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Hong Kong Court of Appeal Affirms that the Choice of Remedies Doctrine Does Not Offend Principle of Good Faith under the New York Convention

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Introduction

The dispute over the enforcement of an arbitration award ("Award") between the Astro and Lippo groups of companies has been fought out in numerous jurisdictions, notably Singapore and Hong Kong. When Astro sought to enforce the Award it had obtained against Lippo in Singapore, Lippo resisted on the ground that the tribunal ("Tribunal") lacked jurisdiction as it had improperly joined some of the parties to the arbitration ("Arbitration"). Astro contended that Lippo may not raise this objection at the enforcement stage as Lippo had elected not to avail itself of its right under Article 16(3) of the Model Law to challenge the Tribunal's preliminary ruling that it had jurisdiction.

Decisions in Singapore and Hong Kong

The Singapore Court of Appeal ("SGCA") disagreed with Astro, holding that Lippo was not so precluded because the Model Law gave parties the choice to elect between active and passive remedies against an award. Accordingly, Lippo may still enforce its passive remedy to resist enforcement, despite not having availed itself of the active remedies in Article 16(3) or Article 34. On the merits of the jurisdictional objection, the SGCA agreed with Lippo that the Tribunal had improperly joined several of the parties to the Arbitration. But that was not the end.

Astro had taken out parallel proceedings in Hong Kong to enforce the Award which Lippo did not resist initially. It was only after enforcement orders were granted and judgment entered against Lippo that Lippo sought an extension of time to set aside the same.

The Hong Kong High Court ("HKHC"), which heard the matter after the SGCA had rendered its judgment, (a) declined to extend time for setting aside the enforcement orders and judgment, and further (b) held that Lippo was precluded from resisting enforcement as its conduct constitutes a breach of the good faith principle under the New York Convention ("Convention").

The Hong Kong Court of Appeal ("HKCA") agreed with the HKHC on the first issue, but not the second, which is the focus of this commentary.

HKCA's decision

The HKCA affirmed the position under Hong Kong law that even if one of the grounds for resisting enforcement under the Convention is established, the court has a discretion to enforce the award *"in circumstances where there has been [a] breach of the 'good faith' principle by the award debtor"*. However, in its view, Lippo had not breached the good faith principle because:

(a) the Tribunal's wrongful joinder of some of the parties was a *"fundamental defect"*. In this regard, it is *"particularly relevant"* to take into account the law of the seat of arbitration and ruling of the supervisory court (i.e. the SGCA's decision);

(b) Lippo had not concealed its objection to the Tribunal's jurisdiction, nor did Lippo fail to raise the same to the Tribunal and carried on with the Arbitration on the footing that it would raise the objection only at the enforcement stage;

(c) as Lippo had expressly reserved its position as regards jurisdiction throughout, Astro did not proceed with the Arbitration in reliance on Lippo's conduct;

(d) there is no general obligation on the part of an award debtor to *"exhaust his remedies in the supervisory court before he could rely on a [Convention] ground to resist enforcement"*; and

(e) the requirement of "good faith" under the Convention and the "choice of remedies" doctrine under the Model Law are not mutually exclusive but complementary.

Commentary

The HKCA's decision represents another significant endorsement of the choice of remedies doctrine.

Practically, with the HKCA's decision, the positions in Singapore and Hong Kong in relation to the raising of jurisdictional objections before the courts are now aligned. It should be noted, however, that the global treatment of choice of remedies is far from homogenous. There are other jurisdictions which have adopted a contrary approach. One such example is England, where section 73(2) of the Arbitration Act 1996 provides that a party which could have but did not challenge the tribunal's ruling on jurisdiction by any available process of review or appeal or by challenging the award on jurisdiction, may not later object to that tribunal's substantive jurisdiction on a ground which was the subject of that ruling.

On that note, it is understandable that some are disappointed that the HKCA did not disapprove of the choice of remedies doctrine as anti-arbitration. Such disappointment should not be overstated.

First, even if an award debtor succeeds in resisting enforcement in one jurisdiction (as opposed to setting aside the award in the supervisory court), the award remains valid. It may still be enforced elsewhere, subject of course to the application of any estoppel.

Second, while there is a default expectation that awards should be enforceable, it bears emphasising that the grounds for refusing enforcement under the Convention exist to protect an award debtor from an unjustified award. Thus, the discretion to enforce an award notwithstanding that a ground for refusing enforcement is established should be exercised judiciously and hence sparingly. The idea that liberal enforcement of awards is somehow pro-arbitration is deeply flawed. Where an award is successfully challenged, it could be as much pro-arbitration as when a challenge is dismissed. The integrity of arbitration as a system cannot be tied to the outcome in particular

cases. It is promoted only when the outcome is driven by the principled application of the rules which comprise and regulate the system.

Third, the risk that much time and resources spent in obtaining an award may be wasted should an award debtor succeed in resisting enforcement on the grounds of a jurisdictional objection which could have been decided earlier by the courts can be ameliorated in at least one of two ways.

The first way is for the putative award creditor to obtain curial blessing of the tribunal's jurisdictional ruling under Article 16(3). Contrary to initial presumptions, Article 16(3) is party-blind. This is evidenced by the Model Law's careful and deliberate choice of words of *"any party may request"* in Article 16(3), which may be contrasted with the use of the words *"the challenging party"* under Article 13(3) which deals with curial review of a challenge against an arbitrator.[1)] The use of the words *"decide the matter"* further adverts to the Model Law's intention not to restrict Article 16(3) to a specific type of application. By choosing not to avail itself of Article 16(3) to determine the tribunal's jurisdictional ruling, the putative award creditor absorbs the risk that an enforcement court may subsequently disagree with the tribunal's ruling. The proposition that it is the award debtor who is responsible for any wastage of time and resources should the final award be refused enforcement is therefore not entirely fair.

The second way is to request the tribunal to codify its jurisdictional ruling in an award, and thereafter enforce the same. There is a legitimate body of jurisprudence that a tribunal's jurisdiction ruling can constitute an award and ought to be enforceable as such under the applicable national arbitration laws and the Convention.[2)] Under this approach, the claimant can take the tribunal's jurisdictional award and enforce it in the seat of arbitration, or any other jurisdiction in which it is likely to seek enforcement of a final award. Indeed, this possibility was directly referenced in the Commission Report on the Model Law.[3)] If the respondent elects not to resist enforcement or is unsuccessful, and the jurisdictional award is enforced as a judgment, any subsequent attempt to challenge the final award on the same jurisdictional objections determined in the jurisdictional award is most likely to fail on res judicata grounds. This approach however remains to be tested fully in Singapore.[4)]

In conclusion, the HKCA's decision represents another victory for the choice of remedies doctrine. But the contours of the doctrine are only starting to take shape. It will likely take many more court and arbitration decisions to work out its optimum operative parameters.

References

?1 See also Simon Greenberg, *"Direct Review of Arbitral Jurisdiction under the UNCITRAL Model Law on International Commercial Arbitration"* in The UNCITRAL Model Law after Twenty-Five Years: Global Perspectives on International Commercial Arbitration (Frédéric Bachand and Fabien Gélinas eds) (Juris, 2013) at pp. 64–65.

?2 See, for e.g., Yves Derain and Eric A. Schwartz, *A Guide fo the ICC Rules of Arbitration* (Kluwer, 2nd Ed, 2005) at p. 108; Jean-François Poudret, Sébastien Besson, *Comparative Law of International Arbitration* (Thomson Sweet & Maxwell, 2nd Ed, 2007) at p. 402. See also *Emirates Trading Agency LLC v Sociedade de Fomento Industrial Private Limited* [2015] EWHC 1452 at [25]; *Christian Mutual Insurance Co., v. Ace Bermuda Insurance Limited* [2002] Bda L. R. 1.

?3 *Report of the United Nations Commission on International Trade Law on the work of its eighteenth session* (3-21 June 1985) A/40/17, at para. 159.

?4 Cf. *International Research Corp PLC v Lufthansa Systems Asia Pacfici Pte Ltd* [2014] 1 SLR 130 at [65] and its treatment of *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA* [2007] 1 SLR(R) 597.

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