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

Not Restricted

LIST G
No. 3827 of 2010

ALTAIN KHUDER LLC — Plaintiff

v

IMC MINING INC — Firstnamed Defendant

IMC MINING SOLUTIONS PTY LTD (ACN 069 083 094) — Secondnamed Defendant

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JUDGE:	CROFT J
WHERE HELD:	Melbourne
DATE OF HEARING:	28 January 2011
DATE OF JUDGMENT:	3 February 2011
CASE MAY BE CITED AS:	Altain Khuder LLC v IMC Mining Inc & Anor (No. 2)
MEDIUM NEUTRAL CITATION:	[2011] VSC 12

COSTS – Special costs orders – Indemnity costs – *Colgate Palmolive Company v Cussons Pty Ltd* (1993) 46 FCR 225 – *Ugly Tribe Co Pty Ltd v Sikola* [2001] VSC 189 – Special circumstances to justify an indemnity costs order – Indemnity costs in arbitration matters – In circumstances of an application to resist enforcement of an international arbitral award – *A v R* [2009] 3 HKLRD 389 – *Wing Hong Construction Limited v Tin Wo Engineering Company Limited* [2010] HKEC 919 – *Taigo Ltd v China Master Shipping Ltd* [2010] HKCFI 530 – *Hung Wan Construction Co Ltd v Hong Kong Housing Authority* [2010] HKCFI 650 – *Civil Justice Reform* (Hong Kong) – *Rules of the High Court* (Hong Kong), Order 1A, Rule 1 – *Civil Procedure Act* 2010 (Vic), section 7.

APPEARANCES:	Counsel	Solicitors
For the Plaintiff	Mr P. Megens, Solicitor	Mallesons Stephen Jaques
For the Firstnamed Defendant	No appearance	
For the Secondnamed Defendant	Mr J. Digby QC with Mr N. McAteer	Hopgood Ganim Lawyers

HIS HONOUR:

Application

1 This is an application by the plaintiff for an order that the second defendant, IMC Mining Solutions Pty Ltd ("IMC Solutions") pay the plaintiff's costs on an indemnity basis as a result of my orders made on 28 January 2011 dismissing the second defendant's summons to set aside my orders of 20 August 2010.

2 The proceeding in which these orders were made was an application brought by originating motion dated 14 July 2010 for the enforcement of a foreign arbitral award (15 September 2009 at Ulaanbaatar City, Mongolia, being Case # 12/09 of the Mongolian National Arbitration Centre at the Mongolian National Chamber of Commerce and Industry) ("the Award").

3 The second defendant, IMC Solutions, sought to resist enforcement of the Award but failed for the reasons set out in my judgment in *Altain Khuder LLC v IMC Mining Inc & Anor*.[1] The background and other matters relevant to the present application are set out in that judgment.

Indemnity costs generally

4 Section 24 of the *Supreme Court Act* 1986 confers upon the court a general jurisdiction with respect to costs. Ordinarily, costs are taxed on a party and party basis, but the court has jurisdiction to award costs on an indemnity basis.[2]

5 The general position is that a court will only depart from the usual rule that costs will be ordered and taxed on a party and party basis if the case is exceptional or there is some special or unusual feature which justifies the exercise of the court's discretion to order costs on an indemnity basis. Thus, Sheppard J, in *Colgate-Palmolive Co v Cussons Pty Ltd*, said:[3]

> "4. In consequence of the settled practice which exists, the Court ought not usually make an order for the payment of costs on some basis other than the party and party basis. The circumstances of the case must be such as to

1 [2011] VSC 1.

2 *Supreme Court (General Civil Procedure) Rules* 2005, rr 63.31, 63.28(c).

3 (1993) 46 FCR 225 at 233.

> warrant the Court in departing from the usual course. That has been the view of all judges dealing with applications for payment of costs on the indemnity or some other basis whether here or in England. The tests have been variously put. The court of Appeal in *Andrews v Barnes* [(1887) 39 Ch D 133 at 141] said the court had a general and discretionary power to award costs as between solicitor and client 'as and when the justice of the case might so require.' Woodward J in *Fountain Selected Meats* appears to have adopted what was said by Brandon LJ (as he was) in *Preston v Preston* [[1981] 3 WLR 619] namely, there should be some special or unusual feature in the case to justify the court in departing from the ordinary practice. Most judges dealing with the problem have resolved the particular case before them by dealing with the circumstances of that case and finding in it the presence or absence of factors which would be capable, if they existed, of warranting a departure from the usual rule. But as French J said (at p 8) in *Tetijo* [*Tetijo Holdings Pty Ltd v Keeprite Australia Pty Ltd* [1991] FCA 187], 'The categories in which the discretion may be exercised are not closed'. Davies J expressed (at p 6) similar views in *Ragata* [*Ragata Developments Pty Ltd v Westpac Banking Corporation* [1993] FCA 72]."

6 More recently, Harper J restated the general principles to be applied when the court is asked to depart from the usual basis for the award of costs. In *Ugly Tribe Co Pty Ltd v Sikola*,[4] Harper J restated the principles and provided examples of circumstances where indemnity costs may be appropriate:

> "7. In seeking costs on an indemnity basis, the first defendant is asking the Court to depart from its usual course: *Spencer v Dowling*[5]. Special circumstances must be present to justify such a departure: *Australian Electoral Commission v Towney (No. 2)*[6]. These include:
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> (i) The making of an allegation, known to be false, that the opposite party is guilty of fraud: *Fountain Selected Meats (Sales) Pty. Ltd v International Produce Merchants Pty Ltd* [1988] FCA 202; (1988) 81 ALR 397.
>
> (ii) The making of an irrelevant allegation of fraud: *Thors v Weekes* (1989) 92 ALR 131.
>
> (iii) Conduct which causes loss of time to the Court and to other parties: *Tetijo Holdings Pty Ltd v Keeprite Australia Pty Ltd* (unreported, Federal Court, French J, 3 May 1991).
>
> (iv) The commencement or continuation of proceedings for an ulterior motive: *Ragata Developments Pty Ltd v Westpac Banking Corporation* (unreported, Federal Court, Davies J, 5 March 1993).
>
> (v) Conduct which amounts to a contempt of court: *EMI Records Ltd v Ian Cameron Wallace Ltd* [1983] Ch 59.

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4 [2001] VSC 189.

5 [1997] 2 VR 127 at 147 per Winneke P and 163 per Callaway JA.

6 (1994) 54 FCR 383 at 388, per Foster J.

(vi) The commencement or continuation of proceedings in wilful disregard of known facts or clearly established law: *J-Corp Pty Ltd v Australian Builders Labourers Federation Union of Workers (WA) Branch (No 2)* [1993] FCA 42; (1993) 46 IR 301.

(vii) The failure until after the commencement of the trial, and without explanation, to discover documents the timely discovery of which would have considerably shortened, and very possibly avoided, the trial: *National Australia Bank v Petit-Breuilh (No 2)* (unreported, [1990] VSC 395, 18 October 1999).

8. The categories of special circumstances are not closed: *Tetijo Holdings*, supra. The cases must not, therefore, be read 'in an endeavour to establish a set of inflexible guidelines which should thereafter be determinative of the manner in which the Court's discretion is to be exercised [for this] would be to fetter the Court's discretion': *National Australia Bank v Petit-Breuilh*, supra.

9. At the same time, the courts should, I think, be astute to avoid a wilderness of single instances. Even worse would be the creation of different regimes in different courts, especially as between the Federal Court and a State Supreme Court. This would encourage the undesirable practice of forum shopping, as well as the almost equally undesirable spectre of frequent post-trial applications for costs to be awarded on some special basis (i.e. on other than the usual party and party basis).

10. According to Winneke P in *Spencer's* case (at 147):

> 'It is well recognised that there is occurring an ever increasing gap between party/party costs and those actually incurred … This … has continued … notwithstanding expressions of view by individual Judges that it is capable, in today's circumstances, of working injustice: see, for example, per Rogers J (as he then was) in *Qantas Airways Ltd v Billingham Corp*.[7] The practice is designed to reflect a compromise between the interests of successful and unsuccessful litigants. As Handley JA observed in *Cachia v Hanes*[8] the practice is also adopted to provide an "important spur to settlement". Sheppard J in *Colgate-Palmolive Co v Cussons Pty Ltd* (1993) 46 FCR 225 at 233 restated the practice and pointed out:
>
>> "This has been the settled practice for centuries in England. It is a practice which is entrenched in Australia. Either legislation … or a decision of an intermediate court of appeal or of the High Court would be required to alter it"."

11. The compromise about which Winneke P spoke is perhaps justifiable on the basis that potential litigants must not be unnecessarily discouraged from bringing their disputes to the courts. After all success can seldom be guaranteed, if only because – where the facts are in dispute, as they generally are – it is seldom possible to predict with certainty what findings of fact will be made. In these circumstances, an honest plaintiff or defendant might be discouraged from bringing or defending a claim were an adverse result to be followed by an order that the losing party indemnify, or go close

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[7] (unreported, NSW Supreme Court, 14 May 1987).

[8] (1991) 23 NSWLR 304 at 318.

> to providing an indemnity to, the successful party against the latter's costs.
>
> 12. The position changes where a litigant acts dishonestly in the litigation, or where the rights and privileges of a litigant are flouted or abused. Then, the rationale for refusing to order that the losing party indemnify an opposite party against that party's costs is less compelling. Indeed, costs are more frequently if not invariably awarded on an indemnity or like basis (such as that of solicitor/client) where findings of dishonesty or serious misconduct have been made against the party ordered to pay."

7 The second defendant submitted that on the basis of this statement of general principle, there is no warrant, in the present circumstances, to depart from the usual approach. It was submitted that no special circumstance exists to award anything but costs on a party and party basis. In relation to this statement, the plaintiff, on the other hand, emphasised paragraph 8 of the judgment of Harper J in the *Ugly Tribe* case, which stresses that the categories of special circumstances are not closed. In this respect, Harper J made specific reference to similar views expressed by French J in *Tetijo*.[9]

8 The plaintiff submitted that there are special circumstances in the present case because the second defendant finds itself in the position of being an unsuccessful applicant resisting enforcement of an arbitral award. The second defendant submitted that this provides no relevant special circumstance to justify an award of costs on anything but costs on a party and party basis. I now turn to the question whether proceedings such at this, to resist enforcement of an international arbitral award, raise special circumstances with respect to the exercise of the discretion in relation to costs.

<u>Indemnity costs in arbitration matters</u>

9 In support of its submissions that indemnity costs should, generally, be awarded against a party unsuccessfully challenging or resisting enforcement of an arbitral award, the plaintiff referred to the decision of Reyes J in *A v R*[10] in the Hong Kong Court of First Instance. In this respect, Reyes J said:[11]

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9 See, also, the passage from the judgment of Sheppard J in *Colgate Palmolive v Cussons* (1993) 46 FCR 225 at 233; which is set out above, paragraph 5.

10 [2009] 3 HKLRD 389.

11 [2009] 3 HKLRD 389 at [67] - [72].

> "67. Parties should comply with arbitration awards. A person who obtains an award in his favour pursuant to an arbitration agreement should be entitled to expect that the Court will enforce the award as a matter of course.
>
> 68. Applications by a party to appeal against or set aside an award or for an Order refusing enforcement should be exceptional events. Where a party unsuccessfully makes such application, he should in principle expect to have to pay costs on a higher basis. This is because a party seeking to enforce an award should not have had to contend with such type of challenge.
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> 69. Further, given the recent introduction of Civil Justice Reform (CJR), the Court ought not normally to be troubled by such type of application. A party unmeritoriously seeking to challenge an award would not be complying with its obligation to the Court under Order 1A Rule 3 to further the underlying objectives of CJR, in particular the duty to assist the Court in the just, cost-effective and efficient resolution of a dispute.
>
> 70. If the losing party is only made to pay costs on a conventional party-and-party basis, the winning party would in effect be subsidising the losing party's abortive attempt to frustrate enforcement of a valid award. The winning party would only be able to recover about two-thirds of its costs of the challenge and would be out of pocket as to one-third. This is despite the winning party already having successfully gone through an arbitration and obtained an award in its favour. The losing party, in contrast, would not be bearing the full consequences of its abortive application.
>
> 71. Such a state of affairs would only encourage the bringing of unmeritorious challenges to an award. It would turn what should be an exceptional and high-risk strategy into something which was potentially 'worth a go'. That cannot be conducive to CJR and its underlying objectives.
>
> 72. Accordingly, in the absence of special circumstances, when an award is unsuccessfully challenged, the Court will henceforth normally consider awarding costs against a losing party on an indemnity basis. The Respondent will here pay the Applicant's costs on an indemnity basis."

10 The decision of Reyes J in *A v R* was considered and applied in three subsequent decisions of the Hong Kong Court of First Instance. In *Wing Hong Construction Limited v Tin Wo Engineering Company Limited*,[12] Saunders J awarded costs on an indemnity basis in an unsuccessful challenge to an arbitral award.

11 On the issue of whether to award indemnity costs, it was submitted to Saunders J that the court was bound to apply the long-established principle that in the absence of any special or unusual feature in the case, an award of indemnity costs could not be justified. The submission was rejected by Saunders J, who instead agreed with

12 [2010] HKEC 919.

the reasoning of Reyes J in *A v R*.[13] Saunders J said:[14]

> "8. As I have said, I agree entirely with the sentiments of Reyes J [in *A v R*].
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> …
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> 11. They [ie applications for leave to appeal against an award, or to set aside an award, or for an order refusing enforcement] … are exceptional events. The whole principle of arbitration is that a person who obtains an award in his favour is entitled to expect that the Court will enforce the award as a matter of course. It is not necessary for a party successfully resisting an application seeking to challenge the award, to establish the application itself as an abuse of process to justify indemnity costs. The nature of arbitration is such that, having regard to the underlying objectives in the RHC, an unsuccessful application to challenge an arbitrators award will normally attract indemnity costs against the applicant.
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> 12. Counsel for the applicant had been obliged to accept that the clauses, the interpretation of which was sought to be challenged, were not standard clauses but were 'one-off' clauses, peculiar to this particular arbitration agreement. The burden faced by an applicant in challenging a one-off clause is high: the arbitral tribunal's construction must be shown to be 'obviously wrong'. Mr Tsang pointed to the fact that I thought that on first impression the argument for the applicant might be right. That, he said, the application being brought before the court.
>
> 13. But when regard is had to the hurdle to be mounted by the applicant, it is immediately seen that a mere first impression will fall a long way short of being able, even arguably, to meet the standard of showing that the interpretation is 'obviously wrong'. I accept that the challenge was not of itself an abuse of process, but it was a challenge made in circumstances where the prospect of establishing that the interpretation was 'obviously wrong' was at best remote. In those circumstances there is no reason to depart from what is now the usual rule, that costs on a failed challenge to an arbitrators award should be on an indemnity basis.
>
> 14. Where the prospect of success is at best remote, an application to challenge an award may properly be characterised as unmeritorious."

Saunders continued:[15]

> "26. I am satisfied, … that as a matter of principle in the special circumstances of arbitration proceedings, where an applicant fails to successfully establish a basis to challenge the award, the proper award of costs will usually be an award of indemnity costs. There is no reason to depart from that principle in this case."

12 The issue was again considered by Saunders J in *Taigo Ltd v China Master Shipping*

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13 [2009] 3 HKLRD 389.

14 [2010] HKEC 919 at [8] – [14].

15 [2010] HKEC 919 at [26].

Ltd.[16] Saunders J said:[17]

> "13. In *A v R (Arbitration: Enforcement)* [2009] 3 HKLRD 389, Reyes J demonstrated that following CJR the usual rule as to costs on an unsuccessful application for leave to appeal against an arbitrators award would be indemnity costs. In *Wing Hong Construction Co Ltd v Tin Wo Engineering Co Ltd*, unreported, HCCT 13/2010, 3 June 2010 I agreed with that decision. So it is not necessary, to justify indemnity costs, for it to be established that the case has special and unusual features.
>
> 14. Counsel for the Applicant puts before me the decision of the Court of Final Appeal in *Karaha Bodas Company LLC v Pertamina*, unreported, FACV 6/2008, 6 February 2009. The decision is a ruling on costs in which the plaintiff sought indemnity costs. The Court of Final Appeal recorded that the plaintiff sought to justify indemnity costs by arguing that the case had special and unusual features.
>
> 15. The decision is a decision prior to CJR, and does not reflect the new approach to be adopted. For the reasons given in *Wing Hong*, para 7, I am satisfied that the appropriate rule now in failed applications for leave to appeal an arbitrators award is that costs should be on an indemnity basis.
>
> 16. There will be an order nisi that the Applicant must pay the Respondent's costs of and incidental to the application, to be taxed on an indemnity basis."

13 In another decision, Saunders J, following Reyes J in *A v R*, made an *order nisi* that awarded indemnity costs for a failed application for leave to appeal against an interim domestic arbitral award.[18]

14 On the basis of these decisions, it does appear to be the settled principle in Hong Kong that the Court of First Instance will generally award indemnity costs against an unsuccessful party in an application to challenge or resist enforcement of an arbitral award.

15 The plaintiff submitted that the Hong Kong approach should be applied in the present circumstances for two reasons. First, it was submitted that the second defendant has unsuccessfully sought to set aside the enforcement orders which I made on 20 August 2010. It was submitted that this alone would bring the matter within the ambit of the rule in *A v R*.[19] Accordingly, it was said, for the reasons

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16 [2010] HKCFI 530.

17 [2010] HKFCI 530 at [13] - [16].

18 *Hung Wan Construction Co Ltd v Hong Kong Housing Authority*[2010] HKCFI 650 at [21].

19 [2009] 3 HKLRD 389.

expressed by Reyes J in that case, this court should find that the second defendant's failed attempt to resist enforcement of the arbitral award warrants the imposition of costs on an indemnity basis. Secondly, it was submitted by the plaintiff that the introduction in Victoria of the *Civil Procedure Act* 2010 further strengthens the analogy to be drawn with the approach and reasoning in *A v R*.[20]

16 In relation to the *Civil Procedure Act* analogy, it was submitted that the overarching purpose of that Act, as expressed in section 7, is "to facilitate the just, efficient, timely and cost-effective resolution of the real issues in dispute". As the plaintiff submitted, under the *Civil Procedure Act*, parties have overarching obligations directed to achieving the overarching purpose of the Act.

17 It was submitted that these overarching obligations under the *Civil Procedure Act*, are analogous to the obligations imposed by the *Civil Justice Reform* ("CJR") in Hong Kong as discussed by Reyes J in *A v R*.[21] In that case, Reyes J found that the party which had unmeritoriously challenged the arbitral award would not be complying with its duty under the CJR to assist the court in the just, cost-effective and efficient resolution of the dispute and that this would justify an award of indemnity costs. The CJR in Hong Kong began operation on 2 April 2009. It effected a number of changes to the practice and procedures of the High Court (which includes the Court of First Instance) and the District Court. The underlying objectives of the CJR are:[22]

> "(a) to increase the cost-effectiveness of any practice and procedure to be followed in relation to proceedings before the Court;
>
> (b) to ensure that a case is dealt with as expeditiously as is reasonably practicable;
>
> (c) to promote a sense of reasonable proportion and procedural economy in the conduct of proceedings;
>
> (d) to ensure fairness between the parties;
>
> (e) to facilitate the settlement of disputes; and
>
> (f) to ensure that the resources of the Court are distributed fairly."

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20 [2009] 3 HKLRD 389.

21 [2009] 3 HKLRD 389.

22 See, for example, *Rules of the High Court* (Hong Kong), Order 1A, r. 1.

These underlying objectives are, of course, in substance the same as the overarching purpose of the *Civil Procedure Act.*

18 In the present case, the plaintiff submitted that the second defendant's application to resist enforcement of the Award was a similarly unmeritorious one. In particular, it was submitted that the second defendant's application was made against the backdrop of provisions in the *International Arbitration Act* 1974 (Cth) and the jurisprudence in the international arbitration field which makes it clear to parties and arbitration practitioners that the grounds for resisting enforcement of an award are very limited, and the relevant burden for establishing those grounds is onerous. In this respect, reference should be made to my earlier judgment in this case, and the references to the critical provisions of both the *International Arbitration Act* and the New York Convention.[23] The plaintiff submitted that the second defendant knew, or at least should have known, that its prospects of success in resisting enforcement of the arbitral award were limited by these factors. Nevertheless, in spite of this, the plaintiff submitted that the second defendant persisted with its attempts to resist enforcement of the Award. For instance, during the proceedings, the second defendant made allegations that the plaintiff lacked candour during the *ex parte* enforcement application and that the plaintiff was required to establish a "threshold issue" before it was entitled to have the award enforced. Again, my earlier judgment and the submissions of the second defendant indicate the extent to which the second defendant pressed these issues, repeatedly. Putting matters in the most general terms, my earlier judgment indicates that I formed the view that there was no issue in relation to candour, both on a general procedural and on a more substantive jurisprudential basis, and that, further, there was no lack of candour in the particular circumstances. In relation to the "threshold issue", I found that the provisions of the *International Arbitration Act* and the *New York Convention*, together with the pro-enforcement policy underlying both legislative instruments, and the case law did not support the existence of any threshold issue. Further, echoing but not relying upon

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23 See, particularly, the provisions of the Act and the Convention set out or referred to in [2011] VSC 1 at [36] to [39] (including the reference to the Parliamentary materials at [37], footnote 23).

the statement of Reyes J in *A v R*,[24] I am of the view, as appears from my earlier judgment, that the second defendant found itself in its predicament with respect to the Mongolian arbitration proceedings as a result of its own decisions as to its participation, or otherwise, in those proceedings.

19 The second defendant submitted that although the decision in *A v R*[25] may represent good law in Hong Kong, such a practice ought not to be followed in Victoria and would "turn on its head" the settled approach to the award of costs in Victoria and, indeed, the rest of Australia, on the basis of the re-statement of principles by Harper J in *Ugly Tribe Co Pty Ltd v Sikola*.[26] More particularly, the second defendant submitted:[27]

> "7. The factors which influenced Reyes J in setting out his new 'rule', as set out at [67]-[71] of his decision, ignores entirely that the settled practice in Australia involves the 'compromise between the interests of successful and unsuccessful litigants' spoken of by Winneke P in the passage from *Spencer's* case quoted by Harper J and that, as noted by Sheppard J in *Colgate-Palmolive Co v Cussons Pty Ltd*, 'Either legislation … or a decision of an intermediate court of appeal or of the High Court would be required to alter …' that practice.
>
> 8. There is nothing, it is submitted, in the regime set up by the *International Arbitration Act* 1974 which can be construed to alter the usual practice. Where Sheppard J referred to legislation being required to alter the settled practice, it is submitted his Honour was referring to an express legislative provision directed unambiguously at the considerations to apply on an award of costs.
>
> 9. Indeed, the Act provides a right to a party against whom the enforcement procedure is invoked to apply for orders that the award not be enforced against it. To adopt a 'rule' such as Reyes J has proposed for Hong Kong would, it is submitted, seriously undermine the right so-given by the Act. That is, setting up a regime whereby a party against whom the enforcement procedure is invoked is placed at peril of solicitor and client costs unless s/he can establish some special circumstance, is likely to create a major deterrent to the exercise of the right given by the Act. Such could not have been, it is submitted, the intention of the legislature.
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> 10. As noted by the Supreme Court in *Dallah Real Estate & Tourism Holding Co v Ministry of Religious Affairs of the Government of Pakistan* [2010] 2 WLR 805, in considering the very similar English regime under the Convention:

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24 [2009] 3 HKLRD 389 at [33].

25 [2009] 3 HKLRD 389.

26 [2001] VSC 189.

27 Second Defendant's submission as to costs (31 January 2011).

> … Article V(1)(a) and s 103(2)(b) are framed as free-standing and categoric alternative grounds to Article V(1)(e) of the Convention and s 103(2)(f) for resisting recognition or enforcement. Neither Article V(1)(a) nor s 103(2)(b) hints at any restriction on the nature of the exercise open, either to the person resisting enforcement or to the court asked to enforce an award, when the validity (sc. existence) of the supposed arbitration agreement is in issue. The onus may be on the person resisting recognition or enforcement, but the language enables such person to do so by proving (or furnishing proof) of the non-existence of any arbitration agreement. This language points strongly to ordinary judicial determination of that issue.

> 11. It would, it is submitted, be entirely inconsistent with an 'ordinary judicial determination' for the party against whom the enforcement procedure is invoked to be at peril of solicitor and client costs unless s/he can establish some special circumstance."

20 I am not persuaded by the second defendant's submissions based on the Victorian and Australian cases in relation to the award of indemnity costs. It is made very clear by Harper J and the other authorities to which reference was made in *Ugly Tribe Co Pty Ltd v Sikola*[28] that the categories of special circumstances are not closed. In my view, the considerations which moved Reyes J and Saunders J in the Hong Kong cases, to which reference has been made, apply with equal force in Victoria, both from an arbitration perspective and also from the perspective of legislation such as that contained in the *Civil Procedure Act* and in the Hong Kong CJR.

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

28 [2001] VSC 189 at [8].

Summary and conclusions

22 For the preceding reasons, I am of the view that it is appropriate to make the order generally in the terms which the plaintiff seeks in this application:

> "The Second Defendant pay the Plaintiff's costs as taxed or assessed on an indemnity basis such that all costs shall be allowed except in so far as they are of an unreasonable amount or have been unreasonably incurred, and any doubts which an Associate Judge may have as to whether the costs were unreasonably incurred or unreasonable in amount shall be resolved in favour of the Plaintiff."

23 I will hear the parties further with respect to the form of final orders.