Kluwer Arbitration Blog

Recourse against an international arbitration award made in Singapore

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In *Astro Nusantara International BV v PT Ayunda Prima Mitra* [2012] SGHC 212, the Singapore High Court set out the available recourse against an international arbitration award made in Singapore. This case has significant implications for Singapore as a seat of arbitration, and this note contrasts the position between Singapore and Hong Kong against the backdrop of this case.

In October 2008, after a failed joint venture, the Claimants, which belonged to the Astro group of companies of Malaysia, commenced arbitration in Singapore against the Respondents, which belonged to the Lippo group of companies of Indonesia. In May 2009, the tribunal first issued an award on jurisdiction upholding its jurisdiction over the Respondents. Subsequently, the tribunal issued four other awards on the substantive merits of the case, largely in favour of the Claimants.

The Claimants obtained leave to enforce these awards in Singapore ("the Enforcement Orders"). These Enforcements Orders were then purportedly served on the Respondents in Indonesia. After expiry of the period to set aside the Enforcement Orders, judgments were rendered against the Respondents.

The Respondents brought applications to set aside the judgments and for leave to apply to set aside the enforcement orders on the grounds of improper service. The Respondents also brought applications to challenge the enforcement of the awards, which rested on the ground that the tribunal had no jurisdiction to join three Astro companies to the arbitration in the first place.

In light of the complexity of the issues raised by these applications, the Singapore High Court granted permission for Astro to be represented by David Joseph QC, and for Lippo to be represented by Toby Landau QC.

This note focuses on the issues arising out of the challenge to the Enforcement Orders. The relevant legislative background is that Singapore adopted in its International Arbitration Act:

(a) Art 16 of the UNCITRAL Model Law on International Commercial Arbitration ("Model Law"), which provides, among other things, that a tribunal can rule on jurisdiction as a preliminary issue, which a party may seek curial review of within 30 days; and

(b) Art 34 of the Model Law, which provides for, among other things, the setting aside of an award on stipulated grounds within 30 days; but *not*

(c) Arts 35 and 36 of the Model Law, which deal with the refusal of recognition or enforcement of an award. The Legislature preferred the enforcement regime of foreign awards to be governed by the New York Convention due to reciprocity concerns. Hong Kong has also similarly excluded Arts 35 and 36.

The central issue was whether the Respondents were entitled to invoke lack of jurisdiction as a ground to resist enforcement when they did not make any prior applications under Art 16 or 34 of the Model Law. As of the date of the Enforcement Orders, the prescribed timelines in Art 16 and 34 had long expired.

The Singapore High Court laid down several principles, which can be summarized as follows:

(a) In relation to an international arbitration award made in Singapore, the unsuccessful party does not have the option of remaining passive by resisting recognition and enforcement only when enforcement proceedings are brought in Singapore. The only possible recourse against an international award made in Singapore is a pro-active application to set aside the award on one of the prescribed grounds within the statutory timeframe.

(b) If the award is allegedly tainted by fraud or a breach of the rules of natural justice, there is a possibility that a court may extend the time frame for bring a setting aside application to prevent injustice.

(c) A challenge of an international award made in Singapore on jurisdictional grounds may be revived where enforcement is being sought in a court other than that of Singapore. For example, it is open to an unsuccessful party to invoke lack of jurisdiction before the courts of another New York Convention state as a means of resisting the recognition and enforcement of an international award made in Singapore. However, the enforcement court may not permit the unsuccessful party to revive a jurisdictional objection because of that party's conduct and failure to raise the objection before the curial court.

(d) In relation to a ruling on jurisdiction heard as a preliminary question, the unsuccessful party similarly does not have the liberty of challenging its enforcement only when enforcement proceedings are brought in Singapore. If the unsuccessful party does not subject the ruling on jurisdiction to curial review within the statutory timeline and continues participation in the arbitration, the ruling on jurisdiction is no longer susceptible to challenge.

The Singapore High Court's holding sets Singapore apart from Hong Kong. In Hong Kong, an unsuccessful party retains its "passive" remedy against an award made in Hong Kong, *ie*, instead of applying to set aside the award pro-actively, the unsuccessful party can resist enforcement when enforcement is sought before the Hong Kong courts.

The Singapore High Court's holding may arguably provide a disincentive for commercial parties to choose Singapore as a seat of arbitration. The extent of disincentive in each case may differ. But in terms of general risk management, a corporation facing the possibility of enforcement proceedings in Singapore may be more comfortable designating a seat of arbitration that would give it both "active" (*ie*, setting aside) and "passive" remedies in the face of an unfavourable award.

As mentioned, although Hong Kong, like Singapore, has eschewed Art 36 of the Model Law, Hong Kong permits an unsuccessful party to resist the enforcement of an award made in Hong Kong.

Section 86 of Hong Kong's Arbitration Ordinance (Cap. 609) provides the grounds upon which an Hong Kong award may be refused enforcement in Hong Kong. Section 86 is a new provision that came into force on 1 June 2011. It largely adopts the grounds in Art V of the New York Convention, with an additional ground that a court may refuse to enforce an award "for any other reason the court considers it just to do so."

Prior to the enactment of section 86, the enforcement of Hong Kong awards in Hong Kong was regulated by s 2GG of the Arbitration Ordinance (Cap. 341, since repealed). The prevalent view of writers on the interpretation of s 2GG was that, instead of bringing an application to set aside the award, an unsuccessful party could resist the enforcement of an Hong Kong award in Hong Kong when enforcement proceedings were brought, and that the Hong Kong courts may refuse to enforce a Hong Kong award only on grounds similar to Art 34 of the Model Law. The enactment of s 86 of the Arbitration Ordinance on 1 June 2011 removed any uncertainty on what those grounds would be. Prior to the case at hand, Singapore writers held a similar view on the position in Singapore.

Whether the case at hand would be overturned on appeal remains to be seen. Since the relevant provisions in Singapore's International Arbitration Act contain language very similar to s 2GG of Hong Kong's Arbitration Ordinance, it may be arguable that the International Arbitration Act should be read in the same way writers had interpreted s 2GG, *ie*, it allows an unsuccessful party to resist the enforcement of an international award made in Singapore.

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