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ENFORCING FOREIGN ARBITRAL AWARDS IN AUSTRALIA AGAINST NON-SIGNATORIES OF THE ARBITRATION AGREEMENT

by Sirko Harder*

This article investigates two questions that may arise in Australian proceedings for the enforcement of a foreign arbitral award where the award-debtor is not named in the relevant arbitration agreement and asserts that it is not a party to that agreement. The first question that may be contested in those circumstances is whether the award-debtor is for some reason precluded from denying its privity to the relevant arbitration agreement. Where this is not the case, the allocation of the onus of proof with regard to the award-debtor's privity to the agreement may become relevant. In the context of investigating these two questions, this article discusses the views expressed in *IMC Aviation Solutions Pty Ltd v Altain Khuder LLC*, decided in 2011 by Croft J as trial judge¹ and then by the Victorian Court of Appeal.²

A. INTRODUCTION

Arbitral awards are sometimes made against persons not named in the underlying arbitration agreement. This occurs because, depending upon the applicable law, persons may be bound by an arbitration agreement without

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1 [2011] VSC 1, (2011) 276 ALR 733. The name of the case was then *Altain Khuder LLC v IMC Mining Inc*. This article indiscriminately uses the name that the case had at the appellate level.

2 [2011] VSCA 248, (2011) 282 ALR 717.

being named in the contractual document.³ Where an award is made against a non-signatory of the arbitration agreement, the parties to the arbitration may join issue on the award-debtor's privity to the agreement, and the award-debtor may refuse to comply with the award, requiring the award-creditor to seek judicial enforcement of the award, which may occur in a country other than the seat of the arbitration. Australian courts may thus face requests for the enforcement of a foreign arbitral award made against a non-signatory of the agreement in pursuance of which the award was made.

Where the award-debtor received no notice of the arbitral proceedings or was otherwise unable to present its case in those proceedings, an enforcement of the award in Australia will be refused on that ground alone,⁴ and the award-debtor's privity to the relevant arbitration agreement has no significance. It does have significance where the award-debtor had an opportunity to present its case in the arbitral proceedings, whether or not that opportunity was used. In this situation, the question arises whether it is always open to the award-debtor to contest its privity to the relevant arbitration agreement in the Australian enforcement proceedings, or whether there are circumstances in which a contention of non-privity is precluded, obliging the Australian court to assume, without investigation, that the award-debtor is a party to the relevant arbitration agreement. Where the award-debtor is free to and does contest its privity to the relevant arbitration agreement, the allocation of the onus of proof with regard to that issue becomes significant. Is it for the award-creditor to prove that the award-debtor is a party to the relevant arbitration agreement, or is it for the award-debtor to prove the contrary?

These questions relate to the very nature of arbitration as a voluntary dispute resolution mechanism, and to the interaction and allocation of jurisdiction between the arbitral tribunal, the court at the seat of the arbitration (the supervisory court) and the court in the country (other than the seat of the arbitration) in which an enforcement of the arbitral award is sought (the enforcing court).

This article investigates the questions mentioned. In that context, this article discusses the views expressed in *IMC Aviation Solutions Pty Ltd v*

3 Beth Cubitt, 'Parties to the Arbitration Agreement: Third Parties, Joinder and Consolidation' (2010) 29 *The Arbitrator and Mediator* 59 at pp 63–67; Simon Greenberg, Christopher Kee and J Romesh Weeramantry, *International Commercial Arbitration: An Asia Pacific Perspective* (2011), Cambridge University Press, paras 4.68–4.82; Bernard Hanotiau, *Complex Arbitrations: Multiparty, Multicontract, Multi-issue and Class Actions* (2005), Kluwer Law International, ch 2.

4 International Arbitration Act 1974 (Cth), s 8(5)(c). The ground was argued, but not proved, in *LKT Industrial Bhd (Malaysia) v Chun* [2004] NSWSC 820 ('*LKT v Chun*').

Altain Khuder LLC,⁵ a case highly significant for two reasons. First, it was the first case concerning the enforceability in Australia of a foreign arbitral award made against a non-signatory of the relevant arbitration agreement. Second, on two fundamental issues, namely the onus of proof with regard to the award-debtor's privity to the arbitration agreement and the alleged preclusionary effect of the arbitral tribunal's ruling on the issue of privity, the views differed between Croft J and the Court of Appeal and within the Court of Appeal, generating three different views between the four judges that have been involved at the two instances.

This article discusses only those aspects of *IMC Aviation Solutions Pty Ltd v Altain Khuder LLC* that are relevant to the subject matter of this article. The case involved other issues too, in particular the admissibility and probative force of certain evidence. Those issues are not addressed here.

Even though the question of preclusion is logically prior to the allocation of the onus of proof, this article discusses the onus of proof first because it received much more attention in *IMC Aviation Solutions Pty Ltd v Altain Khuder LLC*. Beforehand, the facts of the case are briefly outlined.

B. FACTS OF *IMC AVIATION SOLUTIONS PTY LTD V ALTAIN KHUDER LLC*

Altain Khuder LLC ('Altain') is a mining company incorporated in Mongolia. IMC Aviation Solutions Pty Ltd ('IMC Solutions'), formerly known as IMC Mining Solutions Pty Ltd, is a company incorporated in Australia with a registered office at the same Brisbane address as a company called IMC Mining Inc ('IMC Mining'), which is incorporated in the British Virgin Islands. In the relevant period, the same person was the CEO of IMC Solutions and the managing director of IMC Mining.

In 2008, a contract naming Altain and IMC Mining as parties was concluded. In that contract, Altain appointed IMC Mining as operations manager of a Mongolian iron ore mine. A clause in the contract provided for the resolution of disputes through good-faith negotiations and, failing that, through arbitration in Mongolia. Subsequently, both IMC Mining and IMC Solutions performed work on the mine.

In 2009, a dispute arose concerning the provision of services to Altain. Altain initiated arbitral proceedings in Mongolia, naming IMC Mining as opponent. The arbitral tribunal conducted proceedings and made an award ordering both IMC Mining and IMC Solutions (jointly and severally) to pay a certain amount of money to Altain. On Altain's application, a Mongolian court verified the arbitral award, naming only IMC Mining as defendant.

5 *Supra*, nn 1 and 2.

In 2010, Altain initiated proceedings in the Supreme Court of Victoria for the enforcement of the arbitral award against IMC Mining and IMC Solutions. After an *ex parte* hearing, Croft J made the order sought by Altain. IMC Solutions then applied for the order to be set aside in so far as it applied to IMC Solutions. Croft J dismissed the application, and IMC Solutions appealed.

IMC Solutions contended that it had received no notice of the arbitration, had not participated in the arbitral proceedings and was not a party to the agreement in pursuance of which the award had been made. IMC Solutions conceded having worked on the relevant mine but contended that it had been involved as IMC Mining's sub-contractor. Altain contended that the reference to IMC Mining in the contract had been meant as a reference to IMC Solutions, that IMC Solutions was precluded from contending otherwise, and that the persons representing IMC Mining in the arbitral proceedings had represented IMC Solutions too. It is the dispute over IMC Solutions' privity to the relevant arbitration agreement that lies in the focus of this article.

C. ONUS OF PROOF IN RESPECT OF THE AWARD-DEBTOR'S PRIVACY TO THE ARBITRATION AGREEMENT

In Australia and many other countries, court proceedings concerning the enforcement of a foreign arbitral award have two stages.⁶ In the first stage, the award-creditor needs to satisfy certain threshold requirements to allow the court to enforce the award. Where these requirements are not satisfied, the court will refuse to enforce the award without the need of an objection by the award-debtor. Where the award-creditor does satisfy the threshold requirements, it is for the award-debtor to challenge the award in the second stage of the proceedings. These two stages of the proceedings do not have to occur in formally separate phases but they do where, as usual, the first stage takes place *ex parte*.⁷

An issue extensively discussed in *IMC Aviation Solutions Pty Ltd v Altain Khuder LLC* is the parties' evidentiary obligations in those two stages where the arbitration agreement does not name the award-debtor as a party. There were three different views between the four judges involved at the two levels.

6 *Dardana Ltd v Yukos Oil Co* [2002] EWCA Civ 543, [2002] 1 All ER (Comm) 819 at [10]; *Denmark Skibstekniske Konsulenter A/S I Likvidation v Ultrapolis 3000 Investments Ltd* [2010] 3 SLR 661 at [11], [26] ('*Ultrapolis 3000*'); *IMC Aviation Solutions Pty Ltd v Altain Khuder LLC*, *supra*, n 2 at [132].

7 The International Arbitration Act 1974 (Cth) ('the 1974 Act') does not set out the enforcement procedure. In Victoria, the procedure is set out in O 9 of the Supreme Court (Miscellaneous Proceedings) Rules 2008 (Vic). Order 9.04(1)(b) allows an application for the enforcement of an arbitral award to be made *ex parte*.

Croft J at first instance opined that all that the award-creditor needs to do is to produce the award and the agreement in pursuance of which the award was made, and that it is for the award-debtor to plead and prove that the award-debtor is not a party to that agreement.⁸ Warren CJ in the Victorian Court of Appeal opined that the award-debtor's privity to the relevant arbitration agreement is a threshold issue to be proved by the award-creditor on a balance of probabilities in the first stage of the enforcement proceedings.⁹ Hansen JA and Kyrou AJA in the Court of Appeal steered a middle course by opining that the award-creditor needs to produce the award, the agreement and further evidence that satisfies the court on a *prima facie* basis that the award-debtor is a party to the relevant agreement;¹⁰ once this is done (in an *inter partes* hearing), it is for the award-debtor to prove on a balance of probabilities that the award-debtor is not a party to the relevant agreement.¹¹ After assessing the evidence *de novo*, Hansen JA and Kyrou AJA found that Altain had not established, even on a *prima facie* basis, that IMC Solutions was a party to the relevant arbitration agreement,¹² and they quashed Croft J's enforcement order on that ground.¹³ While the reasons for the different assessment of the evidence are of no interest here, the allocation of the onus of proof is.

Which of the three views is correct depends upon the interpretation of ss 8 and 9 of the 1974 Act, which govern the recognition and enforcement of foreign arbitral awards in Australia if the award was made in a country that has acceded to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards¹⁴ (for example, Mongolia) or if the award-creditor is domiciled or ordinarily resident in such a country (including Australia): s 8(4) of the 1974 Act.¹⁵ Statutory interpretation normally starts with the

8 *Supra*, n 1 at [51], [60].

9 *Supra*, n 2 at [33]–[38].

10 *Id* at [134]–[139].

11 *Id* at [169]–[173].

12 *Id* at [234].

13 Warren CJ left open how the appeal ought to have been disposed, indicating that Her Honour would have preferred remitting the case to the Trial Division: *supra*, n 2 at [63].

14 New York, 10 June 1958 ('the New York Convention').

15 The recognition and enforcement of other foreign arbitral awards in Australia is governed by the common law rules, which do not comply with the New York Convention. This is problematic since Australia made no reservation when acceding to the Convention, which without any reservation applies to all foreign arbitral awards; see Richard Garnett and Michael Pryles, 'Enforcement of Foreign Awards in Australia and New Zealand' in *International Arbitration in Australia* (Luke Nottage and Richard Garnett eds, 2010), Federation Press, p 64; Malcolm Holmes and Chester Brown, *The International Arbitration Act 1974: A Commentary* (2011), LexisNexis Butterworths, para 8.9.

language of the statute and, at least where the language is ambiguous, moves on to considering extrinsic material. However, the sole purpose of the original enactment of the 1974 Act was the implementation of the New York Convention into Australian law,¹⁶ and ss 2D(d) and 39(2)(a) of the 1974 Act expressly require Australian courts to have regard to the Act's object of giving effect to the Convention when considering whether or not to enforce a foreign arbitral award.¹⁷ For these reasons, the position under the Convention and the legislative history of the 1974 Act will be considered before the language of the Act.

The interpretation of ss 8 and 9 of the 1974 Act is not influenced by the United Nations Commission on International Trade Law ('UNCITRAL') Model Law on International Commercial Arbitration ('the Model Law') adopted in 1985 and revised in 2006,¹⁸ which contains provisions on the recognition and enforcement of arbitral awards (Arts 35 and 36). While s 16(1) of the 1974 Act accords the Model Law in general the force of law in Australia, s 20 of the 1974 Act excludes the application of the Model Law's Arts 35 and 36 to the recognition and enforcement of foreign arbitral awards in Australia.¹⁹

1. *The Position under the New York Convention*

The New York Convention, which has been acceded to by over 140 countries, aims to facilitate the recognition and enforcement of arbitration agreements and of foreign arbitral awards. Article III of the Convention obliges each contracting state to recognise and enforce foreign arbitral awards under the

16 Commonwealth, *Parliamentary Debates*, House of Representatives, 2 December 1974, 4390 (Mr Enderby).

17 Sections 2D and 39 were inserted into the 1974 Act by the International Arbitration Amendment Act 2010 (Cth) and aim to make Australia more arbitration-friendly: Richard Garnett and Luke Nottage, 'The 2010 Amendments to the International Arbitration Act: A New Dawn for Australia?' (2011) 7 AIAJ 29 at p 31.

18 In order to harmonise the arbitration laws of different countries, the United Nations, in 1985, recommended to its member states the implementation of the Model Law. In 2006, UNCITRAL revised the Model Law and the United Nations recommended the implementation of the revised Model Law.

19 Section 20 of the 1974 Act excludes the application of Arts 35 and 36 of the Model Law even where neither the award nor the award-creditor comes from a Convention country and s 8(4) of the Act thus excludes an enforcement of the award under the Act; see Garnett and Pryles, *supra*, n 15 at p 64; Holmes and Brown, *supra*, n 15 at para 8.9. The opposite view is taken by Martin Davies, Andrew Bell and Paul LG Brereton, *Nygh's Conflict of Laws in Australia* (8th Ed, 2010), LexisNexis Butterworths, para 43.18.

conditions laid down in the subsequent articles. Article IV requires the award-creditor to 'supply' to the enforcing court the original or a duly certified copy of the award, the original or a duly certified copy of the agreement and, if necessary, a certified translation of either document into the official language of the enforcing court. Article V lists grounds that entitle the court to refuse to enforce the award. Article V(1) lists grounds to be proved by the award-debtor, including the invalidity of the arbitration agreement, which can be interpreted as encompassing the fact that the award-debtor is not a party to the agreement.²⁰ Article V(2) lists grounds that the enforcing court can consider *ex officio*: non-arbitrability of the dispute and public policy. Taken literally, Arts IV and V set out an enforcement regime under which all that the award-creditor needs to do is to supply the documents listed in Art IV, leaving it to the court to invoke Art V(2) and leaving it to the award-debtor to plead and prove any ground of non-enforcement listed in Art V(1) including the fact that the award-debtor is not a party to the arbitration agreement.

This interpretation of the New York Convention is favoured by commentators around the world,²¹ has been adopted by courts in some Convention countries, including the Court of Appeal for England and Wales in *Dardana Ltd v Yukos Oil Co*,²² and was accepted as correct in the parties' submissions before the Supreme Court of the United Kingdom in *Dallah Real Estate and Tourism Holding Co v Pakistan*.²³ However, courts in other Convention countries, including the United States, have required the award-creditor to prove that the award-debtor is a party to the arbitration agreement, on the ground that the parties' consent to arbitration is the very foundation

20 David Joseph, *Jurisdiction and Arbitration Agreements and their Enforcement* (2nd Ed, 2010), Sweet & Maxwell, para 16.72.

21 Gary B Born, *International Commercial Arbitration* (2009), Kluwer Law and Business, Vol 2, p 2705; Domenico Di Pietro and Martin Platte, *Enforcement of International Arbitration Awards: The New York Convention of 1958* (2001), Cameron May, p 124; Emmanuel Gaillard and John Savage, *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (1999), Kluwer Law International, para 1675; Albert J van den Berg, *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation* (1981), Kluwer Law and Taxation, pp 247–250.

22 *Supra*, n 6 at [11]–[13]. See also *Aloe Vera of America Inc v Asianic Food (S) Pte Ltd* [2006] 3 SLR 174 at [61] ('*Aloe Vera v Asianic Food*'), where the view was expressed with regard to Singapore's domestic law, and it was implied that Singapore's law complied with the New York Convention; *Sarhank Group v Oracle Corp* 404 F 3d 657 at 661–663 (2nd Cir, 2005) ('*Sarhank v Oracle*'), where the award-debtor's privity to the relevant arbitration agreement was discussed under the heading 'Article V Defenses'.

23 [2010] UKSC 46, [2011] 1 AC 763 at [12] ('*Dallah v Pakistan (SC)*').

of arbitral proceedings and awards.²⁴ While those decisions focused on the interpretation of domestic statutes and said nothing expressly on the position under the Convention, it was probably implied that the interpretation of the relevant domestic statute complied with the Convention.

A look into the *travaux préparatoires* of the New York Convention reveals that the delegates at the Conference at which the Convention was adopted intended to place upon the award-debtor the onus of proving the non-existence of an arbitration agreement between the award-creditor and the award-debtor. The initial draft of the Convention required the award-creditor to prove the existence of such an agreement,²⁵ but the text was redrafted during the Conference 'so as to require from the claimant only positive evidence that his application for enforcement was *prima facie* justified, leaving it to the party opposing enforcement to present such evidence as may be appropriate to rebut this claim'.²⁶

It might be argued that this statement has little relevance to the situation of an arbitration agreement not naming the award-debtor, since that situation was not mentioned in the *travaux préparatoires* and may not have been in the delegates' contemplation. However, while the delegates may not have contemplated the specific situation of an arbitration agreement not naming the award-debtor, they did, of course, know that a valid arbitration agreement between the award-creditor and the award-debtor does not exist in all cases in which the award-creditor presents a document that purports to contain a valid agreement, and they still decided in favour of an enforcement regime under which the award-creditor needs to present only a *prima facie* case for enforcement, the award-debtor bearing the onus of rebuttal.

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- 24 *Peter Cremer GmbH & Co v Co-operative Molasses Traders Ltd* [1985] ILRM 564, 573 (Supreme Court of Ireland); *Javor v Francoeur* [2003] BCSC 350, (2003) 13 BCLR (4th) 195 at [15], [26]–[27]; *Czarina LLC as assignee of Halvanon Insurance Co Ltd v WF Poe Syndicate* 254 F Supp 2d 1229, 1238 (MD Fla, 2002); *China Minmetals Materials Import and Export Co Ltd v Chi Mei Corp* 334 F 3d 274, 293–294 (3rd Cir, 2003) ('China Minmetals').
- 25 United Nations Economic and Social Council, Report of the Committee on the Enforcement of International Arbitral Awards, 19th session, Item 14, UN Doc E/2704 (28 March 1955) [29].
- 26 United Nations Economic and Social Council, United Nations Conference on International Commercial Arbitration, 17th meeting, UN Doc E/Conf 26/SR 17 (12 September 1958), p 2 (Mr de Sydow speaking for Working Party No 3); emphasis in original.

Courts in many countries, including the United States, have recognised this 'pro-enforcement bias' of the New York Convention.²⁷ There is no reason why the situation of an arbitration agreement not naming the award-debtor ought to be treated differently from other situations in which there is no valid arbitration agreement between the parties. The *travaux préparatoires* of the New York Convention thus lend strong support to the view that the Convention requires the award-debtor to prove that it is not a party to the agreement in pursuance of which the award was made. If that view is accepted, the contrary view adopted by Warren CJ in *IMC Aviation Solutions Pty Ltd v Altain Khuder LLC* will not give effect to Australia's obligations under the Convention.

The same may even be true for the view adopted by Hansen JA and Kyrou AJA in that case.²⁸ While they required the award-debtor to prove that it is not a party to the relevant arbitration agreement, they did require the award-creditor to do more than just supplying the award and the agreement (and a translation if needed) in a case where the award-debtor is not mentioned in the agreement. They required the award-creditor to provide further evidence to demonstrate that *prima facie* the award-debtor is a party to the relevant arbitration agreement. Arguably, this view conflicts with Art IV of the New York Convention pursuant to which the award-creditor needs to do no more than supplying the award, the agreement and, if necessary, a translation. In support of the view adopted by Hansen JA and Kyrou AJA, it may be argued that, according to its *travaux préparatoires*, the Convention was intended to require the award-creditor to provide (only) 'positive evidence that his application for enforcement was *prima facie* justified'.²⁹ However, nowhere in the *travaux préparatoires* is there any suggestion that the provision of such *prima facie* evidence could ever require more than the supply of the award and the agreement. In other words, the supply of the award and the agreement seem to have been regarded as always constituting evidence that the application for

27 For example, *Parsons & Whittemore Overseas Co Inc v Société Générale de l'Industrie du Papier (RAKTA)* 508 F 2d 969, 973 (2nd Cir, 1974); *American Construction Machinery & Equipment Co Ltd v Mechanised Construction of Pakistan Ltd* 659 F Supp 426, 428 (SD NY, 1987); *Glencore Grain Rotterdam BV v Shionath Rai Harnarain Co* 284 F 3d 1114, 1120 (9th Cir, 2002); *China Minmetals*, *supra*, n 24 at p 283; *Pacific China Holdings Ltd (in liq) v Grand Pacific Holdings Ltd* [2011] HKEC 878, [2011] 4 HKLRD 188 at [88].

28 The leading expert on the New York Convention, van den Berg, has been quoted as saying that the decision by the Victorian Court of Appeal is not in line with the Convention; his statement is quoted by Albert Monichino, 'International Arbitration in Australia: The Need to Centralise Judicial Power' (2012) 86 *Australian Law Journal* 118 at 123.

29 *Supra*, n 26.

enforcement is *prima facie* justified. This view can be justified on the ground that the arbitral tribunal, when making the award, must have taken the view that the award-debtor is a party to the relevant arbitration agreement, and the view of an arbitral tribunal may be regarded as *prima facie* correct.

Whatever interpretation of the New York Convention is followed, Croft J's view gives effect to Australia's obligations under the Convention. Even if the Convention does not require the domestic laws of the contracting states to be as favourable to the award-creditor as Croft J's view, the Convention certainly allows it. Article VII of the New York Convention permits the contracting states to have domestic laws, or enter into treaties, that are more favourable to the award-creditor than the Convention itself.³⁰

2. *The Legislative History of the International Arbitration Act 1974 (Cth)*

Beyond the objects of a statute expressly mentioned in the statute, the legislature's intention in general influences the interpretation of statutory provisions.³¹ Material that may be considered in that context includes the second-reading speech by a Minister in a House of Parliament.³² It is clear from the Minister's speech in the House of Representative's second reading of the Arbitration (Foreign Awards and Agreements) Bill 1974, which led to the Act now called the International Arbitration Act 1974,³³ that Parliament intended to introduce an enforcement regime under which the award-creditor only needs to produce the award and the agreement (and a translation if necessary), leaving it to the award-debtor to plead and prove any ground of non-enforcement. On moving that the Bill be read a second time in the House, Minister Enderby pointed out that under the then existing law the award-creditor was obliged 'to adduce evidence to prove that the parties had duly submitted the matter to arbitration'.³⁴ He went on to describe the 'simpler' enforcement procedure to be enacted:³⁵

Under the Bill a party seeking to enforce a foreign award will need only to produce to the Australian court the duly authenticated original award

30 Di Pietro and Platte, *supra*, n 21 at pp 170–171.

31 Acts Interpretation Act 1901 (Cth), s 15AA.

32 Acts Interpretation Act 1901 (Cth), s 15AB(2)(f).

33 The original name of the Act was Arbitration (Foreign Awards and Agreements) Act 1974. The name was changed to International Arbitration Act 1974 by the International Arbitration Amendment Act 1989 (Cth), s 4.

34 Commonwealth, Parliamentary Debates, House of Representatives, 2 December 1974, 4391 (Mr Enderby).

35 *Ibid.*

or a certified copy of it plus the original or a certified copy of the arbitration agreement under which the award purports to have been made ... The onus will then be on the other party to establish any reason that may exist why the court should not enforce the award.

It might again be argued that this statement has little relevance to the situation of an arbitration agreement not naming the award-debtor since that situation was not mentioned by the Minister and may not have been in the contemplation of Parliament. It must again be replied that while Parliament may not have contemplated the specific situation of an arbitration agreement not naming the award-debtor, it did make a general policy decision in favour of an enforcement regime under which the award-creditor only needs to produce certain documents, leaving it to the award-debtor to plead and prove any ground of non-enforcement, which must include the fact that the award-debtor is not a party to the relevant arbitration agreement.

3. *The Language of the International Arbitration Act 1974 (Cth)*

Even though ss 2D(d) and 39(2)(a) of the International Arbitration Act 1974 (Cth) require Australian courts to have regard to the Act's object of giving effect to the New York Convention when considering whether or not to enforce a foreign arbitral award, those sections fall short of empowering the court to disregard any other section of the Act and thus preserve the general rule that the possible meaning of a statutory provision is the outer boundary of interpretation.³⁶ It is therefore necessary to determine the extent to which the language of the 1974 Act permits giving effect to Australia's obligations under the New York Convention. Sections 8 and 9 largely mirror Arts IV and V of the Convention, except that the order is reversed. Article 9 of the 1974 Act requires the award-creditor to 'produce' the original or a duly certified copy of the award and the agreement and, if necessary, a certified translation of either document. Section 8 sets out circumstances that permit a refusal to enforce the award. Section 8(5) sets out circumstances (such as the invalidity of the arbitration agreement) that the award-debtor needs to plead and prove 'to the satisfaction of the court'.³⁷ Section 8(7) sets out circumstances that the

36 *Jones v DPP* [1962] AC 635 at 662; *Saraswati v R* (1990) 172 CLR 1 at 22.

37 The Victorian Court of Appeal in *IMC Aviation Solutions Pty Ltd v Altain Khuder LLC* held that, as usual in civil proceedings, the standard of proof is a balance of probabilities and the cogency of evidence required to satisfy that standard depends upon the nature and gravity of the fact to be proved: *supra*, n 2 at [52]–[53], [188]–[195]. Croft J at first instance started from the same position but seems to have taken the view that any fact relevant to s 8(5) is so serious as to require clear, cogent and strict proof: *supra*, n 1 at [61]–[64], [88]. With respect, this is unconvincing.

court can consider *ex officio*, which are the non-arbitrability of the dispute and a violation of public policy by enforcing the award.³⁸

Taken literally, ss 8 and 9 of the 1974 Act provide for the same enforcement regime that is provided by the New York Convention: the award-creditor only needs to produce the award and the agreement (and a translation if necessary), leaving it to the award-debtor to plead and prove any ground of non-enforcement.³⁹ It is natural to conclude that the award-debtor bears the onus of proving that it is not a party to the agreement in pursuance of which the award was made. In *IMC Aviation Solutions Pty Ltd v Altain Khuder LLC*, both Croft J at first instance and Hansen JA and Kyrou AJA in the Victorian Court of Appeal did place the onus of proof upon the award-debtor. Hansen JA and Kyrou AJA pointed in particular to the provision in s 8(3A) that '[t]he court may only refuse to enforce the foreign award in the circumstances mentioned in subsections 5 and 7'.⁴⁰ However, Warren CJ, who classified the award-debtor's privity to the relevant agreement as a threshold issue to be proved by the award-creditor, considered s 8(3A) insignificant. Despite the absolute language of s 8(3A), Her Honour said, non-enforcement is not in fact restricted to the circumstances set out in s 8(5) and (7) since the award-creditor's failure to produce the documents listed in s 9 is another ground of non-enforcement. Section 8(3A), Her Honour said, restricts the grounds of non-enforcement once the award-creditor has discharged some initial burden, but says nothing on what that initial burden is.⁴¹ True, the award-creditor's failure to produce the documents listed in s 9 leads to non-enforcement even though this situation is not mentioned in s 8(3A). But it leads to non-enforcement because s 9 expressly imposes certain threshold obligations onto the award-creditor. The existence of this express exception to s 8(3A) does not entail the possibility of implied exceptions.

38 Section 8(7A), which was inserted into the 1974 Act by the International Arbitration Amendment Act 2010 (Cth), clarifies that the public policy exception applies at least where the making of the award was affected by fraud, corruption or a violation of natural justice.

39 This presupposes, of course, that the award was made against the person against whom its enforcement is sought. A minor misspelling of a party's name in the award is no obstacle to enforcement: *LKT v Chun*, *supra*, n 4 at [22]–[28].

40 *Supra*, n 2 at [162]. Section 8(3A) was inserted into the 1974 Act by the International Arbitration Amendment Act 2010 (Cth) in order to overturn decisions recognising a residual power of courts to refuse enforcement even where the circumstances set out in sub-ss (5) and (7) are not present, *eg Re Resort Condominiums International Inc* [1995] 1 Qd R 406 at 426–427, 432.

41 *Supra*, n 2 at [40].

Warren CJ explained the need for an implied exception to s 8(3A) in the following way.⁴² Since, according to s 8(1), a foreign arbitral award is only binding on the parties to the agreement in pursuance of which it was made, it must be open to an award-debtor to resist enforcement on the ground that it is not a party to that agreement. But s 8(5) does not list lack of privity as a ground of non-enforcement. Privity must therefore be a threshold issue to be proved by the award-creditor. Warren CJ said nothing on whether the public-policy exception in s 8(7)(b) can accommodate lack of privity, but this is not fatal to her argument since it cannot be assumed that Parliament intended such a significant issue as (lack of) privity to be addressed under the broad and vague notion of public policy.

Indeed, Hansen JA and Kyrou AJA had a different objection to Warren CJ's argument. They argued that lack of privity falls under s 8(5)(b), which concerns the award-debtor's contention that 'the arbitration agreement is not valid' under the relevant law. Warren CJ objected that invalidity and lack of privity are separate issues: 'an arbitration agreement pursuant to which the award was made may be perfectly valid without the award-debtor being a party to it'.⁴³ Hansen JA and Kyrou AJA argued that the expression 'not valid' means 'of no legal effect', and that a person who asserts lack of privity is, in substance, asserting that the arbitration agreement is of no legal effect as against that person.⁴⁴

This is convincing. A distinction between privity and validity would be particularly difficult where the arbitration agreement was concluded by an agent acting in the name of the award-debtor and the award-debtor asserts that the agent lacked authority because the instrument purporting to grant the agent authority was invalid.⁴⁵ Furthermore, another ground of non-enforcement to be proved by the award-debtor is that the award deals with a difference not contemplated by, or not falling within the terms of, the submission to arbitration, or contains a decision on a matter beyond the scope of the submission to arbitration: s 8(5)(d) of the 1974 Act. In those circumstances, too, the award-debtor is not a party to an arbitration agreement that permits the award made.

Hansen JA and Kyrou AJA further argued that it would be inconsistent to treat lack of privity different from vitiating factors and forgery: 'There is no reason to think that an award-debtor has greater justification to be aggrieved

42 *Id* at [41].

43 *Ibid*.

44 *Id* at [166].

45 This issue was classified as one of privity in *China Minmetals*, *supra*, n 24 at pp 293–294.

because it maintains that it was not a party to the arbitration agreement than an award-debtor that maintains that the arbitration agreement was invalid because it was forged or obtained by fraud'.⁴⁶ Warren CJ objected that, far from being anomalous, the different treatment of privity and vitiating factors 'reflects a sensible policy decision by the legislature to place the onus on the award-debtor to impugn the agreement or the award where the documents presented to the court pursuant to section 9(1) appear regular on their face, but to require the award creditor to explain an apparent irregularity on the face of the documents'.⁴⁷ It is unclear where Warren CJ found this 'policy decision by the legislature'. Neither the language nor the legislative history of the 1974 Act indicates any distinction between regularity and irregularity.

4. *Conclusion on the Onus of Proof*

It is difficult to maintain that the language of the 1974 Act *requires* the placing upon the award-creditor of the onus of proof in respect of the award-debtor's privity to the relevant arbitration agreement. It is more convincing to maintain that the language of the Act *requires* the placing upon the award-debtor of that onus of proof. Even if that view is rejected, it should at least be conceded that the language of the Act *permits* the placing upon the award-debtor of that onus of proof. If, then, the language of the Act is regarded as being open to either interpretation, ss 2D and 39 require the court to adopt the interpretation that gives effect to Australia's obligations under the New York Convention. While the position under the Convention is not settled, the better view is that it places the onus of proof upon the award-debtor. Parliament intended the award-debtor to bear the onus of proof. It follows that an interpretation of the 1974 Act that places the onus of proof upon the award-debtor accords with the intention of Parliament and is the only interpretation that can safely be said to give effect to Australia's obligations under the New York Convention.

That leaves the question of whether the award-creditor is under any threshold obligation other than the supply of the award and the agreement (and a translation if necessary) where the award-debtor is not named in the relevant arbitration agreement. In *IMC Aviation Solutions Pty Ltd v Altain Khuder LLC*, Hansen JA and Kyrou AJA in the Victorian Court of Appeal took the view that the award-creditor needs to adduce further evidence to establish the award-debtor's privity on a *prima facie* basis.⁴⁸ It is unclear where they took this requirement from. The 1974 Act does not expressly provide for such a requirement, and it is difficult to argue that it does so impliedly.

46 *Supra*, n 2 at [165].

47 *Id* at [50].

48 *Id* at [134]–[139].

All that s 9 of the Act expressly requires the award-creditor to do is to produce the award, the agreement and, if necessary, a translation of either document. Section 9 may be said to imply that the supply of those documents always establishes a *prima facie* entitlement of the award-creditor to an enforcement of the award. Section 9 would thus prohibit the imposition of further threshold obligations upon the award-creditor. If that view is rejected, the language of the Act must be regarded as ambiguous and the position under the New York Convention must be considered. The Convention does not require the imposition of further threshold obligations and probably prohibits it. A literal interpretation of s 9, under which the supply of the documents mentioned is the only threshold obligation of the award-creditor, is the only interpretation that can safely be said to give effect to Australia's obligations under the New York Convention.

It does not follow that the supply of the award and the agreement always obliges the enforcing court to make an enforcement order *ex parte*. The court is entitled, but not obliged, to proceed *ex parte*. There is much to be said for the view, expressed by Hansen JA and Kyrou AJA in *IMC Aviation Solutions Pty Ltd v Altain Khuder LLC*,⁴⁹ that an award-debtor who is not named in the relevant arbitration agreement should always be notified of the enforcement application before a decision is made. This is a procedural matter governed not by the 1974 Act but by the law of the Australian state or territory in which an enforcement of the award is sought.

D. WHICH EVENTS PRECLUDE THE AWARD-DEBTOR FROM CONTESTING PRIVACY IN THE ENFORCEMENT PROCEEDINGS?

In *IMC Aviation Solutions Pty Ltd v Altain Khuder LLC*, the onus of proof with regard to IMC Solutions' privity to the arbitration agreement would have been irrelevant had IMC Solutions for some reason been precluded from contesting privity, obliging the Victorian court to assume privity without investigation. Altain indeed contended that such a preclusion existed on four independent grounds: the arbitral tribunal's ruling that IMC Solutions was a party to the arbitration agreement, the Mongolian court's ruling to the same effect, IMC Solutions' failure to apply to the Mongolian courts to set aside the award, and IMC Solutions' alleged participation in the arbitral proceedings without objecting to the tribunal's jurisdiction. While the first two grounds concern prior decisions by some other tribunal (in a wide sense), the last two grounds concern certain (alleged) conduct on the part of IMC Solutions. The four grounds shall be discussed individually.

49 *Id* at [140]–[143].

There are two preliminary matters. The first is the selection of the law governing the question of whether an Australian court asked to enforce a foreign arbitral award is precluded from investigating a certain issue. Warren CJ in *IMC Aviation Solutions Pty Ltd v Altain Khuder LLC* correctly observed that no choice-of-law question arose *in casu* since neither party had suggested that the law of any jurisdiction other than Victoria governed the issue of preclusion.⁵⁰ It is unclear whether Warren CJ saw the possibility of another law applying if pleaded and proved by a party. No such possibility should generally exist. The question of whether a certain event precludes a litigant from raising a certain issue is a question of procedure and thus governed by the *lex fori*.⁵¹ However, where the event in question took place in a different jurisdiction, the law of that jurisdiction may additionally have to be taken into account. Since the *lex fori* of any Australian court includes Australian federal law, another preliminary matter arises, namely the question of whether the International Arbitration Act 1974 (Cth) expressly or impliedly excludes the application of a preclusionary rule derived from any source. Warren CJ convincingly gave a negative answer.⁵²

1. *Ruling by the Arbitral Tribunal*

Is an Australian court that is asked to enforce a foreign arbitral award precluded from investigating the award-debtor's privity to the relevant arbitration agreement only because the arbitral tribunal has ruled on that issue? Croft J in *IMC Aviation Solutions Pty Ltd v Altain Khuder LLC* made conflicting statements. On the one hand, he repeatedly said that the enforcing court cannot reopen issues that were before the arbitral tribunal.⁵³ On the other hand, he said that an arbitral tribunal's ruling on its own jurisdiction can be reviewed in enforcement proceedings under the New York Convention.⁵⁴ Warren CJ in the Victorian Court of Appeal seems to have taken the view that the arbitral tribunal's ruling, while not binding on the enforcing court, has evidential value, because Her Honour said that the arbitral tribunal's reasoning process constitutes a factor relevant to the enforcing court's decision and affects the weight to be accorded the arbitration agreement.⁵⁵ Hansen JA and Kyrou AJA in the Court of Appeal unequivocally pronounced that the

50 *Id* at [25].

51 *Carl Zeiss Stiftung v Rayner & Keeler Ltd* [1967] 1 AC 853 at 919; American Law Institute, Restatement (Second) of Judgments (1982) § 1 cmt (d); Born, *supra*, n 21 at Vol 1, pp 986–988 (for issues of an arbitral tribunal's 'competence-competence').

52 *Supra*, n 2 at [26].

53 *Supra*, n 1 at [59], [64], [69], [95].

54 *Id* at [68].

55 *Supra*, n 2 at [51].

arbitral tribunal's ruling is neither binding on the enforcing court nor has any evidential value.⁵⁶ This must be correct.

It is a fundamental right of every person in a free society to approach the court in order to resolve a dispute with another person.⁵⁷ A person is obliged to arbitrate, and thus loses the right to litigate, only if that person has chosen arbitration as the method of dispute resolution. The parties' agreement to arbitrate constitutes the very foundation of the arbitral proceedings and the ensuing award. A person who has not consented to being subject to certain arbitral proceedings cannot in any way be affected by the arbitral tribunal's decision including the ruling that this person has agreed to arbitrate.⁵⁸ In other words, an arbitral tribunal's ruling that a certain person has agreed to arbitrate cannot affect that person unless the ruling is correct and the person did in fact agree to arbitrate, which can be determined by a court. An arbitral tribunal cannot establish its jurisdiction over a person through its own (wrong) ruling that this person has agreed to arbitrate. This principle is widely recognised⁵⁹ and underlies Art 16(3) of the Model Law, which allows the supervisory court to decide on the arbitral tribunal's jurisdiction after the tribunal itself has decided on that issue.⁶⁰

Of course, the enforcing court is free to examine the arbitral tribunal's reasoning process and may derive assistance from it,⁶¹ in the same way in which the court may derive assistance from the arguments by counsel before

56 *Id* at [264]–[270].

57 *Raymond v Honey* [1983] 1 AC 1 at 14; *Llewellyn v Nine Network Australia Pty Ltd* [2006] FCA 836, (2006) 154 FCR 293 at [16]. Exceptions are compulsory arbitration and compulsory mediation, neither of which is relevant in the present context.

58 Unless the person has, in a separate agreement, conferred upon the arbitral tribunal the exclusive right to rule on the question of whether the person is a party to the alleged arbitration agreement: *First Options of Chicago Inc v Kaplan* 514 US 938 at 943 (1995) ('*First Options v Kaplan*').

59 *Fung Sang Trading Ltd v Kai Sun Sea Products & Food Co Ltd* [1992] 1 HKLR 40 at 50; *First Options v Kaplan*, *supra*, n 58 at 943; *China Minmetals*, *supra*, n 24 at pp 289, 293; *Sarhank v Oracle*, *supra*, n 22 at 661–663; *Dallah v Pakistan* (SC), *supra*, n 23 at [24]–[30], [84], [99]–[104], [160]. Cf *Jiangxi Provincial Metal & Mineral Import & Export Corp v Sulanser Co Ltd* [1995] 2 HKC 373 at 378–379 ('*Jiangxi Provincial Metal v Sulanser*').

60 By contrast, an arbitral tribunal's ruling that there is no arbitration agreement between the parties ought to be preclusive with regard to that issue in subsequent litigation between the parties: *Born*, *supra*, n 21 at Vol 2, p 2914. If the court referred the parties to arbitration on the ground that there is in fact an arbitration agreement, the parties would be without recourse to either arbitration or litigation.

61 *Dallah v Pakistan* (SC), *supra*, n 23 at [31], [160].

it. But the arbitral tribunal's ruling cannot bind the enforcing court and cannot even have evidential value.⁶²

The idea that an arbitral tribunal's ruling on the existence of an agreement to arbitrate is binding on the enforcing court may be due to the indiscriminate use of the ambiguous term 'competence-competence' (from the French *compétence-compétence* or the German *Kompetenz-Kompetenz*) to describe an arbitral tribunal's power to decide on its own jurisdiction. The term 'competence-competence' is used in many areas of law, well beyond arbitration. But it is used with two different meanings.⁶³ First, the term 'competence-competence' is used to describe the principle that a decision-making body has the power to decide on whether it has jurisdiction, and thus does not have to refer that issue to another body. This principle applies to many decision-making bodies⁶⁴ including arbitral tribunals.⁶⁵ Arbitral proceedings would be seriously inconvenienced if an arbitral tribunal faced with a jurisdictional challenge were forced to either suspend proceedings and await a judicial determination of the issue or to immediately proceed to considering the merits of the dispute and making an award subject to judicial confirmation of the arbitral tribunal's jurisdiction.⁶⁶ In that sense, arbitral tribunals have 'competence-competence'.⁶⁷ But the term 'competence-competence' is also used to describe

62 *Id* at [30]; *Ultrapolis 3000*, *supra*, n 6 at [38]–[39].

63 In the context of arbitration, three different meanings are identified by William W Park, 'Determining Arbitral Jurisdiction: Allocation of Tasks Between Courts and Arbitrators' (1997) 8 *American Review of International Arbitration* 133 at 140: '(1) arbitrators need not stop the arbitration when one party objects to their jurisdiction; (2) courts will delay consideration of arbitral jurisdiction until an award is made; (3) arbitrators may decide on their own jurisdiction free from judicial review'.

64 Greco-Turkish Agreement of 1 December 1926 (Advisory Opinion) (1928) 10 BYBIL 231 (PCIJ) at 243 ('as a general rule, any body possessing jurisdictional powers has the right in the first place itself to determine the extent of its jurisdiction'); *Allianz SpA (formerly Riunione Adriatica di Sicurtà SpA) v West Tankers Inc* (C185/07) [2009] ECR I-663, Opinion of AG Kokott, at [57] ('the general principle that every court is entitled to examine its own jurisdiction').

65 Peter Binder, *International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions* (3rd Ed, 2010), Sweet & Maxwell, paras 4.006–4.008; Born, *supra*, n 21 at Vol 1, pp 966–967; Art 16(1) sentence 1 of the Model Law 2006: 'The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement'.

66 *Christopher Brown Ltd v Genossenschaft Oesterreichischer Waldbesitzer Holzwirtschaftsbetriebe RGmbH* [1954] 1 QB 8 at 12.

67 The Model Law and some national legal systems allow recourse to the court while the arbitral proceedings are continuing: Pieter Sanders, *Quo Vadis Arbitration? Sixty*

the different principle that a decision-making body has the *exclusive* power to decide on its own jurisdiction, so that its ruling on that issue binds other decision-making bodies.⁶⁸ That principle does not apply to arbitral tribunals, as explained before. It is therefore important to clarify in which sense the term ‘competence-competence’ is being used if it is used at all.

2. *Ruling by the Supervisory Court*

Is an Australian court that is asked to enforce a foreign arbitral award precluded from investigating the award-debtor’s privity to the relevant arbitration agreement only because the supervisory court has ruled on that issue? While Croft J in *IMC Aviation Solutions Pty Ltd v Altain Khuder LLC* opined that a ruling by the supervisory court may raise an issue estoppel in enforcement proceedings (without specifying when exactly this would be the case),⁶⁹ neither Warren CJ nor Hansen JA and Kyrou AJA in the Victorian Court of Appeal made a distinction between a ruling by the arbitral tribunal and a ruling by the supervisory court.⁷⁰ All judges in the Victorian Court of Appeal thus seem to have taken the view that a ruling by the supervisory court is never binding on the enforcing court. No explanation was given for this proposition.

The idea that an arbitral tribunal’s ruling on the award-debtor’s consent to arbitration is binding on the enforcing court has been rejected on the ground that a person is not bound by an arbitral tribunal’s decision, including the ruling that this person has agreed to arbitrate, unless the person has in fact agreed to arbitrate. The same reason does not apply to the ruling of the supervisory court. A person may be bound by the judgment of a court even without having agreed to the court having jurisdiction.⁷¹ An Australian court’s final and conclusive decision on the merits of a case binds other Australian courts in that it creates an estoppel *per rem judicatam* between the parties to the original litigation, preventing them from re-litigating the same cause

Years of Arbitration Practice (1999), Kluwer Law International, pp 178–184; William W Park, ‘The Arbitrator’s Jurisdiction to Determine Jurisdiction’ in *International Arbitration 2006: Back to Basics?* (Albert J van den Berg ed, 2007), Kluwer Law International, pp 80–88.

68 This is the traditional understanding of the term *Kompetenz-Kompetenz* in German law: Born, *supra*, n 21 at Vol 1, p 854; Gaillard and Savage, *supra*, n 21 at para 651.

69 *Supra*, n 1 at [70]–[75].

70 *Supra*, n 2 at [51] (Warren CJ), [264]–[270] (Hansen JA and Kyrou AJA).

71 *Jonathan v Kyogle Council* [2012] NSWLEC 16 at [8].

of action (cause-of-action estoppel) or the same issue (issue estoppel).⁷² A foreign judgment creates a cause-of-action estoppel⁷³ or an issue estoppel⁷⁴ in Australian litigation if the requirements for the recognition of the foreign judgment in Australia are satisfied.⁷⁵ Where those requirements are satisfied, the Australian court is bound by the foreign court's decision even if the judgment-debtor took no part in the foreign proceedings.⁷⁶ It is difficult to see why these general principles should not apply to the supervisory court's ruling that the award-debtor is a party to the agreement in pursuance of which an arbitral award has been made.

An Australian court is bound by a foreign judgment that is entitled to recognition in Australia and, as part of its *ratio*,⁷⁷ contains the ruling that a certain person is a party to a certain agreement that is not an arbitration

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- 72 *Jackson v Goldsmith* (1950) 81 CLR 446 at 466 (per Fullagar J): 'The rule as to *res judicata* can be stated sufficiently for present purposes by saying that, where an action has been brought and judgment has been entered in that action, no other proceedings can thereafter be maintained on the same cause of action ... The rule as to issue estoppel is generally stated in the words of Lord Ellenborough in *Outram v. Morewood*. His Lordship said that parties and privies are "precluded from contending to the contrary of that point, or matter of fact, which having been once distinctly put in issue by them ... has been, on such issue joined, solemnly found against them"' (citation omitted). See also *Blair v Curran* (1939) 62 CLR 464 at 531–533 (per Dixon J).
- 73 *Miller v Caddy* (1985) 80 FLR 398 at 404–405; *Spirits International BV v Federal Treasury Enterprise (FKP) Sojuzplodoimport* [2011] FCAFC 69, (2011) 91 IPR 438 at [45] ('*Spirits v Sojuzplodoimport* '); Foreign Judgments Act 1991 (Cth), s 12 ('the 1991 Act').
- 74 *The Society of Lloyd's v White* [2004] VSCA 101 at [21]; *Armacel Pty Ltd v Smurfit Stone Container Corp* [2008] FCA 592, (2008) 248 ALR 573 at [66], [83]; *Spirits v Sojuzplodoimport*, *supra*, n 73 at [45]; Foreign Judgments Act 1991 (Cth), s 12.
- 75 Depending upon the country and court from which the judgment originates, the recognition and enforcement of a foreign judgment in Australia is governed by the common law rules, the Foreign Judgments Act 1991 (Cth) or Pt 7 of the Trans-Tasman Proceedings Act 2010 (Cth). At common law, a foreign judgment is entitled to recognition in the forum, subject to defences, if it is a final and conclusive judgment on the merits rendered by a court of competent jurisdiction (in the eyes of the *lex fori*) between the same parties: *The Sennar (No 2)* [1985] 1 WLR 490 at 499. The Foreign Judgments Act 1991 (Cth) contains similar requirements, but the Trans-Tasman Proceedings Act 2010 (Cth) facilitates the recognition of New Zealand judgments in Australia.
- 76 An example is *Independent Trustee Services Ltd v Morris* [2010] NSWSC 1218.
- 77 *Hoystead v Commissioner of Taxation* [1926] AC 155 at 170; *Blair v Curran*, *supra*, n 72 at 531–533; *Kemp v Pearce* [1972] VR 805 at 811–814; *Yukos Capital Sarl v OJSC Rosneft Oil Co* [2011] EWHC 1461 (Comm), [2012] 1 All ER (Comm) 479 at [50].

agreement. There is no reason why things ought to be different only because the agreement is an agreement to arbitrate. A ruling by a foreign court other than the supervisory court that a certain person is a party to a certain arbitration agreement ought to bind Australian courts if the foreign judgment is generally entitled to recognition in Australia. This applies whether the foreign judgment was made on the application for the enforcement of an arbitral award⁷⁸ or prior to the arbitral proceedings, for example on an application to stay court proceedings in favour of arbitration.⁷⁹

There is no reason why things ought to be different only because the foreign court is the supervisory court for the arbitration at issue. If anything, a decision on the arbitral tribunal's jurisdictions ought to have greater, not less, weight if it comes from the supervisory court than from any other foreign court. It follows that a ruling by the supervisory court that a certain person is a party to the relevant arbitration agreement ought to bind Australian courts if the supervisory court's judgment is generally entitled to recognition in Australia.⁸⁰ This applies whether the judgment was made prior to arbitral proceedings, for example where a declaration was sought,⁸¹ or in an application to annul or verify an arbitral award.

78 See *Karaha Bodas Co LLC v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara* (2003) 28 YB Comm Arb 752 at 785–786 (High Court of Hong Kong); Born, *supra*, n 21 at Vol 2, p 2674; Joseph, *supra*, n 20 at para 16.63; generally also Talia Einhorn, 'The Recognition and Enforcement of Foreign Judgments on International Commercial Arbitral Awards' (2010) 12 *Yearbook of Private International Law* 43 at 64. By contrast, where a foreign court has denied enforcement of an arbitral award on the ground that the award-debtor is not a party to the relevant arbitration agreement, the Australian court might be obliged to make its own ruling on the issue since Art III of the New York Convention might oblige the court of a contracting state to enforce a foreign arbitral award unless that court finds a ground of non-recognition under Art V.

79 By contrast, where a foreign court has refused a stay of proceedings on the ground that the defendant is not a party to the arbitration agreement in question, the Australian court may be obliged to make its own ruling on the issue because Art II(3) of the New York Convention may oblige the court of a contracting state to stay proceedings whenever there is a relevant arbitration agreement in that court's view.

80 This view has been taken in other common law jurisdictions as enforcing forum: *Minmetals Germany GmbH v Ferco Steel Ltd* [1999] 1 All ER (Comm) 315 at 330, [1999] CLC 647 at 661 ('*Minmetals v Ferco*'); *Aloe Vera v Asianic Food*, *supra*, n 22 at [56]; *Dallah v Pakistan* [2009] EWCA Civ 755, [2011] 1 AC 763 at [56]; *Dallah v Pakistan* (SC), *supra*, n 23 at [98] (per Lord Collins JSC); see also *Jiangxi Provincial Metal v Sulanser*, *supra*, n 59 at 378; *Newspeed International Ltd v Citus Trading Pte Ltd* [2003] 3 SLR 1 at [19]–[30] ('*Newspeed v Citus*').

81 See *Toepfer International GmbH v Molino Boschi Srl* [1996] 1 Lloyd's Rep 510 at 513.

Unless the arbitration was seated in New Zealand,⁸² the recognition of the supervisory court's judgment in Australia requires that the supervisory court was a competent court in the eyes of Australian law.⁸³ Where the award-debtor was the defendant in the proceedings before the supervisory court and neither appeared before that court without contesting the court's jurisdiction nor was present in the seat of the arbitration when those proceedings began, the supervisory court was a competent court only if the award-debtor had entered into a jurisdiction agreement in favour of the supervisory court,⁸⁴ which is implied in the arbitration agreement.⁸⁵ In that situation, therefore, the supervisory court's judgment cannot be recognised in Australia unless the award-debtor is a party to the relevant arbitration agreement. Where the award-debtor's privity to the agreement is a prerequisite of issue estoppel, such privity cannot be assumed as a result of an issue estoppel but needs to be determined by the Australian court.

In *IMC Aviation Solutions Pty Ltd v Altain Khuder LLC*, the judgment by the Mongolian court could not create an issue estoppel between Altain and IMC Solutions in the Victorian proceedings because IMC Solutions was not a party to the proceedings before the Mongolian court. An issue estoppel, like a cause-of-action estoppel, can only arise between those parties to the present proceedings that were parties to the previous proceedings.⁸⁶

3. *Failure to Challenge the Award in the Supervisory Court*

In *IMC Aviation Solutions Pty Ltd v Altain Khuder LLC*, Altain argued that IMC Solutions' failure to seek an annulment of the award by the Mongolian supervisory court precluded IMC Solutions from contesting its privity to the relevant arbitration agreement in the Victorian enforcement proceedings. Hansen JA and Kyrou AJA in the Victorian Court of Appeal gave this argument short shrift.⁸⁷ They approvingly quoted the following statement made by Lord

82 The recognition and enforcement of New Zealand judgments in Australia pursuant to Pt 7 of the Trans-Tasman Proceedings Act 2010 (Cth) does not generally require the New Zealand court to be a competent court in the eyes of Australian law.

83 Foreign Judgments Act 1991 (Cth), s 7(2)(a)(iv),(3)–(5); *De Santis v Russo* [2001] QCA 457, [2002] 2 Qd R 230 at [9]–[10].

84 *Ibid.*

85 *C v D* [2007] EWCA Civ 1282, [2008] 1 All ER (Comm) 1001 at [17]; *Xiamen Xinjingdi Group Ltd v Eton Properties Ltd* [2008] 6 HKC 287 at [61] ('*Xiamen Xinjingdi v Eton*'); *Altain Khuder LLC v IMC Mining Inc*, *supra*, n 1 at [67].

86 *Blohn v Desser* [1962] 2 QB 116 at 124–125; *Newcom Holdings Pty Ltd v Funge Systems Inc* [2006] SASC 284 at [33], [40]; Foreign Judgments Act 1991 (Cth), ss 7(2)(a)(viii), 12(1).

87 *Supra*, n 2 at [318]–[321].

Mance JSC in the Supreme Court of the United Kingdom in *Dallah v Pakistan* (SC).⁸⁸

A person who denies being party to any relevant arbitration agreement has no obligation to participate in the arbitration or to take any steps in the country of the seat of what he maintains to be an invalid arbitration leading to an invalid award against him. The party initiating the arbitration must try to enforce the award where it can. Only then and there is it incumbent on the defendant denying the existence of any valid award to resist enforcement.

This view is convincing. Indeed, it is the only tenable view if it is thought that a ruling by the supervisory court that the award-debtor is not a party to the relevant arbitration agreement can never bind a foreign enforcing court. It would be untenable to hold that the award-debtor must challenge the arbitral tribunal's jurisdiction before the supervisory court, lest this challenge be precluded in foreign enforcement proceedings, and must raise the challenge again before the foreign enforcing court even if the supervisory court has ruled in the award-debtor's favour. This would always require double litigation over the same issue, which is inefficient.⁸⁹

But even if it is thought that a ruling by the supervisory court that the award-debtor is not a party to the relevant arbitration agreement does bind a foreign enforcing court at least where the supervisory court's judgment fulfils the requirements for the recognition of foreign judgments in the enforcement forum,⁹⁰ it is unconvincing to preclude a challenge to the arbitral

88 *Supra*, n 23 at [23]. See also *Paklito Investment Ltd v Klockner East Asia Ltd* [1993] 2 HKLR 39 at 48–49; *Svenska Petroleum Exploration AB v Lithuania* (No 2) [2006] EWCA Civ 1529, [2007] QB 886 at [104]; *Galsworthy Ltd v Glory Wealth Shipping Pte Ltd* [2011] 1 SLR 727 at [8].

89 For similar reasons, there should be no preclusionary effect only because the award-debtor took no part in the arbitral proceedings and thus failed to challenge the arbitral tribunal's jurisdiction before the tribunal itself. A different view was taken in *Kanto Yakin Kogyo Kabushiki-Kaisha v Can-Eng Manufacturing Ltd* (1992) 7 OR (3d) 779 at 791.

90 The New York Convention does not preclude such an issue estoppel since its Art V(1)(e) permits the non-enforcement of an award that has been annulled by the supervisory court, for example on the ground that the award-debtor is not a party to the arbitration agreement: Born, *supra*, n 21 at Vol 2, pp 2696–2697. If an issue estoppel requires that the annulment decision is entitled to recognition in Australia under the general rules, the supervisory court should always be regarded as a competent court; see Georgios Petrochilos, *Procedural Law in International Arbitration* (2004), Oxford University Press, para 7.59. Some commentators go further and argue that an annulment decision must always be recognised by other courts: Hamid G Gharavi, 'Chromalloy: Another View' (1997) 12:1 *Mealey's International Arbitration Report* 21; Albert J van den Berg, 'Enforcement of Annulled Awards?' (1998) 9 *ICC International Court of Arbitration Bulletin* 15.

tribunal's jurisdiction before the enforcing court only because the award-debtor has failed to seek an annulment of the award by the supervisory court.⁹¹ The opposite view heavily restricts the applicability of Art V(1)(a)–(d) of the New York Convention, which permit the non-enforcement of foreign arbitral awards in cases of procedural irregularity in the arbitral proceedings, including the lack of jurisdiction on the part of the arbitral tribunal. Art V(1)(e) permits the non-enforcement of a foreign arbitral award that has been set aside by the supervisory court.

If the failure to challenge a foreign arbitral award in the supervisory court precluded the award-debtor from challenging the arbitral tribunal's jurisdiction in foreign enforcement proceedings, Art V(1)(a)–(d) of the New York Convention would be relevant only where a decision by the supervisory court is not, or would not be, entitled to recognition in the enforcement forum. Otherwise, a ruling by the supervisory court that there was no procedural irregularity in the arbitral proceedings would create an issue estoppel preventing the enforcing court from invoking Art V(1)(a)–(d), and an annulment of the award by the supervisory court on the ground of procedural irregularity in the arbitral proceedings would permit the enforcing court to refuse enforcement pursuant to Art V(1)(e). Article V(1)(a)–(d) would not apply in either case.

Article V(1)(a)–(d) of the New York Convention cannot have been intended to apply only where a decision by the supervisory court is not, or would not be, entitled to recognition in the enforcement forum. An award-debtor ought to be entitled to wait and see whether the award-creditor seeks an enforcement of the award outside the seat of the arbitration, and challenge the award if and when such enforcement is sought. As Lord Collins JSC said in *Dallah v Pakistan* (SC):⁹²

[I]n an international commercial arbitration a party which objects to the jurisdiction of the tribunal has two options. It can challenge the tribunal's jurisdiction in the courts of the arbitral seat; and it can resist enforcement in the court before which the award is brought for recognition and enforcement. These

91 There is some support for such a preclusion: *Minmetals v Ferco*, *supra*, n 80 at 330 and 661, respectively; *Petrochilos*, *supra*, n 90 at paras 4.21, 7.61; Christer Söderlund, 'Lis Pendens, Res Judicata and the Issue of Parallel Judicial Proceedings' (2005) 22 *Journal of International Arbitration* 301 at 310. See also *Xiamen Xinjingdi v Eton*, *supra*, n 85 at [61]–[72].

92 *Supra*, n 23 at [98]. See also *Hebei Import & Export Corp v Polytek Engineering Co Ltd* [1999] 1 HKLRD 665 at 688–689 (Hong Kong Court of Final Appeal) ('*Hebei Import & Export Corp*'); *Newspeed v Citus*, *supra*, n 80 at [20]–[28]; *Aloe Vera v Asianic Food*, *supra*, n 22 at [53]–[56].

two options are not mutually exclusive, although in some cases a determination by the court of the seat may give rise to an issue estoppel or other preclusive effect in the court in which enforcement is sought. The fact that jurisdiction can no longer be challenged in the courts of the seat does not preclude consideration of the tribunal's jurisdiction by the enforcing court ...

4. *Participation in the Arbitration without Contesting the Tribunal's Jurisdiction*

In *IMC Aviation Solutions Pty Ltd v Altain Khuder LLC*, Altain argued that IMC Solutions was precluded from contesting its privity to the relevant arbitration agreement in the Victorian enforcement proceedings because IMC Solutions had participated in the arbitral proceedings without objecting to the tribunal's jurisdiction. IMC Solutions disputed having participated in the arbitration. Croft J found that IMC Solutions had in fact participated in the arbitral proceedings and failed to then argue that it was not a party to the relevant arbitration agreement,⁹³ and he held, without further explanation, that IMC Solutions' failure to raise this issue in the arbitral proceedings estopped IMC Solution from raising the issue in the proceedings before him.⁹⁴ In the Victorian Court of Appeal, Hansen JA and Kyrou AJA found that IMC Solutions had not participated in the arbitral proceedings,⁹⁵ and neither they nor Warren CJ expressed a view on whether a preclusionary effect would otherwise have existed. It is submitted that Croft J was correct to recognise a preclusionary effect on the basis of the facts he found.

Courts in several countries have precluded an award-debtor from raising in enforcement proceedings a complaint of procedural irregularity in arbitral proceedings where the award-debtor participated in the arbitral proceedings without raising the complaint even though it was possible to raise it.⁹⁶ This rule has been applied to an objection to the arbitral tribunal's jurisdiction on the ground that the party in question is not a party to the relevant arbitration

93 *Supra*, n 1 at [85].

94 *Id* at [98].

95 *Supra*, n 2 at [201]–[239].

96 *Ghirardosi v Minister of Highways (BC)* (1966) 56 DLR (2d) 469 at 473–474; *Chrome Resources SA v Lazarus Ltd* (1978) 11 YB Comm Arb 538 at [8] (Supreme Court of Switzerland); *AAOT Foreign Economic Association (VO) Technostroyexport v International Development and Trade Services Inc* 139 F 3d 980 at 982 (2nd Cir, 1998) ('*AAOT Technostroyexport v IDTS* '), citing several other US decisions; *Minmetals v Ferco*, *supra*, n 80 at 330 and 661–662, respectively; *Hebei Import & Export Corp, supra*, n 92 at pp 689–690; *Sam Ming City Forestry Economic Co v Lam Pun Hung* [2001] 3 HKC 573 at 579 (Hong Kong Court of Appeal).

agreement.⁹⁷ Three independent arguments can be made for an application of this preclusionary rule in Australian proceedings concerning the enforcement of a foreign arbitral award.⁹⁸

First, it can be argued that the New York Convention enshrines the principle of good faith and precludes an award-debtor from raising in enforcement proceedings a ground of refusal set out in Art V(1) of the Convention where the award-debtor, in bad faith, failed to raise that ground in the arbitral proceedings. Van den Berg has made this argument with regard to the formal invalidity of the arbitration agreement pursuant to Art II(2) of the Convention,⁹⁹ and Kaplan J in the High Court of Hong Kong has supported this argument for any ground of non-enforcement set out in Art V(1) of the Convention.¹⁰⁰

Second, the preclusionary rule may be derived from Art 16(2) of the Model Law, which has the force of law in Australia pursuant to s 16(1) of the International Arbitration Act 1974 (Cth). Article 16(2), which deals with certain pleas in arbitral proceedings, provides in its first sentence: 'A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence'. The fourth sentence of Art 16(2) reads: 'The arbitral tribunal may ... admit a later plea if it considers the delay justified'. The combined effect of those two sentences is that the failure to raise a jurisdictional challenge at or before the submission of defence precludes the party from raising the defence at a later stage of the arbitral proceedings unless the tribunal grants an exception.¹⁰¹ According to the *travaux préparatoires*

97 *La Societe Nationale des Hydrocarbures v Shaheen Natural Resources Co Inc* 585 F Supp 57 at 62 (SD NY, 1983); affirmed 733 F 2d 260 (2nd Cir, 1984).

98 No preclusionary effect should arise where, in the arbitral proceedings, the award-debtor both challenged the tribunal's jurisdiction and argued the merits of the dispute: see *China Minmetals, supra*, n 24 at p 290.

99 Van den Berg, *supra*, n 21 at p 185.

100 *China Nanhai Oil Joint Service Corp Shenzhen Branch v Gee Tai Holdings Co Ltd* [1995] 2 HKLR 215 at 223–225. This view was described as one possible basis of the preclusionary effect *in casu* in *Hebei Import & Export Corp, supra*, n 92 at pp 689–690.

101 Article 4 of the Model Law provides for the preclusion of complaints about the non-compliance with non-mandatory provisions of the Model Law or with procedural requirements set out in the arbitration agreement where the complaint was not made without undue delay or within a time period set. Article 4 does not apply to jurisdictional challenges because Art 16(2) is *lex specialis*. The view that Art 4 does not apply to jurisdictional challenges because Art 16 is a mandatory provision is taken by Binder, *supra*, n 65 at para 4.015.

of Art 16,¹⁰² which an Australian court may consider in interpreting the Model Law,¹⁰³ the preclusionary effect prescribed in Art 16(2) was intended to obtain not only in the arbitral proceedings but also in subsequent annulment or enforcement proceedings, subject to public policy including arbitrability.¹⁰⁴

If it is accepted that Art 16(2) contains a preclusionary rule applying in enforcement proceedings, the question arises whether the applicability of that rule requires that Art 16(2) of the Model Law, or a provision to like effect, is contained not only in the law governing the enforcement procedure but also in the law governing the arbitral proceedings.¹⁰⁵ The preclusion of a challenge in enforcement proceedings may be considered unjust where the award-debtor chose not to raise the challenge in the arbitral proceedings in reliance on the law governing those proceedings. No preclusion ought to obtain at least in the situation where the award-debtor did raise the jurisdictional challenge in the arbitral proceedings but did so at a later time than allowed by Art 16(2) of the Model Law because the law governing the arbitral proceedings permitted the raising of the challenge at that later time.¹⁰⁶ Where the award-debtor failed to raise the defence at all in the arbitral proceedings, the question of whether a preclusionary effect in enforcement proceedings requires the law governing the arbitral proceedings to contain a preclusionary rule has little practical significance since most national laws and institutional arbitration rules do contain Art 16(2) of the Model Law or a similar provision.¹⁰⁷

102 UNCITRAL, Report of the Working Group on International Contract Practices on the work of its seventh session, 17th sess, UN Doc A/CN.9/246 (6–17 February 1984) [51]; UNCITRAL, Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration, 18th sess, A/CN.9/264 (25 March 1985), Art 16 at [8]–[10].

103 International Arbitration Act 1974 (Cth), s 17(1).

104 The preclusionary effect by virtue of Art 4 was also intended to extend to subsequent annulment or enforcement proceedings: UNCITRAL Report on the work of its eighteenth session, UN Doc A/40/17 (3–21 June 1985) [57] (where it is further said that an arbitral tribunal's decision on whether a party has waived an objection pursuant to Art 4 is not binding on either the supervisory court or a foreign enforcing court); Nigel Blackaby and Constantine Partasides, *Redfern and Hunter on International Arbitration* (5th Ed, 2009), Oxford University Press, para 5.125 n 177.

105 A similar question arises where a judgment rendered in one country is said to have a preclusionary effect in litigation in another country; see Peter Barnett, 'The Prevention of Abusive Cross-Border Re-Litigation' (2002) 51 *International and Comparative Law Quarterly* 943 at 953–957.

106 See Di Pietro and Platte, *supra*, n 21 at p 158.

107 Born, *supra*, n 21 at Vol 1, pp 989–990.

Third, an analogy can be made to the preclusionary rule that applies in Australian proceedings for the enforcement of a foreign judgment under the common law rules. A judgment-debtor who participated in the foreign litigation cannot raise in Australian enforcement proceedings a defence (other than fraud¹⁰⁸) that could have been, but was not, raised in the foreign litigation.¹⁰⁹ Indeed, the failure to object to the jurisdiction of the foreign court in the foreign litigation constitutes a submission to that jurisdiction, rendering the foreign court a competent court in the eyes of Australian law.¹¹⁰ This preclusionary rule is justified by 'considerations of comity and the duty of the courts to put an end to litigation'.¹¹¹ It forces litigants to raise all available defences before the court and prevents them from keeping a defence as a 'trump in the sleeve' to be played if they lose the case and the opponent seeks enforcement of the judgment in another country. The preclusionary rule may also be regarded as an instance of estoppel by representation because it protects a litigant's reasonable belief in the absence or waiver of a certain defence where that belief was induced by the opponent's appearance before the court without raising that defence.

These two rationales apply with equal, if not stronger, force where the original proceedings were arbitral rather than judicial proceedings. It would thwart the goal of making arbitration an efficient and timely method of resolving commercial disputes¹¹² were a party to arbitral proceedings allowed to withhold a defence in those proceedings and raise it if that party loses the case and the opponent seeks judicial enforcement of the award. The law ought to protect the reasonable belief by a party to arbitral proceedings that the opponent is unable or unwilling to raise a certain defence where that belief was induced by the opponent's appearance before the tribunal without raising that defence.

There are two final observations. First, if the failure to raise a certain objection in arbitral proceedings (not seated in Australia) precludes the

108 *Norman v Norman (No 2)* (1968) 12 FLR 39 at 47; *Yoon v Song* [2000] NSWSC 1147, (2000) 158 FLR 295 at [22]; *De Santis v Russo* [2001] QSC 65, (2001) 27 Fam LR 414 at [16]; *Trainor Asia Ltd v Calverley* [2007] WADC 124, (2007) 53 SR (WA) 277 at [25]–[28]; *Mobi-Light Inc v KK Machinery Pty Ltd* [2010] WADC 105 at [45]–[48]. Cf *Keele v Findley* (1990) 21 NSWLR 444.

109 *Ellis v M'Henry* (1871) LR 6 CP 228 at 238; *Israel Discount Bank of New York v Hadjipateras* [1984] 1 WLR 137 at 144, 146 ('*Israel Discount Bank of NY v Hadjipateras*'). See also *Stern v National Australia Bank* [1999] FCA 1421 at [137], [145], [147].

110 *Gutnick v Dow Jones & Co Inc* [2001] VSC 305 at [112]; *De Santis v Russo, supra*, n 83 at [11]; *Fletcher Steel v Moghe* [2006] NSWSC 425 at [10]. See also Foreign Judgments Act 1991 (Cth), ss 7(5), 11.

111 *Israel Discount Bank of NY v Hadjipateras, supra*, n 109 at p 144 (per Stephenson LJ).

112 See International Arbitration Act 1974 (Cth), s 39(2)(b)(i).

raising of this objection when enforcement of the award in Australia is sought, so must *a fortiori* the failure to raise an objection during annulment or verification proceedings before the supervisory court.¹¹³ Second, whatever the jurisdictional basis of the preclusionary rule, the award-debtor ought to be able to escape preclusion by proving that the raising of the objection in the previous (arbitral or judicial) proceedings would have been futile (because, for example, the tribunal or court was corrupt),¹¹⁴ or that, at the relevant time, the award-debtor was not, and could not with due diligence have been, aware of the facts giving rise to the objection.¹¹⁵ However, an award-debtor who, before the enforcing court, denies being a party to the relevant arbitration agreement will rarely be able to prove that, at the time of the previous (arbitral or judicial) proceedings, the award-debtor reasonably believed to be a party to that agreement.

E. CONCLUSION

This article has investigated two questions that may arise in Australian proceedings for the enforcement of a foreign arbitral award where the award-debtor is not named in the relevant arbitration agreement and asserts that it is not a party to that agreement. The first question that may be contested in those circumstances is whether the award-debtor is for some reason precluded from denying its privity to the relevant arbitration agreement. This article has argued that no such preclusion ought to exist only because the arbitral tribunal has ruled that the award-debtor is a party to the relevant arbitration agreement, or only because the award-debtor has failed to seek an annulment of the award by the supervisory court. By contrast, the award-debtor ought to be precluded from denying its privity to the relevant arbitration agreement where the award-debtor participated in the arbitral proceedings without raising the issue even though it could have been raised, or where the supervisory court has ruled that the award-debtor is a party to the relevant arbitration agreement and that ruling creates an issue estoppel in Australian proceedings under the rules governing the recognition of foreign judgments in Australia.

113 *Hebei Import & Export Corp, supra*, n 92 at pp 689–690, with regard to enforcement proceedings in Hong Kong.

114 *Petrochilos, supra*, n 90 at para 4.26. In those circumstances, the objection may still be precluded if it was not brought to the opponent's attention during the previous proceedings: *AAOT Technostroyexport v IDTS, supra*, n 96 at p 982.

115 *Petrochilos, supra*, n 90 at para 4.25. Section 73(1) of the Arbitration Act 1996 [UK] contains this exception to the preclusionary effect that otherwise obtains in proceedings before English courts by virtue of the failure to raise in English arbitral proceedings an objection of procedural irregularity.

Where the award-debtor is not precluded from denying its privity to the relevant arbitration agreement and the Australian court thus needs to rule on this issue, the onus of proof with regard to the issue may become relevant. This article has argued that all that the award-creditor needs to do is to produce the award and the agreement in pursuance of which the award was made (and a translation of either document if necessary), and that it is for the award-debtor to plead and prove that it is not a party to that agreement. This view, taken by Croft J as trial judge in *IMC Aviation Solutions Pty Ltd v Altain Khuder LLC*, is the only view that can safely be said to give effect to Australia's obligations under the New York Convention.

For that reason, this article has rejected the view taken by Hansen JA and Kyrou AJA in the Victorian Court of Appeal in *IMC Aviation Solutions Pty Ltd v Altain Khuder LLC* that the award-creditor needs to provide the award, the agreement and further evidence to demonstrate on a *prima facie* basis that the award-debtor is a party to the relevant arbitration agreement. Even more problematic is the view taken by Warren CJ in the Court of Appeal that the award-debtor's privity to the relevant arbitration agreement is a threshold issue to be proved by the award-creditor on a balance of probabilities. It is to be welcomed that Foster J in the Federal Court of Australia has recently adopted the view taken by Croft J in *IMC Aviation Solutions Pty Ltd v Altain Khuder LLC* and refused to adopt either view expressed in the Victorian Court of Appeal in that case.¹¹⁶

116 *Dampskibsselskabet Norden A/S v Beach Building and Civil Group Pty Ltd* [2012] FCA 696 at [89]–[91]. This decision came too late to be fully discussed in this article.