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To boycott proceedings or not? Recourse against arbitral awards on jurisdictional grounds by different categories of respondents under the Model Law

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KEY REFERENCES

- *Astro Nusantara International BV v PT Ayunda Prima Mitra* [2013] 1 SLR 636
- *Astro Nusantara International BV v PT Ayunda Prima Mitra* (2018) 21 HKCFAR 118
- *BAZ v BBA* [2018] SGHC 275
- *Broda Agro Trade (Cyprus) Limited v Alfred C. Toepfer International GmbH* [2009] EWHC 3318 (Comm), [2010] 1 All ER (Comm) 1052
- *Broda Agro Trade (Cyprus) Limited v Alfred C. Toepfer International GmbH* [2010] EWCA Civ 1100, [2011] 2 All ER (Comm) 327
- *Lee Tat Development Pte Ltd v MCST Plan No* 301 [2005] 3 SLR(R) 157
- *PT First Media TBK (formerly known as PT Broadband Multimedia TBK) v Astro Nusantara International BV* [2014] 1 SLR 372
- *Rakna Arakshaka Lanka Ltd v Avant Garde Maritime Services (Pte) Ltd* [2019] 4 SLR 995
- *Rakna Arakshaka Lanka Ltd v Avant Garde Maritime Services (Pte) Ltd* [2019] 2 SLR 131
- *ST Group Co Ltd v Sanum Investments Limited* [2020] 1 SLR 1
- *The London Steam Ship Owners Mutual Insurance Association Ltd v Kingdom of Spain* [2013] EWHC 2840 (Comm), [2014] 1 All ER (Comm) 300
- *Turf Club Auto Emporium Pte Ltd v Yeo Boong Hua* [2017] 2 SLR 12
- Legislation Arbitration Act 1996—sections 66, 67, 68, 72, 73

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- Arbitration Amendment Act 2019 (NZ)—section 4
- Arbitration Ordinance (Cap 609, 2011) (HK)—sections 81, 84
- International Arbitration Act (Cap 143A, 2002 Rev Ed) (Singapore)—sections 3, 10, 24
- UNCITRAL Model Law on International Commercial Arbitration—Articles 4, 16, 34, 35, 36

ABSTRACT

The remedies that award debtors have under Articles 16(3), 34 and 36 of the Model Law, and more critically the inter-relationship between those remedies, has attracted much debate. Yet there is a dearth of analysis on how the availability of each remedy may differ according to the award debtor's degree of participation in the arbitral process. Such analysis carries significant practical value for parties in considering whether and to what extent they should participate in any arbitral process when they harbour jurisdictional objections. This article distils Singapore's experience, describing how Singapore has implemented the 'choice of remedies' principle for participating, non-participating, and boycotting respondents with jurisdictional objections, with comparative observations from Hong Kong, England, and New Zealand. This article shows that the ultimate matrix of remedies chosen by Singapore is far from straightforward. The question whether a respondent has participated in the arbitral process is also a vexed one. The analysis in this article begs the question whether in pursuit of harmonization future reforms to the Model Law ought to be considered.

1. BACKGROUND

What remedies do a respondent who objects to the jurisdiction of an arbitral tribunal have against any eventual arbitral award? Do these remedies differ depending on the respondent's degree of participation in the arbitration? Following undulations in case law, this article sets out the present state of Singapore law on these issues, including suggesting possible areas for reform. For simplicity, this article will distinguish between 3 classes of respondents: a participating respondent (ie, one who participates fully in the arbitration), a non-participating respondent (ie, one who does not participate in the arbitration), and a boycotting[1] respondent (ie, one who leaves the arbitral process after losing a preliminary ruling on jurisdiction).

Preliminarily, which class a respondent falls into may be a controversial question in and of itself. The primary scope of this article is to set out the remedies that each class of respondent would have, which, in turn, might inform and influence the degree of participation a respondent may choose to adopt in a case. Secondarily, to explore the issue of what conduct constitutes participation in the arbitral process, some comparative observations will be made against non-participating respondents under English law.

By way of background, in *PT First Media TBK (formerly known as PT Broadband Multimedia TBK) v Astro Nusantara International BV* [2014] 1 SLR 372 (*Astro CA*),

1 The Singapore Court of Appeal expressed reservations concerning the pejorative effect of this term: *Rakna Arakshaka Lanka Ltd v Avant Garde Maritime Services (Pte) Ltd* [2019] 2 SLR 131 at [54]. Nevertheless, given that the term had been used in *Astro Nusantara International BV v PT Ayunda Prima Mitra* [2013] 1 SLR 636 (*Astro HC*), the term is used here for consistency and ease of cross-referencing.

the Singapore courts had to grapple with, *inter alia*, the remedies that a respondent who objects to the jurisdiction of an arbitral tribunal may have against any eventual award. In a judgment which would have impact beyond its shores, the Singapore Court of Appeal, overruling a High Court decision,[2] found that the architecture of the United Nationals Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration (Model Law) drew a distinction between 'active' and 'passive' remedies. Failure to invoke an 'active' remedy does not preclude a respondent from invoking a 'passive' remedy, and *vice versa*.

Five years later, in *Rakna Arakshaka Lanka Ltd v Avant Garde Maritime Services (Pte) Ltd* [2019] 2 SLR 131 (*Rakna CA*), the Singapore courts had to grapple with similar issues. This time round, however, unlike the participating respondent in *Astro CA*, the respondent in *Rakna CA* was a non-participating respondent, who did not submit a defence and did not substantially participate in any hearing. Are the same remedies against any eventual award available to a non-participating respondent? The Singapore Court of Appeal, again overruling a High Court decision[3] which purportedly applied *Astro CA*, held that the remedies available to a non-participating respondent differs from those available to a participating respondent.

Unlike the position of a participating and a non-participating respondent, there has yet to be case law in Singapore directly addressing the remedies available to boycotting respondents. It has been suggested that a boycotting respondent would have the same remedies as a non-participating respondent. This article will argue otherwise, ie, that the better position is that a boycotting respondent should have the same remedies as a participating respondent.

Section 2 of this article sets out the legislative structure and summarizes the remedies available to each class of respondent under Singapore law by way of a table. Sections 3 and 4 explain the remedies that are available to a participating respondent under Singapore law, including potential areas of reform. Section 5 explains the remedies that are available to a respondent who has sought curial review of a preliminary ruling on jurisdiction without success, under Singapore law. Section 6 explains the remedies that are available to a non-participating respondent, including an exploration of what conduct constitutes participation in the arbitral process, under Singapore law. Section 7 explains the remedies that, in the writers' view, ought to be available to a boycotting respondent under Singapore law. Section 8 offers some concluding remarks on the entire framework of remedies.

2. LEGISLATIVE STRUCTURE AND REMEDIES AVAILABLE TO RESPONDENTS

The starting point of analysis is Singapore's International Arbitration Act[4] (IAA), which in turn, gives effect to the Model Law.

Article 16 of the Model Law (to be read with section 10 of the IAA) provides that an arbitral tribunal may rule on its own jurisdiction either as a preliminary question, or in an award on the merits. If the tribunal issues a preliminary award on

2 *Astro Nusantara International BV v PT Ayunda Prima Mitra* [2013] 1 SLR 636.

3 *Rakna Arakshaka Lanka Ltd v Avant Garde Maritime Services (Pte) Ltd* [2019] 4 SLR 995 (*Rakna HC*).

4 International Arbitration Act (Cap 143A, 2002 Rev Ed).

jurisdiction, under Article 16(3), any party may apply to the curial court within thirty days to decide the matter, whose decision is not subject to appeal. However, in Singapore, under section 10 of the IAA, an appeal from the decision of the High Court made under Article 16(3) of the Model Law shall lie to the Court of Appeal only with the leave of the High Court. When an application has been made under Article 16(3), such an application shall not operate as a stay of the arbitral proceedings.

Article 34 of the Model Law (to be read with section 24 of the IAA) provides for the setting aside of an arbitral award on the merits under a limited set of grounds. Articles 35 and 36 of the Model Law concern the grounds for resisting the recognition and enforcement of arbitral awards. These grounds mirror the grounds for setting aside in Article 34. In Singapore, Articles 35 and 36 are excluded by section 3(1) of the IAA.

The provisions above, however, do not appear to provide express guidance on the following issues which have arisen in practice:

a. Is Article 16(3) a 'one-shot remedy'?[5] In other words, to what extent does the failure of a respondent to invoke Article 16(3) have a preclusive effect on the ability of that respondent to raise the challenge at a later stage?
b. Can a respondent who has not applied to set aside an award on jurisdictional grounds invoke jurisdictional objections in enforcement proceedings?
c. To what extent would a respondent's remedies be affected if that respondent boycotts the arbitration after losing a preliminary ruling on jurisdiction (ie, a boycotting respondent), or if the respondent did not participate in the arbitration from the outset (ie, a non-participating respondent)?

This article attempts to navigate Singapore's current position on the three issues above in relation an international arbitration award made in Singapore, ie, where Singapore is the curial court. Table 1 summarizes the analysis that follows.

3. PARTICIPATING RESPONDENT WHO DOES NOT RAISE ANY JURISDICTIONAL OBJECTIONS BEFORE THE ARBITRAL TRIBUNAL

Generally, a participating respondent who fails to object to jurisdiction at the appropriate time provided by Article 16(2) of the Model Law will be precluded from raising such objections at the post-award stage. Put another way, that respondent will generally not be permitted to raise jurisdictional objections by way of an application to set aside or resist enforcement under the IAA. There are limited exceptions. Certain defects, such as violation of public policy, including non-arbitrability, can be raised, even if no party had raised any objections during the arbitral proceedings. There is also some support in the *travaux préparatoires* (*travaux*) of the Model Law[6]

5 *PT First Media TBK (formerly known as PT Broadband Multimedia TBK) v Astro Nusantara International BV* [2014] 1 SLR 372 (*Astro CA*) at [24].

6 All references hereinafter to the *travaux* is a reference to the *travaux préparatoires* of the Model Law.

Table 1. Summary of remedies available to respondents

Category of respondent	Remedy of setting aside in Singapore on the same jurisdiction objections	Remedy of resisting enforcement in Singapore on the same jurisdiction objections
1. Participating respondent who does not raise any jurisdictional objections before the arbitral tribunal	No: *Astro HC* and *Rakna CA* in *obiter* (see Section 3 below)	No: *Astro HC* and *Rakna CA* in *obiter* (see Section 3 below)
2. Participating respondent who does not invoke Article 16(3) after losing preliminary ruling on jurisdiction	No: *Astro CA* and *Rakna CA* in *obiter* (see Section 4 below)	Yes, subject to waiver or estoppel: *Astro CA* (see Section 4 below)
3. Respondent who invokes and loses application under Article 16(3)	Arguably no, on the basis of *res judicata* (see Section 5 below)	Arguably no, on the basis of *res judicata* (see Section 5 below)
4. Non-participating respondent who does not invoke Article 16(3) after losing preliminary ruling on jurisdiction	Yes, subject to waiver or estoppel: *Rakna CA* (see Section 6 below)	Yes, subject to waiver or estoppel: *Rakna CA* (see Section 6 below)
5. Boycotting respondent who does not invoke Article 16(3) after losing preliminary ruling on jurisdiction	Unclear, but it is suggested that the remedies available should be the same as Category 2 above (see Section 7 below)	Unclear, but it is suggested that the remedies available should be the same as Category 2 above (see Section 7 below)

for the view that a party will not necessarily be precluded from raising an arbitral tribunal's excess of jurisdiction at the post-award stage.[7]

By way of background, Article 16(2) of the Model Law provides as follows:

> (2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence. A party is not precluded from raising such a plea by the fact that he has appointed, or participated in the appointment of, an arbitrator. A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral

7 United Nations Commission on International Trade Law, *Report of the United Nations Commission on International Trade Law on the work of its Eighteenth Session* (UN Doc A/40/17, 3 – 21 June 1985) at pp 30–31, para 155.

> proceedings. The arbitral tribunal may, in either case, admit a later plea if it considers the delay justified.

In the context of a participating respondent, this is to be read together with Article 4 of the Model Law, which provides as follows:

> Article 4. Waiver of right to object
> A party who knows that any provision of this Law from which the parties may derogate or any requirement under the arbitration agreement has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay or, if a time-limit is provided therefor, within such period of time, shall be deemed to have waived his right to object.

The prevailing view recorded in the *travaux* was that the effect of Article 4 would extend to the post-award stage:[8]

> Divergent views were expressed as to the scope of the effect of a waiver. Under one view, the rule in article 4 would have effect only for and during the arbitral proceedings. The prevailing view, however, was that its effect extended to the post-award stage, i.e. setting aside proceedings and recognition or enforcement (art[icles] 34 and 36).

Whilst Article 16(2) does not expressly provide for the effect of non-compliance, its preclusive effect has been recognized under Singapore law by both *Astro HC* and *Rakna CA*.

First, in *Astro HC*, the Singapore High Court, after a review of the *travaux*, stated that:[9]

> UNCITRAL Commentary (A/CN 9/264) on Art[icle] 16 records at para 9 that if a party does not raise a timely objection to jurisdiction in accordance with the (then draft) Art[icle] 16(2) of the Model Law, then the party cannot raise the same objection to jurisdiction under Art[icles] 34 and 36.

Next, in *Rakna CA*, the Singapore Court of Appeal, after a similar review of the *travaux*, stated that:[10]

> There was a great deal of debate among the drafters about whether non-utilisation of the procedure provided for jurisdictional challenges should have a preclusive effect on the ability of the challenging party to raise the challenge again at a later stage, for example, by way of an application to set aside an award. The Article itself does not state what the effect of non-compliance

8 United Nations Commission on International Trade Law, *Report of the Working Group on International Contract Practices on the work of its Seventh Session* (UN Doc A/CN.9/246, 6 March 1984) at p 44, para 181.

9 *Astro Nusantara International BV v PT Ayunda Prima Mitra* [2013] 1 SLR 636 at [141].

10 *Rakna Arakshaka Lanka Ltd v Avant Garde Maritime Services (Pte) Ltd* [2019] 2 SLR 131 at [51].

> would be, but the Working Group in *Report of the Working Group on International Contract Practices on the work of its Seventh Session* (A/CN.9/246, 6 March 1984) at para 51 made an observation to the effect that a party who failed to raise the plea at the appropriate time provided by Art[icle] 16(2) should be precluded from raising such objection later. It is clear that the drafters intended Art[icle] 16(2) to have a preclusive effect . . ..

Notwithstanding the above, the Model Law drafters recognized an exception to the preclusive effect of Article 16(2). Certain defects, such as violations of public policy, including issues of arbitrability, cannot be simply cured by the parties' submission to the arbitral proceedings:[11]

> As expressed in the above observation of the Working Group, there are limits to the effect of a party's failure to raise his objections. These limits arise from the fact that certain defects such as violation of public policy, including non-arbitrability, cannot be cured by submission to the proceedings. Accordingly, such grounds for lack of jurisdiction would be decided upon by a court in accordance with Art[icle] 34(2)(b) or, as regards awards made under this [Model] Law, Art[icle] 36(1)(b) even if no party had raised any objections in this respect during the arbitral proceedings. It may be added that this result is in harmony with the understanding (stated above, para. 3) that these latter issues are to be determined by the arbitral tribunal ex officio. (underline in original)

Similarly, there is also some support in the *travaux* for the view that a party would not necessarily be precluded from raising a tribunal's excess of jurisdiction at the post-award stage:[12]

> The concern was expressed that parties who were not sophisticated in international commercial arbitration might not realize that a matter exceeding the arbitral tribunal's jurisdiction had been raised and that they were compelled to object promptly. Moreover, it was suggested that in some cases the governing law, and therefore limitations on arbitrability of certain disputes, might not be determined until the time of award, making an earlier plea impossible. As a result, failure to raise the plea at an earlier time should not necessarily preclude its use in setting aside proceedings or in recognition and enforcement proceedings.

In sum, a participating respondent who fails to raise a timely jurisdictional objection under Article 16(2) is generally precluded from raising that same objection at the post-award stage, unless that objection falls within limited exceptions, such as violations of public policy, which cannot be cured by the parties' submission to the arbitral proceedings.

11 United Nations Commission on International Trade Law, *Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration* (UN Doc A/CN.9/264, 25 March 1985) at p 40, para 10.

12 United Nations Commission on International Trade Law, *Report of the United Nations Commission on International Trade Law on the work of its Eighteenth Session*, (UN Doc A/40/17, 3–21 June 1985) at pp 30–31, para 155.

4. PARTICIPATING RESPONDENT WHO DOES NOT INVOKE ARTICLE 16(3) OF THE MODEL LAW AFTER LOSING PRELIMINARY RULING ON JURISDICTION

A participating respondent who does not invoke Article 16(3) of the Model Law after losing a preliminary ruling on jurisdiction will very likely be precluded from raising the same jurisdictional objections to set aside any eventual award. However, subject to any waiver or estoppel on the part of the respondent, that respondent retains the right to resist enforcement of that award in Singapore.

This issue was at the heart of the *Astro* line of cases.

Astro concerned a failed joint venture between Indonesia's Lippo Group (Lippo) and Malaysia's Astro Group (Astro). This joint venture was contained in a subscription and shareholders agreement (SSA) which included an arbitration agreement with Singapore as the seat of arbitration. In anticipation of the closing of the joint venture, several of Astro's subsidiaries who were not parties to the SSA provided funding. When the joint venture failed to materialize, Astro commenced arbitration and applied to join those subsidiaries as co-claimants.

Before the arbitral tribunal, Lippo objected to the joinder of the Astro subsidiaries, arguing that the tribunal had no jurisdiction over those subsidiaries. Nevertheless, in a preliminary ruling on jurisdiction, the tribunal exercised its discretion to join the subsidiaries to the arbitration. Lippo informed the tribunal of its decision not to appeal against that preliminary ruling and proceeded to defend its case on the merits, stating that its actions were 'without prejudice to [its] position on any appeal'.[13] Lippo was therefore a participating respondent who did not invoke Article 16(3) of the Model Law to review the tribunal's preliminary ruling on jurisdiction.

Lippo ultimately lost its case on the merits. When Astro sought to enforce the eventual award in Singapore, Lippo invoked the same jurisdictional objections to resist recognition and enforcement.

The ambiguity in the text and *travaux* of Article 16(3) has given rise to diverging approaches.[14] At first instance, the Singapore High Court, citing Canadian and German case law, held that an award debtor who chooses not to apply to review a preliminary ruling on jurisdiction under Article 16(3) of the Model Law is 'taken to accept the finality of the award on jurisdiction'.[15] This would not only preclude the award debtor from raising the jurisdictional objections during the rest of the arbitration. It would also preclude recourse at the post-award stage, whether through setting aside proceedings or recognition and enforcement proceedings.[16] In effect, Article 16(3) would serve as the sole and 'exclusive route to challenge a tribunal's award on jurisdiction under the IAA'.[17]

13 *Astro Nusantara International BV v PT Ayunda Prima Mitra* [2013] 1 SLR 636 at [32] and [153].

14 Nata Ghibradze, 'Preclusion of Remedies under Article 16(3) of the UNCITRAL Model Law' (2015) 27(1) Pace Int L Rev 346.

15 *Astro Nusantara International BV v PT Ayunda Prima Mitra* [2013] 1 SLR 636 at [140].

16 *Astro Nusantara International BV v PT Ayunda Prima Mitra* [2013] 1 SLR 636 at [141], [155] and [162].

17 *Astro Nusantara International BV v PT Ayunda Prima Mitra* [2013] 1 SLR 636 at [157].

In arriving at its decision, the High Court, relying on the *travaux*, concluded that Article 16 was 'intended to promote the finality of a decision on jurisdiction at an early stage' to 'allow the arbitration to proceed on a sure footing'.[18] On this premise, the court should not allow a party who has participated in the arbitration to delay raising jurisdictional challenges until the post-award stage, as this would 'make a mockery of the finality and effectiveness of arbitral awards on jurisdiction'.[19] The court held that, since Lippo's reservation of its position on jurisdiction did not amount to an application under Article 16(3), the court was obligated to enforce the eventual award.

The High Court's decision was reversed on appeal. The Court of Appeal placed particular emphasis on the availability of both 'active' and 'passive' remedies under the Model Law and the underlying philosophy of the Model Law in promoting a 'choice of remedies' for parties.[20] Under the 'choice of remedies' approach, an award debtor is entitled to choose between actively invalidating the award through setting aside proceedings or Article 16(3) applications, or passively defending itself in recognition and enforcement proceedings. Not invoking an active remedy (which included Article 16(3)) would not prejudice the availability of a passive remedy.[21]

In the Court of Appeal's view, 'nothing in the *travaux* suggests that Art[icle] 16(3) was an exception to the "choice of remedies" philosophy upon which the treatment of awards was predicated'.[22] In reaching the conclusion that Article 16(3) is not a 'one-shot remedy', the court reasoned that the 'architecture of Art[icle] 16(3) is not certainty-centric', and did not extend to 'precluding subsequent recourse to passive remedies'.[23] The 'choice of remedies' approach under the Model Law has since been endorsed by the Hong Kong courts as well.[24]

If '[p]arties involved in international arbitrations in Singapore [are] compelled to engage their active remedies in the Singapore courts', including Article 16(3), the Court of Appeal expressed concerns that might have 'potentially far-reaching implications on the practice and flourishing of arbitration here in Singapore'.[25]

That said, New Zealand (a Model Law jurisdiction) has chosen to take a different approach. In response to *Astro CA*, New Zealand recently introduced a new provision which provides that a failure to invoke Article 16(3) has preclusive effect on

18 *Astro Nusantara International BV v PT Ayunda Prima Mitra* [2013] 1 SLR 636 at [142] and [162].

19 *Astro Nusantara International BV v PT Ayunda Prima Mitra* [2013] 1 SLR 636 at [146], [159] and [162].

20 *PT First Media TBK (formerly known as PT Broadband Multimedia TBK) v Astro Nusantara International BV* [2014] 1 SLR 372 at [65]–[71].

21 *PT First Media TBK (formerly known as PT Broadband Multimedia TBK) v Astro Nusantara International BV* [2014] 1 SLR 372 at [26].

22 *PT First Media TBK (formerly known as PT Broadband Multimedia TBK) v Astro Nusantara International BV* [2014] 1 SLR 372 at [111].

23 *PT First Media TBK (formerly known as PT Broadband Multimedia TBK) v Astro Nusantara International BV* [2014] 1 SLR 372 at [116]–[117].

24 *Astro Nusantara International BV v PT Ayunda Prima Mitra* (2018) 21 HKCFAR 118.

25 *PT First Media TBK (formerly known as PT Broadband Multimedia TBK) v Astro Nusantara International BV* [2014] 1 SLR 372 at [90].

both setting aside and enforcement proceedings.[26] This new provision, Article 16(4), reads as follows:[27]

> To avoid doubt, it is declared that the failure to pursue a request made under paragraph (3) in a timely manner operates as a waiver of any right to later object to a ruling of the arbitral tribunal as to its jurisdiction.

Although it is not clear from the face of Article 16(4) whether it applies to all categories of respondents, the Final Report of the Justice Committee of the New Zealand Parliament has observed that Article 16(4) is intended to apply to all respondents, except one who 'does not participate in the arbitration at all'.[28]

In Hong Kong, the Hong Kong Court of Appeal has recognised that there might be circumstances in which a party's failure to invoke Article 16(3) before the curial court could be cosntrued as a breach of the good faith principle, and hence preclude that party from resisting enforcement of the award.[29]

Such diverging approaches between Model Law jurisdictions—which raises practical concerns for parties on where they should seat their arbitrations—beg the question whether in the interests of harmonization the Model Law ought to amended.

Returning to Singapore, an award debtor's ability to raise jurisdictional objections in post-award proceedings when it has not invoked Article 16(3) is limited in two ways.

4.1 Preclusion of the remedy of setting aside

First, while an award debtor may be entitled to rely on its passive remedy of resisting enforcement (as explained above), *Astro CA* suggested in *obiter* that the award debtor may be precluded from relying on the active remedy of setting aside the award.[30] This is because, according to the Singapore Court of Appeal, the Model Law did not intend a 'multiplicity of active remedies' given the policy of 'certainty and finality in the seat of arbitration':[31]

> In light of the *travaux* which we have examined, it appears to us that there is a policy of the Model Law to achieve certainty and finality in the seat of

26 Although commentators have suggested that the legislative amendment should take into account the differing positions of participating, non-participating and boycotting respondents, it appears that the suggestion was not implemented. See Albert Monichino QC, 'Should one-size fit all? Participating, non-participating and boycotting parties under proposed Article 16(4)' (11 December 2018) <https://www.nziac.com/one-size-fit/> (accessed 19 May 2020).

27 Arbitration Amendment Act 2019 (New Zealand) s 4.

28 Justice Committee, Parliament of New Zealand, "Arbitration Amendment Bill: Commentary" (2018) at p 3.

29 *Astro Nusantara International BV and others v Pt Ayunda Prima Mitra and others*, CACV 272/2015 (Hong Kong Court of Appeal), citing *China Nanhai Oil Joint Service Corporation Shenzhen Branch v Gee Tai Holdings Co Ltd* [1994] 3 HKC 375.

30 *PT First Media TBK (formerly known as PT Broadband Multimedia TBK) v Astro Nusantara International BV* [2014] 1 SLR 372 at [130].

31 *PT First Media TBK (formerly known as PT Broadband Multimedia TBK) v Astro Nusantara International BV* [2014] 1 SLR 372 at [123] and [130].

> arbitration. This is further borne out by the strict timeline of 30 days imposed under both Art[icles] 13(3) and 16(3), the design of which seems to be to precipitate an early determination on issues of composition and jurisdiction so that the arbitration can continue. We would therefore be surprised if a party retained the right to bring an application to set aside a final award on the merits under Art[icle] 34 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.

The Court of Appeal concluded that it was of the 'tentative view' that Article 16(3) may preclude a participating respondent from setting aside any eventual award on the same jurisdictional objections.[32] On its terms Article 16(3) is a mechanism that is open to 'any party', and not just the losing party, to invoke. However, instead of characterizing Article 16(3) as a *sui generis* remedy suggested by some commentators,[33] the Court of Appeal chose to place Article 16(3) in the same basket of active remedies alongside setting aside.

Astro CA's 'tentative view'—that Article 16(3) may preclude a participating respondent from setting aside any eventual award on the same jurisdictional objections—has come under question. For instance, Shaun Pereira has raised three objections.[34]

First, Pereira argues that the intent of the drafters was to make Article 16(3) a further alternative option to setting aside, and not to preclude setting aside:[35]

> [T]he shift towards Article 16(3) in its current form was a gentle and permissive one . . . nothing suggests that the inclusion of Article 16(3) was intended to upend the fundamental architecture of the Model Law, a cornerstone of which is the curial court's supervision over arbitral awards on the grounds set out in Article 34(2). If such a dramatic shift were in fact contemplated in situations where a tribunal rendered a preliminary ruling on jurisdiction, one would have expected there to be clearer and more express indications to that effect. It is perhaps telling that the two Drafting Group participants who have written detailed analyses of the *travaux préparatoires* take the view that Article 16(3) was not intended as an exclusive recourse against a jurisdictional decision issued as a preliminary ruling.

Pereira's second objection is that giving preclusive effect to Article 16(3) would create an asymmetry as to a party's right of appeal in jurisdictional questions that are raised to the curial court. Article 16(3) curtails a party's right to appeal, but not Article 34. The preclusive effect of Article 16(3) would mean that a party's right to appeal against a curial court review of the tribunal's jurisdiction would differ,

32 *PT First Media TBK (formerly known as PT Broadband Multimedia TBK) v Astro Nusantara International BV* [2014] 1 SLR 372 at [132].

33 Ghibradze (n 14) 346, 384–85.

34 Shaun Pereira, 'Deferred Challenges to Jurisdiction Under the Model Law' (2018) 35(6) J Int Arbitr 719.

35 ibid 729.

depending on whether the arbitral tribunal rules on the issue of jurisdiction as a preliminary ruling or in an award with the merits.

Pereira's third objection is that giving preclusive effect to Article 16(3) creates practical problems when an arbitral tribunal decides to rule on only some, and not all, of the jurisdictional objections in a preliminary ruling. It may be wasteful to require a respondent to invoke Article 16(3) when it loses a preliminary ruling on jurisdiction, the outcome of which may turn out to be irrelevant if that respondent ultimately succeeds on another jurisdictional objection which the tribunal decides in an award on the merits.

That the *travaux* is ambiguous has been duly recognized by *Rakna CA*, quoting an observation by Nata Ghibradze as follows:[36]

> While this remedy under Article 16(3) of the Model Law was deemed as an innovative and sensible compromise purportedly directed towards faster resolution of jurisdictional issues and obtaining legal certainty, in effect the Model Law has provoked ambiguity by being silent on the consequences of failure to use this remedy.

Despite this recognition, the 'tentative view' expressed in *Astro CA* has now been strengthened in *Rakna CA*. According to *Rakna CA*, the reason for the adoption of Article 16(3) was to effect a compromise between the policy consideration of avoiding wastage of resources (the wastage that results from the setting aside of an arbitral award for lack of jurisdiction after the entire arbitration has been completed), and the policy consideration of preventing parties from trying to delay arbitral proceedings by bringing challenges before the court.[37] The Singapore Court of Appeal, after discussing the preclusive effect of Article 16(2), expressed the view that, 'in all likelihood, [the drafters of the Model Law] intended the same [preclusive effect] for Art[icle] 16(3)'.[38] The Court of Appeal further explained in *obiter* that:[39]

> The position is quite different where the respondent (as in *Astro Nusantara*) having failed in its jurisdictional objection then participates in the arbitration. By doing that, the respondent would have contributed to the wasted costs and it is just to say to such a respondent that he cannot then bring a setting aside application outside the time limit prescribed in Art[icle] 16(3) though he can continue to resist enforcement.

Rakna CA's reliance on Article 16(2) as well as the purported intent of the drafters of the Model Law for the proposition that Article 16(3) has preclusive effect is open to doubt. The *travaux* does not demonstrate that the drafters were fashioning the effects of Article 16(3) after Article 16(2). Rather, Article 16(3) was fashioned after Article 13(3) concerning challenges to the appointment of an arbitrator. The

36 Ghibradze (n 14) 346, 349–50; cited at *Rakna Arakshaka Lanka Ltd v Avant Garde Maritime Services (Pte) Ltd* [2019] 2 SLR 131 at [69].

37 *Rakna Arakshaka Lanka Ltd v Avant Garde Maritime Services (Pte) Ltd* [2019] 2 SLR 131 at [72].

38 *Rakna Arakshaka Lanka Ltd v Avant Garde Maritime Services (Pte) Ltd* [2019] 2 SLR 131 at [51].

39 *Rakna Arakshaka Lanka Ltd v Avant Garde Maritime Services (Pte) Ltd* [2019] 2 SLR 131 at [75].

relationship between Articles 16(3) and 13(3) was extensively analysed in *Astro CA*. Counsel in *Astro CA* acknowledged that there was nothing in the *travaux* which states that a failure to challenge under Article 13(3) precludes raising the same objection as an active remedy in setting aside or as a passive remedy in enforcement proceedings.[40] Put simply, the *travaux* does not provide strong support for the proposition that Article 16(3) has any preclusive effect.

Nevertheless, regardless of whether one can accurately divine the intentions of the Model Law drafters today, what appears to be foremost in the mind of the Court of Appeal in *Rakna CA* is a question of policy: at least insofar as participating respondents are concerned, one should minimize the wastage of time and costs which would be incurred if an award is ultimately set aside for lack of jurisdiction. *Rakna CA* is not alone—such policy-driven concerns were also keenly expressed in *Astro HC*[41] and *Rakna HC*.[42]

Consequently, to meet concerns of time and costs, Article 16(3) will highly likely be construed by the Singapore courts as having a preclusive effect on participating respondents—a failure to invoke Article 16(3) will preclude participating respondents from setting aside any eventual award on jurisdictional objections which could have been raised under Article 16(3).

Be that as it may, Pereira's remaining criticisms merit consideration. Statutory reform might be required to remove any differences in the right of appeal between a lower court decision under Articles 16(3), 34 and 36,[43] eg, by introducing a similar need to seek leave before one can appeal against a High Court decision on setting aside and/or enforcement. Concerns that this may detrimentally affect Singapore's attractiveness as a seat of arbitration can be assuaged by how this would not be novel among other popular seats, which provide two possible models for reform.

First, under sections 81(4) and 84(3) of the Hong Kong Arbitration Ordinance,[44] leave is required before one can appeal against a court decision on all setting aside and enforcement applications respectively.[45]

The second model is the English Arbitration Act, where leave is required before one can appeal against a court decision? on a challenge against the substantive jurisdiction of the tribunal (section 67(4)) or a challenge based on serious irregularity (section 68(4)), but not for resisting enforcement (section 66). This has been explained in the following way:[46]

40 *PT First Media TBK (formerly known as PT Broadband Multimedia TBK) v Astro Nusantara International BV* [2014] 1 SLR 372 at [128].

41 *Astro Nusantara International BV v PT Ayunda Prima Mitra* [2013] 1 SLR 636 at [142].

42 *Rakna Arakshaka Lanka Ltd v Avant Garde Maritime Services (Pte) Ltd* [2019] 4 SLR 995 at [61].

43 Which is excluded by s 3(1) of the IAA, but the grounds of which are equally available in Singapore under section 19 of the IAA: *PT First Media TBK (formerly known as PT Broadband Multimedia TBK) v Astro Nusantara International BV* [2014] 1 SLR 372 at [99].

44 Arbitration Ordinance (Cap 609, 2011) (Hong Kong).

45 The same inconsistency appears in Hong Kong, but in the reverse manner. Section 34 of the Hong Kong Arbitration Ordinance incorporates Article 16 of the Model Law in its entirety. Whilst one can appeal against a setting aside or enforcement application with leave, Article 16(3) as incorporated in Hong Kong does *not* permit an appeal against a court decision reviewing a tribunal's jurisdiction.

46 *The London Steam Ship Owners Mutual Insurance Association Ltd v Kingdom of Spain* [2013] EWHC 2840 at [82(2)].

> The importance of protecting those who object to jurisdiction and do not participate is underlined by what is in effect a saving as to rights of appeal: the High Court's decisions on enforcement under section 66 and on relief under section 72(1) may be appealed to the Court of Appeal in the normal way, whereas its decisions on challenges brought by 'a party to arbitral proceedings' under sections 67 (jurisdiction) and 68 (serious irregularity) may only be appealed with the leave of the High Court.

In essence, insofar as questions of jurisdiction are concerned a participating respondent under the English model would have had two opportunities to make its case: first before the tribunal, and second before the first instance curial court for which leave would be required for any appeal. A non-participating respondent (who would not have made its case before the tribunal) will be afforded two opportunities as well, first before the first instance court, and the second, on any appeal (where leave is not required).

A possible third model can be considered by amalgamating the two models above. For reasons of consistency and the conservation of appellate court time and resources, it may be preferable—as in Hong Kong—to require leave to appeal against all first instance decisions on setting aside and enforcement applications (rather than setting aside applications alone). In this way, an award made in Singapore is not discriminated against—as with a first instance decision concerning the enforcement of a foreign award, a setting aside by the curial court against an award made in Singapore can similarly be appealed with leave of court. However, in considering whether to grant leave to appeal (on both setting aside and enforcement applications), the fact that the applicant for leave may have been a non-participating respondent could carry heavier weight in the overall calculus of factors that the High Court consider.

We turn next to the third criticism levelled by Pereira. In a situation where the arbitral tribunal decides to rule on only some, and not all, of the jurisdictional objections in a preliminary ruling, a respondent is not contributing to wasted time and costs because its continued participation in the arbitration after the preliminary ruling is justified by the remaining jurisdictional objections. Accordingly, such a scenario could arguably constitute a limited exception to the preclusive effect of Article 16(3).

4.2 Second limitation on an award debtor's ability to raise jurisdictional objections in post-award proceedings when it has not invoked Article 16(3)—waiver and estoppel

Returning to *Astro CA*, an award debtor's ability to raise jurisdictional objections in post-award proceedings when it has not invoked Article 16(3) is limited in a second way. The award debtor is entitled to rely on its passive remedy of resisting enforcement (as explained above) only insofar as it has not waived, or is otherwise estopped from asserting, its rights to invoke jurisdictional objections in post-award proceedings.

On the facts, Astro argued that Lippo's continued participation in the arbitration after the preliminary award amounted to a waiver of the latter's right to invoke

jurisdictional objections in post-award proceedings.[47] Such a waiver would form an independent basis of barring Lippo's reliance on its jurisdictional objections, regardless of the regime under Article 16(3). The Singapore Court of Appeal held that Lippo had not waived its rights. Lippo's conduct had not amounted to a clear and unequivocal representation that it would forego the right to challenge the award on jurisdiction, especially because it had reserved its position.[48]

In sum, a participating respondent who does not invoke Article 16(3) of the Model Law after losing a preliminary ruling on jurisdiction will very likely be precluded from raising the same jurisdictional objections to set aside any eventual award. However, subject to any waiver or estoppel on the part of the respondent, that respondent retains the right to resist enforcement of any eventual award in Singapore on the same jurisdictional objections.

5. RESPONDENT WHO INVOKES AND LOSES APPLICATION UNDER ARTICLE 16(3) OF THE MODEL LAW AFTER LOSING PRELIMINARY RULING ON JURISDICTION

In this scenario, the respondent would have invoked Article 16(3) of the Law, but lost before the Singapore courts. It is highly likely that, by virtue of the doctrine of *res judicata*, that respondent would be precluded from re-litigating the same jurisdictional objections before the Singapore courts at the post-award stage.

The doctrine of *res judicata* consists of three conceptually distinct but interrelated principles. These are (i) cause of action estoppel; (ii) issue estoppel; and (iii) what is known as either the 'extended' doctrine of *res judicata* or the defence of 'abuse of process'.[49] The latter two principles are applicable to the scenario at hand.

First, the requirements to establish issue estoppel under Singapore law are likely to be satisfied:[50]

a. There must be a final and conclusive judgment on the merits;
b. That judgment must be by a court of competent jurisdiction;
c. The two actions that are being compared must involve the same parties; and
d. There must be identity of subject matter in the two proceedings.

Next, to the extent the respondent attempts to re-mount or refine its arguments under the same jurisdictional objections at the post-award stage, it is arguable that the 'extended' doctrine of *res judicata* precludes that respondent—in the absence of 'special circumstances'—from raising at the post-award stage matters which were not, but could and should have been, raised in the earlier Article 16(3) proceedings.[51]

47 *PT First Media TBK (formerly known as PT Broadband Multimedia TBK) v Astro Nusantara International BV* [2014] 1 SLR 372 at [199].
48 *PT First Media TBK (formerly known as PT Broadband Multimedia TBK) v Astro Nusantara International BV* [2014] 1 SLR 372 at [209] and [224].
49 *Turf Club Auto Emporium Pte Ltd v Yeo Boong Hua* [2017] 2 SLR 12 at [82].
50 *Lee Tat Development Pte Ltd v MCST Plan No 301* [2005] 3 SLR(R) 157 at [14]–[15].
51 *Turf Club Auto Emporium Pte Ltd v Yeo Boong Hua* [2017] 2 SLR 12 at [85].

For completeness, the Singapore courts have observed that there is an ongoing 'controversy'[52] as to whether issue estoppel should be applicable in setting aside or enforcement proceedings to preclude a party from re-litigating issues already decided in a prior foreign proceeding. However, this is not applicable in this scenario because the forum of litigation is the same, namely the Singapore courts.

In sum, it is highly likely that, by virtue of the doctrine of *res judicata*, a respondent who has lost an Article 16(3) challenge would be precluded from re-litigating the same jurisdictional objections before the Singapore courts at the post-award stage (whether by way of setting aside or resisting enforcement).

6. NON-PARTICIPATING RESPONDENT WHO DOES NOT INVOKE ARTICLE 16(3) OF THE MODEL LAW AFTER LOSING PRELIMINARY RULING ON JURISDICTION

A non-participating respondent who does not invoke Article 16(3) of the Model Law after losing a preliminary ruling on jurisdiction will not be precluded from raising the same jurisdictional objections at the post-award stage, subject to any waiver or estoppel.

This issue was at the heart of the *Rakna* line of cases.

In *Rakna*, the arbitration was administered by the Singapore International Arbitration Centre ('SIAC'). In the early stages of the arbitration, the respondent Rakna requested extensions of time from the SIAC. Rakna did not, however, file any submissions, witness statements, or pleadings, nor did Rakna appoint an arbitrator.

When the SIAC constituted a tribunal in default, Rakna wrote to the SIAC asserting that the parties had settled the dispute. This was contested by the claimant. A preliminary hearing was held, but Rakna was absent. Rakna also did not attend any of the subsequent hearings, though Rakna had written to the SIAC enquiring about the status of the arbitration and requesting copies of the claimant's submissions.

The tribunal eventually rendered a final award in favour of the claimant. Rakna applied to set aside the final award on the basis that the tribunal lacked jurisdiction because the parties had settled the dispute and thereby terminated the reference to arbitration. This was rejected by the Singapore High Court.

The Singapore High Court, following *Astro CA*, held that an award debtor who does not utilize the Article 16(3) mechanism can resist enforcement of the award on the same jurisdictional grounds.[53]

However, again citing *Astro CA*, the High Court held that the award debtor would be precluded from setting aside the award, reasoning that Article 16(3) was 'intended as an early avenue for parties to promptly and finally resolve jurisdictional disputes, . . . and it would defeat those purposes to allow a party to reserve jurisdictional challenges'.[54] The High Court held that this preclusive effect of Article 16(3) would equally apply to non-participating parties. This was motivated by 'considerations of

52 *BAZ v BBA* [2018] SGHC 275 at [38].

53 *Rakna Arakshaka Lanka Ltd v Avant Garde Maritime Services (Pte) Ltd* [2019] 4 SLR 995 at [62].

54 *Rakna Arakshaka Lanka Ltd v Avant Garde Maritime Services (Pte) Ltd* [2019] 4 SLR 995 at [61].

finality, certainty, practicality, cost, preventing dilatory tactics and settling the position at an early stage'.[55]

Further, the High Court considered that it would be an abuse of process to permit a party to reserve its jurisdictional objections until the post-award stage.[56] Rakna was thus precluded from setting aside the award.

On appeal, the Singapore Court of Appeal reversed the High Court's decision on the preclusive effect of Article 16(3). The Singapore apex court held that the preclusive effect of Article 16(3) would not extend to non-participating parties such as *Rakna*.[57] The Court of Appeal's reasoning rested on two planks.

First, a non-participating respondent has no legal duty to participate in the arbitration and defend its position if, in its view, the arbitration was wrongly commenced.[58] The effect of the High Court's approach would undermine this principle in so far as it would compel a respondent to participate in the arbitration or risk forfeiting its right to set aside the award. While the non-participating respondent could still resort to its passive remedy of resisting enforcement in any case, this is less desirable than setting aside the award at the seat of arbitration. A successful setting aside application has an *erga omnes* effect and would preclude enforcement in most jurisdictions.[59] The passive remedy, on the other hand, would require the non-participating respondent to resist enforcement in potentially many jurisdictions, and would result in additional costs for an 'innocent' respondent.[60]

Second, while there may be sound policy reasons for precluding a participating respondent from reserving its jurisdictional objections to the post-award stage, those reasons are inapplicable where a non-participating respondent is concerned.[61] A respondent who has participated fully in the arbitration despite its jurisdictional objections would have contributed to the time and costs of the arbitration, but a non-participating respondent would not. On the contrary, the claimant would have notice of the respondent's jurisdictional objections from its refusal to participate, and 'any wastage of costs on the part of the claimant would be entirely self-induced'.[62]

Rakna CA is not alone in its reasoning. Comparatively, the English Arbitration Act 1996 (which notably chose not to adopt the Model Law but draws inspiration from it) contains a specific provision expressly preserving the rights of non-participating respondents. Specifically, section 72 of the English Arbitration Act provides as follows:

72 Saving for rights of person who takes no part in proceedings

55 *Rakna Arakshaka Lanka Ltd v Avant Garde Maritime Services (Pte) Ltd* [2019] 4 SLR 995 at [71].
56 *Rakna Arakshaka Lanka Ltd v Avant Garde Maritime Services (Pte) Ltd* [2019] 4 SLR 995 at [72].
57 *Rakna Arakshaka Lanka Ltd v Avant Garde Maritime Services (Pte) Ltd* [2019] 2 SLR 131 at [77].
58 *Rakna Arakshaka Lanka Ltd v Avant Garde Maritime Services (Pte) Ltd* [2019] 2 SLR 131 at [73].
59 *PT First Media TBK (formerly known as PT Broadband Multimedia TBK) v Astro Nusantara International BV* [2014] 1 SLR 372 at [77].
60 *Rakna Arakshaka Lanka Ltd v Avant Garde Maritime Services (Pte) Ltd* [2019] 2 SLR 131 at [77].
61 *Rakna Arakshaka Lanka Ltd v Avant Garde Maritime Services (Pte) Ltd* [2019] 2 SLR 131 at [76].
62 *Rakna Arakshaka Lanka Ltd v Avant Garde Maritime Services (Pte) Ltd* [2019] 2 SLR 131 at [75]. It is open to a claimant to protect its interests by applying to court under Article 16(3) to confirm a tribunal's preliminary ruling that it has jurisdiction.

1. A person alleged to be a party to arbitral proceedings but who takes no part in the proceedings may question—
   a. whether there is a valid arbitration agreement,
   b. whether the tribunal is properly constituted, or
   c. what matters have been submitted to arbitration in accordance with the arbitration agreement, by proceedings in the court for a declaration or injunction or other appropriate relief.
2. He also has the same right as a party to the arbitral proceedings to challenge an award—
   a. by an application under section 67 on the ground of lack of substantive jurisdiction in relation to him, or
   b. by an application under section 68 on the ground of serious irregularity (within the meaning of that section) affecting him; and section 70(2) (duty to exhaust arbitral procedures) does not apply in his case.

The Departmental Advisory Committee on Arbitration (DAC) Report on Arbitration Bill 1996, which is used as an aid to interpret the Arbitration Act 1996, explains the background behind section 72 as follows:[63]

> To our minds this is a vital provision. A person who disputes that an arbitral tribunal has jurisdiction cannot be required to take part in the arbitration proceedings or to take positive steps to defend his position, for any such requirement would beg the question whether or not his objection has any substance and thus be likely to lead to gross injustice. Such a person must be entitled, if he wishes, simply to ignore the arbitral process, though of course (if his objection is not well-founded) he runs the risk of an enforceable award being made against him. Those who do decide to take part in the arbitral proceedings in order to challenge the jurisdiction are, of course, in a different category, for then, having made that choice, such people can fairly and properly be required to abide by the time limits etc. that we have proposed.

Whilst the DAC Report was not cited in *Rakna CA*, one can immediately appreciate that the same reasoning was applied. Under English case law the '*Dallah* principle'—namely, a person who denies being a party to an arbitration agreement has no obligation to participate in the arbitration even when the arbitral tribunal has ruled positively on its own jurisdiction—is 'so fundamental that it should not be whittled down unless the interests of justice so require'.[64]

Returning to the facts of *Rakna CA*, the Court of Appeal held that Rakna was a non-participating respondent.[65] Rakna did not file any formal pleadings in the arbitration. It did carry on some correspondence with the SIAC: specifically, twice asking

63 Departmental Advisory Committee on Arbitration, *DAC Report on Arbitration Bill 1996* (February 1996) (*DAC Report*) at para 295.

64 *The London Steam Ship Owners Mutual Insurance Association Ltd v Kingdom of Spain* [2013] EWHC 2840 at [79].

65 *Rakna Arakshaka Lanka Ltd v Avant Garde Maritime Services (Pte) Ltd* [2019] 2 SLR 131 at [78] to [79].

for an extension of three months to respond to the commencement of the arbitration; another letter stating that the arbitration involved a dispute falling outside the scope of submission to arbitration and that the proceedings were in conflict with the public policy of Sri Lanka and requesting a stay of proceedings; a letter informing SIAC that the parties had reached a settlement and that the arbitration need not be proceeded with; and twice asking the SIAC about the arbitration and requesting a copy of the submissions made by the counterparty.

The Court of Appeal explained its decision to characterize Rakna as a non-participating respondent in the following way:[66]

> In our view, the actions of RALL can be divided into two categories: those taken before the MOU was concluded and those taken after that date. While RALL did not do very much before the [settlement] was concluded, it may be possible to say that by asking for extensions of time to respond to the commencement of the arbitration proceedings, RALL was participating in the arbitration. In our view, however, it is not necessary to reach a conclusion on this question because the entry into the [settlement] created a fundamental change in the position. From then on, RALL took a clear stand that the arbitration should be stopped because the settlement had resolved the dispute which had been submitted to arbitration. The letters that RALL wrote thereafter were to inform the SIAC of the facts and for information to apprise itself of the actions taken by the Tribunal and AGMS. In our view, 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 arbitration proceedings. Such queries cannot be regarded as participation. Thus, if RALL is correct and the execution of the [settlement] meant the dispute before the Tribunal had been resolved, from then on the Tribunal acted without jurisdiction and RALL did not participate in the ensuing proceedings at all.

It is notable from the excerpt above that, seeking an extension of time could potentially qualify as participation in the arbitral process.

More recently, in *ST Group Co Ltd v Sanum Investments Ltd* [2020] 1 SLR 1, the respondents sent a letter to SIAC after the commencement of arbitration by the claimant. The letter explained the respondents' position *inter alia* that they had not agreed to the claimant's proposal for arbitration, and that such a unilateral proposal for arbitration was invalid. The respondents did not participate in the arbitral process thereafter. The Singapore Court of Appeal appeared to treat the respondents as non-participating respondents, citing *Rakna CA* and holding that the respondents were not precluded from resisting enforcement of the tribunal's ultimate award in Singapore.[67]

Whether certain acts constitute participation in the arbitral process can be gleaned from the approach taken by the English courts under section 72 of the English Arbitration Act described above.

66 *Rakna Arakshaka Lanka Ltd v Avant Garde Maritime Services (Pte) Ltd* [2019] 2 SLR 131 at [79].
67 *ST Group Co Ltd v Sanum Investments Ltd* [2020] 1 SLR 1 at [92].

For the purposes of section 72, it has been held in *Broda Agro Trade (Cyprus) Limited v Alfred C. Toepfer International GmbH* [2009] EWHC 3318 (*Broda HC*) that, a party is deemed to have taken no part in arbitral proceedings even if that party informs a tribunal of its view that the tribunal lacks jurisdiction, but if that party makes submissions to the tribunal for the tribunal to take into account when ruling on its own jurisdiction, that party risks being held to have taken part in the arbitration proceedings.[68] This proposition was reached after a review of two prior English decisions on section 72:[69]

> The first case is *Caparo Group limited v Fagor Arrasat Sociedad Cooperative* 2000 ADRJ 254, a decision of Clarke J. (as he then was). That case involved an ICC arbitration. Caparo had by letter dated 14 August 1997 requested the ICC to reject the arbitration on the grounds that it had no jurisdiction. The letter contained a simple statement that Caparo was not a party to the contract and was not therefore a party to the arbitration agreement.
> Clarke J. accepted the submission that 'if a person takes any part in an exercise of the jurisdiction of the arbitral tribunal to determine its own substantive jurisdiction within section 30, he will not have taken no part within the meaning of section 72.' Thus if a person takes part in the exercise of such jurisdiction he will have taken part in the arbitration and as a result he will have no right to seek relief pursuant to section 72. Clarke J reached the conclusion that it could not fairly be held that Caparo intended to take part in any part of the process. He considered that Caparo were simply saying 'it has nothing to do with us. The ICC has no jurisdiction.'
> The second case is *Law Debenture Trust Corporation PLC v Elektrim Finance BV* [2005] 2 Lloyd's Reports 755, a decision of Mann J. That case concerned an LCIA arbitration. One of the matters to be decided was whether Law Debenture had taken part in the arbitration proceedings by seeking to bring about a dismissal of the proceedings in correspondence and by participating in the selection process of a second arbitrator (see para. 22). Mann J. held that Law Debenture had not taken part in the arbitration proceedings. First, he held that Law Debenture had merely objected to the arbitration and taken the jurisdiction point. Second, he held that Law Debenture had not sought to appoint a second arbitrator (see para. 27). He drew a distinction between, on the one hand, a submission that an arbitrator should not be acting and, on the other hand, attempting to argue the case against jurisdiction so that the arbitrators can consider it. He put the point this way (at para. 28):
> '[Law Debenture] was asserting non-jurisdiction, not participating in the exercise of it.'

In *Broda HC* itself, after the claimant in that case presented its Claim Submissions to GAFTA claiming damages against Broda, Broda's legal representatives responded

68 *Broda Agro Trade (Cyprus) Limited v Alfred C. Toepfer International GmbH* [2009] EWHC 3318 at [29].
69 *Broda Agro Trade (Cyprus) Limited v Alfred C. Toepfer International GmbH* [2009] EWHC 3318 at [26]–[28].

by letter, denying that there was a contract, giving brief reasons for that contention. The letter stated that Broda had its principal place of business in Russia, and that Broda had commenced legal proceedings in the Russian courts seeking a declaration that no binding contract had been concluded.

When the arbitral tribunal which was constituted by GAFTA gave Broda the chance to make submissions on jurisdiction, Broda's legal representatives responded by way of letter. The letter, emphasizing that its contents did not constitute a reply to the claimant's submissions, stated that the Russian Courts were the most appropriate jurisdiction to determine whether the arbitrators had jurisdiction, and requested GAFTA not to accept jurisdiction.

Broda's legal representatives wrote a further letter thereafter. Broda informed GAFTA that the Russian courts had decided that Broda and the claimant had never entered into a binding contract. In the letter Broda stated that the judgment of the Russian courts would be presented to GAFTA and that the reasoning of the Russian courts 'should play an integral part in a decision by GAFTA to decline jurisdiction in this case'.[70]

The arbitral tribunal issued an interim award on jurisdiction. They concluded that there was a binding contract. The tribunal noted the decision of the Russian courts but disagreed with it. They therefore ruled that they had jurisdiction to determine the substantive dispute, and gave directions for submissions by both parties on the merits of the dispute.

The English High Court took the view that the respondent's conduct described above did not constitute participation in the jurisdictional phase of the arbitration:[71]

> I do not consider that Broda's correspondence with the tribunal between 31 January 2008 and the making of the Interim Award on jurisdiction on 3 July 2008 amounted to taking part in the arbitration. Broda informed GAFTA that they contested the tribunal's jurisdiction but did not seek to participate in the exercise by the tribunal of its jurisdiction to rule on its own jurisdiction. Instead, they requested the Russian court to decide the question of jurisdiction. I agree that there are passages in the correspondence which might suggest that Broda were inviting the tribunal to rule that it had no jurisdiction (eg when Broda passed on the Russian court's judgment to the tribunal Broda stated that 'the reasoning of the said Court should play an integral part in a decision by GAFTA to decline jurisdiction in this case'). But I consider that it is necessary to stand back and take a broader view of what Broda were doing. Throughout this period Broda were arguing the question of jurisdiction in the Russian court. They were not arguing that question before the arbitration tribunal.

Interestingly, on appeal, the English Court of Appeal was equivocal about whether Broda had participated in the jurisdictional phase. That the line between

70 *Broda Agro Trade (Cyprus) Limited v Alfred C. Toepfer International GmbH* [2009] EWHC 3318 at [12].
71 *Broda Agro Trade (Cyprus) Limited v Alfred C. Toepfer International GmbH* [2009] EWHC 3318 at [34].

participation and non-participation is not always easy to draw was highlighted by *Broda CA*:[72]

> It may be difficult to distinguish between a letter that does no more than inform the arbitral tribunal, as a matter of courtesy, that the respondent does not accept its jurisdiction, and a submission that it has no jurisdiction. This is such a case. I say no more about it.

It is therefore possible that a respondent who writes a relatively substantive letter to the arbitral tribunal setting out its objections to jurisdiction but who does not otherwise participate in the arbitral process (such as not attending the hearing on jurisdiction), may nevertheless be taken to have participated in the arbitral process. This would be a matter of degree that would have to be decided on a case-by-case basis.

We turn next to analyse whether there are any limitations on the remedies available to a non-participating respondent.

Although *Rakna CA* did not expressly state so, following the reasoning in *Astro CA* it is likely that any remedies available to a non-participating respondent would be subject to waiver or estoppel on the part of that respondent. More recently, in *ST Group Co Ltd v Sanum Investments Ltd* [2020] 1 SLR 1, the Singapore Court of Appeal suggested that, whilst the doctrines of waiver and estoppel would be applicable when a party seeks to set aside any eventual award, 'the considerations and principles would be different in relation to passive remedies such as resisting enforcement'.[73] It is not entirely clear how the 'considerations and principles' would differ. It is submitted that one possibility could be that the factual threshold for finding that a party had waived, or is estopped from asserting, its passive remedies would be higher than the threshold for active remedies. In *ST Group*, the Court of Appeal dismissed bare allegations of waiver and estoppel, holding that a non-participating respondent was not precluded from resisting enforcement of an award.

Interestingly, even though the fact of non-participation itself does not preclude the respondent from resisting enforcement of an award, the Court of Appeal in *ST Group* suggested in *obiter* that, insofar as the respondent was alleging a wrongful composition of the arbitral tribunal, such an argument might not lie well in the mouth of a party who did not participate at all in the proceedings.[74] This suggestion entails that non-participation in the arbitral process could prejudice a respondent in establishing certain grounds to challenge any eventual award. The Court of Appeal left the point open for a future case. This is indeed a point worth re-considering. Comparatively, section 72 of the English Arbitration Act expressly permits a non-participating respondent to question not just whether there was a valid arbitration agreement, but also whether the tribunal was properly constituted, and what matters

72 *Broda Agro Trade (Cyprus) Limited v Alfred C. Toepfer International GmbH* [2010] EWCA Civ 1100 ('*Broda CA*') at [50].

73 *ST Group Co Ltd v Sanum Investments Ltd* [2020] 1 SLR at [92].

74 *ST Group Co Ltd v Sanum Investments Ltd* [2020] 1 SLR at [108].

have been submitted to arbitration in accordance with the arbitration agreement, and to seek relief without demonstrating actual prejudice.

In sum, a non-participating respondent who does not invoke Article 16(3) of the Model Law after losing a preliminary ruling on jurisdiction will not be precluded from raising the same jurisdictional objections at the post-award stage, subject to any waiver or estoppel.

7. BOYCOTTING RESPONDENT WHO DOES NOT INVOKE ARTICLE 16(3) OF THE MODEL LAW AFTER LOSING PRELIMINARY RULING ON JURISDICTION

Preliminarily, a boycotting respondent is a respondent who participates in the arbitral process, who leaves the arbitral process after losing a preliminary ruling on jurisdiction.

By way of background, *Astro HC*, citing the *travaux*, suggested in *obiter* that Article 16(3) would not preclude a party who has 'boycotted the proceedings altogether' following an unfavourable preliminary ruling on jurisdiction.[75] In such a case, the claimant would also have 'ample notice' of the boycotting party's objections to jurisdiction from the latter's refusal to participate.[76] *Astro CA* did not address this point.

In *Rakna CA*, although the Court of Appeal did not deal expressly with the remedies available to a boycotting respondent, the Court of Appeal's views *vis-à-vis* non-participating respondents appears to be applicable to boycotting respondents as well. The Court of Appeal held as follows:[77]

> We are of the view that the preclusive effect of Art[icle] 16(3) does not extend to a respondent who stays away from the arbitration proceedings and 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[icle] 16(3).

Contrary to the view of some commentators,[78] it is submitted that the Court of Appeal's view above should not extend to a boycotting respondent who does not invoke Article 16(3). For the remedies under consideration, a boycotting respondent ought to be treated the same as a participating respondent. In other words, to the extent a participating respondent is precluded from raising the same jurisdictional objections to set aside any eventual award, a boycotting respondent would be as well. Similarly, subject to any waiver or estoppel on the part of the respondent, a boycotting respondent retains the right to resist enforcement of that award in Singapore, just as a participating respondent would.

There are three reasons why the Court of Appeal's view *vis-à-vis* non-participating respondents excerpted above ought not extend to boycotting respondents.

75 *Astro Nusantara International BV v PT Ayunda Prima Mitra* [2013] 1 SLR 636 at [133] and [141].

76 *Astro Nusantara International BV v PT Ayunda Prima Mitra* [2013] 1 SLR 636 at [133].

77 *Rakna Arakshaka Lanka Ltd v Avant Garde Maritime Services (Pte) Ltd* [2019] 2 SLR 131 at [77].

78 Albert Monichino QC, 'The Problem with *Rakna*: The Scope of the Preclusive Effect of Article 16(3) of the Model Law' (2019) 31 S Ac L J 349, 359, 362.

First, a boycotting respondent would have contributed to additional costs by contesting the issue of jurisdiction as a preliminary issue before the arbitral tribunal.

Preliminarily, it is accepted that a non-participating respondent would not contribute to wastage of costs or the incurring of additional costs. This is because the claimant would need to go through the arbitral process anyway to obtain an eventual award against the respondent. As *Rakna CA* observed (at [76]), the absence of a participating respondent will mean that the time required for evidence-taking and submissions will be much reduced. It is also accepted that, unlike a participating respondent, a boycotting respondent would not contribute to wastage of costs or the incurring of additional costs after it leaves the arbitral process.

However, prior to its departure, the boycotting respondent would have contested the issue of jurisdiction as a preliminary issue before the arbitral tribunal. In that regard, the boycotting respondent would likely have filed various rounds of jurisdictional submissions, and likely attended an oral hearing on jurisdiction (assuming the issue was not decided on a documents-only basis). The time and costs flowing from its participation would likely not be *de minimis*. To the extent *Rakna CA* is concerned about minimizing wastage of time and costs, there is no principled reason why it should only be concerned about minimizing wasted time and costs that are incurred after a preliminary ruling on jurisdiction is made, but not before.

Put another way, for both boycotting and participating respondents, they would have actively contested the tribunal's jurisdiction, thereby incurring time and costs in the arbitral process leading up to the tribunal's preliminary ruling on jurisdiction. During that jurisdictional phase of the arbitral process, both classes of respondents are, for all intents and purposes, the same. If it is accepted that a boycotting respondent would get a subsequent chance to set aside the eventual award on the same jurisdiction grounds, this may have the practical effect of inadvertently incentivizing the boycotting of the arbitral process following an adverse preliminary ruling on jurisdiction. That undermines the 'policy of the Model Law to achieve certainty and finality in the seat of arbitration' articulated in *Astro CA*.[79]

Second, the *travaux* does not support treating boycotting respondents as if they are non-participating respondents. *Astro HC* had cited the following excerpt from the *Analytical Commentary*:[80]

> [Articles 34 and 36] would remain applicable and of practical relevance to those cases **where a party raised the plea in time but without success** or 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. (emphasis added)

79 *PT First Media TBK (formerly known as PT Broadband Multimedia TBK) v Astro Nusantara International BV* [2014] 1 SLR 372 at [130].

80 Analytical Commentary: United Nations Commission on International Trade Law, *Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration* (UN Doc A/CN.9/264, 25 March 1985) at p 39, para 9; cited in *Astro Nusantara International BV v PT Ayunda Prima Mitra* [2013] 1 SLR 636 at [133].

However, reliance on the excerpt above is misplaced. This is because the drafters were commenting on an earlier draft of Article 16(3) which is radically different from the current Article 16(3). At the material time of the Analytical Commentary, the draft Article 16(3) provided as follows:[81]

> The arbitral tribunal may rule on a plea referred to in paragraph (2) of this article either as a preliminary question or in an award on the merits. In either case, a ruling by the arbitral tribunal that it has jurisdiction may be contested by any party only in an action for setting aside the arbitral award.

As *Rakna CA* observed:[82]

> At the time of this commentary, the 30-day time period for application to court was not included in the draft version of Art[icle] 16(3) which was probably why the Secretariat was also able at that time to say that a party that had raised the plea in time without success could also bring up the matter against in a setting aside application.

The draft Article 16(3) excerpted above, which provides that a ruling on jurisdiction can be contested only in a setting aside application, is radically different from the current Article 16(3). Since draft Article 16(3) envisaged that a ruling on jurisdiction could be contested only in a setting aside application, it is unsurprising that the drafters would see Articles 34 (and 36) 'remain[ing] relevant and of practical relevance'. As discussed above, the *travaux* is ambiguous on whether the current Article 16(3) has any preclusive effect, much less whether any such preclusive effect extends to boycotting respondents under discussion.

The position that is being advanced here in relation to boycotting respondents is echoed in the English Arbitration Act 1996. Section 73(2) of the English Arbitration Act provides as follows:

> (2)Where the arbitral tribunal rules that it has substantive jurisdiction and a party to arbitral proceedings who could have questioned that ruling—
>
> a. by any available arbitral process of appeal or review, or
>
> b. by challenging the award,
>
> does not do so, or does not do so within the time allowed by the arbitration agreement or any provision of this Part, he may not object later to the tribunal's substantive jurisdiction on any ground which was the subject of that ruling.

The DAC Report explains section 73 in the following way:[83]

81 Analytical Commentary: United Nations Commission on International Trade Law, *Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration* (UN Doc A/CN.9/264, 25 March 1985) at p 37.

82 *Rakna Arakshaka Lanka Ltd v Avant Garde Maritime Services (Pte) Ltd* [2019] 2 SLR 131 at [63].

83 Departmental Advisory Committee on Arbitration, *DAC Report on Arbitration Bill 1996* (February 1996) at paras 297–98.

> Recalcitrant parties or those who have had an award made against them often seek to delay proceedings or to avoid honouring the award by raising points on jurisdiction, etc. which they have been saving up for this purpose or which they could and should have discovered and raised at an earlier stage. Article 4 of the Model Law contains some provisions designed to combat this sort of behaviour (which does the efficiency of arbitration as a form of dispute resolution no good) and we have attempted to address the same point in this Clause. In particular, unlike the Model Law, we have required a party to arbitration proceedings who has taken part or continued to take part without raising the objection in due time, to show that at that stage he neither knew nor could with reasonable diligence have discovered the grounds for his objection (the latter being an important modification to the Model Law, without which one would have to demonstrate actual knowledge, which may be virtually impossible to do). It seems to us that this is preferable to requiring the innocent party to prove the opposite, which for obvious reasons it might be difficult or impossible to do.
>
> For the reasons explained when considering [section] 72, the provision under discussion cannot, of course, be applied to a party who has chosen to play no part at all in the arbitral proceedings.

In the DAC Report excerpted above, the drafters of the English Arbitration Act made a deliberate decision to preclude a party to arbitration proceedings 'who has taken part' or continued to take part from objecting to the tribunal's jurisdiction at the post-award stage if that objection is not raised in a timely manner. Whilst England is not a Model Law jurisdiction (which *Astro HC* took pains to emphasize[84])—the English Arbitration Act 1996 does not contain a mechanism equivalent to Article 16(3)—what is relevant here is that boycotting respondents are treated the same as participating respondents, at least in the present context, in order to avoid situations where boycotting respondents avoid honouring any eventual award by 'raising points on jurisdiction, etc which they have been saving up for this purpose or which they could and should have discovered and raised at an earlier stage'.

If there were any doubt, the DAC Report confirms that a party 'who decide[s] to take part in the arbitral proceedings to challenge jurisdiction'—a boycotting respondent would fall within this definition—would **not** be treated as a non-participating respondent under section 72:[85]

> To our minds this is a vital provision. A person who disputes that an arbitral tribunal has jurisdiction cannot be required to take part in the arbitration proceedings or to take positive steps to defend his position, for any such requirement would beg the question whether or not his objection has any substance and thus be likely to lead to gross injustice. Such a person must be entitled, if he wishes, simply to ignore the arbitral process, though of course, (if his

84 *Astro Nusantara International BV v PT Ayunda Prima Mitra* [2013] 1 SLR 636 at [85].

85 Departmental Advisory Committee on Arbitration, *DAC Report on Arbitration Bill 1996* (February 1996) at para 295.

> objection is not well-founded) he runs the risk of an enforceable award being made against him. **Those who do decide to take part in the arbitral proceedings in order to challenge the jurisdiction are**, of course, in a different category, for then, having made that choice, such people can fairly and properly be required to abide by the time limits etc that we have proposed. (emphasis added)

That participation in the jurisdictional phase of an arbitration would disqualify a respondent from being treated as a non-participating respondent was confirmed in *Broda CA* as follows:[86]

> A person who considers that he has not entered into an arbitration agreement is entitled to ignore its proceedings. He is entitled to say, in effect, that the arbitral proceedings are nothing to do with him. If he takes that course, his rights to claim relief from the court cannot be restricted because he did not participate in those proceedings. If, on the other hand, **he participated in the proceedings, whether in relation to the jurisdiction of the arbitrators** or in relation to the exercise of their asserted substantive jurisdiction, and is disappointed by their decision, he can fairly be required to bring proceedings to challenge their award within the limited time applicable to an application under section 67, which in any event may in an appropriate case be extended by the court. (emphasis added)

For the reasons above, insofar as participating respondents are precluded by Article 16(3) from raising the same jurisdictional objections to set aside any eventual award, boycotting respondents should be treated the same. Following *Astro CA*, the boycotting respondent, however, retains the right to resist enforcement of that award in Singapore, subject to any waiver or estoppel on the part of the respondent.

8. CONCLUSION

The remedies that award debtors have under Articles 16(3), 34 and 36 of the Model Law, and more critically the inter-relationship between those remedies, has attracted much debate. Yet there is a dearth of analysis on how the availability of each remedy may differ according to the award debtor's degree of participation in the arbitral process. Such analysis carries significant practical value for parties in considering whether and to what extent they should participate in any arbitral process when they harbour jurisdictional objections. This article has sought to distil the Singapore's experience, describing how Singapore has implemented the 'choice of remedies' principle for participating respondents, non-participating respondents, and boycotting respondents with jurisdictional objections, with comparative observations from Hong Kong, England, and New Zealand. This article shows that the ultimate matrix of remedies chosen by Singapore is far from straightforward. The accompanying question of whether a respondent has participated in the arbitral process is also a

86 *Broda Agro Trade (Cyprus) Limited v Alfred C. Toepfer International GmbH* [2010] EWCA Civ 1100 at [37].

vexed one that has to be assessed on a case by case basis. The analysis in this article begs the question whether in pursuit of harmonization future reforms to the Model Law ought to be considered.