PT First Media v Astro Nusantara: A cautionary tale on the enforcement of arbitral awards and joinder of third parties

On 31 October 2013, the Singapore Court of Appeal (“CA”) handed down a landmark decision in the high profile case of PT First Media TBK v Astro Nusantara International and Others [2013] SGCA 57.

The case arose out of an arbitration in Singapore involving the Malaysian conglomerate Astro and the Indonesian conglomerate Lippo, which culminated in a USD250 million award (“the Final Award”) in favour of Astro. The bulk of the sums under the Final Award was awarded to three Astro subsidiaries (“Astro Non-JV Entities”) who were not party to the arbitration agreement, but who were joined in the arbitration pursuant to an application by Astro.

The subject matter of the arbitration, conducted under the Singapore International Arbitration Centre (“SIAC”) Rules 2007, was a joint venture pertaining to the provision of multimedia and television services in Indonesia. Astro had proceeded to obtain leave to enforce the various awards in Singapore.

Lippo then applied, unsuccessfully, to the Singapore High Court to set aside the enforcement orders. In a lengthy 119-page judgment, the CA reversed the High Court’s decision, and found that Astro was only entitled to enforce the awards to the sum of approximately USD700,000, a reduction of some 99.7 percent from USD250 million.

Quite apart from the intense media interest and the dramatic turn of events, this case also highlights numerous legal points of interest in the realm of international arbitration. The CA undertook a detailed analysis (under English law as well as certain other legal systems) of the use of active and passive remedies to defeat an arbitral award at the seat and the place of enforcement, respectively. It also touches on the innovation of forced joinders of third parties in arbitrations, which has garnered significant interest in the arbitration community. This decision is therefore expected to have a significant impact on the practice of international arbitration, including in relation to how awards can be defended/enforced or defeated, as the case may be.
The procedural history

The procedural history of this case is somewhat complicated, and it is worth setting out the parties and framework in some detail.

a) The joint venture vehicle was an Indonesian entity named PT Direct Vision (“DV”) owned by Lippo subsidiary PT First Media TBK (“FM”, the Appellant). Lippo’s share in the joint venture was essentially held by another Lippo subsidiary named PT Ayunda Prima Mitra (“Ayunda”) and guaranteed by FM. Collectively, these three entities can be termed the “Lippo JV Entities”.

b) Astro’s share in the joint venture was essentially held by four Astro subsidiaries and guaranteed by a fifth (collectively, the “Astro JV Entities”).

c) The terms of the joint venture were contained in a Subscription and Shareholder’s Agreement (“SSA”) involving the Astro JV Entities and the Lippo JV Entities. The SSA provided for SIAC arbitration.

d) The SSA apparently contemplated that the Astro Non-JV Entities would be involved in the provision of services envisaged under the joint venture, even though they were not party to the SSA. The Astro Non-JV Entities provided certain ancillary support to DV, in anticipation of the fulfillment of various conditions precedent under the SSA, but subsequently stopped doing so.

e) Ayunda commenced Indonesian court proceedings against the Astro Non-JV parties, alleging that the Astro Non-JV Entities were obliged to provide the ancillary support under an oral joint venture agreed before the execution of the SSA.

f) Astro took the position that Ayunda’s commencement of Indonesian proceedings amounted to a breach of the SSA, and commenced SIAC arbitration under the names of the Astro JV Entities.

Simultaneously, the Astro JV Entities also applied to join the Astro Non-JV Entities to the arbitration on the basis of Rule 24(b) of the SIAC Rules 2007 (3rd Edition). That Rule states:

“24. Additional Powers of the Tribunal

In addition and not in derogation of the powers conferred by any applicable law of the arbitration, the Tribunal shall have the power to:

(b) 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;”

g) The Tribunal rendered an award on this application. It held that it had the power to join the Astro Non-JV Entities as long as they consented to being joined, and exercised the power to do so (“the Preliminary Issues Award”).

h) The Lippo JV Entities did not challenge the Preliminary Issues Award. The Tribunal proceeded to render four other awards including the Final Award.
i) The Astro JV Entities and Astro Non-JV Entities applied to the Singapore High Court for leave to enforce all five awards, and obtained the relevant enforcement orders against the Lippo JV Entities. The Lippo JV Entities did not apply to set aside the enforcement orders, and judgment was entered against all of them.

j) FM successfully applied to set aside judgment that was entered against it, and applied to set aside the enforcement order that was made against it.

Incidentally, Astro announced in September 2013 that it had failed to enforce the awards against Lippo in Indonesia. In addition, Astro also commenced proceedings in Hong Kong, which were stayed pending the outcome of the Singapore enforcement proceedings.

**Key Issues**

The CA characterized the issues as follows:

1. Whether the Singapore court has the power to refuse the enforcement of an award under section 19 of the International Arbitration Act (“IAA”), and if so, what is the ambit or content of that power. Section 19 states:

   "Enforcement of awards

19. An award on an arbitration agreement may, by leave of the High Court or a Judge thereof, be enforced in the same manner as a judgment or an order to the same effect and, where leave is so given, judgment may be entered in terms of the award."

2. Whether Article 16(3) of the UNCITRAL Model Law on International Commercial Arbitration (“Model Law”), which is incorporated in the IAA, is a ‘one-shot remedy’, such that FM’s failure to challenge the Preliminary Issues Award precluded it from raising objections on the joinder of the Astro Non-JV Entities at the enforcement stage. Article 16(3) states:

   "Article 16. Competence of arbitral tribunal to rule on its jurisdiction

(3) The arbitral tribunal may rule on a plea referred to in paragraph (2) of this Article either as a preliminary question or in an award on the merits. If the arbitral tribunal rules as 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; while such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award."

Assuming that FM is entitled to raise objections to the joinder of the Astro Non-JV Entities at the enforcement stage, whether such objections should be allowed as a ground for refusing enforcement, and whether FM had waived its right to raise such objections in any event.
Court of Appeal’s findings

Whether the Singapore court has a power to refuse enforcement under section 19 of the IAA

The CA traced the provenance of section 19 of the IAA to section 26 of the English Arbitration Act and proceeded to consider the English cases on that section on the basis that there are no local cases where section 19 (or its predecessor versions) has been relied upon to resist enforcement.

On this analysis, the CA found that English law recognized two categories of “active remedies” and “passive remedies” as being available to parties after an award had been rendered, and held that the same applied in Singapore just prior to the enactment of the IAA in 1994.

The CA then considered whether the court’s power to refuse enforcement was removed by virtue of the enactment of the IAA, which gave effect to the Model Law and the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“New York Convention”). The CA found, in unequivocal terms, that the court’s power to refuse enforcement was not removed. Amongst other reasons, the CA found that the “choice of remedies” was also “fundamental to the Model Law’s philosophy towards the enforcement of domestic (as opposed to foreign) awards.” Accordingly, the CA found that Singapore’s legislature “intended to retain for the courts the power to refuse enforcement of domestic international awards under s 19, even if the award could have been but was not attacked by an active remedy.”

As regards the scope and content of the power under section 19, the CA held that the power had to be exercised “in a manner compatible with the overarching philosophy of the Model Law on the enforcement of awards”. The CA analyzed the history of the Model Law in detail and concluded, after citing the UK Supreme Court decision in Dallah Real Estate [2011] 1 AC 763 with approval, that it was intended to be aligned with the New York Convention in “continuing this trend of deemphasizing the importance of the seat of arbitration.”

The CA further found that “choice of remedies” is “not just a facet of the Model Law enforcement regime; it is the heart of the entire design”, and concluded that “under the Model Law, parties that do not actively attack a domestic international award remain able to passively rely on defences on enforcement absent any issues of waiver.” In this regard, the CA stated that it is “generally for each enforcing court to determine for itself what weight and significance should be ascribed to the omission, progress or success of an active challenged in the court of the seat”.

As regards the grounds for resisting enforcement under section 19, the CA held that this should be the same as those set out in Article 36(1) of the Model Law, notwithstanding that section 3(1) of the IAA provides that Article 36 does not have force of law in Singapore. In this regard, the CA also highlighted a significant practical ramification if passive remedies were not allowed under Singapore law:

“...Parties involved in international arbitration in Singapore would be compelled to engage their active remedies in the Singapore courts ... because the option of exercising a passive remedy would not be open to them. This can have potentially far-reaching implications on the practice and flourishing of arbitration in Singapore...”
Whether Article 16(3) of the Model Law is a ‘one-shot remedy’

The CA found that Article 16(3) is not a “one-shot remedy” that prevents a party from contesting a preliminary ruling of the Tribunal at the enforcement stage. In doing so, the CA found that whilst certainty, time and cost efficiency were important under the Model Law, these factors were not paramount such that they should be prevent a party from exercising both active and passive remedies.

Whether FM is entitled to raise objections to the joinder at this stage to resist enforcement, and whether FM had waived that right

With regard to whether FM is entitled to raise objections to the joinder of the Astro Non-JV Entities at this stage, and whether this was a legitimate basis for refusal of enforcement, FM’s case was that there was effectively “no arbitration agreement” between FM and the Astro Non-JV Entities. In this regard, FM did not rely on any specific statutory ground in either the IAA or the Model Law, given that the thrust of its case was that the power to refuse enforcement was to be exercised in a manner consistent with generally accepted standards, and not any specific statutory grounds.

The CA found that the applicable law in that regard was Singapore law. This was the law of the place where the awards were made, as any arbitration agreement involving the Astro Non-JV Entities would have been created, if at all, by the joinder procedure, and hence fall outside of the SSA or any choice of law clause in the SSA.

The CA affirmed that any review of the Tribunal’s decision on jurisdiction is to be carried out de novo and that the Tribunal’s “own view of its jurisdiction has no legal or evidential value before a court that has to determine that question”, citing with approval the Dallah Real Estate decision.

The CA then analyzed the relevant provision of the SIAC Rules (Rule 24(b), 2007 Edition set out above) in detail, and compared that provision with its counterpart in the London Court of International Arbitration (“LCIA”) Rules 1998. The CA found that the use of the phrase “other party” in the SIAC Rules was a reference to other parties to the arbitration agreement who were not parties to the arbitration, and not strangers to the arbitration agreement as intended with the use of the phrase “third party” in the LCIA Rules. The CA also cited Rule 34 of the SIAC Rules, where the phrase “third party” was used in connection with the confidentiality obligations under that Rule, in support of this conclusion.

The CA also expressed its concern with the Tribunal’s forced joinder of third parties in strong terms, calling it “a major derogation from the principle of party autonomy” which results in “prejudice to the arbitrating parties … who may find themselves subject to a final award which determines a deeper if not a larger pool of issues and legal liability…” The CA considered that to allow a principal dispute to be “piggy-backed’ on a formal claim” would result in the original arbitration agreement functioning “as little more than a Trojan Horse.”

The CA noted that whilst it is not objectionable for parties to contractually agree to arbitral rules that confer on the tribunal “ultimate discretion” to order forced joiners without having to obtain further consent to the parties to the reference, there remains “raging controversy” and the power is “such utter anathema to the internal logic of consensual arbitration” that the relevant arbitral rule permitting forced joinders “must be decidedly unambiguous...”
The CA then proceeded to find on the facts that there was no waiver by FM. Accordingly, FM’s resistance of the Singapore enforcement by the Astro Non-JV Entities on the basis that the forced joinder was in error succeeded.

**Commentary**

**Deployment of passive remedies**

It is now clear that in Singapore, it is open to a party to adopt “passive measures” to resist the enforcement of a Singapore award made under the IAA.

It is also clear that such “passive remedies” can be deployed even if that party had failed to deploy “active remedies” at an earlier stage for whatever reason, though the weight and significance of that party’s actions during and after the arbitration would be scrutinized by the Singapore court in each individual case.

This has significant practical ramifications for parties in terms of the strategy they adopt during and after the arbitration including, in particular, the extent to which they participate in the arbitration and/or appeal any adverse awards made by the tribunal. For example, it is not uncommon for a party to be loath to challenge an adverse interim award, even if it sincerely believes the interim award to be grossly in error, for fear of prejudicing its case further in the event the appeal is unsuccessful.

Conversely, in light of the CA’s analysis a party should not be complacent even if it has a jurisdictional award in its favour, particularly those where third parties have been joined. As the CA noted:

“...As unfortunate as that might be, it would usually be the party that took an exuberant view of the tribunal’s jurisdiction that suffers the prejudice and this is to be weighed against the prejudice to a party, who on the enforcing court’s view, was never subject to the tribunal’s jurisdiction in the first place.”

Likewise, the CA decision is also clarion call to arbitrators hearing Singapore arbitrations to be circumspect when considering applications to join third parties, and to scrutinize the relevant arbitral rules, if any, carefully before deciding one way or the other.

It is worth noting that section 15 of the IAA allows parties to contract out of the Model Law, however in light of the CA’s finding that “choice of remedies” existed in Singapore even before the introduction of the Model Law, it would appear that such arbitrations may nevertheless be subject to the same regime as that under the Model Law or at least one that is similar.

**Impact of this decision on SIAC arbitrations**

The CA’s decision has also usefully interpreted the provisions of the SIAC Rules 2007, which would be of particular relevance to parties that have agreements governed by those rules.

The position under the current SIAC Rules 2013 appears to be similar. The current version of Rule 24(b) uses the phrase “third party” instead of “other party”, but nevertheless limits the scope of any joinder, as a tribunal under those Rules is only empowered to order a joinder “upon the
application of a party ... provided that such person is a party to the arbitration agreement, with the written consent of such third party...”

Impact of this decision on foreign awards

It is worth noting that the above powers are only open to the Singapore court during the enforcement stage of a “domestic international award” (i.e. Singapore award under the IAA) and not a foreign award, by virtue of the differences between the Model Law and the New York Convention. As the CA put it:

“... there was and is one significant difference between the New York Convention and the Model Law. Unlike the New York Convention which only dealt with enforcement of awards, the Model Law also dealt with the setting aside of awards made in the seat of arbitration by the courts of that seat. This other avenue to challenge domestic awards resulted in the possibility that the enforcement of awards originating from within the jurisdiction of the supervisory court would be treated differently from that of foreign awards. This is where “choice of remedies” becomes significant...”

Accordingly, where the award in question is a foreign award, the enforcement procedure set out in section 19 will not apply, as the relevant procedure is set out in Part III of the IAA which relates to New York Convention awards.

Even so, the CA noted that there appears to be authority to the effect that a party may resist enforcement of a New York Convention award even “after an unsuccessful active challenge, save for the operation of any issue estoppel recognized by the enforcing court.”

Conclusion

In light of the CA’s pronouncement, parties contemplating sophisticated commercial agreements involving multiple related parties would do well to consider, with even more care than before, what rules they wish to govern any potential Singapore arbitration. This may help to avoid being embroiled in a costly and unnecessary dispute over whether a related party is intended to be joined in arbitration, or if such joinder is simply a tactical ploy that was never contemplated by the parties when they entered into the agreement.

Given the extensive and scholarly judgment that has been rendered, and Singapore's pre-eminence as an international arbitration hub, it will be interesting to see if the court’s reasoning will be followed in other jurisdictions such as Hong Kong.

If you would like to discuss how these developments may affect your organization, please speak to your Bryan Cave contact, a member of our International Arbitration Team or the authors of this bulletin:

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