



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.




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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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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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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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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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Singapore (cont.):

- On 31 October 2013 the Court of Appeal overturned the decision of the High Court.
- SIAC did not have the jurisdiction to join the Suppliers to the arbitration without Lippo's consent.
- The award in favour of the Suppliers was set aside.
- The Court found that there is a "choice of remedies" available to a party seeking to challenge an arbitral award on the grounds of jurisdiction.



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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.



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Hong Kong (cont.):

- On 17 February 2015 the Suppliers in the Court of First Instance in Hong Kong were afforded a win.
- This was despite the judgment of the Singapore Court of Appeal.
- The Court held that the fact the arbitral award had been refused enforcement in another jurisdiction was not a ground for resisting enforcement in Hong Kong as different jurisdictions have different laws.
- It is a matter governed by Hong Kong law and is to be determined by a Hong Kong Court.
- The decision confirmed Hong Kong's pro-enforcement stance.

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The Karaha Bodas case:

Facts:

- An award had been granted against Pertamina (a government owned Indonesian company) in Geneva in favour of two Cayman Island subsidiaries of the US state-owned electric company Karaha Bodas in Indonesia.
- Their power project in Indonesia had been cancelled in 1998 in the wake of the Asian Financial Crisis.
- Karaha Bodas began seizing assets in the US, Hong Kong, Singapore and Canada.
- Pertamina then turned to its home ground, Indonesia, to seek enforcement of the award.

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A case study: *Karaha Bodas*

Indonesia:

- Pertamina petitioned the Jakarta Central District Court to annul the award pursuant to Indonesian Law.
- As reasons for annulling the award, the Jakarta Central District Court cited:
 - Public policy grounds;
 - Denial of procedural and substantive fairness; and
 - Violation of natural justice.

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A case study: *Karaha Bodas*

United States:

- Karaha Bodas successfully sought enforcement of the award in the United States District Court of the Southern District of Texas, affirmed by the United States Court of Appeals for the Fifth Circuit.
- An application for a writ of certiorari by the Indonesian government appearing amicus curiae was unsuccessful.
- In addition to seeking enforcement, Karaha Bodas sought a preliminary injunction prohibiting Pertamina from seeking to join the attempts of Karaha Bodas from executing the Court's judgment.
- District Court for Southern District of Texas granted the preliminary injunction.
- On appeal the US Court of Appeal for the Fifth Circuit held that the District Court had abused its discretion and reversed grant of the preliminary injunction.

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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 substantive challenges to an arbitral award.



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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 contract's 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:
 - Seeking leave to adduce new documentary evidence;
 - Arguing that the Arbitral Tribunal had been guilty of fraud in that it had re-written the agreement between the parties; and
 - 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.



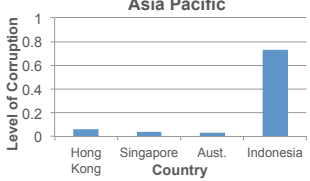
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Corruption:

- 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



Country	Level of Corruption
Hong Kong	0.06
Singapore	0.04
Aust.	0.03
Indonesia	0.73

- 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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