only refuse to enforce an award in the circumstances mentioned in ss 8(5) and 8(7).

Similarly, the majority said that 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 arbitration agreement. According to the majority, it was neither logical nor consistent with the language of the IAA to elevate the importance of privity of contract over the importance of the validity of the contract.¹⁹⁴

In relation to the question as to whether s 8(5)(b) of the IAA extends to the ground that the award debtor was not a party to the arbitration agreement, the majority agreed with the approach that had been adopted in the English cases, in particular in *Dallah* and *Dardana*¹⁹⁵ (as had Croft J at first instance). In this regard, the majority did not share the approach of Warren CJ in distinguishing these English cases because of the differences in the wording of the Australian and English sections.¹⁹⁶ Although the majority did find that these differences in wording justified their conclusion as to there being an evidential onus on the award creditor initially to prove the matters identified in the three bullet points appearing on the previous page on a prima facie basis.¹⁹⁷

But once the Court is satisfied on a prima facie basis that the award debtor is a party to the arbitration agreement in pursuance of which the award was made, if the award debtor disputes that it was a party to that agreement, the majority concluded that the legal onus was upon the award debtor under s 8(5)(b) of the IAA to prove that fact.¹⁹⁸ According to the majority, this approach and interpretation of the IAA promotes the objects of the IAA as required by

¹⁸⁹ *IMC Aviation Solutions Pty Ltd v Altain Khuder LLC* (2011) 253 FLR 9, [144].

¹⁹⁰ Whether by producing an arbitration agreement naming the award debtor or (where the award debtor is not named) by the adducing of extrinsic evidence that the award debtor is a party to that agreement.

¹⁹¹ *IMC Aviation Solutions Pty Ltd v Altain Khuder LLC* (2011) 253 FLR 9, [145].

¹⁹² *Ibid* [169].

¹⁹³ Which as noted earlier was added to the IAA by the amendments made by the *International Arbitration Amendment Act* 2010 (Cth).

¹⁹⁴ *IMC Aviation Solutions Pty Ltd v Altain Khuder LLC* (2011) 253 FLR 9, [170].

¹⁹⁵ *Ibid* [171]-[172] and [180]-[184].

¹⁹⁶ *Ibid* [184].

¹⁹⁷ *Ibid* [184].

¹⁹⁸ *Ibid* [173].

s 39 of the *IAA* and s 15AA of the *Acts Interpretation Act 1901*.¹⁹⁹ It was also said that this was consistent with ‘highly persuasive international jurisprudence on the *Convention*’ and in particular the dicta and decisions in *Dardana* and *Dallah*.²⁰⁰

In applying the above principles to the facts of the case before them, the majority found that the trial judge erred in the approach he had taken at the initial stage of the inquiry. In particular, they concluded that Croft J should not have made an ex parte order for the enforcement of the award against IMC Solutions because it was not apparent on the face of the arbitration agreement that it was a party to that agreement.²⁰¹ Instead, Croft J should have ordered that IMC Solutions be given notice of Altain Khuder’s application to enforce the award against it and that application should have been heard *inter partes*.²⁰²

According to the majority, at that *inter partes* hearing, the evidential onus would have been on Altain Khuder to establish the matters identified in the three bullet points referred to earlier in section 4.2.1 of this paper on a prima facie basis. IMC Solutions would not have had the legal onus to establish one of the s 8(5) or s 8(7) grounds unless Altain Khuder had discharged that initial burden.²⁰³

The majority considered the evidence that had been before the trial judge and (like Warren CJ) formed an adverse view as to the admissibility of large portions of the evidence that Altain Khuder relied upon.²⁰⁴ Although in the end, the findings and conclusions which the majority reached based on that evidence were expressed as ones that they would have reached in any event even if the evidence which IMC Solutions had objected to was not excluded. In the circumstances, both the question of whether Altain Khuder had satisfied its initial evidential onus²⁰⁵ and (assuming it had done so) the next question as to whether IMC Solutions had satisfied its legal onus, fell to be determined on the whole of this evidence. In this regard, the majority concluded:²⁰⁶

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 [IMC Solutions] was a party to the Arbitration Agreement. This is so even if his Honour had rejected all of IMCS’ objections to the admissibility of Mr. Batdorf’s affidavits.

Accordingly, as Altain Khuder had the evidential onus of persuading the Court on a prima facie basis that IMC Solutions was a party to the arbitration agreement in pursuance to which the award was made, the majority concluded in view of their assessment of the evidence that Croft J should have found that Altain Khuder had failed to discharge that onus and for that reason should have dismissed its application for the enforcement of the award as against IMC Solutions.²⁰⁷ The majority also went on to say that even if that conclusion was wrong and the legal onus was on IMC Solutions to establish on the balance of probabilities one of the grounds under s 8(5) or s 8(7) of the *IAA* (under the approach Croft J had taken), IMC Solutions had in any event discharged that onus in relation to the grounds appearing in s 8(5)(b),(c) and s 8(7)(b)²⁰⁸ and the Court was therefore also entitled to refuse to enforce the award against IMC Solutions on that basis.

4.2.2 The Standard of Proof Under s 8(5) and s (7)

At first instance, Croft J substantially accepted the submissions of Altain Khuder that an award debtor can only discharge the onus of resisting the enforcement of an award by providing the Court with clear, cogent and strict proof in relation to the exhaustive grounds listed under ss 8(5) and 8(7) of the *IAA*, and that in doing so, the award debtor was not entitled to venture towards reconsideration of the substantive or procedural findings of the arbitral

¹⁹⁹ Ibid [174].

²⁰⁰ Ibid [180].

²⁰¹ Ibid [196]. Although the majority concluded that Croft J had not erred in making an ex parte order against IMC Mining at that stage because it was named in the arbitration agreement.

²⁰² As already noted, this is not likely to be a relevant consideration in those jurisdictions such as New South Wales and the Federal Court where the application for enforcement is required to be served on the award debtor and the award debtor is given an opportunity to respond to the application before any order for enforcement of the award is made.

²⁰³ *IMC Aviation Solutions Pty Ltd v Altain Khuder LLC* (2011) 253 FLR 9, [200].

²⁰⁴ Ibid [201]–[230].

²⁰⁵ ie to prove those matters which it was required to prove on a prima facie basis at the outset.

²⁰⁶ *IMC Aviation Solutions Pty Ltd v Altain Khuder LLC* (2011) 253 FLR 9, [234], [239], [242] and [250].

²⁰⁷ Ibid [260].

²⁰⁸ Ibid [261].

tribunal. This was said to flow from the essential nature of the proceedings as enforcement proceedings coupled with the overriding pro-enforcement policy underpinning the *IAA* and *Convention*. Croft J found that the correctness of this approach was supported by the authorities to which he had been referred and ss 2D and 39 of the *IAA*.²⁰⁹

However, on appeal, the majority of the Court of Appeal rejected this approach, concluding (at [192]) that there were several difficulties in the path of the reasoning of Croft J.

The first was that the *IAA* neither expressly nor by necessary intendment provides that the standard of proof under ss 8(5) and 8(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’. Section 8(7) refers to a finding by the Court. In both cases, it is on the balance of probabilities. What may be required in a particular case to produce proof on the balance of probabilities will depend on the nature and seriousness of what is sought to be proved. According to the majority, it was evident that what Croft J had done was to read into ss 8(5) and 8(7) qualifications that had the effect of raising the barrier to an evidentiary higher level of satisfaction than the terms or language of those sections required. Accordingly, the majority found that the *IAA* does not warrant, let alone require, the qualifications that Croft J found in this regard or, indeed, a standard other than that of the balance of probabilities.²¹⁰

The second difficulty concerned the finding of Croft J that clear, cogent and strict proof was required. The majority concluded that this had been derived by reference to statements made in cases that were not under the *IAA*, which mis-stated or overstated what had been earlier said and which were inapt because they had been derived in circumstances more appropriately to proof of fraud (which was not the case here).²¹¹ The majority were also not persuaded that the approach adopted by Croft J in this regard was warranted by reference to the enforcement nature of the proceedings and the pro-enforcement policy of the *IAA*.²¹²

However, the view of the majority was not entirely shared by the Chief Justice who was prepared to accept that the onus placed on an award debtor in respect of the defences in s 8(5)(a)-(e) ‘can be properly described as a heavy onus’.²¹³ In this regard, her Honour went on to say:

In accordance with ss 2D and 39 and the policy underlying the *IAA* and *Convention*, the Court’s starting point is that most arbitral awards, subject to formal requirements, should be enforced. The defences in s 8 constitute allegations that are serious. An enforcing court will not be persuaded lightly that it is more than likely that such an allegation or defence is correct.²¹⁴

But as her Honour also explained, this is not to say that the *IAA* imposes or s 8(5) is subject to a standard of proof other than the normal civil standard. The cogency of the evidence required to discharge the civil standard of proof can depend upon the issue sought to be proved.²¹⁵ According to the Chief Justice, s 8(5)(a)-(e) requires 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 *IAA* declares arbitration to be ‘an efficient, impartial, enforceable and timely method by which to resolve commercial disputes’,²¹⁶ 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 and 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

²⁰⁹ *Altain Khuder LLC v IMC Mining Inc & Anor* (2011) 246 FLR 47, [64].

²¹⁰ *IMC Aviation Solutions Pty Ltd v Altain Khuder LLC* (2011) 253 FLR 9, [192].

²¹¹ *Ibid* [194].

²¹² *Ibid* [195].

²¹³ *Ibid* [43] and [52]-[53]. Although of course, in this context, Warren CJ found (contrary to both the majority and Croft J) that the issue of whether the award debtor was a party to the arbitration agreement pursuant to which the award was made was not a defence and therefore not a matter that was subject to this ‘heavy onus’.

²¹⁴ *Ibid* [43].

²¹⁵ *Ibid* [52].

²¹⁶ *International Arbitration Act* 1974 (Cth) s 39.

subsequently asserted, will be a relevant fact to consider when deciding whether that burden has been discharged to the necessary standard.²¹⁷

4.2.3 Estoppel

At first instance, Croft J found²¹⁸ that IMC Solutions was estopped from denying the validity of the arbitration agreement or that it was a party to that agreement. This was based on his finding that it had participated in the arbitration proceedings and having regard to the unchallenged decision of the tribunal. It had also been argued that an estoppel applied because the award had been tested and accepted at the seat of the arbitration.²¹⁹ In this regard, Croft J stated that it was clear on the authorities that a ruling by a supervising court at the arbitral seat may raise certain issue estoppels binding on the courts at the place of enforcement.²²⁰

However, the above findings were rejected by the Court of Appeal.

This was especially so by the majority who concluded that the precise nature of the estoppels that Croft J had found and the factual and legal bases for them was not clear.²²¹ The majority also found (a) that there was no substance to the submissions advanced by Altain Khuder that Croft J had found and the evidence before him had established an issue estoppel (estoppel of record), estoppel by conduct or estoppel as a matter of fact and (b) those findings were not open on the evidence.²²² In particular, the majority concluded that the evidence that had been before Croft J did not support a finding that IMC Solutions had participated in the arbitration. Accordingly, it was not open to the Court to find an estoppel on that basis.

Further, insofar as it had been submitted that the estoppel arose from a failure by IMC Solutions to apply to the Mongolian court to set aside the arbitral tribunal's award, according to the majority that suggestion was based on an error of law, especially having regard to the observations of Lord Mance in *Dallah*.²²³ In particular the majority concluded in this regard:

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.²²⁴

Warren CJ found that the reasoning and conclusions of Croft J on the estoppel issue had been determined at least in part on inadmissible evidence (to which IMC Solutions had taken objection but which Croft J had not ruled on) and findings made by the judge on the basis of that evidence, and must therefore be set aside.²²⁵ As with her Honour's finding on the question of whether IMC Solutions was a party to the arbitration agreement, the Chief Justice did not go on to determine the question of whether IMC Solutions was in fact estopped as Altain Khuder alleged or to express any view as to the existence of any estoppel.²²⁶ But for the determination of the majority that the estoppel alleged by Altain Khuder had not been made out based on the majority's own examination and analysis of the whole of the evidence that was before the Croft J, this is another issue which Warren CJ would have referred back to the his Honour for redetermination.²²⁷

Nevertheless the Chief Justice did make some observations in her judgment about the way in which the assertion of an estoppel should be addressed in the context of a proceeding to enforce an arbitral award.²²⁸ In this regard, her Honour recognised that an award debtor's conduct in respect of the arbitration proceeding and any relevant

²¹⁷ *IMC Aviation Solutions Pty Ltd v Altain Khuder LLC* (2011) 253 FLR 9, [53].

²¹⁸ *Altain Khuder LLC v IMC Mining Inc & Anor* (2011) 246 FLR 47, [98].

²¹⁹ *Ibid* [75].

²²⁰ *Ibid* [70].

²²¹ *IMC Aviation Solutions Pty Ltd v Altain Khuder LLC* (2011) 253 FLR 9, [311].

²²² *Ibid* [316] and [317].

²²³ *Ibid* [318]-[319].

²²⁴ *Ibid* [321].

²²⁵ *Ibid* [23].

²²⁶ *Ibid* [24].

²²⁷ *Ibid* [62].

²²⁸ *Ibid* [25]-[27].

proceedings brought before the courts having supervisory jurisdiction over the arbitration may give rise to an issue estoppel, estoppel by convention or some other established category of estoppel. The IAA contains nothing to suggest that it was intended to exclude the application of ordinary principles of estoppel. But whether or not such an argument or estoppel is made out is largely a factual matter and a matter for evidence.²²⁹ Further, her Honour observed that the manner in which estoppel has been used to preclude an alleged award debtor from resisting enforcement in other jurisdictions was not necessarily determinative of the issue in Australia and that Australian principles of estoppel are not necessarily identical to those applicable in other jurisdictions.²³⁰

4.2.4 Indemnity Costs

In his second judgment, Croft J acceded to a submission by Altain Khuder that it recover its costs of the enforcement proceedings on an indemnity basis (rather than the usual party/party costs). This was principally in reliance upon the judgment of Reyes J in the Hong Kong Court of First Instance in *A v R*,²³¹ which had been subsequently considered and applied in three later decisions of the Hong Kong Court of First Instance. Croft J concluded that:

On the basis of these decisions, it does appear to be 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 award.²³²

At the hearing before Croft J, Altain Khuder had argued that this approach should also be applied to enforcement proceedings in Australia. This was for two reasons. The first was because the award debtor had been unsuccessful in seeking to set aside the orders that Croft J had initially made on Altain Khuder's ex parte application. Secondly, it was said that the introduction of the *Civil Procedure Act* 2010 in Victoria further strengthened the analogy to be drawn with the approach and reasoning in *A v R*.²³³

In response, IMC Solutions had submitted inter alia that whilst the decision in *A v R* may represent good law in Hong Kong, it would turn on its head the settled approach to the award of costs in Victoria and indeed the rest of Australia.²³⁴

However, it was the submissions of Altain Khuder that prevailed at that hearing. In accepting those submissions, Croft J stated that the classes of special circumstances in which indemnity costs may be ordered under the existing Australian authorities were not closed and that in his opinion the considerations which moved the Hong Kong Court in the cases he was referred to to award indemnity costs applied with equal force in Victoria, both from an arbitration perspective and also from the perspective of legislation such as the *Civil Procedure Act* and the *Hong Kong CJR*.²³⁵

However, this approach was firmly rejected by all three members of the Court of Appeal. This was especially to the extent that it suggested that indemnity costs might be ordered (in effect) as a matter of course in arbitration proceedings or proceedings for the enforcement of an arbitral award where the application for enforcement was unsuccessfully opposed by the award debtor.

Ultimately, the Chief Justice found that insofar as Croft J had mistakenly characterised the substantive decision which he was required to make as an application to resist enforcement of the award by IMC Solutions pursuant to ss 8(5) and 8(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 and should therefore be set aside.²³⁶

Moreover, given the Court of Appeal's conclusion that the appeal should be allowed and the orders below should not have been made, strictly speaking it was not necessary for the Court to reconsider the decision of Croft J on the

²²⁹ Ibid [26].

²³⁰ Ibid [27].

²³¹ *A v R* [2009] 3 HKLRD 389, [67]-[72].

²³² *Altain Khuder LLC v IMC Mining Inc & Anor* (no 2) [2011] VSC 12, [14].

²³³ Ibid [15]. This was for the reasons at [16]-[17].

²³⁴ Ibid [19].

²³⁵ Ibid [20].

²³⁶ *IMC Aviation Solutions Pty Ltd v Altain Khuder LLC* (2011) 253 FLR 9, [58].

question of costs or the basis on which they should be assessed. Altain Khuder was no longer a successful party and therefore no longer a party entitled to its costs (on whatever basis they might have been assessed). Nevertheless, the Chief Justice did go on to express her views on this issue.

In this regard, her Honour noted that a decision by a Court to award indemnity costs against an unsuccessful party is dependent 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. Such a departure will only be countenanced in the presence of ‘special circumstances’. According to her Honour, unsuccessfully resisting enforcement of a foreign arbitral award is not an established category of special circumstances in Australia (although her Honour acknowledged that the categories of special circumstances are not closed).²³⁷

Whilst Warren CJ went on to refer both to the judgment of Reyes J in *A v R* and to the three considerations on which that decision to award indemnity costs was based, her Honour concluded that it was not necessary for her to express a view on whether the approach in that case should be followed in Victoria. However, her Honour did accept that the terms and objects of the *IAA* will be a relevant factor to be considered when the Court is exercising its discretion to award costs.²³⁸

The majority of the Court of Appeal did, however, reject the approach that Croft J had favoured on the question of the assessment of costs, including his embracing of the approach taken in Hong Kong by ordering indemnity costs against the unsuccessful award debtor and in favour of the successful award creditor. This was for the reasons given at [323]-[342] of their joint judgment. In particular, the majority said in this regard (foot notes deleted)

[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. Accordingly, his Honour acted on a wrong principle in embracing 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.

[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.

For much the same reasons, the appeal from the order for costs on the same basis in his Honour’s third judgment was also allowed by the Court of Appeal

4.3 The Implications of the Court of Appeal’s Judgment

4.3.1 Onus Where the Award Debtor Denies Being a Party to the Agreement

The only recent Australian authority on this question of onus prior to the judgment of the Court of Appeal was the judgment of Croft J, which followed and was consistent with the approach taken in the recent English cases. That judgment was also viewed as being consistent with the current pro-arbitration and pro-enforcement policy underlying the recent legislative changes. Neither the judgment of Croft J nor the approach that his Honour favoured

²³⁷ Ibid [55].

²³⁸ Ibid [59].

has as yet been followed or applied (at least expressly) in this regard in any judgment of any other Australian Court including prior to the judgment of the Court of Appeal in *Altain Khuder*.²³⁹ Nor to my knowledge has there been (as at the date of this paper) any judgment since then, which has commented on either the judgment of Croft J or the Court of Appeal on this issue.

The judgment of the Court of Appeal is binding on single instance judges in Victoria who are bound to follow it.²⁴⁰ It can therefore be expected that the approach of the Court of Appeal will be applied in future proceedings for the enforcement of foreign awards brought in the Victorian Courts.²⁴¹

However, the Court of Appeal's judgment is not binding on either the Federal Court or the courts of the other States and Territories. Nevertheless, in the absence of any judgment within those Courts on this point and inconsistent with the Court of Appeal's judgment, both first instance judges and the Courts of Appeal or Full Courts of those States and Territories as well as those of the Federal Court are bound to treat the judgment of the Court of Appeal as a persuasive judgment of another intermediate appellate Court on a Commonwealth Act that has application throughout Australia²⁴² which should be followed unless that other Court concludes that the Court of Appeal's judgment is 'plainly wrong'.²⁴³ Despite the criticism that the Court of Appeal's judgment has received to date (and which is discussed later in this paper), it is perhaps unlikely that another judge or Court would form that view, especially a first instance judge.²⁴⁴ But in any event, the circumstances in which the differences between the approach of the Court of Appeal and that of Croft J are likely to be relevant or material to the outcome of subsequent proceedings for the enforcement of an award are relatively narrow (as the discussion below illustrates). Accordingly, the possibility of another Court being in a position where, if it disagrees with the approach of the Court of Appeal and instead favours the approach of Croft J (which the Court of Appeal rejected) the resolution of that issue will be determinative of the outcome of the proceedings (or a significant issue in those proceedings), is likely to occur infrequently.

It therefore remains to be seen whether the Court of Appeal's judgment will be followed and applied by either the Courts of the other States and Territories or the Federal Court or whether any of those Courts take a different view on these issues and in particular follow the approach of Croft J in preference to that of the Court of Appeal.

As will be apparent from the foregoing discussion, there are some matters on which the Chief Justice and the majority of the Court of Appeal were agreed and other matters in respect of which their opinions differed. Assuming that the Court of Appeal judgment is followed in subsequent cases, then to the extent that there are such differences, it is presumably the view and approach of the majority, rather than that of the Chief Justice, that would prevail and be followed or applied. That would especially be so of applications before first instance judges in Victoria. However, that is not necessarily so of the Courts of other States and the Federal Court should they find that the judgment and approach of the majority is 'plainly wrong' and that of the Chief Justice is to be preferred.

It also follows from my earlier discussion that the approaches of both the majority and the Chief Justice in the Court of Appeal impose upon an award creditor an initial burden (or threshold) beyond the requirements of s 9(1) of the IAA and to show that the award debtor is a party to the arbitration agreement in pursuance of which the award was made. This is said to flow from the language of s 8(1).

Where the award debtor is named in the arbitration agreement, then production to the Court of the award and that agreement (in compliance with s 9(1)) would satisfy this first step on each of the competing views:

²³⁹ Although the judgment was cited by Foster J in *Uganda Telecom Ltd v Hi-Tech Telecom Pty Ltd (No 2)* [2011] FCA 206 that was only in the context of the appropriate form of order to be made where a judgment is to be enforced.

²⁴⁰ In the absence of a contrary statement from the High Court (which as noted above will not occur in this case and so must await another matter) or a later contrary statement by the Victorian Court of Appeal.

²⁴¹ At least until the Court of Appeal or the High Court has the opportunity to comment on this issue and says otherwise.

²⁴² *Cargill Insurance SA v Peabody Australia Mining Ltd* (2010) 78 NSWLR 533 [2010] NSWSC 887, [48].

²⁴³ *Ibid* [50]-[51].

²⁴⁴ Although it is not beyond the realm of possibilities as the decision in *Cargill Insurance SA v Peabody Australia Mining Ltd* (op cit) demonstrates.

- this would clearly be sufficient for the purposes of the approach taken by Croft J. At that point, if the award debtor denied that it was a party to the arbitration agreement, it would bear the burden of proving that fact to the requisite standard as part of its s 8(5)(b) defence;
- on the view of the majority, this would also constitute sufficient evidence to satisfy the prima facie burden that the award creditor bears, with the result that if the award debtor disputes that it is a party to that agreement, then the legal burden is on the award debtor to prove that fact to the requisite standard applicable to s 8(5)(b);
- this would also be sufficient on the view of Warren CJ to allow the application for enforcement to proceed, although on this approach if the award debtor did wish to dispute that it was a party to the arbitration agreement and did adduce evidence to that end, the legal burden of proving that the award debtor is a party to that agreement would remain with the award creditor (and the award debtor would have no onus or burden in that regard).

In the above circumstances, there is no appreciable difference between the approach of the majority of the Court of Appeal and that of Croft J.

Further, as a practical matter, the second and third of the above positions (and therefore the approaches of the majority and the Chief Justice) are not likely to result in any appreciable difference in the conduct or outcome of an application for enforcement of an award, unless there is evidence from both the award creditor and award debtor and the Court is unable to make a determination from that evidence one way or the other as to whether the award debtor was a party to the arbitration agreement.

In those circumstances, the identification of the party who bears the onus and who has thereby failed to discharge that onus may be determinative of the outcome. However, in that situation where there is competing evidence, the Court would usually endeavour to come to a finding one way or the other on that evidence.²⁴⁵ If the evidence before it was sufficient for the Court to find that the award debtor was a party to the arbitration agreement, then on the approach of the Chief Justice the award creditor will have discharged the onus it bears; conversely on the approach of the majority the award debtor will have failed to establish its defence. If however the evidence before the Court is not sufficient for it to make that finding, then on the approach of the Chief Justice the award creditor will have failed to discharge the onus it bears and the application for enforcement would be dismissed; conversely on the approach of the majority, the award debtor's s 8(5)(b) defence will have succeeded and the Court would be entitled to refuse enforcement of the award under that sub-section.

If the award debtor is not named in the arbitration agreement, then on the approach of both the majority and Chief Justice the award creditor would need to do more than just produce the award and arbitration agreement in compliance with s 9(1). It would also need to put before the Court extrinsic evidence to the effect that the award debtor was a party to that agreement. If the award creditor fails to do this, then its application for enforcement of the award is bound to fail. This is because the award creditor has not discharged the threshold onus that the Court of Appeal concluded it owed under s 8(1) of the IAA.

It is at this stage that the approach of the Court of Appeal differs from that adopted by Croft J. Under the latter, even if the award debtor is not named in the arbitration agreement, the award creditor need still only produce the award and arbitration agreement. Having done so, if the award debtor disputes that it was a party to that agreement, then that is an issue which it must advance under s 8(5)(b) of the IAA and on which the award debtor bears the burden of proof to the requisite standard. If the award debtor failed to adduce any or sufficient evidence to discharge that onus,²⁴⁶ then its defence would fail and in the absence of any other defences under ss 8(5) or 8(7), the award creditor would be entitled to have the award enforced against the award debtor.²⁴⁷ This is notwithstanding that on the face of the arbitration agreement, the award debtor is not a party.

²⁴⁵ As the majority did in *IMC Aviation Solutions Pty Ltd v Altair Khuder LLC* (2011) 253 FLR 9.

²⁴⁶ And one imagines that an arbitration agreement in which it is not named might in the absence of anything else be at least a good starting point in that regard.

²⁴⁷ Or any ex parte order earlier obtained would not be set aside, as was the result before Croft J.

But if in the above situation the award creditor is able to adduce extrinsic evidence to the effect that the award debtor is a party to the arbitration agreement, then:

- under the approach of the majority of the Court of Appeal, the legal burden is on the award debtor to prove that it is not a party and if it fails to discharge that onus then its defence fails and (subject to any other defences that may be available) the award would be enforced against it. In this regard, the position under the majority approach would be no different to that under the approach of Croft J;
- under the approach favoured by the Chief Justice, if the award debtor adduced evidence to that contrary of the extrinsic evidence initially put on by the award creditor, then the award creditor would still maintain the burden of persuading the Court that on the whole of that evidence and on the balance of probabilities, the award debtor was a party to the arbitration agreement. If the Court was not willing or able to make that finding on the evidence before it, then the award creditor would have failed to discharge the burden it bears. Whilst this approach differs from that of Croft J and the majority conceptually,²⁴⁸ if both the award creditor and award debtor put on evidence and the Court is able to make a finding one way or the other as to whether or not the award debtor is a party to the arbitration agreement, then the outcome is likely to be the same and unlikely to turn on a consideration of who bears the onus of proof on this issue and whether or not that onus has been discharged.²⁴⁹

Another practical difference between the approach of the majority and that of the Chief Justice is that under the latter, the award debtor may at an *inter partes* hearing move to dismiss the award creditor's application at the conclusion of the award creditor's case and before the award debtor goes into evidence, if there is insufficient evidence from the award creditor to prove on the balance of probabilities that the award debtor was a party to the arbitration agreement. Such an application is, however, unlikely or less likely to succeed under the approach of the majority of the Court of Appeal, as (under that approach) all the award creditor has to do to resist or avoid that application and shift the burden of proof onto the award debtor is to produce sufficient evidence to satisfy a *prima facie* case that the award debtor is a party to the agreement. Such an application would, of course, not be open under the approach of Croft J once the award and arbitration agreement have been produced to the Court (even if the award debtor was not named in it). This is because under this approach the onus is always on the award debtor to make out that argument as a defence to the award creditor's claim for enforcement of the award (and under s 8(5)), if it wishes to dispute that is a party to that agreement.

As can be seen from the foregoing comments, in effect the additional obligation that compliance with the approach of the majority of the Court of Appeal imposes on an award creditor beyond both the approach adopted by Croft J and the mere production of the documents referred to in s 9(1) of the IAA, is the need for sufficient evidence that the award debtor is a party to the arbitration agreement where that is not apparent from the agreement itself:

- a) where it is apparent, then as a practical matter nothing further is required of the award creditor under the approach of the majority. Moreover, if in that situation the award debtor wishes to dispute that it is a party to that agreement, then under both the approach of Croft J and also the majority, that is a matter which the award debtor has the onus of proving to the requisite standard as a defence under s 8(5)(b) of the IAA to the award creditor's claim for enforcement of the award;
- b) however where it is not apparent that the award debtor is a party to the arbitration agreement pursuant to which that award was obtained, then under the approach of the majority the award creditor would have to put on sufficient evidence to establish on a *prima facie* basis that the award debtor is a party to that agreement. If it does and the award debtor does not put on any evidence to the contrary, then the award debtor will have failed to discharge the legal onus it bears. In that situation, the *prima facie* position should inure and, subject to any other defences the award debtor may have, the award would be enforced. If however the award debtor did put on contrary evidence after the award creditor had established a *prima facie* case, then the question will be whether on all of that evidence the award debtor has done enough to discharge (to the requisite standard) the legal burden of proof that it bears

²⁴⁸ As to whether this issue is a threshold issue and who bears the burden of proof.

²⁴⁹ One possible qualification to the above would be if the standard of proof that the award creditor and award debtor were required to satisfy in order to meet their respective burdens under these competing approaches differed. Although if the view of the majority of the Court of Appeal in this regard is accepted as being correct, that is also unlikely to result in an appreciable difference.

As the Chief Justice said at the outset of her judgment, the claim in the *Altain Khuder* case was unusual and required the Court to determine an issue which is ordinarily uncontroversial in enforcement proceedings.²⁵⁰ Usually one would expect the party against whom an arbitral award had been obtained would be named in the arbitration agreement. In that more usual situation, as I have endeavoured to illustrate, both the obligations on the award creditor and the likely outcome would be identical²⁵¹ under both the approaches of Croft J and the majority of the Court of Appeal.

Nevertheless there could be many reasons why the party against whom the award has been obtained is not named in the arbitration agreement and if the approach of the majority is to be applied, then in that situation any application by the award creditor for the enforcement of the award would need to be supported by extrinsic evidence both directed at explaining how or why the award debtor is in fact a party to the arbitration agreement and sufficient to show this on a prima facie basis. For instance, the failure of the arbitration agreement to name the award debtor may be due to:

- misnomer – in which case there should be evidence explaining the mistake and reason for it or the true identity of the parties to the agreement;
- the party named may have been acting as an agent and its principal (the award debtor) is either not disclosed in the agreement itself (although known to the award creditor at the time and/or disclosed elsewhere) or possibly not disclosed at all – in which case there should be evidence of that agency which binds the award debtor to an agreement that the person named has entered into;
- the award debtor may be a successor in title to the person named or have acquired the benefit of the agreement by novation etc – in which case there should be evidence of the circumstances in which the award debtor came to be in that position.

The list of the above examples is not intended to be exhaustive.

But once this additional evidence has been put on (and assuming that it is sufficient to meet the prima facie standard), then the onus is upon the award debtor to prove otherwise if it wishes to contend that it is not a party to the arbitration agreement and to resist enforcement of the award on that basis. If the award debtor puts on such evidence, then the application for enforcement of the award would proceed in the same way as it would had the debtor been named in the agreement and under the approach favoured by Croft J namely, the Court would be required to determine that question on which the award debtor bears the burden of proof.

Presumably the award creditor is a party to the arbitration agreement (or agreement in which the arbitration agreement is found), knows with whom it was contracting by way of that agreement, has brought arbitral proceedings against the award debtor as that party and succeeded in that claim. In those circumstances, presumably the award creditor should be able to put before the Court *some* evidence revealing the link between the award debtor and the arbitration agreement, if it is not otherwise apparent from the agreement itself. In such circumstances the imposition upon the award creditor of a threshold requirement to adduce such evidence (as part of and in support of its application to enforce the award) should therefore not be that onerous or difficult.

Moreover, if the award creditor is unable to adduce sufficient evidence to satisfy the prima facie standard, then under the approach of both the majority of the Court of Appeal and that of the Chief Justice the application for enforcement would fail *in limine*. But arguably such an outcome is hardly unfair in those circumstances. This is especially if the award creditor is in the position described in the immediately preceding paragraph and should therefore be able to produce evidence of that link between the arbitration agreement and the award debtor who is said (by the award creditor) to be bound by that agreement.

4.3.2 Standard of Proof of the Award Debtor's Defence

If the award creditor is able to satisfy its threshold onus and the legal burden then passes to the award debtor to establish that it is not a party to the arbitration agreement if it wishes to resist enforcement of the award on that basis, then it would appear from the judgment of the majority that the award debtor must do so to the ordinary civil

²⁵⁰ *IMC Aviation Solutions Pty Ltd v Altain Khuder LLC* (2011) 253 FLR 9, [3].

²⁵¹ Although not as the standard of proof, if that is an issue (see below).

standard and not to some higher or more onerous burden. To the extent that the judgment and comments of Croft J in this regard might be read as suggesting that the award debtor was subject to such a higher standard, then (in light of the judgment of the majority) his Honour was wrong and that approach should not be followed.

There is perhaps one qualification to the above. The application of the ordinary civil standard may to some extent be qualified in the manner suggested in the judgment of the Chief Justice, who found that the onus placed on an award debtor by the s 8(5) defences was a *heavy one*²⁵² and that the enforcing court would *not be persuaded lightly* that any of the allegations in s 8(5)(a)-(e) were made out. But this is not so much a departure from the ordinary civil standard, as an instance where in order to discharge the civil standard of proof, the cogency of the evidence required will depend on the issue sought to be proved.²⁵³ This principle is more usually applied to where there are serious allegations of fraud and the like. Accordingly, where the s 8(5) or s 8(7) defence raises such considerations or allegations of that nature, then this more onerous standard may be said to apply. Conversely where (for example) the assertions underlying a claim by the award debtor that it is not a party to the arbitration agreement are more matter of fact, there may be no warrant for the application of this qualification or the more onerous standard.

4.3.3 Estoppel

In their respective judgments, the Chief Justice and majority of the Court of Appeal both recognized that in appropriate circumstances an award debtor may be estopped from denying that it is a party to the arbitration agreement or asserting that it is not a party to that agreement.

Such an estoppel may arise, for example, in the form of an issue estoppel out of the award debtor's participation in the arbitration or in subsequent proceedings brought in the country in which the award was made or whose law governs the award and which thereby has supervisory jurisdiction over the arbitration. Although, as the majority made clear in the quote in section 4.2.3 of this paper, such an estoppel would not normally arise merely from the award debtor's failure either (a) to appear in the arbitration or any subsequent proceedings at the place of arbitration where it denies that it is a party to the arbitration agreement and the arbitration or (b) to challenge an award in the country where the award was made or whose law governs the arbitration, on the basis that it was not a party to that agreement or the arbitration.

An estoppel may also arise out of representations (whether orally or by conduct) by the award debtor to the award creditor (for instance to the effect that it is a party to the agreement) which the award creditor has relied upon to its detriment it may also be a conventional estoppel arising from the conduct of both the award debtor and award creditor which is consistent with both parties believing and acting as if they were parties to the arbitration agreement. Again, the above list of examples is not intended to be exhaustive.

In each case, whether or not an estoppel arises is ultimately likely to be a question of fact and a matter for evidence. To that end, each case is likely to turn on its own facts and the evidence of those facts put before the Court. As noted earlier, the significance of this part of the Court of Appeal's decision in *Altain Khuder* is not so much about its finding that there was no estoppel established on the facts here (contrary to the findings and conclusion of the trial judge). Rather it is first as to the recognition of the possibility that an estoppel may be raised in an enforcement application. Secondly, it is as to the need for any evidence adduced of these matters to be in an admissible form. Otherwise, there is the risk that the party who bears the onus of establishing the estoppel will be unable to do so.

Presumably an award creditor may seek to assert and rely upon such an estoppel in order to discharge the threshold burden it bears (under the approach of the Court of Appeal).²⁵⁴ If so, then the award creditor would bear the onus of making out that estoppel and the facts necessary to establish it (as the party propounding the estoppel). It would also bear the onus of persuading the Court that what has been established by the evidence adduced by it is sufficient to meet its threshold burden.

²⁵² Although on the view of Warren CJ this heavy onus only applied to the award debtor and therefore did not apply to the burden of proving or disproving the award debtor was a party borne by the award creditor.

²⁵³ *IMC Aviation Solutions Pty Ltd v Altain Khuder LLC* (2011) 253 FLR 9, [52]-[53]. Such as *Bringinshaw v Bringinshaw* (1938) 60 CLR 336, 362.

²⁵⁴ This would of course be unnecessary under the approach favoured by Croft J.

Alternatively, where the award creditor has satisfied that burden and (on the view of the majority) the legal onus is with the award debtor, the award creditor may seek to assert and rely upon such an estoppel in an attempt to answer any claim by the award debtor that is not a party to the arbitration agreement as grounds for resisting enforcement of the award and a defence under s 8(5)(b) of the *IAA*. In those circumstances, the award creditor would again bear the burden of proving the estoppel alleged and the facts on which that estoppel rests (as the party propounding the estoppel), although ultimately the award debtor would still bear the onus of satisfying the Court on the whole of the evidence including that adduced in support of the estoppel that it is not a party to the arbitration agreement.

4.3.4 Availability of Indemnity Costs

In all jurisdictions in Australia, the usual rule is that a successful party recovers its costs of the proceedings on a party/party basis. As each of the judgments noted, the Court will generally only depart from that usual rule and grant costs on a solicitor/client or indemnity basis where there are special circumstances.

The awarding of indemnity costs in the circumstances which Croft J relied upon – in effect because the party opposing the enforcement of the award was unsuccessful in that opposition²⁵⁵ – is not an approach which has to date been adopted or applied by any other Court in Australia in the context of arbitration. To this extent the judgment of Croft J and his adoption and application of the approach taken in Hong Kong represented a new development in Australian law in this regard.

As the judgments of both Croft J and the Court of Appeal recognise, the central question in that case came down to whether merely being unsuccessful in resisting an application for enforcement of an award²⁵⁶ is sufficient to amount to a special circumstance, so as to warrant the Court departing from the usual rule and order that the unsuccessful award debtor pay the successful award creditor its costs on an indemnity basis. The approach adopted by Croft J seemed to suggest that it was.

But in light of the judgment of the Court of Appeal and more especially the dicta of the majority quoted in section 4.2.4 of this paper on page 35, it is plainly not.

The decision of the Court of Appeal in this regard is inconsistent with an argument that the current pro-arbitration and pro-enforcement policy extends to provide a foundation for a more favourable treatment for the assessment of costs in relation to arbitration matters and more especially proceedings for the enforcement of foreign awards.

Although, as the Chief Justice noted, the terms and objects of the *IAA* and the obligation imposed on the Court by s 39(2) are factors to which the Court should have regard when exercising its discretion including in relation to the making of an order for costs and the basis on which those costs are to be assessed, including in the context of an application for indemnity costs. But it is doubtful that those factors alone would be sufficient to warrant an order for indemnity costs or amount to special circumstances.

That is not to say that indemnity costs can not or will not be ordered in appropriate circumstances or where there are special circumstances going beyond merely a successful application for enforcement of an award or an unsuccessful opposition to the application for enforcement. Indemnity costs may, for instance, be awarded where an award debtor in resisting proceedings for the enforcement of an award has repeatedly failed to comply with the orders and directions of the Court and at the final hearing either puts up no defence at all or withdraws its legal representation.²⁵⁷ It may also be possible for an award creditor to obtain an order for indemnity costs in respect of at least part of its costs of proceedings to enforce an award, by making at an early stage of the proceedings an appropriate offer of compromise or calderbank offer of its claim in the enforcement proceedings and thereby award, and then bettering that offer if the application for enforcement of the award proceeds to a hearing and is both ultimately successful and in an amount exceeding the offer made.

²⁵⁵ Or in the two step process, the opposing party was unsuccessful in its application to set aside the ex parte order that the Court had earlier made that the award be enforced against it.

²⁵⁶ Or being unsuccessful in applying to have an ex parte order that the award be enforced set aside.

²⁵⁷ As Hammerschlag J did in *FG Hemisphere Associates LLC v Democratic Republic of Congo* [2010] NSWSC 1394, [14] and [17].

4.3.5 Criticism of the Court of Appeal's Judgment

The judgments of the Court of Appeal have been the subject of some criticism in the short time since they were delivered.²⁵⁸ This is especially on the issue of onus.

In particular, it has been said in this regard that the approach of the Court of Appeal is inconsistent with the intention and approach of the *New York Convention*, which pt II of the *Act* is seeking to give effect to. For instance, one leading authority (Professor Albert Jan van den Berg of Hanotiau & Van den Berg in Brussels) has been quoted as saying that the Court of Appeal 'got it wrong'.²⁵⁹ This is because:

In essence, the court ruled that, if the arbitration agreement does not name the award debtor, the party seeking enforcement has the burden of proving that debtor is a party to the arbitration agreement. That is not the manner in which the *New York Convention* is structured and operates.

Under article IV(1) of the convention, the award creditor needs to submit the arbitration agreement and award to the court when it applies for enforcement. Submission of those documents alone entitles the creditor to leave for enforcement, unless the respondent asserts and proves that one of the grounds for refusal of enforcement listed in article V(1) exists. One of those grounds is the lack of capacity of a party and a valid arbitration agreement - which, according to van den Berg, most courts in *New York Convention* contracting states interpret to cover a situation where the award debtor is not a party to the arbitration agreement.

If one of the respondents in the enforcement action believes that it is not bound by the arbitration agreement, it has the onus of proving the allegation. Such proof will not be difficult to produce if, on the face of it, the award is not based on the arbitration agreement that the party seeking enforcement has submitted. If the award mentions that it is based on that agreement, the respondent has to show that the arbitral tribunal was incorrect in finding that it was a party to the agreement. The Victorian Court of Appeal reversed this fundamental principle of the convention by requiring the party seeking enforcement to prove that a respondent is a party to the arbitration agreement.²⁶⁰

This criticism is perhaps more apt to the approach adopted by the Chief Justice in her separate judgment, especially insofar as her Honour treated the question of whether the award debtor is a party to the arbitration agreement as a threshold question which the award creditor must discharge (both initially and when in issue) and not as one of the limited defences that an award debtor may raise in resisting an application for enforcement under s 8(5). Assuming that the *Convention* is intended to operate in the manner described above, then in these two respects the approach of the Chief Justice is admittedly inconsistent.

But the criticisms made in the passage quoted above are less apt or applicable to the majority judgment and thereby to the approach that the majority of the Court of Appeal favoured and applied. Moreover, as already noted, to the extent that the judgment of the Court of Appeal is binding on lower courts and likely to be followed in the future, it is the judgment and approach of the majority, rather than the Chief Justice (at least in the respects in which their respective judgments differ), that is more likely to be followed and applied.

For instance, the approach of the majority does not require the award creditor to prove that the award debtor is a party to the arbitration agreement,²⁶¹ other than in a preliminary sense and on a prima facie basis. But once that threshold burden has been discharged (either upon the face of the arbitration agreement or by extrinsic evidence), under the approach of the majority, the legal burden remains on the award debtor to prove that it is in fact not a party to that agreement if it wishes to resist enforcement on that basis, consistent with both the way in which the critics

²⁵⁸ Alison Ross, 'Australian Court forges own path on enforcement' (2011) 6(5) *Global Arbitration Review*; Albert Monichino, 'International arbitration in Australia – 2010 / 2011 in review' (2011) 22 *Australasian Dispute Resolution Journal* 215, 226; [and since this paper was originally presented] Jonathan Kay Hoyle, 'Enforcing a foreign award : not as straightforward as it seems ?' (2012) *Bar News: The Journal of the NSW Bar Association*, 38-43; Albert Monichino SC 'International Arbitration in Australia: The Need to Centralise Judicial Power' (2012) 86 *ALJ* 118, 122-124 (the solicitor for IMS responded to the criticisms in this latest article in a letter published at (2012) 86 *ALJ* 153).

²⁵⁹ Albert Monichino, 'International arbitration in Australia – 2010 / 2011 in review' (2011) 22 *Australasian Dispute Resolution Journal* 215, 226.

²⁶⁰ Alison Ross, 'Australian Court forges own path on enforcement' (2011) 6(5) *Global Arbitration Review*; also quoted in Albert Monichino SC 'International Arbitration in Australia: The Need to Centralise Judicial Power' (2012) 86 *ALJ* 118 at 123

²⁶¹ As the last sentence of the passage quoted in s 4.3.5 above suggests, namely 'The Victorian Court of Appeal reversed this fundamental principle of the convention by requiring the party seeking enforcement to prove that a respondent is a party to the arbitration agreement.'

contend the *Convention* was intended to and does operate and the alternate approach of Croft J which the critics prefer.

Similarly, the approach of the majority of the Court of Appeal does not impose the burden of proving that the award debtor is a party to the arbitration agreement upon the award creditor where the award debtor is not named,²⁶² again other than in a preliminary sense and on a prima facie basis. For the reasons given earlier,²⁶³ one might expect an award creditor to be in a position to meet that limited burden and provide such prima facie evidence. Once the award creditor has done so, then the legal burden remains on the award debtor to prove that it is in fact not a party to that agreement if it wishes to resist enforcement on that basis (again consistent with the *Convention* and the way in which the critics of the Court of Appeal's judgment suggest it operates).

It is therefore true to say that if the *Convention* is intended to operate and generally operates in the manner set out in the passage quoted above, even the approach favoured by the majority of the Court of Appeal is inconsistent with it. But this is only to a limited extent and only insofar as the majority found that an award creditor should bear this prima facie threshold burden.

Moreover, this difference in approach is only likely to arise in the first place in the unusual situation where the award debtor is not named in the arbitration agreement. But where the award debtor is named in the arbitration agreement, then production of the award and that agreement will satisfy this preliminary threshold and the position will be no different to the approach taken by Croft J or that propounded by the critics of the Court of Appeal's judgment. Secondly, once this additional threshold burden has been discharged by the award creditor, the approach of the majority accords with that of the proponents of the *Convention* if the award debtor wishes to argue that it is not a party to the arbitration agreement and that the award should not be enforced for that reason.

Accepting that there is this limited difference and inconsistency between the *New York Convention* and the approach favoured by the majority, it is also to be recalled that in Australia, the Court is required to construe the provisions of pt II of the Act and not the terms of the *Convention* directly. Admittedly, in doing so, the Court is bound to have regard to the *Convention* and way in which it operates and is implemented, both because this part of the *IAA* is giving effect to an international convention²⁶⁴ and the directives of s 39(2). Nevertheless, in the end, in determining whether or not an award should be enforced under pt II, the Court is construing and implementing the provisions of the *IAA* and in particular s 8 rather than the *Convention* directly. Where there are differences in wording between the two then, as the Chief Justice observed,²⁶⁵ it is the language of the section rather than the *Convention* that is to be construed and applied and which prevails. The imposition by the Court of Appeal of an addition to the threshold obligation of the award creditor to show to a prima facie case that the award debtor is a party to the arbitration agreement (at least where this is not apparent from the agreement itself) is a consequence of the language of s 8(1) of the *IAA* and in particular the express reference within that section to the award being binding on 'the parties to the agreement in pursuance of which it was made'.

Secondly, it has also been said that in its judgment the Court of Appeal has departed from the approach taken by the courts in other leading arbitration jurisdictions to the enforcement of foreign awards under arts IV and V of the *New York Convention*.²⁶⁶

Again, this comment is perhaps more apt to the judgment of the Chief Justice, insofar as her Honour distinguished the English cases, especially given the differences between the language of the Australian and English Acts.

The criticism, however, is less appropriate to the judgment of the majority, which embraced and accepted the English and other overseas authorities which Croft J had also followed on the question of onus, including as to the

²⁶² As is stated in the opening sentences of the passage quoted in s 4.3.5 above, namely 'In essence, the court ruled that, if the arbitration agreement does not name the award debtor, the party seeking enforcement has the burden of proving that debtor is a party to the arbitration agreement.'

²⁶³ Especially on page 39 of this paper in s 4.3.1.

²⁶⁴ *IMC Aviation Solutions Pty Ltd v Altain Khuder LLC* (2011) 253 FLR 9, [35] and [130].

²⁶⁵ *Ibid* [37].

²⁶⁶ Albert Monichino, 'International arbitration in Australia – 2010 / 2011 in review' (2011) 22 *Australasian Dispute Resolution Journal* 215, 226

legal burden being on an award debtor who wishes to assert that it was not a party to the arbitration agreement. Again, to the extent that there may have been any departure by the majority from the approach of the English cases on this issue, it is confined to the imposition of an additional threshold burden which the majority concluded an award creditor bears to show on a prima facie basis that the award debtor is a party to the arbitration agreement, derived from the language of s 8(1) of the IAA. Although, even in this regard, the majority suggested that this additional threshold burden was supported by the dicta of Lord Mance in *Dallah*.²⁶⁷

The same point might be made in response to the comments of another commentator who, in a similar vein, stated that the Court of Appeal largely ignored leading decisions from the United Kingdom, Hong Kong and Singapore and overturned the reasoning of a specialist arbitration judge (who has managed the arbitration list at the Supreme Court of Victoria since 2009).²⁶⁸

In relation to the first of those criticisms, the majority of the Court of Appeal did not ignore the overseas authorities on the question of onus. Nor did they reject or not agree with them. That is other than in possibly one limited respect (namely as to the threshold burden) although even then the majority found some support for their position in dicta of Lord Mance in *Dallah*. But otherwise the majority embraced²⁶⁹ those authorities, in particular in endorsing that part of the judgment of Croft J which found that if this issue is raised then once the threshold burden has been satisfied, it is a defence on which the award debtor bears the burden of proof.

In relation to the second of these criticisms, this would not be the first time that a specialist judge has had a decision in their area of their specialities overturned by a higher court. The fact that the appeal was allowed and the judgment of the specialist judge overturned does not necessarily reflect adversely on either the specialist judge, or the Court of Appeal.

It has also been said that the judgment of the Court of Appeal is hostile and shows a lack of support for arbitration.²⁷⁰ Whilst the approach of the Court of Appeal including that of the majority may not have been as pro-arbitration and pro-enforcement as the proponents of the *New York Convention* would have wished or contended for, for my part, I doubt that the judgment and in particular the imposition by the majority of the limited additional threshold burden on the award creditor to show on a prima facie basis that the award debtor is a party to the arbitration agreement (at least where the award debtor is not named in that agreement) could be said to be either hostile or showing a lack support for arbitration.

Acknowledging that the judgment of the Court of Appeal including that of the majority may not be entirely consistent with the intention and operation of the *New York Convention* and the way in which the *Convention* has been construed and applied in other jurisdictions,²⁷¹ the inconsistencies between the approaches taken by Croft J and majority of the Court of Appeal are only in limited respects and only likely to apply in limited and unusual circumstances.²⁷² As the Chief Justice stated ‘in all but the most unusual cases, applications to enforce foreign arbitral awards should involve only a summary procedure.’²⁷³

Even under the approach of the majority of the Court of Appeal, that can still be expected.

One might therefore question whether the impact of the Court of Appeal’s judgment is likely to be as adverse as some of the critics have stated. Whilst the approach of the majority does require something more of an award creditor (and its legal advisors) than s 9(1) of the IAA and art IV of the *Convention* contemplate, it is only likely to be in the limited situation where the award debtor is not named in the arbitration agreement, only an obligation to provide additional evidence to show a prima facie position and in circumstances where one would expect the award

²⁶⁷ *IMC Aviation Solutions Pty Ltd v Altain Khuder LLC* (2011) 253 FLR 9, [135]. Even if the majority’s analysis is in fact not supported by that dicta, their judgment at least purports to apply that dicta, rather than rejecting or distinguishing it.

²⁶⁸ Quoted in Alison Ross, ‘Australian Court forges own path on enforcement’ (2011) 6(5) *Global Arbitration Review*.

²⁶⁹ Or at the very least purported to embrace.

²⁷⁰ *Ibid*.

²⁷¹ And to that end may not have been as pro-arbitration and pro-enforcement as many would wish (or as the approach of Croft J was).

²⁷² Where the award debtor is not named in the award and where one would expect the award creditor to have access to and be able to put on at least prima facie evidence that the award debtor is a party to the agreement despite the absence of any reference to it.

²⁷³ *IMC Aviation Solutions Pty Ltd v Altain Khuder LLC* (2011) 253 FLR 9, [5].

creditor would be able to provide that evidence. Even if there is a dispute as to the validity or the fact of the arbitration agreement, then it would appear even under the approach of the majority of the Court of Appeal, that is a matter for defence and does not fall within the award creditor's threshold burden (especially where an arbitration agreement in writing between the parties to the award is produced). It cannot be assumed that the approach of the majority would extend beyond the limited question that was in issue on the facts of that case.

Eventually, time will tell what the reaction and consequence to the judgment of the Court of Appeal will finally be. In particular it will be interesting to see what approach the Courts of the other States and Territories and more particularly the Federal Court take in this regard and whether they might prefer and adopt the approach of Croft J over the approach of the Court of Appeal.

Of course, if the judgment and approach of the Court of Appeal is considered to be so at odds with the operation of the *Convention* or the expectations and intention of the users of arbitration, then it is within the scope of the legislature to amend s 8 to alter the position or make its intentions plain (as it did with the insertion of s 8(3A) to overcome the comments in *Resort Condominiums*). But whether or not that is necessary is likely to depend on the approach taken by the other State Courts and the Federal Court when confronted with a case raising these issues and at the moment remains to be seen.