The Singapore Court of Appeal's decision in *Astro*: Providing Clarity or Causing Uncertainty?

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Introduction

The Singapore Court of Appeal's recent decision in *PT First Media TBK v Astro Nusantara International BV and ors*[1] *(Astro)* is noteworthy for several reasons. Firstly, the Court confirmed that a party against which an award is rendered retains both 'active' and 'passive' remedies in relation to the award. It may therefore apply to set aside the award within prescribed time limits (the active remedy) or resist an application by the other party to enforce the award (the passive remedy). Secondly, the Court clarified the position in Singapore law on a range of issues, in particular (i) the extent to which an award can be considered to be delocalised, (ii) the means by which a party can be joined to an arbitration, and (iii) the test for whether a party has waived its right to challenge an adverse decision by the arbitral tribunal.

Background

Astro arose out of a failed satellite television joint venture between two well-known corporate entities in South-East Asia: the Astro Group, a Malaysian media undertaking, and the Lippo Group, the Indonesian conglomerate. Eight Astro entities, only five of which were party to the arbitration agreement relied upon to bring the claim, commenced SIAC arbitration proceedings in Singapore against three Lippo entities.

The tribunal issued a preliminary ruling in the form of an award confirming it had jurisdiction over the three Astro subsidiaries that were not party to the arbitration agreement. The tribunal relied on r 24(b) of the 2007 SIAC Rules (the 2007 Rules) to approve the joinder of those subsidiaries in the arbitration. Whilst dissatisfied with the decision, Lippo did not apply to the Singapore High Court to have the tribunal's ruling set aside within 30 days, as it was entitled to do pursuant to art 16(3) of the UNCITRAL Model Law on International Commercial Arbitration (the Model Law, which has the force of law in Singapore pursuant to s 3(1) of the International Arbitration Act (IAA)). Instead, Lippo reserved its right to challenge the tribunal's ruling on jurisdiction and proceeded to defend the merits of the case.

In the result, Lippo lost on the merits. The tribunal rendered four final awards for restitutionary relief of approximately US$250 million in favour of Astro. Nonetheless, Lippo did not apply to the Singapore High Court to have these awards set aside. When Astro sought to enforce the awards, Lippo challenged its right to do so, arguing that the tribunal did not have the power to approve the joinder of parties that were not parties to the arbitration agreement.

The question before the Singapore High Court, and subsequently the Court of Appeal, was whether Lippo was entitled to raise an objection to the tribunal's jurisdiction after it had failed to exercise its right to apply for setting aside of the tribunal's ruling on jurisdiction within 30 days of the tribunal's decision.

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An award debtor's choice of active and passive remedies

The challenge confronted by Lippo arose from the fact that the grounds for resisting the enforcement of an award under the Model Law are prescribed by Article 36. Yet, Article 36, which falls within Chapter VIII of the Model Law, does not apply to arbitrations seated in Singapore. Specifically, section 3(1) of the IAA provides that:

> "Subject to this Act, the Model Law, *with the exception of Chapter VIII* thereof,[2] shall have the force of law in Singapore." (Emphasis added)

At first instance, Belinda Ang J in the Singapore High Court held that, as s 3(1) of the IAA expressly excludes art 36 of the Model Law, it was not open to an award debtor to resist enforcement of an international arbitration award or a ruling on jurisdiction made in Singapore. The award debtor could only apply to have the decision set aside within the time limits prescribed by the Model Law.

On appeal, the Court of Appeal, which sits at the apex of the Singapore judicial hierarchy, took a different view. In a judgment delivered by Sundaresh Menon CJ, the Court identified two reasons why section 3(1) of the IAA should not be applied literally.

Firstly, the Court determined, based on the drafting history of the IAA, that the sole objective of s 3(1) was to avoid a conflict between Chapter VIII of the Model Law and the New York Convention. The Convention permits Contracting States to make a declaration that the Convention will only apply to the recognition and enforcement of awards made in another Contracting State. Singapore made such a reciprocity reservation upon accession to the New York Convention in 1986. By contrast, art 36 of the Model Law applies to awards generally, irrespective of the country in which an award is made. The Court determined that the legislature deliberately excluded Chapter VIII of the Model Law to avoid conflict between art 36 and Singapore's reciprocity reservation under the New York Convention.[3] It also determined that the legislature had failed to consider the impact of s 3(1) of the IAA on a party's ability to resist the enforcement of an international arbitral award made in Singapore.

Secondly, and against the background of what the Court determined to be a legislative oversight, the Court "was unwilling to accept" the elimination of "passive remedies" as an "incidental consequence of Parliament's preference" in enacting s 3(1) of the IAA.[4] The Court reasoned that an award debtor's choice between 'active' and 'passive' remedies was central to the Model Law and a feature of the English law-inspired arbitration regime that the Model Law replaced in

Singapore. The Court therefore held that s 3(1) should not be read as "sufficiently indicative of a legislative intention to deprive award debtors … of passive remedies before the Singapore courts."[5] In other words, the express exclusion of Chapter VIII of the Model Law by s 3(1) of the IAA was not, in the eyes of the Court, sufficiently indicative to deprive an award debtor of the benefit of the 'passive' remedies enjoyed under English law and the Model Law.

Having decided that the legislature had not intended to eliminate 'passive' remedies, it fell to the Court to define the parameters of a party's passive remedies under Singapore law. The Court decided to 'align' an award debtor's right to resist enforcement of an international arbitration award made in Singapore with the grounds prescribed by art 36 of the Model Law.[6] In other words, a provision of the Model Law that had been expressly excluded by s 3(1) of the IAA was judicially recognised as forming a part of Singapore law.[7]

> "The Court decided to 'align' an award debtor's right to resist enforcement of an international arbitration award made in Singapore with the grounds prescribed by art 36 of the Model Law."

Delocalisation

The Court of Appeal noted that a theme of the Model Law was to de-emphasise the legal significance of the seat of arbitration.[8] Notwithstanding this, the Court expressed a "tentative" view that an award set aside at the seat of arbitration was generally unlikely to be enforceable in Singapore.[9] The theory, recognised in some jurisdictions, that an award can be delocalised (ie, not dependent on the local jurisdiction in which it is rendered) was rejected.

The issue did not, however, need to be determined and thus remains open to debate as a matter of Singapore law. The Court did acknowledge that the wording of the New York Convention and the Model Law "arguably contemplates the possibility" of enforcing an award that had been set aside.[10] The English High Court, for example, has recognised that it retains a discretion to enforce an award that has been set aside at the seat of arbitration.[11] Similarly, US courts have also recognised they retain a discretion to enforce an award if its setting aside was "repugnant to fundamental notions of what is decent and just."[12]

Joinder

As noted previously, three Astro subsidiaries that were not parties to the arbitration agreement were named as claimants in Astro's Notice of Arbitration. Astro did so in (purported) reliance on r 24(b) of the 2007 SIAC Rules, which provides that the tribunal has the power to:

> "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".

In comparison, r 24(b) of both the 2010 and 2013 SIAC Rules gives the tribunal the power to:

> "upon the application of a party, allow one or more third parties to be joined in the arbitration, *provided that such person is a party to the arbitration agreement,* with the written consent of such third party, and thereafter make a single final award or separate awards in respect of all parties". (Emphasis added)

The arbitral tribunal held that it had the power pursuant to r 24(b) of the 2007 Rules to join third parties that were not parties to the arbitration agreement so long as they consented to their being joined. This was overturned by the Court of Appeal, which held that any third party proposed to be joined under r 24(b) of the 2007 Rules must be a party to the arbitration agreement. In other words, what is express in the 2010 and 2013 SIAC Rules is inferred in the equivalent provision of the 2007 Rules.

In the words of Menon CJ, the power of the tribunal to "join non-parties to an arbitration at any stage without the consent of the existing parties and at the expense of confidentiality of proceedings is such utter anathema to the internal logic of consensual arbitration."[13] A tribunal could therefore grant a "forced joinder" only if it was "decidedly unambiguous" that the parties had conferred such a power,[14] which was held not to be the case under r 24(b) of the 2007 Rules.

Waiver

Finally, the Court of Appeal clarified the applicable test for determining whether a party has waived its right to object to a decision of the tribunal. Astro contended that Lippo had waived its objections to the tribunal's jurisdiction by continuing to participate in the arbitration after the tribunal's ruling on jurisdiction. The Court of Appeal held that in order for a waiver to be established, the party asserting the waiver must "meet a high threshold of demonstrating that the adversely affected party's conduct is only consistent with waiver and that the purported waiver had been communicated in clear and unequivocal terms".[15] The Court was not satisfied that Lippo had waived its objections following the tribunal's ruling on jurisdiction.

> "It remains to be seen whether other provisions of the IAA that have hitherto been applied literally will be subjected to a similar analysis to support an alternative view."

Concluding comments

The *Astro* decision confirms that a party to an international arbitration in Singapore against which a preliminary ruling or an award is rendered has:

(1) 'active' remedies which, in the case of a ruling on jurisdiction requires an application to the Singapore High Court to set aside the decision to be made within 30 days, pursuant to s 10 of the IAA and art 16(3) of the Model Law. In the case of an award, an application to set aside must be filed within three months, under s 24 of the IAA and art 34 of the Model Law; and

(2) 'passive' remedies, whereby a party can resist the enforcement of an award pursuant to s 19 of the IAA on any of the grounds prescribed by art 36 of the Model Law.

The Court of Appeal's decision thus provides considerable clarity as to the rights of the vanquished party in an international arbitration seated in Singapore.

Whilst there are clear policy reasons in favour of the Court's decision, it may nonetheless potentially engender some uncertainty.

Firstly, if a tribunal renders a ruling on jurisdiction in favour of the claimant and the respondent does not immediately challenge it, the claimant may be uncertain during the merits phase of the arbitration as to whether that ruling will be subsequently overturned. A claimant can mitigate such uncertainty and the attendant risk that the costs of the merits phase of the arbitration will be wasted by applying for a declaration from the Singapore High Court that the tribunal's ruling on jurisdiction is valid.[16]

Secondly, the Court's decision raises the question as to whether there are other statutory provisions in Singapore's arbitral regime that appear unambiguous on their terms but nonetheless should not be applied literally. Indeed, the Court of Appeal arrived at its conclusion that an award debtor retains 'passive' remedies - notwithstanding the express exclusion of those remedies pursuant to section 3(1) of the IAA - only after an exhaustive analysis of numerous sources. These included (i) the *travaux préparatoires* of the Model Law, (ii) English arbitration law, (iii) the papers of the law reform committee tasked in 1991 with the introduction of the IAA, (iv) Singapore

Parliamentary debates, (v) the application of the Model Law in jurisdictions other than Singapore, including Germany and Québec, as well as (vi) academic commentary. It remains to be seen whether other provisions of the IAA that have hitherto been applied literally will be subjected to a similar analysis to support an alternative view.

1 [2013] SGCA 57, unreported.

2 *Editorial note:* Chapter VIII of the Model Law comprises arts 35 and 36.

3 *Ibid,* at [101].

4 *Ibid,* at [89].

5 *Ibid,* at [88].

6 *Ibid,* at [85].

7 *Ibid,* at [50].

8 *Ibid,* at [61], [64] and [84].

9 *Ibid,* at [77].

10 *Ibid.*

11 *Dowans Holding SA v Tanzania Electric Supply Co Ltd* [2012] Arb LR 21 at [28], per Burton J, citing *Dallah Estate and Tourism Holding Company v The Ministry of Religious Affairs, Government of Pakistan* [2010] 2 WLR 805 at [58]-[61], per Moore-Bick LJ (Court of Appeal, England & Wales) and *Dallah Estate and Tourism Holding Company v The Ministry of Religious Affairs, Government of Pakistan* [2010] 3 WLR 1471 at [67]-[68] per Lord Mance and at [126], per Lord Collins (UK Supreme Court).

12 *Termorio SA v Electranta SP,* 487 F 3d 928, 938 (DC Cir, 2007) per Senior Circuit Judge Edwards, citing *Tahan v Hodgson* 662 F.2d 862, 864 (DC Cir, 1981) per Circuit Judge Wilkey. See also *Corporación Mexicana de Mantenimiento Integral v PEMEX-Exploración Y Producción* (Case 1:10-cv-00206-AKH (27 August 2013, unreported), US District Court, Southern District of New York).

13 *PT First Media TBK v Astro Nusantara International BV and ors* (note 1 above) at [197].

14 *Ibid,* at [197].

15 *Ibid,* at [202].

16 Section 10(3) of the IAA provides that "any party" may, within 30 days after having received notice of a tribunal's ruling on jurisdiction, apply to the Singapore High Court to "decide the matter".