(2019) 31 SAcLJ 349
(Published on e-First 18 March 2019)

Case Note

THE PROBLEM WITH *RAKNA*

The Scope of the Preclusive Effect of Article 16(3) of the Model Law

Rakna Arakshaka Lanka Ltd v Avant Garde Maritime Services (Pte) Ltd
[2018] SGHC 78

In *Rakna Arakshaka Lanka Ltd v Avant Garde Maritime Services (Pte) Ltd* [2018] SGHC 78, Quentin Loh J extended the preclusive effect of Art 16(3) of the United Nations Commission on International Trade Law Model Law on International Commercial Arbitration ("the Model Law") to a party that did not participate in the arbitration. It is respectfully submitted that this holding is wrong. The decision inappropriately extrapolates from Singapore Court of Appeal *obiter* comments in *PT First Media TBK v Astro Nusantara International BV* [2014] 1 SLR 372 and does not grapple with the Model Law's *travaux* or prior Singaporean authority – which consider non-participating and boycotting parties to be excluded from Art 16(3)'s preclusive effect. Nor do considerations of cost and efficiency support broadening the preclusive effect of Art 16(3) to such parties.

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1 In *Rakna Arakshaka Lanka Ltd v Avant Garde Maritime Services (Pte) Ltd*[1] ("*Rakna*"), Quentin Loh J of the Singapore High Court held that Art 16(3) of the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration[2] ("Model Law") has a preclusive effect in respect of a non-participating party (that is, a party that has not participated in the arbitration, including by not submitting a defence or not substantially

1 [2018] SGHC 78.
2 UN Doc A/40/17, annex I; UN Doc A/61/17, annex I (21 June 1985; amended 7 July 2006).

participating in any hearing).[3] According to this view, if an arbitral tribunal makes a preliminary ruling that it has jurisdiction, a party that has not participated in the arbitration is precluded from applying under Art 34 of the Model Law to set aside a later award on the merits on the grounds of lack of jurisdiction. This holding is an ostensible extrapolation from *obiter* comments made by the Singapore Court of Appeal in *PT First Media TBK v Astro Nusantara International BV*[4] ("*First Media*").

2 *Rakna* is on appeal.[5] This note respectfully submits that *Rakna* is wrongly decided in so far as the purported preclusive effect of Art 16(3) on non-participating parties is concerned.

I. Facts

3 When a dispute arose between the two Sri Lankan parties regarding a commercial maritime security agreement, Avant Garde Maritime Services (Pte) Ltd ("Avant") exercised its right under the agreement to refer the matter to arbitration in Singapore under the Singapore International Arbitration Centre ("SIAC") Arbitration Rules 2013 ("SIAC Rules"). The respondent, Rakna Arakshaka Lanka Ltd ("RALL") (which was wholly owned by the Sri Lankan government), refused to participate in the arbitration in any meaningful way. It failed to appoint an arbitrator, file a statement of defence or attend any hearing. Its engagement with the proceedings was limited to requesting extensions from the SIAC to respond to the notice of arbitration and, subsequently, to informing the SIAC (not the tribunal) that the arbitration proceedings should be discontinued because the parties had settled their dispute by entering into a memorandum of understanding ("MOU").

4 After Avant informed the tribunal that settlement had in fact *not* occurred, the tribunal held a preliminary hearing to determine whether the matter had actually been settled. Following the hearing (which RALL did not attend), the tribunal made a preliminary ruling that the dispute was still alive and that the arbitration would proceed. Inferentially, this was a ruling that the tribunal had jurisdiction to entertain Avant's claim.

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3 *Rakna Arakshaka Lanka Ltd v Avant Garde Maritime Services (Pte) Ltd* [2018] SGHC 78 at [71].

4 [2014] 1 SLR 372.

5 Mike McClure & Kathryn Sanger, "Be on Time to Preserve Your Right to Active Remedies – The Singapore High Court Considers a Party's Duty to Apply Promptly When Challenging the Jurisdiction of an Arbitral Tribunal" *Herbert Smith Freehills Arbitration Notes* (26 September 2018).

5 RALL took no further part in the arbitration. Ultimately, the tribunal made an award in Avant's favour. When Avant sought to enforce the award in Singapore, RALL sought to set it aside on the primary basis that the tribunal lacked jurisdiction because the MOU had effectively terminated the reference to arbitration.[6]

II. Singapore legislative framework

6 The International Arbitration Act[7] ("IAA") governs international arbitration in Singapore. The legislation gives effect – with some modifications – to the Model Law.[8]

7 Article 16(3) of the Model Law provides that where an arbitral tribunal makes a preliminary determination on jurisdiction, any party to the arbitration may apply to the supervisory court for review of the determination. This application must be made within 30 days of the party receiving notice of the determination.[9]

8 Section 10 of the IAA modifies Art 16(3) by allowing court review (by the High Court of Singapore) of findings of negative jurisdiction (that is, a finding that the arbitral tribunal does not have jurisdiction) and, further, providing for appeal from the High Court to the Court of Appeal with leave of the High Court.

9 Article 34 of the Model Law provides for the setting aside of an arbitral award on the merits. The supervisory court at the seat may only set aside an award in a limited, exhaustive set of circumstances, including (relevantly) where it can be demonstrated that the award was

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6 Rakna Arakshaka Lanka Ltd also argued that the award should not be enforced because it had not been given proper notice of the arbitral proceedings (amounting to a breach of natural justice) and, separately, that in breach of public policy, the contract underlying the arbitration had been "procured by bribery" and was, thus, unenforceable: *Rakna Arakshaka Lanka Ltd v Avant Garde Maritime Services (Pte) Ltd* [2018] SGHC 78 at [33].

7 Cap 143A, 2002 Rev Ed.

8 International Arbitration Act (Cap 143A, 2002 Rev Ed) s 3(1).

9 Article 16(3) of the Model Law on International Commercial Arbitration (UN Doc A/40/17, annex I; UN Doc A/61/17, annex I) (21 June 1985; amended 7 July 2006) reads:

> The arbitral tribunal may rule on a plea [that the arbitral tribunal lacks jurisdiction] either as a preliminary question or in an award on the merits. If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within thirty days after having received notice of that ruling, the court specified in article 6 to decide the matter, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award.

made without jurisdiction,[10] the subject matter of the dispute is non-arbitrable or conflicts with the State's public policy. In Singapore, s 24 of the IAA provides two additional grounds for setting aside an arbitral award.[11]

10 Articles 35 and 36 (in Chapter VIII) of the Model Law provide for the recognition and enforcement of arbitral awards. The grounds for resisting enforcement in Art 36 mirror the grounds for setting aside in Art 34.[12]

11 Section 3(1) of the IAA excludes Chapter VIII of the Model Law.[13]

12 Section 19 of the IAA provides for enforcement of awards in simple terms.[14]

13 Notwithstanding s 3(1), the Singapore Court of Appeal in *First Media* did not accept that the Legislature had intended to deprive award debtors under a domestic international award of passive remedies before Singapore courts.[15] Thus, it (creatively) interpreted s 19 as permitting a party resisting enforcement of a domestic international award to do so

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10 Model Law on International Commercial Arbitration (UN Doc A/40/17, annex I; UN Doc A/61/17, annex I) (21 June 1985; amended 7 July 2006) Arts 34(2)(a)(i) and 34(2)(a)(iii).

11 Section 24 of the International Arbitration Act (Cap 143A, 2002 Rev Ed) states:

> Notwithstanding Article 34(1) of the Model Law, the High Court may, in addition to the grounds set out in Article 34(2) of the Model Law, set aside the award of the arbitral tribunal if —
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> (*a*) the making of the award was induced or affected by fraud or corruption; or
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> (*b*) a breach of the rules of natural justice occurred in connection with the making of the award by which the rights of any party may have been prejudiced.

These grounds arguably fall within the "public policy" ground (in Art 34(2)(b)(ii) of the Model Law on International Commercial Arbitration (UN Doc A/40/17, annex I; UN Doc A/61/17, annex I) (21 June 1985; amended 7 July 2006)) in any event.

12 In addition, where the court at the seat of arbitration sets aside an award, an award debtor may resist the enforcement of the award on the grounds that the supervisory court has already set aside the award.

13 Section 3(1) of the International Arbitration Act (Cap 143A, 2002 Rev Ed) provides that "[s]ubject to this Act, the Model Law, with the exception of Chapter VIII thereof, shall have the force of law in Singapore".

14 Section 19 of the International Arbitration Act (Cap 143A, 2002 Rev Ed) provides:

> An award on an arbitration agreement may, by leave of the High Court or a Judge thereof, be enforced in the same manner as a judgment or an order to the same effect and, where leave is so given, judgment may be entered in terms of the award.

15 *PT First Media TBK v Astro Nusantara International BV* [2014] 1 SLR 372 at [88].

"on the same grounds as those in Art 36(1) [of the Model Law]".[16] As such, the court held that s 19 of the IAA implicitly incorporates Arts 35 and 36, with the result that they have effect in Singapore.[17]

III. *First Media*

14 In *First Media*, the Singapore Court of Appeal took the opportunity to comment on the preclusive effect of Art 16 on the enforcement of arbitral awards in Singapore.

15 *First Media* involved a marathon dispute over a failed joint venture between an Indonesian conglomerate ("Lippo") and a Malaysian media group ("Astro"). The joint venture was contained in a subscription and shareholders agreement ("SSA") that included an arbitration agreement providing for arbitration in Singapore under the SIAC Rules. After a dispute arose over funding, Astro initiated arbitral proceedings in Singapore.

16 At the outset, Astro sought to join consenting additional parties ("the Additional Astro Parties") as co-claimants to the arbitration. The tribunal granted joinder over Lippo's objections and, in a preliminary award, held that it had jurisdiction to entertain the claims brought by the Additional Astro Parties. Although at a second preliminary hearing counsel for Lippo informed the tribunal there was no challenge to jurisdiction, Lippo's subsequent statement of defence stated that its actions were to be taken "without prejudice to [Lippo's] position" that the Tribunal lacked jurisdiction to hear and determine the Additional Astro Parties' claims.

17 Lippo never applied to the High Court for review of the preliminary jurisdiction under Art 16(3). Instead, it continued to participate in the arbitration, which it ultimately lost. Nearly all of the award debt – about US$130m – was payable by Lippo to the Additional Astro Parties. When Astro sought to enforce the several awards in Singapore, Lippo resisted enforcement on the basis that the tribunal lacked jurisdiction to make an award in favour of the Additional Astro Parties.

18 By the time the matter came before the Singapore Court of Appeal, one of the central issues in dispute was whether an award debtor that fails to seek an Art 16(3) review of a preliminary ruling on

16 *PT First Media TBK v Astro Nusantara International BV* [2014] 1 SLR 372 at [99].
17 *PT First Media TBK v Astro Nusantara International BV* [2014] 1 SLR 372 at [99].

jurisdiction is precluded from resisting enforcement of a later award on the merits (under Art 36) on jurisdictional grounds.[18]

19 The Singapore Court of Appeal affirmed the centrality of the "choice of remedies" in the Model Law; that is, an award debtor faced with an award against it may apply to the courts at the arbitral seat to set aside the award (under Art 34) or may wait – without first applying to set the award aside – until the award creditor seeks to enforce the award and then resist enforcement of the award (via Art 36). In a similar vein the court held that an award debtor that fails to seek court review (pursuant to Art 16(3)) of a preliminary arbitral ruling on jurisdiction is not precluded from subsequently *resisting enforcement* of a later award on the merits on jurisdictional grounds.

20 Further, the Court of Appeal opined (without deciding) that an award debtor would be precluded from raising a jurisdictional objection at the setting aside stage (under Art 34) if it had not availed itself of its right to seek court review of a preliminary arbitral ruling on jurisdiction (under Art 16(3)).[19]

21 Notably, the Court of Appeal's comments about the preclusive effect of Art 16(3) *vis-à-vis* Art 34 were made in the context of a party that continued to actively participate in the arbitration following the preliminary ruling on jurisdiction (hereafter referred to as a "participating party"). The court did not address the position of a non-participating party or, alternatively, a party who boycotts the arbitration immediately following a preliminary ruling on jurisdiction (hereafter referred to as a "boycotting party").

22 At first instance Belinda Ang Saw Ean J, relying on the Model Law's *travaux*, suggested by way of *obiter* that a boycotting party would be able to later rely on a jurisdictional objection to set aside or resist the enforcement of an award, even though it had not previously applied under Art 16(3) to review a preliminary ruling on jurisdiction.[20] While her Honour spoke in terms of a party who has "boycotted the proceedings altogether", it is clear that in context she was referring to a boycotting party as opposed to a non-participating party.[21] Ang J's

18 *PT First Media TBK v Astro Nusantara International BV* [2014] 1 SLR 372.

19 *PT First Media TBK v Astro Nusantara International BV* [2014] 1 SLR 372 at [130].

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

21 Thus, see *Astro Nusantara International BV v PT Ayunda Prima Mitra* [2013] 1 SLR 636 at [131(b)], [133] and [141]. Contrast Darius Chan, "Is Article 16(3) of the Model Law a 'One-Shot Remedy' for Non-Participating Respondents in International Arbitrations?" *Singapore Law Gazette* (October 2018) which (*cont'd on the next page*)

comments on this point were not doubted (on appeal) by the Court of Appeal.

IV. Loh J's reasoning in *Rakna*

23 The central question facing Loh J in *Rakna* was whether a non-participating party that did not avail itself of Art 16(3) in respect of a preliminary arbitral ruling on jurisdiction could subsequently apply to set aside an award on the merits on the grounds that the arbitral tribunal lacked jurisdiction.

24 In grappling with this question, Loh J began by noting that the tribunal's preliminary ruling on jurisdiction was governed by both Art 16(3) of the Model Law *and* s 10 of the IAA, which operates to modify and supplement Art 16(3).[22]

25 Considering the Model Law's *travaux*, his Honour noted that it was "intended that failure to raise a plea within the 30-day limit [set out in Art 16(3)] should have a preclusive effect on subsequent setting aside proceedings at the seat [under Art 34]".[23] That said, his Honour accepted that the effect of the Singapore Court of Appeal's "very comprehensive judgment" regarding the choice of remedies principle is that the failure to apply within the time limited by Art 16(3) to review a preliminary ruling on jurisdiction did not preclude an award debtor from seeking to resist *enforcement* of the award abroad or at the seat.[24]

26 As far as the preclusive effect of Art 16(3) was concerned, Loh J emphasised the following *obiter* comments in *First Media*:[25]

> It appears to us that there is a policy of the Model Law to achieve certainty and finality in the seat of arbitration … *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 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.* [emphasis in original]

considers that Belinda Ang Saw Ean J was also referring to non-participating parties.

22 *Rakna Arakshaka Lanka Ltd v Avant Garde Maritime Services (Pte) Ltd* [2018] SGHC 78 at [57]–[59].

23 *Rakna Arakshaka Lanka Ltd v Avant Garde Maritime Services (Pte) Ltd* [2018] SGHC 78 at [62].

24 *Rakna Arakshaka Lanka Ltd v Avant Garde Maritime Services (Pte) Ltd* [2018] SGHC 78 at [62]–[63].

25 *Rakna Arakshaka Lanka Ltd v Avant Garde Maritime Services (Pte) Ltd* [2018] SGHC 78 at [63], quoting *PT First Media TBK v Astro Nusantara International BV* [2014] 1 SLR 372 at [130].

27 Acknowledging that *First Media* involved *enforcement* of a domestic international award but that *Rakna* concerned the *setting aside* of a domestic international award, Loh J postulated that two counter-arguments could be made against the Court of Appeal's *obiter* view as to the preclusive effect of Art 16(3) *vis-à-vis* Art 34.[26]

28 The first counter-argument was that Art 16(3) does not apply to a non-participating party because Art 16(2), which triggers Art 16(3), "contemplates a party that is engaged in the arbitration".[27] His Honour dismissed this argument with little discussion, simply stating that "I note that against this, s 10 IAA does not contain such phraseology".[28]

29 The second counter-argument was that there was authority to the effect that Art 16(3) does not operate preclusively in relation to a boycotting party. In particular, Loh J referenced the following *obiter* comments by Ang J:[29]

> One way in which a party may challenge the jurisdiction of a tribunal is simply to step out of the arbitral regime and boycott the proceedings altogether. If this course of action is chosen … then the rules for appeal which would apply to parties within the arbitral regime would no longer apply to the boycotting party. Arguably, the boycotting party would then be able to apply to set aside the award under Art 34(2)(a)(i) on jurisdictional grounds. … This possibility is hinted at in [the Analytical] Commentary.

30 After quoting the Analytical Commentary referred to by Ang J and commentators who had expressed the view that Art 16(3) should not have a preclusive effect in relation to a non-participating party,[30] Loh J simply concluded that "*[o]n balance*, and with respect, I think that the Court of Appeal's statements [in *First Media*] … reflect the correct position" [emphasis added].[31]

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26 *Rakna Arakshaka Lanka Ltd v Avant Garde Maritime Services (Pte) Ltd* [2018] SGHC 78 at [63]–[64].

27 *Rakna Arakshaka Lanka Ltd v Avant Garde Maritime Services (Pte) Ltd* [2018] SGHC 78 at [65].

28 *Rakna Arakshaka Lanka Ltd v Avant Garde Maritime Services (Pte) Ltd* [2018] SGHC 78 at [66].

29 *Astro Nusantara International BV v PT Ayunda Prima Mitra* [2013] 1 SLR 636 at [133], quoted in *Rakna Arakshaka Lanka Ltd v Avant Garde Maritime Services (Pte) Ltd* [2018] SGHC 78 at 67.

30 Namely, Gary Born, *International Commercial Arbitration* (Wolters Kluwer, 2nd Ed, 2014) at p 1105 and Robert Merkin & Johanna Hjalmarsson, *Singapore Arbitration Legislation: Annotated* (Informa, 2nd Ed, 2016) at pp 148–149.

31 *Rakna Arakshaka Lanka Ltd v Avant Garde Maritime Services (Pte) Ltd* [2018] SGHC 78 at [71].

31 According to Loh J, Art 16(3) must have a preclusive effect on non-participating parties because:[32]

> … all the considerations of finality, certainty, practicality cost, preventing dilatory tactics and settling the position at an early stage at the seat militate against allowing a respondent to reserve its objections to the last minute.

32 For Loh J, to allow a party like RALL to set aside the award on the merits would be "an abuse of process".[33]

33 In sum, Loh J considered that, on the basis of the Court of Appeal's *obiter* comments in *First Media*, RALL was precluded from seeking to set aside the award on the basis of a jurisdictional objection that was the subject of a preliminary ruling which it could have, but did not, seek to review within the time limited by Art 16(3).

34 In arriving at this conclusion, his Honour implicitly regarded Ang J's *obiter* comments to be wrong.[34]

35 It should be noted that Loh J further held that even if RALL was not precluded from raising its jurisdictional objection at the setting aside stage, that objection was not sustainable on the facts.[35] This latter finding was a sufficient basis to dispose of the jurisdictional challenge before the court.

V. Comment

36 With respect, Loh J never clearly identifies whether RALL is a non-participating party or a boycotting party. Confusingly, in the same paragraph his Honour states that RALL "stayed away from the arbitration" but also "raised a jurisdictional challenge".[36] It is submitted that the better view is that his Honour considered RALL to be a non-participating party.

37 As previously stated, the Singapore Court of Appeal did not consider the position of non-participating or boycotting parties. With

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32 *Rakna Arakshaka Lanka Ltd v Avant Garde Maritime Services (Pte) Ltd* [2018] SGHC 78 at [71].

33 *Rakna Arakshaka Lanka Ltd v Avant Garde Maritime Services (Pte) Ltd* [2018] SGHC 78 at [72].

34 *Rakna Arakshaka Lanka Ltd v Avant Garde Maritime Services (Pte) Ltd* [2018] SGHC 78 at [71].

35 *Rakna Arakshaka Lanka Ltd v Avant Garde Maritime Services (Pte) Ltd* [2018] SGHC 78 at [73].

36 *Rakna Arakshaka Lanka Ltd v Avant Garde Maritime Services (Pte) Ltd* [2018] SGHC 78 at [72].

respect, it is inappropriate to extrapolate *obiter* comments referable to a party that continues to participate in an arbitration following a preliminary ruling on jurisdiction to the position of a non-participating (or boycotting) party.

38 When faced with an arbitration, a respondent may choose one of three paths. It may choose to participate fully in the arbitration (participating parties). Alternatively, it may decide to stay away from the proceedings altogether (non-participating parties). It could also initially participate in the arbitration and then withdraw from the arbitral proceedings (boycotting parties).[37]

39 The considerations of finality, certainty and efficacy which are central to arbitration (and the enforcement of arbitral awards) clearly militate against allowing a participating party to refuse to avail itself of Art 16(3), continue to participate in the arbitration and then seek to set aside an award on the merits made against it.[38] To do so would prolong the dispute between the parties as well as expose the award creditor to additional costs and uncertainty. Such conduct borders on abuse of process. That much is clear.

40 The same cannot be said of an award debtor which does not participate in the arbitration at all. In such case, the award debtor's conduct has not prolonged the dispute or added any costs. No abuse of process is involved.

41 Consider the position of a party that is served with a notice of arbitration that it considers spurious, in that it doubts that an arbitral tribunal has jurisdiction to determine the claim and, in any event, considers that the claim is completely lacking in merits. Accordingly, the party chooses not to participate in the arbitration. Assume that the tribunal unexpectedly makes a preliminary ruling that it has jurisdiction. Why should the respondent be required to incur the trouble and expense of launching an Art 16(3) application if it confidently expects that an award on the merits will not be made against it? Why shouldn't the respondent (as a matter of policy) be entitled to await the outcome of the arbitration and then exercise a right to set aside any award on the merits against it at that point in time?

37 While a party to the arbitration may boycott an arbitration at various stages, in this note a "boycotting party" is considered to be a party who takes part in an arbitration but takes no active step in the arbitration following a preliminary arbitral ruling on jurisdiction.

38 See, *eg*, Doug Jones, "What Now for Article 16(3)?" (2014) 2 *European International Arbitration Review* 243 at 252.

42 It is submitted that such considerations bolster the case for Art 16(3) not having a preclusive effect on non-participating parties in respect of the setting aside of awards.

43 While finality is an important policy consideration, it should not be the sole priority (as the finding in *First Media* demonstrates).

44 The question of boycotting parties is, perhaps, less clear cut. Where a party clearly communicates its intention to withdraw from an arbitration early in the process or immediately following a preliminary ruling on jurisdiction adverse to it, similar considerations arise as in the case of non-participating parties. That is, arguably, the award debtor's conduct has not prolonged the dispute or added any costs following the ruling on jurisdiction (notwithstanding that the boycotting party has "dipped its toe" in the arbitration).

45 It is submitted that the reasons for circumstances in which and stage of the arbitration at which a party chooses to boycott an arbitration are not relevant to whether Art 16(3) has a preclusive effect *vis-à-vis* the ability of a boycotting party to apply to set aside an arbitral award. The Model Law does not call for any such enquiry. Nor as a matter of policy is such enquiry required. Moreover, to require courts to engage in such an enquiry would be to introduce uncertainty as to the operation of the Model Law (as to some extent it would invite judges to make value judgments which may differ). Rather, it should (as a matter of policy) simply suffice that the respondent has not taken any active step in the arbitration following a preliminary arbitral ruling on jurisdiction. In that event, the respondent should be free to set aside an award on the merits on jurisdictional grounds even though it had not sought court review of an earlier preliminary arbitral ruling on jurisdiction.

46 Quite aside from policy considerations, this approach is consistent with the *travaux* to the Model Law. That is, the drafters of the Model Law arguably intended for both non-participating and boycotting parties to be exempt from Art 16(3)'s preclusive effect. In particular, the Analytical Commentary reads:[39]

> [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]

39 United Nations Commission on International Trade, *Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration* (UN Doc A/CN.9/264 18th Sess) (25 March 1985) at p 39, para 9.

47 Loh J did not (with respect) directly engage with the Analytical Commentary (which was cited by Ang J). It supports the view that Art 16(3) should not have a preclusive effect on non-participating or boycotting parties.

48 It is submitted that the opaque reference to "a party [who] raised the plea in time but without success" is a reference to a boycotting party that (a) raises a jurisdictional objection which is rejected in a preliminary ruling by an arbitral tribunal; and (b) then withdraws from the arbitration. On the other hand, the reference to "a party [who] did not participate in the arbitration" is clearly a reference to a non-participating party. Accordingly, the Analytical Commentary suggests that Art 16(3) should only have a preclusive effect where a party continues to participate in an arbitration after an adverse preliminary ruling on jurisdiction.

49 Furthermore, on a related but distinct tack, the Model Law appears to clearly contemplate that participating parties and non-participating parties are in a different position as to waiver. Article 4 of the Model Law provides that:

> … a party who knows that any provision of [the Model Law] … has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance [as required by the Model Law] shall be deemed to have waived his right to object.

A party that does not participate may not be in a position to be aware of non-compliance by another party to the arbitration and, as such, would not be deemed to have waived their right to object to an award made against it on the basis that some requirement under the Model law was not met. The upshot is that this further supports the existence under the Model Law of a distinction between participating and non-participating parties.

50 Loh J sought to distinguish the views of several learned commentators (like Gary Born) who had expressed the view that Art 16(3) should not have a preclusive effect on non-participating parties, on the basis that even if Art 16(3) of the Model Law anticipates a jurisdictional objection raised by an active participant in the arbitration, there is no such requirement in Singapore's adoption and modification of the Model Law as found in s 10 of the IAA.[40] There are two difficulties with this view:

40 See *Rakna Arakshaka Lanka Ltd v Avant Garde Maritime Services (Pte) Ltd* [2018] SGHC 78 at [64]–[66].

(a) First, it is doubtful that Art 16(3) is predicated on a jurisdictional objection by an active participant. Pursuant to the concept of *kompetenz-kompetenz* enshrined in Art 16(1), a tribunal may determine jurisdiction on its own motion. When this occurs, parties to the arbitration have a right to apply for court review within 30 days. As previously discussed, there is no good reason why a non-participating party should not be able to come out from behind the woodwork after being served with an arbitral tribunal's preliminary ruling on jurisdiction and apply to the court at the seat to review that ruling. Nothing in the text of Art 16(3) or the *travaux* suggests otherwise.[41] Whether Art 16(3) should have a preclusive effect in respect of a non-participating party is a separate question. For the reasons set out above, a non-participating party who fails to avail itself of the right of court review under Art 16(3) should not be precluded from setting aside an award on the merits on jurisdictional grounds. It matters not that there is a time limit in Art 16(3). The time limit is only relevant if the non-participating party wishes to avail itself of the right of court review, in which case the time limit must be strictly complied with.

(b) secondly, unlike Art 16(3), s 10(3) is clearly predicated on a jurisdictional objection by an active participant in the arbitration. Thus, s 10(3) speaks of a preliminary ruling "on a plea [that the arbitral tribunal lacks jurisdiction]". Accordingly, Art 16(3) as modified by s 10(3) should not have a preclusive effect in respect of a non-participating party in an arbitration seated in Singapore (whatever the position may be in other Model Law jurisdictions where Art 16(3) has not been modified), as a non-participating party (by definition) has not raised such a plea.

51 Finally, Loh J simply concluded that "[o]n balance and with respect, I think the Court of Appeal's statements … reflect the correct position".[42] Loh J highlighted wasted costs, wasted time and preventing dilatory tactics as why Art 16(3) should have a preclusive effect.[43] However, the vice referred to is not one that can, in the usual case, be levelled at a boycotting party, let alone a non-participating party. It is

41 Of course, it must do so within the time limited by Art 16(3) of the Model Law on International Commercial Arbitration (UN Doc A/40/17, annex I; UN Doc A/61/17, annex I) (21 June 1985; amended 7 July 2006).

42 *Rakna Arakshaka Lanka Ltd v Avant Garde Maritime Services (Pte) Ltd* [2018] SGHC 78 at [71].

43 *Rakna Arakshaka Lanka Ltd v Avant Garde Maritime Services (Pte) Ltd* [2018] SGHC 78 at [71].

one thing to say that a party should not be able to (a) continue to participate in an arbitration following an adverse preliminary ruling on jurisdiction; and then (b) seek to set aside a later award on jurisdictional grounds. Such tactics are likely to draw out the arbitration process and result in delay and wasted costs, thereby undermining the efficiency of the arbitration process. The same cannot be said, however, of a respondent that does not participate in the arbitration at all, or boycotts and takes no further active step in the arbitration following a preliminary ruling on jurisdiction.

52 The better view, it is submitted, is that Art 16(3) of the Model Law (as modified by s 10(3) of the IAA) should *not* have a preclusive effect in respect of *either* a non-participating or boycotting party.[44] With respect, to hold otherwise would be a wrong turn for Singapore arbitration law.

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44 It is noted that s 72 of the UK Arbitration Act 1996 (c 23) provides for an express statutory exception for a non-participating party.