

Kwok Kit Cheung,
Partner,
Hong Kong



DEACONS
的近律師行

HONG KONG
INDEMNITY
UNSUCCESSFUL

In *Chimbusco International Petroleum (Singapore) Pte Ltd v Fully Best Trading Ltd*, HCA 2416/2014, 3 December 2015, the Court of First Instance confirmed that the principle of awarding indemnity costs for unsuccessful attempts to resist enforcement of an arbitral award applied equally to unsuccessful attempts to resist enforcement and recognition of the arbitration agreement itself.

The Plaintiff had commenced court proceedings against the Defendant, seeking sums due under an agreement between them for the supply of fuel oil. The Defendant applied to stay the proceedings in favour of arbitration, pursuant to an arbitration clause in the agreement, which stated that all disputes arising out of or in connection with their agreement would be referred to arbitration by the Singapore International Arbitration Centre (SIAC). The Plaintiff eventually agreed to the

stay before the application was heard and the only issue before the court was the costs of the application, namely whether the Plaintiff should pay the Defendant's costs on an indemnity basis, or, as argued by the Plaintiff, costs should be in the cause of the arbitration.

Since *A v R (Arbitration: Enforcement)* [2009] 3 HKLRD 389, where a party unsuccessfully applies to appeal against, set aside, or refuse enforcement of an arbitral award, it has been the practice of the Hong Kong court to order the unsuccessful party to pay the other party's costs on an indemnity basis, unless special circumstances are shown. In the *Chimbusco* case, the Court held that there was no reason at all to differentiate between unsuccessful attempts to resist enforcement of an arbitral award made under an arbitration agreement, and unsuccessful attempts to resist enforcement and recognition of the arbitration agreement itself. The Court said that the

BUILDING DISPUTES TRIBUNAL TE TARAIPUNURA MŌ NGĀ TAUTOHE WHARE

An Authority

- New Zealand's only independent, nationwide, specialist
- 25 Years experience - 700+ Adjudication Cases handled
- Highly skilled, experienced, and respected adjudicators
- Comprehensive and professional fully administered cases
- Comprehensive, informative, and user friendly website
- FIXED FEE service for low value claims.
- NO APPOINTMENT FEES - FREE on-line nomination service



THE SUPREME COURT CONFIRMS THAT COSTS ARE PAYABLE FOR UNSUCCESSFUL CHALLENGES TO ARBITRATION AGREEMENTS

reasons and observations made by the Court in *A v R*, that recourse should not be made to the Court and that parties should comply with arbitration awards made under the arbitration agreement, all applied with equal force to a case where a party to the arbitration agreement unmeritoriously seeks to challenge it and refuses to refer the dispute to arbitration in accordance with the agreement. Parties to an arbitration agreement should expect that the Court will recognize and enforce the arbitration agreement, and if they take the risk of instituting court proceedings in breach of such an agreement, they should expect to pay costs on a higher scale if they fail in their attempt to impeach the agreement.

The Court said that unless the point is clear that there is no valid arbitration agreement, the Court should not attempt to resolve the issue, and the matter should be stayed to arbitration; the Court should not usurp the

function and role of the arbitration tribunal. It should therefore be an exceptional case, the Court said, when a party seeks recourse from the Court, instead of the arbitral tribunal, when there is an arbitration clause in an agreement between the parties.

The Court said that the fact that challenges to the arbitration agreement are not unarguable, does not constitute a special circumstances and none of the matters raised by the Plaintiff in this case constituted a special circumstance to justify the Court departing from the general rule that the costs to be borne in an unsuccessful challenge to an arbitration agreement should be ordered on an indemnity basis. The Court did not elaborate on what would amount to special circumstances, but it is clear from the judgment that it will not be easy to establish such.

Authorised nominating Authority under the Construction Contracts Act 2002

Building and construction dispute resolution service.

and

arbitrators and mediators.

case management services.

etc.

Service within 24hrs.

www.buildingdisputetribunal.co.nz