

# Dispute Resolution Hotline

December 27, 2012

## SINGAPORE HIGH COURT RULES ON JURISDICTIONAL CHALLENGE IN ENFORCEMENT: NO SECOND BITE AT THE APPLE?

In this recent decision<sup>1</sup>, the Singapore High Court set out the boundaries to challenge enforcement of an international arbitration award with seat in Singapore. The Court held that when a jurisdictional objection has not been raised within the time limit prescribed for a set-aside application, the same cannot be agitated at the enforcement stage when the time limit has expired. The decision of the Singapore High Court is relevant in the post-Balco<sup>2</sup> jurisprudence in India since it deals with the distinction in the treatment of foreign awards made outside the enforcing jurisdiction and international awards made within the enforcing jurisdiction.

### BRIEF FACTS

The Claimants, ("Plaintiffs") were 8 Singaporean entities, the Astro group of companies. The defendants ("Respondents") were three Indonesian companies, the Lippo group of companies. The Astro group and Lippo group entered into a joint venture agreement for providing Direct to Home ("DTH") services in Indonesia. This agreement was accompanied by a Subscription and Shareholders Agreement ("SSA"). One of the conditions- precedent to completion / closing / conclusion under the SSA was the conclusion of a service agreement. The service agreement was between three of the Plaintiffs and one of the Respondents but these three Plaintiffs were not a party to the SSA. Since disputes arose and the joint venture between the parties failed, both the parties approached different forums for resolution of their disputes.

Accordingly, the Respondents filed proceedings before courts in Indonesia and the Plaintiffs commenced arbitration in Singapore in accordance with the arbitration agreement under the SSA joining the three Plaintiffs to the arbitration although they were not party to the SSA. The reliefs prayed for in the arbitration proceeding included an order for joinder of the three Plaintiffs. Other reliefs included a declaration that the SSA was no longer binding due to failure of the joint venture, and therefore the a declaration that the Plaintiffs were not obliged to provide any services under the service agreement. In addition to above, reliefs prayed for included final injunctions restraining the Indonesian proceedings, a prayer for costs incurred for the Indonesian proceedings and restitutionary reliefs.

The Respondents claimed that the Tribunal had no jurisdiction to join non-parties to the SSA as parties to the arbitration (the "jurisdiction question"). In the award on the preliminary question of jurisdiction, the Tribunal held that it had jurisdiction to join the non-parties under Rule 24(b)<sup>3</sup> of the SIAC rules (where joinder is allowed upon express consent of non-parties and where it is necessary in the interest of justice). There were a total of 4 final awards on merits and this award on jurisdiction was also treated as a final award on jurisdiction.

After the further four awards on merits were made in favour of the Plaintiffs, Plaintiffs sought to enforce them and received ex-parte orders to enforce these awards. These ex-parte enforcement orders were apparently served on the Respondents (although this fact was contested by the Respondents) and Singapore judgments in terms of the awards were received.

At this stage, the Respondents sought to challenge the ex-parte enforcement orders on the basis of jurisdictional challenge to the Tribunal.

It may be noted that under the International Arbitration Act ("IAA"), the UNCITRAL Model Law has been adopted with the exception of Chapter VIII of the Model Law which deals with enforcement of awards.<sup>4</sup> Article V of the New York Convention applies in the context of enforcement. Under Article 16 of the Model Law which the IAA adopts, the tribunal may decide on its jurisdiction either as a preliminary question or as an award on merits. If the tribunal decides this as a preliminary question then an appeal would lie before the Court within 30 days. In this decision, the jurisdictional question was issued as an award on a preliminary question. This was not challenged within the 30 day period under Article 16<sup>5</sup>. The Respondents however defended the Arbitration on merits and filed a counterclaim while reserving their right to challenge. The award on the jurisdiction question was not subjected to a set aside challenge either within 3 months of the award.

### ISSUE

Whether a jurisdictional challenge to an award (made in a Singapore seated international commercial arbitration) can be made at the enforcement stage when no such challenge has been raised within the 30 day timeframe for appeal or within the three month time limitation at the set aside stage for the final award? That is, if Respondents do not challenge the award on the jurisdiction question at the set aside stage, would they be able to do so at the enforcement stage when the final awards on merits are also being enforced and thereby get a second bite of the apple?

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## ARGUMENTS

It was argued in great detail that the question of lack of jurisdiction (by joinder of parties which were not parties to the arbitration agreement) can be raised at the stage of enforcement under Article 36(1)(a)(i) which is the basis of Section 19 of the IAA since Section 19 IAA imports Article 36<sup>6</sup> of the Model Law. It was argued that a post award challenge as to jurisdiction at the enforcement stage is permissible even if the parties haven't raised it at the set aside stage. For this purpose Landau QC took recourse to the drafting history of the Model Law where it was discussed and concluded that a jurisdictional challenge could be raised at either the set aside or enforcement stage. The option of an active approach or a passive approach was both open to the losing party. It was therefore argued that the time limit to make a setting aside challenge of the Model Law ought not to apply to an enforcement challenge under Article 36.

## HOLDING

The Court framed a threshold question as to whether a jurisdictional challenge can be raised at the stage of enforcement.

In this case, the Court held that the Tribunal had issued an award on jurisdiction and the same was not challenged by the Respondents under Article 16 (3) of the Model law. The Respondents did not even take steps to set aside the award as they could under Article 34 of the Model law within the prescribed time limit. As a result they were precluded from raising this question at the enforcement stage.

### The Court held:

*There are three situations where a challenge to a domestic international award may be brought at the enforcement stage before this court where the seat of arbitration is Singapore, namely:*

1. where there has been an application to set aside a domestic international award and the application has been finally disposed of (in this situation, there will be no grounds for refusing to enforce the award as the application to set it aside has been conclusively dismissed);
2. where the time limit for setting aside under Art 34 of the Model Law has not expired and there has been no application for setting aside (in this situation, if a timely application for enforcement is brought, the domestic international award, in a proper case, may be set aside under Art 34); and
3. where the time limit for setting aside under Art 34 of the Model Law has expired and an application for setting aside has not been brought and is now time-barred.

*In my view, the question in all three of these scenarios is the same: should the domestic international award be set aside or should it be recognised and enforced as a Singapore judgment under s 19 of the IAA? The only difference between the first two situations and the third is that in the third situation, the grounds under Art 34 of the Model Law are no longer available to the party which brings its challenge to the award out of time. The relevant question in the present case is simple: are there any remaining grounds found or incorporated in the IAA for Mr Landau to challenge the recognition and enforcement of the Singapore Awards? **For the reasons set out in this judgment, I find that there are no remaining grounds for this court to refuse recognition and enforcement of the Singapore Awards.** (Emphasis supplied).*

The Court's rationale was based on the following:

Once no challenge is brought at the set-aside stage for jurisdiction, no grounds remain at the enforcement stage after the time limit for the set-aside challenge is over. For an award (made in a Singapore seated international commercial arbitration), as in this case, since there would be a set aside provision available the enforcing court only enforces having already recognized in the set aside proceeding. "The words "final and binding" belong to the paradigm of recognition."<sup>7</sup> On the other hand for an international award the grounds for refusing enforcement would be those available under Art V of the NY convention.<sup>8</sup> This basically meant that the set aside grounds were transcribed to the recognition and enforcement stage and if the time limit for raising them was over the award was already recognized and all that remained was to enforce it.

## ANALYSIS

The decision has significance in order to understand Singapore's treatment of awards as an enforcing seat. This case raises a number of interesting questions, especially in the Indian context.

- The question this decision raises is the differing treatment to a foreign award and an award made in an international commercial arbitration seated in the enforcement country. If the award was being enforced in a jurisdiction outside of Singapore, all the grounds under Article V of the New York Convention would be applicable which would mean that even the jurisdictional challenge could have been raised at the stage of enforcement.
- The position in India is similar to that of Singapore. In India, under Section 36 of the Arbitration and Conciliation Act, 1996 once the time limit for a set aside application is over (three months of making the final award) or the Court has rejected the set aside application, the award is enforced as a decree of the Court. This would amount to an execution. One would recall that the difference in treatment between a domestic seated international award and a foreign award made by the Singapore High Court in this case is akin to what the Hon'ble Supreme Court recently held in Balco.<sup>9</sup> That is, when an award is considered as domestic, (when made within the territory of India whether in an international commercial arbitration or domestic arbitration), provisions of Part I would apply and therefore only set aside challenges under Section 34 of the Arbitration and Conciliation Act, 1996 would apply. On the other hand when the award is a foreign award (in an international commercial arbitration seated outside India), Article V New York Convention grounds would be applicable.
- One could argue that a domestic international award is still an international award and ought to be allowed the dual benefits of a domestic set aside system (where it is treated as a purely domestic award) and a foreign award treatment during enforcement challenges. There should be no reason to distinguish just because the country of enforcement happens to be the same country as the seat. On the other hand it could be argued that since the seat allows a party to raise pertinent challenges at an appropriate prior stage itself, there is no need for the same grounds at the enforcement stage.

- If enforcement is akin to execution in an international award seated in the enforcing jurisdiction and the award has already been recognized at the set-aside stage, it would have to be further examined as to what would happen in situations when grounds may arise (as a result of discovery of new facts) but only at the enforcement stage and / or when it is admitted (as it was not in this case) that the challenging party did not receive any opportunity at the set-aside stage to raise any challenges.

On a policy analysis it is obvious that the Court wanted Singapore to be seen as a pro-arbitration forum and therefore held that the Model law was better interpreted in the context of civil law jurisprudence rather than English law.

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You can direct your queries or comments to the authors

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<sup>1</sup>Astro Nusantara International BV and others v PT Aunda Prima Mitra and others [2012] SGHC 212

<sup>2</sup> Bharat Aluminium v. Kaiser Aluminium (2012) 9 SCC 552

<sup>3</sup>SIAC Rules, Rule 24: Additional Powers of the Tribunal

<sup>1</sup>24.1 In addition and not in derogation of the powers conferred by any applicable law of the arbitration, the Tribunal shall have the power to:

<sup>1</sup>...

<sup>1</sup>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;

<sup>4</sup> Section 3 of the IAA.

<sup>5</sup>Article 16 - Competence of arbitral tribunal to rule on its jurisdiction

1. The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.

2. A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence. A party is not precluded from raising such a plea by the fact that he has appointed, or participated in the appointment of, an arbitrator. A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings. The arbitral tribunal may, in either case, admit a later plea if it considers the delay justified.

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.

<sup>6</sup>Article 36 of the Model Law provides grounds for refusal of enforcement. This Article is not a part of the IAA since the IAA adopts Article V of the New York Convention.

<sup>7</sup>para 77, at pg 37

<sup>8</sup>paras 78-81 at pgs 38,39.

<sup>9</sup>Bharat Aluminium v. Kaiser Aluminium (2012) 9 SCC 552, at para 88.

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