

Dispute Resolution Hotline

November 11, 2013

SINGAPORE COURT OF APPEALS REVERSAL: ASTRO V. LIPPO - SECOND BITE? YES, INDEED.

- Both an active (at the set aside stage) and passive remedy (at the enforcement stage) of jurisdictional challenge available;
- Rule of “choice of remedies” widened and “double-control” upheld;
- Harmonious reading of Model Law with the New York Convention;
- Singapore law brought in line with English law.

This hotline is in continuation of our previous coverage of the Singapore High Court’s decision in the case of Astro v. Lippo which was in appeal before the Singapore Court of Appeals.¹

Here’s a brief recap of the facts: The Claimants were the Malaysian Astro group of companies and the Respondents were the Lippo group of companies. There was a JV between both the group companies under a Share Subscription Agreement to provide Direct to Home Services to customers in Indonesia. Disputes arose between the parties and the Claimants commenced arbitration in Singapore and joined three other parties to the arbitration although they were not party to the Share Subscription Agreement. The Respondents objected to the joinder of non-parties to the agreement as parties to the arbitration (which was the jurisdiction question). However in a preliminary award, the Tribunal held that it had jurisdiction to join the non-parties under Rule 24.1(b) of the SIAC rules, 2007 (holding that such joinder would be allowed upon express consent of the non-parties and if it was necessary in the interest of justice)². The award on jurisdiction was also a part of four final awards which were passed in this arbitration. The Respondents did not apply to set aside the award on jurisdiction. When the Claimants sought to enforce the 4 awards (including the award on jurisdiction) the Respondents for the very first time raised an enforcement challenge claiming that non-parties to an arbitration agreement could never have been made parties to the arbitration. Therefore the award ought not to be enforced.

HOLDING OF THE SINGAPORE HIGH COURT:

The Singapore High Court held that the challenge with respect to jurisdiction ought to have been raised at the earlier stage and once the period for such a challenge setting aside the award expired, the award became final and was recognized. Therefore at the enforcement stage no such challenge with respect to jurisdiction was available.

The question decided by the Court was with respect to Article 16 (3) of the UNCITRAL Model law (incorporated in the Singapore International Arbitration Act).

Article 16 (3) provides the following:

Article 16 - Competence of arbitral tribunal to rule on its jurisdiction

...

3. The arbitral tribunal may rule on a plea referred to in paragraph (2) [challenge to jurisdiction] of this article either as a preliminary question or in an award on the merits. If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within thirty days after having received notice of that ruling, the court specified in article 6 to decide the matter, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award.

Since the Respondents had not raised a challenge either at the preliminary stage or at the set aside stage the High Court was of the opinion that the opportunity of challenge was closed at the enforcement stage.

REVERSAL OF THE COURT OF APPEALS AND ANALYSIS:

· **Both an Active and Passive Remedy available:**

The Singapore High Court had held that once a domestic international award has gone through the set-aside stage, it has been recognised and therefore after there has already been curial court intervention, the enforcement ought to be on summary and limited grounds. The High Court had observed, “*Challenging the enforcement of a domestic international award is more properly analysed as challenging the recognition of such an award. The pro-arbitration stance taken by the IAA privileges party autonomy and the finality of awards, and espouses limited curial intervention. This is in line with numerous other civil jurisdictions and jurisdictions which have adopted the Model Law (referred to hereafter as either “Model Law jurisdictions” or “Model Law countries”), and favours the summary enforcement of a domestic international award which has been recognised.*”³ Based on this premise the court rejected the “double-control” rule of the remedy of jurisdictional challenge being available at both stages.

The Court of Appeals was of the view that the Singapore International Arbitration Act was on the lines of the Model law and the scheme of Model law was such that it allowed for both a remedy in offence (which would be an active

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application to set aside the award by way of a jurisdictional challenge) or a remedy in defence (which would be by means of a challenge at the time of enforcement). The Court of Appeals was of the view that the choice was with the challenger and there was bar on a challenge at a later stage merely because the challenge was not raised before the award became final.

The Court treated the availability of the remedy as alternative provisions. The Court held that if a party had not exercised its right to challenge at the set aside stage (in the active) it could do so at the enforcement stage (in the passive).

The Court's analysis involved reviewing a number of textbooks and the position under English law (which is substantially similar) and the Court observed,

"The 'substantive requirements' imposed on the award which, if not complied with, might render the award unenforceable, were: (a) cogency; (b) completeness; (c) certainty; (d) finality; and (e) enforceability: Mustill & Boyd at pp 339-343.

43 Although the principles appear to be stated with some degree of clarity in the textbooks, the cases lack the same precision. Nonetheless, the general theme in case-law is consistent with what had been suggested in the textbooks. It was certainly clear that the invalidity of the award encompassed cases where the award was made without jurisdiction."

Thus the Court was of the view that jurisprudence suggests that the invalidity of an award entails a jurisdictional challenge.

• **Similar treatment to the enforcement of foreign awards and domestic international awards:**

The Singapore High Court had made a specific distinction between a domestic international award which was afforded the remedy of a jurisdictional challenge in the curial court (which was also the enforcing court) and a foreign award where this challenge could be raised at enforcement if the enforcing country allowed for it.⁴

As our analysis in the previous hotline had observed, the Court of Appeals was of the view that domestic international awards would also be treated similarly to international awards. The Court observed that the Model law approach adopted by Singapore had always been that of allowing for a 'choice of remedies' and (at para 47)

"there is every reason to think 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."

• **Harmonious reading of the Model Law and the New York Convention**

Another point which was a part of our analysis in the previous hotline has been explained by the Court of Appeals. The Court observed that due to the distinctions between the Model Law and the New York convention, there would be a differing treatment to domestic international awards and foreign awards. This is where the 'choice of remedies' provision would become significant.⁵

The Court therefore held at para 74:

"It is clear, from our foregoing analysis, that both the New York Convention and the Model Law recognise the 'choice of remedies' as one such interstitial doctrine, so that a party is not precluded from resisting the enforcement of an award by virtue of its failure to utilise an available active remedy.

The Court also observed that there is commentary that indicates that there is authority to suggest that the New York Convention permits passive challenge even when the active challenge fails, unless there is any ground of estoppel and it advocated the treatment of international awards uniformly.

• **Substantive decision on the question of jurisdiction**

On the question of merits of whether the tribunal had jurisdiction in impleading non-parties to an arbitration, the Court held that Rule 24.1 (b) of the SIAC rules, 2007 (as it applied to this arbitration) would have to be interpreted to mean that only those parties that are existing parties to an arbitration agreement (here Share Subscription Agreement) but not parties to the arbitration may be joined with their consent. It could not be extended so widely as to include even non-parties since that was not the intent of the rule and such a reading would be overreach. This was read in from the explanations provided in the subsequent amendments to the SIAC rules in 2010 and 2013.

It may be noted that most of the portion of the total award amount of USD 250 million was against the non-parties to the arbitration. The Court therefore refused to enforce the enforcement orders against such non-parties.

CONCLUSION

The decision of the Singapore Court of Appeals is significant since it delineates the boundaries of challenge and the timing for raising such challenges. It also brings a certain degree of uniformity in the understanding of the law in this regard and brings it in line with English law.

— **Shalaka Patil & Vyapak Desai**

You can direct your queries or comments to the authors

¹ PT First Media TBK v Astro Nusantara International BV & others [2013] SGCA 47

² *"In addition and not in derogation of the powers conferred by any applicable law of the arbitration, the Tribunal shall have the power to:*

...

(b) allow other parties to be joined in the arbitration with their express consent, and make a single final award determining all disputes among the parties to the arbitration"

³ See para 71, Astro Nusantara International BV and others v PT Aunda Prima Mitra and others [2012] SGHC 212

⁴ See paras 72-89, Astro Nusantara International BV and others v PT Aunda Prima Mitra and others [2012] SGHC 212

⁵ *"Unlike the New York Convention which only dealt with enforcement of awards, the Model Law also dealt with the setting aside of awards made in the seat of arbitration by the courts of that seat. This other avenue to challenge domestic awards resulted in the possibility that the enforcement of awards originating from within the jurisdiction of the supervisory court would be treated differently*

from that of foreign awards. This is where 'choice of remedies' becomes significant and forms the crux of this dispute." At para 64 of the Court of Appeals decision.

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