"What now for Art 16(3)?"[1]

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1. Introduction

On 31 October 2013 the Singapore Court of Appeal delivered its decision, *PT First Media TBK v Astro Nusantara International BV* [2013] SGCA 57, in the long-running dispute between the Astro Group, a Malaysian media group, and the Lippo Group, an Indonesian conglomerate. The decision concerned the enforcement of arbitral awards that were rendered in Singapore, a Model Law jurisdiction, in which the *International Arbitration Act* ("IAA")[2] gives force to the UNCITRAL Model Law on International Commercial Arbitration ("Model Law").

The Singapore Court of Appeal provided a detailed analysis of the Model Law and its *travaux préparatoires*, regarding the ability of a party to oppose enforcement of an arbitral award on the grounds of the tribunal's alleged lack of jurisdiction. In particular, the Court of Appeal considered the circumstances where that party did not challenge the tribunal's preliminary determination even though it was entitled to under Article 16(3) of the Model Law. In reaching their decision, the Court of Appeal identified the policy of 'choice of remedies' as being central to the Model Law. Under this interpretation of the Model Law, parties are free, either to make an active challenge by seeking judicial review or setting aside an award, or to invoke a passive remedy by requesting an award to be refused only in response to enforcement proceedings.

This article first outlines in Section 2 the background to the arbitration and the subsequent enforcement proceedings. Section 3 examines the Court of Appeal's decision and its references to the *travaux préparatoires*, focusing particularly on the interpretation of the Model Law and the 'choice of remedies' policy. The article in Section 4 concludes with a discussion regarding the practical implications of the decision. The decision draws attention to the competence-competence principle and the compromise position adopted by the Model Law. It also calls into question the continuing utility of Article 16(3), in light of an interpretation of the provision that is contrary to the demands of certainty and efficiency in international arbitration practices.

2. Background

Lippo and Astro entered into a joint venture for the provision of multimedia and television services in Indonesia. The terms of the joint venture were contained in a Subscription and Shareholders' Agreement dated 11 March 2005 ("SSA"). A dispute arose over the funding of the joint venture, and in October 2008, the Astro companies commenced arbitration in the Singapore International Arbitration Centre ("SIAC") against Lippo, pursuant to the arbitration agreement in the SSA. A three-member tribunal seated in Singapore was formed ("Tribunal") and Astro requested the Tribunal to allow another three Astro companies, who were not party to the SSA, to be joined to the arbitration proceedings. Lippo contested the joinder application.

[1] The author gratefully acknowledges the assistance provided in preparation of this paper by Tomoyuki Hachigo, Legal Assistant of Clayton Utz, Sydney.

[2] *International Arbitration Act* (cap 143A, 2002 rev ed).

On 7 May 2009, the Tribunal rendered a preliminary award, ruling that it had the power under the *SIAC Rules 2007* to join the three Astro companies, and exercised its discretion to join the three Astro companies. Lippo did not challenge the preliminary award in the Singapore courts as it was entitled to under Article 16(3) of the Model Law within a 30-day limit. Rather, it continued to participate in the arbitration, but reserved its objections to the Tribunal's jurisdiction. Subsequently the Tribunal rendered four further awards on the merits of the dispute, largely in favour of Astro.

Astro then sought to enforce the awards in Singapore. Lippo in response requested the courts to refuse the enforcement, claiming that there was never any arbitration agreement between Lippo and the three Astro companies, who were not party to the SSA but had been joined by the Tribunal. At first instance, the Singapore High Court ruled in favour of Astro, one of the grounds being that Article 16(3) of the Model Law was a 'one-shot remedy'. [3] In other words, Lippo, given that it had not made an application under Article 16(3) of the Model Law within the prescribed time limit of 30 days, was precluded from raising the same jurisdictional objections at the enforcement stage.

Against this background, one of the Lippo companies, PT First Media TBK, appealed to the Singapore Court of Appeal.

3. Decision of the Singapore Court of Appeal

The key question considered by the Singapore Court of Appeal was whether, once a tribunal makes a preliminary ruling on its own jurisdiction, an application under Article 16(3) of the Model Law is the only route available to a party seeking to challenge the arbitral award on grounds of lack of jurisdiction; or alternatively, whether a party can also challenge the award on the same grounds at the enforcement stage.

Reversing the decision of the High Court, the Court of Appeal held that both avenues are available. By conducting a detailed examination of the Model Law and its *travaux préparatoires*, its decision relied on two propositions: firstly, that the policy of 'choice of remedies' is at the heart of the entire design of the Model Law;[4] and secondly, that Article 16(3) is neither an exception to the 'choice of remedies' nor a 'one-shot remedy'.[5]

3.1 The centrality of 'choice of remedies' to the Model Law design

The Court of Appeal found that a party seeking to challenge an arbitral award on the grounds of jurisdiction has a 'choice of remedies' under the Model Law. On one level, the 'choice of remedies' policy makes available the *active* choice of taking positive steps to invalidate the tribunal's award, such as by a jurisdictional challenge under Article 16(3), or by seeking to set aside an award under Article 34. On another level, there is the *passive* choice of requesting an award to be refused recognition or enforcement under Articles 35 and 36, only in response to enforcement proceedings initiated by the other party.

The Court of Appeal extracted the following passage from the *Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration* ("*Analytical Commentary*"),[6] in support of the argument for a conceptual separation between the two choices:

[3] *Astro Nusantara International BV v PT Ayunda Prima Mitra* [2012] SGHC 212, at [141], [151], [157].

[4] *PT First Media TBK v Astro Nusantara International BV* [2013] SGCA 57, at [65]-[74].

[5] *PT First Media TBK v Astro Nusantara International BV* [2013] SGCA 57, at [100]-[132].

[6] UNCITRAL, *Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration*, UN Doc A/CN.9/264 (25 March 1985) ("*Analytical Commentary*").

> 'The application for setting aside constitutes the exclusive recourse to a court against the award in the sense that it is the only means for actively attacking the award, i.e. initiating proceedings for judicial review. A party retains, of course, the right to defend himself against the award, by requesting refusal of recognition or enforcement in proceedings initiated by the other party (articles 35 and 36).'[7]

The Court of Appeal further enquired as to whether the two choices should be available as a 'menu' to the award debtor. The UNCITRAL Working Group on International Contract Practices ("Working Group") had in fact considered this issue, as evident from the *Report of the Working Group on the work of its seventh session* ("*Working Group Report*").[8] There was a specific proposal put before the Working Group, which considered denying a party its passive remedy under Article 36 if the party did not make an active challenge to set aside the award under Article 34.[9] Most critically, the Working Group rejected this proposal and provided the following explanation:

> 'It was pointed out that the intended preclusion unduly restricted the freedom of a party to decide on how to raise its objections. In view of the different purposes and effects of setting aside and of invoking grounds for refusal of recognition or enforcement, a party should be free to avail itself of the alternative system of defences which was recognized by the 1958 New York Convention and should be maintained in the model law. It was further pointed out that if the provision were limited to recognition and enforcement of domestic awards it would not be consistent with the policy of the model law to treat awards in a uniform manner irrespective of their place of origin.'[10]

It is crucial to note the reference in the above passage to the defences recognised by the New York Convention. The New York Convention deals only with challenges to a foreign award *in the place of enforcement*. In contrast, the Model Law, in addition to challenges to foreign awards in the place of enforcement under Article 36, provides avenues for challenges *in the place of the seat of arbitration* under Article 34. The 'choice of remedies' is based on this distinction. It provides parties the option to challenge the award, either actively in the place of the seat, or passively in the place of enforcement. Interestingly, the Model Law, by making both avenues available, gave rise to the possibility that the enforcement of awards in the place of the seat of arbitration could be treated differently from the enforcement of foreign awards in that same jurisdiction.[11] To do so, however, as expressed by the Working Group in the above passage, would be contrary to the policy of treating awards in a uniform manner, irrespective of their place of origin.[12] It is within this context that the Court of Appeal upheld the 'choice of remedies' policy, under which parties are free to pursue either an active or a passive remedy.

Under this reading of the Model Law, even if a party chooses not to actively attack an award in the place of the seat, absent any issues of waiver, that party remains able to passively defend against the enforcement proceedings initiated by the other party.[13] This passive route is available to the party, regardless of whether the enforcement is sought in the seat or elsewhere. It is important to note that Article 16(3) exists within this design of the Model Law.

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[7] *Analytical Commentary*, UN Doc A/CN.9/264, p 71 at [2]. See also UNCITRAL, *Report of the United Nations Commission on International Trade Law on the work of its eighteenth session*, UN Doc A/40/17 (21 August 1985) ("*Commission Report*"), p 54 at [274], which makes a similar point.

[8] UNCITRAL, *Report of the Working Group on the work of its seventh session*, UN Doc A/CN.9/246 (6 March 1984) ("*Working Group Report*").

[9] *Working Group Report*, UN Doc A/CN.9/246, p 207 at [153].

[10] *Working Group Report*, UN Doc A/CN.9/246, p 207 at [154].

[11] *PT First Media TBK v Astro Nusantara International BV* [2013] SGCA 57, at [64].

[12] *PT First Media TBK v Astro Nusantara International BV* [2013] SGCA 57, at [64].

[13] *PT First Media TBK v Astro Nusantara International BV* [2013] SGCA 57, at [71].

3.2 Article 16(3) and 'choice of remedies'

If Article 16(3) were to be a 'one-shot remedy', once a tribunal makes a preliminary ruling on its own jurisdiction, the only route available to a party seeking to challenge jurisdiction would be an application to the seat court within 30 days. Such interpretation of Article 16(3) would be an exception to the underlying system of 'choice of remedies'. The Court of Appeal considered that clear intention on the part of the drafters was needed to interpret Article 16(3) in this way.

Some participating members of the negotiations did in fact raise concerns regarding this issue. As recorded in the *Analytical Compilation of comments by Governments and international organizations on the Draft Text of a Model Law of International Commercial Arbitration* ("*Analytical Compilation*"):[14]

> 'Norway and IBA suggest that it should be mentioned in article 16(3) that a ruling by an arbitral tribunal that it has jurisdiction could also be contested by way of defence against recognition or enforcement of the award. It is pointed out by IBA that under article 16(3) it appears that questions of jurisdiction may only be raised in an action for setting aside, and not by way of defence to an action for recognition or enforcement of the award. This could lead to an absurd result if the losing party is unable to take an action for setting aside simply because the winner stepped in first with an action for enforcement.'[15]

There were also calls for clarification as to whether a party who chooses not to challenge the preliminary ruling pursuant to 16(3) may raise the same challenge in enforcement proceedings. This concern was expressed in the *Analytical Commentary*:

> 'The reason for referring in article 16(3) only to the application for setting aside was that the thrust of this provision concerns the faculty of an objecting party to attack the arbitral tribunal's ruling by initiating court proceedings for review of that ruling. However, the Commission may wish to consider the appropriateness of adding, for the sake of clarity, a reference to recognition or enforcement proceedings, which, although initiated by the other party, provide a forum for the objecting party to invoke lack of jurisdiction as a ground for refusal (under article 36(1)(a)(i)).'[16]

Furthermore, the *Summary Records for meetings devoted to the preparation of the UNCITRAL Model Law on International Commercial Arbitration* ("*Summary Records*")[17] also recorded a number of concerns voiced by the participating members, querying the availability of both active and passive remedies following a failure to raise objections under Article 16(3).[18] In response to these concerns, the *Summary Records* do not reveal an unequivocal conclusion as to the availability of further recourse if parties do not seek judicial review within 30 days. On one occasion it was suggested that these concerns 'would be more appropriately discussed in conjunction with article 36'.[19] When the issue was raised again, the Chairman noted that it 'would be a question of national procedural law on the authority of

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[14] UNCITRAL, *Analytical Compilation of comments by Governments and international organizations on the Draft Text of a Model Law of International Commercial Arbitration*, UN Doc A/CN.9/263 (19 March 1985) ("*Analytical Compilation*").

[15] *Analytical Compilation*, UN Doc A/CN.9/263, p 30 at [8].

[16] *Analytical Commentary*, UN Doc A/CN.9/264, p 40 at [12] n 57.

[17] 'Summary Records of the United Nations Commission on International Trade Law for meetings devoted to the preparation of the UNCITRAL Model Law on International Commercial Arbitration' (1985) XVI *Yearbook of the United Nations Commision on International Trade Law* 399 ("*Summary Records*").

[18] *PT First Media TBK v Astro Nusantara International BV* [2013] SGCA 57, at [110]; *Summary Records*, p 440 at [51] (Mr Bonell, Italy representative, 315th mtg), p 440 at [56] (Sir Michael Mustill, UK representative, 315th mtg), p 441 at [9] (Mr Holtzmann, USA representative, 316th mtg), p 443 at [33] (Mr Holtzmann, USA representative, 316th mtg), p 459 at [16] (Mr Broches, observer for the International Council for Commercial Arbitration, 310th mtg).

[19] *Summary Records*, p 443 at [34] (Mr Loewe, Chairman, 316th mtg).

judicial decision (*res judicata*)'.[20] Given this ambivalence, the Court of Appeal concluded that Article 16(3) was not intended to preclude subsequent recourse to passive remedies. The Court of Appeal inferred that, if such were the intentions behind Article 16(3), the drafters of the Model Law would have dealt with the issue there and then.[21]

The Court of Appeal also considered the competing policy considerations of certainty and efficiency, which undoubtedly could be achieved if Article 16(3) were to be the one and only route for raising jurisdictional objections. It observed that certainty and efficiency, though important, were not the paramount objectives in Article 16(3). In so far as the tribunal exercises its discretion and a party chooses to challenge that decision instantly before the courts, certainty surrounding the tribunal's jurisdiction could be achieved at an earlier stage under Article 16(3). However, given the centrality of the 'choice of remedies' policy to the Model Law, these considerations did not extend to precluding subsequent recourse to passive remedies.[22] Consistent with the 'choice of remedies' policy, the Court of Appeal held that the failure to challenge a tribunal's preliminary ruling pursuant to Article 16(3) does not deny the party the option to later raise a challenging at the place of enforcement, regardless of whether enforcement is sought in the place of the seat or elsewhere.

3.3 Outcome of the jurisdictional challenge

As a result, Lippo was able to pursue the passive route of resisting enforcement in Singapore, even though it did not actively challenge the Tribunal's preliminary ruling on jurisdiction as it was entitled to under Article 16(3). In reviewing the Tribunal's decision to join the three Astro parties, the Court of Appeal found that the Tribunal erred in allowing the joinder. Consequently, the awards could not be enforced against Lippo by the three Astro companies who were not party to the SSA. Although the awards were still enforceable by the Astro companies that were party to the SSA, Astro lost most of the damages initially awarded in its favour by the High Court.

4. What now for Art 16(3)?

A number of interesting points can be taken from the decision of the Singapore Court of Appeal. Firstly, the decision draws attention to the application of the competence-competence principle in the Model Law. In particular, it revisits the policy considerations of balancing the rights of the parties to have recourse in circumstances where there is a real question over a tribunal's jurisdiction, against the need to prevent the opportunity for the parties to engage in delay tactics. It serves as a reminder that the position under the Model Law represents a compromise between these competing policy considerations, as evident from the *travaux préparatoires*. Secondly, an interpretation of Article 16(3) which prioritises the 'choice of remedies' policy calls into question the continuing utility of this provision. An interpretation which permits parties to make jurisdictional challenges at the enforcement stage, even though it had an earlier opportunity to do so, is contrary to demands for efficiency and certainty that is sought after in international arbitration proceedings today.

4.1 The competence-competence principle and the Model Law

The competence-competence principle provides the practical option for a tribunal, when challenged, to make a ruling on its own jurisdiction. If it were not authorised to determine the challenge, an unco-operative party to a genuine arbitration agreement would have the opportunity to halt proceedings, or cause considerable delay, simply by challenging the tribunal's jurisdiction. This would serve to undermine the arbitral process as an effective means of dispute resolution. Equally, not all challenges to

[20] *Summary Records*, p 459 at [17 (Mr Loewe, Chairman, 320th mtg).

[21] *PT First Media TBK v Astro Nusantara International BV* [2013] SGCA 57, at [111].

[22] *PT First Media TBK v Astro Nusantara International BV* [2013] SGCA 57, at [117].

the jurisdiction of an arbitral panel are unfounded and a party should have recourse to the courts if it has in fact not agreed to arbitrate.

These divergent views are reflected in the varying approaches that were considered for Article 16(3), as recorded in the *Report of the United Nations Commission on International Trade Law on the work of its eighteenth session* ("*Commission Report*").[23] On the one hand, an approach which delays recourse to the courts on the question of jurisdiction until after an award has been made, while minimising interference by the courts, may create injustice by wasting the parties' time and expense should it be found that the tribunal never had jurisdiction. Therefore on one view, it was thought to be desirable for parties to have immediate resort to the court in order to obtain certainty in the question of the arbitral tribunal's jurisdiction.[24] On the other hand, if recourse to the courts were to be made available to the parties in the preliminary stages of the arbitration in order to prevent the possibility of wasted resources, this might undermine the arbitral process by providing parties wishing to disrupt proceedings with the opportunity to do so.[25]

The solution which was finally agreed on was to enable the tribunal, in its discretion, either to rule upon the issue of jurisdiction as a preliminary point, or to defer its ruling until the making of the award. In support of this approach, the *Commission Report* stated:

> '…such flexibility was desirable since it would enable the arbitral tribunal to assess in each particular case whether the risk of dilatory tactics was greater than the opposite danger of waste of money and time. As regards that possible danger, the suggestion was made to reduce its effect by providing some or all of the safeguards envisaged in the context of court control over a challenge of an arbitrator in article 13(3), i.e. short time-period, finality of decision, discretion to continue the arbitral proceedings and to render an award.'[26]

Therefore, the Model Law position may be considered as a compromise between the divergent views as to when in the arbitral process judicial review is permitted. Should a tribunal's jurisdiction be challenged in the preliminary stages of the proceedings, rapid and unappealable review of its decision may occur without interruption to the arbitral process. This approach has the potential to save the parties both time and expense if the tribunal, as a preliminary matter, incorrectly finds that it has jurisdiction and the parties are able to immediately challenge the decision in court.

The Model Law approach can be contrasted with the French approach, where judicial intervention is generally delayed until after the final award.[27] In comparison to the French approach, the Model Law approach would appear to be placing less faith in a tribunal's ability to make fair and just decisions relating to its jurisdiction. However, as noted in the *Summary Records* by Lord Wilberforce who was the observer for the Chartered Institute of Arbitrators, it was thought to be desirable for the tribunal to at least have the option, at their discretion, of having legal questions determined by the courts at a preliminary stage.[28] This was especially a concern for difficult cases in which the arbitrators themselves were interested in having the question settled by the courts.[29] It is this option, to invite the courts to determine the tribunal's jurisdiction at a preliminary stage, that strikes the balance between the competing policy

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[23] *Commission Report*, UN Doc A/40/17, p 31 at [158]-[160].

[24] *Commission Report*, UN Doc A/40/17, p 31 at [160].

[25] *Commission Report*, UN Doc A/40/17, p 31 at [158].

[26] *Commission Report*, UN Doc A/40/17, p 31 at [159].

[27] *Nouveau Code de Procedure Civile*, art 1458.

[28] *Summary Records*, p 442 at [24] (Lord Wilberforce, observer for the Chartered Institute of Arbitrators, 316th mtg).

[29] *Summary Records*, p 442 at [24] (Lord Wilberforce, observer for the Chartered Institute of Arbitrators, 316th mtg).

considerations. What then is the point of Article 16(3), if this option can be ignored by a party, and that party is permitted at a later stage to mount a jurisdictional challenge on the same grounds?

4.2 Utility of Article 16(3) in light of the Court of Appeal's decision

When a tribunal's jurisdiction is challenged in the preliminary stages of proceedings, the purpose of Article 16(3) is to provide parties the option to have jurisdictional questions settled by the courts at that early stage. The availability of subsequent recourse to the courts undermines this function, if the losing party is permitted to raise the same objections at the enforcement stage. To further clarify this point, the Court of Appeal was indeed doubtful that a party in these circumstances could rely on its active remedy, by bringing an application to set aside a final award under Article 34.[30] However, that party would in any event retain its passive remedy under Article 36, subject to any issues of waiver or estoppel. In seeking to treat domestic and foreign awards uniformly, the Court of Appeal concluded that the passive remedy must be available, even if enforcement is sought in the place of the seat.

From a practical perspective, this reading of Article 16(3) brings about an undesirable result. Even when there was a clear option for a party to challenge the tribunal's jurisdiction at an early stage, if the party chooses not to exercise this option, that party is permitted to raise the same objections at a later stage. This interpretation undeniably goes against the policy imperatives of certainty and efficiency in arbitral proceedings. The Court of Appeal did in fact take into account such policy considerations, and found that certainty was achieved by providing the parties a choice to challenge the tribunal's jurisdiction at an early stage. In support of this argument, it is true that the availability of an option under Article 16(3) achieves more certainty than the alternative approach, under which jurisdictional challenges are only available after the award on the merits have been rendered.[31] But it is nevertheless difficult to see a public policy advantage in allowing a party to take part in arbitral proceedings, see whether they win or lose the arbitration and, after wasting time and money on the arbitration, permit them to have a second bite of the cherry.

While the *travaux préparatoires* do not conclusively reveal the true intentions behind Article 16(3), the Court of Appeal was clearly guided by the original drafters' emphasis on the 'choice of remedies'. Absent clear evidence that certainty and efficiency were the paramount objectives in Article 16(3), it declined to override the clearly articulated policy of having both active and passive remedies available to the parties. That may have been the intent of the original drafters at the time. However, considering the demand for certainty and efficiency in arbitral proceedings, a more measured approach that reflects international arbitration practice today could be more appropriate for Article 16(3). It is of course acknowledged that a contrary interpretation of Article 16(3) comes at the expense of the coexistence of active and passive remedies. Nonetheless, a situation under which a party is permitted to challenge a tribunal's jurisdiction, even though it had the opportunity to do so at an early stage, is not a satisfactory approach for modern international arbitration practices.

5. Conclusion

The Singapore Court of Appeal in *PT First Media TBK v Astro Nusantara International BV* identified the policy of 'choice of remedies' and provided an interpretation of Article 16(3) that is consistent with that approach. The Court of Appeal made an interesting note of how the departure from the 'choice of remedies' policy would have significant practical ramifications, that:

> '[p]arties involved in international arbitrations in Singapore would be compelled to engage their active remedies in the Singapore courts, *ie*, by challenging a preliminary ruling under Art 16(3) or initiating setting aside proceedings under Art 34, because the option of exercising a passive remedy of resisting

[30] *PT First Media TBK v Astro Nusantara International BV* [2013] SGCA 57, at [130].

[31] *PT First Media TBK v Astro Nusantara International BV* [2013] SGCA 57, at [118].

> enforcement here would not be open to them. This can have potentially far-reaching implications on the practice and flourishing of arbitration in Singapore.'[32]

Arguably, the way it interpreted Article 16(3), by making available a subsequent passive remedy, can equally have practical ramifications for arbitrations seated in Singapore. Under a system that provides a two-stage remedy, parties can never be certain about the tribunal's jurisdiction. Even if the tribunal provides an early opportunity for that question to be determined by the courts, if the objecting party chooses not to exercise the option for judicial review, the jurisdictional question remains open to challenges at the enforcement stage. It is not suggested that the provisions of Article 16 are designed to completely oust the jurisdiction of the court as the final arbiter of jurisdictional questions. However, it ought to provide some certainty when there is an opportunity to do so.

Although the Court of Appeal recognised the importance of certainty and efficiency, it chose an interpretation of Article 16(3) which prioritises the overarching theme of uniformity in the treatment of domestic and foreign awards and the co-existence of active and passive remedies.[33] Alternative readings of Article 16(3) are not without its complexities, as they come at the expense of either or both of these policy objectives. The decision encourages further discussion of the competing policy considerations and the time is right for the international arbitration community to begin to develop a uniform view on the practical application of Article 16(3).

[32] *PT First Media TBK v Astro Nusantara International BV* [2013] SGCA 57, at [89].

[33] *PT First Media TBK v Astro Nusantara International BV* [2013] SGCA 57, at [116].