The Enforcement of Foreign Arbitral Awards in the Asia Pacific: Case Studies.
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A case study: Astro v Lippo
Long running dispute between Malaysia's Astro Group and Indonesia's Lippo Group.
Lippo for many years avoided the enforcement of the award rendered from the Singapore International Arbitration Centre ('SIAC') in favour of Astro.
Enforcement proceedings in Hong Kong have finally yielded results.
To date, enforcement in the UK, Singapore, and Indonesia have been unsuccessful.
astro
LIPPO GROUP
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A case study: Astro v Lippo
Facts:
Failed satellite television joint venture between Indonesian conglomerate Lippo's First Media, and companies within a Malaysian media group Astro.
Clause 17 of The Agreement between the parties required that all disputes in connection with, or in relation to, the joint venture were to be referred to arbitration.
Despite Clause 17, Lippo attempted to bring several actions in tort in Indonesia.
Astro commenced arbitration proceedings in Singapore's International Arbitration Centre (SIAC), and took the position that the Indonesian court proceedings were in breach of the arbitration clause in The Agreement.
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A case study: Astro v Lippo
Facts (cont.):
The Agreement contemplated the provision of services, equipment, and finance ('support services') by three Astro group companies (the 'Suppliers'), however these Suppliers were never made a party to The Agreement.
Despite this, Astro sought to have them joined to the arbitration, seeking a declaration that there was no binding joint venture and no continuing obligation to provide support services. Both were granted.
SIAC awarded Astro US$300 million in damages, interest, and costs.
In late 2010 Astro commenced enforcement proceedings for the awards in Indonesia, Malaysia, Hong Kong and Singapore.
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A case study: Astro v Lippo
Indonesia:
Astro failed to enforce the awards against Lippo in Indonesia on the basis that the award:
i. Was contrary to public order;
ii. Interfered with Indonesian judicial process; and
iii. Violated the sovereignty of Indonesia.
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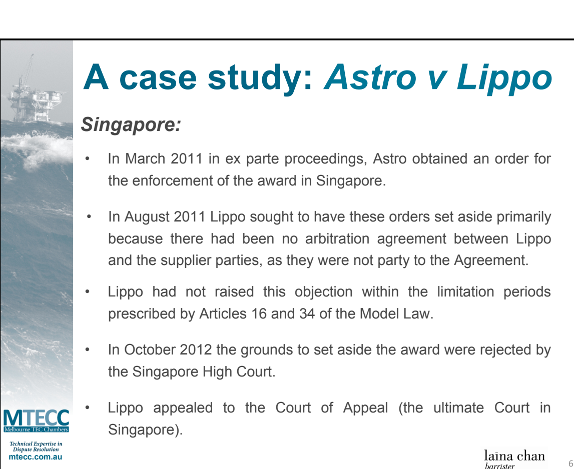
A case study: Astro v Lippo
Singapore:
In March 2011 in ex parte proceedings, Astro obtained an order for the enforcement of the award in Singapore.
In August 2011 Lippo sought to have these orders set aside primarily because there had been no arbitration agreement between Lippo and the supplier parties, as they were not party to the Agreement.
Lippo had not raised this objection within the limitation periods prescribed by Articles 16 and 34 of the Model Law.
In October 2012 the grounds to set aside the award were rejected by the Singapore High Court.
Lippo appealed to the Court of Appeal (the ultimate Court in Singapore).
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A case study: *Astro v Lippo*

Hong Kong:

- In December 2010 judgment was entered in terms of the award in the Hong Kong High Court.
- Astro was granted a Garnishee Order against Across Asia (parent company and controlling shareholder of Lippo).
- Lippo appealed the Garnishee Order.
- As a result of the Singapore Court of Appeal decision of 31 October 2013, Lippo was granted a stay of execution on the Garnishee Order Absolute in Hong Kong.
- In the absence of a judgment debt to form the basis of the Garnishee Order, the Court held that was the just outcome

THE HIGH COURT

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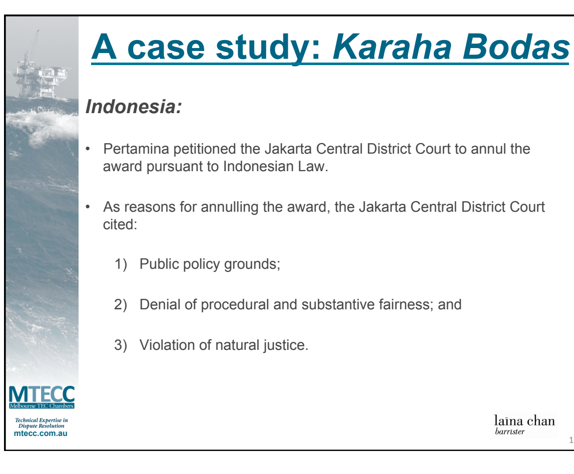

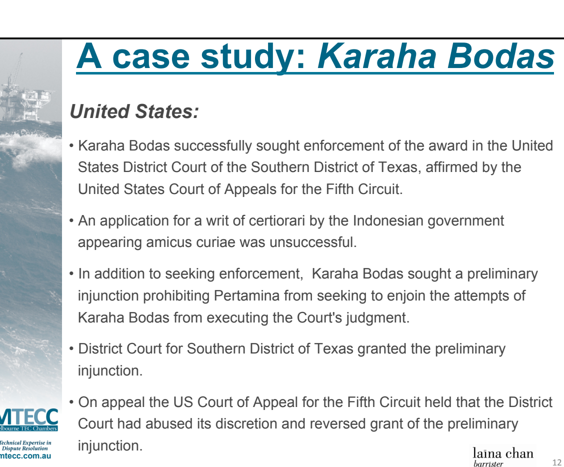

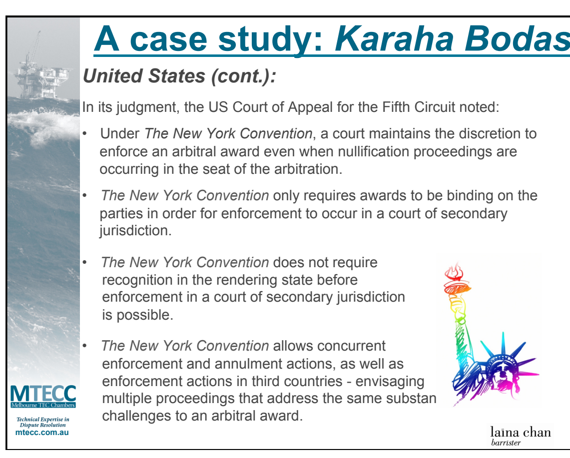
A case study: Karaha Bodas
United States (cont.):
In its judgment, the US Court of Appeal for the Fifth Circuit noted:
• Under The New York Convention, a court maintains the discretion to enforce an arbitral award even when nullification proceedings are occurring in the seat of the arbitration.
• The New York Convention only requires awards to be binding on the parties in order for enforcement to occur in a court of secondary jurisdiction.
• The New York Convention does not require recognition in the rendering state before enforcement in a court of secondary jurisdiction is possible.
• The New York Convention allows concurrent enforcement and annulment actions, as well as enforcement actions in third countries - envisaging multiple proceedings that address the same substan challenges to an arbitral award.
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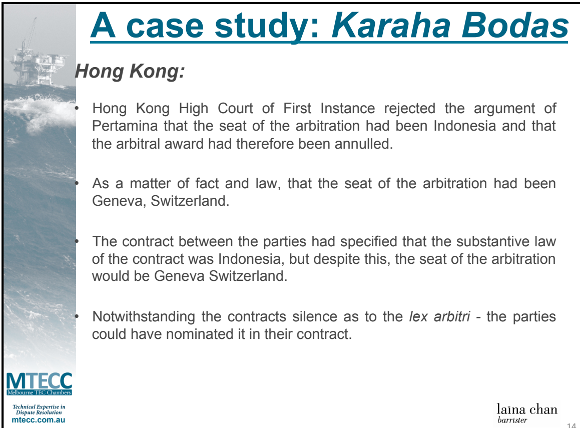
A case study: Karaha Bodas
Hong Kong:
• Hong Kong High Court of First Instance rejected the argument of Pertamina that the seat of the arbitration had been Indonesia and that the arbitral award had therefore been annulled.
• As a matter of fact and law, that the seat of the arbitration had been Geneva, Switzerland.
• The contract between the parties had specified that the substantive law of the contract was Indonesia, but despite this, the seat of the arbitration would be Geneva Switzerland.
• Notwithstanding the contracts silence as to the lex arbitri - the parties could have nominated it in their contract.
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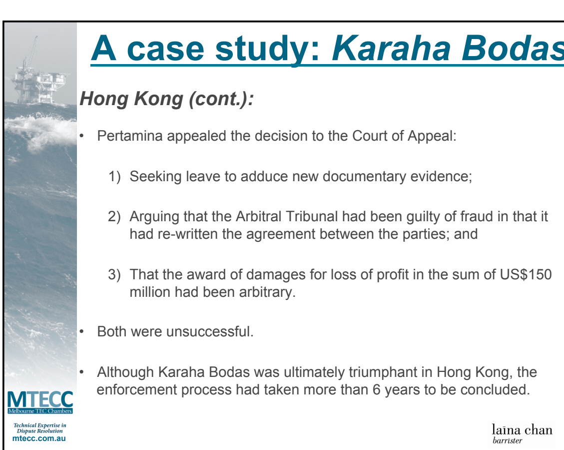
A case study: Karaha Bodas
Hong Kong (cont.):
• Pertamina appealed the decision to the Court of Appeal:
1) Seeking leave to adduce new documentary evidence;
2) Arguing that the Arbitral Tribunal had been guilty of fraud in that it had re-written the agreement between the parties; and
3) That the award of damages for loss of profit in the sum of US$150 million had been arbitrary.
• Both were unsuccessful.
• Although Karaha Bodas was ultimately triumphant in Hong Kong, the enforcement process had taken more than 6 years to be concluded.
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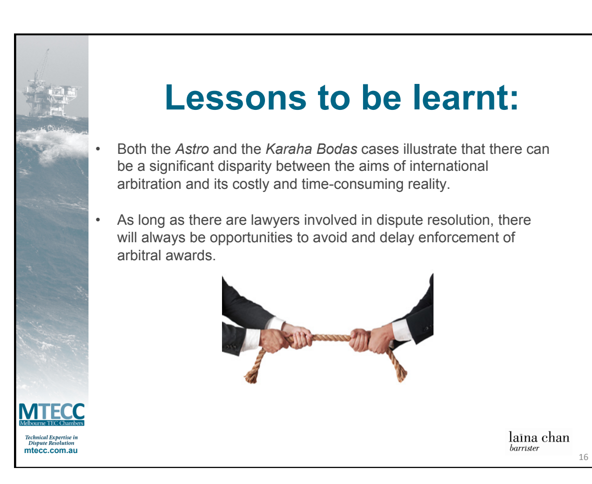
Lessons to be learnt:
• Both the Astro and the Karaha Bodas cases illustrate that there can be a significant disparity between the aims of international arbitration and its costly and time-consuming reality.
• As long as there are lawyers involved in dispute resolution, there will always be opportunities to avoid and delay enforcement of arbitral awards.
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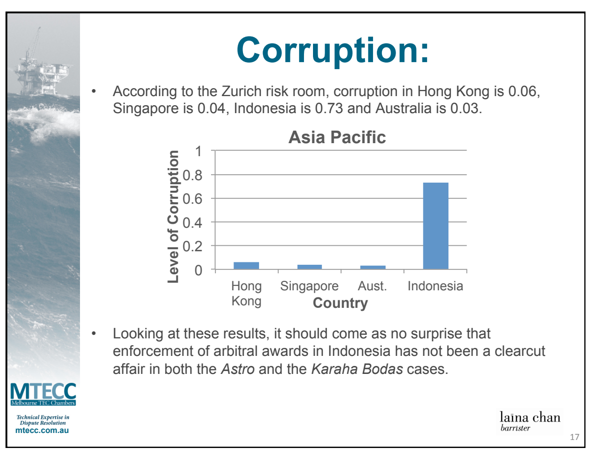
Corruption:
• According to the Zurich risk room, corruption in Hong Kong is 0.06, Singapore is 0.04, Indonesia is 0.73 and Australia is 0.03.
Asia Pacific
Level of Corruption
1
0.8
0.6
0.4
0.2
0
Hong Kong
Singapore
Aust.
Indonesia
Country
• Looking at these results, it should come as no surprise that enforcement of arbitral awards in Indonesia has not been a clearcut affair in both the Astro and the Karaha Bodas cases.
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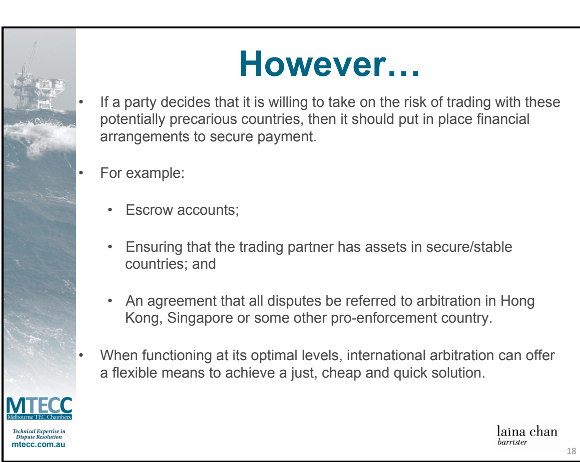
However…
• If a party decides that it is willing to take on the risk of trading with these potentially precarious countries, then it should put in place financial arrangements to secure payment.
• For example:
• Escrow accounts;
• Ensuring that the trading partner has assets in secure/stable countries; and
• An agreement that all disputes be referred to arbitration in Hong Kong, Singapore or some other pro-enforcement country.
• When functioning at its optimal levels, international arbitration can offer a flexible means to achieve a just, cheap and quick solution.
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