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# Singapore Court of Appeal Decision: Does Art. 16(3) Model Law Preclude Setting Aside Proceedings?

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Art 16(3) of the UNCITRAL Model Law on International Commercial Arbitration ("*Model Law*") provides that if a tribunal issues a preliminary ruling that it has jurisdiction, a respondent may appeal the tribunal's ruling to the relevant court within 30 days.

Can a party who loses a jurisdictional challenge still set aside the final award for lack of jurisdiction, if that party did not seek curial review of its unsuccessful jurisdictional challenge under Art 16(3) of the Model Law?

In a recent decision by the Singapore Court of Appeal in *Rakna Arakshaka Lanka Ltd v Avant Garde Maritime Services (Pte) Ltd* [2019] SGCA 33 ("*Rakna*"), the key issue was whether the party had participated in the arbitration proceedings. A party who chooses not to participate in the proceedings does not contribute to the wastage of costs, and therefore retains its entitlement to apply to the seat Courts to set aside the award for lack of jurisdiction.

**Facts**

The Appellant, Rakna Arakshaka Lanka Ltd ("*RALL*"), was a Sri Lankan company specialising in providing security and risk management services. The Respondent, Avant Garde Maritime Services (Pte) Ltd ("*AGMS*"), another Sri Lankan company, was in the business of providing maritime security services.

Prior to March 2011, acting under the auspices of the Ministry of Defence and Urban Development of the Republic of Sri Lanka ("*MOD*"), the parties agreed to form a private-public partnership to carry out certain projects. The parties entered into a Master Agreement that incorporated 6 separate agreements, pursuant to which they undertook various projects including one called the Galle Floating Armoury Project. The Master Agreement provided for disputes to be settled by arbitration in Singapore in accordance with the rules of the Singapore International Arbitration Centre ("*SIAC*").

Following the election of a new president of Sri Lanka in 2015, the new government commenced investigations into the dealings between RALL and AGMS. AGMS took the position that there was no illegality in the operation of the Galle Floating Armoury Project. AGMS asked RALL to obtain, *inter alia*, a letter from the MOD and/or the government to confirm that AGMS's business

under its public-private partnership with RALL was legitimate and carried out under the authority of the government through MOD. RALL did not do so.

AGMS commenced arbitration proceedings against RALL, claiming that RALL had breached the Master Agreement by failing to provide utmost assistance to AGMS. The Notice of Arbitration was sent to RALL, but RALL did not file any response. SIAC nominated an arbitrator on behalf of RALL after the latter failed to do so.

Subsequently, RALL wrote to SIAC stating that AGMS had agreed to withdraw the matter on the basis of a memorandum of understanding ("*MOU*") between parties. RALL requested the Tribunal to "lay by the proceedings of the Arbitration". However, AGMS informed the Tribunal that it was not in a position to withdraw the arbitration and requested an award granting an interim injunction preventing RALL from terminating the Master Agreement. The Tribunal issued an Interim Order in which it held that RALL's failure to ensure the continuity of the Master Agreement went to the root of the MOU, and that the dispute in the arbitration was therefore still alive. The Tribunal proceeded with the arbitration and issued an award in favour of AGMS. RALL did not participate in the arbitration.

RALL commenced proceedings to set aside the award. The Singapore High Court dismissed RALL's application to set aside the award. RALL appealed.

**The Court of Appeal's Decision**

The Singapore Court of Appeal held that it is not necessary for parties to file a formal objection, or a plea in the legal sense of the term, in order to engage Art 16(3) of the Model Law. On the facts, Art 16(3) of the Model Law was engaged as:

- RALL had challenged the Tribunal's jurisdiction. While there was no formal pleading by RALL which asserted a lack of jurisdiction, RALL had furnished the Tribunal with its objection to jurisdiction by way of its letter to the SIAC. RALL's letter had stated that the parties had "reach[ed] a settlement", and "it is no longer required to proceed with the above matter". This letter was equivalent to objecting to the Tribunal's continued jurisdiction over the matter on the basis that there was no longer any dispute which the Tribunal could deal with.
- The Tribunal had clearly made a preliminary ruling on its jurisdiction to deal with the matter within Art 16 of the Model Law, when it held that the MOU had not been implemented and the dispute referred to in the Statement of Claim was "still alive" and should be proceeded with.

The preclusive effect of Art 16(3) of the Model Law does not extend to a respondent who fails in its jurisdictional objection, but does not participate in the arbitration proceedings. Such a respondent has not contributed to any wastage of costs, or the incurring of any additional costs that could have been prevented by a timely application under Art 16(3) of the Model Law.

The position is different if a respondent fails in its jurisdictional objection but then participates in the arbitration. By doing that, the respondent would have contributed to wasted costs. It is just to bar such a respondent from bringing a setting aside application based on the ground of lack of jurisdiction, as such an application is outside the time limit prescribed in Art 16(3) of the Model Law.

In *Rakna*, the Court of Appeal set aside the Tribunal's award as it contained decisions on matters that were beyond the scope of the submission to the arbitration. In the Court's view, the MOU had effected a settlement and resolved the dispute between the parties. Once the dispute was resolved, *ipso facto* there was no longer a dispute which could be arbitrated on. The Tribunal thus had no jurisdiction to conduct the arbitration proceedings.

The Court of Appeal rejected RALL's other challenges against the Award.

**Discussion**

At first blush, a respondent may think that the path is clear for him to choose not to participate in the arbitration proceedings, if he takes the view that the tribunal lacks jurisdiction over the dispute.

However, such a strategy is a gamble. Should the respondent ultimately fail in challenging the tribunal's jurisdiction, he will have lost the opportunity to present any substantive defences to the claim.

A strategy of non-participation preserves a respondent's ability to set aside the final award based on jurisdictional objections and saves the costs of participating in the arbitration, but comes at the cost of sacrificing the substantive defences which the respondent could have raised if he had participated in the arbitration. Such a strategy may only be attractive to a respondent who has a meritorious case on jurisdiction, but a weak defence on the merits.

A respondent who has reasonable defences may not want to give up his chances of defeating the claim on its merits. Where such a respondent loses his preliminary jurisdictional challenge but intends to participate in the merits hearing, his options are as follows.

First, he can seek curial review on the jurisdiction decision within the time limit in Art 16(3) of the Model Law.

Secondly, if he does not seek curial review, the preclusive effect of Art 16(3) will prevent him from making a subsequent setting aside application on jurisdictional grounds. However, it is important to bear in mind that Art 16(3) is not a "one-shot" remedy: see *Pt First Media TBK v Astro Nusantara International BV and others and another appeal* [2014] 1 SLR 372. The preclusive effect of Article 16(3) does not extend to the respondent's rights to resist recognition and enforcement of any award. For some respondents, resisting enforcement may be enough.

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