SINGAPORE INSTITUTE OF ARBITRATORS
NEWSLETTER
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THE PRESIDENT'S COLUMN

The Institute's 2012 AGM was held on Tuesday 28 August, followed by networking cocktails.

New Council

The AGM saw the offices of Vice President and Honorary Secretary open for election, together with 3 Council seats. Chan Leng Sun and Naresh Mahtani were returned unopposed as Vice President and Honorary Secretary respectively. The 3 Council seats saw a keenly contested election between 4 nominees, with Tay Yu Jin, Ganesh Chandru and Dinesh Dhillon being voted into the Council.

I was heartened by the level of interest in running for Council. The fact that we received more nominations than available Council seats, is in my view, positive. I see it as a real expression of interest in what we are doing in SIArb.

The election of existing council member Naresh Mahtani as Honorary Secretary led to a vacancy on the Council, which in accordance with the Constitution, was filled by Eric Chew, who was one of the candidates for election at the AGM.

The new Council also co-opted Audrey Perez.

So I am delighted to present you the new Council for 2012:

Mohan R Pillay	President
Chan Leng Sun, SC	Vice-President
Naresh Mahtani	Honorary Secretary
Anil Changaroth	Honorary Treasurer
Past President Johnny Tan	Immediate Past President

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ANNOUNCEMENTS UPDATES & UPCOMING EVENTS

1. Michael Hwang – "Getting the Architecture of the Arbitration Right – Model Procedural Order No. 1" on **6 November 2012**.
2. Annual Dinner – Sheraton Towers Singapore on **20 November 2012**. Justice of Appeal and Chief Justice Designate Justice Sundaresh Menon will be gracing the occasion as our Guest of Honour.

NEW MEMBERS

The Institute extends a warm welcome to the following new members:

Fellows

1. Amanda Lees
2. Ng Hon Khag Edward
3. Lee Wai Pong
4. Suey Kok Hua

Members

1. Pranav Vyas
2. Eunice Chew
3. Lim You Yu Benson
4. Wong Kien Keong
5. Sunil Lopez
6. Kevin Ong

COUNCIL – 2012 / 2013

President
Mr. Mohan R Pillay

Vice-President
Mr. Chan Leng Sun, SC

Hon. Secretary
Mr. Naresh Mahtani

Hon. Treasurer
Mr. Anil Changaroth

Immediate Past President
Mr. Johnny Tan Cheng Hye, PBM

Council Members
Ms. Audrey Perez (Co-opted)
Mr. Chew Yee Teck, Eric
Mr. Chia Ho Choon
Mr. Dinesh Dhillon
Mr. Ganesh Chandru
Mr. Raymond Chan (Past President)
Mr. Tay Yu-Jin

PUBLICATIONS COMMITTEE

Co-Chair
Dinesh Dhillon / Chew Yee Teck, Eric

Editor
Chew Yee Teck, Eric

Committee Members
Chew Yee Teck, Eric
Audrey Perez
Gan Kam Yuin
Ganesh Chandru
Sheila Lim

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Tay Yu-Jin	Council Member
Ganesh Chandru	Council Member
Chia Ho Choon	Council Member
Dinesh Dhillon	Council Member
Eric Chew	Council Member
Audrey Perez (Co-opted)	Council Member

Thanks and Appreciation

I wish to record my thanks and appreciation to Andrew Chan (Hon Sec) and Ng Ming Fai, both of whom are retiring from the Council due to work demands. Andrew has discharged the demanding office of Honorary Secretary over the 2 years of his term with dedication and diligence. Ng Ming Fai, who was co-opted into Council last year enthusiastically helped the Institute with his industry expertise and experience as Chair of our IT and Website Committee.

On behalf of the Council and the Institute I wish to express my gratitude for their time and devotion to the Institute's work. I look forward to welcoming Andrew and Ming Fai back when their work commitments permit. They have both kindly indicated that they will continue to stay involved at Committee level.

I am delighted to welcome Dinesh Dhillon and Eric Chew who debut on the Council this year, and very pleased to see the return of some old hands back at the Council - Chan Leng Sun, Naresh Mahtani, Tay Yu-Jin, Ganesh Chandru and Audrey Perez.

Committees

With the new faces on the Council, there has been some movement of Committee Chairs.

The 2012 Committee leadership is as follows:

Panel Arbitrators Committee:	Raymond Chan (Past President)
External Relations Committee:	Johnny Tan Cheng Hye, PBM (Immediate Past President)
Education/Training Committee:	Chan Leng Sun, SC
CPD Committee:	Tay Yu-Jin
Publications Committee:	Eric Chew/ Dinesh Dhillon
IT/Website Committee:	Ganesh Chandru
Activities Committee:	Chia Ho Choon
Scheme Arbitration Committee:	Anil Changaroth
Arbitration Bar Committee:	Tay Yu-Jin
Special Focus Committee:	Audrey Perez

Highlights of Annual Report

For those who were not able to make the AGM, I briefly touched on some highlights in the Annual Report.

Secretariat

Our Marketing Manager Pauline Wong left on 13 July 2012. I wish to thank her for her support and services to the Institution. She had a career opportunity elsewhere and leaves with our best wishes.

Council has decided to explore outsourcing instead of simply replacing headcount. We are currently in the process of evaluating if this may be a more cost efficient and productive option.

Membership

At last year's AGM, our membership stood at 753. I am pleased to report that as of 31 July 2012, our membership has increased some 10% to 824. Most of the increase has come through at fellowship and membership level.

Education & Training

This increase in Fellows and Members is testament to the appeal and value of our IEC and our FAC programs. In 2012 we attracted good levels of interest in both these programs, with some 30 registrations each for IEC and FAC - historically high levels for the Institute.

My thanks to the many teachers and tutors from amongst our members who give their professional time in support of these 2 programs.

The Institute will continue to maintain a key focus on these training programs.

Additionally, the Council is looking at expanding its professional development programs offerings to include arbitration surgery workshops. This will explore practical aspects of the arbitration process using DVDs that replicate mock arbitrations. We expect to roll this out in the New Year.

CPD

This remains very much at the heart of our training and service to members.

My target is to provide 7 - 10 such seminars per calendar year.

SIArb Commercial Arbitration Symposium:

This Symposium event is close to my heart.

It debuted in 2009 and celebrated its 4th year in June this year, on the sidelines of the ICCA Congress. It continues to be a popular national and regional draw. The 2012 Symposium saw delegates from Hong Kong, India, Malaysia, Japan, Vietnam and Philippines.

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Regional Work
We continue our collaboration with the World Bank funded arbitration training program in Cambodia.

It started in 2010 and our work will continue into 2013.

National Arbitration Conference
We are looking into organizing a National Arbitration Conference in 2013.

I believe the Institute is well placed to do this, given its position in the Singapore arbitration community.

Annual Dinner – 20 Nov 2012
This year's Annual Dinner commemorates the Institute's 31st Anniversary.

We have the honour of Judge of Appeal & Chief Justice Designate Justice Sundaresh Menon as Guest of Honour. Justice Menon has been a long time and much valued friend and supporter of the Institute for many years. We are very fortunate to have his company at our Annual Dinner so soon after he officially assumes the office of Chief Justice in early November.

I very much hope that you too will be able to join us for an evening of fellowship and camaraderie.

Mohan R Pillay, President 2011-2013

Case Law Development

By Dr. Philip Chan

Latest Development in Arbitration Case Law in Singapore

In this issue, 4 cases are reviewed, 3 under the International Arbitration Act ("**IAA**") and 1 under the Arbitration Act ("**AA**").

The cases under the IAA are:

(1) **AZT & others v AZV** [2012] SGHC 116;

(2) **PT Prima International Development v Kempinski Hotels SA & other appeals [2012]** SGCA 35; and

(3) **Quarella SpA v Scelta Marble Australia Pty Ltd** [2012] SGHC 166.

The case under the AA is **Daimler South East Asia Pte Ltd v Front Row Investment Holdings (Singapore) Pte Ltd** [2012] SGHC 157.

AZT concerns an application for sealing court documents as the matter before the court related to arbitration proceedings. The respect for confidentiality relating to documents and information arising from arbitration gives users of arbitration the assurance of confidentiality.

Kempinski Hotels and Quarella SpA concern applications for setting aside awards.

In *Kempinski Hotels* the Court of Appeal reversed the order of the High Court setting aside an award. The Court of Appeal also clarified the role of pleadings in arbitrations and this should be instructive on how to plead in arbitrations.

In *Quarella SpA*, the High Court dismissed the application to set aside an award. The High Court was also concerned with the effect of wrongly interpreting a choice of law clause.

With regards to the AA case, *Daimler*, the High Court found that an exclusion of appeal clause was valid when the ICC Rules was adopted by the parties.

IAA Cases

(a) Sealing Court Documents

AZT and others v AZV [2012] SGHC 116 [Andrew Ang J]

AZT applied for court documents in an on-going originating summons to be *"sealed in order to preserve the confidentiality of the arbitration proceedings"*.

The Court first found that the legal principle, that justice must be administered publicly, is not without exception. This is because there is a more fundamental object of the Courts, which is to "secure that justice be done". One exception is when the public administration of justice "destroys the subject matter of the dispute".

Based on the above legal basis, the following factors were considered by the court:

- Both AZT and AZV were parties to the arbitration and

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the confidentiality of the arbitration should not be compromised by the present originating summons proceedings between the parties;

- The dispute between the parties is purely commercial, with nothing to suggest that there is any countervailing and legitimate public interest weighing in favour of disclosure;

- Having perused the documents, there is nothing to indicate that there is a legitimate public interest in not sealing the court documents; and

- While AZV had earlier been recorded as opposing the sealing application, it subsequently clarified that since it is reserving the right to apply to stay the originating summons action on the ground that the court lacks jurisdiction, it neither opposes nor consents to the application.

The court also noted that a majority of the case law in Singapore dealt with *"judgments and the need to make judgments dealing with challenges to arbitral awards public"* for the development of *"arbitration jurisprudence"* in Singapore. However, this was not the case in AZT where *"The sealing of court documents, however, would not stifle the development of arbitration jurisprudence in Singapore"*.

Based on the above considerations, the court allowed the plaintiff's application, holding that *"……the principle of open justice must be weighed against the need to preserve confidentiality in arbitration, with the latter being an important factor in the court's exercise of discretion …"*.

(*b) Setting Aside Reversed*

PT Prima International Development v Kempinski Hotels SA and other appeals [2012] SGCA 35 [Chan Sek Keong CJ, Andrew Phang Boon Leong JA and Belinda Ang Saw Ean J]

There were 4 appeals concerning the setting aside of 4 awards in the same arbitration. A key issue arising out of the 4 appeals that advances the *"jurisprudence of arbitration"* in Singapore concerned the role of pleadings in international arbitration.

It was argued that the arbitrator acted beyond the scope of his authority in deciding issues that were not pleaded. Hence, 2 of the awards should be set aside. The following arguments were put up to oppose the said argument:

(1) Pleadings are not essential in international arbitration;

(2) Procedural fairness in international arbitrations is governed by Article 18 of the UNCITRAL Model Law, which does not require pleadings;

(3) The UNCITRAL Model Law does not fetter the required content of pleadings in international arbitration; and

(4) The arbitrator's jurisdiction is determined by the scope of the arbitration agreement and not by the parties' pleadings.

The Court of Appeal held that *"the role of pleadings in arbitral proceedings is to provide a convenient way for the parties to define the jurisdiction of the arbitrator by setting out the precise nature and scope of the disputes in respect of which they seek the arbitrator's adjudication"*. Hence, *"in order to determine whether an arbitral tribunal has the jurisdiction to adjudicate on and make an award in respect of a particular dispute, it is necessary to refer to the pleaded case of each party to the arbitration and the issues of law or fact that are raised in the pleadings to see whether they encompass the dispute"*.

The above ruling stems from the fact that the scope of an arbitration agreement is not the same as the scope of a submission to arbitration, with the former encompassing the latter, but not necessarily vice versa. Parties may choose to refer some only of their disputes to arbitration.

Nevertheless, despite the finding that pleadings in arbitration play the same role as pleadings in litigation, the Court of Appeal also held that, "any new fact or change in the law arising after a submission to arbitration which is ancillary to the dispute submitted for arbitration and which is known to all the parties to the arbitration is part of that dispute and need not be specifically pleaded".

(c) Setting Aside Not Granted

Quarella SpA v Scelta Marble Australia Pty Ltd [2012] SGHC 166 [Judith Prakash J]

In this case, the Plaintiffs applied to set aside 2 awards made in an international arbitration on the basis that the tribunal *"failed to apply the rules of law that were agreed upon by the parties to govern the merits of the dispute"*.

The issue to be decided by the Court was whether

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a *"purportedly wrong interpretation of the choice of law clause (chosen by the parties to govern their distributorship agreement) by a tribunal justify setting aside an award under Articles 34(2)(a)(iii)-34(2)(a)(iv) of the UNCITRAL Model Law"*.

The choice of law clause read as follows :

"This Agreement shall be governed by the Uniform Law for International Sales under the United Nations Convention of April 11, 1980 (Vienna) and where not applicable by Italian Law".

Article 34(2)(a)(iii) and Article 34(2)(a)(iv) read as follows:

"An arbitral award may be set aside by the court specified in Article 6 only if:

(a) the party making the application furnishes proof that:

...

(iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; …

(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law;…"

The Court found as a matter of fact that the arbitrator had in his award considered the choice of law clause extensively and then came to a conclusion that Italian law applied. Hence, the arbitrator did not fail to apply the choice of law clause and declined to set aside the award under Article 34(2)(a)(iv) of the Model Law.

The Court found that ***Quarella SpA's*** real dispute was that the Tribunal applied the chosen law wrongly (i.e. that it disagreed *"with the interpretation the Tribunal took regarding the choice of law clause"*). The Court held that this was insufficient to engage Article 34(2)(a)(iii) of the Model Law as it is merely a wrong interpretation of a clause that does not go outside the scope of submission to arbitration.

AA cases

(a) Valid exclusion of appeal clause

Daimler South East Asia Pte Ltd v Front Row Investment Holdings (Singapore) Pte Ltd [2012] SGHC 157 [Woo Bih Li J]

The Plaintiff sought leave to appeal an award under section 49 of the AA. The Defendant sought to set aside the Plaintiffs' application *"on the ground that the parties had agreed to exclude their right of appeal to the High Court under s 49(1) of the AA when they had agreed to submit any dispute under [their joint venture contract] to arbitration under the ICC Rules 1998"*.

Sections 49(1) & 49(2) of the AA and Article 28(6) of the ICC Rules read as follows:

"Section 49

(1) A party to arbitration proceedings may (upon notice to the other parties and to the arbitral tribunal) appeal to the Court on a question of law arising out of an award made in the proceedings.

(2) Notwithstanding subsection (1), the parties may agree to exclude the jurisdiction of the Court under this section and an agreement to dispense with reasons for the arbitral tribunal's award shall be treated as an agreement to exclude the jurisdiction of the Court under this section."

"Article 28(6), ICC Rules

Every Award shall be binding on the parties. By submitting the dispute to arbitration under these Rules, the parties undertake to carry out any Award without delay and shall be deemed to have waived their right to any form of recourse insofar as such waiver can validly be made."

The court held that, *"by adopting the ICC Rules 1998, the parties had agreed to exclude the right of appeal under s 49(1) of the AA".*

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AUSTRALIA/SINGAPORE/UK

To act robotically is not to act judicially

The author argues that the approaches taken by the courts of Australia, Singapore and the UK when an award debtor resists enforcement under the New York Convention on the basis that there was no valid arbitration agreement are consistent - and not as "mechanistic" as sometimes suggested.

At the first stage of enforcement of an award under the New York Convention, the legislation of Australia, England and Singapore requires the party seeking enforcement to provide both the award and the arbitration agreement to the court. At the second stage, the other side can raise one of the grounds recognised in the convention as a ground to resist enforcement.

In the past six years, courts in all three jurisdictions have issued talked-about judgments on what happens when an award debtor asserts the lack of a valid arbitration agreement to resist enforcement. First there was the 2006 Singapore High Court case, *Aloe Vera of America v Asianic Food and another*. Then, there was the English Supreme Court judgment in *Dallah Real Estate and Tourism Holding Company v The Ministry of Religious Affairs, Government of Pakistan* in 2010.

More recently, in 2011, the Australian Court of Appeal issued such a judgment in *IMC Aviation Solutions v Altain Khuder* – which was heavily criticised for departing from the approaches taken in Singapore and England.

Contrary to the criticisms directed at IMC Aviation, this author is of the view that the approach taken in Australia is in fact uniform with that taken in Singapore and England. When reviewing the requirement for the award creditor to produce the arbitration agreement at the first stage of enforcement, the courts in all three jurisdictions required the creditor to show on a prima facie basis that the award debtor was found by the tribunal to be a party to the arbitration agreement.

The different outcomes of the cases can be attributed to their own special facts and not different approaches taken by the courts.

Aloe Vera

The plaintiff, Aloe Vera of America, entered into an agreement with the first defendant, Asianic Food, which was another member of the same group, the Forever Living Products Companies. The second defendant, a Mr. Chiew, had signed the agreement on Asianic's behalf as its manager, but was not expressly stated to be a contracting party to the agreement, which was governed by the law of Arizona.

Aloe Vera subsequently commenced arbitration proceedings, naming both Asianic and Chiew as parties to the arbitration. Chiew denied being a party to the arbitration agreement. The arbitrator made a preliminary order that under the broadly drafted arbitration clause (governed by Arizona law), Mr. Chiew was a party to the arbitration due to his position as manager of Asianic.

The clause stated that: "If a dispute arises relating to any relationship among any of the Forever Living Products Companies, [...] their officers, employees, distributors or vendors [...] it is expected that the parties will attempt in good faith to resolve any such dispute in an amicable and mutually satisfactory manner [...]" [Emphasis added].

The arbitrator accordingly made a final award against both Asianic and Chiew. But when Aloe Vera applied to enforce the award against both parties in Singapore, Chiew resisted enforcement on the basis that he was not a party to the arbitration agreement.

Justice Judith Prakash in the Singapore High Court noted that the process of enforcement is "mechanistic". She found that the first stage of enforcement was complied with as Aloe Vera could prove that the arbitration clause included Chiew as a party to the arbitration agreement, and that the arbitrator had made a preliminary finding to that effect.

In making the above findings, Prakash J was guided by the 2002 English Court of Appeal case of Dardana Ltd v Yukos Oil Company, which was also referred to in Dallah and IMC Aviation. In Dardana, the present UK Supreme Court judge Lord Mance held that to fulfill the requirement of producing the arbitration agreement at the first stage of enforcement, all that is required is "valid documentation containing an arbitration clause, by reference to which the arbitrators have accepted that the parties had agreed on arbitration or in which the arbitrators have accepted that an agreement to arbitrate was recorded with the parties' authority." [Emphasis added].

Prakash J also distinguished the 2003 Canadian case Javor v Francoeur (from the British Columbia Supreme

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Court), in which the arbitrator made an award against a Mr. Francoeur, who was not a party to the arbitration agreement, on the basis that he was one and the same with the corporate respondent and should be held personally liable for the latter's debts.

At the second stage of enforcement, Prakash J found that Chiew had failed to show that the agreement was invalid under the law of Arizona. Enforcement of the award was therefore allowed.

Dallah

The appellant, a Saudi Arabian real estate company called Dallah, entered into an agreement with a trust set up by the respondent, the government of Pakistan. The agreement provided for arbitration of any disputes arising between the trust and Dallah.

Dallah later commenced arbitration proceedings against Pakistan, which was a named party to the arbitration. Pakistan denied being party to the arbitration agreement.

The tribunal found that Pakistan was a party to the arbitration agreement, since the trust was its alter ego – and issued a final award against the government.

Dallah took steps to enforce the final award in the UK, which Pakistan resisted on the same grounds raised in the arbitration. Since the arbitration was seated in Paris, it was common ground that French law was applicable and the test that should be applied was the common intention of the parties.

On appeal to the UK Supreme Court, the parties' submissions proceeded on the basis that the onus was on Pakistan to prove that it was not party to any such arbitration agreement. There was no discussion of the first stage of enforcement, which required the award and arbitration agreement to be produced. This was because there was neither a challenge to nor an attempt to distinguish Dardana, the English Court of Appeal case also referred to in Aloe Vera.

At the second stage of the enforcement proceeding, the Supreme Court decided that Pakistan had proved there was no common intention for the government to be bound by the arbitration agreement. Enforcement of the award was accordingly refused.

IMC Aviation Solutions

The plaintiff, Mongolian-registered mining company Altain Khuder commenced arbitration proceedings against the first defendant, British Virgin Islands-registered IMC Mining, pursuant to an agreement. The second defendant, IMC Aviation Solutions, was an Australian-registered company. It was not expressly named as a party to the arbitration agreement or as a defendant to the arbitration proceedings in Mongolia.

Despite this, the tribunal issued an award, ordering IMC Aviation Solutions to pay Altain the sum for which IMC Mining had been found liable, on the BVI company's behalf. When Altain sought to enforce this award in Australia, IMC Aviation Solutions filed an application to resist enforcement on the ground that it was not a party to the arbitration agreement.

The Australian Court of Appeal held that enforcement should be refused as IMC Aviation Solutions was not a party to the arbitration agreement. The court held that at the first stage of enforcement, an award creditor must satisfy the court on a prima facie basis that an award has been made by a tribunal granting relief to the award creditor against the award debtor; that the award was made pursuant to an arbitration agreement; and that both creditor and debtor were parties to the arbitration agreement.

The court must carefully review the award and the arbitration agreement to determine whether those documents, considered alone or in combination with other evidence, satisfy the prima facie evidential requirements set out above. Producing the award and the arbitration agreement will not alone suffice where, on the face of them, the award debtor was not a party to the agreement.

If this is the case, the court must proceed to review the award and agreement to determine if, on a very low threshold, the award debtor is bound by the arbitration clause, and if the tribunal made a finding to that effect.

The court will only enforce against the award debtor if all the requirements are satisfied.

The Court of Appeal noted that while the English 1996 Arbitration Act has different provisions from the Australian International Arbitration Act, the cases of Dallah and Dardana were not based solely on the features of the 1996 Act, but in the context of the New York Convention enforcement regime as well. The English cases were therefore useful in the analysis of enforcement requirements.

The majority of the Court of Appeal decided Altain

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had not proved there was prima facie evidence that IMC Aviation Solutions was a party to the arbitration agreement. Therefore, the application failed at the first stage of enforcement.

Criticisms of *IMC Aviation Solutions*

A GAR article from 31 August 2011, Australian court forges own path on enforcement, noted the following criticisms and/or observations made of IMC Aviation Solutions:

- That the Australian Court of Appeal ruled that the award creditor has the burden of proving the award debtor was a party to the arbitration agreement, which is not the manner in which the New York Convention operates.

- That under Article IV(1) of the convention, submission of the arbitration agreement and the award alone will entitle the award creditor to leave for enforcement, unless the creditor asserts and proves that one of the grounds for refusal of enforcement listed in Article V(1) exists.

- That the court relied on linguistic differences between enforcement provisions in sections 8 and 9 of the Australian International Arbitration Act 1974 (which reflects Articles IV and V of the New York Convention) and the enforcement provisions in other jurisdictions, to justify departure from the approach in English and Singaporean cases. This criticism stated that, as the Australian parliament did not evidence any intention to modify its enforcement regime, Australia, like other convention countries, has to implement the obligations contained in the instrument.

  That Australia risked isolation in the arbitration world with this decision.

- That the court largely ignored leading decisions from England, Hong Kong and Singapore, and overturned the reasoning of a specialist arbitration judge (**Mr. Justice Croft** in the lower court).

A uniform approach

This author is of the view that the Australian court did not reverse the burden of proof, so that the award creditor has to prove the award debtor was a party to the arbitration agreement. As seen in Aloe Vera, Dardana and Dallah, the debtor bore the onus of proving he was not a party to the arbitration agreement but the creditor still had to show, on a prima facie basis, that the tribunal made a finding that the debtor was party to the arbitration agreement.

The following special facts led the Australian Court of Appeal to find that Altain had not shown that IMC Aviation Solutions was mentioned in the arbitration agreement and found by the tribunal to be a party to the arbitration agreement on a prima facie basis:

- The key documents (arbitration agreement, claim document, additional claim document, preliminary hearing document and the award) do not refer to IMC Aviation Solutions as a party to the arbitration agreement.

- Although the award made reference to IMC Aviation Solutions and directed it to pay to Altain amounts for which IMC Mining was liable, the award did not state that the first company was a party to the arbitration agreement or that the direction for payment was made against the company as a party to the arbitration agreement or the arbitration proceedings. In fact, the words 'on behalf of IMC Mining Inc Company of Australia' in the award suggested that the direction for payment was made against IMC Aviation Solutions in another unspecified capacity.

The factual scenario in IMC Aviation is actually similar to that in the 2003 Canadian case already discussed, Javor. In both cases, the parties were liable under an award but not on the basis that they were party to the arbitration agreement. It must, however, be fully appreciated that the prima facie requirement is to find the award debtor a party to the arbitration agreement, which is not the same as the debtor being named as liable under an award.

This author is of the view that the "mechanistic" approach taken by the Singapore High Court in Aloe Vera might have been misunderstood by other courts to mean that mere submission of the award and arbitration agreement, without any prima facie review, are sufficient to comply with the first stage of enforcement.

The Australian appeal court in IMC Aviation Solutions clarified that "mechanistic" should not be interpreted in this way.

"The enforcement court's function at stage one has been described as 'highly summary and essentially quasi-administrative', 'mechanistic' or as 'mechanistic as possible'. Altain's submissions placed emphasis on these expressions as indicating proper approach at

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stage one," the court said.

However, it immediately went on to observe that "such adjectives are potentially unhelpful because they may be misunderstood – or, as here, misused – as suggesting that the enforcement court is entitled to act, or does act, robotically".

"At all stages of the enforcement process, courts perform a judicial function and, accordingly, must act judicially. To act robotically is not to act judicially," the court said.

A uniform approach

The author's own view is that the Australian approach is actually the same as that in Singapore and England. The court did not seek to reverse the burden of proof in an enforcement application, nor did it ignore the leading precedents from other jurisdictions in requiring the award creditor to show that the award debtor is a party to the arbitration agreement on a prima facie basis.

In light of the above, it is suggested that arbitrating parties should ensure that the tribunal makes a ruling as to whether the arbitrating parties are proper parties to an arbitration agreement. This will prevent delays and problems with enforcement at a later stage.

Cases referenced

Aloe Vera of America, Inc v Asianic Food (S) Pte Ltd and another [2006] 3 SLR(R) 174 [2006] SGHC 78;

Dallah Real Estate and Tourism Holding Company v The Ministry of Religious Affairs, Government of Pakistan [2011] 1 AC 763 [2010] UKSC 46;

IMC Aviation Solutions Pty Ltd v Altain Khuder LLC [2011] VSCA;

Dardana Ltd v Yukos Oil Co [2002] 2 Lloyd's Rep 326 [2002] EWCA Civ 543; and

Javor v Francoeur [2003] BCJ No 480; 2003 BCSC 350

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Dinesh's areas of specialisation include international arbitration.

Dinesh was called to the Singapore Bar in 1995. In 2004, Dinesh obtained the Graduate Certificate in International Arbitration from the National University of Singapore.

MEMBERS' NIGHT

Date	Event
1 August 2012	Members' Night

Another wonderful Members' Night was held on 1 August 2012. Existing members of the Institution used the opportunity to catch up with old friends whilst new members were warmly welcomed into the Institution and new fellows congratulated on their promotion. 73 new members and 18 new fellows were presented with their certificates of membership and fellowship. Drinks and food flowed freely amongst lively banter in the calm and peaceful setting of RedDot Brew House in Boat Quay.

23 AUGUST SEMINAR




Date	Event	Speakers	Chairperson:
23 August 2012	Seminar	Mr. Kelvin Aw	Mr. Naresh Mahtani

In this seminar, Mr. Kelvin Aw from INCA Law LLC discussed the validity and enforceability of tiered alternative dispute resolution mechanisms involving arbitrations which are commonly found in modern contracts. Tiered alternative dispute resolution mechanisms involve the use of mediation, expert determination, neutral evaluation and/or adjudication in conjunction with arbitration to resolve disputes. Cases such as CRW Joint Operation v PT Perusahaan Gas Negara (Persero) TBK, Barclays Bank Plc v Nylon Capital LLP, Evergreat v Presscrete, Geowin v MCST No. 1256 and The Oriental Insurance Co Ltd v Reliance National Asia Re Pte Ltd were discussed, followed by a lively question and answer session.

COMMERCIAL ARBITRATION SYMPOSIUM



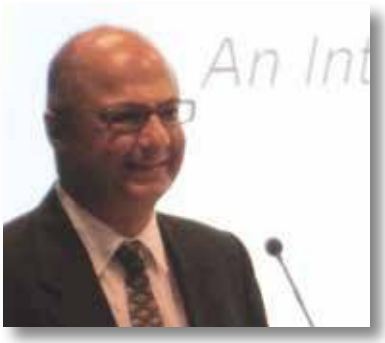





Date	Event
8 June 2012	Commercial arbitration symposium

This year saw another successful run of the Institution's Commercial Arbitration Symposium. The Symposium has over the years attracted many local and overseas participants and panelists. This year, the Symposium was held on the sidelines of the International Congress of Commercial Arbitrators. The Symposium's format where there are no set speeches or speakers and where participants submit topics for discussion with both panelist and the floor sparked off many lively debates with regard the latest issues in the conduct, practice and procedure in arbitrations, jurisdiction, power and duties of tribunals and the role of courts in support of arbitration and enforcement of arbitral awards. We eagerly look forward to the next installment of this unique Symposium.

FELLOWSHIP ASSESSMENT COURSE & INTERNATIONAL ENTRY COURSE



Date	Event
May 2012 Aug 2012	Fellowship assessment course & international entry course

The latest runs of the International Entry Course and Fellowship Assessment Course were held in May 2012 and August 2012, respectively. This time the Fellowship Assessment Course saw 27 participants being taken through basic contract, tort and evidence law, followed by modules on arbitration law and practice covering topics such as institutional and ad-hoc arbitrations, arbitration agreements, appointments of arbitrators and award writing. The course culminated in an award writing examination and successful candidates who met other criteria also qualified for admission or promotion to Fellows of the Institute. The International Entry Course saw 26 participants being taken through the basics of arbitration over 4 modules, covering topics such as the concept of "seat" and "lex arbitri" as well as commencement of arbitration and constitution of the tribunal. Candidates sat for a written examination and successful candidates who met other criteria also qualified for admission as Members of the Institute.

31st AGM

Date	Event
28 August 2012	AGM

The Institute's 31st Annual General Meeting was successfully held on 28 August 2012 at Maxwell Chambers' new location in Centennial Tower. This year's Annual General Meeting saw 4 candidates contest for 3 Council places and a healthy turnout of members. After the serious business of scrutinizing the Institute's annual reports and election of the next council, members proceeded to a networking session amidst a generous and tasty buffet spread and free flow of wines. All the best to Council 2012/2013 in their upcoming endeavours for the Institute.

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