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Time Limits in Challenging a Tribunal's Jurisdiction

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One of the most defining characteristics of arbitration is that an arbitral tribunal's jurisdiction is established by parties' mutual agreement. If a party to the arbitral proceedings believes that a tribunal constituted lacks jurisdiction to conduct the arbitral proceedings, it may challenge the jurisdiction of the tribunal in different ways. Although the concept of kompetenz-kompetenz and the grounds to challenge the Tribunal's jurisdiction are readily accepted in the arbitration community, what parties often fail to observe is the time limit imposed by the relevant laws in bringing such objections. This article aims to examine several main ways of challenging the tribunal's jurisdiction and the applicable time limits in each scenario. The article will then focus on the consequences of a party's failure to adhere to the strict time limits and its effect at the post-award stage. These issues will be considered in the light of case law from different Model law jurisdictions with particular illustrations from the arbitration law of Singapore.

Key Words : Time Limits, Challenging the Tribunal's Jurisdiction, *Kompetenz-Kompetenz*

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I. Introduction

Benjamin Franklin once said: "*Lost time is never found again.*" Recent arbitration cases concerning objections to a tribunal's jurisdiction tend to suggest that this quote is also applicable in arbitration proceedings. This article aims to examine important time limits in challenging the tribunal's jurisdiction and the consequences of a party's failure to object to the tribunal's jurisdiction in a timely manner. It is now almost trite that an arbitral tribunal has the power to rule on its own jurisdiction, the principle commonly known as *kompetenz-kompetenz.* However, parties often overlook the importance of the time limits imposed by the applicable arbitration laws and encounter obstacle to their right to invoke a jurisdictional challenge even they otherwise have a good basis for it. This article looks at case law from different jurisdictions, with particular illustrations from Singapore. This article will also consider a recent Singapore High Court decision that is currently pending the Court of Appeal's judgment, which addresses the interplay between various statutory options available to a party in relation to jurisdictional challenges.

Ⅱ. Basic Principle - *Kompetenz-Kompetenz*

In today's international arbitration context, the tribunal's right to rule on its own jurisdiction is a well-recognised doctrine. Practically, all countries recognise the right of the tribunal to decide on their jurisdiction, subject to the subsequent court control. The Singapore legislation, also adopts the concept known as *kompetenz-kompetenz* or competence de la competence, which refers to the ability of the tribunal to rule on its own jurisdiction.[1] This is captured in Article 16(1) of the UNCITRAL Model Law on International Commercial Arbitration 1985 ("Model Law"), which reads as follows:

1) Chan Leng Sun, SC, *Singapore Law on Arbitral Awards* (2011), Academy Publishing, p 14.

Article 16

(1) The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.

The following articles, Articles 16(2) and 16(3), regulate the operation of this doctrine:

Article 16

….

(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.

The inclusion of time limits in Article 16(2) is intended to ensure that

objections to the arbitral tribunal's jurisdiction will be raised promptly, although it will be seen as explained below that there are two types of time limits within Article 16(2), one each for a different type of jurisdictional challenge.[2] In relation to Article 16(3), the first part relates to the tribunal's discretion to rule on an objection to its jurisdiction in a preliminary phase or together with the award on the merits. The second part of 16(3) governs the judicial review of interim jurisdictional decisions rendered by the arbitral tribunal.

The Model Law (1985 version, with some modifications) is given the force of law in Singapore by section 3 of the International Arbitration Act (Cap 143A) ("IAA").[3] It should be noted that section 10(3)(b) of the IAA has modified Art 16(3) of the Model Law to permit an appeal from a tribunal's negative jurisdictional ruling. Section 10(3) IAA provides as follows:

> *"10.*
> *....*
> *(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."*

Ⅲ. Options Available to the Respondent

Respondents who intend to challenge a tribunal's jurisdiction are known to have tried the following options, sometimes more than one in the same proceedings:[4]

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2) For further discussions, see also Peter Binder, *International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions* (2010, 3rd ed), Thomson Reuters, pp 217-218.

3) s3 of the IAA provides as follows:
"(1) Subject to this Act the Model Law, with the exception of Chapter VIII thereof, shall have the force of law in Singapore.

4) The four options are well summarized in *Law and Practice of International Commercial*

1. Boycott the arbitration;
2. Raise the Objection with the Tribunal;
3. Apply to the national court to determine the issue; or
4. Challenge at the setting aside or enforcement stage.

Sometimes, a Respondent will submit to an arbitral institution to not even accept a reference, in which case the arbitral institution is asked to determine the validity of an arbitration agreement on a *prima facie* basis. This option will be considered briefly in this article.

(1) Boycotting the Arbitration

If a party decides to boycott the arbitration, the arbitration will proceed anyway. A tribunal does not give an award automatically to the Claimant in default of a defence or the absence of the Respondent. This means that the Tribunal must still proceed to consider the claim on the submissions and evidence of the Claimant, even in the absence of submissions from the Respondent.[5] It is not unusual for the boycotting party to try to set aside or resist enforcement of the award that is subsequently rendered if it is made against it, which is likely though not inevitable in the absence of submissions from it. A common ground is lack of jurisdiction by the tribunal.[6] If the seat of the arbitration is in a Model Law country, a dissatisfied party has three months from receipt of the award[7] to bring its application to set aside the award. Singapore cases have treated this time limit as mandatory. In *ABC Co v XYZ Co Ltd,*[8] Justice Prakash emphasised the strict application of this time limit as

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Arbitration A. Redfern and M. Hunter, 4th Edition, Sweet & Maxwell. 2004, p259.

5) See Art 25 Model Law.

6) The grounds for resisting enforcement, which are similar to those for setting aside an award, are set out in a later part of this article.

7) The relevant time limit is available at Article 34(4) of the Model Law of the IAA which reads as follows:
"(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the award or, if a request had been made under Article 33, from the date on which that request had been disposed of by the arbitral tribunal."

8) *ABC Co v XYZ Co Ltd* [2003] 3 SLR(R) 546 at [9]; see the discussions in Chan Leng Sun,

follows:

> *"..[i]t appears to me that the court would not be able to entertain any application lodged after the expiry of the three-month period as art 34 has been drafted as the all-encompassing, and only, basis for challenging an award in court. It does not provide for any extension of the time period and, as the court derives its jurisdiction to hear the application from the article alone, the absence of such a provision means the court has not been conferred with the power to extend time."*

The same decision was made by Justice Lee Seiu Kin in *PT Pukuafu Indah and others v Newmont Indonesia Ltd and another.*[9]

A contrasting approach was taken by the Malaysian Court of Appeal in *Government of the Lao People's Democratic Republic v Thai-Lao Lignite Co Ltd*[10] where an application was made to set aside an award 9 months after the expiry of the 90 days deadline provided for such an application to be made. The Court of Appeal held that it had an unfettered general discretion to extend time under its Courts of Judicature Act 1964 even though its arbitration statute did not expressly provide for extension of the setting aside deadline. In determining whether extension of time should be allowed, the court would consider the following factors:

(1) the length of the delay;
(2) the reason for the delay;
(3) the prospect of success; and
(4) the degree of prejudice to the Respondents if the application is granted.[11]

SC, *Singapore Law on Arbitral Awards* (2011), Academy Publishing, pp 148-149.

9) *PT Pukuafu Indah and others v Newmont Indonesia Ltd and another* [2012] SGHC 187.

10) *Government of the Lao People's Democratic Republic v Thai-Lao Lignite Co Ltd,* Civil Appeal 2 - 02 (NCC) - 1286-2011, July 26, 2011. Note the award was subsequently set aside by the Kuala Lumpur High Court.

11) *Ibid, at* [16].

Taking these factors into account, the Court of Appeal granted extension of time to the Respondent in the arbitral proceedings to set aside the award on the jurisdictional ground. The Court of Appeal went further to say that although Malaysia has adopted the Model Law (which promotes minimum intervention of the court), this does not in any way take away the powers of the court in dealing with any application for extension of time.

The lesson from these contrasting approaches is that parties must take advice on the approach and procedural laws of a particular jurisdiction. The Model Law is not applied in the same way in all Model Law countries.

Some countries have express statutory provisions giving power to the courts to extend time in relation to arbitration proceedings. In England, which is not a Model Law country, section 80(5) of the Arbitration Act 1996 ("the UK 1996 Act") empowers the court to extend or abridge time for an application or appeal to the court. The exercise of this power is in the discretion of the court.[12)]

Boycotting an arbitration, however, is a risky tactic. It raises questions whether the absent party has lost its right to raise objections on jurisdiction. This is elaborated in the section below on the time for raising objections with the tribunal. Advice should be taken on the laws of at least two jurisdictions. First, the seat of arbitration, as this is where any application to set aside an award should be heard and determined. Secondly, the forum of enforcement, where the courts will hear any application for or against enforcement.

(2) Raise the Objection with the Tribunal

A safer alternative to boycotting the arbitral proceedings is to raise the jurisdictional objection before the tribunal within the stipulated timeframe. As discussed above, Article 16(1) gives the tribunal the power to rule on its jurisdiction and Article 16(3) provides the Tribunal the discretion to rule on such pleas either "as a preliminary question or in an award on the merits".

Article 16(2) places time limitations on a party's ability to raise a plea that "the arbitral tribunal does not have jurisdiction" or that "the arbitral tribunal is

12) See *Ranko Group v Antarctic Maritime SA* (Com Ct, NLD, June 23 1999) where an extension of time was not granted.

exceeding the scope of its authority". The former type of plea must be raised *no later than the submission of the statement of defence.* With respect to a counter-claim, the relevant cut-off point would be the time at which the Claimant submits his reply thereto.[13] A plea that the tribunal is exceeding the scope of its authority must be raised *as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings.* The full clause reads as follows:

> *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.*

Numerous jurisdictions including Hong Kong, Singapore, Malaysia, India, Korea, Australia and New Zealand have adopted Article 16(2) of the Model Law without any substantive modification.[14] The time limits imposed in Article 16(2) for the two types of jurisdictional challenge (no jurisdiction and exceeding authority) encourage a party to promptly raise the jurisdiction objection, if any. Although these time limits should be strictly adhered to by a party, the tribunal may, at its discretion admit a later plea if it considers the delay justified in either case. The tribunal has freedom to assess on the facts of each case whether a belated challenge to the tribunal's jurisdiction should be entertained. In *Downer Construction (New Zealand) Ltd v Silverfield Developments Ltd,* the New Zealand court held that a challenge to jurisdiction does not have to be in any

13) *UNCITRAL Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration: Report of the Secretary General,* UN GAOR 9th Comm, 18th Sess, UN Doc A/CN.9/264 (1985), Art 16, [5].

14) Greenberg/Kee/Weeramantry, *International Commercial Arbitration* (2011), Cambridge University press, at [5.21].

particular form, and if an out-of time challenge is brought and determined by the tribunal without objection from the other party on the lateness of the challenge, this delay can no longer be a ground for complaint before the court when the tribunal's ruling is being appealed.[15] Article 16 does not enumerate the circumstances under which a delay is considered justified. The Report of the Secretary-General of the revised draft of the UNCITRAL Rules suggests that "*a plea based on facts newly discovered*" might be admitted being raised late.[16]

One must also consider Article 4 of the Model Law, which reads as follows:

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

The question is whether a party who does not raise any objection to the tribunal's jurisdiction is deemed to have waived its objection. Some English judges have taken the view that a party who has not submitted to the arbitrator's jurisdiction is entitled to raise it before an English court.[17] On the other hand, the UNCITRAL Working Group has taken the view that a party who does not raise a challenge to jurisdiction "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."[18] If a party participates in an arbitration and does not expressly

15) *Downer Construction (New Zealand) Ltd v Silverfield Developments Ltd* (HC Auckland CIV 2004-404-4488, 26 October 2004) at [54].

16) Report of the Secretary-General on the Revised Draft Set of Arbitration Rules, UNICTRAL, 9th Session, Addendum 1(Commentary), UN Doc A/CN.9/97 (1974), reprinted in (1975) VI UNCITRAL Ybk 163, 174 (Draft Article 18(2)).

17) *Dallah Real Estate and Tourism Holding Company v The Ministry of Religious Affairs, Government of Pakistan* [2010] UKSC 46, per Lord Mance; distinguishing *Svenska Petroleum Exploration AB v Government of the Republic of Lithuania (No 2)* [2006] EWCA 1529 at [26].

question the jurisdiction of the tribunal, it may find later that it can no longer invoke this ground to challenge the award.

If a challenge is mounted before the tribunal, two further observations can be made. First, although the Model Law provides only for appeals to a national court (of the seat) from a tribunal's ruling that it has jurisdiction, some countries like Singapore and New Zealand have provided in their arbitration statutes that appeals can also be made to the courts where a tribunal rules that it has no jurisdiction. Secondly, it should also be noted that the tribunal has discretion whether or not to rule on the jurisdictional challenge as a preliminary issue which would be subject to instant court control by way of appeal or defer it to be decided with an award on the merits which is subject only to a challenge by way of setting aside or refusal of enforcement. The *travaux préparatoires* of the Model Law indicate that this was to let the tribunal weigh two conflicting concerns, i.e. "fear of dilatory tactics and obstruction versus waste of time and money."[19]

If the tribunal decides to defer the question of jurisdiction to its final award on the merits, there is no right to separately appeal against the tribunal's finding on its jurisdiction which is contained within the award. This assumes it finds that it has jurisdiction. The only recourse is to apply to set aside the award or resist enforcement. As mentioned, Singapore which allows an appeal even if the tribunal finds it has no jurisdiction, also allows an appeal even if the tribunal does not make a preliminary ruling but only makes a finding that it has no jurisdiction at the close of the hearing on the merits.[20] The rationale for this is that a tribunal might not make any award if it finds it has no jurisdiction, which

18) *Report of the Working Group on International Contract Practices on the work of its seventh session (New York, 6-17 February 1984),* UN Doc A/CN.9/246 at [51]; *UNCITRAL Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration: Report of the Secretary General,* UN GAOR 9th Comm, 18th Sess, UN Doc A/CN.9/264 (1985), Art 16, [8]. See also Peter Binder, *International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions* (2010, 3rd ed), Thomson Reuters, pp 217-218.

19) *UNCITRAL Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration: Report of the Secretary General,* UN GAOR 9th Comm, 18th Sess,UN Doc A/CN.9/264 (1985), Art 16, [14].

20) Section 10(3)(b) IAA allows any appeal "at any stage of the arbitral proceedings" if the tribunal rules that it has no jurisdiction.

makes it impossible to apply to set aside a decision of the tribunal that it has no jurisdiction unless there is a right of appeal. An appeal must be brought within 30 days of receipt of notice of the tribunal's ruling on jurisdiction.[21]

When the Tribunal decides the jurisdictional issue as a preliminary issue, a party dissatisfied with the ruling may consider two options:

(a) it can appeal to the supervisory court (namely the court at the seat of arbitration) under Art 16(3) within 30 days if the tribunal affirms its jurisdiction; or
(b) it may choose not to appeal to the curial court under Art 16(3), but continue within the arbitral regime by fully participating in the hearing with an express reservation of its rights.

If the party chooses option (a) above, any party may request, within thirty days after having received notice of the tribunal's ruling, before the relevant court, to decide the matter. The importance of adhering to the stipulated time limit was emphasized in an Australian case in which the court held that it could not intervene under Art 16(3) on the question of the tribunal's jurisdiction after expiry of the 30-day period.[22] In Singapore, a party who is dissatisfied with the High Court's decision on an appeal from the tribunal's ruling on jurisdiction can appeal further to the Court of Appeal with the leave of the High Court.[23]

Option (b) is risky and controversial, as it is not yet clearly determined in many jurisdictions whether a party who chooses not to appeal to the supervisory court has lost his right later to challenge the award on the same jurisdictional ground. This is discussed under the section on setting aside and enforcement below.

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21) Article 16(3) Model Law; section 10(3) IAA.
22) *TeleMates (previously Better Telecom) Pty Ltd v Standard SoftTel Solutions Pvt Ltd* [2011] NSWSC 1365 (11 November 2011). The importance of making applications within time limits set down by the arbitration law at the chosen seat was again emphasized in the case *Dampskibsselskabet Norden A/S v Beach Building & Civil Group Pty Ltd* [2012] FCA 696 (29 June 2012).
23) Section 10(4) IAA.

(3) Apply to the national court to determine the issue

Sometimes, parties are tempted to approach the court directly instead of applying to the Tribunal first. Legislation and judicial attitude towards such an attempt vary from country to country. Jurisdictions like the USA[24], Germany[25] and the UK[26] allow the parties to bring a jurisdictional question to the court at any time. In contrast, the Singapore statute is silent on whether an application can be made directly to the Court on the question of the tribunal's jurisdiction. It is unlikely that this can be done. Section 12A IAA permits an application to the court for interim relief if the arbitral tribunal has no power or is unable for the time being to act effectively. No statutory provision exists to permit bypassing the operation of *kompetenz-kompetenz* in Art 16 or section 10 of the IAA. Article 5 of the Model Law provides that *"[i]n matters governed by this Law, no court shall intervene except where so provided in this Law."*

Application before an arbitral institution

With constant developments in rules of arbitral institutions, parties nowadays have another mode of challenging the jurisdiction of the tribunal by asking the institution concerned in an institutional arbitration to determine the existence of

24) U.S. courts have frequently held that interlocutory judicial consideration of jurisdictional issues could proceed prior to a jurisdictional award by the arbitral tribunal and that jurisdictional disputes were ultimately issues for judicial (not arbitral) resolution; *China Minemetals Materials Imp. & Exp. Co. v. Chi Mei Corp.,* 334 F.3d 274, 288 (3d Cir. 2003); *Dean Witter Reynolds, Inc. v. Mc Coy,* 995 F.2d. 649, 650 (6th Cir. 1993). For full list of case law, see Footnotes 317 and 318 of Gary Born's *International Commercial Arbitration,* Wolters Kluwer (2009) p912.

25) Section 1032(2) of the German Zivilprozessordnung (Tenth Book on the Code of Civil Procedure) (German) ("the ZPO") allows an action for a declaration of the admissibility of non-admissibility of arbitral proceedings until the arbitral tribunal has been constituted, which limits the risk of contradictory decisions.

26) The UK 1996 Act expressly provides for an application to be made to the court on a question as to the substantive jurisdiction of the tribunal. Section 32 of the Act permits a party to the arbitration to apply to the court for a decision on jurisdiction either with the written consent of the other parties or with that of the arbitrators. However, even with the Tribunal's consent, the court needs to be satisfied that the determination of the question is likely to save costs, that the application was made without delay and that there is good reason why the matter should be decided by the court.

an arbitration agreement on a *prima facie* basis. This usually happens right at the beginning when the reference is submitted to the institution. For example, Rule 25.1 of the SIAC Rules 2013 reads as follows:

> *If a party objects to the existence or validity of the arbitration agreement or to the competence of SIAC to administer an arbitration before the Tribunal is appointed, the Registrar shall determine if reference of such an objection is to be made to the Court [of Arbitration of SIAC]. If the Registrar so determines, the Court shall decide if it is prima facie satisfied that a valid arbitration agreement under the Rules may exist. The proceedings shall be terminated if the Court is not so satisfied. Any decision by the Registrar or the Court is without prejudice to the power of the Tribunal to rule on its own jurisdiction.*

Under the ICC Rules 2011, if any party raises a challenge to the arbitration agreement or on jurisdiction, the plea shall be decided by the tribunal unless the Secretary General refers the matter for decision to the ICC Court.[27] The ICC Court shall decide whether the arbitration shall proceed. If the Court is *prima facie* satisfied that an arbitration agreement exists (namely there is jurisdiction), the arbitration shall proceed.[28] The question of jurisdiction will still be taken up by the tribunal if the ICC Court makes a *prima facie* finding on the existence of jurisdiction.[29]

(4) Challenge at the Setting Aside or Enforcement Stage

An application to set aside an award is a proactive step that is taken to the national court of the seat of arbitration. The grounds for setting aside are defined by the laws of that seat. If it is a Model Law country, Article 34 of the Model Law stipulates the grounds for setting aside an award. This includes a

27) Article 6(3) ICC Rules 2011.
28) Article 6(4) ICC Rules 2011.
29) Article 6(5) ICC Rules 2011.

jurisdiction-based challenge under Article 34(2)(a)(i) or Article 34(2)(a)(iii). An application must be made within three months from the date of receipt of the award.[30] This time frame and the question whether it can be extended have been discussed above.

Resisting enforcement takes place at the forum where enforcement is sought. This can be either at or outside the seat of arbitration. Enforcement within the seat of arbitration is subject of course to the laws of the seat. Enforcement outside the seat of arbitration is governed by the law of the forum, which in many States (148 to be exact) is based on the New York Convention. The grounds for resisting enforcement under the New York Convention are similar to the grounds for setting aside under the Model Law. Art IV of the New York Convention reads as follows:

ARTICLE V

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that —

(a) the parties to the agreement referred to in Article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(b) the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

(c) the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions

30) Article 34(3) Model Law.

on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognised and enforced; or

(d) the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(e) the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that —

(a) the subject-matter of the difference is not capable of settlement by arbitration under the law of that country; or

(b) the recognition or enforcement of the award would be contrary to the public policy of that country.

The sections above have discussed the risk of a party not raising a jurisdictional challenge before the tribunal. What if the party did raise and lose a challenge before an arbitral tribunal, but does not bring an appeal against the tribunal's ruling or apply to set aside the award? Does he lose the right to resist enforcement of the award on the jurisdictional ground?

Many of the finer issues regarding treatment of a jurisdictional challenge, including the question when such a right is lost, have not been ventilated in national courts.

In England, the well-known case of *Dallah Real Estate and Tourism Holding Company v The Ministry of Religious Affairs, Government of Pakistan,*[31] touched on this issue. Lord Collins thought that a party who chose not to bring the jurisdictional challenge to the court of the seat may still have a right to rely on the same ground at the court of enforcement:[32]

> *Consequently, in an international commercial arbitration a party which objects to the jurisdiction of the tribunal has two options. It can challenge the tribunal's jurisdiction in the courts of the arbitral seat; and it can resist enforcement in the court before which the award is brought for recognition and enforcement. These two options are not mutually exclusive, although in some cases a determination by the court of the seat may give rise to an issue estoppel or other preclusive effect in the court in which enforcement is sought. The fact that jurisdiction can no longer be challenged in the courts of the seat does not preclude consideration of the tribunal's jurisdiction by the enforcing court.*

Whether this view finds favour elsewhere has to be assessed country by country. In the Singapore High Court decision of *Astro Nusantara v PT Ayunda Prima Mitra*[33] (*Astro* case), the question arose in the context of enforcement of a Singapore award in Singapore.

In the *Astro* case, a dispute arose out of a failed joint venture between Astro Group of companies and the Lippo Group of companies. This case involved multi-party proceedings, in which three of the Respondents denied that they were parties to the agreement in dispute. The Tribunal then decided this objection as a preliminary issue and affirmed its jurisdiction over all the Respondents. The Respondents did not appeal the Tribunal's decision within the

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31) *Dallah Real Estate and Tourism Holding Company v The Ministry of Religious Affairs, Government of Pakistan* [2010] UKSC 46.

32) D*allah Real Estate and Tourism Holding Company v The Ministry of Religious Affairs, Government of Pakistan* [2010] UKSC 46 at [98], see also *per* Lord Mance at [10]-[11]; *Dallah Estate and Tourism Holding Company v The Ministry of Religious Affairs, Government of Pakistan* [2009] EWCA Civ 755, *per* Moore-Bick LJ at [56], *per* Rix LJ at [90].

33) *Astro Nusantara v PT Ayunda Prima Mitra* [2012] SGHC 21.

stipulated time in Article 16(3) of the Model Law but participated in the arbitration while expressly reserving its rights. The Tribunal subsequently issued its final awards (in total 5 awards) in favour of the Claimant. *PT Ayunda* did not apply to set aside the awards either under Article 34 Model Law. When the Claimant sought to enforce all five awards in Singapore, the *PT Ayunda* resisted enforcement of the awards on the basis that the Tribunal lacked jurisdiction to join it to the arbitration. At first instance, Justice Belinda Ang held that *PT Ayunda* could no longer resist enforcement on the ground that the tribunal lacked jurisdiction. Submissions based on the *Dallah* case did not find favour with the Judge who noted that England is not a Model Law country like Singapore is, and moreover, the Singapore Court in that case was considering not enforcement of a foreign award under the New York Convention but enforcement of an award made in Singapore under specific provisions of the IAA. The appeal to the Court of Appeal has been argued at length and the decision of the Court of Appeal is pending.

The *Astro* case was in relation to enforcement in Singapore of a Singapore award. Another Singapore case demonstrates the approach used in relation to enforcement of a foreign award under the New York Convention. In *Aloe Vera of America, Inc v Asianic Food (S) Pte Ltd and another*[34] the second Defendant ("Chiew") objected to a Tribunal's finding that he was a party to the arbitration agreement and took no further part in the arbitration which was seated in Arizona, USA. An award was made against him. Chiew did not apply to set aside the award in the USA. When the Claimant tried to enforce the award in Singapore against Chiew, Chiew resisted enforcement on the ground that the Tribunal did not have jurisdiction over him. Justice Prakash acknowledged that the failure of Chiew to apply to set aside the award in Arizona did not preclude him from resisting enforcement in Singapore. However, to resist enforcement, Chiew had to satisfy the court of one of the specified grounds for resisting enforcement under the New York Convention (re-enacted as section 31(2) of the IAA). Chiew failed to do so on the facts of that case.

34) [2006] SGHC 78.

Ⅳ. Conclusion

The case law illustrations in this article must be read with the understanding that what is decided in one jurisdiction may not be adopted in another. They do, however, bring home an important message. That is the importance of complying with the time lines imposed by applicable laws and considering carefully the risks of not raising jurisdictional objections at the first opportune moment. There may be reasons why a party chooses to bring its challenge before one forum or another. It does, however, have to consider carefully whether refraining from promptly objecting to jurisdiction might result in the loss of this right. The laws of every potential forum where this issue might be argued have to be considered carefully. We started this article with a quote from Benjamin Franklin. Perhaps we can end it with a phrase that is often uttered in a happier setting: "*Speak now or else hereafter forever hold your peace.*"

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