

Astro v Lippo - From Singapore to Hong Kong - an obligation to act in good faith?

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Hong Kong and Singapore have adopted the UNCITRAL Model Law on International Commercial Arbitration (Model Law) as a basis for their respective international arbitration statutes. The Model Law's imprint on domestic legislation, however, only runs as deep as a national court chooses to give it effect.

May a court in a Model Law jurisdiction, under certain circumstances, disregard the Model Law provisions which its domestic legislation has adopted? The Hong Kong judgment of *Astro Nusantara International BV and ors v PT Ayunda Prima Mitra and ors HCCT 45/2010* (17 February 2015) (HK decision) dealt with this issue indirectly. The HK decision is the latest instalment of the legal battle arising from a failed Lippo – Astro joint venture for provision of multimedia and television services in Indonesia.

What is enforced or not enforceable in Singapore stays in Singapore

In a Singapore-seated international arbitration between some companies of the Astro group (Astro) against several companies of the Lippo group (Lippo), the tribunal issued a preliminary ruling on jurisdiction on 7 May 2009, stating that it was empowered to join three Astro entities which were not parties to the agreement that contained the material arbitration clause. In this article, we focus on the actions of one of the Lippo entities, i.e. PT First Media TBK (First Media), for reasons that will be apparent.

First Media chose to not challenge the preliminary ruling on jurisdiction before the Singapore courts which it could have done under Article 16 of the Model Law. Article 16 of the Model Law applies in Singapore by virtue of the Singapore International Arbitration Act (IAA). Instead, First Media reserved its position on the tribunal's jurisdiction to hear the dispute in connection with the Astro entities. Eventually, Astro obtained monetary relief against First Media under five awards issued in Singapore between 7 May 2009 and 3 August 2010 (Awards). First Media did not apply to set aside the Awards.

As it turned out, First Media successfully resisted the enforcement of the Awards in Singapore when Astro sought to enforce them there. The Singapore Court of Appeal (SCA) in October 2013 held that the clear philosophy of the Model Law was to provide a “*choice of remedies*”.

Hence, arbitrating parties who had eschewed opportunities to raise an appeal or set an award aside would not be precluded (subject to waiver and estoppel) from resisting its enforcement. The SCA also held that nothing in the *travaux préparatoires* on Article 16 of the Model Law suggested that it was an exception to the philosophy of “*choice of remedies*”, or intended to be a “*one-shot remedy*”. Recourse under Article 16(3) was meant to render the arbitration process more efficient as compared to being able to challenge jurisdictional rulings only after the award on merits was rendered.

What happened in Hong Kong?

In September 2010, Astro sought and obtained permission to enforce the Awards in Hong Kong as well. At that time, First Media could have applied to set aside these orders (Hong Kong Orders). It did not do so and Astro subsequently entered judgment on 9 December 2010 against First Media in terms of the Awards (Hong Kong Judgment). It appears that First Media did not do so because it was of the view that it had no assets in Hong Kong.

As it turned out, First Media had some “assets” in Hong Kong in the form of receivables and they were garnished by Astro. On 18 January 2012, First Media then sought to deal with the situation. This led to the HK decision of Justice Chow where he had to and did decide two issues:

- Should First Media be granted an extension of time to apply to set aside the Hong Kong Orders and the Hong Kong Judgment?
- If time was so extended, should the Hong Kong Orders and the Hong Kong Judgment be set aside?

The first question was an issue of Hong Kong civil procedure since it concerned the circumstances under which time would be extended to allow a party to seek relief that was being sought out of time. Justice Chow identified three factors that operated against First Media – First Media’s 17-month delay was lengthy; First Media’s initial state of inaction was deliberate; and First Media had not set aside the Awards.

What was decisive was a fourth factor. That is, even if First Media was given an opportunity to resist Astro’s enforcement of the Awards, it would fail. Therefore, Justice Chow declined to extend time for First Media.

In coming to his view, Justice Chow referred to section 44 of the Hong Kong Arbitration Ordinance (Ordinance) (now section 89 of the Hong Kong Arbitration Ordinance). That provision was based on Article 36 of the Model Law. Section 44(1) of the Ordinance provided that enforcement of an award “*shall not be refused*” except on the grounds mentioned in that section; while section 44(2) provided six grounds on which enforcement “*may*” be refused. (section 44(3) contains two other grounds which were irrelevant to the case.)

However, Justice Chow appeared to disregard the mandatory tenor of section 44(1) when he then framed the question: Is the resisting party even permitted to rely on section 44(2) of the Ordinance to begin with? (Threshold Question)

The Threshold Question appears to be a novel one. Traditionally, when an award debtor applies to resist enforcement of an award against him, the Hong Kong courts first examine if the applicant can prove one or more of the grounds in section 44. After the applicant manages to do so, refusal of enforcement is still not guaranteed – the award creditor may still persuade the Court to exercise a discretion to allow the award to be enforced.

However, it is unclear from the grounds of decision that Justice Chow specifically identified any one of the grounds in section 44 as the basis for his decision, i.e. the precluding circumstances. Instead, Justice Chow appeared to focus on what is described as First Media’s breach of a Hong Kong “*good faith principle*”, which in his view was distinct from the doctrines of waiver and estoppel.

Justice Chow held it was inimical to the good faith principle the idea that:-

“a party to an arbitration, while being fully aware of an objection (whether in relation to the jurisdiction of the tribunal or the procedure or conduct in the course of the arbitration), should be permitted to keep the objection in reserve, participate fully in the arbitration and raise the objection in the enforcing court only after an award had been made against him by the tribunal”.

So what exactly was First Media’s conduct that offended the good faith principle, given that First Media did object to

the tribunal's jurisdiction, and did reserve their position that the tribunal lacked jurisdiction? It could only have been First Media's decision taken in May 2009 not to appeal against the tribunal's jurisdiction in Singapore under the IAA, specifically Article 16(3) of the Model Law.

If this is the case, Justice Chow's reasoning is troubling on two levels:

1. First, it seems to be inconsistent with the choice of remedies that is apparent from the *travaux préparatoires* on Article 16 of the Model Law. Unlike the German statutory regime, the Ordinance does not have clear language that excluded the choice of remedies. Indeed, the Ordinance simply adopts the Model Law as it is on this point.
2. Second, it seems to introduce a ground for refusal of enforcement not found in section 44, i.e. absence of good faith, separate and distinct from the discretionary powers of the Hong Kong Court to refuse enforcement even if any or some of the section 44 grounds are made out. The Hong Kong courts is certainly entitled to consider the question of "*good faith*" under the rubric of sections 44(2) and/or 44(3) of the Ordinance but this analysis should take place after the applicant has made out any or some of the section 44 grounds.

Hence, the outcome in Hong Kong appears to suggest that the Hong Court Courts can disapply section 44(1) of the Ordinance on the basis of lack of good faith. If so, this amounts to a disregard of Article 16 of the Model Law.

The more interesting question is how the concept of good faith operates and where its limits are, if any, when it comes to enforcement of international arbitral awards arising from arbitrations based on the Model Law. Good faith, or lack thereof, can be a powerful and flexible tool but at the same time, an untamed animal which requires circumspect and caution. Indeed, why should there be an investigation into a party's conduct if it was entitled, as a matter of Model law and domestic law, to a choice of remedies? Is there a stand-alone obligation to exercise a statutory right in good faith (separate from waiver and estoppel)? These are questions thrown up by Justice Chow's decision that perhaps the Hong Kong appellate Courts will consider in due course.

Lastly, the key element which founded a lack of "*good faith*" involved a Singapore law issue because it is in respect of First Media's omission to trigger a Singapore statutory right – Article 16(3) of the Model Law, as incorporated by the IAA. The answer to the Singapore law issue had been unequivocally provided by the SCA, but Justice Chow gave it no weight because he analysed the SCA's focus as being "*on issues of waiver and estoppel as a matter of Singapore domestic law*". This seems to be an unfortunate misreading of the SCA's judgment.

Interesting issues on appeal

Indications are that First Media has or will be appealing the decision of Justice Chow. It will be interesting to see how the Hong Kong appellate courts decide the issues arising from his decision. This will have far-reaching consequences for Hong Kong practitioners as well as the international arbitration community, particularly in jurisdictions that have given statutory effect to the enforcement and setting aside provisions of the Model Law.

Indeed, it also remains to be seen whether the Hong Kong Court of Appeal will depart from the observations of Madam Justice Mimmie Chan in an earlier application arising from the same case where she stated:

... "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 [Hong Kong] based on the same arbitration awards that were made without jurisdiction." ¹

Lippo v Astro will not cease transmission (yet).

¹ [13] of the grounds of decision HCMP 835/2014.

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