



Hong Kong Court of Appeal holds that the “Good Faith” Principle is Complementary to the “Choice of Remedies” Principle, Aligning Hong Kong Law with Singapore Law

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On 5 December 2016, in a case concerning the enforcement of five arbitral awards (the “**Awards**”) made in favour of Astro Group (“**Astro**”) against PT First Media TBK (“**First Media**”), the Hong Kong Court of Appeal (“**HKCA**”) found that the “good faith” principle was complementary to the “choice of remedies” principle, moving Hong Kong law in line with Singapore law. Under the “choice of remedies” principle, the award debtor may resist recognition and enforcement of an arbitral award, which is what the Singapore and Hong Kong courts refer to as a passive remedy, even though it had not applied to challenge a preliminary ruling on jurisdiction or to set aside an arbitral award, referred to as active remedies.

In the lower court decision, Judge Anderson Chow Ka-ming (“**Chow J**”) held that First Media had breached the “good faith” principle by participating in the arbitration but then only raising objections to jurisdiction later at the enforcement stage. On appeal, the HKCA overturned the lower court’s finding and held that there was no breach of the “good faith” principle.

Just three years prior in Singapore, First Media had successfully resisted enforcement of the Awards before the Singapore Court of Appeal based on the Singapore Court of Appeal’s holding that parties who do not elect active remedies are not thereby precluded from relying on passive remedies to resist recognition and enforcement of arbitral awards.

In a lengthy judgment littered with references to the Singapore Court of Appeal judgment, the HKCA found that one of the reasons why First Media had not breached the good faith principle is that First Media did not remain silent about its objection to jurisdiction even though it had not challenged the preliminary award, and had expressly preserved its rights throughout as regards jurisdiction. This was confirmed by the Singapore Court of Appeal. Additionally, the HKCA held that Chow J had “fallen into error” in not giving weight to the decision of the supervisory court of the seat of the arbitration, i.e. the Singapore Court of Appeal judgment, in considering the conduct of the arbitration for the purpose of the good faith principle.

However, the HKCA acknowledged that “[a]pplying the principle of “good faith” too rigorously whenever there is a failure to pursue active remedies might bring this into conflict with the “choice of remedies” principle”. To prevent such a conflict, the court should consider the “full circumstances why an active remedy is not pursued or other relevant considerations (such as whether there was a clear reservation of rights so the opposite party was not misled)”.

The decision of the HKCA brings Hong Kong’s position in line with Singapore’s position in respect of raising jurisdictional objections before the courts.

In conclusion, this pro-arbitration stance of the Hong Kong courts has allowed Hong Kong to maintain its appeal as one of the world’s leading arbitral centres, despite stiff competition from Singapore. This decision of the HKCA also underscores the importance of parties expressly reserving their position on jurisdiction in order to

avail themselves of passive remedies during the enforcement of arbitral awards.

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