

2023  
Volume 5, Issue 1



Institute for Transnational Arbitration  
**ITA IN REVIEW**

# ITA IN REVIEW

The Journal of the Institute for Transnational Arbitration





## ITA IN REVIEW

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**VOL. 5**

**2023**

**No. 1**

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## **THE CHALLENGE TO ARBITRAL AWARD ON JURISDICTION DIFFERENT SEAT, DIFFERENT STORY**

by Kriti Srivastava

### **I. INTRODUCTION**

An arbitral tribunal's jurisdiction can be said to be central to the entire arbitration proceedings. Without proper jurisdiction, the pieces of the proceedings would fall like dominoes. Therefore, the question of whether the arbitral tribunal has jurisdiction to hear the parties becomes pivotal. While a party can object to jurisdiction before the arbitral tribunal itself, such an objection can be dismissed by way of a partial or final arbitral award on merits ("Jurisdiction Award").<sup>1</sup> The unsatisfied party thereafter also gets a second bite at the cherry before the national court of the seat of arbitration.<sup>2</sup> However, this second bite is subject to the timing of the arbitral tribunal's ruling on its jurisdiction, *i.e.*, either as a preliminary question during the arbitral proceedings or as an award on the merits.<sup>3</sup>

The purpose of this article is to consider the timing and efficiency of challenging the Jurisdiction Award during or after the arbitral proceedings, based on the seat chosen by the parties or determined in the arbitration. To critically analyze the question, this article will consider the provisions of (i) the Model Law on International Commercial Arbitration (1985) ("MAL"), (ii) Singapore's International Arbitration Act,<sup>4</sup> and (iii) the Indian Act to understand the different approaches taken by countries regarding the challenge of the Jurisdiction Award before its national court. Thereafter, based on a comparative analysis, this article will critically review the

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<sup>1</sup> NIGEL BLACKABY ET AL., REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION (2015) 344 [hereinafter Redfern and Hunter].

<sup>2</sup> Leng Sun Chan & Ye Won Han, *Time Limits in Challenging a Tribunal's Jurisdiction*, 23(3) J. OF ARB. STUD. 81, 91 (2013) [hereinafter Chan, *Time Limits*].

<sup>3</sup> See UNCITRAL, UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006, U.N. Sales No. E.08.V.4 (2006), art. 16(3) [hereinafter MAL]; Indian Arbitration and Conciliation Act (1996), § 13(3) [hereinafter Indian Act].

<sup>4</sup> Singapore International Arbitration Act (1996) [hereinafter Singapore Act].



appropriate stage of the challenge to the Jurisdiction Award to ensure the efficiency of arbitral proceedings.

## II. THE CHALLENGE BEFORE THE ARBITRAL TRIBUNAL

The question of jurisdiction is subject to the arbitral tribunal's decision, which, in most jurisdictions, must be raised no later than the submission of the statement of defense.<sup>5</sup> It is then for the arbitral tribunal to consider the objections either at a preliminary stage of the arbitration proceedings or decide with the final award on merits. Thereafter, the arbitral tribunal, by the principle of *kompetenz-kompetenz*,<sup>6</sup> may either pass a positive or a negative jurisdiction ruling.<sup>7</sup> To address the central issue regarding challenging the Jurisdiction Award before national courts, the present article will consider a limited scenario where the arbitral tribunal has passed a positive jurisdictional ruling<sup>8</sup> by way of an arbitral award<sup>9</sup> as contemplated under Article 16(3) of MAL.

Since nearly all arbitration laws provide for a challenge procedure to the Jurisdiction Award,<sup>10</sup> such a positive jurisdiction ruling is subject to supervision by the national court<sup>11</sup> of the seat of arbitration.<sup>12</sup> This is because the said court, in its decision on the validity of the Jurisdiction Award, shall have the final word.<sup>13</sup> In such a scenario, the arbitration law in force at the seat of the arbitration shall determine the timeline for challenging the Jurisdiction Award and the efficiency of such a challenge.

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<sup>5</sup> See MAL, art. 16(2); Indian Act, § 16(2); Hong Kong Arbitration Ordinance (2014), § 34(2) [hereinafter Hong Kong Act]; Australian Commercial Arbitration Act (2017), § 16(4) [hereinafter Australian Act].

<sup>6</sup> See generally, GARY BORN, INTERNATIONAL COMMERCIAL ARBITRATION 1141 (2021).

<sup>7</sup> Antony Crockett and Daniel Mills, *A Tale of Two Cities: An Analysis of Divergent Approaches to Negative Jurisdictional Rulings*, KLUWER ARB. BLOG, Nov. 8, 2016, <https://arbitrationblog.kluwerarbitration.com/2016/11/08/a-tale-of-two-cities-an-analysis-of-divergent-approaches-to-negative-jurisdictional-rulings/>.

<sup>8</sup> York Int'l Pte Ltd v. Voltas Ltd., [2022] SGHC 153.

<sup>9</sup> REDFERN AND HUNTER, *supra* note 1.

<sup>10</sup> JULIAN D.M. LEW ET AL., COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION 312 (2003).

<sup>11</sup> MAL, art. 16(3); Indian Act, section 16(6); German Arbitration Act (1998), § 1040(3).

<sup>12</sup> Chan, *supra* note 2.

<sup>13</sup> REDFERN AND HUNTER, *supra* note 1, at 342.



### III. THE CHALLENGE TO THE JURISDICTIONAL DECISION

As per Article 16(3) of MAL, if the arbitral tribunal considers and rejects the jurisdictional challenge as a preliminary question, such a Jurisdiction Award shall be subject to further challenge before the national court of the seat of arbitration.<sup>14</sup> Such a challenge before the national court must be made within 30 days after receiving notice of the Jurisdiction Award rejecting the challenge. While the application to the national court is pending, the arbitral tribunal may continue the proceedings and render the final arbitral award. The decision of the court cannot be further appealed, preventing the parties from taking *a third bite at the cherry*.

Further, the drafters of MAL also considered a scenario where, if the party failed to raise a jurisdictional objection under Article 16(2) of MAL, it would be precluded from objecting at the stage of setting aside or enforcement proceedings of the final award.<sup>15</sup> However, evidently the same was not included in Article 16 of MAL.

While Gary Born believes that MAL's challenge procedure primarily prevents delays to the arbitral process,<sup>16</sup> Alan Redfern and Martin Hunter believe that MAL's challenge procedure is also bound to save parties' time and cost in preparing its case should the court deny the arbitral tribunal jurisdiction.<sup>17</sup> Notably, the possible impact of dilatory tactics<sup>18</sup> and the removal of the court's control in challenging the Jurisdiction Award<sup>19</sup> during the arbitral proceedings was discussed by the drafters of MAL.<sup>20</sup>

#### A. Singaporean Approach Regarding The Jurisdiction Award

Interestingly, while Singapore is a Model Law country (having adopted UNCITRAL Model Law, 1985 version<sup>21</sup>), it has derogated from Article 16(3) of MAL. The Singapore

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<sup>14</sup> Chan, *supra* note 2.

<sup>15</sup> UNCITRAL, *Official Records of the General Assembly*, Fortieth Session, Supplement No. 17 (A/40/17), 1985, ¶ 122.

<sup>16</sup> GARY BORN, *supra* note 6, at §12.06[B][5].

<sup>17</sup> REDFERN AND HUNTER, *supra* note 1, at 343.

<sup>18</sup> UNCITRAL, *Official Records of the General Assembly*, Seventeenth Session (A/CN. 9/246), 1984, ¶ 51.

<sup>19</sup> *Id.*

<sup>20</sup> UNCITRAL, *supra* note 15.

<sup>21</sup> Status: UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as



Act under Section 10 provides for an appellate mechanism before the national court to challenge the Jurisdiction Award.<sup>22</sup> In Singapore, a decision of the General Division of the High Court under Article 16(3) is not final, and a party can approach the appellate court to the High Court solely with permission.<sup>23</sup> Evidently, Singapore continues to incorporate the position of MAL that the arbitration must continue while the review is ongoing,<sup>24</sup> unless the High Court or the appellate court orders otherwise.<sup>25</sup> While Singapore has derogated from MAL by creating an appellate stage to challenge the Jurisdiction Award, Professor Gary F. Bell believes that no significant delays would ensue as Singapore courts are quite efficient.<sup>26</sup>

The appellate mechanism incorporated by Singapore was also a point of discussion with the drafters of MAL, which considered the possible ‘*abuse of any immediate right to appeal*’.<sup>27</sup> The main concerns revolved around allowing a party to drag the proceedings or create diversions from the main arbitral proceedings. However, one can presume that owing to Singapore’s efficient court system, such an appellate mechanism does not result in delayed arbitral proceedings or abuse of the judicial process. Therefore, depending on the seat of the arbitration, such as Singapore, it is clear that the Jurisdiction Award may not simply attain finality by challenging it before the national court at first instance.

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adopted \_\_\_\_\_ in \_\_\_\_\_ 2006,  
[https://uncitral.un.org/en/texts/arbitration/modellaw/commercial\\_arbitration/status](https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status).

<sup>22</sup> CLQ v. CLR, [2021] SGHC (I) 15 (wherein a jurisdiction award was challenged and rejected); *Singapore Court Rejects Award Challenge Based on Repudiation of Arbitration Agreement (Singapore International Commercial Court)*, *Prac. L. Arb.*, Dec. 10, 2021, [https://uk.practicallaw.thomsonreuters.com/w-033-7209?transitionType=Default&contextData=\(sc.Default\)&firstPage=true](https://uk.practicallaw.thomsonreuters.com/w-033-7209?transitionType=Default&contextData=(sc.Default)&firstPage=true).

<sup>23</sup> Singapore Act, § 10(4).

<sup>24</sup> MAL, art. 16(3); Gary F. Bell, *Singapore: Singapore’s Implementation of the Model Law: If at First You Don’t Succeed ...*, in *THE UNCITRAL MODEL LAW AND ASIAN ARBITRATION LAWS: IMPLEMENTATION AND COMPARISONS* 249 (Gary F. Bell ed., 2018).

<sup>25</sup> Andre Yeap et al., *Law and Practice: Singapore. International Arbitration 2022*, CHAMBERS AND PARTNERS, Aug. 16, 2022, <https://practiceguides.chambers.com/practice-guides/comparison/434/3458/15035-15041-15044-15049-15055-15063-15067-15072-15076-15078-15082-15086-15090>.

<sup>26</sup> Gary Bell, *supra* note 24.

<sup>27</sup> UNCITRAL, *Official Records of the General Assembly, Eighteenth Session (A/CN. 9/264)*, 1985, ¶ 13.





B. *The Indian Approach Regarding The Jurisdiction Award*

Unlike Singapore, which simply adds further steps to the MAL approach under Article 16(3), India has very distinctly departed from Article 16(3) of MAL. The Indian legislature, by Sections 16(5) and 16(6) of the Indian Act, has avoided any *concurrent control*,<sup>28</sup> under which an arbitral tribunal's decision rejecting jurisdictional objections may be challenged immediately before the national court, before issuance of the final award on merits.<sup>29</sup> It is relevant to clarify that, unlike international practice,<sup>30</sup> any ruling on jurisdiction under Section 16 of the Indian Act is not treated as a *partial or interim award*<sup>31</sup> (the position of whether the point of limitation is to be treated as a jurisdictional issue under Section 16 is unclear as Supreme Court has passed contradictory judgments<sup>32</sup>). Such ruling is treated as an order by the arbitral tribunal,<sup>33</sup> which forms part of the final award on the merits, by Section 16(6).

Given the judicial interpretation of Section 16 of the Indian Act, it is clear that it was the Indian legislative policy to restrict judicial intervention at the pre-reference stage<sup>34</sup> and restrain the party from intentionally dragging the case.<sup>35</sup> Therefore, when a party is aggrieved from an arbitral tribunal's decision rejecting any challenge to its jurisdiction, it can only seek to set aside the final award for lack of jurisdiction under Section 34 of the Indian Act. By Section 16(6) of the Indian Act, the aggrieved party has no immediate course of action, unlike Singapore, and must await the final award on merits. However, the opposition to such an approach believes that in the event

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<sup>28</sup> REDFERN AND HUNTER, *supra* note 1, at 343-344.

<sup>29</sup> Constantine Partasides and Manish Aggarwal, *Jurisdiction of the Arbitral Tribunal*, in *ARBITRATION IN INDIA 99* (Dushyant Dave et al eds., 2021).

<sup>30</sup> REDFERN AND HUNTER, *supra* note 1, at 503; A.G.K. SARL v. A.M. Todd Co., et al., ICDR Case No. 50-181-T-00230-08, Partial Award on Jurisdiction (Apr. 30, 2009).

<sup>31</sup> Kapal R. Mehra v. Bhupendra M. Bheda, (1998) 4 Bom CR 872 at 6; Rajnigandha Co-operative Group Housing Society Ltd v. Chand Constr. Co., 2002(1) RAJ 212 (Del).

<sup>32</sup> Indian Farmers Fertilizer Coop. Ltd. v. Bhadra Prods., (2018) 2 SCC 534 at 30; Uttarakhand Purv Sainik Kalyan Nigam Ltd. v. N. Coal Field Ltd., (2020) 2 SCC 455 at 7.13, 7.14.

<sup>33</sup> Kapal R. Mehra v. Bhupendra M. Bheda, (1998) 4 Bom CR 872 at 6.

<sup>34</sup> Uttarakhand Purv Sainik Kalyan Nigam Ltd. v. N. Coal Field Ltd., (2020) 2 SCC 455 at 7.13.

<sup>35</sup> Partasides and Aggarwal, *supra* note 29.



the arbitration proceedings continue till the final award is rendered, it would cause an “unnecessary waste of time and costs if the court later sustained the challenge”.<sup>36</sup>

#### IV. QUESTION ON EFFICIENCY

Considering the discussion above, most jurisdictions contain provisions for challenging an arbitral tribunal’s jurisdiction in their arbitration laws. Avenues have been created under MAL and in arbitration laws of various countries to allow the aggrieved party to further challenge the Jurisdiction Award (partial or final award) passed by the arbitral tribunal. The question of the efficiency of such procedures would depend on when the issue of jurisdiction gets closure and attains finality.

Singapore and India can be considered examples at the extreme ends regarding their challenge to the Jurisdiction Award. Singapore provides the aggrieved party possibility of questioning the Jurisdiction Award before the General Division of the High Court and thereafter the appellate court, during which time the question of the finality of the Jurisdiction Award must wait. While the arbitration proceedings continue during such time, the finality of the Jurisdiction Award hangs in the balance, having the capability of abruptly ending the proceedings. The time spent and costs incurred till the appellate court arrives at a decision, regrettably against jurisdiction, will bear no fruits. Parties would have no other option but to rethink the resolution mechanism for their disputes from the inception.

Unfortunately for a claimant, the saga of questioning the jurisdiction can not only continue with the jurisdiction ruling during the proceedings (Jurisdiction Award) but could also continue with the final award on merits. While a party has an appeal mechanism to question jurisdiction under the Singapore Act, failure to avail such remedies shall not preclude the aggrieved party from bringing jurisdictional objections during enforcement<sup>37</sup> and even setting-aside proceedings<sup>38</sup> of the final award. Pertinently, the Singapore Court of Appeal, while allowing jurisdictional

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<sup>36</sup> UNCITRAL, *Official Records of the General Assembly, Fortieth Session, Supplement No. 17 (A/40/17)*, 1985, at ¶ 123.

<sup>37</sup> PT First Media TBK v. Astro Nusantara Int’l BV and others, [2013] SGCA 57.

<sup>38</sup> Rakna Arakshaka Lanka Ltd. v. Avant Garde Mar. Servs. (Priv.) Ltd., [2019] SGCA 33.



objections in enforcement and setting-aside proceedings, was dealing with a party that had boycotted the proceedings, *i.e.*, was a non-participating party.<sup>39</sup> For a claimant, an unchallenged Jurisdiction Award passed during the arbitral proceedings appears to give no solace despite successfully receiving the final award on merits. The issue of the finality of the Jurisdiction Award, therefore, could very well be extended till the end of the proceedings and even be dragged till the enforcement proceedings.

A similar precarious situation appears to be easily predicted with the provisions of the Indian Act. With parties having no immediate response to the ruling on jurisdiction, parties ought to wait for the entire arbitration proceedings to end, to challenge the final award on jurisdiction. The finality to the question of jurisdiction is only attainable upon the challenge to the final award. If the national court concludes that the arbitral tribunal did not have any jurisdiction and sets aside the final award, the parties are simply left with nothing but time and costs incurred, with no result to show. By the end of the arbitration proceedings, both parties would be aware of each other's entire case, evidence, and legal grounds, in an irreversible scenario. While the Indian legislature derogated from Article 16(3) of MAL to avoid any delay caused in arbitration proceedings pending challenge in the national court, empowering the arbitral tribunal to continue with the proceedings could restore a balance. However, since challenging the arbitral award on merits is the only way to attain finality on the issue of jurisdiction for parties with the seat as India, the reason for treating jurisdiction as a preliminary question seems to be losing its flair.

## V. CONCLUSION

There appears to be a conundrum in deciding the question of efficiency between the above-mentioned two arbitration systems, more specifically, the simple question of when an arbitral award on jurisdiction would attain finality. The lack of finality for an arbitral award on jurisdiction simply appears to be a sword dangling on the claimant and the tribunal. On the one hand, Singapore has proceeded to have an additional review of the Jurisdiction Award by the appellate court, which is to be

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<sup>39</sup> *Id.* at 54.



undertaken during the arbitral proceedings. On the other hand, India, focusing on avoiding any possible dilatory tactics, has removed any interference by the courts during the arbitration proceedings. While one may consider both approaches substantially different, the delayed finality of the Jurisdiction Award appears to be a common ground.

The author believes that since the arbitral tribunal's jurisdiction is the substratum of arbitration, the challenge to the Jurisdiction Award must be resolved at the earliest, thereby attaining finality and binding on parties. The middle ground chosen by MAL under Article 16 successfully addresses the four main concerns: dilatory tactics, court interference, and wastage of time and money. While MAL attempts to create a situation of a *final interim award*,<sup>40</sup> countries that have added certain nuances to their arbitration laws appear to have subtly tilted the playing field towards the party objecting to the arbitral tribunal's jurisdiction.



**KRITI SRIVASTAVA** is an India-qualified dispute resolution lawyer with over four years of experience handling commercial arbitrations and complex litigations at India's top dispute firms, Cyril Amarchand Mangaldas and Bharucha & Partners, Mumbai. She has gained experience from numerous arbitration proceedings involving telecommunication infrastructure, enforcement of a foreign award, licensing of a movie etc. Having been admitted to the Bar in 2018, her experience also extends to appearances before various forums, including the Bombay High Court, Telangana High Court, Tribunals etc. She has also co-authored several publications on crucial topics in arbitration, white-collar crimes, and litigation. Currently, Kriti is pursuing an LL.M. in International Commercial Arbitration Law at Stockholm University, Sweden, cementing her interest in arbitration.

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<sup>40</sup> Emirates Trading Agency LLC v. Sociedade de Fomento Indus. Priv. Ltd., [2015] EWHC (Comm) 1452 at 22.

**INSTITUTE FOR TRANSNATIONAL ARBITRATION  
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