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Is Article 16(3) of the Model Law a 'one-shot remedy' for non-participating respondents in international arbitrations?

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LAW GAZETTE

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Is Article 16(3) of the Model Law a "One-Shot Remedy" for Non-Participating Respondents in International Arbitrations?

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Introduction

It is not uncommon for practitioners acting for claimants in an arbitration to encounter a respondent who chooses to boycott the arbitral process. In cases involving such "non-participating" respondents, what are the rights and obligations of each party? Specifically, insofar as Model Law jurisdictions are concerned, if a tribunal decides on jurisdiction as a preliminary issue must the non-participating respondent apply under Article 16(3) of the UNCITRAL Model Law on International Commercial Arbitration (**Model Law**) to the curial Court to review that decision, or otherwise lose the right to challenge any eventual award thereafter on jurisdictional grounds? Can the non-participating respondent surface at a later stage to set aside, or alternatively resist enforcement, of any eventual award based on jurisdictional grounds?

There are two Singapore High Court decisions which appear to have given differing guidance on this issue.

"Participating Respondents"

Preliminarily, it would be helpful to remind ourselves of the position for "participating" respondents.

Insofar as participating respondents are concerned, the Singapore High Court in *Astro Nusantara International BV v PT Ayunda Prima Mitra* (***Astro HC***)[1] had ruled that a party who does not seek curial review of a tribunal's decision under Article 16(3) of the Model Law **cannot** subsequently set aside or resist enforcement of any

eventual award on the same jurisdictional objections. In so deciding, the Singapore High Court was motivated by concerns of "minimis[ing] dilatory or obstructionist tactics so as to avoid unnecessary wastage of time and money". [2]

However, this was reversed on appeal. The Singapore Court of Appeal in *PT First Media TBK (formerly known as PT Broadband Multimedia TBK) v Astro Nusantara International BV and others (**Astro CA**)* [3] opined that Article 16(3) is **not** a "one-shot" remedy. A party who does not seek curial review of a tribunal's decision under Article 16(3) of the Model Law can subsequently resist enforcement of any eventual award on the same jurisdictional objections. However, that party may be precluded from **setting aside** the award on the same jurisdictional objections. The Court of Appeal opined in *dicta* as follows: [4]

> "
> *"[The Court of Appeal] would … be surprised if a party retained the right to bring an application to set aside a final award on the merits under [Article 34 of the Model Law] on a ground which they could have raised via other active remedies before the supervising court at an earlier stage when the arbitration process was still ongoing*."

We turn now to address two cases which have considered the rights of "non-participating" respondents.

"Non-Participating Respondents"

(1) Astro Nusantara International BV v PT Ayunda Prima Mitra

The first case is the first instance decision of *Astro HC* by Belinda Ang J. [5]

Ang J took the view that a non-participating respondent who does not seek curial review of a tribunal's decision under Article 16(3) can subsequently seek to set aside or resist enforcement of any eventual award on jurisdictional grounds. A non-participating respondent could be a party who boycotts the arbitral process from the commencement of the arbitration, or a party who elects to leave the arbitral regime after the tribunal renders an unfavourable decision on jurisdiction as a preliminary issue. Put simply, on Ang J's analysis, a non-participating respondent's rights under Articles 34 and 36 of the Model Law are not fettered by the fact that the respondent had chosen not to participate in the arbitration.

Ang J opined that the counterparty "would have ample notice of this from the boycotting party's absolute refusal to participate". Ang J reasoned that "this possibility is hinted at" in the *travaux préparatoires* of the Model Law, namely the UNCITRAL Analytical Commentary on Draft Text of Model Law on International Commercial Arbitration (A/CN 9/264, 25 March 1985). [6] The *travaux* suggested that, a party who fails to raise a jurisdictional objection within the time limit under Article 16(2) of the Model Law (eg, "not later than the submission of the

statement of defence") would be precluded from raising jurisdictional objections whether to set aside or resist enforcement of an award (subject to certain limits such as public policy and arbitrability). However, according to the *travaux*, the Model Law provisions on setting aside *and* resisting enforcement remains applicable to cases "where a party did not participate in the arbitration, at least not submit a statement or take part in hearings on the substance of the dispute".

We turn next to contrast Ang J's views against a recent decision by Quentin Loh J in *Rakna Arakshaka Lanka Ltd v Avant Garde Maritime Services (Private) Limited* [2018] SGHC 78.

(2) Rakna Arakshaka Lanka Ltd v Avant Garde Maritime Services (Private) Limited

In *Rakna Arakshaka Lanka Ltd v Avant Garde Maritime Services (Private) Limited*, [7] Loh J citing the Court of Appeal's ruling in *AstroCA,* held that non-participating respondents who do not seek curial review of a tribunal's decision under Article 16(3) can subsequently seek to resist enforcement of any eventual award under jurisdictional grounds. However, such non-participating respondents cannot seek to **set aside** any eventual award on jurisdictional grounds.

Loh J reasoned that where a tribunal has chosen "to decide jurisdiction as a preliminary … issue, … considerations of finality, certainty, practicality, cost, preventing dilatory tactics and settling the position at an early stage at the seat militate against allowing a [non-participating] respondent to reserve its objections to the last minute and indulge in tactics which result in immense delays and costs". [8] In Loh J's view, it is an "abuse of process" for "a [non-participating] party to wait till the opposing party goes through the whole arbitral process, obtains an award, only to be met by a setting aside application at the seat on the ground of a lack of jurisdiction". [9]

It is interesting to note that, even though concerns with dilatory, obstructionist tactics as well as time and costs had played central roles in both cases described above, the Judges appeared to reach differing conclusions on the rights of the non-participating respondent. Four points can be made.

First, in reaching his conclusion, Loh J purported to adopt the Court of Appeal's ruling in *Astro CA* described above. However, it is not clear that the Court of Appeal in *Astro CA* had in mind the specific situation of a **non-participating** respondent. Loh J did not specifically engage the views of the *travaux* cited by Ang J.

The *travaux* speaks of another situation where a party ought to be precluded from raising objections at the setting aside or enforcement stage: under Article 4 of the Model Law, a party is taken to have impliedly waived any objection to another party's non-compliance with certain procedural requirements if that first party knew about the non-compliance, **but proceeds with the arbitration** without making a timely objection. A corollary to the *travaux* is that any party that does not "proceed with the arbitration" arguably has **not** waived its objection(s) to jurisdiction; in other words, it should be permitted to raise that objection in a future setting.

Second, taking a step back, assume an arbitral tribunal does **not** decide jurisdiction as a preliminary issue, but in a final merits award instead. In that scenario, it appears to be currently accepted (and which finds support from the *travaux* cited above) that a non-participating respondent may seek to set aside **and** resist enforcement of any eventual award on jurisdictional grounds. It is not intuitively obvious why the rights of the same non-participating respondent should automatically be diminished (by losing the right to set aside any eventual award on jurisdictional grounds) if the tribunal chooses instead to decide the issue of jurisdiction as a preliminary issue. The practical implication of Loh J's decision is that there may be tactical advantage for a claimant facing a non-participating respondent to press a tribunal to decide the issue of jurisdiction as a preliminary issue. If the tribunal agrees, that places the respondent under pressure: if the respondent continues **not** to participate in the arbitration, the respondent loses the right to seek a setting aside of any eventual award on jurisdictional grounds.

Third, insofar as Loh J's decision was motivated by concerns of finality, certainty, time and costs, those same concerns arguably ought to lead to an outcome where, **in addition** to losing its rights to **set aside** any eventual award on jurisdictional grounds, a non-participating party should **not** be permitted to **resist enforcement** of any eventual award on jurisdictional grounds. It is not intuitive why concerns of abuse of process, finality and certainty, etc, should justify barring the non-participating respondent from setting aside the award, but not preclude the same respondent from resisting enforcement of the same award. This observation has led some commentators to question the correctness of *Astro CA,* [10] and led to calls that the Singapore legislature should consider the stance adopted by section 73(2) of the English Arbitration Act [11] by precluding a party, who could have but did not object to the tribunal's ruling on its jurisdiction, from raising those objections in a future setting. According to these commentators, this is justifiable on the policy bases of preventing an abuse of process, good faith and efficiency.

However, such arguments by commentators are not without problems.

First, the English Arbitration Act itself in section 72 preserves the rights of persons who take no part in arbitral proceedings, including the right to challenge any ultimate award on jurisdictional grounds. The Model Law is therefore not alone in giving similar rights to a non-participating party. In Court proceedings in common law jurisdictions, a non-participating defendant is, generally speaking, not precluded from applying to set aside a judgment obtained in default of appearance simply because the defendant was non-participating.

Furthermore, these arguments are premised on the assumption that a non-participating party is automatically an abuser of process out to jeopardise a process that it had earlier signed up for. Whilst that may be often the case, that assumption may not always be true. Arguably, the claimant needs to go through the process, any way, to obtain an award. Second, in many cases, the non-participating respondent would already have made known to the claimant and the tribunal its views as to the tribunal's lack of jurisdiction. In that sense, the non-participating respondent cannot be said to be inducing the claimant to proceed on a false or misleading basis. Finally, as the commentators themselves have recognised, the curial review mechanism under Article 16(3) is as much for the claimant as it is for the respondent, whereby the right to curial review is available to "any party", not "party in whose favour the ruling is made", and the power of the Court is to "decide any matter", not "set aside the ruling". The claimant itself arguably has the opportunity to avoid the risk of wasting time and resources; the claimant

itself can go to the Court to obtain a declaration that the tribunal's preliminary ruling on jurisdiction is valid. This forces the non-participating respondent to decide whether to appear before the Court to fight the declaration sought. Commentators have argued that such a "self-help" mechanism for claimants may be limited in scope because a declaration from the Singapore Court may not be easily enforceable in other jurisdictions. But enforcement of the declaration itself is not the point: the Court ruling will bind the tribunal, and it is likely foreign enforcement Courts will at least consider the Court ruling when considering whether to enforce any eventual award.

Finally, coming back to the fundamental issue, how should Courts apply Article 16(3) to different types of respondents? Given the silence from the text of the Model Law, [12] this is a difficult issue worthy of another discussion in and of itself. Preliminarily, it is suggested that one would have to consider distinctions between:

a. a fully participating respondent, who continues to participate in the arbitration after receiving an unfavourable award on jurisdiction decided as a preliminary issue;
b. a partially participating respondent, who boycotts the arbitral process after receiving an unfavourable award on jurisdiction decided as a preliminary issue; and
c. a fully non-participating respondent, who does not participate in the tribunal's determination of jurisdiction as a preliminary issue.

For the first two categories, *Astro CA* has indicated an inclination towards precluding the respondent from raising jurisdictional objections at the setting aside stage. If one had to support this position, one could formulate a waiver argument along the lines of Article 4 of the Model Law, namely, by electing to participate in the arbitration – whether fully or partially – without invoking a curial challenge under Article 16(3), that respondent has waived its rights to set aside any eventual award on jurisdictional grounds. This would have a similar effect as section 73(2) of the English Arbitration Act.

For the third category, as a matter of principle, these respondents ought to be **no worse off** than a non-participating respondent in an arbitration where the tribunal decides the issue of jurisdiction alongside the merits. Since it currently appears the latter has unfettered rights to set aside or resist enforcement of any eventual award on jurisdictional grounds, the third category of respondents should enjoy the same unfettered rights. This would have a similar effect as section 72 of the English Arbitration Act.

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Endnotes

1. [2013] 1 SLR 636.

2.	*Ibid* at [143].
3.	[2014] 1 SLR 372.
4.	*Ibid* at [130].
5.	*Astro Nusantara International BV v PT Ayunda Prima Mitra* [2013] 1 SLR 636.
6.	*Ibid* at 133.
7.	[2018] SGHC 78
8.	*Ibid* at [71].
9.	*Ibid* at [72].
10.	Danna Er, Annia Hsu, Lavan Vickneson, *The Choice of Remedies Doctrine – a Jack-In-The-Box?* (Kluwer Arbitration Blog, 23 July 2018) <http://arbitrationblog.kluwerarbitration.com/2018/07/23/choice-remedies-doctrine-jack-box/> (accessed 2 October 2018).
11.	Arbitration Act 1996 (Chap 23).
12.	See *PT First Media TBK (formerly known as PT Broadband Multimedia TBK) v Astro Nusantara International BV and others* [2014] 1 SLR 372 at [110] and [131].

Tags: ARTICLE 16(3) MODEL LAW, BOYCOTTING OF ARBITRATION, CHOICE OF REMEDIES, JURISDICTION OF ARBITRAL TRIBUNAL

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