Case Note
PT First Media v Astro Nusantara International: Should parties be allowed a second bite of the cherry?[1]

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Introduction

Bringing an end to the long-running dispute between the Malaysian Astro Group (**Astro**) and the Indonesian Lippo Group (**Lippo**), the Singapore Court of Appeal in *PT First Media TBK v Astro Nusantara International BV*[3] delivered a judgment of particular note for international arbitration practice. Central to the dispute were arbitrations seated in Singapore, which involved the joinder of third parties and the arbitral tribunal's ruling on its own jurisdiction over these parties.

In this case, the Court of Appeal provided an analysis of the UNCITRAL Model Law on International Commercial Arbitration (**Model Law**), specifically with respect to the interpretation of Article 16(3). As will be discussed, the interpretation of the Model Law in the judgment does not sit well with the demands of certainty and efficiency in international arbitration practices. It invites further discussion on the Model Law approach to competence-competence, calling into question the continuing utility of Article 16(3) in light of the judgment.

Outline of facts

Lippo and Astro entered into a joint venture for the provision of multimedia and television services in Indonesia. The terms of the joint venture were contained in a Subscription and Shareholders' Agreement (**SSA**). A dispute arose over the funding of the joint venture, and subsequently, the Astro companies commenced arbitration in the Singapore International Arbitration Centre (**SIAC**) against Lippo, pursuant to the arbitration agreement in the SSA. A three-member tribunal seated in Singapore was formed (**Tribunal**) and Astro requested the Tribunal to allow another three Astro companies who were not party to the SSA, namely the sixth to eighth respondents, to be joined to the arbitration proceedings. Lippo contested the joinder application.

In response to Lippo's objection, the Tribunal rendered a preliminary award, ruling that it had the power under the *SIAC Rules 2007* to join the three Astro companies, and exercised its discretion to join the three Astro companies. Lippo did not challenge the preliminary decision in the Singapore courts, even though it was entitled to do so within 30-days, under Article 16(3) of the Model Law. Rather, it continued to participate in the arbitration, but reserved its objections to the Tribunal's jurisdiction. Subsequently the Tribunal rendered four further awards on the merits of the dispute, largely in favour of Astro.

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3 [2014] 1 SLR 372 (Court of Appeal).

Astro then sought to enforce the awards in Singapore. Lippo in response requested the Singapore courts to refuse the enforcement, claiming that there were never any arbitration agreements between Lippo and the sixth to eighth respondents. At first instance, the Singapore High Court ruled in favour of Astro, one of the grounds being that Article 16(3) of the Model Law was a 'one-shot remedy'.[4] It held that Lippo, given that it had not made an application under Article 16(3) of the Model Law within the prescribed time limit of 30 days, was precluded from raising the same jurisdictional objections at the enforcement stage.

Against this background, one of the Lippo companies, PT First Media TBK, appealed to the Singapore Court of Appeal.

Decision of the Singapore Court of Appeal

The Court of Appeal reversed the decision of the High Court, based on two propositions: first, that the policy of 'choice of remedies' is at the heart of the entire design of the Model Law; and second, that Article 16(3) is neither an exception to the 'choice of remedies' nor a 'one-shot remedy'.

As to the first proposition, by conducting a detailed examination of the Model Law and its *travaux préparatoires*, the Court of Appeal identified the policy of 'choice of remedies' as being central to the Model Law.[5] Under this 'choice of remedies' policy, on one level the party has the *active* choice of taking positive steps to invalidate the tribunal's award, such as by a jurisdictional challenge under Article 16(3), or by seeking to set aside an award under Article 34 of the Model Law. On another level, there is the *passive* choice of requesting an award to be refused recognition or enforcement under Articles 35 and 36, only in response to enforcement proceedings initiated by the other party.

The Court of Appeal then found that Article 16(3) cannot be a 'one-shot remedy'.[6] Under the 'choice of remedies' reading of the Model Law, even if a party chooses not to actively attack an award in the place of the seat, absent any issues of waiver, that party ought to remain able to passively defend against the enforcement proceedings initiated by the other party. However, if Article 16(3) were to be a 'one-shot remedy', once a tribunal makes a preliminary ruling on its own jurisdiction, the only route available to a party seeking to challenge jurisdiction would be an application to the seat court within 30 days of the preliminary ruling.

In this context, the Court of Appeal concluded that clear intention on the part of the drafters was needed to interpret Article 16(3) in this way. To this end, the Court of Appeal did not find an unequivocal conclusion in the *travaux préparatoires* as to the availability of further recourse if parties do not seek judicial review within 30 days.[7] The Court of Appeal thus inferred that, given the centrality of the 'choice

4 *Astro Nusantara International BV v PT Ayunda Prima Mitra* [2013] SLR 636, 679 [141], 683 [151], 685 [157] (High Court).

5 *PT First Media TBK v Astro Nusantara International BV* [2014] 1 SLR 372, 396-400 [65]-[74].

6 Ibid 408-418 [100]-[132].

7 See, UNCITRAL, *Analytical Compilation of comments by Governments and international organizations on the Draft Text of a Model Law of International Commercial Arbitration*, UN Doc A/CN.9/263 (19 March 1985) ("Analytical Compilation"), 30 [8], 40 [12] n 57. See also 'summary Records of the United Nations Commission on International Trade Law for meetings devoted to the preparation of the UNCITRAL Model Law on International Commercial Arbitration' (1985) XVI *Yearbook of the United Nations Commission on International Trade Law 399 ("Summary Records")*, 440 (315th mtg), 441-3 (316th mtg), 459 (320th mtg).

of remedies' to the Model Law design, the drafters of the Model Law would have been clearer if such were the intentions behind Article 16(3).[8]

As a result, even though Lippo did not actively challenge the Tribunal's preliminary ruling, as it was entitled to under Article 16(3) at an earlier stage, it was still permitted to pursue the passive remedy at the enforcement stage.

What now for Art 16(3)?

The decision in *PT First Media TBK v Astro Nusantara International BV* raises a number of interesting points regarding the competence-competence principle and its implementation in the Model Law. It calls into question the continuing utility of Article 16(3), as an interpretation which permits parties to make jurisdictional challenges at the enforcement stage, even though it had an earlier opportunity to do so, is contrary to demands for efficiency and certainty that is sought after in international arbitration proceedings today.

The competence-competence principle and the Model Law

The theoretical foundation of the competence-competence principle is that it provides the practical option for a tribunal, when challenged, to make a ruling on its own jurisdiction. If it were not authorised to determine the challenge, an unco-operative party to a genuine arbitration agreement would have the opportunity to halt proceedings, or cause considerable delay, simply by challenging the tribunal's jurisdiction. This would serve to undermine the arbitral process by providing parties wishing to disrupt proceedings with the opportunity to do so.[9]

Having said that, not all jurisdictional challenges are unfounded and a party should have recourse to the courts if it has in fact not agreed to arbitrate. However, an approach which delays recourse to the courts on the question of jurisdiction until after an award has been made,[10] while minimising interference by the courts, may create injustices by wasting the parties' time and expense should it be found that the tribunal never had jurisdiction.[11]

The compromise solution that was adopted in the Model Law was to enable the tribunal, in its discretion, either to rule upon the issue of jurisdiction as a preliminary point, or to defer its ruling until the making of the award. Should a tribunal's jurisdiction be challenged in the preliminary stages of the proceedings, rapid and unappealable review of its decision may occur without interruption to the arbitral process. If the tribunal, as a preliminary matter, incorrectly finds that it has jurisdiction, the parties are able to immediately challenge the decision in court.

It was thought that this flexibility would enable the tribunal to assess, in each particular case, the risk of dilatory tactics against the opposite danger of wasting money and time.[12] It was also thought to be desirable for the tribunal to at least have the option of having legal questions determined by the courts

8 *PT First Media TBK v Astro Nusantara International BV* [2014] 1 SLR 372, 411 [111].

9 UNCITRAL, *Report of the United Nations Commission on International Trade Law on the work of its eighteenth session*, UN Doc A/40/17 (21 August 1985) ("Commission Report"), 31 [158].

10 For example, the French approach; See *Nouveau Code de Procedure Civile* (France) art 1458.

11 *Commission Report*, UN Doc A/40/17, 31 [160].

12 Ibid 31 [159].

at a preliminary stage.[13] This was especially a concern for difficult cases in which the arbitrators themselves were interested in having the question settled by the courts.[14] It is this option, to invite the courts to determine the tribunal's jurisdiction at a preliminary stage, that strikes the balance between the competing policy considerations. What then is the point of Article 16(3), if this option can be ignored by a party, and that party is permitted at a later stage to mount a jurisdictional challenge on the same grounds?

Utility of Article 16(3) in light of the Court of Appeal's decision

When a tribunal's jurisdiction is challenged in the preliminary stages of proceedings, the purpose of Article 16(3) is to provide parties the option to have jurisdictional questions settled by the courts at that early stage. However, having identified the 'choice of remedies' ingrained in the Model Law design, the Court of Appeal concluded that a passive remedy must remain available. This is notwithstanding the fact that the availability of a subsequent passive recourse to the courts undermines this function of Article 16(3). Even when there was a clear option for a party to challenge the tribunal's jurisdiction at an early stage, if the party chooses not to exercise this option, that party is permitted to raise the same objections at a later stage. This interpretation undeniably goes against the policy imperatives of certainty and efficiency in arbitral proceedings.

The Court of Appeal did in fact take these concerns into account, and found that certainty and efficiency, though important, were not the paramount objectives in Article 16(3).[15] Arguably, in so far as the tribunal exercises its discretion to make a preliminary ruling, and a party chooses to challenge that ruling instantly before the courts, certainty surrounding the tribunal's jurisdiction could be achieved at an earlier stage. However, the Court of Appeal found that these considerations did not extend to precluding subsequent recourse to passive remedies.[16] In support of this argument, it is true that the availability of an option under Article 16(3) achieves more certainty than the alternative approach, under which jurisdictional challenges are only available after the award on the merits have been rendered.[17]

But it is nevertheless difficult to see a public policy advantage in allowing a party to take part in arbitral proceedings, see whether they win or lose the arbitration and, after wasting time and money on the arbitration, permit them to have a second bite of the cherry.

Conclusion

The Singapore Court of Appeal in *PT First Media TBK v Astro Nusantara International BV* identified the policy of 'choice of remedies' and provided an interpretation of Article 16(3) that is consistent with that approach. The Court of Appeal made an interesting note of how, if it were otherwise:

> *'[p]arties involved in international arbitrations in Singapore would be compelled to engage their active remedies in the Singapore courts,* ie*, by challenging a preliminary ruling under Art 16(3) or initiating setting aside proceedings under Art 34, because the*

13 *Summary Records*, above n 7, 442 [24] (Lord Wilberforce, observer for the Chartered Institute of Arbitrators, 316th mtg).

14 Ibid.

15 *PT First Media TBK v Astro Nusantara International BV* [2014] 1 SLR 372, 413 [117].

16 Ibid.

17 Ibid 414 [118].

> *option of exercising a passive remedy of resisting enforcement here would not be open to them. This can have potentially far-reaching implications on the practice and flourishing of arbitration in Singapore.'*[18]

Arguably, the way the Court of Appeal interpreted Article 16(3), by making available a subsequent passive remedy to challenge the tribunal's jurisdiction, can equally have practical ramifications for arbitrations seated in Singapore. Under a system that provides a two-stage remedy, parties can never be certain about the tribunal's jurisdiction. Even if the tribunal provides an early opportunity for that question to be determined by the courts, if the objecting party chooses not to exercise the option for judicial review, the jurisdictional question remains open to challenges at the enforcement stage.

To further clarify this point, it is not suggested that the provisions of Article 16 are designed to completely oust the jurisdiction of the court as the final arbiter of jurisdictional questions. However, it ought to provide some certainty where there is an opportunity to do so. Although the Court of Appeal recognised the importance of certainty and efficiency, it chose an interpretation of Article 16(3) which prioritises the co-existence of active and passive remedies. That may have been the intent of the original drafters at the time; however, considering the demand for certainty and efficiency in arbitral proceedings, a more measured approach that reflects international arbitration practice today is more appropriate for Article 16(3).

From a practical perspective, Singapore's interpretation of the Model Law, under which a party is permitted to challenge a tribunal's jurisdiction even though it had the opportunity to do so at an early stage, is not a satisfactory approach for modern international arbitration practices. The decision encourages further discussion of the competing policy considerations and the time is right for the international arbitration community to begin to develop a uniform view on the practical application of Article 16(3).

18 Ibid 405 [89].