The geographical limitation on s5N of the *Civil Liability Act* is nevertheless important. It is a recognition of the fact that Part 1A of the *Civil Liability Act* (of which s5N forms a part) is essentially concerned with liability in negligence.[10] The common law choice of law rule for negligence actions is the law of the place of the tort (the *lex loci delicti*) which will govern all matters of substance including matters affecting the existence, extent or enforceability of rights.[11] The geographical limitation on s5N helps to avoid tension that may arise between the contracting parties' choice of law for the contract and the *lex loci delicti*. Such a tension may have arisen in Mrs Young's case, had s5N applied. The contract provided for the law of NSW to be the proper law of the contract, whereas the *lexi loci delicti* was arguably the law area of the site in Europe where Mrs Young was injured. Had s5N been picked up and applied by s74(2A), liability under the contract may have been excluded for breach of the implied warranty to render services with due care and skill. This outcome may have been different from the outcome in tort.

The geographical limitation imposed by the High Court on s5N may also affect the way in which other provisions in Part 1A of the *Civil Liability Act* are construed. Section 5O of the *Civil Liability Act* concerns the standard of care in relation to the supply of services by professionals such as lawyers, doctors, engineers and architects. Arguably, the geographical limitation that applies to the supply of recreation services should also apply to the provision of professional services. Professionals who undertake work in NSW and other states and territories may be subject to different standards of care, depending upon the law that applies where the services are being supplied. This may be so irrespective of contractual provisions that purport to apply the law of another particular law area. ■

Notes: **1** *Insight Vacations Pty Ltd v Young* [2011] HCA 16. **2** At [27]. **3** See *Baltic Shipping Co v Dillon* (1993) 176 CLR 344. **4** *Insight Vacations Pty Ltd v Young* [2010] NSWCA 137. **5** At [26]. **6** At [28]. **7** *Ibid.* **8** At [34]. **9** At [33]. **10** *Ibid.* **11** *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503.

Andrew Naylor *is a barrister at Maurice Byers Chambers in Sydney. He was counsel for Mrs Young before the High Court and appeared with Michael Joseph SC. While the views expressed in this casenote are necessarily those of Mr Naylor, he nevertheless gratefully acknowledges the assistance of Mr Joseph in its preparation.*
EMAIL *a.naylor@mauricebyers.com.*

Defences are limited when challenging enforcement of foreign arbitral awards

Altain Khuder LLC v IMC Mining Inc & Anor (No. 2) [2011] VSC 12 (3 February 2011)

By Marian Wheatley

A dispute that began in a windswept corner of Mongolia's Gobi-Altai region, 1,200 km southwest of Ulaanbaatar City, found its conclusion in a Melbourne courtroom of the Supreme Court of Victoria.

This case and its predecessor, *Altain Khuder* (No. 1),[1] affirm the non-discriminatory nature of the *NY Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, New York, 1958 (the NY Convention) and make it clear that Australian courts will ensure that such awards are

recognised and enforced in their jurisdiction in the same way as domestic awards. *Altain Khuder* (No. 2) goes further and demonstrates that Australian companies which enter into private agreements to arbitrate in foreign jurisdictions may be dealt with severely if they choose to ignore the internationally agreed rules of such arbitration.

In *Altain Khuder* (No. 2), the plaintiff, a Mongolian mining company, sought an order that the second defendant, IMC Mining Solutions Pty Ltd (IMC-MS), an Australian company, pay the plaintiff's costs on an indemnity basis. The order followed an unsuccessful application to the Victorian Supreme Court by IMC-MS seeking to block enforcement of an international arbitration order granted by the Victorian court (acting as the enforcing court) in favour of the plaintiff company, *Altain Khuder* (No. 1).

The court found that the award enforcement order had been unmeritoriously challenged by IMC-MS,[2] and that the challenge was so misguided when viewed in light of the objectives of the civil procedure rules that it resulted in a special circumstance enabling the court to exercise its costs discretion. The court granted indemnity costs orders against IMC-MS, *Altain Khuder* (No. 2).

To understand why the plaintiff was successful and what compelled the court to exercise its discretion as to costs, it is necessary to look at the history of the dispute and the actions taken by IMC-MS in the ensuing arbitration.

THE DISPUTE BACKGROUND AND THE MONGOLIAN ARBITRATION

In 2008, by contractual agreement, Altain Khuder LLC advanced $US6.2 million to IMC Mining Inc (IMC Mining) to carry out work at the Tayan Nuur Iron Ore Project in Mongolia. IMC Mining agreed to prepare mine plans, operations plans and budgets for a proposed iron ore mine. To this end, the parties signed an Operations Management Agreement that included an agreement to arbitrate.

IMC Mining failed to perform the agreed services and Altain Khuder claimed entitlement to repayment. Under the arbitration provisions agreed to by the parties, arbitration was possible under either Mongolian law or Hong Kong law. At a preliminary hearing, the parties resolved that the dispute would be heard at the Mongolian National Arbitration Centre in Ulaanbaatar City, that Mongolian law would apply and that the arbitration would be conducted in the Mongolian language.

THE AWARD AND SUBSEQUENT ENFORCEMENT PROCEDURES

In September 2009, the Mongolian Arbitral Tribunal made an award against both IMC Mining and IMC-MS, finding that IMC-MS was the 'alter ego' of IMC Mining and therefore liable to pay for and on its behalf. IMC Mining was ordered to pay US$5,953,355.70. The award was subsequently verified by the Mongolian court as being validly made in accordance with Mongolian law.

There was no compliance with the award either by IMC Mining or IMC-MS. Under Mongolian law, it had been open to both defendants to challenge the validity of the award in the Mongolian court, but neither did so. This failure to contest the award when it was appropriate to do so would prove significant in the ensuing litigation.

The NY Convention requires the courts of the contracting states to give effect to private agreements to arbitrate and to recognise and enforce arbitration awards made in other contracting states. Both Mongolia and Australia are parties to the NY Convention.

In Australia, the NY Convention is given legal effect though the *International Arbitration Act* 1974 (Cth) (the IAA). On 14 July 2010, Altain Khuder sought enforcement of the award through an *ex parte* application in the Victorian Supreme Court. On August 20, Justice Croft made such enforcement orders, giving the two defendants 42 days to apply to have the orders set aside.

IMC-MS responded with an application to refuse enforcement, but there was no response from IMC Mining. IMC Mining was registered in the British Virgin Islands, but had listed the same Brisbane address as the offices of IMC-MS.

THE CASE FOR AWARD ENFORCEMENT

IMC-MS attempted to shield itself from both the jurisdiction of the Mongolian arbiter and the subsequent enforcement of the award. IMC-MS also sought to transfer the onus of proof – as to why the award should be enforced – on to the party seeking enforcement. IMC-MS alleged that the plaintiff had failed to satisfy what IMC-MS considered to be the 'threshold issue', which went to the award enforcement court's jurisdiction under s8(1) of the IAA. It contended that, because the contractual agreement to arbitrate did not, in fact, name IMC-MS as a party to the agreement, the agreement could not bind IMC-MS.

IMC-MS also alleged that the plaintiff had lacked 'candour' during the *ex parte* application, by failing to draw the court's attention to this threshold issue.

The plaintiff submitted that the Mongolian Arbitral Tribunal had already decided the 'threshold issue', thereby absolving the plaintiff of any non-disclosure. The plaintiff also submitted, and the Victorian Supreme Court eventually concluded, that under the process prescribed by Rule 9.04 of Chapter II *Supreme Court (Miscellaneous Civil Proceedings) Rules* 2008, Vic, an award creditor may bring an *ex parte* application as a matter of course within the time limits.

RESOLUTION OF THE MAIN ISSUES (*ALTAIN KHUDER* (NO. 1))

Justice Croft looked at a wide body of international precedent to resolve what he established to be the main issues of the case:

- whether there was an arbitration agreement affecting IMC-MS, and whether that was a matter that could be determined by the enforcing court; or whether the party resisting enforcement was estopped in the enforcement court from challenging the jurisdiction of the arbiter;
- the extent of the onus on the plaintiff to establish the existence of an arbitration agreement and foreign arbitral award binding on the parties; and the extent of the onus on the party resisting enforcement to show grounds and >>

whether any defences to enforcement had been made out by IMC-MS.

On the evidence before him, Justice Croft was persuaded to find that IMC-MS was the alter ego of IMC Mining, but ultimately his Honour concluded this was not an issue to be decided by the enforcing court. Examining case law from the UK, the US, Hong Kong and Singapore, Justice Croft followed the reasoning of Justice Prakash of the Singapore High Court in *Aloe Vera of America Inc v Asiatic Food (S) Pte Ltd* [2006].[3] Commenting on the roles of the supervisory court and the enforcing court, Justice Prakash found that where there is an international arbitral award, a challenge to the jurisdiction of the arbitration tribunal must be made at the seat of arbitration in the supervisory court, not in the award enforcement court.[4] Additionally, Justice Prakash found that where an international award has been tested and accepted by the arbiter and the supervisory court, then, '...a party may be precluded by his failure to raise a point before the court of supervisory jurisdiction from raising that point before the court of enforcement. This is because failure to raise such a point may amount to an estoppel or a want of *bona fides* such as to justify the court of enforcement in enforcing an award.'[5]

With proper application of the NY Convention through the IAA, Justice Croft found that the enforceability of the award disposed of all the matters raised by IMC-MS in relation to the enforcement orders.[6] Furthermore, and significantly, IMC-MS had failed to provide any credible evidence to support its submissions, especially its contention that it had failed to understand the meaning of the resolution agreeing to Mongolian law for arbitration.[7]

Under the statutory requirements of the IAA, the onus of proving a valid reason to refuse enforcement belongs to the person against whom the international arbitral award is invoked. Valid defences to enforcement are limited to those set out in Article V(1).[8] The plaintiff has to show only that the award has been authenticated valid under the law of the signatory country and that the award continues in force,[9] both of which the plaintiff had done. Justice Croft found that to put the onus on to the plaintiff to show that the arbitral tribunal had proper jurisdiction in order to seek enforcement of an award would go against the objectives of the NY Convention to make arbitration internationally binding.[10]

THE DISCRETION TO ORDER INDEMNITY COSTS

As a general rule, the court will depart from party/party costs only in circumstances where either the case is exceptional, or there is some special or unusual feature about the case that justifies the exercise of the court's discretion to order costs on an indemnity basis.[11] It was the plaintiff's submission that any application by a party to appeal against, or set aside, an order for enforcement of an international arbitral award should be considered such an exceptional event. This argument appears to have some support in the decision of Justice Reyes in *A v R* [2009] 3 HKLRD 389, where his Honour found a party that was unsuccessful in such an application, '...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.'[12]

Justice Croft found that the *Civil Procedure Act* 2010 (Vic) gave strength to the reasoning found in both *A v R*[13] and in *Wing Hong Construction Limited v Tin Wo Engineering Company Limited*.[14] Specifically, his Honour found that parties have obligations directed to achieving the overarching purpose of the Act, 'to facilitate the just, efficient, timely and cost-effective resolution of the real issues in dispute.'[15]

In considering if resisting enforcement gives rise to either an exceptional event or a special circumstance, Justice Croft noted that the categories of special circumstances are not closed.[16] However, his Honour stressed that finding a category of special circumstances in this context did 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.'[17]

The IAA, the NY Convention and jurisprudence in the international arbitration field make it clear that the grounds for resisting enforcement of an international arbitral award are limited, and the burden of proof required for establishing those grounds is onerous.[18] The plaintiff submitted that the application by IMC-MS to resist enforcement had been without merit. Justice Croft reached the same conclusion.[19]

In considering whether the court's discretion to award indemnity costs was enlivened by the action of the defendants, Justice Croft remarked on the dogged persistence of IMC-MS in resisting enforcement. His Honour concluded that the predicament in which IMC-MS found itself with respect to the Mongolian arbitration was entirely of its own making, the result of poor decisions 'as to participation, or otherwise',[20] and that the enforcement court had clearly never been the forum for the issues that IMC-MS had sought to pursue there. ■

Notes: **1** *Altain Khuder LLC v IMC Mining Inc and IMC Mining Solutions Pty Ltd* [2011] VSC 1 (28 January 2011), (*Altain Khuder* No. 1) < http://www.austlii.edu.au/au/cases/vic/VSC2011/1.html >. **2** *Ibid* at [112]. **3** SGHC 78. **4** *Aloe Vera* at [56] cited in *Altain Khuder* (No. 1) at [74]. **5** *Ibid*. **6** *Altain Khuder* (No. 2) at [18]. **7** *Altain Khuder* (No. 1) at [110]-[112]. **8** *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, June 10, 1958 art V(1) is implemented by Section 8(5) *International Arbitraion Act* 1974 (Cth). **9** Section 9, *International Arbitration Act* 1974 (Cth). **10** *Altain Khuder* (No. 1) at [19]. **11** *Colgate-Palmolive Co v Cussons Pty Ltd* (1993) 46 FCR 225 at 233 cited in *Altain Khuder* No 2) at [5]. **12** *A v R* at [67] - [72] cited in *Altain Khuder* (No. 2) at [9. **13** [2009] 3 HKLRD 389. **14** [2010] HKEC 919 **15** *Civil Procedure Act* 2010 (VIC), s7 cited in *Altain Khuder* (No. 2) at [17]. **16** *Ugly Tribe Co Pty Ltd v Sikola* (unreported, NSW Supreme Court, Harper J, 14 May 1987) at [8] cited in *Altain Khuder* (No. 2) at [6]. **17** *Altain Khuder* (No. 2) at [21]. **18** *Altain Khuder* No. 1) at [61]. **19** Above note 2 **20** Above note 6.

Marian Wheatley *is an experienced technical communication specialist who has qualified in law at UWS. She is seeking a PLT position in Sydney in order to complete a Graduate Diploma of Legal Practice at the College of Law.* **PHONE** *(02) 9633 2625.*
EMAIL *msmarian@yahoo.com.*