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A commentary article reprinted from the January 2017 issue of Mealey's International Arbitration Report

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Commentary

Astro v. Lippo: Hong Kong Court Clarifies The Discretion Found In Article V Of The New York Convention, But Holds Firm On Time Limits

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I. Introduction

On 5 December 2016, the Hong Kong Court of Appeal ("**the Hong Kong CA**") issued its decision in the long-running Astro vs. Lippo dispute, allowing the enforcement in Hong Kong of arbitration awards that the Singapore Court of Appeal ("**the Singapore CA**") had refused to enforce.[1] Although the Hong Kong CA overturned one aspect of the decision made by the lower court (the finding that there had been a breach of the good faith principle), the Hong Kong CA dismissed First Media's appeal. Fatal to First Media's case was the inexcusable delay which had occurred before First Media had applied to set aside the enforcement order originally made in Hong Kong.

II. Background

In 2005, companies from the Malaysian media conglomerate, Astro, ("**Astro**") and companies from the Indonesian Lippo group, including First Media, formed a joint venture to provide multimedia and television services in Indonesia. The joint venture failed, prompting Astro to initiate arbitration proceedings in Singapore, pursuant to the rules of the Singapore International Arbitration Centre ("**SIAC**") in 2008, as prescribed by the contract between itself and Lippo. Astro put forward claims in respect of the services and funding it had provided. In the arbitration, Astro also sought to include as co-claimants three additional Astro companies that wished to bring claims (but were not signatories to the arbitration clause in the joint venture agreement). A tribunal (consisting of three English arbitrators, Sir Gordon Langley, Sir Simon Tuckey and Stewart C Boyd CBE QC) was constituted in accordance with the SIAC rules. First Media, meanwhile, contended that the tribunal did not have jurisdiction over the claims being advanced. In an interim partial award, the tribunal concluded that it did have jurisdiction over all claims and the three Astro companies were entitled to bring claims. First Media decided not to challenge this award in the Singapore courts at that time (even though Article 16(3) of the UNCITRAL Model Law ("**Model Law**"), as enacted in Singapore, would have permitted a challenge to be brought at that time).[2] The tribunal ultimately delivered awards totaling US$130 million in favor of the Astro companies (including the three Astro non-signatories).

Astro and its affiliates sought to enforce the award in several countries including Singapore, Hong Kong, England, Malaysia and Indonesia. It obtained leave to enforce the awards in Singapore in 2010. First Media then sought to resist enforcement by bringing before the Singapore courts an objection to the arbitral tribunal's jurisdiction over the three Astro companies. The Singapore High Court held that because First Media had not challenged the jurisdictional award in time, it had *waived* its right to raise the jurisdictional objection. The Singapore CA overturned the lower court's decision, on the basis that First Media was entitled to raise

the jurisdictional argument pursuant to what it characterized as the "choice of remedies" principle.[3] Specifically, the Singapore CA reasoned that a party that failed to take an "active approach" (by challenging a jurisdictional award at the time the award was rendered) was not precluded from subsequently resisting enforcement on the basis of *the same jurisdictional objection* (the so-called "passive approach"). Having decided that First Media *was entitled* to raise the jurisdictional objection, the Singapore CA concluded that the three Astro companies were not properly to be regarded as parties to the arbitration agreement and, hence, that the tribunal had erred in finding that their claims came within its jurisdiction. For that reason, the Singapore CA held that the awards in favor of the three Astro companies could not be enforced in Singapore.

Astro then sought to enforce the awards *in Hong Kong*. In the (mistaken) belief that it did not have any assets in Hong Kong, First Media took no steps to resist Astro's enforcement application and a judgment was entered in respect of the awards ("**the Hong Kong Judgment**"). Astro then located assets in Hong Kong and, in particular, obtained a garnishee order to attach a debt of US$ 44 million ("**the Garnishee Order**").

In response to these developments, First Media applied (fourteen months out of time) to set aside the Hong Kong Judgment, and also sought an order quashing the Hong Kong Garnishee Order.

In contrast with the approach of the Singapore CA, Mr. Justice Chow of the Hong Kong Court of First Instance *upheld* the Hong Kong Judgment and in doing so affirmed the Garnishee Order.[4] His Honor acknowledged that the argument as to lack of jurisdiction had been made out. However, he concluded, first, that First Media's failure to raise its jurisdictional objection *earlier* in the Singapore courts gave rise to a breach of the principle of good faith and, secondly and in any event, that in circumstances where the deadline for challenging enforcement in Hong Kong had long since expired, there was no basis for the court to exercise its discretion to extend time. First Media then appealed to the Hong Kong CA.

In its appeal in Hong Kong, First Media fixed on Mr. Justice Chow's conclusion that it had breached the "good faith" principle. It also took issue with his failure to grant an extension of time for First Media's set aside application.

III. Good Faith Principle and the Court's Discretion to Refuse Enforcement

Hong Kong's statutory arbitration framework, which implements the 1958 New York Convention on Recognition and Enforcement of Foreign Arbitration Awards, provides as a general principle that arbitration awards, including Convention awards, are to be recognized and enforced in the same way as judgments of the Hong Kong courts, unless grounds for declining recognition and enforced are established.[5] Article V of the New York Convention sets forth certain grounds on which recognition and enforcement of a foreign arbitration award can possibly be refused. The provisions of Article V are given statutory effect in Hong Kong. Thus, sections 44(2) and (3) of the Arbitration Ordinance (which were in force at the times relevant to this dispute) stated that "enforcement of a Convention Award *may* be refused" on various grounds, including:

- "that the arbitration agreement was not valid under the law to which the parties had subjected it or . . . under the law of the country where the award was made"; and
- ". . . that the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration or contains decisions on matters beyond the scope of the submission to arbitration."

Self-evidently, the discretion conferred by the use of the word "*may*" enables the court to enforce an award even if a ground for declining enforcement the award has been proved. In the 1995 case of *China Nanhai*, for example, Mr. Justice Kaplan explained that, since the principle of good faith is fundamental to the New York Convention, the enforcing court retains discretion to enforce the award in the interests of preserving the principle of good faith – even if a ground for refusing enforcement has been established by the challenging party.[6]

In its decision in the *Astro* case, therefore, the Hong Kong CA first addressed the question of good faith and then reviewed Mr. Justice Chow's exercise of his discretion to allow enforcement.

On this point, the Hong Kong CA disagreed with the finding of Mr. Justice Chow that there had been a breach of good faith. Although Chow J. had considered

that the failure to bring an immediate challenge to the SIAC tribunal's jurisdiction in the Singapore Courts had violated the principle of good faith, the Hong Kong CA considered that this merely reflected a legitimate exercise by First Media of its choice of remedies under Singapore law. This, it held, could not be characterized as a breach of good faith, or as a waiver of its right to object to jurisdiction subsequently. The Hong Kong CA thus concluded that Chow J. had not given "proper recognition to the findings in the [Singapore CA's] judgment."

Turning to the discretion in Article V of the New York Convention to decline enforcement of an award (as reflected in the above-quoted portions of Article 44(2) and (3) of the then-applicable Arbitration Ordinance). The Hong Kong CA disagreed with Mr. Justice Chow's approach to exercising that discretion. Mr. Justice Chow had considered that, before reaching the issue of whether to decline enforcement on the grounds that the SIAC tribunal lacked jurisdiction to make the awards (which he considered to be a "narrow" question), he should separately decide whether the principle of good faith precluded a party from resisting enforcement in the first place. The Hong Kong CA considered this to be an "erroneous" approach. Instead, the Hong Kong CA held that, in exercising its discretion as to whether to "overrule a defence" to enforcement of a Convention Award, including the question of whether good faith requires that a resisting party be "estopped" from using such a defence, the Hong Kong court must consider "fundamental jurisdiction objections." In the view of the Hong Kong CA, the lower court's approach "failed to take into account the fundamental defect that the Awards were sought to be enforced against the Additional Parties who were wrongly joined by the Tribunal into the Arbitration and the Awards were made without jurisdiction." Had this factor been properly considered, the judge "could only have exercised his discretion to refuse enforcement."

In support of this view, the Hong Kong CA cited the UK Supreme Court's 2011 decision in *Dallah v Pakistan*, which held that ". . .if the person opposing recognition or enforcement of an award can prove that he was not a party to the relevant arbitration agreement, it will rarely, if ever, be right to recognize or enforce it solely on the grounds that he has failed to take steps to challenge it before the supervisory court."[7] The full implications of these observations are likely to be explored in future jurisprudence.

IV. Discretion To Extend Time

Mr. Justice Chow's decision to allow enforcement had also rested (as an alternative basis) on the fact that First Media had not made a timely application to set aside the judgments entered against it by the Hong Kong court. In declining to grant an extension of time to First Media (to apply to set aside the Hong Kong Judgments) Mr. Justice Chow had highlighted three specific factors:

(1) the extent of the delay;

(2) the fact that the delay had been deliberate and calculated (and was part of a strategy based on First Media's belief that it had no assets in Hong Kong);

(3) the fact that the awards had not been set aside at the seat.

In reviewing this aspect of Mr. Justice Chow's decision, the Hong Kong CA emphasised that it would not interfere unless it could be shown that:

(1) his discretion had been exercised under a mistake of law or in disregard of principle; or

(2) he had taken into account irrelevant matters or that the exercise of his discretion was "outside the generous ambit within which a reasonable disagreement is possible".

Upholding Mr. Justice Chow's refusal to grant an extension of time, the Hong Kong CA rejected First Media's various reasons for its lateness. For example, it rejected its contention that the fact that the awards had not been set aside at the seat was an "irrelevant factor".

First Media sought to rely on *The Decurion*, in which Hong Kong CA commented that in considering a proposed extension of time, the court should consider "all relevant matters" and "the overall justice of the case", and should not adopt a "rigid[ly] mechanistic" approach.[8] However, the Hong Kong CA accepted Astro's argument that, where the delay had arisen in the context of arbitration proceedings in which both parties had been actively involved, a more disciplined approach was required. In this respect, Astro had placed

considerable emphasis on the policy of speed and finality as enshrined in Section 2AA(1) of the Hong Kong Arbitration Ordinance.

V. Conclusion

The Hong Kong Court of Appeal decision provides welcome clarification of the discretion granted to the court to refuse enforcement pursuant to Article 44 of the Arbitration Ordinance (which gave effect to Article V of the New York Convention). It also makes clear that, because the policy of "speedy resolution" is central to the resolution of disputes by arbitration, extensions of time should not be easily granted in the circumstances which arose.

Endnotes

1. *Astro Nusantara International BV v PT First Media TBK*, CACV 272/2015, 5 December 2016 (HK CA).

2. Article 16(3) of the UNCITRAL Model Law is given force in Singapore by way of its inclusion as a schedule to its International Arbitration Act (Cap. 143A, 2002 Rev. Ed). Article 16(3) of the Model Law stipulates that, "...(i)f the arbitral tribunal rules 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..."

3. *Astro Nusantara International BV and others v PT Ayunda Prima Mitra and others* [2013] 1 SLR 636.

4. *Astro Nusantara International BV v PT Ayunda Prima Mitra* [2015] HKEC 330.

5. For purposes of the *Astro* case, this principle was relevantly enshrined in Section 2GG of the Hong Kong Arbitration Ordinance (Cap 341), in force at the time the applications for leave to enforce the Awards were made in August and September 2010, and also in force at the time the applications for leave to enforce the Awards were made in August and September 2010. Since that date, the principle allowing for enforcement of local and foreign awards is presently stated in Section 84 of the Hong Kong Arbitration Ordinance (Cap 609), which came into effect in June 2011 (and adopts a version of the UNCITRAL Model Law).

6. *China Nanhai Oil Joint Service Corporation Shenzhen Brance v Gee Tai Holdings Co Ltd* [1995] 2 HKLR 215.

7. *Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs of the Government of Pakistan* [2011] 1 AC 763 at §§61.

8. *The Decurion* [2012] 1 HKLRD 1063. ■

MEALEY'S: INTERNATIONAL ARBITRATION REPORT
edited by Lisa Hickey
The Report is produced monthly by

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Email: mealeyinfo@lexisnexis.com
Web site: http://www.lexisnexis.com/mealeys
ISSN 1089-2397