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## The Enforceability Of Awards Set Aside At The Seat: An Asian And European Perspective

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## THE ENFORCEABILITY OF AWARDS SET ASIDE AT THE SEAT: AN ASIAN AND EUROPEAN PERSPECTIVE

*Rashda Rana SC\**

The enforcement of awards following a decision at the seat remains a controversial issue in international arbitration. Should an enforcement court follow the decision of the seat court, or can the enforcement court reach a different conclusion? US, English, and French courts continue to take different approaches to this issue. The position may not be so different in Asian courts.

While, at first blush, it may be thought that an award which has been set aside by a supervisory court cannot be enforced in any other jurisdiction, there is an emerging body of cases which suggests otherwise. The emerging case law does not give the seat the pre-eminent prominence in the determination of the validity of the award as one would think it deserves. French courts disregard the decisions of seat courts altogether. In a series of cases, French courts have enforced awards that have been set aside or suspended at the seat of arbitration. The French courts have provided two justifications for their approach:

1. French domestic law does not recognize the setting aside or suspension of the award as a ground for refusing enforcement.

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2. French courts consider that an international arbitral award is not “anchored” or “integrated” in the seat of arbitration. Therefore, the views of seat courts on the validity of the award simply have no bearing on whether the award should be enforced in France.

Some commentators favor the French approach. In Gaillard’s view, international arbitration is a transnational legal order in which no state should have the final say on the validity of the award. Accordingly, each enforcement court should be entitled to form its own view on the validity of the award, regardless of what the courts at the seat of arbitration may think.

As Emmanuel Gaillard has observed:

The idea that the New York Convention would *place the seat of the arbitration at the top of a jurisdictional hierarchy for enforcement purposes is counter to its fundamental objectives*. If accepted, it would shift the focus from the award itself, which is the subject matter of the Convention, to the judicial process surrounding the award in the country where it was rendered, and would fly in the face of one of the greatest achievements of the New York Convention. Indeed, one must recall that the drafters of the Convention set out to abolish the requirement of double exequatur, which governed enforcement under the 1927 Geneva Convention on the Enforcement and Recognition of Foreign Arbitral Awards.<sup>1</sup>

In *Soci t  Hilmarton v. Soci t  O.T.V.*,<sup>2</sup> the French court had to consider whether to recognize an award that had been set aside in its country of origin, Switzerland. The Cour de Cassation held that the award in question was, “an international award which was not integrated into the Swiss . . . legal order, such that its existence continued in spite of its being set aside.”<sup>3</sup> The decision in *Hilmarton* was explained by the Cour de Cassation in *Soci t  PT Putrabali Adyamulia c/ SA Rena Holdings*<sup>4</sup>: the impact of a national court’s decision to annul an award is confined to its own jurisdiction and that the enforcement court decides whether to enforce based on its own rules. In other words, the French approach is that the French courts

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1. Emmanuel Gaillard, *International Arbitration as a Transnational System of Justice, in ARBITRATION—THE NEXT FIFTY YEARS* 71 (ICCA Congress Series No. 16, 2012) (emphasis added).

2. The Cour de Cassation, 1st Civil Chamber, 23 March 1994, Rev. Arb. 327.

3. *Id.*

4. 1 re civ., 29 June 2007.

may still enforce an award which has been set aside by the supervisory court.

A recent case dealt with this very issue. In *Yukos Capital S.a.r.L v. OJSC Oil Company Rosneft*,<sup>5</sup> the English High Court was required to consider whether to recognize a decision of a foreign court setting aside an award and to take into account whether the decision in question was obtained by fraud and to apply principles of natural justice and English public policy. In September 2006, Yukos Capital obtained four arbitral awards (“Awards”) against a former Yukos entity taken over by a Russian state-owned Rosneft and began enforcement proceedings in the Dutch courts. The arbitration was seated in Russia. Although the Russian *Arbitrazh* Courts had subsequently set aside all of the Awards (“Russian Set-aside Decisions”), the Dutch courts allowed Yukos Capital to enforce the Awards, holding that the Russian courts had acted without impartiality and independence. However, no payment was forthcoming.

Yukos Capital then brought a second enforcement action in England. It argued that, in light of the Dutch court’s judgment, Rosneft could no longer rely on the Russian Set-aside Decisions to annul the Awards. Rosneft argued, to the contrary, that the doctrine of Act of State prohibited the English courts from questioning the Russian Set-aside Decisions. The English Court of Appeal did not agree with either proposition. It did not consider the Russian Set-aside Decisions to be an Act of State, and Rosneft was not estopped from relying on them.

The principal sums due under the Awards were eventually paid by Rosneft but, as the Awards did not contain provisions for the payment of interest, no interest was paid in respect of the delay in payment. Accordingly, Yukos Capital continued its claim in the English High Court for post-award interest. The claims for interest were advanced under Article 395 of the Russian Civil Code and/or Section 35 of the Senior Courts Act 1981 (“1981 Act”).

The English High Court was concerned with two preliminary questions:

1. Whether the Russian Set-aside Decisions meant that the Awards could not be enforced because they no longer existed in a legal sense (“Enforcement Preliminary Issue”); and

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5. [2014] EWHC 2188 (Comm).

2. Whether, in principle, interest could be recovered in respect of such awards under Russian law and/or English law (“Interest Preliminary Issue”).

On the Enforcement Preliminary Issue, Rosneft argued that the Awards were made under and existed subject to Russian law. Since the Awards had been annulled by the Russian courts in the Russian Set-aside Decisions, they no longer existed and consequently there was no obligation under Russian law to comply with them. Accordingly, Rosneft contended that under the principle *ex nihilo nil fit*,<sup>6</sup> there were no legal grounds on which Yukos Capital could bring an action in the English court.

Yukos Capital argued that an award could be enforced provided that it was made in accordance with a valid arbitration agreement and was final and binding according to its governing law and that for this purpose it was not necessary for the award to be enforceable under the law governing the arbitration. The court reviewed a considerable body of academic opinion and case law on the question of whether an award has legal effect notwithstanding an order of the court of the seat annulling it:

[T]he answer to the question is not provided by a theory of legal philosophy but by a test: whether the Court in considering whether to give effect to an award can (in particular and identifiable circumstances) treat it as having legal effect notwithstanding a later order of a court annulling the award. In applying this test it would be both unsatisfactory and contrary to principle if the Court were bound to recognise a decision of a foreign court which offended against basic principles of honesty, natural justice and domestic concepts of public policy.<sup>7</sup>

Accordingly, the existence of the Russian Set-aside Decisions did not automatically extinguish the Awards. It was open to Yukos Capital to argue that the Russian Set-aside Decisions ought to be disregarded. The question of whether the Awards in the present case were in fact enforceable was left for later determination.<sup>8</sup>

On the Interest Preliminary Issue there were two distinct sub-issues considered by the High Court:

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6. Latin maxim meaning “nothing comes out of nothing.”

7. [2014] EWHC 2188 (Comm), *supra* note 5.

8. Following a trial determining, among other things, that Yukos Capital’s allegations that the Russian Court Decisions should not be recognized, and (to the extent permissible) Rosneft’s ‘public policy’ defense was based on an allegation of tax fraud.

1. the claim for interest under Article 395 of the Russian Civil Code; and
2. the claim for interest in English law under section 35A of the 1981 Act.

Having examined expert evidence adduced by the parties, the High Court held that interest cannot be recovered as a matter of Russian law. In respect of English law, Rosneft argued that the parties had excluded the ability of the English Court to award interest by having agreed that all disputes between them, including a dispute as to any interest, should be resolved by an arbitral tribunal in Russia, and that such tribunal had no power to award interest under Section 35A of the 1981 Act.

The High Court held that the enforcement action was a claim to enforce a debt and therefore interest could be claimed as part of that action even though it was not included in the underlying award. Although the circumstances in which the arbitrators declined to grant an award of interest might be relevant to the exercise of the English Court's discretion to award interest, the court held there was no absolute bar to an award of interest in respect of the late payment of a foreign award under Section 35A of the 1981 Act. Whether the interest should be awarded as a matter of discretion in these particular circumstances was also left for later determination.

The question of whether a party *must* object to jurisdiction (and other preliminary issues or decisions) at certain stages of the arbitral process has been the subject of debate in a number of cases worldwide. In the English case *Dallah Real Estate and Tourism Co. v. Ministry of Religious Affairs, Government of Pakistan*,<sup>9</sup> Dallah was a Saudi Arabian company which provided services for pilgrims travelling to the Holy Places in Saudi Arabia. In July 1995, Dallah signed a memorandum of understanding (“MoU”) with the Government of Pakistan in relation to the construction of certain housing for Pakistani pilgrims. In September 1996, Dallah entered into a contract (“Contract”) with the Awami Hajj Trust (“Trust”), a body which had been established by an Ordinance promulgated by the President of Pakistan. The Contract contained an arbitration agreement, under which all disputes were to be referred to International Chamber of Commerce (“ICC”) arbitration in Paris.

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9. *Dallah Real Estate and Tourism Co. v. Ministry of Religious Affairs, Government of Pakistan* [2011] 1 AC 763, 763 (Eng.).

The Government was not a signatory to the Contract, although the Contract made reference to a guarantee to be provided by the Government and included a provision by which the Trust could assign its rights and obligations to the Government without the permission of Dallah. The housing project never came to fruition and, following a change of government in Pakistan, the Trust ceased to exist as a legal entity. In May 1998, Dallah commenced ICC arbitration proceedings against the government. In the arbitration, Dallah convinced the arbitral tribunal—composed of three well-known arbitrators—that the tribunal had jurisdiction over the government. The arbitral tribunal issued three awards (successively on jurisdiction, applicable law, and the merits) and awarded Dallah approximately US\$20 million in damages and legal costs. Dallah then endeavored to enforce the final award in the United Kingdom. The government opposed enforcement before the UK courts and commenced annulment proceedings against all three awards before the Paris Court of Appeal.

The UK Supreme Court was faced with the question of whether the government, which was not a signatory to the Contract, should be considered a party to the arbitration agreement (as an ICC tribunal sitting in Paris had found), or whether enforcement of the tribunal's award could be refused under Article V(1)(a) of the New York Convention because a proper application of French law led to the conclusion that the Government was not a party to the arbitration agreement. The UK Supreme Court held that, on a proper interpretation of the New York Convention, whenever a party resists enforcement under Article V(1)(a) of the New York Convention (i.e., by claiming that the arbitration agreement was invalid), the Court is bound to "revisit the tribunal's decision on jurisdiction." The Supreme Court also endorsed the position of the government that the reviewing court "may have regard to the reasoning and findings of the alleged arbitral tribunal, if they are helpful, but it is neither bound nor restricted by them."

The UK Supreme Court, in applying French law, purported to follow the reasoning of the French Court of Cassation in the well-known *Dalico* case to the extent that it analyzed the common intention of the parties.<sup>10</sup> It concluded that "*there was no material sufficient to justify the tribunal's conclusion,*" that the Government

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10. Cour de Cassation [Cass.], First Civil Chamber, *Municipalité de Khoms El Mergeb v. Dalico*, Dec. 20, 1993, JDI 1994, 432, note E. Gaillard.

was a party to the arbitration agreement, and therefore refused to enforce the award in the United Kingdom. In contrast, in 2011, in *Gouvernement du Pakistan—Ministère des Affaires Religieuses v. Dallah Real Estate and Tourism Holding Company*,<sup>11</sup> the Paris Court of Appeal rejected an application by the Government of Pakistan to set aside three ICC awards delivered in Paris, holding that the arbitral tribunal was correct in finding it had jurisdiction over the government despite it not being a signatory to the arbitration agreement

The Paris Court of Appeal followed the *Dalico* doctrine whereby:

1. an international arbitration agreement is not governed by any national law but by French “material rules” (*règles matérielles*) of international arbitration;<sup>12</sup> and
2. the issue of whether a party is bound by an arbitration clause has to be solved by a factual enquiry, i.e. the court must assess whether the parties intended to go to arbitration.

Following *Dalico*, the Paris Court retraced in detail the successive steps of the project in order to analyze the dealings between the parties.

The Paris Court noted that during the entire period prior to the conclusion of the Contract, the Government was Dallah’s sole counterpart/negotiating partner, in particular, that the government negotiated the Contract directly, although the signatory, from a legal standpoint, was the Trust. The Paris Court then emphasized that the government was also involved during the performance of the Contract, as evidenced, in particular, by the direct involvement of two employees of the government in the organization of savings plans and advertising campaigns related to the project. Finally, the Court stressed that the government directly handled the termination of the Contract.

In light of the above, the Paris Court of Appeal concluded that:

[The government] behaved as if the Contract was its own; . . . this involvement of [the government], in the absence of evidence that the Trust took any actions, as well as [the government’s] behaviour during the pre-contractual negotiations,

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11. Cour d’appel [CA] [regional court of appeal] *Gouvernement du Pakistan – Ministère des Affaires Religieuses v. Societe Dallah Real Estate Tourism and Holding Company*, civ., Feb. 17, 2011, 09/28533.

12. Rules applied by a French court without a conflict of laws analysis.



confirm that the creation of the Trust was purely formal and that [the government] was in fact the true Pakistani party in the course of the economic transaction.

The Court thus rejected the Government's request.<sup>13</sup> Both the UK and French courts concluded that they had authority to conduct a full review of the arbitrators' decision on jurisdiction. With regards to French law, this decision is consistent with well-established case law.

To some extent the position in Asia is still being developed as courts there grapple with establishing jurisprudence that suit their policies and principles. As far as enforcement in Asia is concerned there are a few common relevant principles that apply:

1. The primary aim of the court is to facilitate the arbitral process and to assist with enforcement of arbitral awards.
2. Under most arbitration laws, the court should interfere in the arbitration of the dispute only as expressly provided for in the law.
3. Subject to the observance of the safeguards that are necessary in the public interest, the parties to a dispute should be free to agree on how their dispute should be resolved.

The grounds that arise most often are:

1. not having been given notice of the arbitral proceedings,
2. inability to present one's case, or
3. that the composition of the tribunal or the arbitral procedure was not in accordance with the parties' agreement.

On applications to set aside or to refuse enforcement on any of those grounds, the court is concerned with the *structural integrity* of the arbitration proceedings. In this regard, the conduct complained of "*must be serious, even egregious,*" before the court would find that there was an error sufficiently serious so as to have undermined due process.<sup>14</sup> Thus, it is fair to say that in drawing on recent case law on the issue of enforcement a number of principles emerge (particularly from the courts in Hong Kong):

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13. Furthermore, the court ordered the Government to pay the full amount of legal fees claimed by Dallah, (€100,000) under Article 700 of the French Code of Civil Procedure.

14. *Grand Pacific Holdings Ltd. v. Pacific China Holdings Ltd.* [2012] 4 H.K.L.R.D. 1 (CA).

1. The courts are prepared to enforce awards except where complaints of substance can be made good.
2. The party opposing enforcement has to show a real risk of prejudice and that its rights are shown to have been violated in a material way.<sup>15</sup>
3. Failure to make prompt objection to the tribunal or the supervisory court may constitute estoppel or want of bona fide.<sup>16</sup>
4. In considering whether or not to refuse the enforcement of the award, the court does not look into the merits or at the underlying transaction.<sup>17</sup>
5. Even if sufficient grounds are made out either to refuse enforcement or to set aside an arbitral award, the court has a residual discretion and may nevertheless enforce the award despite the proven existence of a valid ground.<sup>18</sup>
6. In addition, the Court of Final Appeal (HK) has clearly recognized that parties to the arbitration have a duty of good faith, or to act bona fide.<sup>19</sup>

In Malaysia, in *Agrovenus LLP v. Pacific Inter-Link*,<sup>20</sup> the award debtor sought to resist enforcement of the award on the ground that the tribunal had no jurisdiction to hear the dispute between the parties (s.39 of *Arbitration Act 2005* (Malaysia)). The opposing party argued that as the award debtor had not raised any objection to the tribunal's jurisdiction throughout the arbitration proceedings, the award debtor was now estopped from raising such objections to the court. At first instance, the judge held that it had the ability to evaluate the tribunal's jurisdiction despite the jurisdictional issue having not been raised at an earlier time (in line with English decision of *Dallah*). The Court of Appeal, overturned the High Court's decision, holding that the award debtor was effectively estopped from challenging the tribunal's jurisdiction after the award had already been rendered, citing *Rustall Trading Ltd v. Gill & Duffus SA*:

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15. *Id.*

16. *Hebei Import & Export Corp. v. Polytek Engineering Co. Ltd.* [1999] 2 H.K.C.F.A.R. 111 (CFA).

17. *Xiamen Xingjingdi Group Ltd. v. Eton Properties Ltd.* [2009] 4 H.K.L.R.D. 353 (CA).

18. *Hebei Import & Export Corp. v. Polytek Engineering Co. Ltd.* [1999] 2 H.K.C.F.A.R. 111, *supra* note 16, at 136A-B.

19. *Id.* at 1201, 137B.

20. [2014] 4 C.L.J. 525.

. . . a party to an arbitration must act promptly if he considered that there were grounds on which he could challenge the effectiveness of the proceedings; if he failed to do so and continued to take party in the proceedings, he would be precluded from making a challenge at a later date.<sup>21</sup>

This position is to be contrasted with the position in Singapore in a number of respects. *Astro Nusantara v. PT Ayunda*<sup>22</sup> concerns the arbitration proceedings arising out of a joint venture for the provision of multimedia services in Indonesia.

The dispute between the parties arose out of a joint venture agreement called the Subscription and Shareholders' Agreement ("SSA"), dated March 11, 2005, entered into between companies belonging to an Indonesian conglomerate ("Lippo Group") on the one hand and companies within a Malaysian media group ("Astro Group") on the other for the provision of multimedia and television services in Indonesia. The joint venture vehicle was the third defendant in these proceedings ("Direct Vision"). The Lippo Group's interest in the joint venture was held by the first defendant in these proceedings, Ayunda, whose obligations to the Astro Group under the joint venture were guaranteed by First Media, an Indonesian company with its shares listed on the Indonesian Stock Exchange. On the other hand, the Astro Group's interest in the joint venture was held by the third and fourth applicants, with the fifth applicant guaranteeing their obligations. The original parties to the SSA were the third to fifth applicants on the side of the Astro Group, and Ayunda, First Media and Direct Vision (collectively referred to as "Lippo") on the side of the Lippo Group. Subsequently, pursuant to a novation agreement, the first and second applicants took the place of the third and fourth applicants in the joint venture. The Additional Parties were, however, never made parties to the SSA.

Clause 18.5 of the SSA provided that the agreement shall be governed by and construed in accordance with the laws of the Republic of Singapore. The SSA contained a number of conditions precedent upon which the parties' respective obligations thereunder were predicated. It was agreed that the parties would have until July

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21. [2000] 1 Lloyd's Rep. 228.

22. *Astro Nusantara Int'l BV and Others v. PT Ayunda Prima Mitra and Others* [2013] 1 SLR 636 (first instance); *PT First Media TBK (formerly known as PT Broadband Multimedia TBK) v. Astro Nusantara Int'l BV and Others* [2014] 1 SLR 372 (Court of Appeal).

2006 to fulfil those conditions precedent. In the meantime, funds and services were provided by the Additional Parties to Direct Vision to build up the latter's business from about December 2005.

As a matter of fact, the conditions precedent were not fulfilled. By about mid-August 2007, it became clear to the parties that the joint venture would not close. Nevertheless, the Additional Parties continued to provide funds and services to Direct Vision while the parties were exploring exit options. A dispute then arose between Lippo and Astro. Lippo contended that the Additional Parties had, orally or by conduct, agreed to continue to provide funds and services to Direct Vision, but Astro was not willing to do so.

In October 2008, the Additional Parties stopped further provision of funds and services to Direct Vision. In the meantime, in September 2009, Ayunda commenced proceedings in the Indonesian court against, *inter alia*, the Additional Parties ("Indonesian Proceedings"). On the basis that the commencement of the Indonesian Proceedings amounted to a breach of the arbitration agreement contained in the SSA, Astro commenced arbitration at the Singapore International Arbitration Centre ("SIAC") by a notice of arbitration dated October 6, 2008 against Lippo ("the Arbitration").

In the notice of arbitration, Astro sought, *inter alia*, the following relief against Lippo:

1. an anti-suit injunction against Ayunda in respect of the Indonesian Proceedings;
2. declarations that the SSA was the parties' only joint venture agreement which had lapsed and there was no continuing obligation on the part of Astro to continue to provide funds and services to Direct Vision; and
3. payment of various sums by way of restitution and/or *quantum meruit*.

In view of the fact that the Additional Parties were not parties to the SSA, Astro stated in the notice of arbitration that the Additional Parties had consented to being added as parties to the Arbitration, and made an application pursuant to Rule 24(b) of the 2007 SIAC Rules to join the Additional Parties as parties to the Arbitration ("Joinder Application").

Rule 24(b), under the heading of "Additional Powers of the Tribunal," states as follows:

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.

The Joinder Application was contested by Lippo. On May 7, 2009, the Tribunal rendered an award (“Award on Preliminary Issues”), holding that:

1. on the true construction of Rule 24(b), it had power to join the Additional Parties as parties to the Arbitration as long as they consented to being joined; and
2. the power to join the Additional Parties as parties to the Arbitration should be exercised.

Lippo did not challenge the Tribunal’s preliminary award on jurisdiction before the Singapore Courts within the thirty-day time limit under Article 16(3) of the Model Law. Instead, it continued to participate in the arbitration, but noted its continued objection to the jurisdiction of the Tribunal. Although relief was granted to all eight applicants under the Awards, the principal monetary relief awarded by the Tribunal was in favor of the Astro Joinder Parties (the sixth to eighth applicants). Between May 7, 2009 and August 3, 2010, the Tribunal issued four further awards in Astro’s favor in excess of US\$130 million.<sup>23</sup>

Astro sought enforcement of the Awards in various jurisdictions, including Singapore, Hong Kong, England, Malaysia, and Indonesia. Lippo did not resist proceedings for the recognition and enforcement of the Awards in England or Malaysia, because Lippo had no assets in those jurisdictions on which execution of the judgments giving effect to the Awards could be levied. For the same reason, Lippo did not originally take steps to resist proceedings for the recognition and enforcement of the Awards in Hong Kong, but subsequently adopted a different stance when it transpired that there were assets of Lippo to be found here (disputed by Lippo). Lippo did take active steps to

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23. The arbitral tribunal constituted of very eminent and experienced practitioners: Sir Gordon Langley, Sir Simon Tuckey, and Stewart C Boyd CBE QC.

resist proceedings for the recognition and enforcement of the Awards in Indonesia on various grounds.

The focus of the parties' arguments before the Hong Kong and Singapore courts related to the enforcement of the Awards by the Additional Parties against First Media. In Hong Kong, the enforcement had occurred without any significant challenge grounded on the joinder issue. In Singapore, the seat of the arbitration, the joinder issue was raised not in a setting aside application but in defense of an enforcement application.

In view of the fact that the seat of the Arbitration was in Singapore, the Awards were regarded as "domestic international awards" in so far as proceedings for their recognition and enforcement in Singapore were concerned. The statutory regime governing the enforcement of a domestic international award in Singapore is Section 19 of the International Arbitration Act ("IAA"), which states, "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."<sup>24</sup>

The following provisions of the 1985 Model Law are also relevant for the purposes of properly understanding the decision:

(1) Article 16(3): "The arbitral tribunal may rule on a plea referred to in paragraph (2) of this Article [i.e., a plea that the arbitral tribunal does not have jurisdiction] 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."

(2) Article 34(1): "Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of this article."

(3) Article 34(2): "An arbitral award may be set aside by the court specified in article 6 only if (a) the party making the application furnishes proof that: (i) . . . the said agreement is not valid under the law to which the parties have subjected it or . . .

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24. Cap 143A, 2002 Rev. Ed.

(iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration . . . .”

(4) Article 34(3): “An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the award . . . .”

(5) Article 36(1): “Recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused only: (a) at the request of the party against whom it is invoked, if that party furnishes to the competent court where recognition or enforcement is sought proof that: (i) . . . the said agreement is not valid under the law to which the parties have subjected it or . . . (iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration . . . .”

The Lippo companies did not apply to set aside the Awards in Singapore based on the grounds of Article 34(1) ML within the time limit. Astro subsequently sought to enforce the Awards in Singapore by the High Court. In response, Lippo challenged the enforcement orders on the jurisdictional ground that there was no agreement to arbitrate between the Lippo and the Astro Joinder Parties, who were not parties to the SSA.

The Singapore High Court, in dismissing the challenge held that there was no statutory basis to invoke lack of jurisdiction as a ground to resist or refuse enforcement of a Singapore Award. Further, the Court held that a domestic international award is recognized as final and binding, unless, and exclusively so, it is set aside under the grounds stipulated under the IAA. At first instance in the High Court of Singapore, the judge interpreted Article 16(3) of the Model Law as the “exclusive route” through which a preliminary decision on jurisdiction can be challenged. Once the time limit for bringing a challenge under Article 16(3) has elapsed without any application having been made, the preliminary ruling on jurisdiction becomes final and cannot be challenged subsequently, whether by way of a setting-aside application or at the enforcement stage. As the Lippo parties did not challenge the Award on Preliminary Issues under Article 16(3) of the Model Law, the judge held that it had lost its sole and exclusive opportunity to raise its jurisdictional objection before the Singapore courts. It was therefore no longer open to a Singapore

court to revisit the jurisdictional objection. The Matter then proceeded to an appeal to the Court of Appeal, where the Court of Appeal was asked to deal with the question of whether Lippo was estopped from pursuing a *passive remedy*.

While the validity of the Awards could no longer be challenged by First Media before the Singapore court, being the supervisory court of the arbitration, *enforcement* of the Awards by the Additional Parties against First Media was refused by the Singapore Court of Appeal by a judgment of that court rendered on October 31, 2013, on the ground that there was no valid arbitration agreement between the Additional Parties and First Media and the Tribunal had no jurisdiction to make the Awards in favor of the Additional Parties against First Media. On appeal, the Singapore Court of Appeal, examined the development of the law of arbitration in Singapore since the first enactment of its arbitration legislation, the subsequent adoption of the Model Law and the New York Convention, as well as the United Nations Commission on International Trade Law Working Group's *travaux preparatoires* in relation to the Model Law.

It also referred to pronouncements by other courts as to the implications of the New York Convention on whether and how the pursuit of active remedies in the seat of arbitration might be relevant to enforcement proceedings. In particular, the court referred to the decision of the UK Supreme Court in *Dallah*. In *Dallah*, Lord Mance noted that Article V(1)(e) of the New York Convention accorded some deference and importance to the seat of arbitration, but went on to say the following, with which the Singapore Court of Appeal agreed:

But article V(1)(a) and section 103(2)(b) [the section in the English Arbitration Act 1996 (c 23) which gives effect to the New York Convention] are framed as free-standing and categorical alternative grounds to article V(1)(e) of the Convention and section 103(2)(f) for resisting recognition or enforcement. Neither article V(1)(a) nor section 103(2)(b) hints at any restriction on the nature of the exercise open, either to the person resisting enforcement or to the court asked to enforce an award, when the validity (sc existence) of the supposed arbitration agreement is in issue. The onus may be on the person resisting recognition or enforcement, but the language enables such person to do so by proving (or furnishing proof) of the non-existence of any arbitration agreement. This language points strongly to ordinary judicial determination of that issue. Nor do article VI



and section 103(5) contain any suggestion that a person resisting recognition or enforcement in one country has any obligation to seek to set aside the award in the other country where it was made.<sup>25</sup>

A close examination of the development of and difference in the Model Law and New York Convention allows for an argument said to be established by the “choice of remedies” principle. The Singapore Court of Appeal said:

The drafters of the Model Law, in aligning the Model Law with the New York Convention, were plainly desirous of continuing this trend of de-emphasising the importance of the seat of arbitration. However, 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 and forms the crux of this dispute.<sup>26</sup>

Contrary to the view of the judge at first instance, the Court interpreted Section 19 of the IAA as providing the Singapore Court with an inherent power to refuse the enforcement of domestic international awards rendered in Singapore.

Drawing on earlier iterations of the wording of Section 19 in enactments prior to the IAA (which had in turn come from the 1950 Arbitration Act) and English case law, the court determined that historically a “choice of remedies” was enshrined within Singapore law. This provided two options for a party against whom an award was rendered:

1. an “active remedy” of setting aside the award; or
2. a “passive remedy” of resisting enforcement by the counterparty, which was available even where no active challenge had been made.

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25. *PT First Media TBK v. Astro Nusantara International BV & Ors* SGCA 57, at 28 (2013).

26. *Id.* at 64.

The Court did not consider this position had been altered by the introduction of the Model Law through the IAA. Therefore, it was held that “Parliament, in receiving the Model Law into Singapore, 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.”<sup>27</sup> The Singapore Court of Appeal examined and then applied the following principles in reaching its decision:

(1) The enforcement of domestic international awards is governed by s.19 of the IAA, the construction of which must be consonant with the underlying philosophy of the Model Law.

(2) The overarching scheme of the Model Law is to de-emphasize the importance of the seat of the arbitration and facilitate the uniform treatment of international arbitration awards.

(3) The principle of “choice of remedies,” under which passive remedies will still be available to the award debtor who did not utilize his active remedies, is fundamental to the design of the Model Law. In this connection,

(i) “active remedies” means taking positive steps to invalidate an arbitral award such as by an application to challenge a preliminary ruling on jurisdiction under article 16(3) of the Model Law or to set aside an award on the grounds set out in article 34(1) of the Model Law,

(ii) “passive remedies” means resisting the recognition or enforcement of an award in the jurisdiction where and when the award is sought to be enforced under article 36 of the Model Law; and

(iii) “choice of remedies” means the award debtor may resist enforcement of an award by “passive” means even though it had not pursued “active” remedies to challenge the preliminary ruling or set aside the award.

(4) It follows that the best way to give effect to the philosophy of the Model Law would be to recognize that the same grounds for resisting enforcement under Article 36(1) of the Model Law will be equally available under s 19 of the IAA.

(5) Article 16(3) of the Model Law is neither an exception to the principle of “choice of remedies,” nor a “one-shot remedy”

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27. *Id.* at 47.

(meaning that a preliminary ruling on jurisdiction must be challenged within the prescribed thirty-day time limit, failing which the party objecting to the ruling will be deprived of any other chance to subsequently raise the same jurisdictional ground in setting aside or enforcement proceedings, and if the preliminary ruling is challenged but not set aside by the supervisory court, the party objecting to jurisdiction cannot raise the same grounds in any subsequent application to set aside the award before the supervisory court, or to resist enforcement of the award before the enforcement court, irrespective of whether the latter is in the same jurisdiction as the supervisory court or elsewhere).

(6) As such, pursuant to s 19 of the IAA, First Media may apply to set aside the Singapore Enforcement Orders under any of the grounds which are found in article 36(1) of the Model Law, even though it did not pursue “active remedies” to challenge the Award on Preliminary Issues under Article 16(3) of the Model Law or set aside the Awards under Article 34(1) of the Model Law.

(7) It is a matter to be determined by Singapore law whether the Additional Parties were properly joined to the Arbitration so as to establish an arbitration agreement with First Media.

(8) Upon the true construction of Rule 24(b), it does not confer on the Tribunal the power to join third parties who are not parties to the arbitration agreement (i.e., the SSA in the present case) into the Arbitration.

(9) Accordingly, the Tribunal’s exercise of its power under Rule 24(b) to join the Additional Parties to the Arbitration was improper with the corollary that no express agreement to arbitrate existed between the Additional Parties and First Media.

(10) In addition, First Media did not waive its rights or conduct itself in such a way that it was estopped from raising the joinder objection.

(11) First Media is entitled to resist the enforcement of the Awards pursuant to s 19 of the IAA.

(12) Nevertheless, partial enforcement of the Awards in favor of the first to fifth applicants (whom First Media did not dispute were proper parties to the SSA and the Arbitration) was viable, and leave to enforce the Awards, to the extent of those parts which are exclusively directed at the first to fifth applicants, was granted.

Thus, the court rejected the submission that Article 16(3) of the Model law was a mandatory route that must be followed. The Court of Appeal held that there was no evidence that the drafters intended to override the co-existence of active and passive remedies. Article 16(3) of the Model Law constituted “neither an exception to the ‘choice of remedies’ policy of the Model Law, nor a ‘one-shot remedy.’” Consequently, leave was granted to appeal on the substantive point of joinder. On the joinder issue, therefore, the court held that since there was no agreement to arbitrate between Lippo and the Astro Joinder Parties, the Tribunal had erred in joining the Astro Joinder Parties, and the Awards could not be enforced against Lippo by *those* parties.

This is consistent with the position in England. In *Dallah*, Lord Collins of Mapesbury stated:

[c]onsequently, in an international commercial arbitration a party which objects to the jurisdiction of the tribunal has two options. It can challenge the tribunal’s jurisdiction in the courts of the arbitral seat; and it can resist enforcement in the court before which the award is brought for recognition and enforcement. These two options are not mutually exclusive, although in some cases a determination by the court of the seat may give rise to an issue estoppel or other preclusive effect in the court in which enforcement is sought. The fact that jurisdiction can no longer be challenged in the courts of the seat does not preclude consideration of the tribunal’s jurisdiction by the enforcing courts.<sup>28</sup>

It was recognized by the Court of Appeal that not overruling the judge’s decision at first instance would have the unwanted effect of constraining party autonomy and compelling parties in international arbitrations seated in Singapore to raise active challenges with the courts. For this reason, when reaching its decision, the Court of Appeal was cognizant of the “practical ramifications” and “potentially far-reaching implications on the practice and flourishing of arbitration in Singapore.”<sup>29</sup>

Thus, through its purposive interpretation of the IAA, the Court of Appeal has confirmed that a “choice of remedies” for domestic international awards rendered in Singapore has been retained in the

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28. *Dallah Real Estate and Tourism Co. v. Ministry of Religious Affairs, Government of Pakistan* 1 AC 763 (2010), at 98.

29. *Id.* at 90.

IAA, bringing the position in Singapore into line with the Model Law as well as other key arbitration jurisdictions, including its regional competitor, Hong Kong. Accordingly, parties involved in international arbitrations seated in Singapore will be afforded the freedom to choose whether to make an active challenge to an award (which may have its own advantages) or wait until the award is sought to be enforced in Singapore, depending on tactical considerations, including cost, efficiency, and timing.

However, before the enforcement proceedings in Singapore took place, the matter was also in the courts for enforcement proceedings in Hong Kong in *Astro Nusantara International BV v. PT First Media*.<sup>30</sup> In 2010, the Hong Kong High Court on application from Astro, granted leave to Astro to enforce the awards as judgments and directed First Media (Lippo) to apply, if it so chose to do, to set aside the orders of the Court within fourteen days of service. No application was made to set aside the Hong Kong orders and, therefore, judgment was entered in Hong Kong against First Media. Further, no application having been made by First Media, in July 2011, Astro obtained a garnishee order to attach a debt due to First Media from one of its majority shareholders. First Media then made two applications to the High Court of Hong Kong seeking:

1. An extension of time to set aside two court orders made by the court in September 2010 granting leave to Astro to enforce five arbitration awards against First Media.
2. To set aside these court orders.

In those applications, the Court was required to consider whether valid grounds existed for granting an extension of time to apply to set aside the court orders fourteen months after the expiry of the prescribed period.

Astro argued on five substantive grounds:

- (1) The Awards, being valid and binding and not having been set aside, have been entered as judgments in Hong Kong. There was no machinery to permit any challenge of such judgments, whether under s 44 of the Arbitration Ordinance, Cap 341 (“Ordinance”) or otherwise, except by way of an appeal to the Court of Appeal.

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30. *Astro Nusantara International BV v. PT First Media*, HCCT 45/2010.

(2) There were no valid grounds to extend the time to apply to set aside the Hong Kong Orders and Hong Kong Judgment fourteen months after the period prescribed by the Orders for making such application has expired.

(3) Further, there was no valid basis under Hong Kong law at the enforcement stage for First Media to challenge the jurisdiction of the Tribunal to make the Awards when it lost its challenge in a ruling on a preliminary issue by the Tribunal and then deliberately decided not to challenge that ruling in court but chose to defend the claims on the merits. First Media's conduct is said to be not consonant with the principle of good faith, or amount to an implied waiver or give rise to an estoppel.

(4) In any event, the Tribunal's decision on jurisdiction was correct, and the Hong Kong court was not bound by the decision of another enforcing court, namely, the Singapore Court of Appeal.

(5) Further, and in any event, the Tribunal made a further finding in the Interim Final Award, namely, that First Media in the course of defending the merits had, by signing the Memorandum of Issues with its particular wording and without reservation, signed a further agreement for the arbitration of the issues identified in the memorandum. This, it was said, amounted to a binding submission to arbitration of those issues. The Interim Final Award has not been challenged or set aside and remained valid and binding. The reasoning of the Tribunal on this further submission was unimpeachable, and was not addressed by the Singapore Courts in the enforcement proceedings in that jurisdiction.

The Court held that there was no basis for accepting a rigid rule which would preclude an enforcement order from challenge as soon as judgment is entered to give effect to the arbitration award. Section 44(1) of the Ordinance provides that enforcement of a Convention award shall not be refused except in the cases mentioned in that section. Section 44(2) of the Ordinance goes to state (*inter alia*) as follows:

Enforcement of a Convention award may be refused if the person against whom it is invoked proves –

- (b) that the arbitration agreement was not valid to which the parties subjected it or, failing any indication thereon, under the law of the country where the award was made; or

...

(d) subject to subsection(4), that the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration or contains decision on matters beyond the scope of the submission to arbitration.

In addition, s.44(3) of the Ordinance, states, relevantly,

[e]nforcement of a Convention award may also be refused if the award is in respect of a matter which is not capable of settlement by arbitration, or if it would be contrary to public policy to enforce the award.

In considering ground 3 put forward by the Astro parties, the Court said that the following basic principles should be borne in mind:

(1) s.44 of the Ordinance represents the statutory enactment of article V of the New York Convention.

(2) The Hong Kong courts approach Convention awards with a pro-enforcement bias: see *Werner A Bock KG v The N's Co Ltd* [1978] HKLR 281 at 285 *per* Huggins JA; *China Nanhai Oil Joint Service Corporation Shenzhen Branch v Gee Tai Holdings Co Ltd* [1995] 2 HKLR 215 at 226 *per* Kaplan J; *Hebei Import & Export Corp. v Polyteck Engineering Co. Ltd.* (1999) 2 HKCFAR 111 at 136A-B *per* Sir Anthony Mason NPJ; *Societe Nationale D'Operations Petrolieres de la Cote d'Ivoire-Holding v Keen Lloyd Resources Ltd* [2004] 3 HKC 452, at paragraph 14 *per* Burrell J.

(3) Enforcement of a Convention award is mandatory unless a case under s.44(2) or (3) of the Ordinance is made out, in which case the court has a *discretion* to permit or refuse enforcement.

(4) The fact that an arbitral award has been refused enforcement by a court in another jurisdiction, even one whose law governs the arbitration agreement or the procedures of the arbitration (sometimes referred to as the *curial* law), is not a ground for resisting enforcement of the arbitral award in Hong Kong under the New York Convention, because different jurisdictions have different rules, laws and regulations governing enforcement of arbitral awards.<sup>31</sup> In principle, this should be the position even where the court in that other jurisdiction also applies the New York Convention in denying enforcement of the arbitral award, because the Hong Kong court applies s.44 of the Ordinance as a

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31. *Societe Nationale D'Operations Petrolieres de la Cote d'Ivoire-Holding v. Keen Lloyd Resources Ltd.*, at para. 14 *per* Burrell J.

piece of domestic legislation, although it would obviously be desirable for different jurisdictions applying the New York Convention to do so in a consistent manner.

(5) Whether a ground has been made out for refusing to enforce a Convention award under s.44(2) and (3) of the Ordinance is a matter governed by Hong Kong law and to be determined by the Hong Kong court. In *Hebei Import & Export Corp. v Polyteck Engineering Co. Ltd.*, supra, Sir Anthony Mason NPJ stated at 136C-E that the Convention distinguished between proceedings to set aside an award in the court of supervisory jurisdiction and proceedings in the court of enforcement. Proceedings to set aside are governed by the law under which the award was made or the law of the place where it was made, while proceedings in the court of enforcement are governed by the law of that forum.<sup>32</sup>

In *Hebei*, Sir Anthony Mason went on to say that where enforcement of an award is resisted on the ground of “public policy” under s.44(3) of the Ordinance, the relevant public policy is that of the jurisdiction in which enforcement is sought.<sup>33</sup> The court held that this is also the position where a party seeks to resist enforcement of an arbitral award on one or more of the *discretionary* grounds under s. 44(2) of the Ordinance. In such a case, the Hong Kong court should apply its own jurisprudence regarding the exercise of its discretion under that section, and approach the matter as one governed by Hong Kong law.

The court held that First Media should not be permitted to resist enforcement of the awards on the principle of *good faith*, as First Media did not challenge the tribunal’s preliminary ruling on jurisdiction and instead sought to defend its claims on the merits in the arbitration. The court also stated that a Hong Kong court was bound by the decision of the Singapore Court of Appeal because it was the enforcing court. The Court held that First Media was not entitled to an extension and dismissed the setting aside application, citing the following reasons:

1. First Media’s application to set aside the orders for enforcement was made fourteen months out of time.
2. The Court was not prepared to exercise its discretion to extend the time for First Media’s application given that the delay was substantial and a result of First Media’s tactical decision to not

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32. *Astro Nusantara International BV v. PT First Media*, supra note 30, at 73.

33. 2 H.K.C.F.A.R. 111, at 136G-H (2001).



resist enforcement in Hong Kong and the awards had not been set aside and were valid and binding on First Media itself.

3. The Singapore Court of Appeal's decision was final and conclusive as to whether the tribunal had jurisdiction to join the other parties into the arbitration.

The court referred to two decisions in support of the proposition that the court has a discretion under s.44(2) of the Ordinance to decline to refuse enforcement, even if a ground for refusal might otherwise be made out, in circumstances where there has been a breach of the good faith, or *bona fide*, principle on the part of the award debtor: *China Nanhai Oil Joint Service Corp. Shenzhen Branch v. Gee Tai Holdings Co. Ltd.* and *Hebei Import & Export Corp. v. Polyteck Engineering Co. Ltd.*<sup>34</sup>

In *China Nanhai Oil Joint Service Corporation Shenzhen Branch v. Gee Tai Holdings Co. Ltd.*,<sup>35</sup> the court held that there was a general duty of good faith which was distinct from principles of estoppel (and presumably waiver) under domestic or municipal laws. Justice Kaplan said in that case in relation to the application of the principle of good faith:

It strikes me as quite unfair for a party to appreciate that there might be something wrong with the composition of the tribunal yet not make any formal submission whatsoever to the tribunal about its own jurisdiction, or to the arbitration commission which constituted the tribunal and then to proceed to fight the case on the merits and then 2 years after the award attempt to nullify the whole proceedings on the grounds that the arbitrators were chosen from the wrong CIETAC list. I think there is much force in Dr. van den Berg's point that even if a ground of opposition is proved, there is still a residual discretion left in the enforcing court to enforce nonetheless. This shows that the grounds of opposition are not to be inflexibly applied. The residual discretion enables the enforcing court to achieve a just result in all the circumstances although I accept that in many cases where a ground of opposition is established, the discretion is unlikely to be exercised in favour of enforcement. If the enforcing court was obliged to refuse enforcement in the event of the establishing of a

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34. *China Nanhai Oil Joint Service Corp. Shenzhen Branch v. Gee Tai Holdings Co. Ltd.* [1994] 3 HKC 375; *Hebei Import & Export Corp. v. Polyteck Engineering Co. Ltd.* 39383 [1995] 2 HKLR 215.

35. *China Nanhai Oil Joint Service Corp. Shenzhen Branch v. Gee Tai Holdings Co. Ltd.*, *supra* note 34.

ground of opposition, I believe that it would be far harder to import the doctrine of estoppel. But a discretion there is, and I for myself are prepared to hold that on a true construction of the Convention there is indeed a duty of good faith which in the circumstances of this case required the Defendant to bring to the notice of the full tribunal or the CIETAC Commission in Beijing its objections to the formation of this particular arbitral tribunal. Its failure to do so and its obvious policy of keeping this point up its sleeve to be pulled out only if the arbitration was lost, is not one that I find consistent with the obligation of good faith nor with any notions of justice and fair play.<sup>36</sup>

The Court of Final Appeal in *Hebei*, stated in relation to the failure by a party to raise an objection but instead continue participating in the arbitration as follows:

The respondent's conduct amounted to a breach of the principle that a party to an arbitration who wishes to rely on a non-compliance with the rules governing an arbitration shall do so promptly and shall not proceed with the arbitration as if there had been no compliance, keeping the point up his sleeve for later use.<sup>37</sup>

Hence, First Media's failure to challenge the tribunal's preliminary ruling on jurisdiction amounted to a breach of the principle of good faith. Chow J stated that he had the discretion to refuse enforcement if the party's conduct was found to be in breach of good faith. On good faith, the Court stated:

. . . it seems clear that what First Media decided to do was to defend the claim on the merits in the hope that it would succeed before the Tribunal, and keep the jurisdictional point in reserve to be deployed in the enforcement court only when it suited its interests to do so. The fact that First Media did raise the objection with the Tribunal should not, in my view, make any difference having regard to its subsequent conduct [during the arbitration] . . . First Media should not be permitted to rely on s.44(2) of the Ordinance to resist enforcement of the awards because it has acted in breach of the good faith, or bona fide, principle.<sup>38</sup>

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36. *China Nanhai Oil Joint Service Corp. Shenzhen Branch v. Gee Tai Holdings Co. Ltd.* [1995] 2 HKLR 215, at 225.

37. *Hebei Import & Export Corp. v. Polyteck Engineering Co. Ltd.* [1999] 2 H.K.C.F.A.R. 111 (C.F.A.), at 137.

38. *Astro Nusantara International BV v. PT First Media*, *supra* note 30, at 44.

Although First Media had successfully resisted the enforcement of the Awards before the Singapore Court of Appeal, the Singapore court was acting in its capacity as the enforcement court and not as supervisory court. The Awards have not been set aside. They are still valid and created legally binding obligations on First Media to satisfy them.

We come full circle with the distinction between setting aside proceedings and enforcement proceedings and the respective powers exercisable by each court in each scenario. This distinction has been held to be a well-understood and accepted conceptual difference, in that, setting-aside proceedings are a means of “recourse against the award,” that is, they are proceedings to attack the award itself. If successful, the award is annulled and, in many cases, no longer exists. The legal and practical consequence is that, generally speaking, the award is no longer capable of enforcement anywhere else. It also means, generally, that the award no longer binds the parties and fresh proceedings may be commenced.

This is very different from a party merely raising defenses to enforcement. A court’s ruling on whether to enforce an award within its own jurisdiction is not an attack against the award itself but a statement by the court that it will not lend its aid to the enforcement of the award in that jurisdiction. The effect of such a ruling is, in principle, confined to that jurisdiction alone and it is possible for an award to be refused enforcement in one jurisdiction but enforced in another.

As the foregoing cases demonstrate, it is far from clear and the debate will continue for some time to come.