IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2018] SGHC 78

Originating Summons No 198 of 2017

In the matter of Section 24 of the International Arbitration Act (Cap 143A, 2002 Rev Ed)

And

In the matter of Article 34 of the UNCITRAL Model Law on International Commercial Arbitration as set out and modified in the First Schedule to the International Arbitration Act

And

In the matter of an arbitration under the Arbitration Rules of the Singapore International Arbitration Centre SIAC Rules (5th edition, 1 April 2013)

And

In the matter of ARB No 070 of 2015

And

In the matter of the Final
Award dated 24 November
2016 in respect of ARB No
070 of 2015

Between

Rakna Arakshaka Lanka Ltd

… *Plaintiff*

And

Avant Garde Maritime
Services (Private) Limited

… *Defendant*

GROUNDS OF DECISION

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

[Arbitration] — [Arbitral tribunal] — [Jurisdiction]

[Arbitration] — [Setting aside] — [Breach of natural justice]

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v
Avant Garde Maritime Services (Private) Limited

[2018] SGHC 78

High Court — Originating Summons No 198 of 2017
Quentin Loh J
30 November 2017, 1 December 2017

2 April 2018

Quentin Loh J:

1 In Originating Summons No 198 of 2017 ("OS 198/2017"), the plaintiff, Rakna Arakshaka Lanka Ltd ("RALL"), applied to set aside a final award dated 24 November 2016 made in Singapore International Arbitration Centre ("SIAC") Arbitration No 70 of 2015 pursuant to s 24 of the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("the IAA") and Art 34 of the UNCITRAL Model Law on International Commercial Arbitration ("the Model Law"). In the arbitration, RALL was the respondent and the defendant, Avant Garde Maritime Services (Private) Limited ("AGMS"), was the claimant.

2 Having heard oral argument on 30 November 2017, I dismissed the application with brief oral grounds on 1 December 2017. RALL filed its notice of appeal on 27 December 2017, and I now give the full grounds of my decision.

Facts

The parties

3 The plaintiff, RALL, is a company incorporated in Sri Lanka, and was engaged in, *inter alia*, the business of providing comprehensive security services and the issuing of arms, ammunition and related manpower for such security services. RALL is described by Mr Kaluwewe Mudiyanselage Gunawathgedara Sirimevan Nalaka Kaluwewe ("Mr Kaluwewe"), Chairman of RALL since January 2017,[1] as being owned at all material times by the Government of Sri Lanka with the Secretary to the Treasury of Sri Lanka as its sole shareholder.[2] It is affiliated to the Ministry of Defence of the Republic of Sri Lanka ("MOD"), and its chairman and board of directors are appointees of the government of Sri Lanka.

4 The defendant, AGMS, is a Sri Lanka-incorporated company specialising in the provision of maritime security services to vessels transiting waters with high risk of piracy.[3] At all material times, the sole shareholder and chairman of AGMS was Mr Yapa Hetti Pathirannehelage Nissanka Yapa Senadhipathi ("Mr Senadhipathi").

Background

5 Between March 2011 and October 2013, the parties entered into six separate agreements concerning various maritime security-related projects under the auspices of a Public Private Partnership facilitated by the MOD. In its

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1 1st affidavit of Kaluwewe Mudiyanselage Gunawathgedara Sirimevan Nalaka Kaluwewe dated 21st April 2017 ("KAL-1"), p 1 at para 1.

2 KAL-1, p 4 at paras 13 and 14; Plaintiff's Core Bundle of Documents ("PCB"), vol 1, Tab 7, p 160 at para 109.

3 PCB, vol 1, Tab 7, p 159 at para 108.

submissions, RALL additionally states that it specialises in supplying risk management services for corporate entities including the provision of unarmed marshals to merchant vessels exposed to pirate menace whilst traversing the Arabian Gulf and Indian Ocean. RALL describes AGMS as being primarily engaged in the business of providing maritime security related infrastructure facility services including related manpower for vessels transiting the Indian Ocean. These six agreements were subsequently incorporated as annexures to an umbrella Master Agreement dated 27 January 2014 ("Master Agreement").

6 One such project involved the establishment of a floating armoury on the vessel *MV Mahanuwara*, which was operated by AGMS off the coast of Galle in Sri Lanka ("the Galle Floating Armoury Project"). The other five projects set out in Cl 1 of the Master Agreement are:

(a) Armouries Project consisting of *inter alia*, Forward Operations Centres established in other countries including but not limited to the Floating Armouries positioned in Fujairah and the Red Sea;

(b) The Fishing Trawler Project;

(c) Air and Sea Transportation of Weapons Project;

(d) Un Armed Sea Marshals Project; and

(e) Rangala Weapons Depository Projects.[4]

It appears there was another floating armoury on board the vessel *MV Avant Garde*.

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4 PCB, vol 1, Tab 1, p 8, cl 1.

7 Cl 3.1 of the Master Agreement stipulates that RALL would provide its "utmost assistance" to AGMS in respect of the various projects entered into:[5]

> 3. Mutual Assistance
>
> 3.1 RALL hereby 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 this agreement without giving permission for any other local or foreign party handle any function of the ongoing projects.

The Master Agreement was governed by the laws of Sri Lanka and Cl 8, the dispute resolution clause, states that "any dispute, difference or question, which has risen in connection with or in relation to the agreement shall" be referred to arbitration in Singapore under the rules of the Singapore International Arbitration Centre ("SIAC").[6]

8 At the Sri Lankan presidential elections held on 8 January 2015, the incumbent, Mr Mahinda Rajapaksa (who had also concurrently held the appointment of Minister of Defence), was defeated and replaced by Mr Maithripala Sirisena.[7] Around ten days later, on or about 18 January 2015, the *MV Mahanuwara* was detained by the Sri Lankan Police while docked at Galle Port, following several allegations levelled against the legality and legitimacy of the Galle Floating Armoury Project.[8]

9 On 20 February 2015, AGMS demanded that RALL, pursuant to its obligation to provide its "utmost assistance" under Cl 3.1 of the Master

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5 PCB, vol 1, Tab 1, p 5, cl 3.1.

6 PCB, vol 1, Tab 1, pp 8–9, cl 8.

7 KAL-1, p 7 at para 25.

8 KAL-1, p 254 at para 85.

Agreement, take all required steps to obtain a Letter of Clearance from the MOD declaring that the Public Private Partnership and the projects carried on by the parties thereunder (including the Galle Floating Armoury Project) were legitimate, and that the Sri Lankan government spokesperson release an appropriate media release confirming the same.[9] RALL replied on 27 February 2015 that it was unable to respond to AGMS's requests as the board of directors, who were appointees of the previous government, had resigned in late January 2015 and had yet to be replaced.[10]

The arbitral proceedings

10 On 9 April 2015, AGMS commenced arbitral proceedings against RALL, alleging that RALL had breached Cl 3.1 of the Master Agreement by failing to comply with AGMS's requests for the Letter of Clearance and a suitable press release confirming the legitimacy of the floating armoury on board the *MV Mahanuwara*.[11] The Arbitration Notice, dated 8 April 2015, was sent by email to the SIAC and by courier on 13 April 2015 together with the filing fee. AGMS served the Arbitration Notice on RALL by email and courier on 9 April 2015.[12]

11 RALL did not respond to the Arbitration Notice as required under the SIAC Rules. As will be seen below, RALL did not participate in the arbitration despite being given notice at various stages and having had ample opportunity to do so. Throughout the arbitration, RALL's participation was limited to asking for extensions of time and later on, for copies of some communications and

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9 KAL-1, p 387.

10 KAL-1, p 395.

11 KAL-1, p 15 at para 56.

12 PCB-1, vol 1, Tab 7, p 140 at para 12.

documents. RALL did not file its Response to AGMS's Notice of Arbitration, did not file any Defence, did not file any submissions, did not pay any of the required SIAC fees and did not turn up at any of the hearings.

12 To return to the narrative, AGMS sent various emails to SIAC from 17 to 30 April 2015 with queries on administrative matters. SIAC reminded AGMS to send copies of all communications with SIAC to RALL. SIAC sent copies of all emails to AGM to RALL. On 7 May 2015, SIAC wrote to both parties requesting them to pay their share of the costs in respect of the Arbitration.

13 On 13 May 2015, RALL wrote to the SIAC and requested for an extension of 3 months to respond to the Notice of Arbitration, citing recent appointment of a new board of management and that it required further time to "study this case before arriving at any decision" and the need to secure Treasury approval through the Ministry of Defence:[13]

> …
>
> 2. A new Board of Management of this company has been appointed by the government of Sri Lanka with effect from 22nd April 2015.
>
> 3. Please note that the correspondence initially forwarded by Gowers International Legal Consultants & Corporate Lawyers [AGMS's legal counsel] had been to the previous Board of Management.
>
> 4. As we are of a new Board of Management we need more time to study this case before arriving at any decision.
>
> 5. Consequent to the consent obtained from the Board of Directors, we need to secure Treasury approval through Ministry of Defense for any international fund transfers.
>
> 6. Considering all above we humbly request to be granted three months period of extension to resolve the issue.
>
> …

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[13] KAL-1, p 581.

14 Meanwhile on 18 May 2015, AGMS paid its share of the first tranche costs and on 20 May 2015 called on SIAC to appoint an arbitrator on behalf of RALL as it had failed to do so pursuant to the mandatory time limit of 14 days under the SIAC Rules.[14]

15 On 25 May 2015, SIAC granted RALL an extension of 3 weeks to respond to the Arbitration Notice and to nominate a co-arbitrator by close of business, 9 June 2015.[15] Before me, counsel for RALL acknowledged this extension as being quite "generous".[16]

16 On 10 June 2015, the SIAC informed the parties that having had no response from RALL, SIAC would proceed under Rule 8.2 of the SIAC Rules to appoint a co-arbitrator in due course.[17] On 10 July 2015, SIAC informed RALL that it had not received its payment towards the first tranche of advance costs and requested payment by 17 July 2015. In the event, RALL's share of the SIAC fees was paid by AGMS.[18]

17 On 22 July 2015, the SIAC appointed Chief Justice (Retd) Chan Sek Keong SC ("CJ (R) Chan") as co-arbitrator in the absence of any nomination made by RALL under Rule 8.2 of the SIAC Rules. AGMS's nominee was Dr Wickrema Weerasooria ("Dr Weerasooria"). I note there were disclosures made by Dr Weerasooria, to which AGMS stated they had no objections but no comments or objections were made by RALL despite being given an

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14 PCB, vol 1, Tab 7, p 143 at paras 25–26.

15 PCB, vol 1, Tab 7, p 143 at para 27.

16 Notes of Evidence, 30 November 2017, p 9 at lines 13–14.

17 PCB, vol 1, Tab 7, p 143 at para 30.

18 PCB, vol 1, Tab 7, p 145 at para 38; p 146 at para 45.

opportunity to do so by the SIAC. Dr Weerasooria was accordingly confirmed by the SIAC as AGMS's nominated arbitrator.[19]

18 On 29 July 2015, AGMS filed its Statement of Claim (dated 28 July 2015).[20]

19 On 30 July 2015, almost two months after the aforementioned extended deadline had passed, RALL wrote to the SIAC requesting another three-month extension to 12 November 2015, again ostensibly because "the matter require[d] further study to ensure a successful and effective solution":[21]

> …
>
> 2. … we are in need of a further three months extension till November 2015, as we have found that the matter requires further study to ensure a successful and effective solution.
>
> 3. Hence, we humbly request your kind consideration on granting a further extension of three months till 12th November 2015.
>
> …

This was strongly objected to by AGMS as RALL had not filed its Response to the Notice of Arbitration and had not paid their share of the fees.[22]

20 Once again, the SIAC granted an extension by way of a letter dated 14 August 2015, stating that RALL had until 18 August 2015 to respond, failing which the SIAC would proceed with the next steps in the arbitration.[23]

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19 PCB, vol 1, Tab 7, pp 145, 147 at paras 39–41, 49–52.

20 KAL-1, p 21 at para 86; p 657.

21 KAL-1, p 795.

22 KAL-1, p 21 at para 89; p 799.

23 PCB, vol 1, Tab 7, p 147 at para 49.

21 On 20 August 2015, the SIAC noted the lack of response from RALL,[24] and on 21 August 2015 notified the parties that it was proceeding with the next steps of arbitration.[25]

22 On 21 August 2015, legal counsel for RALL, Mr Radeep Ginige, sent a letter to the SIAC, which bears setting out in full:[26]

> We write on the instruction of our client Rakna Arakshaka Lanka Limited, who has instructed us to defend them in the resolution of the above captioned dispute.
>
> This is to inform you that commenced Arbitration proceedings against Rakna Arakshaka Lanka Limited, by the Avant Garde Maritime Services (Private) Limited, a dispute is contemplated by falling or contains facts on matters beyond the scope of submission to arbitration and further informed you that, the Arbitration proceedings on agreement dated 27th day of January 2014 is conflict with the Public Policy of Republic of Sri Lanka.
>
> Hence the please lay by the Arbitration proceedings until this matter to be discussed with the claimant [AGMS].

23 With respect, this letter was rather difficult to decipher. It simply asserted, without any explanation or substantiation, that the arbitration involved a dispute "contemplated by falling or contains facts on matters beyond the scope of submission to arbitration" and that the arbitral proceedings were in "conflict with the Public Policy of the Republic of Sri Lanka". The arbitral tribunal ("the Tribunal") unanimously considered that this vaguely-worded letter did not constitute a proper objection to the Tribunal's jurisdiction.[27] I agree with the Tribunal.

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24 KAL-1, p 815.

25 KAL-1, pp 819–822.

26 PCB, vol 2, Tab 23, p 865.

27 PCB, vol 1, Tab 7, p 184 at para 173; Tab 8, pp 215–216 at paras 13–14.

24 On 15 October 2015, the Tribunal called for a Preliminary Meeting on 16 November 2015.[28] A letter dated 20 October 2015 was duly sent by registered post, fax and email to AGMS and RALL informing them of the same and annexing a draft procedural order for their consideration.[29]

25 It appears the parties entered into negotiations in an effort to resolve the matter. This resulted in an agreement dated 20 October 2015 ("the MOU"),[30] which, *inter alia*, provided that AGMS would withdraw its claim against RALL in the SIAC arbitral proceedings.

26 On 12 November 2015, RALL unilaterally informed the SIAC that it had "reached settlement" with AGMS and that it was "no longer required to proceed" with the arbitration. RALL did not annex a copy of the MOU to its letter.[31]

27 Following RALL's letter of 12 November 2015, AGMS sent a letter to the Tribunal dated 15 November 2015, stating that in light of certain events that had recently transpired, it appeared that there was no longer any settlement and there was in fact an imminent threat that RALL would terminate the Master Agreement. AGMS therefore sought a preliminary hearing on an urgent basis for two purposes: to determine whether the arbitration ought to be proceeded with, and also to request interim relief from the Tribunal in the form of an interim injunction preventing RALL from terminating the Master Agreement.[32]

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28 KAL-1, p 23 at para 98; p 851.

29 PCB, vol 1, Tab 7, p 149 at para 62,

30 PCB, vol 1, Tab 3, p 41.

31 PCB, vol 1, Tab 3, p 39.

32 PCB, vol 1, Tab 4, pp 47–48.

28 AGMS's requests were copied to RALL, but RALL did not give any response and did not participate in the preliminary hearing held on 16 November 2015.[33] After the hearing, the Tribunal issued directions. RALL was directed to inform the Tribunal of its position in relation to AGMS's two applications, and both parties were requested to tender written submissions thereon. AGMS tendered its written submissions dated 22 November 2015 on 24 November 2015 but RALL did not do so.[34]

29 Having considered AGMS's applications, the Tribunal issued an Interim Order on 19 December 2015, holding by a majority (CJ (R) Chan dissenting) that RALL had failed to ensure continuity of the Master Agreement, which went to the root of the MOU, and therefore the dispute was still alive.[35] The Tribunal determined to proceed with the arbitration and gave directions but expressly stated that RALL was free to make objections in the procedurally proper manner in the course of the arbitration.[36] The Tribunal unanimously declined to grant AGMS's application for an interim injunction.[37]

30 Following the Interim Order, AGMS filed written submissions and a witness statement. RALL did not file any submissions, witness statements or pleadings, although it sent two letters to the SIAC dated 16 February and 26 April 2016, stating that it had not received AGMS's written submissions and inquiring after the status of the arbitration respectively.[38] I note that RALL's request of 16 February 2016 erroneously referred to AGMS's written

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33 KAL-1, pp 871–877.

34 PCB, vol 1, Tab 7, pp 150–151.

35 PCB, vol 1, Tab 4, p 50.

36 PCB, vol 1, Tab 4, p 51.

37 PCB, vol 1, Tab 4, p 51; Tab 5, p 63.

38 PCB, vol 1, Tab 7, p 154 at para 81, p 156 at para 89.

submissions in relation to the *preliminary hearing*,[39] which had already been sent to RALL in an email dated 24 November 2015.[40] RALL must have intended to refer instead to AGMS's witness statement for the substantive hearing (which AGMS had been directed to file pursuant to the Interim Order dated 19 December 2015), and this was subsequently sent to RALL in an email dated 25 April 2016.[41] Although the witness statement was sent to RALL about one month after the extended deadline set by the Tribunal, nothing turns on this; AGMS explained that the delay in filing its witness statement was due to difficulties faced in obtaining instructions from the witness, Mr Senadhipathi, on account of his ill-health,[42] and RALL raised no complaint, simply inquiring in its letter of 26 April 2016 as to the status of the arbitration;[43] it was not RALL's case before me that the delayed provision of the witness statement was a breach of natural justice or had resulted in it being unable to present its case.

31 On 5 May 2016, the Tribunal informed the parties that the substantive hearing was fixed on 20–21 June 2016.[44] On 16 May 2016, AGMS requested that the substantive hearing be postponed to 21–22 June 2016 as its lead counsel was unavailable on 20 June 2016. On the same day, the chairman of the Tribunal, Dr Harsha Cabral, replied that the substantive hearing would be fixed on 21 June 2016 only. All of these emails were copied to RALL.[45] Accordingly, the substantive hearing was held in Singapore on 21 June 2016. RALL was absent and unrepresented and failed to submit post-hearing written submissions

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39 KAL-1, p 1029.

40 KAL-1, p 981.

41 KAL-1, pp 647, 1055.

42 KAL-1, p 647.

43 KAL-1, pp 1113–1114.

44 KAL-1, p 1125.

45 KAL-1, p 1163.

or costs submissions.[46] AGMS filed its post-hearing written submissions via an email dated 8 July 2016 which was copied to RALL.[47] On 29 November 2016, the majority (CJ (R) Chan dissenting) issued a Final Award dated 24 November 2016 in AGMS's favour.

32 RALL commenced the present proceedings to set aside the Final Award on 27 February 2017.

Parties' cases

33 RALL relied on three grounds in support of its application to set aside the Final Award:

(a) First, the Final Award 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 under Art 34(2)(*a*)(iii) of the Model Law. The thrust of RALL's submissions on this point was that the MOU had terminated the reference to arbitration.[48]

(b) Secondly, RALL was not given proper notice of the arbitral proceedings, or was otherwise unable to present its case pursuant to Art 34(2)(*a*)(ii) of the Model Law because certain pieces of correspondence and documents were not copied to it (in particular, the notes of evidence for the substantive hearing held on 21 June 2016). RALL further argued that this also gave rise to a breach of the rules of natural justice in the making of the award by which its rights had been prejudiced under s 24(*b*) of the IAA.[49]

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46 PCB, vol 1, Tab 7, pp 157–158.

47 KAL-1, p 33 at para 132.

48 Plaintiff's Written Submissions at para 16(a).

(c) Thirdly, the making of the award was induced or affected by fraud or corruption within the meaning of s 24(*a*) of the IAA or the award was in conflict with the public policy of Singapore under Art 34(2)(*b*)(ii) of the Model Law. In this regard, RALL's main argument was that the Master Agreement – the underlying contract in the arbitral proceedings – was procured by bribes given by AGMS's Mr Senadhipathi to the chairman of RALL at the time, Mr Waduge Palitha Piyasiri Fernando ("Mr Fernando"), noting that both men had been indicted in the Sri Lankan High Court and Magistrates' Court on charges of bribery and corruption.[50]

34 AGMS joined issue with RALL on all three grounds:

(a) On the point that the Tribunal lacked jurisdiction, AGMS made three points in reply:

(i) First, it was far too late in the day for RALL to mount a jurisdictional challenge, having failed to do so at the preliminary hearing on 16 November 2015, and after the Interim Order was issued on 19 December 2015.[51]

(ii) Secondly, even if RALL could take objection, the MOU did not terminate the Tribunal's jurisdiction to hear the matter.[52]

(iii) Thirdly, in any case, the MOU had been rescinded for misrepresentation.[53]

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49 Plaintiff's Written Submissions at para 16(b).

50 Plaintiff's Written Submissions at para 16(c).

51 Defendant's Written Submissions at paras 69–81.

52 Defendant's Written Submissions at paras 87–92.

53 Defendant's Written Submissions at paras 99, 104.

(b) On the natural justice point, AGMS argued that the alleged breaches complained of were of an arid, technical or trifling nature that resulted in no prejudice to RALL.[54]

(c) On the point that the Master Agreement was procured by bribery, AGMS pointed out that corruption had not been proved. The corruption trials were still pending; all that RALL could produce were indictments, not convictions, and the relevant persons must be presumed innocent of the charges until proven guilty and convicted.[55]

Issues to be determined

35 The issues to be determined track the three grounds for setting aside raised by RALL:

(a) Whether the Final Award should be set aside under Art 34(2)(*a*)(iii) of the Model Law on the basis that the MOU terminated the reference to arbitration ("the Jurisdiction Issue").

(b) Whether the Final Award should be set aside under Art 34(2)(*a*)(ii) of the Model Law and/or s 24(*b*) of the IAA because certain pieces of correspondence (especially the notes of evidence for the substantive hearing) were not copied to RALL ("the Natural Justice Issue").

(c) Whether the Final Award should be set aside under Art 34(2)(*b*)(ii) of the Model Law or s 24(*a*) of the IAA on the basis that the underlying Master Agreement upon which the arbitral proceedings were

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54 Defendant's Written Submissions at paras 109–113.

55 Defendant's Written Submissions at paras 23–26, 56–62.

brought was procured and furthered by bribery and corruption in Sri Lanka ("the Public Policy Issue").

My decision

The Jurisdiction Issue

36 RALL does not challenge AGMS's Notice of Arbitration dated 8 April 2015 and AGMS's Statement of Claim filed on 28 July 2015 as comprising claims or matters beyond the scope of Cl 8 of the Master Agreement.

37 Instead, RALL's first submission was that in breach of Art 34(2)(a)(iii), the dispute dealt with in the award did not fall within the terms of the submission to arbitration, or that it contained decisions on matters beyond the scope of the submission to arbitration as the MOU terminated the reference to arbitration with the result that the mandate of the Tribunal to carry on with the arbitration had ceased.[56]

38 In my view, RALL has not made out this ground for setting-aside on two separate grounds.

Did the MOU terminate the arbitral proceedings?

39 First, as noted above, RALL failed to come forward to argue its case that the reference to arbitration had been terminated as a result of the entry into the MOU despite being given the opportunity to do so. It merely wrote unilaterally to the SIAC on 12 November 2015, stating:

> …
>
> 02 It is kindly informed that we have reached a settlement with the Claimant as per the written agreement dated 20th

[56] Plaintiff's Written Submissions at para 279.

> October 2015 made by and between the above two parties 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.

RALL did not annex a copy of the MOU to its letter[57] and this was noted by the Tribunal.[58]

40 AGMS on the other hand had made submissions to the contrary contending (a) that the MOU was premised on the continuity of the Master Agreement, (b) the withdrawal of AGMS's claims could only be made by AGMS and not RALL, (c) the MOU was limited to the dispute regarding the monies owed to RALL, (d) AGMS had already complied by paying Sri Lankan Rupees ("Rs") 165 million to RALL and (e) RALL had directly and indirectly breached the said MOU.[59]

41 Having considered the matters before it, the Tribunal ruled that though AGMS had, *inter alia*, agreed to withdraw the claim submitted to arbitration, this was agreed on the premise that RALL would ensure the continuity of the Master Agreement, which RALL had failed to do. Further, the object of the MOU was solely to resolve disputes regarding the monies owed to RALL, and in this regard AGMS had fulfilled its obligations under the MOU with the payment of Rs 165 million, whereas 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 AGMS's statement of claim was still alive. The Tribunal noted RALL had not established to the Tribunal how it could resile from this scenario and it has failed to impress upon the Tribunal anything to the contrary. The

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57 PCB, vol 1, Tab 3, p 39.

58 PCB, vol 1, Tab 4, pp 49–50.

59 PCB, vol 1, Tab 4, p 50.

Tribunal was of the view that AGMS had provided sufficient reasons as to why the arbitration should proceed and ruled that it will proceed with the arbitration in its Interim Order dated 19 December 2015.[60]

42 In my view, there was ample evidence before the Tribunal that RALL had failed to maintain the continuity of the Master Agreement. I was referred to media reports dated 12 November 2015[61] stating that at a special cabinet meeting presided over by President Sirisena, it was decided to revoke all agreements with AGMS; there was a reference to cabinet spokesman, Dr Rajitha Senaratne, giving details of the President's discussions with the Navy and that the Navy were fully capable of carrying out the same operations directly. There was also a reference to the government ordering the Sri Lanka Navy to take over the operations hitherto jointly run by the parties. In particular, a report carried by the state-owned Daily News dated 12 November 2015 ran the headline "Operations handed back to Navy: All agreements with Avant Garde cancelled".[62]

43 I note that the *MV Mahanuwara*, which had been arrested since 18 January 2015, remained under arrest and furthermore, on 6 October 2015, the Navy seized the *MV Avant Garde* in international waters, some 15 nautical miles off Sri Lanka, and brought the vessel into port and placed it under arrest.[63] These two vessels, operated by AGMS as floating armouries, carried a significant amount of firearms and ammunition (the *MV Avant Garde* was said to carry in excess of 200 firearms and 204,674 bullets),[64] were not released upon the

60 PCB, vol 1, Tab 4, pp 49–51.

61 Mr Senadhipathi's Affidavit dated 29 June 2017, pp 239–240.

62 KAL-1, p 893.

63 Mr Senadhipathi's Affidavit dated 29 June 2017, p 23 at para 44(d); p 324.

64 See KAL-1, p 11, para 42

conclusion of the MOU on 20 October 2015.[65] On the contrary, on 13 November 2015, the Sri Lanka Navy seized the weapons on board the *MV Mahanuwara*.[66] Before me, counsel for AGMS described these vessels as "the two prize catches".[67] Needless to say, as against the evidence put forward by AGMS and its submissions, RALL had chosen not to put any evidence before the Tribunal or make any submissions in spite of being given every opportunity to do so.

44 RALL's contention that Cl 5 of the MOU terminated the reference to arbitration, and along with it, the Tribunal's mandate[68] is also not borne out by the language of Cl 5 which states:

> 5. [AGMS] *shall withdraw* the arbitration claim No: 70 of 2015 already filed by [AGMS] against [RALL] in the International Arbitration Centre in Singapore …
>
> [emphasis added]

45 According to RALL, the agreement to arbitrate ARB 070 of 2015 must have at this point been mutually withdrawn, thus terminating the reference to arbitration of ARB 070 of 2015. In support, reliance was placed on *Chimimport plc v G D'Alesio SAS* [1994] CLC 459 ("*Chimimport*"), a case where 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 defendants were accordingly not able subsequently to seek to avoid the settlement agreement before the arbitrator. However, there are material differences between the wording of the clause in *Chimimport*, which clearly stated the arbitration had ceased, and Cl 5 of the MOU. The *Chimimport* clause provided:

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65 Notes of Evidence, 30 November 2017, p 36 at lines 22–23.

66 KAL-1, p 901; PCB, vol 1, Tab 6, pp 89–90.

67 Notes of Evidence, 30 November 2017, p 36 at lines 21–28.

68 Plaintiff's Written Submissions at para 279.

> 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.[69] This meant that *until* AGMS took the step of withdrawing the arbitration claim (and it was undisputed that AGMS took no such step),[70] 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.

47 What RALL did, instead of engaging in the arbitral process, was therefore *to write* an economically worded letter to the SIAC, not the Tribunal, stating that the dispute had been settled and "it is no longer required to proceed with the above matter." Thereafter, despite being given notice that AGMS disputed the same and was asking the Tribunal to rule the arbitration was still afoot, RALL chose to stay away from the arbitration proceedings.

48 The MOU should also be viewed in the context of the Master Agreement and the claims brought by AGMS under its Notice of Arbitration and the Statement of Claim, which was before the Tribunal. At the hearing before the Tribunal, AGMS produced the MOU, which was in Sinhalese, and provided a translation.

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69 Notes of Evidence, 1 December 2017, p 8 at line 5.

70 2nd Affidavit of John Anthony Shivaji Felix dated 23 August 2017 at para 51.

49 The contents of the MOU are also important:

(a) It acknowledges, in what would be characterised as the recitals, the existence of the Master Agreement, the six projects and acknowledged a further agreement to operate two further projects.

(b) It also stated that the "aforesaid parties are bound by the said respective agreements to operate the aforementioned projects and whilst the aforesaid agreements are still in force, the parties hereby agree to enter this new agreement on October 20, 2015 thereby mutually agreeing to abide by the terms and conditions…"

(c) It goes on to state: "Furthermore, this agreement is limited in scope to the relevant monitory [*sic*] transactions specified therein."

(d) The MOU then goes on to provide for AGMS to pay fairly significant sums of money, described as "arrears", to RALL, provisions on computation and these clauses also appear on their face to reflect discounted sums for the payments of arrears.

(e) The only other clause not reflecting these payments of arrears, computation or reference of confirmation by way of an audit is Cl 5 (cited at [44] above) which, for completeness, also provided that RALL shall take action to terminate proceedings in relation to RALL's letter of demand to AGMS claiming Rs 500,000,000 for damages caused to reputation and monetary losses caused to RALL and terminate legal proceedings initiated against AGMS.

50 At the preliminary hearing, AGMS informed the Tribunal that although they had fulfilled their obligations by making payment to RALL as stipulated in the MOU, RALL had not fulfilled their obligations under the Master

Agreement and the claims and matters in the arbitration were still live. AGMS therefore wished to proceed with the arbitration. The Tribunal, after due deliberation, ruled in favour of AGMS and continued with the arbitration.

51 I agree with the Tribunal's ruling that its mandate had not terminated. If there was evidence that the position was otherwise, then RALL cannot complain because it chose to stay away from the arbitration and not provide any evidence or submissions refuting AGMS's claims and contentions. I also agree that on the facts and contentions of AGMS that were before the Tribunal and on the terms of the MOU taken in context, there is 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.

Article 34(2)(a)(iii)

52 Secondly, in these proceedings, RALL seeks to set aside the Final Award dated 24 November 2016 pursuant to Art 34(2)(a)(iii) of the Model Law (I address its case on s 24 IAA below). It should be noted that these proceedings are therefore neither enforcement proceedings brought by AGMS nor RALL defending itself against enforcement proceedings. RALL is making an application at the seat to set aside the Final Award rendered by the Tribunal.

53 Counsel for RALL contends that with the execution of the MOU there was no longer any submission to arbitration or mandate to arbitrate and accordingly the Final Award is null and void for lack of jurisdiction and/or there was a withdrawal by the parties of the submission to arbitration and the Final Award should be set aside. He contends that RALL has brought its challenge within the 3 months prescribed by Art 34(3).

54 Leaving aside the position where a party has refused to participate in the arbitral proceedings, which I deal with below, I do not think RALL can apply to set aside the Final Award at the seat under Art 34 at this stage and certainly not on the facts of this case.

55 The parties agreed under Cl 8 of the Master Agreement to refer their disputes to arbitration in Singapore under the Rules of the SIAC. Rule 25.3 of the applicable SIAC Rules 2013 stipulates:

> A plea that the Tribunal does not have jurisdiction shall be raised not later than in the Statement of Defence or in a Statement of Defence to a Counterclaim. *A plea that the Tribunal is exceeding the scope of its jurisdiction shall be raised promptly after the Tribunal has indicated its intention to decide on the matter alleged to be beyond the scope of its jurisdiction.* In either case the Tribunal may nevertheless admit a late plea under this Rule if it considers the delay justified. A party is not precluded from raising such a plea by the fact that he has nominated or participated in the nomination of, an arbitrator.
>
> [emphasis added]

56 As noted above, when RALL wrote to the SIAC on 12 November 2015 stating that the dispute had been settled and it was no longer required to proceed with the arbitration, AGMS wrote to the Tribunal on 15 November 2015 disagreeing. AGMS stated that there was no longer any settlement in view of certain events that had recently transpired and sought instead a preliminary hearing on an urgent basis to determine whether the arbitration ought to be proceeded with and to request for an interim injunction to prevent RALL from terminating the Master Agreement.[71] AGMS's requests were copied to RALL, but RALL did not give any response and despite receiving notice of the same did not participate in the preliminary hearing that was held on 16 November 2015.[72] After the hearing, RALL was invited to inform the Tribunal of its

71 PCB, vol 1, Tab 4, pp 47–48.

72 KAL-1, p 24 at para 100–101; pp 871–877.

position in relation to AGMS's applications, but failed to do so.[73] The inevitable conclusion is that RALL chose this course of action (which was in itself an unorthodox challenge to the jurisdiction or mandate of the Tribunal to carry on with the arbitration), refused to comply with Rule 25.3, and is therefore in breach of its agreement to arbitrate disputes or differences or questions which have risen in connection with or in relation to the Master Agreement. More pertinently, the Tribunal then ruled on 19 December 2015 that the arbitral proceedings were not at an end and that it would continue with the arbitration. That was a ruling on jurisdiction as a preliminary issue.

57 Under s 10(3) IAA, if the arbitral tribunal rules that it has jurisdiction as a preliminary question or issue (or 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 determine the matter. RALL, in bringing this Originating Summons to set aside the Final Award for lack of jurisdiction is therefore outside the time limit set down in s 10(3).

58 By s 3 IAA, the Model Law (with the exception of Chapter VIII) has the force of law in Singapore. Under Art 16(2) a plea that the arbitral tribunal has no jurisdiction shall be raised not later than the submission of the statement of defence; also, a plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as possible as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings. RALL refused to so plead but wrote the letter dated 12 November 2015 to the SIAC. Knowing the settlement as a cause of bringing the arbitral proceedings to an end was strongly disputed by AGMS, RALL nonetheless refused to attend the Preliminary Meeting on 16 November 2015 to make its case before the arbitral tribunal. I note it is *not* part of RALL's case that it did not have the opportunity,

[73] PCB, vol 1, Tab 7, pp 150–151.

whether due to the short notice or otherwise, to attend the 16 November 2015 Preliminary Meeting. This is not surprising as the 16 November 2015 Preliminary Meeting was fixed about one month earlier on 15 October 2015.

59 Art 16(3) states explicitly what is implicit in s 10(3) IAA; *viz*, the arbitral tribunal has the discretion whether to rule on a plea that it has no jurisdiction either as a preliminary question or as an award on the merits. Both s 10 IAA and Art 16(3) clearly provide that if the arbitral tribunal rules that it has jurisdiction as a preliminary issue then any party may apply, within 30 days after having received notice of that ruling, to the supervisory court at the seat to determine the matter.

60 In my judgment, under s 10 IAA and Art 16(3), RALL's challenge to the jurisdiction of the Tribunal to continue with the arbitration after the MOU was executed is one that, having received an adverse ruling by the Tribunal as a preliminary question that it had jurisdiction to continue with the arbitration, required RALL, if dissatisfied, to bring that question to the supervisory court within 30 days of having received notice of that ruling from the Tribunal. Counsel for RALL contends instead that RALL's challenge is in time because Art 34(3) gives RALL 3 months to do so. That is, with respect, not correct. As the Tribunal decided this question as a preliminary issue the applicable provision is Art 16(3) and s 10(3) IAA. Where the arbitral tribunal chooses to decide on jurisdiction in its award on the merits (which is not the case here), then Art 34(3) gives the dissatisfied party an opportunity to set aside that ruling, and any other decisions or ruling made on the merits, within 3 months of that party receiving the award.

61 Art 16(3) of the Model Law was intended as an early avenue for parties to promptly and finally resolve jurisdictional disputes so as to save costs and

time, and it would defeat these purposes to allow a party to reserve jurisdictional challenges to the award on the merits (see Gary Born, *International Commercial Arbitration* (Wolters Kluwer, 2nd Ed, 2014) ("*International Commercial Arbitration*") at p 1104):

> … The better view, which is strongly supported by Article 16(3)'s text and the Model Law's purposes, is that a party must challenge the tribunal's jurisdictional ruling within the 30 day time period allowed under Article 16(3) and, if it does not, then it will not be permitted subsequently to do so in an annulment action under Article 34.
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> This is the clear import of the text of Article 16(3) which, by laying out a path to challenge the arbitrators' positive jurisdictional ruling, impliedly requires that this path be taken, failing which the ruling will be binding. …

62 It was therefore intended that a failure to raise a plea on jurisdiction within the 30-day limit should have a preclusive effect on subsequent setting aside proceedings at the seat (see the *Report of the Working Group on the Work of its Seventh Session* (A/CN 9/246, 6 March 1984) at para 51):

> It was observed … 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 arbitrability.

However, that party has *not* lost its passive remedy of resisting *enforcement* whether in another jurisdiction or as a domestic international award at the seat: see *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 ("*PT First Media (CA)*").

63 The Court of Appeal in its very comprehensive judgment on the active and passive remedies open to a party under the IAA and Model Law stated, albeit *obiter,* in *PT First Media (CA)* at [130] and [132] as follows:

> 130 … The more pertinent controversy is whether a party's active remedy under Art 34 remains available to it if it fails to trigger the instant controls available under Arts 13(3) or 16(3). In the light of the *travaux* which we have examined, it appears to us that there is a policy of the Model Law to achieve certainty and finality in the *seat of arbitration*. This is further borne out by the strict timeline of 30 days imposed under both Arts 13(3) and 16(3), the design of which seems to be to precipitate an early determination on issues of composition and jurisdiction so that the arbitration can continue. ***We would therefore be surprised if a party retained the right to bring an application to set aside a final award on the merits under Art 34 on a ground which they could have raised via other active remedies before the supervising court at an earlier stage*** when the arbitration process was still ongoing. …
>
> …
>
> 132 … Parties who elect not to challenge the tribunal's preliminary ruling on its jurisdiction are not thereby precluded from relying on its passive remedy to resist recognition and enforcement on the grounds set out in Art 36(1). That having been said, we are of the tentative view, as noted above, that the position might not be the same in relation to whether such a party may raise such a ground to initiate setting aside proceedings under Art 34.
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> [original emphasis in italics, emphasis added in bold italics]

It will be noted that *PT First Media (CA)* involved *enforcement* proceedings of a domestic international arbitration award at the seat. Here, RALL is applying to the supervisory court at the seat under Model Law to set aside the Award.

64 Perhaps two counter-arguments against this construction of Art 16(3) can be made.

65 First, the phraseology of Art 16(2) contemplates a party that is engaged in the arbitration; hence the reference to raising the plea not later than its statement of defence and the reference to a party not being precluded from raising a plea of no jurisdiction by appointing or participating in the appointment of an arbitrator. It is therefore unsurprising that texts on Art 16 mostly proceed on the footing that the objecting party is an active participant in

the arbitral proceedings (see Blackaby *et al*, *Redfern and Hunter on International Arbitration* (Oxford University Press, 6th Ed, 2015) ("*Redfern and Hunter*") at para 10.30):

> Parties are unlikely to succeed on any challenge to an award based on an objection that *they have failed to raise during the arbitration*. This is because they will usually be deemed to have waived that objection. …
>
> [emphasis added]

The authors of *Redfern and Hunter* referred to the English decision of *Thyssen Canada Ltd v Mariana Maritime SA* [2005] EWHC 219 ("*Thyssen Canada*"), observing in a footnote to the above-quoted paragraph (footnote 57):

> [In *Thyssen Canada*] it was held that a party *who takes part in arbitral proceedings* and fails to raise an objection as to a serious irregularity affecting the proceedings will lose the right to object, unless it can show that, *at the time that it took part or continued to take part in the proceedings*, it did not know and could not with reasonable diligence have discovered the grounds for the objection.
>
> [emphasis added]

66 These views support an argument that where a party has stayed away from the arbitral proceedings altogether or has walked out at some early stage, *eg*, before filing its statement of defence, then Art 16's time limit is not binding on it. However, I note that against this, s 10 IAA does not contain such phraseology.

67 Secondly, there is authority that an option remains open to a party to choose to leave the arbitral proceedings in protest, in which case the time limits in Art 34 (and therefore by extension, Art 16 as well) do not apply. This can be found in the first instance decision of *Astro Nusantara International BV v PT Ayunda Prima Mitra* [2013] 1 SLR 636 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 The learned trial judge found support in the *UNCITRAL Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration* (A/CN 9/264, 25 March 1985), p 39 at paras 8–9:

> 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.
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> 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]

69 This has been picked up by Gary Born in *International Commercial Arbitration* at p 1105:

> *The only exception to this requirement, that a party challenge the arbitrators' positive jurisdictional ruling immediately (or within 30 days) under Article 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.
>
> Other courts have adopted similar interpretations of the Model Law, holding that a party must challenge an arbitral tribunal's positive jurisdictional ruling under Article 16(3), rather than awaiting a final award and challenging jurisdiction under Article 34. *Although these decisions do not address the point, they presumably permit an exception where a party does not participate in the arbitral process at all.*
>
> [emphasis added]

70 The authors of *Singapore Arbitration Legislation Annotated* (Informa, 2nd Ed, 2016), Robert Merkin and Johanna Hjalmarsson, also seem to recognise the existence of an exception where a party does not participate at all in the proceedings (at pp 148–149):

> The manner of the challenge depends upon the respondent's attitude to the arbitration. *The respondent 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.* A further possibility is that the respondent may use the mechanism in Model Law, art 16(2), and appear in the arbitration under protest. … Making an objection preserves his right to challenge the substantive award on the jurisdictional point at some later stage. … The result is that if a party has not objected to the arbitrators' assertion of jurisdiction but has proceeded with the hearing on the merits, the award cannot be challenged on jurisdictional grounds.
>
> [emphasis added]

71 On balance, and with respect, I think the Court of Appeal's statements in *PT First Media (CA)* (referred to at [63] above) reflect the correct position. Where the arbitral tribunal chooses to decide jurisdiction as a preliminary question or issue, then all the considerations of finality, certainty, practicality, cost, preventing dilatory tactics and settling the position at an early stage at the seat militate against allowing a respondent to reserve its objections to the last minute and indulge in tactics which result in immense delays and cost.

72 This very case is a good example. RALL stayed away from the arbitration, did not file a response, did not nominate an arbitrator, refused to pay any fees, did not file a statement of defence and then raised a jurisdictional challenge by way of a terse letter and absented itself from the preliminary meeting, refused to file any submissions in support of its stand and allowed the arbitration to proceed without participation. Why should a party in RALL's position be entitled to take up a challenge to jurisdiction *at the seat* in blatant disregard of Art 16 and the policy reasons behind the 30-day time limit? This amounts, in my view, to an abuse of process. It allows a party to wait till the opposing party goes through the whole arbitral process, obtains an award, only to be met by a setting aside application at the seat on the ground of a lack of jurisdiction.

73 However, even if RALL was not precluded from raising its Art 34(2)(*a*)(iii) jurisdictional objection at this late stage, I find that the objection is not sustainable on these facts as the MOU did not terminate the Tribunal's mandate.

74 I note for completeness that AGMS had argued, in the alternative, that the MOU had been rescinded for misrepresentation and therefore could not be the basis on which the arbitration was terminated.[74] However, even if AGMS's

entry into the MOU had been induced by a misrepresentation, the MOU would only be voidable and not void. AGMS was unable to point to any clear and unequivocal act indicating that it had elected to rescind the MOU. All that AGMS did was to proceed with the arbitration, which can hardly be said to be conduct unequivocally indicating that the entire MOU (which contained other rights and obligations unrelated to the arbitral proceedings) was rescinded. Be that as it may, even if the MOU remained in force, I had previously found that it did not terminate the reference to arbitration nor the Tribunal's mandate. Therefore my decision on the Jurisdiction Issue remains.

The Natural Justice Issue

75 RALL's second ground was that it was not given proper notice of the arbitral proceedings or was otherwise unable to present its case within the meaning of Art 34(2)(*a*)(ii) of the Model Law read with s 24 of the IAA and/or that a breach of natural justice under s 24(*b*) of the IAA had occurred. In support of these submissions RALL alleged that: (i) several key documents and correspondence (in particular, the notes of evidence for the substantive hearing) were not forwarded to it, and (ii) RALL was deprived of an opportunity to respond to AGMS's submissions on the costs of the arbitral proceedings.

76 I have little hesitation in saying this ground has no merit whatsoever. As noted above, RALL chose not to participate in the arbitration despite being given due notice of each stage and having ample opportunity to do so. RALL cannot fulfil any of the requirements of Art 34(2)(*a*)(ii) or s 24 of the IAA to make out its case. It will be a travesty of language and legal principle for RALL to have acted in the way that it did in this arbitration and then claim it was denied

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[74] Defendant's Written Submissions at paras 94–104.

natural justice in that it was unable to present its case or it did not have an opportunity to be heard.

77 I also have little hesitation in dismissing RALL's submission[75] that the arbitration proceedings were conducted by AGMS's counsel and the majority arbitrators in an irregular manner and that AGMS's counsel were "deliberately not copying/sending documents/correspondence in the arbitration to [RALL] to keep it in the dark and where [RALL] did not have sufficient opportunity to prepare its defence or responses and to be heard and defend itself including as regards the notes of evidence of the merits hearing were deliberately withheld from [RALL] causing it prejudice." This seems to be, with respect, an overly enthusiastic but nonetheless misplaced submission.

78 RALL's complaint boils down to not being forwarded a copy of the notes of evidence of the substantive hearing held on 21 June 2016. RALL asserted that if the notes of evidence had been forwarded, it *could* have taken steps (*eg*, instructing counsel to put in submissions) in the five months until the award was delivered on 24 November 2016, and that it had thereby suffered prejudice.

79 RALL deliberately chose to absent itself from that hearing. If indeed it suffered any prejudice, something which I am constrained to doubt, it was entirely of its own doing. I do not think that the Tribunal's omission to furnish RALL with a copy of the notes of evidence occasioned RALL any prejudice at all. Given RALL's near-total disengagement from the arbitral proceedings, it was far from clear to me that RALL would have abruptly started participating in the proceedings upon receiving the notes of evidence. In this regard I note that RALL only saw fit to request a copy of the notes of evidence on 17 February

[75] Plaintiff's Written Submissions, p 14 at para 16(b).

2017;[76] almost five months after the Tribunal had informed the parties of the close of proceedings on 19 September 2016.[77]

80 RALL was unable to cite me any authority to the effect that a failure to supply a party with a copy of the notes of evidence, much less when applied to the facts of this case, constitutes a breach of natural justice serious enough to justify setting aside the award. RALL only referred to a set of practice guidelines titled "International Arbitration Practice Guideline: Party Non-Participation" published by the Chartered Institute of Arbitrators:

> Paragraph 4: Communication with a non-participating party
>
> …
>
> (c) … if a hearing is held in the absence of a party, arbitrators may require the production of a transcript of the hearing and for it to be sent to all the parties as soon as available.

81 These Practice Guidelines merely commend providing absent parties with the transcript as a matter of good practice; that recommendation said "may", not "must". On the facts of this case, I did not think it was incumbent on the Tribunal, SIAC or AGMS to send a copy of the notes of evidence to RALL. It is noteworthy that RALL had not paid any part of its share of the arbitration fees. It is also beyond argument that transcribers' fees would have been incurred by AGMS to have notes of evidence of the proceedings drawn up. Given its conduct, RALL's argument that it was *entitled* to a copy of the notes of evidence cannot on any view be sustained.

82 RALL also referred to a list of various pieces of correspondence between AGMS and SIAC which were not forwarded to RALL.[78] These were in large

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[76] KAL-1, p 39 at para 159.

[77] PCB, vol 1, Tab 7, p 158 at para 107.

[78] Plaintiff's Written Submissions at para 320.

part queries raised by AGMS to the SIAC on various matters, such as the consequences of RALL's non-participation and the reasons for the Tribunal's decision to grant extensions to RALL.[79] None of these exchanges can be said to have resulted in any prejudice to RALL; the SIAC's replies noted that RALL was not precluded from participating, and the three-week extensions granted to RALL were, as RALL's counsel accepted, "generous".[80]

83 I note that quite a number of the important pieces of correspondence were sent to RALL. RALL confirmed that it had received the Notice of Arbitration and the Statement of Claim, as well as most of the early communications and the later administrative emails (after the SIAC obtained an alternative e-mail address for RALL when it surfaced that RALL was no longer represented by its previous lawyer). RALL was copied on all important developments, including the appointment of the arbitrators, the constitution of the Tribunal, the Tribunal's interim order, notice of the preliminary hearing, notice of the substantive hearing, the Tribunal's request for post-hearing written submissions, AGMS's submissions prior to and after the substantive hearing, and AGMS's costs submissions.[81] In the circumstances, I did not think that RALL was prejudiced in any way by not being copied in on other correspondence. This complaint has no substance at all.

84 RALL also complained that it had no opportunity to respond to the costs submissions filed by AGMS. That is untrue: RALL chose not to tender any submissions, either addressing costs or in response to AGMS's submissions, although it was certainly free to do so, having received AGMS's submissions

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79 KAL-1, pp 16–20.

80 Notes of Evidence, 30 November 2017, p 9 at lines 13–14.

81 PCB, vol 1, Tab 7, pp 140–158. Notes of Evidence, 30 November 2017, p 8 at lines 25–28.

on costs as early as 17 July 2016.[82] RALL took issue with AGMS's costs submissions on the basis that they were a "simple 2 page table with no particulars provided",[83] but at no point did RALL request particulars from AGMS, nor indeed raise any objection at all. The emails which RALL said were not copied to it were queries from AGMS to the SIAC as to when the award would be released, and had nothing to do with the issue of costs.[84] Having chosen to absent itself from the proceedings, I do not see how RALL can say that it was unable to present its case on costs or that there was a breach of natural justice.

The Public Policy Issue

85 Thirdly, RALL submits that the making of the award was induced or affected by fraud or corruption within the meaning of s 24(*a*) of the IAA, and/or that the award is in conflict with the public policy of Singapore within the meaning of Art 34(2)(*b*)(ii) of the Model Law.

86 RALL's submissions on this issue rests on two grounds:

(a) First, the Master Agreement was procured by and was a means of furthering bribery and corruption in Sri Lanka, and an arbitral award enforcing the terms of such a contract would be in conflict with public policy of Singapore and should be set aside under Art 34(2)(*b*)(ii) of the Model Law read with s 24 of the IAA.[85]

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82 KAL-1, p 33 at para 134.

83 Plaintiff's Written Submissions at para 318.

84 KAL-1, p 34 at para 137.

85 Plaintiff's Written Submissions at para 328.

(b) Secondly, Cl 3.1 of the Master Agreement requires the performance of an act which is illegal by the law of the place of performance (*ie*, Sri Lanka), and therefore an arbitral award enforcing the terms of such contract would be in conflict with public policy of Singapore and should be set aside under Art 34(2)(*b*)(ii) of the Model Law read with s 24 of the IAA.[86]

87 Here, RALL alleges that Mr Senadhipathi had bribed the then-chairman of RALL, who was also a government servant, to cause RALL to enter into various contracts including the Master Agreement. Counsel for RALL then makes a great leap, with respect, bereft of any logic, and submits that the Final Award was tainted "by fraud/corruption" and its being challenged.[87] These allegations do not fall within s 24(*a*) of the IAA, which contemplates a situation where the award itself (rather than the contract between the parties) is tainted or induced by fraud or corruption.

88 I note that RALL had, in its written submissions, made assertions that the majority's decision was "farcical", "devoid of proper legal reasoning" and "highly suspicious".[88] To the extent that this amounted to an allegation that the Award had been fraudulently obtained, I had no hesitation in dismissing it. These were very serious allegations for which RALL did not present a shred of evidence.

Whether the Master Agreement was procured by bribery

89 The basis of RALL's allegations of bribery and corruption were the pending trials of Mr Fernando and Mr Senadhipathi (the chairpersons of RALL

86 Plaintiff's Written Submissions at para 327.

87 Plaintiff's Written Submissions at para 16(c).

88 Plaintiff's Written Submissions at para 330.

and AGMS respectively at the material time) on charges of corruption in the Sri Lankan courts.[89] It was not disputed that at the time of the proceedings before me, the trials had not yet commenced, much less resulted in any convictions.[90] Neither was it disputed that under Sri Lankan law, Mr Fernando and Mr Senadhipathi must be presumed innocent until proven guilty.[91] Until they have been convicted and their avenues for appeal exhausted, there is no basis for me to find that the award would perpetuate or enable corruption or bribery in Sri Lanka. The allegations of corruption and bribery on the evidence before me are only allegations.

90 Counsel for RALL then suggested that even if the evidence was insufficient for a finding of corruption, it was at least sufficient to justify an adjournment of the present proceedings until the determination of the criminal proceedings in Sri Lanka.[92] However, counsel was unable to give me any indication as to when the proceedings would likely be concluded. The Magistrate's Court indictments, comprising 19 corruption charges against eight persons, were fixed for trial on 26 February and 26 March 2018. The High Court indictments, comprising 47 charges against two persons, were fixed for trial on 19–22 March 2018. It is highly unlikely that such important and numerous criminal charges can be determined within such a short of period of time (not to mention the prospect of appeals). I therefore did not think it would be appropriate for me to adjourn these proceedings indefinitely. I note, however, that in the event convictions are eventually secured, RALL may be able to

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89 Plaintiff's Written Submissions at para 324.

90 Notes of Evidence, 30 November 2017, p 4 at lines 28–31.

91 Notes of Evidence, 30 November 2017, pp 5–6.

92 Notes of Evidence, 30 November 2017, p 25 at lines 25–28; Plaintiff's Written Submissions at paras 331–332.

invoke public policy as a ground to resist the enforcement of the arbitral award (for example under s 31(4)(*b*) of the IAA).

Whether Cl 3.1 of the Master Agreement required the performance of an illegal act

91 Cl 3.1 of the Master Agreement required that RALL "provide its utmost assistance" to AGMS in respect of the various projects they had jointly undertaken, such as the Galle Floating Armoury Project. RALL argued that AGMS's request for assistance – for RALL to obtain a declaration from the MOD confirming the legitimacy of the Galle Floating Armour Project – would be a "direct interference with the dispensation of justice, law and order" as RALL did not have the power or authority to procure from the Sri Lankan government AGMS's requested assurances.[93] Since the performance of Cl 3.1 of the Master Agreement would be illegal by the place of performance (*ie*, Sri Lanka), an award which enforced the performance of such an agreement would be contrary to the public policy of Singapore.

92 Importantly, the Tribunal considered this very issue and found that the Master Agreement "clearly show[ed] no sign of illegality or even in the slightest, indicate[d] that such Agreement and/or Agreements are contrary to public policy".[94] This finding of fact is binding on the parties and cannot be reopened by a supervisory court (*AJU v AJT* [2011] 4 SLR 739 at [65]).

93 I find it is also quite telling that both RALL and AGMS are still presently engaged in joint ventures on the maintenance of armouries in the littoral states in the Indian Ocean. Indeed, RALL itself stated that the Master Agreement "[has] not been terminated and still operates today".[95] As noted above, Mr

93 1st Affidavit of John Anthony Shivaji Felix dated 20 April 2017 at para 22.

94 PCB, vol 1, Tab 7, p 197 at para 216.

Kulawewe, in his affidavit affirmed on 21 April 2017, confirmed that at all material times RALL was owned by the Government of Sri Lanka and confirmed its businesses set out at [3] above. If these agreements and the Master Agreement were entered into or induced by corruption or as a result of corruption, or tainted with (unspecified) illegality, it seems quite startling to me that they have not taken any steps to repudiate or terminate these agreements.

94 Given that RALL had affirmed the Master Agreement, and on their own evidence continues the business described above, I do not see how RALL can seriously take the position that its performance of the Master Agreement was illegal.

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95 Defendant's Written Submissions at para 14; KAL-1 at para 104.

Conclusion

95 For the foregoing reasons, I found that none of the grounds relied on by RALL warranted a setting aside of the Final Award. I therefore dismissed OS 198/2017 in its entirety.

96 I awarded costs to AGMS fixed at $30,000, plus disbursements of $31,278.43 as was agreed between the parties.

Quentin Loh
Judge

Arul Andre Ravindran Saravanapavan and Renaro Daniel Ezra Bunyamin (Arul Chew & Partners) for the plaintiff;
Sarbjit Singh Chopra and Ho May Kim (Selvam LLC) for the defendant