



JONES DAY
COMMENTARY

***ASTRO v LIPPO*: SINGAPORE COURT OF APPEAL ESTABLISHES OPTIONS FOR PARTIES CHALLENGING ARBITRAL AWARDS**

In the latest chapter of the long-running dispute between the Astro Group and the Lippo Group, the Singapore Court of Appeal has handed down its judgment relating to challenges brought by the Lippo Group against five Singapore arbitration awards (*PT First Media TBK v Astro Nusantara International BV & others* [2013] SGCA 57). The Court of Appeal refused leave to enforce all but a small proportion of the awards against the Lippo Group, resulting in the award sum being reduced to approximately US\$700,000—less than 1 percent of the original US\$250 million sum of the awards.

BACKGROUND

The Astro Group is a Malaysian broadcasting and media entity, and the Lippo Group is an Indonesian conglomerate.

A dispute arose between the parties over a failed satellite television joint venture. As a result of the failure,

the Lippo Group commenced proceedings in the Indonesian courts against companies in the Astro Group that were not a party to the joint venture. The Astro Group took the position that the Indonesian court proceedings were in breach of the arbitration agreement contained in the joint venture agreement and commenced arbitration proceedings in Singapore under the 2007 Singapore International Arbitration Centre (“SIAC”) Rules.

A preliminary issue to be determined by the arbitral tribunal was whether or not the Astro Group could join the companies that, while part of its group and named in the Lippo Group’s Indonesian Court proceedings, were not parties to the joint venture. The tribunal determined, on the basis of their interpretation of the 2007 SIAC Rules, that the non-party subsidiaries could be joined and that the tribunal had jurisdiction to determine the dispute, despite objections from the Lippo Group that the subsidiary companies were not parties to the arbitration agreement.

The Astro Group obtained a series of five arbitration awards against the Lippo Group for a total sum of approximately US\$250 million and subsequently sought to enforce the awards in Indonesia, Malaysia, Hong Kong, and Singapore.

Proceedings in Hong Kong were stayed pending the outcome of the enforcement proceedings in Singapore.

In September 2013, the Astro Group announced that it had failed to enforce the awards against the Lippo Group in Indonesia, having had an appeal to the Indonesian Supreme Court dismissed on grounds that the awards were (i) contrary to public order, (ii) interfered with Indonesian judicial process, and (iii) violated the sovereignty of Indonesia.

Of critical importance in the enforcement proceedings in the Singapore High Court and this latest decision from the Singapore Court of Appeal was that the Lippo Group did not pursue jurisdictional objections against the arbitral tribunal until enforcement proceedings commenced.

HIGH COURT DECISION

In 2012, the Singapore High Court dismissed the challenges to the enforcement of the arbitral awards. The Lippo Group sought to argue that the arbitral tribunal was wrong in allowing the joinder of the non-parties and that those parts of the awards decided in favor of the non-parties were unenforceable.

The High Court found that the Lippo Group was unable to challenge the jurisdiction of the arbitral tribunal under Article 16 of the Model Law, nor was it able to seek to set aside the award under Article 34 because in both instances they had failed to do so within the time limits. An appeal was lodged earlier this year, and the hearing took place before the Singapore Court of Appeal in April 2013.

DECISION OF THE COURT OF APPEAL

The significance of the decision of the High Court is apparent in the comprehensiveness and depth of analysis employed by the Court of Appeal in overturning the High Court's decision.

The key question that the Court of Appeal considered was whether an application under Article 16(3) of the Model Law to set aside an arbitral award on jurisdiction is the only route available to a party seeking to raise an objection against an arbitral award on grounds of lack of jurisdiction, or, alternatively, whether a party can also raise jurisdictional objections at the time of enforcement proceedings.

The Court of Appeal considered the legislative history behind the Singapore International Arbitration Act (the "IAA") and the UNCITRAL Model Law and found that, under the current framework in Singapore, there is a "choice of remedies" available to a party seeking to challenge an arbitral award on the grounds of jurisdiction. The choices were considered to be either "active" or "passive" depending on the method that the party chose.

The "passive" choice entails the party raising its objections to an award as a defense in enforcement proceedings initiated against the party, namely under s19 of the IAA, which provides a residual/inherent jurisdiction to refuse enforcement of an international arbitration award issued in Singapore.

The "active" route, as the name suggests, is determined by a party initiating setting-aside proceedings in the court with supervisory jurisdiction under Article 16(3) of the UNCITRAL Model Law.

Having established that the choice of remedies remained available to the Lippo Group and included the passive route that it had taken, the Court of Appeal found that it had the ability to review the tribunal's findings on jurisdiction and subsequently held that the tribunal's joinder of the non-parties had been based on an incorrect interpretation of the SIAC Rules as then in force. Accordingly, the parts of the award relating to the joined parties were unenforceable.

SIGNIFICANCE

The overturned High Court decision may have led to an increase in litigation (and therefore costs) for parties to arbitrations in Singapore. If a losing party did not actively take steps to set aside the award in Singapore, enforcement in Singapore could not be resisted. Further, a party who lost a preliminary challenge to jurisdiction in an arbitration in Singapore would have to appeal to the Singapore courts. The result being that a losing party would be forced to engage its active remedies in Singapore courts.

The Court of Appeal decision clearly establishes the key principle that a party seeking to object to an arbitral award has options when challenging an award either at the stage of setting aside or while resisting its enforcement. Parties are not required to challenge a tribunal's jurisdiction in the Singapore courts while the arbitration proceedings are ongoing; it can conserve its resources and challenge an unfavorable award at the point of enforcement.

The decision also highlights the care parties and the arbitral tribunal need to take while considering extending the jurisdiction of an arbitration to non-parties to the arbitration agreement. The latest version of the SIAC rules released in April 2013 has addressed the bases upon which parties can be joined to existing proceedings, stating that third parties can be joined in an arbitration, provided that they are a party to the arbitration agreement and that they consent to be joined (SIAC Rule 24.1(b)).

LAWYER CONTACTS

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