

**IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
CONSTRUCTION AND ARBITRATION PROCEEDINGS
NO. 45 OF 2010**

BETWEEN

- (1) ASTRO NUSANTARA INTERNATIONAL B.V.
- (2) ASTRO NUSANTARA HOLDINGS B.V.
- (3) ASTRO MULTIMEDIA CORPORATION N.V.
- (4) ASTRO MULTIMEDIA N.V.
- (5) ASTRO OVERSEAS LIMITED (formerly
known as AAAN (Bermuda) Limited)
- (6) ASTRO ALL ASIA NETWORKS PLC
- (7) MEASAT BROADCAST NETWORK
SYSTEMS SDN BHD
- (8) ALL ASIA MULTIMEDIA NETWORK FZ-LLC

Applicants/

Claimants in the Arbitration/

Judgment Creditors

and

- (1) PT AYUNDA PRIMA MITRA
- (2) PT FIRST MEDIA TBK (formerly known
as PT BROADBAND MULTIMEDIA TBK)
- (3) PT DIRECT VISION

Defendants/

Respondents in the Arbitration/
Judgment Debtors

and

ACROSSASIA LIMITED

Garnishee

Before: Deputy High Court Judge Lok in Chambers

Date of Hearing: 15 March 2012

Dates of Decisions: 15 & 21 March 2012

Date of Reasons for Decision: 21 March 2012

DECISION & REASONS FOR DECISION

1. This is an application (“the Subject Application”) by the applicants (collectively “Astro”) dated 20 February 2012 for an order that, *inter alia*:

- (i) all further proceedings in this action, including the application of the 2nd defendant, PT First Media TBK (“First Media”), by its summons dated 18 January 2012, be stayed pending the determination by the Singapore High Court (“the Singapore Court”) of the application by First Media to set aside the orders made on 5 August and 3 September 2011 by which Astro were given leave to enforce 5 arbitral awards made in the Singapore International Arbitration Centre (“the SIAC”) Case No. 62 of 2008; and

- (ii) pending the final determination of the said setting aside application in the Singapore Court, the garnishee, AcrossAsia Limited (“AAL”), shall pay all sums due and payable, as they become due and payable, to the defendants into court.

BACKGROUND

(i) The arbitration proceedings in Singapore

2. Astro are related companies within a group of companies with the headquarter in Malaysia and First Media is an Indonesian company listed in the Indonesian Stock Exchange.

3. The dispute originated from a Subscription and Shareholders’ Agreement dated 11 March 2005 (“SSA”) between the 3rd, 4th and 5th applicants and the 1st, 2nd and 3rd defendants. Pursuant to a Novation Agreement dated 13 September 2005, the 1st and 2nd applicants became parties to the transaction in place of the 3rd and 4th applicants.

4. Pursuant to clause 17.4 of the SSA, the 1st to 8th applicants (Astro) initiated arbitration in the SIAC against the defendants (“the SIAC Arbitration”). The 6th to 8th applicants were not parties to the SSA.

5. A total of 5 arbitral awards were subsequently made in the SIAC Arbitration (collectively “the Awards”). They include:

- (i) an “Award on Preliminary Issue of Jurisdiction, Interim Anti-Suit Injunction and Joinder” dated 7 May 2009 (“the 7 May Award”);

- (ii) a “Further Partial Award” dated 3 October 2009;
- (iii) an “Award on Costs for the Preliminary hearing from 20 to 24 April 2009” dated 5 February 2010;
- (iv) an “Interim Final Award” dated 16 February 2010; and
- (v) a “Final Award – Interests and Costs” dated 3 August 2010.

6. The position of First Media is that there was no basis to join the 6th to 8th applicants to the SIAC Arbitration as there were not parties to the SSA or any arbitration agreement. However, in the 7 May Award, the tribunal of the SIAC (“the Tribunal”) allowed the joinder of the said applicants on the basis that clause 17.4 of the SSA provided that the SIAC Arbitration shall be conducted in accordance with the SIAC Rules and rule 24.1b provides that the Tribunal shall have the power to “*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.*” First Media’s contention is that there was no agreement to allow the Tribunal to join non-parties to the SSA in the arbitration by the mere adoption of the SIAC Rules in clause 17.4 of the SSA. The 4 awards made subsequent to the 7 May Award contain awards of money and declarations in favour of the 6th to 8th applicants, and the sums allegedly due from First Media under the Awards are over US\$130 million.

(ii) *The enforcement proceedings in Hong Kong*

7. Astro subsequently sought to enforce the Awards in Hong Kong, and leave to enforce was obtained pursuant to the orders of

Saunders J dated 3 August and 20 September 2010 (“the Hong Kong Orders”). Judgment was entered in terms of the Awards on 9 December 2010 (“the Hong Kong Judgment”).

8. It is First Media’s position that the purported service of the Hong Kong Orders on First Media in Indonesia was contrary to Indonesian law and therefore not effective. Further, First Media claims that, as it had no asset in Hong Kong, no step was taken to set aside the Hong Kong Orders at the initial stage.

9. On 14 July 2011, Astro applied *ex parte* for a garnishee order against AAL. AAL holds an interest of 55.1% in the issued share capital of First Media, and the allegation was that a loan of US\$44 million was advanced by First media to AAL. A garnishee order to show cause was granted on 22 July 2011.

10. By 2 summonses dated 18 January 2012, First Media applied in the Court of First Instance for the following orders:

(i) the first summons seeking: (a) extension of time to set aside the Hong Kong Orders and the Hong Kong Judgment; (b) the Hong Kong Orders and Judgment be set aside; and (c) the garnishee order be discharged (“the Hong Kong Setting Aside Application”); and

(ii) the second summons seeking: (a) stay of execution; (b) adjournment of the garnishee hearing, pending the determination of the Hong Kong Setting Aside Application.

11. On 30 January 2012, the parties appeared before Burrell DHCJ for directions on the Hong Kong Setting Aside Application. The substantive hearing of the Hong Kong Setting Aside Application is now fixed before Au J on 27 March 2012 with an estimated time of 2 days.

(iii) Enforcement proceedings in Singapore

12. On about 5 August and 3 September 2010, Astro obtained orders for the enforcement of the Awards in Singapore (“the Singapore Orders”). On 24 March 2011, judgment was entered in Singapore against the defendants (“the Singapore Judgment”).

13. After obtaining leave, First Media made an application in the Singapore Court on 12 September 2011 to set aside the Singapore Orders (“the Singapore Setting Aside Application”).

14. On 16 November 2011, the Singapore Court allowed Astro’s application for admission of Queen’s Counsel to represent them in the Singapore Setting Aside Application. The decision is subject to an appeal and no date has been fixed for the substantive hearing of the Singapore Setting Aside Application.

15. There is dispute between the parties as to who is responsible for the delay in the Singapore proceedings. A pre-trial conference will take place on 27 March 2012. As leave has already been given for the parties to seek an urgent date to hear the Singapore Setting Aside Application, Astro anticipate that the hearing date will be some time in April or May 2012.

THE SUBJECT APPLICATION

(i) Stay of the Hong Kong Setting Aside Application pending the result of the Singapore Setting Aside Application

16. The first issue I have to decide under the Subject Application is whether I should stay the Hong Kong Setting Aside Application pending the result of the Singapore Setting Aside Application. I answered such question in the affirmative in the hearing on 15 March 2012 and I now give my reasons.

17. The Singapore Setting Aside Application is made essentially on the basis that there was no arbitration agreement between the 6th to 8th applicants and First Media. Based on the materials supplied to me in the affidavit evidence, I am given to understand that the Singapore Court has to determine the following issues in the Singapore Setting Aside Application:

- (i) whether First Media is right in contending that the Tribunal had no jurisdiction to join the 6th to 8th applicants to the SIAC Arbitration, and whether by ordering such joinder, which it did by the 7 May Award, the Tribunal had wrongly interpreted or applied rule 24(b) of the SIAC Rules;
- (ii) the effect of First Media deliberately deciding not to appeal the 7 May Award and its counsel's confirmation in the course of the SIAC Arbitration proceedings that First Media had abandoned its right to appeal and its fully participating in the arbitration thereafter;

(iii) the effect of First Media signing the Memorandum of Issues dated 31 July 2009 which set out the issues still to be determined and confirmed that certain issues had already been fully and finally determined by the 7 May Award, including the issue about the Tribunal's jurisdiction.

18. It is clear that the aforesaid issues have to be determined in accordance with Singapore law.

19. In support of the Hong Kong Setting Aside Application, First Media has adduced evidence of Singapore law in the form of an opinion by Mr Vinodh S Coomaraswamy SC dated 17 January 2012 for the purpose of contending that the Awards are unenforceable under the New York Convention having regard to the terms of Article II and Article V 1(a) and (c). The opinion of Mr Coomaraswamy is very much based on the premise that, as there was no valid arbitration agreement between the 6th to 8th applicants and First Media, the Tribunal had no jurisdiction to join these applicants to the SIAC Arbitration and the Awards are therefore not enforceable under the New York Convention. On the other hand, Astro have adduced evidence of Singapore law in the form of a different legal opinion of Mr Michal Hwang SC which annexes 2 earlier opinions dated 12 March and 20 August 2009. It is clear that, in determining the Hong Kong Setting Aside Application, the Hong Kong court has to consider and determine issues of Singapore law which are identical to those raised by First Media in the pending Singapore Setting Aside Application.

20. In such circumstances, I agree with Mr. Smith SC, counsel for Astro, that, as Singapore is the seat of the arbitration and Singapore law is the governing law, it is obviously preferable to have these issues

determined by the Singapore Court as questions of law, rather than having them decided as questions of fact (foreign law being a question of fact) in Hong Kong. There is of course only limited scope for any appeal on a question of fact, and so fairness between the parties demands that questions of law be decided as questions of law and not as questions of fact.

21. Further, it is also preferable to have questions of foreign law to be decided by the courts of the country whose law is in issue. As observed by Brandon J, as he then was, in *Eleftheria* [1970] P 94, at 105B, this is very much “a matter of common sense”.

22. In fact, as parties in the Singapore Setting Aside Application and the Hong Kong Setting Aside Application are the same and there are common issues involved in two sets of proceedings, it can save a lot of unnecessary time and costs if the issues are resolved in the Singapore Court first. In such case, the Hong Kong court may accept the determination on questions of law made by the Singapore Court without the necessity of considering the disputed expert evidence on foreign law on the same issues (see: *First Laser Ltd v Fujian Enterprises Ltd*, unreported, HCA No. 4412 of 2001, decision of Lam DHJC, as he then was, on 12 December 2002, at §56). It had actually been held in *National Bank of Egypt International v Oman Housing Bank* [2003] 1 All ER (Comm) 246 at 249f, that, as the foreign court had already decided the question of the foreign law in issue, the court, in the exercise of case management powers, should exclude expert evidence on that issue which would result in considerable saving in time and costs. Hence, I agree with Mr Smith that there are compelling reasons in favour of the stay of the Hong Kong Setting Aside Application.

23. Mr. Dawes, counsel for First Media, submits that as the parties are now ready for the substantive hearing of the Hong Kong Setting Aside Application which is only about 2 weeks away from the hearing before myself, in the interest of procedural economy and cost-effectiveness, the substantive hearing should proceed as scheduled. Further, the issues to be considered by the court in the Hong Kong Setting Aside Application are much wider. Even if the Hong Kong court is to determine that there was in fact no agreement to arbitrate, the court would still have a residual discretion, albeit a narrow one, and probably limited to waiver or estoppels, to enforce the Awards (see: *Dallah Real Estate and Tourism Holding Company v The Ministry of Religious Affairs, Government of Pakistan* 133 Con LR 1 (SC) at §67 and *Tweeddale & Tweeddale, Arbitration of Commercial Disputes*, 2005 at §§13.84-13.97). The Hong Kong court may also have to determine whether there is an arbitration agreement in writing as a matter of Hong Kong law, and so the matters that the Hong Kong court has to consider are more extensive. Further, Singapore law and Hong Kong law in this area are very much the same as they share a common heritage of the English common law system, and so the Hong Kong court should have no difficulty in dealing with the legal issues in question.

24. Despite the able submission of Mr Dawes, I cannot accept his argument. Although the issues that have to be considered by the Hong Kong court are more extensive, one cannot overlook the fact that the main ground to challenge the Singapore Judgment and the Hong Kong Judgment is the same, namely the Tribunal had wrongly joined the 6th to 8th applicants to the SIAC Arbitration. Since this issue has to be determined in accordance with Singapore law, from the point of view of fairness and procedural efficiency, such issue should be determined by the Singapore

Court first. I agree that Astro may be late in making the Subject Application, but that should not disturb the conclusion that a stay of the Hong Kong Setting Aside Application is eminently appropriate in the circumstances. In any event, the court will take into account the lateness in the making of the Subject Application in considering the issue of costs in due course.

(ii) Payment of the debt by AAL into court

25. The second issue I have to consider under the Subject Application is whether the court should order the garnishee, AAL, to pay the debt it owes to First Media into the Hong Kong court pending the result of the Hong Kong Setting Aside Application. In the hearing on 15 March 2012, I reserved my decision on this particular issue. I now give the decision.

26. First Media is an indirect 55.1% subsidiary of AAL, which is a company incorporated in the Cayman Islands and listed in the GEM Market of the Hong Kong Stock Exchange.

27. AAL does not dispute that it owes a debt to First Media in the amount of US\$44 million with the due date on 30 June 2012. I am given to understand that the loan agreement for such debt (“the Loan Agreement”) was signed in Indonesia and the governing law of the Loan Agreement is Indonesian law.

28. Both AAL and First Media object for an order for AAL to pay the debt into court. Mr Dawes refers me to the case of *Karaha Bodas Company LLC v Persusahaan Pertambangan Minyak Dan Gas Bumi*

Negara, unreported, HCCT No 28 of 2002, decision of Burrell J on 20 December 2002) and argues that the court should not make such order, as it would require AAL or First Media to bring in more assets from overseas to Hong Kong which would be unfair to them. On the other hand, Mr Barber, solicitor for AAL, argues that the court should not garnishee the debt because, although AAL is within the jurisdiction, there is a risk that AAL may have to pay the debt twice because such debt is recoverable outside the jurisdiction.

29. Undoubtedly, the Loan Agreement has a certain degree of international dimension. The Loan Agreement was signed in Indonesia and the governing law is Indonesian law. However, so long as the debtor is within the jurisdiction and the debt is properly recoverable within the jurisdiction, the debt is attachable under the law in Hong Kong (see: *Hong Kong Civil Procedure 2012*, §§49/1/8 and 49/1/24). As there is a proper judgment entered in favour of Astro against First Media, the debt owed by AAL to First Media is attachable. To me, the question is not a matter of jurisdiction, but rather whether the court should exercise the discretion to order the payment of the debt into court.

30. As there is a pending Hong Kong Setting Aside Application, the court should not order AAL to pay the debt directly to Astro. In fact, that is not the request of Astro. However, since there is a proper garnishee order *nisi* against AAL and AAL is not disputing the liability under the debt, the court should order AAL to pay the debt into court when it is due for payment. By so doing, AAL will not suffer any prejudice because the debt is due for payment in any event. There is also no risk of double payment because the money is there in the court. If necessary, the money

can be paid out of the court to satisfy any possible claim by First Media against AAL.

31. In the 2010 Annual Report of AAL, doubts had been raised as to the ability of AAL as a going concern. Although the 2011 Half-year Report seems to suggest that the financial position of AAL has improved, Astro are concerned that AAL will be unable to pay Astro pursuant to the garnishee order if made absolute. This is certainly a legitimate concern on the part of Astro, and in my judgment, this is a strong reason why AAL should be asked to pay the debt into court. In the meantime, the garnishee order absolute application should be adjourned pending the result of the Hong Kong Setting Aside Application.

32. *Karaha* is not a case that can assist First Media. In that case, the plaintiff is asking for security under O 73 r 10A of the RHC pending the defendant's application to set aside the *ex parte* order enabling the enforcement of an arbitral award made in Switzerland (though the hearing was actually conducted in Paris). Burrell J refused to exercise the discretion to order security, and one of the reasons was that the making of the order would require the defendant to bring in more assets from overseas which could have a seriously adverse and unnecessarily unjust effect on the defendant. In the present case, the making of the order would have no such unjust effect on First Media or AAL. For AAL, it has to pay the debt in any event. For First Media, it may be deprived of the use of the fund for a short period of time. However, as there is an existing judgment for the enforcement of the Awards and there is delay on the part of the First Media in making the Hong Kong Setting Aside Application, such inconvenience to First Media is quite justified. In any event, the Singapore Setting Aside Application is going to be heard soon. In the case of any

changes in the circumstances, the parties are at liberty to make application to deal with the fund in the court.

33. I therefore make an order in terms of paragraphs 2 and 5 of Astro's summons dated 20 February 2012. I would ask the parties to work out the date when the interest under the Loan Agreement is or was due for payment so that the same can be expressly stipulated in the order. In the case of any disagreement, the parties can come back to the court for a determination. There is no dispute that the due date of the principal under the Loan Agreement is 30 June 2012 and the same should also be stated in the order. As mentioned above, I provide for liberty to apply in the order.

COSTS

34. I now also give my reserved decision on the issue of costs.

35. In general, the parties agree for costs of the Subject Application be reserved.

36. However, Mr Dawes submits that First Media should at least, at this stage, get the costs of and occasioned by the adjournment of the substantive hearing of the Hong Kong Setting Aside Application on 27 March 2012. If Astro took the view that the Hong Kong Setting Aside Application should be heard after the Singapore Setting Application, they should have informed the court of such stance in the direction hearing on 30 January 2012. In such case, the court would deal with this particular issue first without the need to fix the date for the substantive hearing of the Hong Kong Setting Aside Application or to give directions for the filing of affidavit evidence for the substantive hearing. As Astro made the Subject

Application very late on 20 February 2012, costs incurred for preparation of the substantive hearing have been wasted.

37. Mr Smith seeks to justify Astro's conduct in the direction hearing. Due to the heavy caseload in the Court of First Instance, Astro did not anticipate that the hearing date of the Hong Kong Setting Aside Application would be earlier than that of the Singapore Setting Aside Application, and that was why they did not inform the court of their stance in the direction hearing.

38. I do not accept such explanation. It was wrong for Astro to make any assumption about the court diary. By reason of the delay in making known their stance, part of the costs incurred for the preparation of the substantive hearing on 27 March 2012 have been wasted. I therefore order that, save that the costs of and occasioned by the adjournment of the hearing on 27 March 2012, if any, be to First Media and AAL to be taxed and paid after the final determination of the Hong Kong Setting Aside Application, the costs of the Subject Application be reserved.

(David Lok)
Deputy High Court Judge

Mr Clifford Smith SC, instructed by Clifford Chance, for the applicants

Mr Victor Dawes, instructed by Sidley Austin, for the 2nd defendant

Mr William Barber, of Reed Smith Richards Butler, for the garnishee