IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2019] SGCA 33

Civil Appeal No 240 of 2017

Between

Rakna Arakshaka Lanka Ltd

… Appellant

And

Avant Garde Maritime Services (Private) Limited

… Respondent

JUDGMENT

[Arbitration] — [Award] — [Recourse against award] — [Setting aside] — [Jurisdiction]

[Arbitration] — [Award] — [Recourse against award] — [Setting aside] — [Public policy]

Rakna Arakshaka Lanka Ltd
v
Avant Garde Maritime Services (Pte) Ltd

[2019] SGCA 33

Court of Appeal — Civil Appeal No 240 of 2017
Sundaresh Menon CJ, Judith Prakash JA and Steven Chong JA
30 January 2019

9 May 2019 Judgment reserved.

Judith Prakash JA (delivering the judgment of the court):

Introduction

1 Article 16 of the UNCITRAL Model Law on International Commercial Arbitration ("Model Law") provides a route for early resolution of disputes over the jurisdiction of an arbitral tribunal. Such disputes are generally raised by the respondent in the arbitration proceedings and the arbitral tribunal may deal with the issue on a preliminary basis before it goes on to consider the merits of the claim. If it does so and finds that it has jurisdiction then, under Art 16(3), the respondent has thirty days to appeal against that ruling to the supervisory court. The question that we face in this appeal is whether a respondent who fails to participate in the arbitration proceedings and therefore does not avail itself of the appeal route provided by Art 16 can, nevertheless, raise the jurisdictional objection before the supervisory court in setting-aside proceedings after the issue of the final award.

Facts

The parties

2 The appellant, Rakna Arakshaka Lanka Ltd ("RALL"), is a Sri Lankan company specialising in providing security and risk management services. These services include the issuing of arms, ammunition and manpower to merchant vessels sailing in pirate-infested waters. Although incorporated as a limited liability company under the relevant Sri Lankan legislation, RALL has at all material times been owned by the Government of Sri Lanka. RALL has emphasised in this appeal that, nevertheless, it and the Government of Sri Lanka are two wholly different legal entities.

3 The chairman of RALL was, for some years, one Mr WPP Fernando. The current chairman of the company is one Mr KMGSN Kaluwewe.

4 The respondent, Avant Garde Maritime Services (Private) Limited ("AGMS"), another Sri Lankan company, is in the business of providing maritime security services to vessels at risk of piracy. One Mr YHPNY Senadhipathi is the chairman and sole shareholder of AGMS.

Background to the dispute

5 The factual background is largely undisputed. Prior to March 2011, acting under the auspices of the Ministry of Defence and Urban Development of the Republic of Sri Lanka ("MOD"), the parties agreed to form a private-public partnership to carry out certain projects. Consequently, between March 2011 and October 2013, they entered into six separate agreements, pursuant to which they undertook various projects including one called the Galle Floating Armoury Project.

6 To facilitate the projects, the six agreements were subsequently incorporated into a master agreement dated 27 January 2014 ("the Master Agreement"). The Master Agreement includes the following governing law and dispute resolution clause which provides for the governing law to be Sri Lankan law but for disputes to be settled by arbitration in Singapore in accordance with the rules of the Singapore International Arbitration Centre ("SIAC"):

> **8. GOVERNING LAW AND DISPUTE RESOLUTION**
>
> This Agreement shall be governed and construed in accordance with the laws of the Sri Lanka.
>
> The parties will first use their best endeavours to resolve, through mutual consultation between themselves without involving any third party or parties, any dispute, difference or question arising between the parties in connection with or in relation to the agreement. In the event that any dispute, difference or question, which has arisen in connection with or in relation to the agreement, cannot be, resolved amicably as stated above, then such dispute, difference or question shall be referred to arbitration. *The proceedings of the arbitration shall be conducted in the English language in accordance with the Rules of the Singapore International Arbitration Centre (SIAC). The place of arbitration shall be Singapore.* The Arbitral Tribunal shall be composed of three arbitrators, out of which one arbitrator shall be appointed by RALL, and one by AGMS, and the two arbitrators so appointed shall appoint a third arbitrator who shall act as the chairman of the tribunal.
>
> [emphasis added]

7 About a year later, at the Sri Lankan presidential elections held on 8 January 2015, the incumbent president was defeated. On or about 28 January 2015, the then directors of RALL, who had been appointed by the previous government, resigned from its board. A new board of directors was appointed by the new government on or about 7 April 2015. The new government then launched investigations into alleged instances of bribery, corruption and abuse of power that had occurred during the previous regime. The investigations also looked into the dealings between AGMS and RALL.

8 On or about 21 January 2015, a vessel named "*MV Mahanuwara*" was detained by the Sri Lankan Police Navy while it was docked at Galle Port, Sri Lanka, in connection with investigations that were being carried out into the legitimacy of the Galle Floating Armoury Project. The *MV Mahanuwara* was chartered and operated by AGMS at the material time. AGMS took the position that there was no illegality in the operation of the Galle Floating Armoury Project given that it was operated with the complete knowledge and approval of the MOD. Thus, by a letter dated 20 February 2015, AGMS requested RALL to obtain a "Letter of Clearance" from the MOD and/or the government of Sri Lanka clearing the name of AGMS, and stating that the business carried out by AGMS under the public-private partnership with RALL was legitimate and carried out under the authority of the government through the MOD. AGMS also asked RALL to obtain an appropriate media release from the government confirming the legitimacy of the business activities carried out by AGMS and of the public-private partnership between AGMS and RALL. RALL replied to AGMS that its board had yet to be reconstituted.

The arbitration proceedings

9 AGMS then commenced arbitration proceedings against RALL on the basis that RALL had breached cl 3.1 of the Master Agreement by failing to provide utmost assistance to AGMS. Clause 3.1 states that RALL "agrees that it shall continue to provide its utmost assistance to AGMS as provided thus far through the MOD *viz a viz* the said Authorizations and Approvals necessary, to operate and manage all functions in respect of the aforesaid projects set out in Clause 1 above and any future projects entered into by the Public Private Partnership until the expiration of [the Master Agreement] without giving

permission for any other local or foreign party to handle any function of the ongoing projects".

10 In the Notice of Arbitration dated 8 April 2015 ("the NOA"), AGMS claimed US$20 million in liquidated damages pursuant to cl 4.2 of the Master Agreement. It also nominated its arbitrator.

11 The NOA was sent to RALL on or about 10 April 2015. On 14 April 2015, the SIAC sent both parties a letter acknowledging the receipt of the NOA and requesting that RALL send a response within 14 days from the date of receipt of the notice. RALL did not file any response.

12 Further correspondence on administrative matters between AGMS and the SIAC then took place. AGMS forwarded the correspondence to RALL on 28 April 2015 at the request of the SIAC.

13 On 13 May 2015, RALL wrote to the SIAC seeking a three-month extension of time to respond to the NOA, on the basis that the new board of RALL had been appointed only recently so it needed time to study the case and to secure any approval required for any international fund transfers. AGMS objected strongly to RALL being granted an extension of time. On 25 May 2015, however, the SIAC granted RALL an extension of time to 9 June 2015 to respond to the NOA and to nominate a co-arbitrator.

14 As no response from RALL was received by the specified date, the SIAC wrote to the parties on 10 June 2015 informing them of its decision to proceed with the next step in the appointment of a co-arbitrator on behalf of RALL under the Arbitration Rules of the Singapore International Arbitration Centre (5th Ed, 2013) ("SIAC Rules"). On 10 July 2015, the SIAC requested payment from

RALL of its share of the first tranche of the costs of arbitration. By then, AGMS had already paid its share of those costs.

15 On 22 July 2015, a co-arbitrator was appointed by the Vice President of the Court of Arbitration. On 29 July 2015, AGMS sent its Statement of Claim to the SIAC and RALL. Subsequently, on 30 July 2015, RALL sent a letter to the SIAC requesting a further extension of three months to 12 November 2015, due to the matter requiring "further study to ensure a successful and effective solution". AGMS objected strongly to the request, and urged the SIAC to proceed with constituting the tribunal as soon as possible. AGMS also paid RALL's share of the first tranche of the arbitration costs for the sake of expediency.

16 On 21 August 2015, the SIAC sent the parties copies of the letters of appointment of the two arbitrators. Thereafter, acting on the nomination of the two arbitrators, the SIAC appointed the presiding arbitrator in the reference.

17 Also on 21 August 2015, RALL's attorney sent a letter to the SIAC stating the dispute between the parties "contemplated by falling [*sic*] or contain[ed] facts on matters beyond the scope of submission to arbitration", and that the arbitration proceeding was in "conflict with the Public Policy of the Republic of Sri Lanka". The attorney requested the SIAC to "please lay by the Arbitration proceedings until this matter to be discussed with [AGMS]".

18 On 23 August 2015, RALL's attorney sent a letter of demand on behalf of RALL to AGMS claiming compensation for the loss of reputation caused by the institution of the arbitration proceedings. A day later, he sent another letter to AGMS inviting AGMS to discuss the dispute. Several discussions were held

thereafter in an attempt to resolve the matter. In the meantime, the arbitration continued. The SIAC confirmed the constitution of the arbitral tribunal (the "Tribunal") on 30 September 2015. The Tribunal informed the parties on 15 October 2015 that a preliminary meeting would be held on 16 November 2015 in Singapore ("the Preliminary Meeting"), and sent them a draft procedural order on 20 October 2015.

19 In the interim, on or about 6 October 2015, a vessel named *MV Avant Garde* was detained outside the port limits of Galle Harbour by the Sri Lankan Navy. At the time of this detention, AGMS was operating a floating armoury on board the vessel. After finding weapons on the *MV Avant Garde*, the government of Sri Lanka launched criminal investigations. AGMS claimed that the detention was unlawful because the MOD had granted approval on 23 September 2015 for the *MV Avant Garde* to transport RALL's weapons, ammunition and equipment from the Red Sea to Galle.

The memorandum of understanding

20 On 12 November 2015, RALL's attorney wrote to the SIAC, copying AGMS, stating that AGMS had "already agreed to withdraw the … matter", and thus requesting the Tribunal to "lay by the proceedings of the Arbitration". He informed the SIAC that a "copy of the agreement signed by the Claimant and Respondent [would] be sent by Registered post … shortly". The attorney also forwarded a letter from RALL which stated, *inter alia*:

> 02. It is kindly informed that we have reached a settlement with the Claimant as per the written agreement dated 20th October 2015 made by and between [RALL and AGMS] with regard to the dispute that led the Claimant to commence the arbitration proceedings against us.

> 03. In the above circumstances, we kindly inform you that it is no longer required to proceed with the above matter.

21 The settlement is encapsulated in a memorandum of understanding ("MOU") dated 20 October 2015 signed by the parties. The pertinent clauses of the MOU are set out at [87] and [88] below. Basically, the MOU provided for AGMS to pay certain sums to RALL, for RALL to waive part of one of its claims against AGMS and for each party to withdraw the arbitration/legal proceedings it had commenced against the other.

22 Some three days later however, on 15 November 2015, AGMS sent a letter to the Tribunal, stating that in the light of certain events that had recently transpired, it was "not in a position to withdraw" the arbitration. It requested the Tribunal to make an "award granting an interim injunction preventing [RALL] from terminating the [Master Agreement]". AGMS took the view that in the light of the developments detailed in its letter, there was no settlement and the arbitration remained afoot.

23 RALL did not respond to AGMS' position. The Tribunal conducted the Preliminary Meeting on 16 November 2015. RALL did not attend or participate in any way. After the hearing, the Tribunal made an order directing RALL to inform the Tribunal of its position with regard to AGMS' application that the arbitration be proceeded with and for an interim injunction, and directing AGMS to file written submissions. While AGMS filed written submissions shortly thereafter, RALL did not respond to the Tribunal's direction.

24 On 19 December 2105, the Tribunal, by a majority, issued an Interim Order ("the Order"). The Order stated that RALL had "failed to ensure the continuity of the Master Agreement, which [went] to the root of the [MOU]".

Thus, "the dispute referred to in the Statement of Claim of [AGMS] [was] still alive". The Tribunal noted the public policy objection raised by RALL (see [17] above), but did not discuss it. It concluded that the arbitration ought to proceed but stated that RALL was free to make objections in a procedurally proper manner in the course of the arbitration. The Tribunal did not, however, grant the interim injunction sought by AGMS.

25 The third arbitrator issued a dissenting opinion in relation to jurisdiction (the "Dissent"). He took the position that the settlement under the MOU remained in place. Therefore, AGMS's obligation to withdraw its claim in the arbitration subsisted. The Dissent stated that the "effect of AGMS's agreement to withdraw its claim in this Arbitration [was] that there [was] no longer any dispute before the Tribunal to arbitrate"; thus, the "Tribunal should declare that the dispute ha[d] been settled".

The final award and the dissenting opinion

26 The Tribunal then proceeded with the arbitration. On 16 February 2016 and 27 April 2016, RALL made enquiries of the SIAC regarding the progress of the arbitration but did nothing else.

27 AGMS sent its witness statement to the Tribunal, copying RALL, on 24 April 2016. At the same time, it also stated that it would be paying RALL's share of the costs of arbitration and, in order to foot these costs, it decreased its claim amount to US$5 million. On 5 May 2016, the Tribunal sent further directions on the dates of the substantive hearing to both parties. Shortly after, the SIAC sent an update of the status of the arbitration. The substantive hearing took place on 21 June 2016, and RALL was informed of this. RALL did not attend the hearing, and did not submit any post-hearing written submissions or

submissions on costs. AGMS sent its post-hearing written submissions dated 8 July 2016 to the Tribunal and RALL.

28 On 29 November 2016, the Tribunal issued the Final Award dated 24 November 2016 ("the Award"). This was a majority decision; a dissenting opinion was issued by the third arbitrator. The Tribunal decided that RALL had breached cl 3.1 of the Master Agreement. RALL was ordered to pay AGMS US$5 million with interest at 5.98% for the breach and S$424,891.01 for the costs of the arbitral proceedings. The Award noted that RALL "ha[d] not taken part in the arbitration proceedings nor ha[d] [RALL] requested any sort of relief from the Tribunal by any valid form of response or defence recognised in terms of the SIAC Rules" (Award at [114]). The Award addressed RALL's jurisdictional observation raised on 21 August 2015 (see [17] above) and held that the Tribunal had jurisdiction under cl 8 of the Master Agreement.

29 The minority arbitrator took the view, *inter alia*, that RALL did not breach cl 3.1 of the Master Agreement because the assistance requested by AGMS fell outside the scope of the clause.

30 RALL commenced proceedings in the High Court of Singapore to set aside the Award on 27 February 2017. In the ensuing portions of this judgement, unless otherwise indicated, references to Articles should be read as references to Articles of the Model Law and references to sections should be read as references to sections of the International Arbitration Act (Cap 143A, 2002 Rev Ed) (the "IAA") which was enacted to implement the Model Law in Singapore.

The proceedings below

31 In the High Court, RALL contended that:

(a) The Award should be set aside pursuant to Art 34(2)(*a*)(iii) because it deals with a dispute not falling within the terms of the submission to arbitration or contains decisions on matters beyond the scope of the submission to arbitration ("the jurisdictional challenge"). The core of RALL's argument was that the MOU had terminated the reference to arbitration.

(b) The Award should be set aside pursuant to Art 34(2)(*a*)(ii) because RALL was not given proper notice of the arbitral proceedings or was unable to present its case, in that certain pieces of correspondence and documents were not copied to it. In particular, the notes of evidence of the substantive hearing on 21 June 2016 were not sent to it. RALL argued that this also breached the rules of natural justice in the making of the Award under s 24(*b*).

(c) The Award should be set aside pursuant to Art 34(2)(*b*)(ii) as being in conflict with the public policy of Singapore, or under s 24(*a*) because it was induced or affected by fraud or corruption ("the public policy challenge"). RALL's main argument was that the Master Agreement was procured by bribes given by AGMS' chairman, Mr Senadhipathi, to RALL's then chairman, Mr Fernando.

32 The Judge dismissed RALL's application to set aside the Award, and set out his reasons in *Rakna Arakshaka Lanka Ltd v Avant Garde Maritime Services (Private) Limited* [2018] SGHC 78 ("the GD"). On the jurisdictional challenge, the Judge held that the Order was a ruling on jurisdiction as a preliminary issue.

Thus, s 10(3) and Art 16(3) were applicable, and RALL had to challenge the Order within 30 days of receiving notice of the ruling. The Judge noted that a party's failure to challenge a tribunal's ruling on jurisdiction as a preliminary issue has a preclusive effect in that such party cannot thereafter bring a jurisdictional challenge in subsequent setting aside proceedings in the seat court (GD at [56]–[63]). He then decided that the preclusive effect of s 10(3) and Art 16(3) applied equally to a party that had stayed away from the arbitral proceedings. All the considerations of finality, certainty, practicality, costs, preventing dilatory tactics and settling the position at an early stage at the seat where the arbitral tribunal has chosen to decide jurisdiction as a preliminary issue militated against allowing a respondent to reserve its objections to the last minute and indulge in tactics which would result in immense delays and costs. RALL's jurisdictional challenge at the seat in blatant disregard of Art 16 amounted to an abuse of process (GD at [65]–[74]).

33 Even if RALL was not precluded from bringing its jurisdictional challenge, the Judge agreed with the Tribunal that its mandate was not terminated by virtue of the MOU. There was ample evidence before the Tribunal that RALL had failed to maintain the continuity of the Master Agreement. Based on the contents of the MOU, there was no compelling case on a balance of probabilities that all disputes between the parties had been settled and that the mandate to continue with the arbitration had ended. Moreover, cl 5 of the MOU imposed an obligation on AGMS to withdraw its claim in the arbitration, meaning that until AGMS took the step of withdrawing, the arbitral proceedings remained live (GD at [42], [46] and [51]). The Judge further found that RALL was in breach of its agreement to arbitrate disputes or differences or questions that had arisen in connection with or in relation to the Master Agreement. RALL had only written to the SIAC stating that the dispute had been settled and

arbitration should not be proceeded with, and had not responded to AGMS's objection. After taking this unorthodox challenge to jurisdiction, RALL failed to comply with Rule 25.3 of the SIAC Rules, which stipulates that a plea of no jurisdiction has to be raised promptly after the Tribunal has indicated its intention to decide on the matter alleged to be beyond the scope of its jurisdiction (GD at [56]).

34 The Judge also dismissed RALL's challenge on the ground of breach of natural justice. RALL was copied on all important developments during the arbitration and RALL was not prejudiced in any way by not being copied in on other correspondence. Moreover, RALL chose not to participate in the arbitration despite being given due notice of each stage and ample opportunity to do so.

35 With regard to the public policy challenge, the Judge held that the alleged bribery and corruption that caused RALL to enter into the Master Agreement did not fall within s 24(*a*), which contemplates a situation where the award itself, rather than the contract between the parties, is tainted or induced by fraud or corruption (GD at [87]). As for the ground of challenge under Art 34(2)(*b*)(ii), the basis for RALL's allegation of bribery and corruption was the pending trials of the former chairmen of RALL and AGMS. The Judge held that until they were convicted and their avenues for appeal exhausted, there was no basis on which he could hold that the Award would perpetuate or enable corruption or bribery in Sri Lanka (GD at [89]). The Judge decided not to adjourn the setting aside proceedings until the determination of the criminal proceedings because it was unclear when they would be concluded. On the issue whether cl 3.1 of the Master Agreement required the performance of an illegal act, the Judge held that the Tribunal had considered the issue and found that the

Master Agreement clearly showed no sign of illegality. This was a finding of fact that could not be reopened by the supervisory court. Moreover, given that RALL had affirmed the Master Agreement and was still engaged with AGMS in the joint ventures on the maintenance of armouries in the Indian Ocean, it could not argue that the Master Agreement was illegal (GD at [92] and [94]).

The appeal

36 RALL appealed against the Judge's decision on the jurisdictional ground and on the public policy ground. It did not appeal against the Judge's holdings in relation to its challenge on the ground of breach of natural justice (see [35] above).

37 On the jurisdictional challenge pursuant to Art 34(2)(*a*)(iii), RALL argues that it is not precluded from raising the challenge in the setting aside stage.

(a) First, it submits that the Order is not a preliminary ruling on jurisdiction, so Art 16(3) and s 10(3) do not apply. The Tribunal did not rule on its jurisdiction but only directed the parties to continue with the proceedings.

(b) Second, even assuming that the Order is a preliminary ruling, RALL submits that it is not precluded from challenging the Award under Art 34. RALL relies the observation by GP Selvam J in *Tan Poh Leng Stanley v Tang Boon Jek Jeffrey* [2000] 3 SLR(R) 847 ("*Tan Poh Leng*") that the right to request the High Court for a decision on jurisdiction after the tribunal has ruled on jurisdiction as a preliminary issue is only

a request that does not bar a challenge by an applicant to set aside the award on the ground of lack of jurisdiction.

(c) Third, RALL argues that even if preclusion applies, it does not apply to a party that has not participated in the arbitral proceedings, and RALL is such a party.

38 RALL submits that the existence of a tribunal's jurisdiction is a matter that is subject to *de novo* review by the court. In this regard, it avers that the mandate of the Tribunal ended with the MOU, because the MOU contains the parties' agreement that the arbitration was to be put to an end. Reiterating the Dissent, RALL argues that cl 5 of the MOU stipulated that AGMS was obliged to formally withdraw the arbitration, and the MOU was not repudiated or terminated at any time. There is no evidence that RALL failed to maintain the continuity of the Master Agreement – the Master Agreement and the agreements therein, as listed in the MOU, still continue to run.

39 On the substantive merits of the Award, RALL submits that it did not breach of cl 3.1 of the Master Agreement and agrees fully with the reasons given by the dissenting arbitrator.

40 In relation to the public policy challenge, RALL repeats the arguments made below on corruption having brought about the Master Agreement and the six earlier agreements. RALL submits that the Judge also erred in considering that he was bound by the finding of the Tribunal that the Master Agreement showed no sign of illegality. RALL argues that the Award should be set aside pursuant to s 24(*a*), asserting the existence of a principle that bribery and corruption inducing an agreement render it illegal and contrary to public order and good morals.

41 RALL further argues that the Award should be set aside pursuant to Art 34(2)(*b*)(ii), because it is the public policy of Singapore not to recognise or enforce contracts and awards premised on contracts obtained through bribery or corruption.

42 In response, on the jurisdictional challenge, AGMS submits that a formalistic approach to determining whether the Order is a preliminary ruling by the Tribunal on jurisdiction should be rejected. Since the Tribunal decided that it should proceed with the arbitration despite the MOU, the Order must be a preliminary ruling on jurisdiction. AGMS agrees with the Judge that the time limit under s 10(3) and Art 16(3) should be respected and RALL should be precluded from bringing the jurisdictional ground of challenge in the setting aside stage. AGMS emphasises that the principles of certainty and finality underpin the time limit. Not ascribing a preclusive effect to s 10(3) and Art 16(3) would render the time limit redundant, and would lead to a circumvention of the expressed restriction on the right to appeal the jurisdictional decision to the court. In support, AGMS relies mainly on the *travaux préparatoires* of the Model Law (the "*travaux*"), and the Court of Appeal's *dicta* in *PT First Media TBK (formerly known as PT Broadband Multimedia TBK) v Astro Nusantara International BV and others and another appeal* [2014] 1 SLR 372 ("*Astro Nusantara*") that Art 16(3) may have a preclusive effect in respect of a setting aside application. AGMS submits that the view expressed in *Tan Poh Leng* should not be followed.

43 AGMS avers that the preclusive effect of Art 16(3) and s 10(3) applies to RALL even though it did not participate in the arbitration. First, the provisions do not state expressly that they only apply to parties that are involved in arbitral proceedings. Second, RALL was informed of the Order and decided

not to do anything. It would go against the intention of the drafters of the Model Law, which was to prevent parties from wasting resources, if RALL was allowed to engage in dilatory tactics by waiting to a late stage to mount the jurisdictional challenge. It would also put a party that chooses to boycott arbitral proceedings while being kept informed of the proceedings in a better position than a party that actively participates in the arbitral proceedings. AGMS submits that the reasoning in *Aloe Vera of America, Inc v Asianic Food (S) Pte Ltd and another* [2006] 3 SLR(R) 174 should be followed. In that case, at [76], the High Court held that no relief was available to the applicant because he took part in the arbitration to the extent that he objected to the jurisdiction and thereafter took a calculated decision not to participate further in the proceedings and not to seek recourse in the supervisory court.

44 AGMS advances the view that, in any event, the Tribunal's jurisdiction was not terminated automatically by the MOU. The MOU does not state that the dispute between the parties was fully and finally settled – the agreement in the MOU was only for AGMS to withdraw the arbitration. AGMS agrees with the Judge that since AGMS did not withdraw the arbitration, the Tribunal's jurisdiction continued. Whether there was a breach of the MOU by AGMS is a separate matter to be determined under the MOU in a separate forum. The Tribunal also found that RALL had failed to maintain the continuity of the MOU, so the MOU did not terminate the Tribunal's jurisdiction.

45 On the public policy ground of challenge under s 24(*a*) of the IAA raised by RALL, AGMS submits that RALL had not substantiated its allegation that the making of the Award was induced by fraud. On RALL's claim under Art 34(2)(*b*)(ii) of the Model Law, AGMS argues that the indictments of Mr Senadhipathi and Mr Fernando are insufficient to support RALL's claim.

AGMS also points out that the parties continue to work together under the Master Agreement, and the Master Agreement was reaffirmed by the parties in the MOU. It also argues that the Master Agreement did not require that bribery or corruption be carried out, and it is not the public policy of Singapore to set aside an arbitral award on the basis that the underlying contract was procured by bribery or corruption. AGMS agrees with the Judge that following *AJU v AJT* [2011] 4 SLR 739 ("*AJU v AJT*") the court is bound by the Tribunal's finding of fact that the Master Agreement showed no sign of illegality.

46 On the basis of the matters raised by the parties, the issues we have to decide are:

(a) Whether the Award should be set aside on the basis of the jurisdictional challenge. This involves the following sub-issues:

(i) Whether the Order was a ruling on jurisdiction that fell within s 10(3) and Art 16(3);

(ii) If so, whether the aforesaid provisions apply to a party that did not participate in the arbitration so that RALL, having failed to utilise the court supervisory mechanism in those provisions, is precluded from bringing a challenge to the Tribunal's jurisdiction in the setting aside proceeding;

(iii) Which limb of Art 34(2) applies to an application to set aside an award on the basis of lack of jurisdiction; and

(iv) If RALL is not precluded from bringing the jurisdiction ground of challenge, whether the Tribunal had jurisdiction (which involves a consideration of the effect of the MOU); and

(b) Whether the Award should be set aside on the ground of public policy pursuant to s 24(*a*) or Art 34(2)(*b*)(ii).

The jurisdictional challenge

The applicable legal framework

47 Before we begin the discussion on the jurisdictional challenge, we reproduce the material portions of Art 16 and s 10 as a reference point.

48 First, Art 16 of the Model Law provides:

> **Article 16. Competence of arbitral tribunal to rule on its jurisdiction**
>
> (1) The arbitral tribunal may rule on its own jurisdiction, including any objections to the existence or validity of the arbitration agreement. …
>
> (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 proceedings. The arbitral tribunal may, in either case, admit a later plea if it considers the delay justified.
>
> (3) 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. *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.
>
> [emphasis added]

49 Secondly, the IAA in order to implement Art 16 provides by s 10:

> **Appeal on ruling of jurisdiction**
>
> **10.** – (1) This section shall have effect notwithstanding Article 16(3) of the Model Law.
>
> (2) An arbitral tribunal may rule on a plea that it has no jurisdiction at any stage of the arbitral proceedings.
>
> (3) If the arbitral tribunal rules –
>
> (*a*) on a plea as a preliminary question that it has jurisdiction; or
>
> (*b*) on a plea at any stage of the arbitral proceedings that it has no jurisdiction,
>
> any party may, within 30 days after having received notice of that ruling, apply to the High Court to decide the matter.
>
> …

50 The drafters of the Model Law inserted Art 16 to reflect the important principle of *Kompetenz–Kompetenz* (which had sometimes been controverted), that initially it is for the arbitral tribunal to determine whether it has jurisdiction *albeit* that such determination is subject to court supervision. Paragraph 2 of Art 16 was formulated to deal with challenges to the tribunal's jurisdiction and was aimed, in particular, at ensuring that any such objections were raised without delay. Hence, the provision that such a challenge has to be made at the latest by the submission of the statement of defence. The tribunal is given the discretion to decide whether to deal with the challenge on a preliminary basis or to deal with it in the course of the final award. If the first method is adopted and the tribunal issues a preliminary ruling that it has jurisdiction, the defendant may then appeal to the relevant court within 30 days. Once again, the timeline has been imposed in order to expedite resolution of the question and of the arbitration generally (see United Nations Commission on International Trade, *Analytical Commentary on Draft Text of a Model Law on International*

Commercial Arbitration (A/CN.9/264, 25 March 1985) at p 41) (the "*Analytical Commentary*").

51 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 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 16(2) should be precluded from raising such objection later. It is clear that the drafters intended Art 16(2) to have a preclusive effect and, in all likelihood, intended the same effect for Art 16(3). Texts on the Model Law like Gary Born, *International Commercial Arbitration* vol 2 (Kluwer Law International, 2nd Ed, 2014) ("*International Commercial Arbitration*") at p 1104 (which was cited by the Judge at [61] of the GD), have propounded the view that a party must challenge the tribunal's jurisdictional ruling within the prescribed 30 days and if it does not then it will not be permitted to do so in a setting aside application under Art 34. The question that arises, since the drafters did not make that point equally clear, is whether the preclusive effect operates in all circumstances.

52 By s 10, the Singapore legislature provided the avenue of court recourse for a party to an arbitration who is dissatisfied with a preliminary ruling of the tribunal as to jurisdiction. Going further than Art 16, s 10(3) provides this recourse when the arbitral tribunal has ruled that it has no jurisdiction as well as

when it has found that it has jurisdiction. In contrast, Art 16 provides for court recourse only in the latter situation.

53 This Court has held that the preclusive effect of Art 16 does not extend to completely bar a party from relying on a tribunal's lack of jurisdiction even though that party has not availed itself of court recourse pursuant to s 10(3). In *Astro Nusantara*, this Court, acting as an enforcement court, considered the position of a party who had brought a jurisdictional challenge to the tribunal and failed but had not thereafter utilised the recourse to the court provided by s 10(3). This Court held that such party was nevertheless not precluded from raising the contention that the tribunal had no jurisdiction as a defence to enforcement of the eventual award which the tribunal had made against it.

54 The *Astro Nusantara* decision indicates one exception to the preclusive effect of Art 16. The issue before us is whether the present situation, in which a party that did not participate in the arbitration is asking the supervisory court to exercise its powers under Art 34 to set aside a final award because the tribunal had no jurisdiction, can constitute another such exception. As an aside, we refer to such a party as a "non-participating party" rather than use the somewhat pejorative term "boycotting party". This is because it is not correct to stigmatise a party before determining whether its object to jurisdiction is well founded.

55 Before we can get to the issue of whether the preclusive effect of Art 16 can be bypassed, there is a preliminary point to consider. This is whether Art 16(3) has been engaged at all in the present circumstances. The introductory words of Art 16(3) are that "the arbitral tribunal may rule on a plea referred to in paragraph (2)" and it is only if it does so as a preliminary ruling that immediate court recourse becomes available. The plea referred to in Art 16(2)

is a plea of no jurisdiction that is raised by the defendant in the arbitration either with or prior to his submission of the statement of defence. The Judge held that RALL did not plead in the form stipulated by Art 16(2) (GD at [58]). Whilst the parties did not submit on this, we consider it necessary to examine the point because if the interpretation the Judge gave Art 16 is correct, the application of Art 16(3) would be irrelevant.

56 In our view, it was not necessary for RALL to file a formal objection or plea in the legal sense of the term in order to engage Art 16(3). This is because there is nothing in Art 16 as a whole which prohibits the tribunal from considering its jurisdiction on its own motion. All that Art 16(1) states is that the "arbitral tribunal may rule on its own jurisdiction". This is permissive language which suggests that the tribunal may itself raise and decide issues of jurisdiction without waiting for the filing of a formal objection. This is the view taken in the *Report of the United Nations Commission on International Trade Law on the work of its Eighteenth Session* (A/40/17, 3–21 June 1985) ("*Commission Report*"), in which it is stated at paragraph 150 that the arbitral tribunal could decide on its own motion if there were doubts or questions as to its jurisdiction, including the issue of arbitrability. It would reinforce the principle of certainty and finality, which is an important principle in arbitration law, if it is accepted that once the arbitral tribunal has issued a preliminary ruling on its jurisdiction, even on its own accord, that ruling is a preliminary ruling for the purpose of Art 16(3). In the context of the IAA, while the word "plea" is used in both sub-ss 10(2) and 10(3), the licence in s 10(2) given to the tribunal to rule on a plea that it has no jurisdiction "at any stage of the arbitral proceedings" indicates that such objection may be raised and responded to at any time which must necessarily include the period before the delivery of formal pleadings. This language is not, in our view, inconsistent with the tribunal being

able to consider the issue of jurisdiction of its own accord and also implies that any objection made need not take the form of a pleading.

57 It is apparent on the facts of this case that there was no pleading by RALL which asserted a lack of jurisdiction. RALL did, however, furnish the Tribunal with its objection to jurisdiction. The objection is contained in RALL's letter to the SIAC dated 12 November 2015. In that letter, RALL stated that the parties had "reached a settlement" and that "it is no longer required to proceed with the above matter" (see [20] above). RALL, by sending this letter, was stating that the Tribunal no longer had any mandate. This was equivalent to objecting to the Tribunal's continued jurisdiction over the matter and saying that there was no longer any dispute which the Tribunal could deal with. In our view, the "plea" or objection to jurisdiction which Art 16(3) refers to does not need to be in any specific form or worded in any specific manner. The Judge himself stated that sending the letter was "an unorthodox challenge to the jurisdiction or mandate of the Tribunal to carry on with the arbitration" (GD at [56]). The course taken may have been unorthodox but it was no less a challenge to the Tribunal's jurisdiction and the Tribunal treated it as such by looking into the issue and asking for submissions, and eventually issuing the Order. On the facts here, Art 16(3) is engaged.

Character of the Order

58 We now turn to a brief consideration of the legal character of the Order. RALL points out that under Art 16(3), the remedy of court recourse on the question of the arbitral tribunal's jurisdiction only applies when the tribunal "rules as a preliminary question that it has jurisdiction". It says that, however, on the plain wording of the Order, it is clear that the Tribunal did not rule on its jurisdiction at all and only directed the parties to continue with the proceedings.

The Order does not even mention the word "jurisdiction". Accordingly, Art 16(3) does not apply and whether it is preclusive or not is irrelevant to RALL's entitlement to commence proceedings under Art 34 of the Model Law.

59 The same argument was made to the Judge. He was in no doubt that the Order was a ruling on jurisdiction as a preliminary issue (GD at [56]). We completely agree. First, it was expressly given the title "Interim Order" and made reference to the preliminary hearing and two applications made by AGMS. Additionally, after setting out the background facts and documents, the Tribunal stated that it had "perused the material available to it and has examined the facts and law both, in coming to its conclusion" which statement in itself indicated that the Tribunal was about to make a ruling. Thereafter, the Tribunal noted that the crux of the matter was "[i]n view of the Settlement Agreement entered into by the parties on 20 October 2015, whether there is no longer a requirement to proceed with this Arbitration as requested by [RALL]". The Tribunal considered the MOU in the light of the facts and decided that [RALL] had failed to ensure the continuity of the Master Agreement which action went to the root of the MOU. It reasoned, "[t]hus, the dispute referred to in the Statement of Claim of [AGMS] is still alive". It went on to state that AGMS had provided it with sufficient reason as to why the arbitration ought to proceed and then held that "[the] Arbitration ought to proceed". It is plain that the Tribunal was fully aware that RALL had, by its letter of 12 November 2015, lodged an objection to the continuation of the Arbitration and the mandate of the Tribunal. By holding that the MOU had not been implemented and the dispute referred to in the Statement of Claim was therefore "still alive" and should be proceeded with, the Tribunal clearly asserted its jurisdiction to deal with the matter. The minority arbitrator came to the opposite conclusion, holding in the Dissent that the effect of AGMS's agreement to withdraw its

claim in the Arbitration meant that there was no longer any dispute before the Tribunal to arbitrate. From the analysis of both the Order and the Dissent, it cannot be gainsaid that the Order is a preliminary ruling on jurisdiction falling within Art 16(3).

Preclusive effect of Art 16(3)

60 We now come to the analysis of the effect of Art 16(3). For convenience, we reiterate the question that we are considering, that is: whether a defendant to arbitration proceedings, who declines to participate in those proceedings because he takes the view that they have been wrongly started or continued due to a lack of jurisdiction, is entitled to stand by while the claimant proceeds with the arbitration without losing his right to challenge the jurisdiction of the tribunal in setting aside proceedings before the supervisory court?

61 To answer this question, we turn first to the *Analytical Commentary* as it reveals the views of the drafters of the Model Law. In relation to Art 16(2) and the effect of a failure to raise a plea of no jurisdiction within the specified time-limit, it states (at p 39):

> 8. The model law does not state whether a party's failure to raise his objections within the time-limit set by article 16(2) has effect at the post-award stage. The pertinent observation of the Working Group was that a party who failed to raise the plea as required under article 16(2) should be precluded from raising such objections not only during the later stages of the arbitral proceedings but also in other contexts, in particular, in setting aside proceedings or enforcement proceedings, subject to certain limits such as public policy, including those relating to arbitrability.

62 Then the *Analytical Commentary* goes on to give the views of the Secretariat itself as to the preclusive effect of such failure:

> 9. It is submitted that this observation accords with the purpose underlying paragraph (2) and might appropriately be expressed in the model law. It would mean, in practical terms, that any objection, for example, to the validity of the arbitration agreement may not later be invoked as a ground for setting aside under article 34(2)(*a*)(i) or for requesting, under article 36(1)(*a*)(i), refusal of recognition or enforcement of an award (made under this Law); *these provisions on grounds for setting aside or refusing recognition or enforcement 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]

63 The second part of the paragraph (emphasised in italics above) goes further than the Working Group did and reflects the Secretariat's view that a party who has not participated in the arbitration at all may still object to jurisdiction at the setting aside stage. The Secretariat therefore recognised that a different regime should apply to a non-participating party. At the time of this commentary, the 30-day time period for application to court was not included in the draft version of Art 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 again in a setting aside application. In any case, the submission that the time limit in Art 16(2) would not have a preclusive effect on a non-participating party must, logically, apply also to non-observance of the time limit in Art 16(3) by such a party.

64 AGMS, on the other hand, submits that the language of the provisions leads to the opposite view. It points out that neither s 10 nor Art 16 states expressly that the parties have to be involved in the proceedings before s 10(3) or Art 16(3) applies. This is in contrast to Art 4 of the Model Law relating to waiver which states expressly that it applies where a party "proceeds with the arbitration". AGMS says that the lack of express language to the contrary in the

cited provisions must mean that they apply to all parties who have contractually accepted arbitration as the proper form of dispute resolution whether or not they eventually deign to take part in ensuing arbitration proceedings.

65 The Singapore courts, other than the court below, have not commented on this precise issue. The leading case on Art 16(3) is this Court's decision in *Astro Nusantara*. In that case, the Court dealt with the relationship between the passive remedy of resisting enforcement on jurisdictional grounds and the active remedy of challenging jurisdiction before the court as provided by Art 16(3). It concluded that even if a party did not avail itself at the relevant time of the active remedy under Art 16(3), it would not be precluded from using lack of jurisdiction as a ground to resist enforcement of a final award. The Court left open the question of the relationship between the active remedy of setting aside under Art 34 and the active remedy of appeal under Art 16(3), but was of the view that preclusion would apply in that context. This observation was, however, *obiter*.

66 In the case of *Tan Poh Leng*, Selvam J expressed the view that the avenue of challenge under Art 16(3) was merely an option available to the parties by virtue of the phrasing "may request". He stated that Art 16(3) did not bar a challenge by a party to set aside an award on the ground of jurisdiction. This statement was, however, also *obiter* since on the facts of that case, the arbitral tribunal did not rule on its jurisdiction as a preliminary question so Art 16(3) was not engaged.

67 It is also pertinent that the Judge who heard the *Astro Nusantara* case at first instance (*Astro Nusantara International BV and others v PT Ayunda Prima*

Mitra and others [2013] 1 SLR 636) expressed a different opinion on the effect of Art 16(3). She said at [133]:

> If a party chooses the second option of challenge by choosing to *leave the arbitral regime in protest* and should the tribunal rule against it on the merits, that party, as the losing party, is entitled within the time stipulated in Art 34 to set aside the award under any of the grounds in Art 34. … 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 (and this course is not without risk), 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*. The jurisdictional award would not be final *vis-à-vis* the boycotting party, and the opposing party would have ample notice of this from the boycotting party's absolute refusal to participate. This possibility is hinted at in UNCITRAL Commentary (A/CN 9/264) on Art 16(2) at para 9. [emphasis added]

68 This permissive interpretation of Art 16(3) as only one remedy available to the parties, which does not preclude them from challenging the arbitral tribunal's jurisdictional decision at a later stage, has also been explained by this Court in *Astro Nusantara*. Along the lines of *Tan Poh Leng*, this Court stated (at [119]) that the words "may request" pointed to Art 16(3) providing parties with an additional option rather than confining them to a particular course of action. However, no great weight is placed on the wording of the provision. In any event, the Court clarified (at [130]) that in setting aside proceedings it would be "surprised" if a party retained the right to bring an application to set aside the final award on the merits under Art 34 on the jurisdictional ground it could have relied on to base a challenge under Art 16(3). With reference to the present case, that clarification is *obiter* in two ways: first, in that this Court was not there dealing with an Art 34 challenge; and secondly, in that it was not dealing with the situation of a party who had not participated in the arbitration at all.

69 In relation to academic commentary, there is an interesting article by Nata Ghibradze, ("Preclusion of Remedies under Article 16(3) of the UNICTRAL Model Law" 27 Pace International Law Review 345 (2015)) which undertook a wide-ranging review of the *travaux*, literature, and case law relevant to Art 16(3) and its meaning. Ghibradze pointed out that although the remedy provided under Art 16(3) 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" (at p 349). The article discussed *Astro Nusantara* and agreed with its conclusion that the overall, analysis of the *travaux* demonstrated the will of the drafters to allow parties to have an alternative "system of defences". But, she commented, this policy only concerned the choice between setting aside and enforcement proceedings without any indication of its extension to Art 16(3). Ghibradze's review of German, Canadian and Australian decisions and a range of academic articles led her to observe that many courts and the greater part of the legal scholarship support the preclusive effect of Art 16(3). She noted too that the decision in *Astro Nusantara* had been criticised as working against finality and certainty. Her tentative conclusion was that the Art 16(3) challenge seems to represent a "one shot remedy" (at p 394).

70 It should be noted that Gary Born, in *International Commercial Arbitration*, at p 1106, opines that the only exception to the requirement that a party must challenge the arbitrator's positive jurisdictional ruling under Art 16(3), "is where a party does not participate at all in the arbitral proceedings; in this instance, the Singaporean court would permit a challenge to a final arbitral award under Article 34 of the Model Law". Robert Merkin and Johanna Hjalmarsson, authors of *Singapore Arbitration Legislation Annotated* (Informa,

2nd Ed, 2016) at pp 148–149, as cited by the Judge at [70] of the GD, similarly take the view that a party "may simply refuse to have anything to do with the arbitration, in which case he has the right to await the award itself and then challenge it under Model Law, Art 34".

71 One thing is clear from Ghibradze's article and that is that the position on the preclusive effect of Art 16(3) is unsettled and has been left by the drafters to the individual national courts to decide in accordance with their own jurisprudence. While substantial time has been spent debating the intentions of the drafters and the language and the views of academics and jurists, much of this has been on the basis of imagined situations. The benefit of the judicial approach is that it takes place in a specific factual matrix and the decision made, while it may be applicable in other circumstances, must first of all pass the test of being appropriate and fair in all the circumstances of the case including the basic principles and precepts of arbitration law which parties would be deemed to be familiar with at the time they chose arbitration as their method of dispute resolution.

72 We are asked to decide what the effect of non-compliance with Art 16(3) on a non-participating party is. As we have mentioned earlier, the reason for the adoption of Art 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. Art 16 requires parties to an arbitration to bring out their challenges to jurisdiction at an early point of the proceedings. But this requirement pre-supposes that parties are before the arbitral tribunal and that a party to an

arbitration agreement who is served with a notice of arbitration by a counterparty has no option but to participate in the ensuing proceedings.

73 The established rule is that a party to a contract which contains an arbitration clause is legally obliged to resolve disputes arising under that contract by arbitration. This principle is enshrined in the IAA via s 6 which directs the court to stay any court proceedings that have been instituted in breach of an agreement to arbitrate. While a claimant in this situation is obliged to arbitrate however, there is no such duty on the respondent. The law does not compel a respondent against whom arbitration proceedings have been started to take part in those proceedings and defend his position. If the respondent believes that the arbitration tribunal has no jurisdiction, for one reason or another, he is perfectly entitled to sit by and do nothing in the belief that either the proceedings will not result in a final award against him or that if an award is made, he will have valid grounds to resist enforcement. Such a respondent may therefore let the opportunity to challenge the tribunal's jurisdiction afforded to him by Art 16 go unutilised. This might be a risky course of action to pursue but it is one that lies within the prerogative of every respondent. If the respondent is mistaken in his belief, then the arbitration which proceeds without his participation will end in an award which will be enforceable against him and no challenge to jurisdiction that he seeks to mount thereafter will be successful. If in fact he does not have a valid objection, then even if Art 16(3) does not have preclusive effect, whatever he does would not affect the ultimate result or the justice of the case.

74 On the other hand, if the respondent is found to have a valid objection to the tribunal's jurisdiction, should that objection be disregarded because of Art 16(3)? In the absence of a clear duty on the respondent to participate in the

arbitration proceedings imposed either by the Model Law or the IAA we find it difficult to conclude that a non-participating respondent should be bound by the award no matter the validity of his reasons for believing that the arbitration was wrongly undertaken. The *Astro Nusantara* case is a prime example of a situation in which it would have caused injustice to enforce the award granted by the tribunal against the 6th to 8th respondents in the case. This is because those respondents were never parties to the subscription and shareholders' contract that the dispute arose out of, much less to the arbitration agreement in that contract. In our view, neither Art 16(3) nor s 10 should be construed so as to prevent a respondent who chooses not to participate in an arbitration because he has a valid objection to the jurisdiction of the tribunal from raising that objection as a ground to set aside such tribunal's award.

75 We have set out in [72] above the objections that have been raised to the view that we have expressed. The first of these is that the point of Art 16(3) is to avoid wastage of resources by allowing the entire proceedings to continue, without further doubt as to jurisdiction. In our view, this objection has little weight when it is applied to a situation in which there is either no arbitration agreement to begin with or the arbitration proceedings are in some way contrary to the agreement. Where the claimant chooses to continue with the proceedings in such circumstances, the respondent who stays away altogether is not boycotting anything but is exercising his undoubted right to be undisturbed by the arbitration. Most importantly, the claimant who insists on proceeding in such circumstances must take the risk of wasted costs. In that sense, any wastage of costs on the part of the claimant would be entirely self-induced. 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 16(3) though he can continue to resist enforcement. But a respondent who chooses not to participate is not in any way contributing to any wastage of costs – that is entirely a matter for the claimant. We see no reason why such a respondent should not be allowed to apply to set aside the award after it has been made, if indeed the Tribunal had no jurisdiction to make that award.

76 The second objection is that circumscribing the preclusive effect of Art 16(3) would allow parties to keep quiet about jurisdiction during the arbitral proceedings only to raise a jurisdictional challenge after the issue of the final award. In our view, this objection does not apply at all to a party who does not participate in the arbitration proceedings. The proceedings will proceed in the normal manner in accordance with the directions of the tribunal and, we dare say, that the absence of a participating respondent will mean that the time required for evidence-taking and submissions will be much reduced. After the issue of the award, if the non-participating party seeks to set it aside, he will be subject to the same time constraints as a participating respondent would have been.

77 We are of the view that the preclusive effect of Art 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 16(3). Such a party does not owe the other party any duty to participate especially when such participation may be inconsistent with his position that he is not subject to the jurisdiction of the tribunal. When a justifiably non-participating party is confronted with an award, he would be entitled to avail himself of all remedies

that the law gives him. We also mention that giving Art 16(3) preclusive effect in such circumstances would mean putting an "innocent" respondent to the additional cost of having to defend against enforcement of the award in, potentially, many jurisdictions as he would not have been able to procure the setting aside of the award by the supervisory court.

78 Having come to the above conclusion, we must now determine whether RALL would qualify as a "non-participating" respondent and would thus fall outside Art 16(3). As can be seen from the recital of the facts between [13] and [26] above, while RALL did not file any formal pleadings in the arbitration, it did carry on some correspondence with the SIAC. It twice asked for an extension of three months to respond to the commencement of the arbitration by AGMS. Further, it wrote a letter to the SIAC on 21 August 2015 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 requested a stay of the proceedings. Then, on 12 November 2015, RALL wrote to the SIAC informing it that the parties had reached a settlement and stating that the arbitration need not be proceeded with. In 2016, RALL wrote twice to the SIAC regarding the arbitration and asking for a copy of the submissions made by AGMS.

79 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 MOU 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 MOU 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 MOU 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.

Setting aside under Art 34 on the ground of lack of jurisdiction

80 Article 34 of the Model Law prescribes the grounds on which a dissatisfied respondent may apply to a court to set aside an arbitral award against him. It is clear from the title of the article "Application for setting aside as exclusive recourse against arbitral award" that the intention of the drafters was that no court challenge to the award would be permitted if the party making the application is unable to satisfy one of the grounds set out in Art 34(2). The IAA by s 24, added two additional grounds.

81 In this appeal, RALL says that it has satisfied Art 34(2)(*a*)(iii). The Judge did not need to consider which of the limbs of Art 34(2)(*a*)(iii) applied to the present situation since he held that RALL was precluded from applying to set aside the Award on the basis that it had not utilised the appeal procedure provided by Art 16(3) and s 10(3).

82 RALL says that the Award should be set aside because in the language of Art 34(2)(*a*)(iii) it dealt "with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration". This was based on the premise that the parties unambiguously and unequivocally agreed in writing to no longer proceed with the arbitration after the arbitration proceedings commenced.

83 The first limb of Art 34(2)(*a*)(iii) which RALL has cited is: "the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration". In our view, this limb does not apply. This is because cl 8 of the Master Agreement states, *inter alia*:

> In the event that any dispute, difference or question, which has arisen in connection with or in relation to the agreement, cannot be, resolved amicably as stated above, then such dispute, difference or question shall be referred to arbitration.

There was no doubt that the dispute which AGMS submitted to arbitration arose out of the Master Agreement. Before us, RALL did not contend otherwise though it had made such an objection initially to the SIAC (see [17] above).

84 Whilst the Tribunal might originally have had jurisdiction over the dispute submitted by AGMS, if the effect of the MOU was to settle that dispute between the parties, that meant that there was no longer a dispute before the Tribunal to be decided on. Further, under the MOU as read by RALL, the parties have agreed to withdraw the submission to arbitration. Thus, the Award, resulting as it did from the Tribunal's continuation of arbitration proceedings that no longer dealt with a valid submission, would have contained "decisions on matters beyond the scope of the submission to arbitration" within the meaning of the second limb in Art 34(2)(*a*)(iii). Any decision on a dispute which

an arbitral tribunal makes after the parties have agreed to withdraw the submission must, by definition, be outside the scope of the submission.

Was there a valid and subsisting settlement?

85 The Judge held that the MOU did not terminate the Tribunal's mandate (GD at [51] and [73]). RALL has cited the case of *Chimimport plc v G D'Alesio SAS* [1994] CLC 459 ("*Chimimport*") in support of its argument that the agreement to arbitrate the dispute must have been mutually withdrawn by the entry into the MOU. In *Chimimport*, it was held that an arbitration in London had been terminated by a settlement agreement and the arbitrator had no jurisdiction to continue to act. The Judge, however, was not persuaded to apply *Chimimport* because he considered that there were material differences between the wording of the relevant clause in *Chimimport* and cl 5 of the MOU. He said (GD at [45]–[46]):

> 45. … The *Chimimport* clause provided:
>
> > 5. *By signing this agreement* the parties settle their differences, cease the [arbitration] case in London and will have no claims whatsoever towards one another, nor towards seller of the goods, charterers respectively. … [emphasis added]
>
> 46. Whereas the effect of the clause in *Chimimport* was to automatically terminate the arbitration upon the signing of the agreement, the effect of Clause 5 in the present case (see [44] above) was only to *oblige* AGMS to withdraw its claim in the arbitration; a point that counsel for RALL quite rightly conceded. This meant that *until* AGMS took the step of withdrawing the arbitration claim (and it was undisputed that AGMS took no such step), the arbitral proceedings remained live and the Tribunal's mandate never came to an end. AGMS argued that it was no longer obliged to take that step as RALL had failed to ensure the continuity of the Master Agreement. Hence their original claims still remained.
>
> [emphasis in original]

86 We disagree with this portion of the Judge's analysis. We take a different view of the effect of the MOU. To explain this, a short review of the MOU may be helpful.

87 The MOU starts with a description of the parties, RALL being referred to as the "First Party" and AGMS being referred to as the "Second Party". It then proceeds to state as follows:

> *It is observed that the aforesaid parties* by the Agreement No: 322 entered into on March 19, 2012, Agreement No: 323 entered into on March 21, 2012, Agreement No: 36 entered into on December 15, 2012, Agreement No: 333 entered into on April 25, 2013, Agreement No: 339 A entered into on August 01, 2013, Agreement No: 348 A entered into on September 25, 2013 and the Agreement entered into on January 27, 2014 and in addition to the aforesaid agreements if they had signed any other agreements prior to 9th January 2015 including such agreements, *have agreed to carry out and conduct the below–mentioned projects* – [Italics added for ease of comprehension]

That portion is followed by a listing of those projects including the Galle Floating Armoury Project. The MOU then goes on:

> Furthermore, it is also observed that the parties have by the aforesaid agreements agreed to carry out and conduct the following projects in the future:
>
> a. …
>
> b. …
>
> *The aforesaid parties are bound by the respective agreements to operate the aforementioned projects and whilst the aforesaid agreements are still in force* the said parties hereby agree to enter into this new agreement on October 20, 2015 thereby mutually agreeing to abide by the terms and conditions described hereunder. Furthermore, this agreement is limited in scope to the relevant monetary transactions specified therein.
>
> [emphasis added]

88 Seven terms and conditions, numbered from 01 to 07, follow. The first three conditions provide for AGMS to pay certain sums of money to RALL and for RALL to waive payment of a sum in excess of Sri Lankan Rupees 255 million and the fourth provides for the instalment payment of certain specified arrears by AGMS to RALL. The sixth and seventh conditions also deal with payment matters. The fifth condition, however, relates to the arbitration proceedings. It states:

> 05. *The said second party shall withdraw the arbitration claim* No: 70 of 2015 already filed by the said second party against the said first party in the International Arbitration Centre in Singapore and the said first party shall take action to terminate proceedings in relation to the letter of demand sent by the said first party to the said second party claiming Rupees Five hundred million (Rs. 500,000,000.00) on grounds of damage caused to reputation and monetary loss suffered as a result of the arbitration claim so filed and terminate the legal proceedings initiated against the said second party. [emphasis added]

89 From the above, it can be seen that the effect of the MOU as expressed in the clause immediately before the recitation of the terms and conditions was as follows:

(a) There was first a contractual declaration that both parties are bound by the agreements they had entered into. This was the MOU's principal value to AGMS because much of the rest of that contract stipulates payment obligations for AGMS to perform.

(b) There was then a statement that in effect the obligations under the previous agreements would continue to be valid and would not be affected by the MOU, save as specifically provided in the MOU in respect of the specific monetary transactions.

90 In our view, the words "whilst the aforesaid agreements are still in force" do not, as AGMS contends, signify that there was a separate obligation on RALL to keep the agreements alive. That would make no sense as there was already a declaration in the opening words that the "the aforesaid parties are bound by their respective agreements to operate the aforementioned projects …". Hence, the clause read as a whole records the validity and subsistence of the prior agreements, and then goes on in effect to say that whereas those agreements were and remained valid, they would be affected by the terms of the MOU only to the extent of the transactions provided therein. Consistent with this, the MOU only provided for obligations on AGMS to pay and terminate the arbitration and for RALL in turn to terminate the law suit it had commenced claiming damages from AGMS.

91 We are further of the opinion that the MOU was operative immediately upon its execution. There is nothing in it that indicates its effectiveness was to be postponed to a later date. Indeed, where there is a timetable for the performance of individual obligations, the MOU sets the same out quite plainly. While conditions 01 and 02 do not specify the dates on which AGMS has to pay the sums mentioned therein to RALL, the natural inference from such omission is that the amounts were payable forthwith. This inference is fortified by the specific time limits provided for in other conditions, like conditions 03 and 04. Condition 05 dealing with the withdrawal of the arbitration proceedings and termination of RALL's court action uses the words "shall withdraw" without specifying a time period and thus indicates a mandatory and immediate action.

92 We are satisfied that the intention of the parties when entering into the MOU was to effect an immediate settlement. The MOU resolved the dispute between the parties. Once the dispute was resolved, *ipso facto* there was no

longer a dispute which could be arbitrated on. The obligation to withdraw the arbitration proceedings therefore was in the nature of an administrative action rather than a legal requirement for the substantive end to the dispute. We do not agree in this regard that there was a difference between the effect of cl 5 of the MOU and that of cl 5 of the settlement agreement in the *Chimimport* case. The Judge's view that the language in the *Chimimport* case clause, to wit "[by] signing this agreement the parties settle their differences, cease the [arbitration] case in London", effected a direct and automatic termination of the arbitration proceedings there, is unimpeachable. However, the fact that here, as the Judge put it, the effect of condition 05 was "only to *oblige* AGMS to withdraw its claim in the arbitration" (GD at [46]), in our judgment, does not make a difference to the effect of the MOU overall. The result of the MOU is in legal terms exactly the same as that of the settlement agreement in *Chimimport*.

93 It is significant that AGMS does not deny that the MOU effected a settlement. As early as 14 November 2015, in submissions that it made to the Tribunal, it forwarded a copy of the MOU to the Tribunal and referred to that as "the Settlement Agreement reached between [AGMS] and [RALL] dated 20th October 2015". Its focus in those submissions was to assert the alleged breach of the MOU by actions of the Sri Lankan government as reported in the media and to contend that as a result of the circumstances that had developed "now there seemingly is no Settlement between [AGMS] and [RALL]". AGMS explained that accordingly it was not in a position to withdraw the arbitration as per the MOU and was "compelled" to proceed with its claim.

94 The stand taken by AGMS therefore was that it had been released from its obligations under the MOU and was entitled to have the arbitration proceedings continue. This was the argument that the Tribunal accepted by a

majority, resulting in the Order. The minority arbitrator, however, rejected that position. It is worth quoting the Dissent in some detail. He said:

> 21 In my view, the media reports, even if true, had no effect on the validity of the Settlement Agreement which AGMS had partially performed by making two payments to RALL (see [19] above). The reported event occurred (if it did) more than 20 days after the date of the Settlement Agreement. Up to today, there is no evidence that RALL has done anything to obstruct or prevent AGMS from carrying on the various projects under the Master Agreement. Neither is there any evidence that RALL has repudiated or done anything with a view to repudiating the Settlement Agreement to justify AGMS from refusing to withdraw its claim against RALL in this Arbitration under [condition 05] of the Settlement Agreement.
>
> 22 With respect to the second event, the Sri Lankan Navy took possession of the weapons and accessories kept on board "MV MAHANUWARA on the alleged [*sic*] that the weapons were illegally kept in the floating armoury as they did not belong to AGMS's customers. Whether or not the Sri Lankan Navy's action was lawful or otherwise does not affect the subsistence of the Settlement Agreement. AGMS has its own civil remedies against the Sri Lankan Navy if its action were unlawful or wrongful.
>
> 23 Accordingly, AGMS's obligation under [condition 05] of the Settlement Agreement to withdraw the claim in this Arbitration against RALL subsists as it is not affected by these two events.
>
> …
>
> 25 AGMS has argued that [the recital] states that the parties have agreed to resolve *solely* the dispute regarding the monies AGMS owes to RALL, implying that its claim for breach of Clause 3.1 of the Settlement Agreement [*sic*] has not been settled. However, under [condition 05], AGMS has expressly agreed to withdraw the claim preferred against RALL in this Arbitration as a result of the settlement of the amount claimed by RALL against AGMS (which involved a waiver of 50% of its claim by RALL and the payment of the settled sum by instalments). The effect of AGMS's agreement to withdraw its claim in the Arbitration is that there is no longer any dispute before the Tribunal to arbitrate.

95 We agree entirely with the reasoning of the minority arbitrator. We should add that we accept RALL's contention that it is a legally separate entity from the government of Sri Lanka which acts independently from RALL and is not controlled by RALL. Accordingly, actions taken by the Sri Lankan government or any of its agencies cannot be attributed to RALL. As was pointed out by the minority arbitrator, there was no evidence before the Tribunal that RALL itself had done anything to repudiate the MOU. In our view, however, even if RALL had breached the MOU, such breach would give rise to a separate claim against RALL but would not revive the settled dispute. This Court has endorsed the principle that a settlement agreement which has been entered into for good consideration has three effects. First, it puts an end to the proceedings which would thereby be spent and exhausted. Secondly, it precludes the parties from taking any further steps in the action, except where they have provided in the settlement agreement for liberty to apply in the same action for the purpose of enforcing the agreed terms (a provision that the MOU does not contain). Thirdly, it supersedes the original cause of action altogether (see *Turf Club Auto Emporium Pte Ltd and others v Yeo Boong Hua and others* [2017] 2 SLR 12 at [152]).

Conclusion on the jurisdictional challenge

96 For the reasons given above, we conclude that on and from the date of the MOU, the mandate given to the Tribunal to decide the dispute between the parties had ended. With respect, the decision of the Tribunal to continue with the arbitration was in error. Accordingly, the Award contains decisions on matters that were beyond the scope of the submission to arbitration and must be set aside on this basis.

The public policy challenge

97 Strictly speaking, as we have held in favour of RALL in relation to the jurisdictional challenge, we need not deal with the challenges brought under s 24(*a*) and Art 34(2)(*b*)(ii) on the basis that the making of the Award was induced or affected by fraud or corruption (s 24(*a*)) and the Award is in conflict with the public policy of Singapore (Art 34(2)(*b*)(ii)). For completeness, however, and as the issue was dealt with at length by the parties, we will make a few observations.

98 First, the contention that the making of the Award was induced or affected by fraud or corruption, was roundly rejected by the Judge. At [87] of the GD, he noted RALL's allegation that Mr Senadhipathi had bribed the then chairman of RALL to cause RALL to enter into various contracts including the Master Agreement. Then he stated "[c]ounsel for RALL then makes a great leap, with respect, bereft of any logic, and submits that the Final Award was tainted 'by fraud/corruption'". The Judge rejected this challenge on the basis that the allegations did not fall within s 24(*a*) which contemplates a situation where the Award itself (rather than the contract between the parties) is tainted or induced by fraud or corruption. We entirely agree. None of the cases cited by RALL for the application of s 24(*a*) supports the position that that section is applicable where the alleged fraud or corruption relates to the underlying contract and not the Award itself.

99 We turn next to the challenge under Art 24(2)(*b*)(ii), that the Award is against Singapore public policy. The basis of this assertion is that the six agreements between RALL and AGMS and the subsequent Master Agreement were illegal because they were procured by bribery on the part of AGMS, meaning that RALL's obligations thereunder would be unenforceable. RALL

appears to be contending that it is against the public policy of Singapore for a court to enforce an award based on such a contract.

100 Before we can consider the applicability and scope of Singapore public policy, however, RALL has first to establish that the Master Agreement and the other agreements were illegal under their governing law. Such an issue would be pre-eminently one for the Tribunal to decide based on the facts and law before it as it was the forum concerned with the validity of the underlying obligations. RALL did not put this issue before the Tribunal. Notwithstanding that, the Tribunal did look into the question and found that the Master Agreement clearly showed "no sign of illegality or even in the slightest [way], indicate that such Agreement and/or Agreements are contrary to public policy". That finding is binding on the parties and RALL cannot challenge it before this Court as the court of the arbitral seat. It is well established that a finding of fact by an arbitral tribunal cannot be re-opened by the supervisory court as the Judge observed, relying on *AJU v AJT*. In these circumstances, there is no need to consider public policy at all.

101 RALL faces another obstacle. Its position is that the MOU is valid and binding on the parties. By the MOU, the parties affirmed the Master Agreement and the six other agreements. Having taken this position voluntarily as part of the settlement, RALL cannot now do an about face and declare the various agreements to be illegal and unenforceable. Indeed, the Tribunal itself noted that the contents of the MOU "in fact ratified all agreements entered into" by RALL and AGMS.

Conclusion

102 For the reasons given above, we allow the appeal. We set aside the Award because the Tribunal had no jurisdiction to conduct the arbitration proceedings after the conclusion of the MOU.

103 We also set aside the costs order made below. In respect of the costs below, we award RALL S$30,000 plus reasonable disbursements to be taxed if not agreed. In respect of the appeal, we award RALL S$50,000 plus reasonable disbursements to be taxed if not agreed. The security deposit shall be released to RALL.

Sundaresh Menon Chief Justice	Judith Prakash JA Judge of Appeal	Steven Chong Judge of Appeal

Arul Andre Ravindran Saravanapavan and
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