

# Kluwer Arbitration Blog

## **Astro v Lippo in Hong Kong: Award Enforced Despite Singapore Court of Appeal's Finding that the Tribunal Lacked Jurisdiction**

Tomas Furlong (Herbert Smith Freehills LLP) · Saturday, March 7th, 2015 · Herbert Smith Freehills

It is well known that the Singapore Court of Appeal refused enforcement of Awards in favour of Astro in 2013 ([discussed here](#)), on the grounds that the tribunal lacked jurisdiction over the claimants. The same Awards have now been enforced against First Media, a Lippo company, in Hong Kong (*Astro Nusantara International B.V. v PT First Media TBK* HCCT 45/2010).

Mimmie Chan J had commented at an interlocutory stage of the Hong Kong proceedings that “it will indeed be remarkable if, despite the Singapore Court of Appeal judgment on the invalidity of arbitration awards, Astro will still be able to enforce a judgment here based on the same arbitration awards that were made without jurisdiction.”

Whilst at first blush the most recent decision of the Hong Kong courts might seem “remarkable”, the first ground on which Astro was entitled to enforce is somewhat routine: First Media was out of time to resist enforcement and was not entitled to an extension. However, the other ground relied on by the judge raises some practical issues with which parties who wish to exercise the “passive” defence of resisting enforcement (rather than the “active” remedy of set aside) will have to grapple in order to preserve their rights.

### **The judge's decision on his discretion to allow enforcement, notwithstanding the tribunal's lack of jurisdiction**

Enforcement of a New York Convention award is mandatory in Hong Kong, unless a case under section 44 of the Hong Kong Arbitration Ordinance (“AO”) (which gives effect to Article V of the New York Convention) is made out. If one of the section 44 grounds is established, then the court has a discretion under the AO and the New York Convention, to permit or refuse enforcement.

In the present case, Anderson Chow J, accepted that the Tribunal did not have jurisdiction over the award-creditors, holding that this issue was *res judicata* as a result of the Singapore Court of Appeal decision. A ground for resisting enforcement

under section 44(2) was thereby made out. However, the judge relied on his discretion under the AO and the New York Convention to nonetheless permit enforcement.

It is a well-established principle of Hong Kong law that an award-debtor can only rely on a section 44(2) AO ground to resist enforcement if they are relying on that ground in good faith. The judge considered that his discretion as to whether permit or deny enforcement was governed by Hong Kong law, and that the manner in which that discretion should be exercised was not an issue that had been decided in Singapore. Applying the authorities, the judge concluded:

“It seems clear that what First Media decided to do was to defend the claim on the merits in the hope that it would succeed before the Tribunal, and keep the jurisdictional point in reserve to be deployed in the enforcement court only when it suited its interests to do so. The fact that First Media did raise the objection with the Tribunal should not, in my view, make any difference having regard to its subsequent conduct [during the arbitration]... First Media should not be permitted to rely on s 44(2) of the Ordinance to resist enforcement of the Awards because it has acted in breach of the good faith, or bona fide, principle.”

### **Analysis of the judge’s decision**

The judge’s decision leaves parties who unsuccessfully challenge the jurisdiction of a tribunal facing uncertainty as to what steps are required to protect their potential jurisdictional challenge at the enforcement stage (assuming that they also decide not to pursue the “active” remedy of set-aside at the seat of arbitration). It may not be safe to rely on a mere reservation of rights. Parties must be diligent to act in good faith in relation to possible challenges to an award – notwithstanding that reminding a tribunal of grounds of potential challenge will often be a delicate issue.

The judgment does not clearly identify where the lack of good faith lies in circumstances where the tribunal has ruled on the issue that forms the basis of the attempt to resist enforcement. Whilst this enquiry is to some extent fact-sensitive, there is perhaps scope for the principle to be clarified by later judgments of the Hong Kong courts or elsewhere.

The judge appeared to rely principally on First Media’s choice to resist enforcement rather than seek to set aside the jurisdiction Award in Singapore. But the Singapore Court of Appeal had already decided that this choice was First Media’s statutory right. Likewise, in Hong Kong “[a]n alternative to challenging the award is for a party to wait until a court application to enforce the award is made by the successful party in the arbitration” (Choong and Weeramantry, *The Hong Kong Arbitration Ordinance*). In other words, parties to a Singapore or Hong Kong seated arbitration are generally free to choose between setting aside an award at the seat within the proscribed time limits (the “active” remedy), and waiting to resist enforcement when the time comes (the “passive” remedy). Given this free choice, something more than waiting to deploy the passive remedy as a shield should be required to establish a lack of good faith.

The judge also relied on First Media's conduct during the arbitration. The judge noted that the Tribunal had ruled on its own jurisdiction following submissions from the parties. Astro accepted that First Media did on occasions, although not at every step, reserve its position regarding the Tribunal's jurisdiction. However, Astro argued that First Media's defence of the claim on the merits, and other conduct in the arbitration, means that First Media can no longer resist enforcement of the Awards on the grounds that the Tribunal had no jurisdiction. The judge accepted those submissions.

There are two potential difficulties with the judge's approach. First, the judgment appears to go further than the Hong Kong authorities relied on by the judge. In *China Nanhai Oil* [1994] 3 HKC 375 and *Hebei Import & Export Corp* [1999] 2 HCK 205 the lack of good faith lay in not providing the tribunal with an opportunity to consider the grounds for potential challenge. The rationale is that the tribunal may agree with the complaint and take steps to rectify their error. However the judge concluded that it did not make any difference that First Media raised its objection with the Tribunal, in light of First Media's other conduct in the arbitration.

Second, with respect to First Media's conduct in the arbitration, the judge's finding of lack of good faith causes potentially significant uncertainty for parties who unsuccessfully challenge a tribunal's jurisdiction. In Singapore, one clear reservation of rights is probably sufficient to protect the right to revive the jurisdiction challenge on enforcement (subject to waiver). The disappointed party is then expected to fully engage in presenting its case on the merits (indeed, it cannot be consistent with good faith to refuse to participate). However, following *Astro v First Media*, a simple reservation of rights may not be enough. Unfortunately, the judge did not specifically identify where the lack of good faith lay in First Media's conduct, or identify what First Media should have done to protect its position on good faith. Further guidance on this point would be welcome.

### **The judge's alternative ground for allowing enforcement**

The second ground on which First Media lost is more prosaic: First Media was fourteen months too late in seeking to resist enforcement. The court did not extend the time limit.

It was common ground before the judge that First Media had 14 days from the service of the enforcement orders ("Enforcement Orders") to apply to set them aside, ending on 1 November 2010. No application was made within the time limit. Accordingly, on 9 December 2010, judgment was entered against First Media in terms of the Awards. First Media's summons to set aside the Enforcement Orders was issued on 18 January 2012, around 14 months out of time. First Media therefore sought an extension of time for making the orders.

The judge considered that in deciding whether to grant an extension of time, he must look at all relevant matters and consider the overall justice of the case. In refusing to allow an extension of time, the judge took account of (i) the "substantial" delay of 14 months, (ii) that the delay was the result of a deliberate and calculated decision not to take action in Hong Kong, (iii) that the Awards were still valid and created legally binding obligations on First Media, because they had not been set aside. The judge

considered that these factors outweighed the fact that Astro had not suffered any prejudice, other than costs that could be compensated, as a result of First Media's delay.

This is a reminder that award-debtors reach a fork in the road once enforcement proceedings are started. The award-debtor must resist enforcement in that jurisdiction within the time allowed, or risk losing the right to resist enforcement in that jurisdiction altogether. The hard edge of such deadlines is familiar to practitioners, but is perhaps frustrating for commercial parties who are reluctant to spend substantial sums resisting enforcement in jurisdictions where, at the time, they have no assets.

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This entry was posted on Saturday, March 7th, 2015 at 12:45 pm and is filed under [Enforcement, Jurisdiction of the arbitral tribunal](#)

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