



Consistency restored as Astro v Lippo appeal dismissed

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

In the latest instalment of the long-running dispute between Astro and Lippo, the Hong Kong Court of Appeal ("CA") has dismissed Lippo's appeal against a 2015 first instance decision allowing the enforcement of five arbitral awards, despite a ruling of the Singapore Court of Appeal refusing enforcement in favour of the joined additional parties on the basis that the arbitral tribunal acted outside its jurisdiction (partial enforcement of the awards in favour of parties whom First Media did not dispute were proper parties to the arbitration was allowed). Although it upheld the first instance decision, the CA notably disagreed with the High Court's finding that Lippo did not act in good faith and reflected this in its award of 60% costs to Astro.

Background

Two companies belonging to an Indonesian conglomerate ("**Lippo**") and a Malaysian media group ("**Astro**") respectively, entered into a joint venture which subsequently failed and led to arbitration proceedings in 2008 at the Singapore International Arbitration Centre (the "**Arbitration**"). Astro successfully joined to the Arbitration a number of Astro companies that had not been parties to the arbitration agreement ("**Additional Parties**"). The arbitral tribunal rendered five awards in a total amount of over US\$ 130 million, of which all but US\$ 700,000 was awarded to the Additional Parties (the "**Awards**"). Astro sought to enforce these awards against First Media (part of the Lippo group) in multiple jurisdictions, including in Singapore and in Hong Kong.

Proceedings in Singapore

Lippo did not take any steps to challenge or apply to set aside the Awards in the Singaporean courts (the supervisory court of the Arbitration) and the time limits for such challenges had long since passed. On 31

October 2013, the highest court in Singapore (the Court of Appeal, or CA) refused the Additional Parties' application to enforce the Awards (the "**Singapore Judgment**") on the grounds that (a) there was no valid arbitration agreement between First Media and the Additional Parties and (b) the arbitral tribunal had no jurisdiction to make the Awards in favour of the Additional Parties against First Media.

In allowing First Media to resist enforcement of the Awards by the Additional Parties, the Singapore CA had particular regard to the "choice of remedies" principle embodied in Singapore law, under which the decision of a party due to pay an award not to pursue 'active' remedies to challenge a preliminary ruling or set aside the award would not prevent the award debtor from later using 'passive' remedies such as resisting the enforcement of an award in a certain jurisdiction. Consequently, First Media's failure to challenge an earlier preliminary ruling in the arbitration did not prevent it from resisting enforcement.

Proceedings in Hong Kong

In 2010, Astro applied for and was granted leave to enforce the Awards in two orders rendered by the Hong Kong court (the "**Hong Kong Orders**"). Lippo did not make an application to set aside the Hong Kong Orders within the stipulated 14-day time limit and judgment was subsequently entered against Lippo in terms (the "**Hong Kong Judgment**"). Lippo subsequently explained that it had not made an application to set aside because First Media did not have any assets in Hong Kong and it had therefore considered no action needed to be taken.

This position changed in July 2011 when Astro successfully obtained a garnishee order nisi to attach a debt of US\$ 44 million due to First Media from a GEM-listed company in Hong Kong to answer the Hong Kong Judgment (the "**Garnishee Order Nisi**").

At first instance

On 18 January 2012, First Media commenced the current proceedings, applying for (a) an extension of time to apply to set aside the Hong Kong Orders and Hong Kong Judgment; and (b) orders to set aside the Hong Kong Orders and Hong Kong Judgment as well as the Garnishee Order Nisi. Shortly after, the Garnishee Order Nisi was made absolute (the "**Garnishee Order Absolute**") but subsequently stayed in 2014 pending the determination of the present summons on the basis that First Media had "*good prospects of success*" in its setting-aside application.

At first instance Chow J dismissed First Media's application for an extension of time in a judgment dated 17 February 2015. Moreover, the judge found that even if an extension of time were to be granted, First Media would be precluded from resisting enforcement of the Awards for breaching the "good faith" principle.



On appeal

On appeal, First Media focused on attacking the first instance judge's findings on good faith before contending that it was entitled to an extension of time for its setting aside application provided that the court accepted its good faith argument and the merits of the application itself. Astro, on the other hand, argued that the primary issue was not related to good faith but rather whether there was any proper basis to challenge the judge's exercise of discretion in refusing to extend time. Without such a proper basis, the appeal should be dismissed.

1. Application of the good faith principle in exercising the discretion to refuse enforcement

Under Hong Kong law, the enforcement of an award made in any of the state parties that have signed the Convention on the Recognition and Enforcement of Foreign Arbitral Awards signed in New York in 1958 ("**Convention**") is dealt with in sections 2GG(1) and 42(1) of the Arbitration Ordinance (Cap 341) (the "**Ordinance**"). Read together, these sections provide that a Convention award shall be enforceable in the same way as a court order or judgment made with leave of the court. Enforcement of a Convention award is mandatory and a court "*may*" only refuse enforcement where a ground is established under section 44(2) or (3) of the Ordinance, for example where the award:

- (a) deals with a dispute "*not contemplated by or not falling within the terms of the submission to arbitration or containing decisions on matters beyond the scope of the submission to arbitration*" (s.44(2)(d)); or
- (b) is in respect of a matter incapable of settlement by arbitration, or if enforcement of the award would be contrary to public policy (s.44(3)).

At first instance, the court held that in circumstances where there had been a breach of good faith, it had a discretion to allow enforcement even where a ground for refusal might otherwise be made out. First Media had infringed this "good faith" principle by keeping its jurisdictional objection concealed "*up its sleeve to be pulled out only if the arbitration was lost*", applying the Hong Kong case of *China Nanhai Oil [1995]*¹ in which a duty of good faith had been found on a "true construction of the Convention" and a party's deliberate decision not to notify the arbitral tribunal or institution of its objections to the formation of the tribunal was found to be inconsistent with the good faith obligation or "*any notions of justice and fair play*". The Court of Final Appeal in *Hebei Import & Export [1999]*² approved this approach, justifying the scope of such discretion on the use of the word "may" in s.44 of the Ordinance and Article V of the Convention.

On appeal, First Media contended that there was no breach of good faith in this case, where First Media had lodged a jurisdictional objection before the arbitral tribunal but had not sought to subsequently challenge the adverse ruling (the "*Award on Preliminary Issues*") in the Singapore courts, which it was entitled to do under Article 16(3) of the 1985 UNCITRAL Model Law on International Commercial Arbitration ("**Model Law**").

Astro's arguments to the contrary (i.e. that the good faith principle did apply as First Media had not challenged the adverse ruling) were dismissed by the CA.

First Media also argued that the acts relied on by the judge at first instance in finding that First Media had breached the "good faith" principle were all in accordance with the law of the seat of the arbitration (Singapore law) as confirmed by the Singapore Judgment and therefore could

not be in breach of good faith. The Singapore Judgment had found that none of the following actions by First Media had affected its rights at the enforcement stage under the 'choice of remedies' principle:

- (a) its jurisdictional objection before the tribunal and decision not to challenge the adverse ruling under Article 16(3) of the Model Law (since Article 16(3) was not intended to be a 'one-shot remedy');
- (b) its proposal to the tribunal to determine the jurisdictional objection as a preliminary issue in order to save time and costs and subsequent agreement to the proposed draft order after the determination for the Award on Preliminary Issues (as these had not amounted to any waiver of its rights);
- (c) its signing of a 'Memorandum of Issues' stating that the jurisdictional issue had been 'fully and finally determined' (as it was only a statement of the remaining issues to be determined by the tribunal); and
- (d) its decision to proceed with the arbitration (which did not amount to a waiver of its rights nor estop it from asserting its rights to resist enforcement of the Awards).



¹ *China Nanhai Oil Joint Service Corporation Shenzhen Branch v Gee Tai Holdings Co Ltd [1995] 2 HKLR 215*

² *Hebei Import & Export Corp v Polytek Engineering Co Ltd (1999) 2 HKCFAR 111*

In the present case, the CA followed First's Media's arguments and found that the first instance judge's ruling that First Media was precluded by the good faith principle from relying on section 44(2) to resist enforcement could not be supported.

First, the first instance judge had failed to give proper recognition to the findings in the Singapore Judgment. Under Hong Kong law, conduct of the arbitration for the purpose of applying the good faith principle could not be looked at in a 'legal vacuum' and it was "*particularly relevant*" to take account of the law of the arbitral seat and the ruling of the supervisory court of the seat of arbitration, following the approach of *Hebei and Gao Haiyan*³. In considering whether an award should be enforced, the CA in the latter case had emphasised the importance of giving weight to the decision of the supervisory court of the arbitral seat.



Second, the first instance judge had erred in his approach to the exercise of discretion under s.44(2) of the Ordinance. He had considered that First Media's conduct in breaching the good faith principle was such that it should not be permitted to rely on s.44(2) to resist enforcement of the Awards. According to the judge, only if he had erred in his conclusion that First Media had breached the good faith principle would he need to consider the proper approach to exercising his discretion under s.44(2). The judge added, in obiter, that the discretion under s.44(2) to permit enforcement even where a ground for refusal of enforcement was made out was narrow, and noted that "*subject to the application of the good faith principle*", he would not feel able to exercise his "*residual discretion*" to permit enforcement in circumstances where an Award was made by a tribunal without jurisdiction.

On the first instance judge's reasoning, the finding that the Awards were made without jurisdiction was not to be taken into account when he exercised his discretion whether First Media should be permitted to rely on any of the grounds in s.44(2) to resist enforcement, but was only to be taken into account when he exercised his "residual discretion" whether to permit enforcement where a ground for refusing to enforce the Awards under s.44(2) was made out.

The CA found this reasoning to be erroneous. In considering whether the "good faith" principle could be successfully invoked to resist enforcement, there was only one discretion to exercise. That discretion was found in the word "may" in the opening part of s.44(2). It was the use of the word "may" that "enables the enforcing court to enforce an award, notwithstanding that a s.44 ground might otherwise be established". Had the first instance judge, when he exercised his s.44(2) discretion, taken into account the "*fundamental defect*" that the Awards sought to be enforced against the Additional Parties - who had been wrongly joined to the Arbitration - had been

made without jurisdiction, he "*could only*" have exercised his discretion to refuse enforcement.

Finally, the Court made clear that the principles of good faith and 'choice of remedies' are not mutually exclusive but complementary. Relevant considerations such as why an active remedy was not pursued and whether a party had clearly reserved its rights (thus not misleading the other party) had to be contemplated.

2. Extension of time

The first instance judge's decision to decline to grant an extension of time was primarily based on its findings that:

- (a) the length of the delay (14 months) was "*very substantial*" in itself and relative to the statutory time limit of 14 days;
- (b) the delay was "*the result of a deliberate and calculated decision not to take action in Hong Kong*"; and
- (c) the Singapore court had been acting in its capacity as the enforcement court and not the supervisory court and the Awards had not been set aside.

On appeal, First Media argued that in deciding issue (c) above, the first instance judge had taken into account the "*irrelevant matter*" that the Awards had not been set aside in Singapore. The CA disagreed. The judge had simply recognized that the award remained valid and binding and was capable of being enforced in Hong Kong if he declined to extend time for a setting-aside application – this was relevant and did not undermine the "choice of remedies" principle as contended by First Media.

First Media also contended that the first instance judge had reached a "*plainly wrong*" conclusion by using a "*faulty assessment*" of the weights of the different factors to be taken into account. Insufficient weight had been given to the "*incontrovertible and fundamental jurisdictional objection*" raised in arbitration and the fact that Astro had not suffered any substantial prejudice other than costs, and less

weight should have been placed on the length of the delay.

The CA was not persuaded by First Media's arguments in this respect. The judge had not erred in the exercise of his discretion by weighing the merits against other factors, and following *The Decurion*⁴, had not used a "*rigid mechanistic approach*". No Hong Kong or English cases had been cited to show that a delay similar to that of 14 months had been forgiven in the enforcement of a Convention award. Applying the *Terna Bahrain*⁵ method of judging the length of the delay against the yardstick of the statutory time limit (of 14 days), a delay measured even in days would be "*significant*" and a delay measured in weeks or months would be "*substantial*". To find otherwise would be to make nonsense of the 'speedy finality' policy underpinning section 2AA(1) of the Ordinance.

Appeal dismissed

As the judge had neither improperly exercised his discretion by taking into account "*irrelevant matters*" nor reached a conclusion that was "*plainly wrong*", the CA dismissed the appeal. However, the CA awarded only 60% of the costs to Astro, taking into account its findings on good faith in First Media's favour, which took up a "considerable amount of time".

Comment

The effect of the Hong Kong Court of Appeal's refusal to allow an extension of time for an application to set aside enforcement of the Awards (and consequently preventing any setting-aside application in Hong Kong) is to contradict the Singapore Court of Appeal's decision to refuse enforcement of the Award in relation to Additional Parties.

However, this judgment should not be understood as a difference in approach between the Hong Kong and Singapore courts. Rather,

⁴ *The Decurion* [2012] 1 HKLRD 1063

⁵ *Terna Bahrain Holding Company WLL v Al Shamsi & Ors* [2013] 1 Lloyd's Rep 86.

the outcome of this case must be considered in light of the very specific facts. Namely, the dismissal of the appeal in the present case turned on First Media's untenable delay of 14 months in making an application to set aside the enforcement of the Awards in Hong Kong. By way of contrast, on the substantive argument of whether First Media had acted in good faith, the Hong Kong CA found it was relevant to consider the findings of the Singapore CA. The Hong Kong courts generally afford deference to decisions of the supervisory court at the seat (see for e.g. our [blog](#) "Hong Kong courts are to have due regard to decisions affecting an arbitral award rendered by a court at the seat of arbitration" regarding the *Dana Shipping and Trading SA v Sino Channel Asia Ltd* (HCCT47/2015) case.

The ruling is a warning to all debtors of arbitration awards of the importance of timely challenges to orders to enforce awards, whether or not they are aware of any assets in the relevant jurisdiction.

Contacts

James Kwan

Partner, Hong Kong

james.kwan@hoganlovells.com

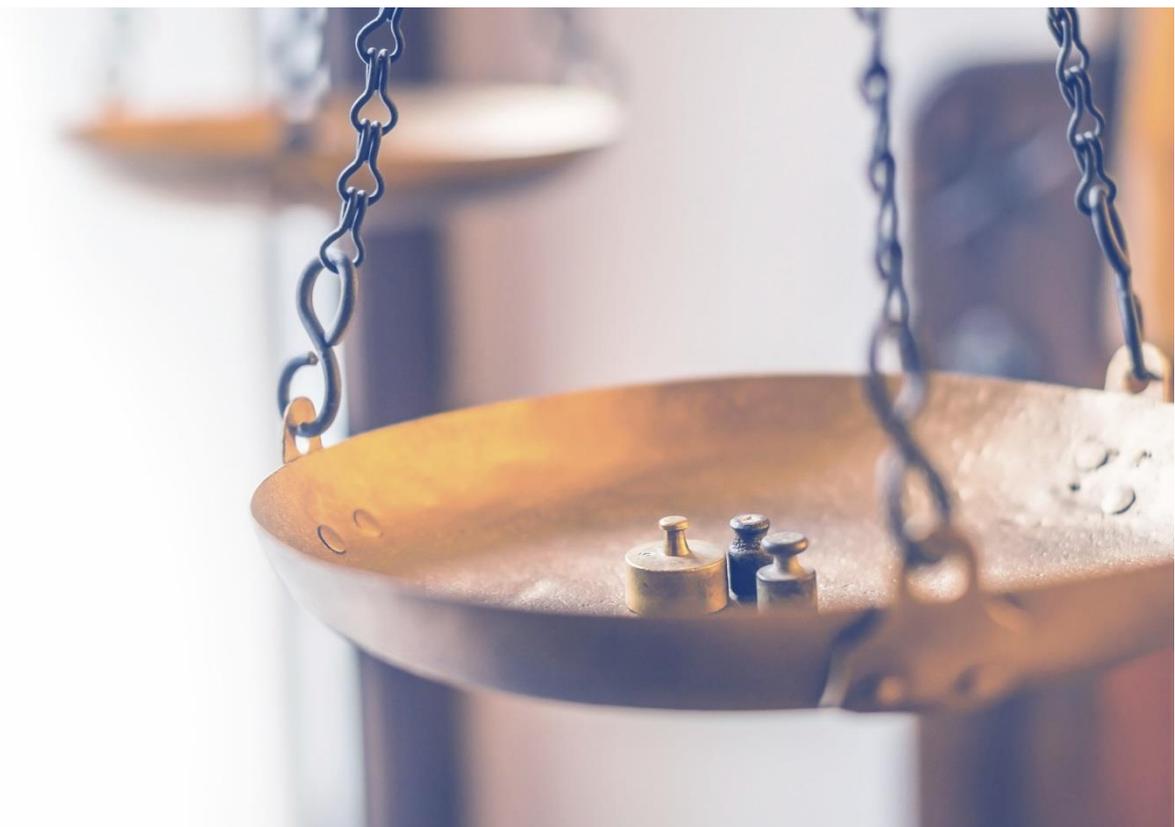
Mariel Dimsey

Registered Foreign Lawyer, Hong Kong

mariel.dimsey@hoganlovells.com

Marie Devereux

marie.devereux@hoganlovells.com



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