Arbitration: A second chance to object to the tribunal's jurisdiction –
Rakna Arakshaka Lanka Ltd v Avant Garde Maritime Services (Private) Limited
[2019] SGCA 33

I Executive Summary

The UNCITRAL Model Law on International Commercial Arbitration ("**Model Law**") provides a framework for international commercial arbitration procedures, for countries to adopt. Under Article 16 of the Model Law, if a party ("**claimant**") demands arbitration over a dispute and the responding party (or "**respondent**") argues that the arbitral tribunal has no jurisdiction[1] over the dispute, the tribunal may first consider this issue of jurisdiction, before considering the actual merits of the case. If the tribunal decides that it does have jurisdiction, under Article 16(3) the respondent may appeal this decision to the courts *within 30 days* of receiving notice of such ruling. If the respondent fails to so appeal, and the tribunal makes a final award in favour of the claimant, the respondent may be precluded (or prevented) from contesting the tribunal's jurisdiction in subsequent court proceedings to set aside the award ("**setting-aside proceedings**").

In *Rakna Arakshaka Lanka Ltd v Avant Garde Maritime Services (Private) Limited* [2019] SGCA 33, a respondent disagreed with an arbitral tribunal's ruling that the tribunal had jurisdiction over the respondent's dispute with the claimant, and did not participate in arbitral proceedings over the dispute. The respondent also did not appeal the ruling within the 30-day period. The Court of Appeal ("**CA**") nonetheless held that the respondent was not precluded by Article 16(3) from raising such objections in setting-aside proceedings.

The CA stated that the preclusive effect of Article 16(3) did not extend to a respondent who stayed away from the arbitration proceedings, and did not contribute to any wastage of costs or the incurrence of any additional costs that could have been prevented by a timely application under Article 16(3). Such a respondent did not owe the claimant any duty to participate, especially when such participation might be inconsistent with the non-participating respondent's position that he was not subject to the tribunal's jurisdiction. When a justifiably non-participating respondent was faced with an award, he could use all remedies available to him under the law, including making a court application to set aside the award.

II Material Facts

The arbitrating parties, Rakna Arakshaka Lanka Ltd ("**RALL**") and Avant Garde Maritime Services (Private) Limited ("**AGMS**"), were Sri Lankan companies who formed a partnership to carry out certain projects, under the Sri Lankan Ministry of Defence and Urban Development ("**MOD**"). RALL specialised in providing security and risk management services while AGMS provided maritime security services to vessels at risk of piracy. Between March 2011 and October 2013, they entered into six agreements to carry out these projects, including the Galle Floating Armoury Project. These agreements were later incorporated into a master agreement dated 27 January 2014 ("**Master Agreement**"). The Master Agreement stated that any disputes arising from the agreement would be settled by arbitration in Singapore, in accordance with the rules of the Singapore International Arbitration Centre ("**SIAC**").

RALL's previous board of directors had been appointed by the Sri Lankan government, before 2015. Following the January 2015 elections, which resulted in a change in the government, the then-directors resigned and a new board was appointed by the new government. The new government starting investigating alleged instances of bribery, corruption and abuse of power during the previous regime. This included the dealings between AGMS and RALL, and the legitimacy of the Galle Floating Armoury Project.

[1] Generally, "jurisdiction" here means the authority of the arbitral tribunal to decide disputes between the parties. The parties themselves must have agreed to give the tribunal such authority, usually through a contract.

AGMS argued that there was no illegality with the project as it was operated with MOD's approval. It requested RALL to obtain a "Letter of Clearance" from MOD and/or the government of Sri Lanka clearing AGMS' name, and stating that the business was legitimate and carried out under the government's authority (through MOD). It also asked RALL to obtain an appropriate media release from the government, confirming the legitimacy of their business activities. However, RALL replied that its board was not yet reconstituted, and did not do so.

AGMS then commenced arbitration proceedings against RALL for an alleged breach of clause 3.1 of the Master Agreement, for failing to "provide utmost assistance" to AGMS. AGMS sent a Notice of Arbitration on 8 April 2015, but RALL did not file any response. However, RALL requested, and received, a three-month extension to respond to AGMS' notice of arbitration and to nominate a co-arbitrator[2] for the tribunal. (AGMS had already nominated its arbitrator.) As RALL did not respond to the notice or nominate a co-arbitrator by the end of the extension period, the SIAC proceeded to appoint an arbitrator on RALL's behalf. RALL subsequently requested a further extension, to discuss matters further with AGMS. Two months after, in September 2015, the SIAC confirmed the arbitral tribunal ("**Tribunal**").

In August 2015, RALL wrote to the SIAC, stating that the dispute between the parties was "beyond the scope of submission to arbitration" and also that the arbitration proceeding was in "conflict with the Public Policy of the Republic of Sri Lanka". Then in November 2015, RALL informed the SIAC through a letter that the parties had signed a Memorandum of Understanding ("**MOU**") dated 20 October 2015, under which AGMS had agreed to withdraw the matter. As such, the Tribunal should not proceed with the arbitration. A few days later, however, AGMS stated that it was "not in a position to withdraw" from the arbitration: there was a concern that RALL was not ensuring the continuity of the Master Agreement, and as such there was no settlement.

RALL did not respond to AGMS' position that the arbitration should continue, or the Tribunal's order for RALL to inform it of RALL's position. On 19 December 2015, the Tribunal issued an interim order (the "**Order**") that RALL had "failed to ensure the continuity of the Master Agreement, which [went] to the root of the [**MOU**]", and thus that the underlying dispute was still alive. It concluded that the arbitration ought to proceed, but that RALL could object in a procedurally proper manner during the arbitration. The Tribunal proceeded with the arbitration. RALL did not attend the arbitration or make post-hearing submissions.

In November 2016, the Tribunal issued an award (the "**Award**") in favour of AGMS, deciding that RALL had breached clause 3.1 of the Master Agreement. This was a majority decision; one of the arbitrators dissented on the grounds that there was no breach, because the assistance requested by AGMS fell outside the scope of the clause.

RALL then applied to the Singapore High Court ("**HC**") to set aside the Award. It argued, among other things, that the Tribunal no longer had jurisdiction because the MOU had resolved the dispute between the parties ("**the jurisdictional challenge**"). It also claimed that the Award should be set aside because the underlying Master Agreement was allegedly procured by bribes ("**the public policy challenge**"). The HC dismissed RALL's application to set aside the award on both grounds, after which RALL appealed.

III Issues on Appeal

The CA discussed the following issues on appeal:

(a) Whether the Award should be set aside on the basis of the jurisdictional challenge; and

[2] Generally, each party will appoint one arbitrator, and those two arbitrators will appoint the third arbitrator. If either party fails to appoint the arbitrator or the two arbitrators cannot agree on the third arbitrator within 30 days, the appointment shall be made by either the courts or the president of the SIAC.

(b) Whether the Award should be set aside on the basis of the public policy challenge.

A. The Jurisdictional Challenge

The main issues involved were:

(i) Whether the Order fell within the provisions of Article 16(3) of the Model Law (and section 10(3) of the International Arbitration Act ("**IAA**")); and if so;

(ii) Whether the above provisions applied to a party who did not participate in the arbitration proceedings ("**non-participating party**"), such that RALL would be precluded from challenging the Tribunal's jurisdiction in any setting-aside proceedings; and finally,

(iii) If RALL was not precluded from bringing the challenge, whether the Tribunal in fact had jurisdiction in this matter.

(i) Article 16(3) Model Law and Section 10(3) IAA

The IAA was enacted in Singapore to implement[3] the Model Law. Under Article 16(3), a party who disputes an arbitral tribunal's ruling that it has jurisdiction over a dispute, but does not appeal the ruling *within 30 days* after receiving notice of such ruling, may be precluded from subsequently raising such objections in the courts. Similarly, under section 10(3), a party to an arbitration who is dissatisfied with a preliminary ruling of the tribunal as to jurisdiction may appeal the ruling to the courts within 30 days of receiving notice of the ruling.

The CA held that the Order did fall within section 10(3) and Article 16(3). RALL's November 2015 letter requesting the Tribunal not to proceed with the arbitration in view of the MOU was an objection to the Tribunal's jurisdiction. And the Tribunal's Order, which asserted that the dispute was still alive, was a ruling on this question of jurisdiction under Article 16(3).

The CA rejected the argument that RALL should have filed a formal objection or plea in order for Article 16(3) to apply. There was nothing in Article 16 which prohibited a tribunal from considering its jurisdiction on its own motion. Indeed, the language of Article 16 suggested that the tribunal could itself raise and decide jurisdictional issues without waiting for a formal objection. Moreover, it would reinforce the principle of certainty and finality (an important principle in arbitration law) if it was accepted that once an arbitral tribunal issued a preliminary ruling on its jurisdiction, that ruling was a preliminary ruling under Article 16(3). The language of section 10(3) was also not inconsistent with such an interpretation.

(ii) The preclusive effect of section 10(3) IAA and Article 16(3) Model Law

The CA then held that the preclusive effect of Article 16(3) (and section 10(3)) did not apply to a non-participating party. In other words, a non-participating party should not be prevented from raising jurisdictional objections as a ground to set aside a tribunal's award, even if it had not complied with Article 16(3) (or section 10(3)).

The preclusive effect of Article 16(3) was unsettled: the drafters of the Model Law had left that decision up to the individual national courts. And the Singapore courts had not, prior to this case, decided conclusively the question of whether Article 16(3) has a preclusive effect, or whether it applied to a non-participating party. While the leading case of *PT First Media TBK (formerly known as PT Broadband Multimedia TBK) v Astro Nusantara International BV* [2014] 1 SLR 372 ("*Astro Nusantara*") did involve discussion of Article 16(3), the CA noted that it was focused on the *enforcement* of an arbitral award. The *Astro Nusantara* court had discussed the relationship between the *passive* remedy of resisting enforcement on jurisdictional grounds, and the *active* remedy of

[3] The Model Law by itself is not binding upon countries; instead, each country must implement it through enacting domestic legislation which gives binding effect to the Model law provisions. Section 10(3) IAA implements Article 16(3) Model Law, by providing that if an arbitral tribunal rules on a plea or objection to jurisdiction as a preliminary question, any party may appeal to the supervisory court within 30 days after having received notice of that ruling.

challenging jurisdiction under Article 16(3). It concluded that even if a party did not use the active remedy, it was not precluded from using lack of jurisdiction as a passive ground to *resist enforcement* of a final award.[4] Thus a party which had not appealed to the courts under Article 16(3) (or section 10(3)) could still argue that the tribunal had no jurisdiction as a *defence* to enforcement of an award which the tribunal made against it. The CA then stressed that any further observations the *Astro Nusantara* court had made about the preclusive effect of Article 16(3) was only commentary and was not binding on future cases, including this case.

The CA acknowledged that the Article 16 requirement for parties to challenge jurisdiction at an early point of the arbitral proceedings was a compromise between the policy consideration of avoiding wastage of resources (due to the setting aside of an arbitral award for lack of jurisdiction only after the entire arbitration is completed), and the policy consideration of preventing parties from trying to delay proceedings by bringing challenges before the court.

First, however, this requirement pre-supposed that parties were before the arbitral tribunal, and that a party to an arbitration agreement who was served with a notice of arbitration by a counterparty *had no option but to participate* in the ensuing proceedings. The CA noted that while a *claimant* is obliged to arbitrate disputes arising from a contract with an arbitration clause, a *respondent* is not compelled to take part in arbitration proceedings. If the respondent believes that the tribunal has no jurisdiction, he is entitled to sit by and do nothing, in the belief that there will be no final award made against him, or that if an award is made, he can resist enforcement on valid grounds. Such a respondent may therefore let the opportunity to challenge the tribunal's jurisdiction (under Article 16(3)) go unused.

Of course, this might be a risky course of action to pursue. If the respondent was mistaken in his belief, then the arbitration would end in an award which would be enforceable against him, and no later challenge to jurisdiction would be successful. If in fact he did *not* have a valid objection, then even if Article 16(3) did not have preclusive effect, whatever he did would not affect the ultimate result or the justice of the case. On the other hand, if those objections were valid, the respondent should be allowed all the remedies the law provides. Finally, giving Article 16(3) preclusive effect in this situation would mean that the respondent would potentially have to face the additional cost of defending against enforcement of the award in multiple jurisdictions.

Second, as to the alleged wastage of resources, the CA noted that this had little weight in a situation where there was either no arbitration agreement at all, or the arbitration proceedings were contrary to the agreement. Where the claimant chose to continue with the proceedings in such circumstances, the respondent who stayed away altogether was not boycotting anything, but exercising his right to be undisturbed by the arbitration. Thus, the claimant who insisted on proceeding in such circumstances must take the risk of wasted costs. This was quite different from where the respondent, having failed in its jurisdictional objection before the tribunal, then participated in the arbitration. By doing that, the respondent would have contributed to the wasted costs. Then it would be just to say that he could not then bring an application outside the Article 16(3) time limit (though he could resist enforcement).

Finally, the concern of preventing parties from trying to delay proceedings by bringing challenges before the court did not apply to a party who did not participate in the arbitration proceedings at all. The proceedings would proceed in the normal manner in accordance with the directions of the tribunal. After the award was issued, if the non-participating party tried to set it aside, he would be subject to the same time constraints as a participating respondent would have been.

As such, the CA held that the preclusive effect of Article 16(3) did not extend to a non-participating party because such a party had not contributed to any wastage of costs or the incurring of any

[4] Even after a tribunal makes an arbitration award, the party who won must still enforce the award in the relevant national court where the other party has assets.

additional costs that could have been prevented by a timely application under Article 16(3).

In this case, the CA considered RALL a non-participating party. The CA first considered, but ultimately did not decide on, the issue of whether RALL participated in the arbitration before the MOU was concluded. It stated that a conclusion on this point was unnecessary because the parties' entry into the MOU created a fundamental change in position. From that point, RALL took a clear stance that the MOU had resolved the dispute and thus the arbitration should be stopped. Any queries RALL made regarding the arbitration proceedings was not participation; a party in RALL's situation would be perfectly entitled to ask for information on what was going on, even though it did not want to participate in the proceedings.

(iii) Whether the Tribunal had jurisdiction in this matter

Once the CA held that RALL was not precluded from bringing a jurisdictional challenge, it had to consider whether the Tribunal in fact had jurisdiction, or whether the MOU had settled the original dispute and there was therefore no dispute for it to arbitrate.

The MOU stated, among other things, that "the said second party [i.e. AGMS] shall withdraw the arbitration claim," and RALL would terminate the lawsuit it had commenced separately. The MOU then provided for certain monetary payments (or waivers thereof) between the parties. It also stated that the parties were "bound by the respective agreements to operate the aforementioned projects [i.e. the Galle Floating Armoury Project] and *whilst the aforesaid agreements are still in force* the said parties hereby agree to enter into this new agreement on October 20, 2015". The CA concluded that under the MOU, there was a contractual declaration that both parties were bound by the agreements they had entered into; this was the MOU's principal value to AGMS because much of the rest of the MOU stipulated payment obligations for AGMS to perform. The CA further found that there was a statement, in effect, that the obligations under the previous agreements would continue to be valid and would not be affected by the MOU, save as specifically provided in the MOU in respect of the specific monetary transactions. The CA also found that the parties' intention when entering into the MOU was to effect an immediate settlement.

As such, the CA held that the MOU did resolve the dispute between the parties. And once the dispute was resolved, there was no longer a dispute which could be arbitrated on; hence the Tribunal lacked jurisdiction over the dispute.

The CA disagreed with AGMS' argument that the clause stating that "*whilst the aforesaid agreements are still in force*" signified that there was a separate obligation on RALL to keep the original agreements going. AGMS' interpretation would make no sense as there was already a previous statement in the MOU that "the aforesaid parties are bound by their respective agreements to operate the aforementioned projects". Instead, the clause recorded the validity and subsistence of the prior agreements, and then stated that whereas those agreements were and remained valid, they would be affected by the MOU through certain transactions as stated in the MOU. The CA also noted that AGMS' obligation to withdraw was only an administrative action rather than a legal requirement for the substantive end to the dispute. It stated that there was no need for the MOU to contain specific words, e.g. that the parties by signing settled their differences and ceased the arbitration.

Moreover, AGMS did not deny that the MOU effected a settlement, only that due to RALL's actions it was released from its obligations under the MOU and was entitled to continue with the arbitration proceedings. However, even if RALL had breached the MOU, such a breach would not revive the settled dispute. Instead, it would only allow AGMS a separate claim against RALL, which would have to be separately determined.

Since the Tribunal lacked jurisdiction from the date of the MOU, its decision to continue with the

arbitration was in error. Accordingly, the resultant Award had to be set aside.

B. The Public Policy Challenge

RALL argued that the Award should be set aside (a) under section 24(a) of the IAA as the making of the Award was induced or affected by fraud or corruption, or (b) under Article 34(2)(b)(ii) of the Model Law as it was in conflict with Singapore's public policy. RALL's main argument was that the Master Agreement was procured by bribes given by AGMS' chairman to RALL's then chairman.

Although it was not necessary for the CA to deal with these arguments given its decision to set aside the Award on the jurisdictional challenge, for completeness it made a few observations regarding RALL's arguments here. The CA agreed with the HC in rejecting RALL's arguments.

Regarding the section 24(a) challenge, the CA noted that the allegations of fraud and corruption did not fall within this section. Section 24(a) only applied where the award itself (rather than the contract between the parties) was tainted or induced by fraud or corruption. Regarding the Article 34(2)(b)(ii)) challenge, the CA noted that before it could consider the applicability and scope of Singapore public policy, RALL first had to establish that the Master Agreement and the other agreements were illegal under their governing law, i.e. under Sri Lankan law. RALL did not put this issue before the Tribunal. Notwithstanding that, the Tribunal did look into the question and found that the Master Agreement clearly showed no sign of illegality, nor did it indicate that underlying agreements were contrary to public policy. That finding was binding on the parties, and RALL could not then challenge it in court.

Finally, RALL had taken the position that the MOU was valid and binding on the parties. Through the MOU, it had affirmed the Master Agreement and the underlying agreements. As such, it could not do an about face and declare the various agreements to be illegal and unenforceable.

V Lessons Learnt

This decision has practical implications on the strategic options available to a respondent (in a Singapore-based arbitration) who believes that the arbitral tribunal is acting out of its jurisdiction. At first instance, it may make submissions to the tribunal regarding its lack of jurisdiction. If the tribunal rules against the respondent, the respondent may appeal within 30 days under Article 16(3) (and section 10(3)). Alternatively, the respondent may choose to not participate in the arbitration proceedings at all, and instead wait until the tribunal makes its final award, and appeal to the court to set aside such award. Provided that it has not contributed to any wastage or additional incurrence of costs, the respondent's second chance to raise jurisdictional objections in setting-aside proceedings is likely be preserved. However, this course of action is risky since the respondent would still be bound by the tribunal's award if he was mistaken in his belief that the tribunal had no jurisdiction.

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