

CASE IN BRIEF

Astro Nusantara International BV v PT Ayunda Prima Mitra CACV272/2015, 5 December 2016)

Recently the Hong Kong Court of Appeal dismissed an out of time appeal against enforcement, and confirmed the “choice of remedies” principle: an unsuccessful party to an international arbitration can choose to passively oppose enforcement of an award, despite abstaining from any active challenge against the award.

Background

In 2005, Astro and Lippo entered into a joint venture for the provision of multimedia services in Indonesia. The parties signed a conditional subscription and shareholders’ agreement (**SSA**) which set out their obligations and intentions under the joint venture. In the interim period while the SSA remained conditional, three Astro subsidiaries provided funding for the joint venture. However, when the conditions fell through and the SSA failed to go unconditional, a dispute arose over the continued funding of the joint venture while the parties considered exit strategies.

In October 2008, Astro commenced arbitration proceedings against Lippo in the Singapore International Arbitration Centre. Astro’s notice of arbitration sought to join the subsidiaries (**Joinder Parties**) to the arbitration, stating they had consented to being joined because they were not parties to the SSA. Lippo contested the joinder application; however the Tribunal held that it had the power to join additional parties as long as they consented. Thereafter between 2009 and 2010, the Tribunal rendered five awards in favour of Astro against Lippo, totalling in excess of US\$130 million, approximately US\$700,000 of which was awarded to the Joinder Parties as non-contractual, restitutionary relief.

Lippo did not take any steps to challenge the awards or apply to have them set aside before the Singapore Court as the court of the Arbitration. Astro subsequently applied for and was granted leave to enforce the awards in Singapore by the High Court.

It was not until Astro sought enforcement of the awards in various jurisdictions that First Media, a Lippo entity, opposed enforcement on jurisdictional grounds arguing that there was no agreement to arbitrate between First Media and the Joinder Parties as they were not parties to the SSA. While Astro sought enforcement in various jurisdictions, Lippo only resisted proceedings for recognition and enforcement of the award in Hong Kong, as it was the only relevant jurisdiction in which Lippo had assets that could be levied.

Singapore Court of Appeal

In a 2013 judgment, the Singapore Court of Appeal refused enforcement of the awards by the Joinder Parties against First Media on the grounds that there was no valid arbitration agreement between the Joinder Parties and First Media, and the Tribunal had no jurisdiction to make the awards it had in favour of the Joinder Parties against First Media.

Case in Brief (Cont..)

In allowing First Media to resist enforcement, the Singapore Court of Appeal confirmed the principle of “choice of remedies”, under which passive remedies will still be available to an award debtor who did not utilise its active remedies, is fundamental to the UNCITRAL Model Law which Singapore adopted in 1994. Astro argued that Lippo had breached the principle of good faith by participating in the arbitration and only raising objections at the enforcement stage of the awards granted. The Singapore Court of Appeal disagreed, finding that the ‘choice of remedies’ principle meant that First Media’s failure to pursue active remedies to challenge the preliminary ruling or set aside the award did not prevent it from resisting enforcement by passive means, and was not a breach of good faith based on the following principles:

- ‘Active remedies’ means taking positive steps to invalidate an arbitral award such as by an application to challenge a preliminary ruling on jurisdiction, or to set aside an award; and
- ‘Passive remedies’ means resisting the recognition or enforcement of an award in the jurisdiction where and when the award is sought to be enforced.

Hong Kong Court of First Instance

In 2010 the Hong Kong Court (Court of first instance) granted Astro leave to enforce the awards in two orders (**Hong Kong Orders**). Initially, Lippo did not apply to have the orders set aside within the required 14-day timeframe, and judgment was entered in favour of Astro. It later came to light that Lippo’s inaction was due to a mistaken belief that it did not have any assets in Hong Kong which could be levied against in any enforced award. In July 2011, Lippo realised its error when Astro obtained a garnishee order to attach a US\$44 million debt due to First Media, from a Hong Kong listed company.

In January 2012, First Media commenced proceedings for an extension of time to set aside the Hong Kong Orders, as well as substantive orders to set aside the Hong Kong Orders and garnishee order. First Media’s applications were dismissed at first instance. The Court found that First Media’s delay in taking any action against the awards amounted to bad faith, and declined to aid First Media to get out of its *self-inflicted predicament*. The Court also held that it could not rely on its discretion (under section 44(2) of the Ordinance) to allow enforcement as it was precluded by the good faith principle. The Court considered that to grant an extension of time in the circumstances would undermine the principle of finality, against the background of which questions of fairness fall to be judged. First Media appealed the decision.

Hong Kong Court of Appeal

The Court of Appeal declined to interfere with the Court of first instance decision against not extending the time limit for First Media’s application. However, the Court of Appeal found that the lower court’s decision on the principle of good faith was incorrect. The CA considered the lower court had misdirected itself on the exercise of discretion in relation to the good faith principle, and had not given sufficient weight to the findings of the Singapore Court of Appeal. In considering the purpose of the good faith principle, the CA considered the law of the seat of arbitration and the ruling of the supervisory court of the seat of arbitration, being Singapore, as particularly relevant.

The CA held that First Media was not in breach of good faith by reserving its right to resist enforcement despite not actively challenging the awards. This aligned with the ‘choice of remedies’ principle endorsed earlier by the Singapore Court of Appeal. The CA considered that the two principles: good faith and choice of remedies were not mutually exclusive but complementary, meaning that a party’s’ actions in line with one were not necessarily in detriment to the other.



The CA also found the lower Court's decision that First Media's conduct was such that it should not be permitted to rely on section 44(2) of the Ordinance to resist enforcement of the awards because it had acted in breach of the good faith principle was incorrect. Section 44 provides that enforcement of a convention award is mandatory unless a ground is made out under the relevant subsections, in which case the court has discretion whether to permit or refuse enforcement.

The CA held that the lower Court had erred in ruling that the breach of the good faith principle precluded it from resisting enforcement pursuant to its discretion under s44(2). The CA held that the discretion was found in the word "may" which enables the enforcing court to enforce an award, notwithstanding that a s 44 ground might otherwise be established". The CA held that once the fundamental defect of the awards sought to be enforced was taken into account, (that the awards were made without jurisdiction in favour of parties wrongly joined to the arbitration), the only conclusion was to exercise discretion and refuse enforcement. For these reasons, the CA concluded that the Court at first instance decision that First Media is precluded by the principle of good faith from relying on s 44(2) to resist enforcement could not be supported.

Despite the CA's disagreement with the lower Court's approach, the CA considered the conclusion was not plainly wrong, and the appeal was ultimately dismissed due to the significant time delay in First Media's application for an extension of time. First Media's application some 14 months after the Hong Kong Court's enforcement orders was well outside the statutory 14-day time limit. However, the CA reflected its disagreement with the Court of first instance conclusion on good faith by awarding 60% costs against Astro.

Comment

The Hong Kong Court of Appeal's decision brings Hong Kong law in line with already established Singaporean law on the "choice of remedies" principle to allow parties to choose active or passive remedies against awards. The decision brings some procedural certainty for parties involved in international arbitration seated in two of Asia's most prominent arbitration destinations (Singapore and Hong Kong). While both the Singaporean and Hong Kong Courts have endorsed the choice of remedies principle and passive approach to challenging enforcement, this decision serves as a timely reminder to debtors who do not challenge enforcement orders for awards within specified timeframes. All debtors are encouraged to act quickly when challenging enforcement orders for awards against them, regardless of their asset liability in the relevant jurisdiction, or prepare to face the consequences as First Media did.



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