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Astro v. Lippo: Singapore Court of Appeal Confirms Passive Remedies to Enforcement Available for Domestic International Awards

Ben Jolley (Herbert Smith Freehills LLP) · Friday, November 29th, 2013 · Herbert Smith Freehills

In a recent decision in the long-running *Astro v. Lippo* dispute,[1)] the Singapore Court of Appeal (the "**Court**") grappled with the question of whether an unsuccessful party to an international arbitration award rendered in Singapore (a "**domestic international award**") can choose to wait and invoke a passive remedy only in response to enforcement proceedings at the seat.

The judgment confirms Singapore's commitment to the philosophy of "choice of remedies" contained in the UNICTRAL Model Law (the "**Model Law**"). Parties to international arbitrations seated in Singapore therefore have the option to choose whether to make an active challenge to an award or instead wait until the award is sought to be enforced in Singapore.

From a practical perspective, the decision reverses a first instance judgment that was considered detrimental to Singapore as a seat of arbitration and has brought the position back into line with other jurisdictions that employ a "choice of remedies", including its regional competitor, Hong Kong.

Background

The arbitration proceedings between Astro, a Malaysian media group, and Lippo, an Indonesian conglomerate, arose out of a joint venture ("**JV**") for the provision of digital satellite TV and other multimedia services in Indonesia.

Astro and Lippo entered into a Subscription and Shareholders' Agreement (the "**SSA**") setting out the JV's obligations. Pending the fulfilment of conditions precedent to the SSA, three subsidiaries of the Astro group (who were not signatories to the SSA) (the "**Astro Joinder Parties**") provided funds and services to the JV entity. Ultimately, the conditions precedent were not met and a dispute arose as to the continued funding of the JV.

In 2008, five Astro companies (who were parties to the SSA) and the Astro Joinder Parties commenced arbitration against Lippo in Singapore through the arbitration agreement in the SSA. An application to join the Astro Joinder Parties to the proceedings under Article 24.1(b) of the 2007 SIAC Rules (the "**Joinder Application**") was made at the time of filing.

Lippo disputed the application, but the Tribunal determined in a preliminary award that it had the

power and would exercise its discretion to join the Astro Joinder Parties to the arbitration. Lippo did not challenge the Tribunal's preliminary award on jurisdiction before the Singapore Courts within the 30 day time limit under Article 16(3) of the Model Law (which has force in Singapore through the Singapore International Arbitration Act ("**IAA**")). Instead, it continued to participate in the arbitration, but noted its continued objection to the jurisdiction of the Tribunal.

The Tribunal subsequently issued four further domestic international awards (together with the Preliminary Award, the "**Awards**") in Astro's favour for around US$250 million. Again, the Lippo companies did not apply to set aside the Awards in Singapore based on the grounds of Article 34(1) of the Model Law within the required time limit.

Enforcement proceedings

Astro subsequently sought and was granted leave to enforce the Awards in Singapore by the High Court.

In response, Lippo challenged the enforcement orders on the jurisdictional ground that there was no agreement to arbitrate between the Lippo and the Astro Joinder Parties, who were not parties to the SSA.

Singapore International Arbitration Act

Before examining the Court's decision in detail it is useful to consider some key provisions of the IAA.

Part II of the IAA applies to "international arbitrations", which includes both arbitrations seated outside of Singapore and international arbitrations seated in Singapore (as in the present dispute).

Within Part II of the IAA:

- Section 3(1) provides that the Model Law "shall have the force of law in Singapore", with the "exception of Chapter VIII". Chapter VIII contains Articles 35 and 36, which deal with the refusal of recognition and enforcement of arbitral awards.
- Section 19 states that "[a]n award on an arbitration agreement may, by leave of the High Court or a Judge thereof, be enforced in the same manner as a judgment or an order to the same effect and, where leave is so given, judgment may be entered in terms of the award".

The IAA does not include any express grounds for resisting enforcement of domestic international awards rendered in arbitrations seated in Singapore. However, Part III of the IAA does reproduce the grounds for resisting enforcement contained in Article V of the New York Convention, but this only applies to the enforcement of "foreign awards" under the New York Convention.

The decision of the Court of Appeal

The Court of Appeal overturned the decision of the first instance Judge, who had favoured the default enforcement in Singapore of domestic international awards that have not been set aside.

In doing so, the Court interpreted the IAA by undertaking a detailed review of the drafting history and purpose of the IAA and the Model Law.

(1) Power to refuse enforcement under section 19 of the IAA

Contrary to the view of the Judge at first instance, the Court interpreted section 19 of the IAA as providing the Singapore Court with an inherent power to refuse the enforcement of domestic international awards rendered in Singapore.

Drawing on earlier iterations of the wording of section 19 in enactments prior to the IAA (which had in turn come from the 1950 Arbitration Act) and English case law, it was determined that historically a "choice of remedies" was enshrined within Singapore law. This provided two options for a party against whom an award was rendered: (i) an "active remedy" of setting aside the award; or (ii) a "passive remedy" of resisting enforcement by the counterparty, which was available even where no active challenge had been made.

The Court did not consider this position had been altered by the introduction of the Model Law through the IAA. Therefore, it was held that "Parliament, in receiving the Model Law into Singapore, intended to retain for the courts the power to refuse enforcement of domestic international awards under s 19, even if the award could have been but was not attacked by an active remedy".[2)]

(2) Scope of the power to refuse enforcement

Having determined that a "passive remedy" was available, the Court considered the scope of its power to refuse enforcement of domestic international awards under section 19.

After reviewing the *travaux* of the Model Law, the Court found that a "choice of remedies" applying equally to foreign and domestic awards was at the "heart of its entire design". Accordingly, to give effect to the purpose of the IAA (which was to embrace the Model Law), the Court held that the grounds for resisting enforcement under Article 36(1) of the UNCITRAL Model Law should be made available to a party resisting enforcement of a domestic international award under section 19 of the IAA.

On this point, the Court also had to reconcile its position with the express exclusion of Article 36 of the Model Law through section 3(1) of the IAA. It determined that making the grounds under Article 36(1) available to parties resisting enforcement was not precluded because:

1. there was a distinction between (a) the grounds under Article 36(1) being available to guide the Court's exercise of discretion under section 19 of the IAA and (b) Article 36 not having the force of law in Singapore; and
2. the legislative object of the IAA in excluding Part VIII of the Model Law was to avoid conflict with the New York Convention on the enforcement of foreign awards – it was not intended to exclude the "choice of remedies" in favour of policy of default enforcement of domestic international awards.

(3) Impact of failure to challenge an Award under Article 16(3) of the Model Law

Finally, the Court considered whether Lippo's failure to exercise its active right to challenge the Tribunal's preliminary ruling on jurisdiction under Article 16(3) of the Model Law[3)] could prevent Lippo's "passive remedy" being available.

The Court rejected the submission that Article 16(3) was a mandatory route that must be followed. The Court reasoned that "if certainty and time and cost efficiency are the paramount objectives, Art 16(3) ought to be the one and only opportunity for raising a jurisdictional objection which has already been decided as a preliminary ruling".[4] However, having carried out a detailed examination of the negotiating history of the Model Law, it could find no evidence that the drafters intended these factors to override the co-existence of active and passive remedies.

Accordingly, Article 16(3) of the Model Law constituted "neither an exception to the 'choice of remedies' policy of the Model Law, nor a 'one-shot remedy'".[5] The fact that Lippo had not raised a timely challenge to the preliminary award on jurisdiction under this provision did not therefore prevent it from exercising its passive remedy to challenge the enforcement of the Awards.

Outcome of jurisdictional objection

Having established that Lippo had the power to resist enforcement based on the grounds under Article 36 of the Model Law, the Court found that the Tribunal had erred in joining the Astro Joinder Parties under Rule 24.1(b) of the SIAC Rules. As a result there was no agreement to arbitrate between Lippo and the Astro Joinder Parties and the Awards could not be enforced against Lippo by those parties.

It should be noted that this did not affect the enforcement of the Awards by the remaining Astro parties against Lippo. However, because a substantial portion of the amounts contained in the Awards were rendered in favour of the Astro Joinder Parties the amounts due from Lippo to the remaining Astro parties were limited.

Commentary

The Court of Appeal's decision provides a welcome clarification to practitioners of the availability of passive remedies to the enforcement of domestic international awards under the IAA, and in doing so also reverses a first instance decision which has been seen by some as detrimental to Singapore as a seat of arbitration.

Indeed, it was recognised by the Court of Appeal that not overruling the Judge's decision at first instance would have the unwanted effect of constraining party autonomy and compelling parties in international arbitrations seated in Singapore to raise active challenges with the Courts. For this reason, when reaching its decision, the Court of Appeal was cognisant of the "practical ramifications" and "potentially far-reaching implications on the practice and flourishing of arbitration in Singapore".[6]

Through its purposive interpretation of the IAA, the Court of Appeal has confirmed that a "choice of remedies" for domestic international awards rendered in Singapore has been retained in the IAA, bringing the position in Singapore into line with the Model Law as well as other key arbitration jurisdictions, including its regional competitor, Hong Kong. Accordingly, parties involved in international arbitrations seated in Singapore will be afforded the freedom to choose whether to make an active challenge to an award (which may have its own advantages) or wait until the award is sought to be enforced in Singapore, depending on tactical considerations, including cost, efficiency and timing.

It is also relevant to consider the wider application of the decision outside of arbitrations seated in

Singapore. Although the decision is fairly unique to the interpretation of the IAA and may find limited direct application, the Court's detailed and through analysis of the travaux of the Model Law may be of use to practitioners in other jurisdictions should similar questions arise as to the "choice of remedies" in other Model Law jurisdictions.

References

?1 *PT First Media TBK (formerly known as PT Broadband Multimedia TBK) v. Astro Nusantara International BV and others and another appeal* (2013) SGCA 57.

?2 *PT First Media TBK v. Astro Nusantara International BV*, at paragraph 47.

?3 Article 16(3) was included in the Model Law to allow an immediate route to challenge before the curial court a Tribunal's determination on jurisdiction as a preliminary question.

?4 *PT First Media TBK v. Astro Nusantara International BV*, at paragraph 116.

?5 *PT First Media TBK v. Astro Nusantara International BV*, at paragraph 132.

?6 *PT First Media TBK v. Astro Nusantara International BV*, at paragraph 90.

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