Status: Positive or Neutral Judicial Treatment

Astro Nusantara International BV v PT Ayunda Prima Mitra

Date of Judgment: 11 April 2018

Court of Final Appeal

CFA

Final Appeal No 14 of 2017 (Civil)

FACV 14/2017

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| Citations: | (2018) 21 HKCFAR 118<br>[2018] HKCFA 12<br>[2018] HKEC 874 |
| Presiding Judges: | Ma CJ, Ribeiro, Tang and Fok PJJ and Lord Reed NPJ |
| Phrases: | Arbitration - arbitral award - enforcement of foreign awards - leave granted to enforce foreign awards - application for extension of time to apply to set aside enforcement order - proper test for determining whether extension of time should be granted - considering all relevant matters and overall justice of case - absence of valid arbitration agreement between parties - no application to set aside awards in forum of arbitration irrelevant - extension granted |
| Facts: | *118 In October 2008, Ps commenced arbitration through the Singapore International Arbitration Centre (SIAC) against the Group (including D2) in relation to a failed joint venture. As P6-8 were not parties to the joint venture agreement which contained the arbitration clause, a successful application was made to the Arbitral Tribunal to join P6-8 (who had the main monetary claims) to the arbitration under the SIAC Rules. The arbitration then proceeded on the merits, with the Tribunal rendering four additional awards, including an Interim Final Award in October 2010 in favour of Ps in a sum exceeding USD130 million. Ps sought enforcement of the awards, principally against D2, in various jurisdictions including Singapore and Hong Kong. In Singapore, Ps were initially granted leave to enforce the awards. However, in October 2013, the Singapore Court of Appeal set aside the enforcement orders, holding that the Tribunal had no power to order joinder of P6-8 and lacked jurisdiction to make the awards in favour of P6-8. In Hong Kong, Ps obtained leave to enforce the awards against the Group pursuant to s.2GG of the then Arbitration Ordinance (Cap.341) (the Ordinance) in about 2010. Believing that they did not have any assets in Hong Kong, the Group made no application to set aside the orders within the 14-day time limit under O.73 r.10(6) of the Rules of the High Court (Cap.4A, Sub.Leg.). Judgment was entered against the Group in terms of the awards. In July 2011, Ps obtained a garnishee order nisi attaching a debt of USD44 million due from a debtor (AAL) to D2. AAL opposed the grant of an order absolute and D2 applied for an extension of time to apply to set aside the Hong |

Kong*119 enforcement orders and judgment in January 2012. The Judge and the Court of Appeal dismissed D2's application.

Held, unanimously allowing D2's appeal, that (Ribeiro PJ, the other Judges agreeing):

(1) The proper test for determining whether an extension of time should be granted on an application to resist enforcement of an arbitral award under the New York Convention involved looking at all relevant matters and considering the overall justice of the case, eschewing a rigid mechanistic approach. The Courts below erred in principle in adopting the Terna Bahrain approach. It led to a failure to accord proper weight to the established lack of a valid arbitration agreement between D2 and P6-8 which, if recognised, would have wholly undermined the central arguments made on Ps' behalf. The policy favouring speedy finality in resolving an arbitration was necessarily premised on a valid arbitration agreement between the parties which was absent in the present case (Costellow v Somerset County Council [1993] 1 WLR 256, Kwan Lee Construction Co Ltd v Elevator Parts Engineering Co Ltd [1997] HKLRD 965, The Decurion [2012] 1 HKLRD 1063 applied; Terna Bahrain Holding Co WLL v Al Shamsi [2013] 1 Lloyd's Rep 86 not followed; Denton v TH White Ltd [2014] 1 WLR 3926 distinguished). (See paras.53-55, 62-71.)

(2) The choice of remedies principle admitted of two options and they were mirrored in s.44(2) of the Ordinance itself. Where a party opted to set aside the award in the courts of the seat and succeeded in doing so, it acquired a defence against enforcement under s.44(2)(f) which covered cases where the award had been set aside by a competent authority of the country in which, or under the law of which, it was made. The other option was to resist enforcement on other grounds, including s.44(2)(b), without having taken steps to set aside the awards in the supervisory court. They were options which were independently available. It followed that the decisions of the Courts below to treat the fact that the awards had not been set aside in Singapore as a major factor in refusing a time extension conflicted with the choice of remedies principle (Paklito Investment Ltd v Klockner East Asia Ltd [1993] 2 HKLR 39, Hebei Import & Export Corp v Polytek Engineering Co Ltd (1999) 2 HKCFAR 111, Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs of the Government of Pakistan [2011] 1 AC 763 applied). (See paras.75-78.)

(3) The fact that D2 made a deliberate choice not to set aside the orders within time could not be held against it. Further, its *120 decision not to embark upon a setting-aside application when there were then no assets in Hong Kong was entirely reasonable, particularly where the Tribunal's jurisdiction had been challenged and the right to bring further challenges was expressly reserved. (See paras.78-81, 84.)

(4) D2 was granted an extension of time to apply to set aside the orders granting leave to enforce the awards and the judgment entered on the strength of those orders. There must be balanced against the 14-month delay, the

fundamentally important absence of a valid arbitration agreement between D2 and P6-8, so that those parties were wrongly joined and the Tribunal's awards were made in their favour without jurisdiction. To refuse an extension would be to deny D2 a hearing where its application had decisively strong merits and would involve penalising it for a delay which caused Ps no uncompensable prejudice to the extent of permitting enforcement of an award for USD130 million. That would self-evidently be wholly disproportionate. (See paras.86-88.)

[Editor's note: On 18 July 2018, the Court of Final Appeal granted an order for variation of the costs order nisi made on 11 April 2018 in terms of [9] of the Decision (see [2018] HKCFA 33, [2018] HKEC 1960).]

[編者按: 2018年7月18日, 終審法院頒令更改於2018年4月11日所作的暫准訟費令, 更改方式如相關裁決書第9段所述 (詳見 [2018] HKCFA 33, [2018] HKEC 1960)。]

2008年10月，本案各名原告人 (下稱Ps) 透過新加坡國際仲裁中心就一個失敗的合營項目針對涉案集團 (包括D2) 展開仲裁。該合營項目背後的協議載有仲裁條款，但提出主要金錢申索的三名原告人P6至P8並非該協議的立約方，而他們根據新加坡國際仲裁中心規則成功向仲裁庭申請加入仲裁。其後，仲裁庭繼續審理案件的是非曲直，並頒發四項額外裁決，包括於2010年10月頒發一項對Ps有利的中期最終裁決，所涉金額超逾一億三千萬美元。Ps在包括新加坡和香港等多個司法管轄區尋求執行上述裁決，主要針對的是D2。在新加坡，Ps起初獲批予許可執行裁決，但新加坡上訴法庭於2013年10月下令將執行令作廢，並裁定仲裁庭既無權力下令加入P6至P8，也沒有司法管轄權作出有利於P6至P8的裁決。在香港，Ps於2010年左右根據當時的《仲裁條例》(第341章) 第2GG條取得許可針對涉案集團執行有關裁決。涉案集團相信它們在香港沒有任何資產，故沒有在《高等法院規則》(第4章，附屬法例A) 第73號命令第10(6) 規則所訂明的14日期限內申請將相關執行令作廢。針對涉案集團並以相關裁決的內容為本的判決被登錄。2011年7月，Ps取得暫准第三債務人命令，扣押D2的一筆四千四百萬美*121 元款項作為債項。2012年1月，D2反對法庭批予絕對命令，並申請延展時限以申請將香港的執行令和判決作廢。原審法官和上訴法庭先後駁回D2的申請。

裁決—一致裁定D2上訴得直 (判詞由常任法官李義作出，其餘四位法官表示贊同):

(1) 對於延展時限以申請反對執行《紐約公約》下的仲裁裁決，法庭用以決定應否准許延展時限的恰當驗證標準，乃為考慮所有相關事宜以及在案中如何體現整體公正。就此而言，法庭應避免採用機械式的處理手法。下級法庭採納Terna Bahrain 一案所採用的處理手法，原則上有錯。該做法導致法庭沒有向D2與P6至P8之間已證實缺乏有效仲裁協議一事賦予恰當比重，而該點若然獲給予比重，將完全破壞Ps所提出的核心論據。鼓勵迅速和最終地完成仲裁的政策，必然須建基於各方之間存在有效仲裁協議的前提，而這在本案中正正不存在 (引用Costellow v Somerset County Council [1993] 1 WLR 256，Kwan Lee Construction Co Ltd v Elevator Parts Engineering Ltd [1997] HKLRD 965，The Decurion [2012] 1 HKLRD 1063；不依循 Terna Bahrain Holding Co WLL v Al Shamsi [2013] 1 Lloyd's Rep 86; Denton v TH White Ltd [2014] 1 WLR 3926予以區別)。(見第53至55、62至71段)

(2) 「補救方法選項」原則容許兩個選項，而它們都反映於《仲裁條例》第44(2) 條本身。假如某方選擇要求審理地的法院將裁決作廢並取得成功，則該方得享第44(2)(f) 條用

以反對執行裁決的抗辯理由，其涵蓋該裁決在某國或按某國法律作出、而該國的主管當局將該裁決作廢的情況。另一選項是基於其他理由反對執行裁決，包括第44(2)(b)條，但沒有採取步驟要求監管法院將裁決作廢。它們是獨立地可供採用的選項。由此可見，本案下級法院把涉案裁決沒有在新加坡被作廢一事視為拒絕延展時限的主要因素，與「補救方法選項」原則有所抵觸（引用 Paklito Investment Ltd v Klockner East Asia Ltd [1993] 2 HKLR 39，Hebei Import & Export Corp v Polytek Engineering Co Ltd (1999) 2 HKCFAR 111，Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs of the Government of Pakistan [2011] 1 AC 763)。(見第75至78段)

(3) D2刻意選擇不在限期內尋求將涉案命令作廢一事，不能用作針對D2。此外，在對方當時在香港沒有資產的情況下，D2不提出作廢申請的決定完全合理，特別是當仲裁庭的司法管轄權已受到質疑以及提出進一步質疑的權利已獲明文保留之時為然。(見第78至81、84段)

(4) D2獲給予延展時限，以申請將執行裁決許可令和依據該等命令登錄的判決作廢。為期14個月的延誤，須與以下因素互相衡量，即D2與P6至P8之間欠缺有效仲裁協議(而這點至關重要)，以致P6至P8誤被加入為與訟方以及仲裁庭在沒有司法管轄權下作出對它們有利的裁決。一旦拒絕延展時限不但會*122 在D2的申請肯定有充分理據的情況下剝奪它獲聆訊的機會，更會涉及因若干未有令Ps蒙受不可補償的損害的延誤而懲罰D2，以至Ps將獲准針對D2而執行涉及一億三千萬美元的裁決。這種懲罰顯然完全不成比例。(見第86至88段)

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Mr David Joseph QC, Mr Bernard Man SC and Mr Justin Ho, instructed by Clifford Chance, for the respondents.

Cases cited in the judgment:

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| Legislation mentioned in the judgment: | Arbitration Act 1996 [United Kingdom] ss.67, 68<br>Arbitration Ordinance (Cap.341) (repealed) ss.2AA(1), 2AA(2)(a), 2GG, 42, 42(2), 44(1), 44(2), 44(2)(b), 44(2)(c), 44(2)(d), 44(2)(e), 44(2)(f), 44(3)<br>Arbitration Ordinance (Cap.609) s.2, Sch.3 Pt.1 para.1<br>Civil Procedure Rules [United Kingdom] rr.1.1, 3.9(1)<br>International Arbitration Act (Cap.143A) [Singapore] s.3(1)<br>Rules of the High Court (Cap.4A, Sub.Leg.) O.1A r.2(2), O.3 r.5, O. 73 r.10(6) |
| Other materials mentioned in the judgment: | Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 1958, art.V<br>Singapore International Arbitration Centre Rules 2007, r.24(b)<br>UNCITRAL Model Law, art.36(1)(a)(i), 36(1)(a)(iii) |

Judgment:

*125 Ma CJ:

1. I agree with the judgment of Mr Justice Ribeiro PJ.

Ribeiro PJ:

2. This appeal raises issues concerning the principles applicable where a party seeks leave to resist enforcement of a New York Convention arbitration award out of time.

3. The eight respondent companies, members of a Malaysian media group conveniently referred to as "Astro", were the claimants in the arbitration. The 1st to 5th, 7th and 8th respondents are subsidiaries of the 6th respondent, a substantial company listed on the Kuala Lumpur Stock Exchange.

4. The appellant (First Media) is a substantial company listed on the Indonesian Stock Exchange and part of an Indonesian conglomerate referred to as "Lippo". It was a respondent in the arbitration and Astro seeks to enforce an award against it in a sum exceeding USD130 million. First Media seeks leave to resist enforcement out of time on the basis that the award was made without jurisdiction.

## A. The underlying dispute and the arbitration:

5. By a Subscription and Shareholders' Agreement (the SSA) dated 11 March 2005, Lippo companies including First Media entered into a joint venture with companies in Astro (originally consisting of the 3rd to 5th respondents and then, by novation, the 1st and 2nd respondents) for the provision of multimedia and television services in Indonesia. The joint venture vehicle was to be "Direct Vision" which was the 3rd respondent in the arbitration.

6. The arbitration agreement is contained in the SSA and provides for arbitration through the Singapore International Arbitration Centre (SIAC), applying Singapore law. However, the 6th, 7th and 8th respondents were never parties to the SSA. They have been referred to throughout as "the Additional Parties".

*126 7. The joint venture failed because certain conditions precedent were not fulfilled. However, in the meantime, Direct Vision had pressed ahead with the commercial launch of its pay satellite television service in Indonesia and between about December 2005 and October 2008, the Additional Parties had been providing Direct Vision with substantial funds and services. The breakdown of the joint venture led Lippo to commence court proceedings against Astro in Indonesia, alleging that Astro was obliged to continue the funding and support services under an oral joint venture contract. Astro's riposte was to commence the arbitration against Lippo, including First Media, at SIAC by notice dated 6 October 2008, seeking an anti-suit injunction to restrain the Indonesian proceedings and advancing monetary claims, inter alia, by way of restitution and quantum meruit .

8. Astro applied to join the Additional Parties (who had the main monetary claims) to the arbitration

relying on r.24(b) of the 2007 SIAC Rules.1 Such joinder was unsuccessfully resisted by Lippo before the Arbitral Tribunal.2 By its Award on Preliminary Issues dated 7 May 2009, the Tribunal ruled that on the true construction of r.24(b), it had power to join persons, such as the Additional Parties, who were not already parties to the agreement to refer the dispute to arbitration.3 Lippo could have, but did not, challenge that award in the Singapore Court which had supervisory jurisdiction.

9. The arbitration then proceeded on the merits, with the Tribunal rendering four additional awards, including an Interim Final Award dated 16 February 2010 in favour of Astro in a sum exceeding USD130 million. Lippo again did not seek to challenge the validity of those awards in the Singapore Court.

## B. Astro's enforcement of the awards:

10. Astro then proceeded to seek enforcement of the awards, principally against First Media, in various jurisdictions including Singapore and Hong Kong.

11. In Singapore, Astro was initially granted leave to enforce the awards but First Media succeeded on its appeal to the Singapore Court of Appeal which held, by a judgment dated 31 October 2013 (the SCA Judgment),4 that r.24(b) did not empower the Tribunal to order joinder of the Additional Parties since they were not parties to the SSA. The Tribunal therefore lacked jurisdiction to make the*127 awards in favour of the Additional Parties and the Singapore enforcement orders in their favour were set aside.

12. On 3 August and 9 September 2010, at about the same time as the enforcement proceedings were commenced in Singapore, Astro obtained orders from Saunders J granting them leave to enforce the Tribunal's awards in Hong Kong against the Lippo parties pursuant to s.2GG5 of the Arbitration Ordinance.6

13. In accordance with O.73 r.10(6),7 Lippo had 14 days after service of those orders to apply to set them aside. Believing that they did not have any assets in Hong Kong, Lippo made no such application and, on 9 December 2010, Saunders J entered judgment against them in terms of the awards.

14. However, on 22 July 2011, Astro obtained a garnishee order nisi attaching a debt of USD44 million due from AcrossAsia Ltd (AAL) to First Media. AAL is a Cayman Islands company listed on the Growth Enterprise Market of the Stock Exchange of Hong Kong and holds 55.1% of the issued shares, and thus a controlling interest, in First Media. The debt arose out of an agreement dated 30 June 2011 whereby First Media granted a loan facility of USD44 million to AAL. When, on 5 August 2011, the garnishee order nisi was served on First Media, AAL filed an affirmation opposing the grant of an order absolute and, on 18 January 2012, First Media took out the summons applying for an extension of time to apply to set aside the Hong Kong enforcement orders and judgment. That summons is at the centre of the present appeal.

15. The SCA Judgment was then pending and, at Astro's instigation, First Media's application was stayed to await the Singapore Court of Appeal's decision. Astro also obtained judgment, dated 31 October 2013,8 from Deputy Judge Mayo (who took a dim view of what he found to be collusive conduct between First Media and AAL) directing that the garnishee order be made absolute.

16. The SCA Judgment was coincidentally also published on 31 October 2013 and appeals were lodged against Deputy Judge Mayo's*128 decision by both AAL and First Media. In the light of the SCA Judgment, Mimmie Chan J9 unconditionally stayed execution of the garnishee order absolute pending determination of First Media's setting aside application. The Court of Appeal refused Astro leave to appeal against Her Ladyship's unconditional order10 and Anderson Chow J therefore proceeded to deal substantively with First Media's summons for leave to make a setting aside application.

## C. Chow J's judgment11:

17. It is common ground that the awards in question are Convention awards.12 The law's policy is to aid enforcement of such awards, s.42 making them enforceable, with leave, in the same way as a judgment of the Court. Grounds for refusing (and hence for setting aside) enforcement13 are strictly limited. Section 44(1) provides that enforcement of a Convention award "shall not be refused except in the cases mentioned in this section". Accordingly, to succeed in its setting aside application, First Media has to bring itself within one of the cases listed in s.44(2)14 or s.44(3)15 (and also persuade the Court that its application should be allowed to proceed although well out of time).

18. Since First Media contends that the awards were made without jurisdiction, the exception which is principally relevant is contained in s.44(2)(b):

*129 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 under the law to which the parties subjected it or, failing any indication thereon, under the law of the country where the award was made …16

19. Anderson Chow J upheld the enforcement orders and judgment, rejecting First Media's application for leave to apply out of time to set them aside on the s.44(2)(b) ground.

## C.1 The effect of the SCA Judgment:

20. His Lordship so decided even though he held that the SCA Judgment had conclusively established that the Arbitral Tribunal did not have power to join the Additional Parties to the arbitration, that being a matter governed by Singapore law.17 It follows, so the Singapore Court of Appeal held,18 that there was no arbitration agreement in existence and thus no valid agreement on which to found the awards. That conclusion, as Lord Collins of Mapesbury JSC pointed out, is in accordance with consistent international practice:

Although article V(1)(a) [of the New York Convention] (and section 103(2)(b) [of the Arbitration Act 1996]) deals expressly only with the case where the arbitration agreement is not valid, the consistent international practice shows that there is no doubt that it also covers the case where a party claims that the agreement is not binding on it because that party was never a party to the arbitration agreement.19

21. Moreover, Anderson Chow J held that since the Singapore Court of Appeal was undoubtedly a court of competent jurisdiction which had determined an identical issue between the parties on the merits in a final and conclusive judgment, the SCA Judgment raised*130 an issue estoppel per rem judicatam preventing Astro from denying the absence of a valid arbitration agreement.20

22. It follows that if leave had been granted, First Media would have brought itself within s.44(2)(b) as a ground for refusing enforcement. Anderson Chow J's refusal of leave is therefore, as the Judge himself acknowledged, somewhat surprising. He noted that, when refusing Astro leave to appeal against Mimmie Chan J's grant of an unconditional stay of execution of the garnishee order absolute, the Court of Appeal had commented obiter that it would:

… indeed be remarkable if, despite the Singapore Court of Appeal judgment on the invalidity of arbitration awards, Astro will still be able to enforce a judgment here based on the same arbitration awards that were made without jurisdiction.21

23. Anderson Chow J, however, did not consider the SCA Judgment definitive since, he reasoned, questions of enforcement are governed by Hong Kong law, being the law of the forum in which enforcement is sought;22 our law makes enforcement mandatory unless the case falls within s.44(2) or (3);23 and refusal of enforcement abroad is not a ground for resisting enforcement of the award in Hong Kong.24 His Lordship proceeded to refuse leave on two grounds.

## C.2 The good faith principle:

24. First, his Lordship decided that First Media was precluded from relying on s.44(2)(b) on the ground that it was in breach of a duty of good faith.

25. Anderson Chow J's starting point was that the word "may" in s.44(2) - "Enforcement of a Convention award may be refused" - makes it clear that the Court has a residual discretion to order or uphold an order for enforcement even though the person resisting that order comes within one of the s.44(2) exceptions.

26. The existence of such a residual discretion is supported by the authority of this Court in Hebei Import & Export Corp v Polytek Engineering Co Ltd,25 where Sir Anthony Mason NPJ endorsed the *131 decision of Kaplan J in China Nanhai Oil Joint Service Corp Shenzhen Branch v Gee Tai Holdings Co Ltd,26 to that effect.

27. Anderson Chow J also relied on those two authorities as establishing that the discretion may be exercised in favour of enforcement where the resisting party (although within a s.44(2) exception) has acted in breach of his duty of good faith, drawing parallels between those two cases and the present.

28. In China Nanhai Oil Joint Service Corp Shenzhen Branch v Gee Tai Holdings Co Ltd, having participated in the arbitration and having lost on the merits, the defendant sought to oppose enforcement on the s.44(2)(e) ground, ie, that "the composition of the arbitral authority … was not in accordance with the agreement of the parties". It complained that whereas the arbitration agreement provided for arbitration before a CIETAC27 panel in Beijing, at the plaintiff's behest, a Shenzhen CIETAC panel had assumed jurisdiction. Kaplan J held that while technically the Shenzhen Tribunal lacked jurisdiction, the residual discretion in favour of enforcement ought to be exercised because there was:

> … 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.28

29. However, his Lordship regarded the arbitration as one which the parties had in substance agreed to:

> The parties agreed on a CIETAC Arbitration under CIETAC Rules. They got it. CIETAC, Shenzhen, is a sub-commission of CIETAC in Beijing. The Defendants participated in the arbitration and have raised no other grounds whatsoever which go to the procedure of the arbitration or the substance of the award. Had they won, they would not have complained … I am quite satisfied that the Defendants got what they agreed in their contract in the sense that they got an arbitration conducted by 3 Chinese arbitrators under CIETAC Rules. To exercise my discretion against enforcement on the facts of this case would be a travesty of justice. Had I thought that the Defendants' rights had been violated in any material way, I would, of course, have taken a different view.29

*132 30.Hebei Import & Export Corp v Polytek Engineering Co Ltd involved a CIETAC arbitration regarding the allegedly substandard performance of certain equipment supplied under a contract. The complaint was that, without notice to the respondent, an inspection had been conducted by experts appointed by the Arbitral Tribunal accompanied by the Chief Arbitrator at the end user's factory, where technicians who had installed the equipment communicated with the Chief Arbitrator in the respondent's absence. Enforcement of the award was resisted on the s.44(2)(c) ground, namely, that the resisting party had been "unable to present his case" and on the s.44(3) ground that enforcement in such circumstances would be contrary to public policy. However, when the respondent discovered that the inspection had occurred it did not raise the matter with the Tribunal but continued to participate in the arbitration. It was held that:

> 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 compliance, keeping the point up his sleeve for later use.30

31. Anderson Chow J considered that the principles established by China Nanhai Oil Joint Service Corp Shenzhen Branch v Gee Tai Holdings Co Ltd and Hebei Import & Export Corp v Polytek Engineering Co Ltd were applicable on the facts of the present case:

> In my view, what was considered to be so objectionable in China Nanhai Oil Joint Service Corporation Shenzhen Branch and Hebei Import & Export Corp v Polyteck Engineering Co Ltd was the idea that a party to an arbitration, while being fully aware of an objection (whether in relation to the jurisdiction of the tribunal or the procedure or conduct in the course of the arbitration), should be permitted to keep the objection in reserve, participate fully in the arbitration and raise the objection in the enforcing court only after an award had been made against him by the tribunal. This is effectively what happened in the present case. First Media was fully aware of its right to challenge the Tribunal's ruling on jurisdiction before the Singapore High Court under article 16(3) of the Model Law, but chose not to do so. 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.31

*133 32. His Lordship arrived at this conclusion notwithstanding that he:

(a) accepted that a party is not obliged to exhaust its remedies by challenging the validity of an award in the courts of the arbitral seat, having a choice between the "active remedy" of

making such a challenge and a "passive remedy" of resisting enforcement in the jurisdiction where enforcement is sought;32

(b) acknowledged that First Media had objected to and expressly reserved its position concerning the Tribunal's jurisdiction both before and after the Award on Preliminary Issues33 so that it could not be said to have kept the objection "up its sleeve"; and,

(c) recognised that the SCA Judgment had conclusively established that the Tribunal lacked jurisdiction in respect of the Additional Parties, bringing First Media within s.44(2)(b) and that "it would take a very strong case to permit enforcement of an arbitral award in circumstances where it was made by an arbitral tribunal without jurisdiction".34

## C.3 Refusal of an extension of time:

33. Secondly, Anderson Chow J held that even if he had decided not to exercise his residual discretion under s.44(2) in favour of enforcement, he would have refused to extend time for First Media to make its application for leave.35

34. The time limit is the limit of 14 days after service of the orders in question, laid down by O.73 r.10(6).36 It expired on 1 November 2010 so that First Media's summons for a time extension, issued on 18 January 2012, was 14 months out of time. The Court's power to grant an extension is contained in O.3 r.5 which materially states:

(1) The Court may, on such terms as it thinks just, by order extend or abridge the period within which a person is required or authorized by these rules, or by any judgment, order or direction, to do any act in any proceedings.

(2) The Court may extend any such period as is referred to in paragraph (1) although the application for extension is not made until after the expiration of that period.

*134 35. After having considered authorities on how the discretion should be approached, in particular The Decurion37 and Terna Bahrain Holding Co WLL v Al Shamsi38 (to which I shall return), Anderson Chow J based his refusal of an extension on three factors39 namely:

(a) the fact that the delay of 14 months, viewed in the light of the 14-day limit prescribed by O.73 r.10(6) was very substantial;40

(b) the fact that First Media's delay was a deliberate decision not to take action within the time limit because it thought that it had no assets here, thus taking a "calculated risk";41 and,

(c) the fact that the awards had not been set aside in Singapore and thus were "still valid and create legally binding obligations on First Media to satisfy them", so that refusing an extension of time "merely means that Astro is permitted to obtain satisfaction of a legally binding debt due and owing by First Media to Astro".42

36. His Lordship refused an extension even though he accepted "that Astro has not suffered any substantial prejudice (other than costs which can be compensated) as a result of First Media's delay of 14 months".43

## D. The Court of Appeal's judgment44:

## D.1 Good faith and the residual discretion:

37. The Court of Appeal overturned the Judge's decision based on the good faith principle.

38. Kwan JA considered the conclusive judgment of the Singapore Court of Appeal (which she referred to as the supervisory court) as to the invalidity of the arbitration agreement "a very strong policy consideration" in the Hong Kong courts for s.44(2) purposes.45

39. The Judge had found it objectionable (relying on China Nanhai Oil Joint Service Corp Shenzhen Branch v Gee Tai Holdings*135 Co Ltd and Hebei Import & Export Corp v Polytek Engineering Co Ltd ) that First Media, while "fully aware of its right to challenge the Tribunal's ruling on jurisdiction before the Singapore High Court" chose not to do so, but "decided … to defend the claim on the merits in the hope that it would succeed before the Tribunal … [keeping] the jurisdictional point in reserve to be deployed in the enforcement court",46 but her Ladyship pointed out that First Media was fully entitled under Singapore law to follow that course. The SCA Judgment had held that a challenge to the Tribunal's preliminary ruling was not a "one-shot remedy" and did not affect the availability of defences at the enforcement stage.47 It had also found that First Media had not waived its rights, but

had disputed the Tribunal's jurisdiction and then proceeded with the arbitration reserving its position.48 Anderson Chow J was thus held by the Court of Appeal to have fallen into error "in not giving proper recognition to the findings in the SCA Judgment."49

40. The SCA Judgment is undoubtedly of central importance because it conclusively determined, as a matter governed by Singapore law, that there was no valid arbitration agreement between First Media and the Additional Parties and raised an issue estoppel to that effect. The Singapore Court of Appeal was, however, acting as an enforcement court and not invalidating the awards in its supervisory capacity. The proposition that First Media's adoption of a passive remedy was in accordance with Singapore law is, with respect, not to the point since the availability of enforcement in Hong Kong is governed by the law of this forum. The true issue was whether, as a matter of Hong Kong law, Anderson Chow J was right to find that First Media was in breach of its duty of good faith so as to justify precluding it from relying on s.44(2)(b). Many of the points made by the Court of Appeal as to the consequences of the SCA Judgment are, however, equally relevant to the position under Hong Kong law.

41. In any event, Kwan JA's rejection of the Judge's application of the good faith principle is soundly based on her Ladyship's finding that, when exercising his discretion, Anderson Chow J failed to take sufficient account of "the fundamental defect that the Awards were sought to be enforced against the Additional Parties who were wrongly joined by the Tribunal into the Arbitration and the Awards were made without jurisdiction".50

42. It is clear that the absence of a valid arbitration agreement between the parties is a fundamentally important factor militating against discretionary enforcement. Thus, referring to equivalent *136 provisions, Rix LJ stated in the English Court of Appeal in Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs of the Government of Pakistan as follows:51

> … There is no express provision however as to what is to happen if a defence is proven, but the strong inference is that a proven defence is a defence. It is possible to see that a defence allowed under Convention or statute may nevertheless no longer be open because of an estoppel (Professor van den Berg's view, see The New York Arbitration Convention 1958, at p.265), or that a minor and prejudicially irrelevant error, albeit within the Convention or statutory language, might not succeed as a defence (as in the China Agribusiness case [1998] 2 Lloyd's Rep 76). But it is difficult to think that anything as fundamental as the absence of consent or some substantial and material unfairness in the arbitral proceedings could leave it open to a court to ignore the proven defence and instead decide in favour of enforcement.

43. And in the UK Supreme Court in the same case, Lord Collins of Mapesbury JSC pointed out that " … article V52 safeguards fundamental rights including the right of a party which has not agreed to arbitration to object to the jurisdiction of the tribunal".53 He acknowledged that because of the word "may":

> The court before which recognition or enforcement is sought has a discretion to recognise or enforce even if the party resisting recognition or enforcement has proved that there was no valid arbitration agreement.54

However, his Lordship emphasised the limits of that discretion, observing that "it is not easy to see how that could apply to a case where a party had not acceded to an arbitration agreement."55

44. In the light of such authority, at [59] of its judgment the Court of Appeal, in my view correctly, held as follows:

> The judge had misdirected himself and failed to take into account the fundamental defect that the Awards were sought to be enforced against the Additional Parties who were wrongly joined by the Tribunal into the Arbitration and the Awards were made without jurisdiction when he exercised his discretion under section 44(2) whether to refuse enforcement. Had he taken this into account, he could only have exercised his discretion to refuse enforcement.

## *137 D.2 Extension of time:

45. Given the forceful statement in [59], one might have expected the Court of Appeal to allow the appeal and grant First Media leave to make its setting aside application. However, instead, it upheld Anderson Chow J's refusal of a time extension and dismissed the appeal.

46. The Court of Appeal declined to interfere with Anderson Chow J's exercise of discretion and endorsed his reliance on the three factors mentioned above, namely: (i) the length of the delay; (ii) the fact that a deliberate decision was taken not to apply to set aside within the time prescribed; and (iii)

the fact that the awards had not been set aside at the seat of the arbitration.

47. The Court rejected First Media's argument that factor (iii) was an irrelevant matter erroneously taken into account and also disagreed with the submission that the Judge's exercise of discretion, guided largely by the decision of Popplewell J in Terna Bahrain Holding Co WLL v Al Shamsi,56 was inappropriate and plainly wrong.

48. The Appeal Committee granted leave to appeal to this Court on both the question of law and the "or otherwise" bases.57 The questions of law are formulated as follows:

(1) What is the proper test for determining whether an extension of time should be granted for the purposes of an application to resist enforcement of an arbitral award under the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention)? (Question 1)

(2) In determining whether to extend time for the purposes of an application to resist enforcement of an arbitral award under the New York Convention, is the fact that the award has not been set aside by the courts of the seat of arbitration a relevant factor? (Question 2)

## E. This appeal:

49. As those questions indicate, the issue before this Court concerns the refusal of a time extension. Although the good faith ground is no longer advanced by Astro, aspects of why that ground was rejected provide a context relevant to considering the refusal to extend time in the Courts below.

## *138 E.1 Appellate review of discretion:

50. The grant or refusal of a time extension is of course discretionary and the principles as to when an appellate court may interfere with a discretionary decision are conveniently summarised by Yuen JA in the Court of Appeal in Tai Fook Futures Ltd v Cheung Moon Hoi58 as follows:

> It is well-established law that an appellate court should not interfere with the exercise of a judge's discretion unless it is satisfied that the judge has erred in law or in principle, or if she has taken into account some matter which she should not have taken into account, or has left out of account some matter which she should have taken into account, or if the decision was so plainly wrong that it must have been reached by a faulty assessment of the weights of the different factors which have to be taken into account …

51. Mr Toby Landau QC59 submits that: (i) as presaged in Question 1, the Judge and the Court of Appeal erred in principle in applying the wrong test when exercising the discretion; (ii) that, as anticipated in Question 2, they erroneously took into account an irrelevant factor, namely, the fact that the award has not been set aside by the Court at the seat; and (iii) that looked at overall, the refusal was plainly wrong, being perverse and disproportionate in its consequences.

52. Mr David Joseph QC60 seeks to uphold the Court of Appeal's decision as one made within the proper bounds of its discretion and seeks to rely on a line of cases concerning applications for relief from sanctions under CPR r.3.9(1) of the English Civil Procedure Rules, not previously explored.

## E.2 The appropriate test:

53. It has often been emphasised that the discretion to extend time conferred by O.3 r.5 is broad and unrestricted, designed to enable justice to be done between the parties. Thus, in Kwan Lee Construction Co Ltd v Elevator Parts Engineering Co Ltd,61 Litton V-P in the Court of Appeal, stated:

> The court's jurisdiction to extend time, as conferred by O.3 r.5, is as broad as it can come and, in the exercise of that discretion, the court would, generally speaking, have some regard to what might ultimately be in issue.

*139 54. In Costellow v Somerset County Council,62 dealing with the equivalent provision in England and Wales, Sir Thomas Bingham MR noted that the discretion involves the intersection of two principles. The first promotes the enforcement of time limits for the expeditious dispatch of litigation in the public interest and the second recognises that a plaintiff should not ordinarily be denied adjudication of his claim on the merits because of a procedural default "unless the default causes prejudice to his opponent for which an award of costs cannot compensate". His Lordship noted that the second principle "is reflected in the general discretion to extend time conferred by O.3 r.5, a discretion to be exercised in accordance with the requirements of justice in the particular case."

55. The approach advocated on First Media's behalf as formulated by the Court of Appeal in The Decurion,63 is in line with the foregoing authorities. Citing Costellow v Somerset County Council, Cheung JA acknowledged the intersecting principles and stated:

> It is clear that the applicable principle in deciding whether time should be extended is to look at all relevant matters and consider the overall justice of the case. A rigid mechanistic approach is not appropriate …64

56. Although Anderson Chow J and the Court of Appeal cited The Decurion, it is clear that they laid primary emphasis on Terna Bahrain Holding Co WLL v Al Shamsi,65 quoting extensively from the judgment of Popplewell J.66 In Terna Bahrain Holding Co WLL v Al Shamsi, the respondent in a London arbitration sought an extension of time to challenge the validity of the award under ss.67 and 68 of the Arbitration Act 1996 on the footing that the award had been made on a basis not advanced by the claimant so that the award was vitiated by serious irregularity and lack of jurisdiction.

57. The focus of Mr Landau QC's criticism is on the passages in Popplewell J's judgment in which, having cited certain authorities for the applicable principles, His Lordship stated:

> (1) Section 70(3) of the Act requires challenges to an award under sections 67 and 68 to be brought within 28 days. This relatively short period of time reflects the principle of speedy finality which underpins the Act, and which is enshrined in section 1(a). The party seeking an extension must therefore show that the interests of justice require an exceptional *140 departure from the timetable laid down by the Act. Any significant delay beyond 28 days is to be regarded as inimical to the policy of the Act.
>
> (2) The relevant factors are:
>
> (i) the length of the delay;
>
> (ii) whether the party who permitted the time limit to expire and subsequently delayed was acting reasonably in the circumstances in doing so;
>
> (iii) whether the respondent to the application or the arbitrator caused or contributed to the delay;
>
> (iv) whether the respondent to the application would by reason of the delay suffer irremediable prejudice in addition to the mere loss of time if the application were permitted to proceed;
>
> (v) whether the arbitration has continued during the period of delay and, if so, what impact on the progress of the arbitration, or the costs incurred in respect of the arbitration, the determination of the application by the court might now have;
>
> (vi) the strength of the application;
>
> (vii) whether in the broadest sense it would be unfair to the applicant for him to be denied the opportunity of having the application determined.
>
> (3) Factors (i), (ii), and (iii) are the primary factors.67

58. Popplewell J added four observations: (i) that "the length of delay must be judged against the yardstick of 28 days provided for in the Act. Therefore a delay measured even in days is significant; a delay measured in many weeks or in months is substantial;"68 (ii) that reasons given for the delay had to be supported by evidence;69 (iii) that in the light of CPR r.3.9(1) which identifies an intentional failure as a separate factor, an intentional failure to comply militates against a finding that the applicant acted reasonably;70 and (iv) that since the Court will not normally conduct a substantial investigation into the merits, they are of secondary significance:

> Unless the challenge can be seen to be either strong or intrinsically weak on a brief perusal of the grounds, this will not be a factor which is treated as of weight in either direction on the application for an extension of time. If it can readily be seen to be either strong or weak, that is a relevant factor; but it is not a primary factor,*141 because the court is only able to form a provisional view of the merits, a view which might not be confirmed by a full investigation of the challenge, with the benefit of the argument which would take place at the hearing of the application itself if an extension of time were granted.71

59. The elaborately structured approach to discretion in Terna Bahrain Holding Co WLL v Al Shamsi is qualitatively different from the broad, unrestricted approach espoused in cases like The Decurion .

60. Popplewell J's reference to CPR r.3.9(1)72 is instructive since that is a provision addressing applications for relief from a sanction imposed for failure to comply with any rule, practice direction or court order. Those are situations in which, as one might expect, a substantial burden is placed on an

applicant seeking relief from an applicable sanction, and where features such as intentional non-compliance with the rule or order weigh heavily against relief. Given this perspective, it is unsurprising that Popplewell J's focus was not so much on finding a balance between intersecting policy principles but on the enforcement of procedural orders which have triggered sanctions against the applicant. Thus, His Lordship requires the party seeking an extension to "show that the interests of justice require an exceptional departure from the timetable laid down by the Act", treating the grant of an extension as "exceptional".

61. His Lordship's treatment of the merits is also important. In para.(3) cited above, he states that items (i), (ii) and (iii) "are the primary factors". These comprise the length of delay; the reasonableness of allowing the time limit to expire and whether the other side or the arbitrator contributed to the delay. The strength of the application and fairness to the applicant are only mentioned at the end of the list as items (vi) and (vii) and are thus treated as secondary considerations. As indicated in Popplewell J's fourth observation, this is because His Lordship's view was that an investigation of the merits is not generally undertaken so that the court is only able to form a provisional rather than a concluded view of the merits.

62. The Terna Bahrain Holding Co WLL v Al Shamsi approach of promoting the importance of certain factors and according to others (including the merits) a secondary status is plainly inconsistent with the The Decurion approach of looking at all relevant matters and considering the overall justice of the case, eschewing a rigid, mechanistic methodology. The downgrading of the merits as a factor is particularly inapt in a case like the present, where the Tribunal's lack of jurisdiction has been conclusively shown.

*142 63. Mr Landau QC convincingly submits that the Judge faithfully applied the approach of Popplewell J set out in the passages cited above, focusing especially on items (i) and (ii) of the listed principles.73 While it is true, as Mr Joseph QC points out, that Popplewell J did refer to cases where the merits "may be a powerful factor in favour of the grant of an extension" where "the court can determine that the challenge will succeed",74Anderson Chow J did not give any weight to, or even mention in this context, the conclusively established merits.

64. It follows, in my judgment, that the test in Terna Bahrain Holding Co WLL v Al Shamsi was inappropriately applied in the present case. It led to a failure to accord proper weight to the established lack of a valid arbitration agreement which, if recognised, would have wholly undermined the central arguments made on Astro's behalf. Thus, much emphasis was laid on s.2AA(1) which states that the object of the Arbitration Ordinance is "to facilitate the fair and speedy resolution of disputes by arbitration without unnecessary expense". This led the Court of Appeal to state as follows:

> As rightly submitted by Mr Joseph, a more disciplined approach is called for in the arbitration context, with its emphasis on speedy finality and the short statutory time limits. It is accordingly in an "entirely different territory" from applications for extensions of time for compliance with interlocutory orders or rules applying during the currency of a case (Soinco SACI v Novokuznetsk Aluminium Plant [1998] 2 Lloyd's Rep 337 at 338, per Waller LJ).75

65. The policy favouring speedy finality in resolving an arbitration is necessarily premised on a valid arbitration agreement between the parties which is absent in the present case. The trite proposition that binding arbitrations must rest on a consensual basis is reflected in s.2AA itself which, in sub-s.(2)(a) states:

> (2) This Ordinance is based on the principles that:
>
> (a) subject to the observance of such safeguards as are necessary in the public interest, the parties to a dispute should be free to agree how the dispute should be resolved …

*143 66.Soinco SACI v Novokuznetsk Aluminium Plant,76 cited by the Court of Appeal, is not a case where a valid arbitration agreement was lacking. The challenge to enforcement was there based on the argument (held to be unsustainable) that it would be contrary to public policy to enforce the award. In any event, Waller LJ's approach differed significantly from that of Terna Bahrain Holding Co WLL v Al Shamsi in that the strength of the applicant's case was given equal prominence with other discretionary factors comprising the extent of and excuse for the delay, and the degree of prejudice to the respondent.

67.Terna Bahrain Holding Co WLL v Al Shamsi involved an active remedy challenge to the validity of the award, launched before the Court with supervisory jurisdiction in London. There is force in Mr Landau QC's submission that, unlike challenges in an enforcement forum other than the seat, such a

challenge involves invoking the procedural rules contractually agreed upon by the parties, and may justify a stricter approach to procedural time limits.

68. For the foregoing reasons, I conclude that in adopting the Terna Bahrain Holding Co WLL v Al Shamsi approach, the Courts below erred in principle, leading them to downgrade the fundamentally important absence of a valid arbitration agreement between First Media and the Additional Parties. They thereby failed to take proper account of a relevant matter, justifying this Court's interference with their exercise of discretion.

69. Before leaving this part of the discussion, I note that Mr Joseph QC sought to rely on a line of English authority on the application of CPR r.3.9(1) culminating in Denton v TH White Ltd .77 That rule provides:

> On an application for relief from any sanction imposed for a failure to comply with any rule, practice direction or court order, the court will consider all the circumstances of the case, so as to enable it to deal justly with the application, including the need - (a) for litigation to be conducted efficiently and at proportionate cost; and (b) to enforce compliance with rules, practice directions and orders.

70. It is a procedural rule which makes no mention of the substantive merits, setting out an approach to applications for relief from sanctions imposed for non-compliance with rules or orders. I do not accept Mr Joseph QC's submission that First Media's application "is as a matter of substance analogous to" such applications for relief. Thus, Denton v TH White Ltd was a consolidated appeal before the English Court of Appeal involving three cases which, respectively, concerned: (i) service of witness statements outside time limits set at a case management conference, *144 carrying the automatic sanction of prohibiting the proposed witness from being called; (ii) failing to comply in time with a pre-trial checklist setting a deadline for payment of court fees with an unless order for automatically striking out the claim in default; and (iii) filing a costs budget form 45 minutes late, carrying the automatic sanction of restricting the applicable cost budget. It is obvious that these situations are miles away from the circumstances under discussion. There is no question of the discretion exercised in such cases being overshadowed by a lack of jurisdiction to make the awards upon which the challenged orders are based.

71. Even at a purely procedural level, cases in the Denton v TH White Ltd line (in which the parties' substantive rights do not feature) sit uncomfortably with the procedural regime in this jurisdiction. Order 1A r.2(2) provides that:

> In giving effect to the underlying objectives of these rules, the Court shall always recognize that the primary aim in exercising the powers of the Court is to secure the just resolution of disputes in accordance with the substantive rights of the parties.

This Court in Wing Fai Construction Co Ltd v Yip Kwong Robert, reiterated the importance of the primary aim of securing the just resolution of disputes in accordance with the parties' substantive rights, stressing that compliance with the rules is not an end in itself78 and that a mechanistic approach is to be eschewed.79 The overriding objective in the English CPR r.1.1 emphasises procedural fairness and economy rather than the parties' substantive rights.

## E.3 Deliberate failure to set aside the awards at the arbitral seat:

72. The third discretionary factor relied on for refusing a time extension by Anderson Chow J and upheld by the Court of Appeal involved the fact that the awards had not been set aside in Singapore and thus were "still valid and create legally binding obligations on First Media to satisfy them".80 This is closely linked to Anderson Chow J's second factor, which is that First Media's delay involved a deliberate decision not to take action to set aside the orders and judgment within time.

73. First Media's submission, based principally on the "choice of remedies" doctrine, is that, in giving weight to those two factors, the Courts below erred in principle and took account of irrelevant factors.

74. In Paklito Investment Ltd v Klockner East Asia Ltd,81 Kaplan J referred to the choice of remedies doctrine as follows:

> *145 It is clear to me that a party faced with a Convention award against him has two options. Firstly, he can apply to the courts of the country where the award was made to seek the setting aside of the award. If the award is set aside then this becomes a ground in itself for opposing enforcement under the Convention. Secondly, the unsuccessful party can decide to take no steps to set aside the award but wait until enforcement is sought and attempt to establish a Convention ground of opposition.

75. Those options are mirrored in s.44(2) itself. Thus, where a party opts to set aside the award in the courts of the seat and succeeds in doing so, it acquires a defence against enforcement under s.44(2)(f) which covers cases where the award has been set aside by a competent authority of the country in which, or under the law of which, it was made. The other option is to resist enforcement on other grounds, including s.44(2)(b), without having taken steps to set aside the awards in the supervisory court. They are options which are independently available.

76. As Lord Collins of Mapesbury pointed out in Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs of the Government of Pakistan:82

> There is nothing in the Convention which imposes an obligation on a party seeking to resist an award on the ground of the non-existence of an arbitration agreement to challenge the award before the courts of the seat.

77. In Hebei Import & Export Corp v Polytek Engineering Co Ltd,83 Sir Anthony Mason NPJ points out that even where the supervisory court has held that the awards are valid, it would be open to the Hong Kong court in the enforcement forum to refuse enforcement, for example, on the ground of a differing Hong Kong public policy:

> The Convention distinguishes between proceedings to set aside an award in the court of supervisory jurisdiction (arts.VI and VI(e)) and proceedings in the court of enforcement (art.VI). 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. The Convention, in providing that enforcement of an award may be resisted on certain specified grounds, recognises that, although an award may be valid by the law of the place where it is made, its making may be attended by such a grave departure from basic concepts of justice as applied by the court of enforcement that the award should not be enforced. It follows, in my view, that it would *146 be inconsistent with the principles on which the Convention is based to hold that the refusal by a court of supervisory jurisdiction to set aside an award debars an unsuccessful applicant from resisting enforcement of the award in the court of enforcement.

78. Section 44(2) is therefore consonant with the choice of remedies principle and enables the party concerned to resist enforcement in Hong Kong without having challenged the awards in the supervisory court. It follows that the decisions of the Courts below to treat the fact that the awards have not been set aside in Singapore as a major factor in refusing a time extension come into conflict with the choice of remedies principle.

79. Moreover, since the doctrine admits of (and indeed presupposes) a choice being made between an active or passive remedy, to hold it against First Media that it made a deliberate choice in favour of a passive remedy also conflicts with the choice of remedies principle.

80. Respecting that principle, Anderson Chow J's second and third factors should not have been taken into account and, in embracing them, the discretionary exercise in the Courts below miscarried.

81. The decision not to embark upon a setting aside application within the 14-day time limit (which Mr Joseph QC submitted was incumbent on First Media) when there were then no assets in Hong Kong was entirely reasonable, particularly where the Tribunal's jurisdiction had been challenged and the right to bring further challenges was expressly reserved.

82. Mr Joseph QC sought to submit that the continued existence of the Singapore awards is a relevant discretionary factor to be taken into account because, as he puts it, they constitute "documents of title" creating legally binding debts which Astro is entitled to enforce.84 The Court of Appeal sought to buttress that proposition by reference to s.42(2), stating:

> … unless an award is set aside, it is treated as binding for all purposes between the parties as between whom it is made, see s.42(2) of the Ordinance.85

83. In my view, s.42(2) does not assist. It relevantly provides:

> Any Convention award which would be enforceable under this Part shall be treated as binding for all purposes on the persons as between whom it was made, and may accordingly be relied on by any of those persons by way of defence, set off or otherwise in any legal proceedings in Hong Kong …

*147 84. The binding quality of the award therefore depends on whether it would be enforceable

under the Ordinance. Such enforceability is of course the very issue between the parties and s.42(2) does not help to resolve it. To argue, as Mr Joseph QC does, that the awards are relevant because they create enforceable debts begs the very question of their enforceability.

## F. Proper exercise of the discretion:

85. For the foregoing reasons, this Court is entitled and bound to set aside the decisions below and to exercise the discretion under O.3 r.5 afresh, looking at all relevant matters and considering the overall justice of the case.

86. Having discarded two of the three factors given weight by Anderson Chow J and the Court of Appeal, one is left only with the factor of the 14-month delay as a possible basis for refusing an extension. Viewed against the 14-day limit prescribed by O.73 r.10(6), that period is obviously substantial. However, as Anderson Chow J accepted, "Astro has not suffered any substantial prejudice (other than costs which can be compensated) as a result of First Media's delay of 14 months".86 Moreover, it is clear that Astro did not feel the need to press on urgently with the litigation since it was on Astro's application that the hearing of First Media's summons was stayed to await the Singapore Court of Appeal's decision, involving a delay of some 20 months.

87. There must be balanced against the 14-month delay, the fundamentally important absence of a valid arbitration agreement between First Media and the Additional Parties, so that those parties were wrongly joined and the Tribunal's awards were made in their favour without jurisdiction. Thus if an extension of time is granted, the s.44(2)(b) defence against enforcement will clearly be available, there being no basis for precluding its operation. To refuse an extension would be to deny First Media a hearing where its application has decisively strong merits and would involve penalising it for a delay which caused Astro no uncompensable prejudice to the extent of permitting enforcement of an award for USD130 million. That would self-evidently be wholly disproportionate.

88. In my view, the Court's discretion can only properly be exercised by setting aside the decisions below and granting the appellant an extension of time. Mr Joseph QC submitted that if the Court were minded to grant such an extension, it should do so only on terms that First Media makes full payment in satisfaction of all outstanding costs orders. That submission cannot be accepted. It was advanced without prior notice to the other side; without identifying what, if any, costs orders have been left unpaid; without *148 considering whether any such orders may be subject to appeal; and without taking into account any available set-offs.

## G. Disposal of this appeal:

89. I would accordingly allow the appeal and grant the appellant an extension of time to apply to set aside the orders granting leave to enforce the awards and the judgment entered on the strength of those orders.

90. My answer to Question 1 is that the proper test involves looking at all relevant matters and considering the overall justice of the case, eschewing a rigid mechanistic approach, as indicated in The Decurion . And my answer to Question 2 is "No" except in cases where s.44(2)(f) is relied on. It is unnecessary to consider the "or otherwise" ground.

91. I would make an order nisi that the respondents pay to the appellant the costs of the appeals in this Court and in the Court of Appeal. Since it was necessary for the appellant to apply to Anderson Chow J for an extension of time, it must bear to some degree the costs of seeking the Court's indulgence. But since it has succeeded in showing that His Lordship's exercise of discretion miscarried on both grounds relied on when refusing them an extension, I would set aside his order as to costs and make an order nisi that the appellant pay half of the respondents' costs before Anderson Chow J.

92. If a different order on costs is sought, written submissions should be lodged with the Registrar and served on the other parties within four weeks of the handing down of this judgment with liberty to the other parties to serve written submissions in reply within four weeks thereafter. If no submissions are lodged or served within the initial four-week period, the orders nisi shall stand as orders absolute without further direction.

Tang PJ:

93. I agree with the judgment of Mr Justice Ribeiro PJ.

Fok PJ:

94. I agree with the judgment of Mr Justice Ribeiro PJ.

Lord Reed NPJ:

95. I agree with the judgment of Mr Justice Ribeiro PJ.

*149 Ma CJ:

96. The Court unanimously allows the appeal, sets aside the orders of the Courts below and directs that time for the appellant to file its application for leave to set aside the orders granting the respondents leave to enforce the awards and to enter judgment thereon be extended for three months from the date of the handing down of this judgment. The Court also makes the orders as to costs set out in [91] and [92] above.

Reported by Ken TC Lee

1 Rule 24(b): "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".
2 Comprising Sir Gordon Langley, Sir Simon Tuckey and Stewart Boyd CBE QC.
3 Award on Preliminary Issues, [97].
4 , Sundaresh Menon CJ giving the judgment of the Court.
5 Section 2GG: "(1) An award, order or direction made or given in or in relation to arbitration proceedings by an arbitral tribunal is enforceable in the same way as a judgment, order or direction of the Court that has the same effect, but only with the leave of the Court or a judge of the Court. If that leave is given, the Court or judge may enter judgment in terms of the award, order or direction. (2) Notwithstanding anything in this Ordinance, this section applies to an award, order or direction made or given whether in or outside Hong Kong." The awards being Convention awards, under s.42, they are enforceable in the same manner as under s.2GG.
6 References to sections in this judgment are (unless otherwise indicated) to provisions of the Arbitration Ordinance (Cap.) applicable by virtue of transitional provisions in Sch.3 para.1 of the Arbitration Ordinance (Cap.) which has since replaced Cap..
7 Rules of the High Court (Cap., Sub.Leg.). Order 73 r.10(6): "Within 14 days after service of the order … the debtor may apply to set aside the order, and the settlement agreement or award shall not be enforced until after the expiration of that period or, if the debtor applies within that period to set aside the order, until after the application is finally disposed of."
8 .
9 (HCCT 45/2010, ).
10 (HCMP 835/2014, ) (Cheung and Barma JJA).
11 (HCCT 45/2010, ).
12 Awards "made in pursuance of an arbitration agreement in a State or territory, other than China or any part thereof, which is a party to the New York Convention", ie, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards adopted by the United Nations Conference on International Commercial Arbitration on 10 June 1958 the text of which is set out in the Third Schedule of the Ordinance: see s.2. Singapore acceded to the Convention on 21 August 1986.
13 Reflecting art.V of the New York Convention.
14 Section 44(2): "Enforcement of a Convention award may be refused if the person against whom it is invoked proves - (a) that a party to the arbitration agreement was (under the law applicable to him) under some incapacity; or (b) that the arbitration agreement was not valid under the law to which the parties subjected it or, failing any indication thereon, under the law of the country where the award was made; or (c) that he was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; 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 decisions on matters beyond the scope of the submission to arbitration; or (e) that the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, with the law of the country where the arbitration took place; or (f) that the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, it was made."
15 Section 44(3): "Enforcement 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."
16 It is also arguable that the exception set out in s.44(2)(d) is relevant. The focus of the argument

has, however, been on s.44(2)(b).
17 Judgment, [95], citing .
18 SCA Judgment, [152]-[158], [162]-[164]. The applicable Singapore provisions, namely, art.36(1)(a)(i) and (iii) of the Model Law given statutory effect by s.3(1) of the International Arbitration Act (Cap., 2002 rev. ed.) are directly comparable to those governing the present appeal.
19 Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs of the Government of Pakistan [2011] 1 AC 763 , 828 [77].
20 Judgment, [96], citing First Laser Ltd v Fujian Enterprises (Holdings) Co Ltd (2012) 15 HKCFAR 569 , [43]-[49] (Lord Collins of Mapesbury NPJ); and The Sennar (No 2) [1985] 1 WLR 490 , 493F-494A (Lord Diplock) and 499A-C (Lord Brandon).
21 (HCMP 835/2014, ), [13] (Cheung and Barma JJA).
22 Judgment, [73(5)], citing Hebei Import & Export Corp v Polytek Engineering Co Ltd (1999) 2 HKCFAR 111 , 136D-E.
23 Judgment, [73(3)].
24 Judgment, [73(4)], citing , [14] (Burrell J).
25 , 138.
26 [1995] 2 HKLR 215 , 217.
27 China International Economic and Trade Arbitration Commission.
28 , 225.
29 , 226.
30 , 137, citing .
31 Judgment, [91].
32 Judgment, [82]-[86].
33 Judgment, [67] and [89].
34 Judgment, [92].
35 Judgment, [131].
36 Set out in Section B of this judgment.
37 [2012] 1 HKLRD 1063 .
38 [2013] 1 Lloyd's Rep 86 .
39 Judgment, [131].
40 Judgment, [129(1)].
41 Judgment, [129(2)].
42 Judgment, [129].
43 Judgment, [130].
44 (CACV 272/2015, ) (Kwan JA and Lok J), Kwan JA writing for the Court.
45 Court of Appeal, [44] and [47], citing Gao Haiyan v Keeneye Holdings Ltd [2012] 1 HKLRD 627 , [65]-[69] and Minmetals Germany GmbH v Ferco Steel Ltd [1999] CLC 647 , 661.
46 Judgment, [91].
47 SCA Judgment, [100]-[123], [125]-[132].
48 SCA Judgment, [205]-[219], [222]-[224].
49 Court of Appeal, 47.
50 Court of Appeal, [59].
51 , [89].
52 Reflected in our s.44(2).
53 , 836, [102].
54 , 843, [126].
55 , 844, [127].
56 .
57 (FAMV 20/2017, ) (Ribeiro, Tang and Fok PJJ).
58 (CACV 103/2005, ), [15] (Yuen JA and Kwan J).
59 Appearing for the appellant with Mr Mark Strachan SC and Mr Jeffrey Chau.
60 Appearing for the respondents with Mr Bernard Man SC and Mr Justin Ho.
61 [1997] HKLRD 965 , 973.
62 [1993] 1 WLR 256 , 263-264.
63 .
64 , [11].
65 .
66 Judgment, [127]-[128] and Court of Appeal, [76].
67 At [27].
68 At [28].
69 At [29].

70 At [30].
71 At [31].
72 Set out in Section E.2 of this judgment.
73 Judgment, [129].
74 , [33], an approach reiterated by Popplewell J in .
75 Court of Appeal, [81].
76 [1998] 2 Lloyd's Rep 337 .
77 .
78 , [34].
79 , [80].
80 Judgment, [129].
81 [1993] 2 HKLR 39 , [48]-[49].
82 , 837, [103].
83 , 136.
84 Respondents' written submissions, [76]-[77].
85 Court of Appeal, [86].
86 Judgment, [130].