Interview with Judith Gill QC, Arbitrator, 20 Essex Street
by Kate Apostolova, Freshfields Bruckhaus Deringer

Singapore Court of Appeal Decision: Does Art 16(3) Model Law Preclude Setting Aside Applications?
by Eunice Chan, Drew & Napier LLC

To enforce or not to enforce annulled arbitral awards?
by Kirsten Teo, Eversheds Harry Elias LLP

Click below to join the Young Singapore International Arbitration Centre (YSIAC) group on LinkedIn to get information and updates on developments at YSIAC.
1. What made you decide to enter the world of international arbitration?

I gravitated towards arbitration from the outset as a newly qualified solicitor. I had the good fortune to work on two large international arbitrations at a very early stage of my career and thoroughly enjoyed them. I think what I liked most was the degree of hands-on involvement in the case which arbitration afforded. Despite being a young solicitor, I found opportunities when working on these arbitrations for advocacy, both oral and written which, at least in those days, seemed harder to come by when dealing with court proceedings. I was also genuinely attracted by the flexibility arbitration offered in tailoring the procedure to the particular needs of the case.

2. What do you enjoy most about being an arbitrator and what do you enjoy least?

There is so much that I enjoy about being an arbitrator! Obviously there is the intellectual challenge of drafting awards which I thoroughly enjoy but beyond that I find it very satisfying to work with colleagues from all over the world who may have very different perspectives but all of whom have important input into the process. I also like the independence and flexibility that comes with being an arbitrator. My role is now simply to decide cases on the basis solely of their merit and in some respects that is quite liberating in comparison with the counsel role of having to argue your client’s case. On the downside, being an arbitrator involves rather more self-help and administration than I was used to as a partner in a global law firm!

3. What is the biggest change in international arbitration you have witnessed?

The most obvious change that I have witnessed is the huge increase in the number of arbitrations and variety of arbitration practitioners involved. Solid data is hard to come by, but my sense from being involved in this practice area over more than three decades is that the number of arbitrations has increased considerably with the globalisation of trade and the inevitable concerns the parties have, rightly or wrongly, about litigating in the domestic courts of the counterparty. There was a time when it was common, even in international arbitrations, for local counsel to appear on both sides and the procedures largely to mimic the relevant court processes. Of course that still happens in some cases but it is much rarer now and international arbitration lawyers from different backgrounds, appearing before arbitrators from equally diverse legal cultures, is now commonplace. This makes it all much more fun!

4. What is your favourite international arbitration decision?

My favourite decision was a ‘bet the company’ licensing case I argued as counsel many years ago. The other side only had to succeed on one of the alleged grounds for termination of the licence and I was very concerned, having received 300 pages of single line spaced memorial that the tribunal would succumb to the sheer weight of the allegations pouring in against my clients. Such lengthy pleadings were very unusual in those days and I feared that the three days it would take them to read this diatribe would leave them poisoned against us. I was wrong.
This high calibre tribunal saw through the tactic and delivered an award of a modest 50 pages which rejected the claim in its entirety.

5. On the flip side, do you have an international arbitration decision you do not like?
Yes, but I am not going to tell you because I will sound like a sore loser.

6. If there is one thing about the practice of international arbitration that you could change, what would it be?
The repetitiveness of written submissions. I think there are many positives from the use of detailed written submissions, including that they reduce the risk of fundamental last-minute changes of case because the parties have to think through their case strategy at an earlier stage. But I wish counsel would trust arbitrators to read and digest the submission thoroughly without feeling the need to emphasise points of their case by repeating them over and over again (often using identical language, courtesy of the cut and paste function!).

7. What is the most exotic destination you have been to as an arbitrator?
I always thought myself very fortunate to have had an arbitration in Barbados concerning a luxury beachfront property. Obviously a site visit was essential. However that is rivalled, at least as regards a place of interest, by an upcoming hearing in Kathmandu, Nepal.

8. If not an arbitrator, what would you be?
If I was not an arbitrator, I would like to think that I would have become an adventurer or an explorer. But in truth I would probably be an accountant.

9. What do you enjoy doing in your free time?
Sailing, skiing, going on long walks, eating good food, and generally having as much fun as I can.

10. What advice would you give younger lawyers today who would like to be successful in their legal careers?
Master the detail of your cases and remember that technology is there to help you be more efficient, not to stop you thinking.

11. What do you think young lawyers should do to gain more oral advocacy experience?
Take every opportunity that presents itself. Some of my early oral advocacy was in regional County Courts defending relatives of important clients who happened to have a minor brush with the law or some consumer dispute. It wasn’t very glamorous for a City lawyer but I learned a huge amount from it.

12. What changes do you think we will see in arbitration over the next ten years?
I think arbitration will continue to flourish but we will see some changes over that timescale. The drive for greater diversity will continue, in particular for arbitrators to be more representative of the wide range of users of arbitration. We have made a start on gender diversity but there is still a long way to go, particularly with ethnic and geographical diversity. I also think that there will be a continuing push for greater efficiency. This is not just about cost-cutting, but making sure that the arbitration is conducted in a way befitting the particular case rather than going through the motions of a standard procedure. I am increasingly seeing parties taking the initiative to agree upon expedited or streamlined procedures to deal with their disputes, such as limiting the disclosure process and witness evidence to be submitted. I expect this to be commonplace in the next decade. But no, I do not see humans being replaced by computerised decision makers. That will take at least 20 years!
Art 16(3) of the UNCITRAL Model Law on International Commercial Arbitration (“Model Law”) provides that if a tribunal issues a preliminary ruling that it has jurisdiction, a respondent may appeal the tribunal’s ruling to the relevant court within 30 days.

Can a party who loses a jurisdictional challenge still set aside the final award for lack of jurisdiction, if that party did not seek curial review of its unsuccessful jurisdictional challenge under Art 16(3) of the Model Law?

In a recent decision by the Singapore Court of Appeal in Rakna Arakshaka Lanka Ltd v Avant Garde Maritime Services (Pte) Ltd [2019] SGCA 33 (“Rakna”), the key issue was whether the party had participated in the arbitration proceedings. A party who chooses not to participate in the proceedings does not contribute to the wastage of costs, and therefore retains its entitlement to apply to the seat Courts to set aside the award for lack of jurisdiction.

Facts
The Appellant, Rakna Arakshaka Lanka Ltd (“RALL”), was a Sri Lankan company specialising in providing security and risk management services. The Respondent, Avant Garde Maritime Services (Pte) Ltd (“AGMS”), another Sri Lankan company, was in the business of providing maritime security services.

Prior to March 2011, acting under the auspices of the Ministry of Defence and Urban Development of the Republic of Sri Lanka (“MOD”), the parties agreed to form a private-public partnership to carry out certain projects. The parties entered into a Master Agreement that incorporated 6 separate agreements, pursuant to which they undertook various projects including one called the Galle Floating Armoury Project. The Master Agreement provided for disputes to be settled by arbitration in Singapore in accordance with the rules of the Singapore International Arbitration Centre (“SIAC”).

Following the election of a new president of Sri Lanka in 2015, the new government commenced investigations into the dealings between RALL and AGMS. AGMS took the position that there was no illegality in the operation of the Galle Floating Armoury Project. AGMS asked RALL to obtain, inter alia, a letter from the MOD and/or the government to confirm that AGMS’s business under its public-private partnership with RALL was legitimate and carried out under the authority of the government through MOD. RALL did not do so.

AGMS commenced arbitration proceedings against RALL, claiming that RALL had breached the Master Agreement by failing to provide utmost assistance to AGMS. The Notice of Arbitration was sent to RALL, but RALL did not file any response. SIAC nominated an arbitrator on behalf of RALL after the latter failed to do so.

Subsequently, RALL wrote to SIAC stating that AGMS had agreed to withdraw the matter on the basis of a memorandum of understanding (“MOU”) between parties. RALL requested the Tribunal to “lay by the proceedings of the Arbitration”. However, AGMS informed the Tribunal that it was not in a position to withdraw the arbitration and requested an award granting an interim injunction preventing RALL from terminating the Master Agreement. The Tribunal issued an Interim Order in which it held that RALL’s failure to ensure the continuity of the Master Agreement went to the root of the MOU, and that the dispute in the arbitration was therefore still alive. The Tribunal proceeded with the arbitration and issued an award in favour of AGMS. RALL did not participate in the arbitration.

RALL commenced proceedings to set aside the award. The Singapore High Court dismissed RALL’s application to set aside the award. RALL appealed.

The Court of Appeal’s Decision
The Singapore Court of Appeal held that it is not necessary for parties to file a formal objection, or a plea in the legal sense of the term, in order to engage Art 16(3) of the Model Law. On the facts, Art 16(3) of the Model Law was engaged as:

(a) RALL had challenged the Tribunal’s jurisdiction. While there was no formal pleading by RALL which asserted a lack of jurisdiction, RALL had
furnished the Tribunal with its objection to jurisdiction by way of its letter to the SIAC. RALL’s letter had stated that the parties had “reach[ed] a settlement”, and “it is no longer required to proceed with the above matter”. This letter was equivalent to objecting to the Tribunal’s continued jurisdiction over the matter on the basis that there was no longer any dispute which the Tribunal could deal with. T

(b) The Tribunal had clearly made a preliminary ruling on its jurisdiction to deal with the matter within Art 16 of the Model Law, when it held that the MOU had not been implemented and the dispute referred to in the Statement of Claim was “still alive” and should be proceeded with.

The preclusive effect of Art 16(3) of the Model Law does not extend to a respondent who fails in its jurisdictional objection, but does not participate in the arbitration proceedings. Such a respondent has not contributed to any wastage of costs, or the incurring of any additional costs that could have been prevented by a timely application under Art 16(3) of the Model Law.

The position is different if a respondent fails in its jurisdictional objection but then participates in the arbitration proceedings. By doing that, the respondent would have contributed to wasted costs. It is just to bar such a respondent from bringing a setting aside application based on the ground of lack of jurisdiction, as such an application is outside the time limit prescribed in Art 16(3) of the Model Law.

In Rakna, the Court of Appeal set aside the Tribunal’s award as it contained decisions on matters that were beyond the scope of the submission to the arbitration. In the Court’s view, the MOU had effected a settlement and resolved the dispute between the parties. Once the dispute was resolved, ipso facto there was no longer a dispute which could be arbitrated on. The Tribunal thus had no jurisdiction to conduct the arbitration proceedings.

The Court of Appeal rejected RALL’s other challenges against the Award.

Discussion
At first blush, a respondent may think that the path is clear for him to choose not to participate in the arbitration proceedings, if he takes the view that the tribunal lacks jurisdiction over the dispute. However, such a strategy is a gamble. Should the respondent ultimately fail in challenging the tribunal’s jurisdiction, he will have lost the opportunity to present any substantive defences to the claim.

A strategy of non-participation preserves a respondent’s ability to set aside the final award based on jurisdictional objections and saves the costs of participating in the arbitration, but comes at the cost of sacrificing the substantive defences which the respondent could have raised if he had participated in the arbitration. Such a strategy may only be attractive to a respondent who has a meritorious case on jurisdiction, but a weak defence on the merits.

A respondent who has reasonable defences may not want to give up his chances of defeating the claim on its merits. Where such a respondent loses his preliminary jurisdictional challenge but intends to participate in the merits hearing, his options are as follows.

First, he can seek curial review on the jurisdiction decision within the time limit in Art 16(3) of the Model Law.

Secondly, if he does not seek curial review, the preclusive effect of Art 16(3) will prevent him from making a subsequent setting aside application on jurisdictional grounds. However, it is important to bear in mind that Art 16(3) is not a “one-shot” remedy: see Pt First Media TBK v Astro Nusantara International BV and others and another appeal [2014] 1 SLR 372. The preclusive effect of Article 16(3) does not extend to the respondent’s rights to resist recognition and enforcement of any award. For some respondents, resisting enforcement may be enough.
The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention") prescribes mandatory, uniform international rules for the recognition and enforcement of international arbitration agreements and awards in the Contracting States. Pursuant to Article V(1)(e) of the New York Convention, an award may be denied recognition and enforcement by the enforcement court if a competent court in the arbitral seat or primary jurisdiction annuls the award (Gary B. Born, *The New York Convention: A Self-Executing Treaty*, 40 Michigan Journal of International Law 115 (2018). ([https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1941&context=mjil](https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1941&context=mjil)).

In view of the permissive language in Article V(1)(e) of the New York Convention, enforcement courts have the discretion to: (a) treat the annulled award as an invalid underlying judgment that ceases to exist, hence there is nothing to enforce; (b) accord some deference to the annulment judgment but reserve the right to enforce the award if deemed justified according to the domestic laws of the enforcement jurisdiction; or (c) disregard the annulment judgment and make an independent decision on whether or not to enforce the annulled award. As the Honourable the Chief Justice of Singapore Sundaresh Menon noted in his keynote address at the CIArb London Centenary Conference on 2 July 2015, “[T]here is growing uncertainty over the international framework governing the recognition and enforcement of awards. There is, for instance, a lack of international consensus on the effect of an order by the seat court setting aside an award in subsequent enforcement proceedings. And we have also seen the re-litigation of identical issues in different enforcement proceedings in different courts. This is bound to increase costs and further erode the value of finality.”

**The Territorial, Westphalian and Transnational Theories**

Whether or not enforcement courts decide to enforce an annulled award is influenced by how the enforcement courts characterise the nature and role of the arbitral seat. On a broad spectrum, there are three theories namely: (a) the seat or territorial theory i.e. where an award has been set aside by the competent authority in the country where it was rendered, it ceases to exist and is not enforced; (b) the Westphalian or multi-local theory pursuant to which annulment decisions do not conclusively determine enforcement unless the annulment is based on internationally recognised grounds; and (c) the transnational legal autonomy or delocalisation theory according to which the annulment decision has no bearing on enforcement, and an annulled award may be enforced unless it falls within the grounds to refuse enforcement under the domestic law of the enforcement court (see Albert Jan van den Berg, *Enforcement of Annulled Awards*, 9 (2) ICC International Court of Arbitration Bulletin 15, 15 (1998), Julian Lew, *Achieving the Dream: Autonomous Arbitration*, 22 (2) Arbitration International (2006), and Emmanuel Gaillard, *Legal Theory of International Arbitration* (Martinus Nijhoff Publishers, 2010)).

As an example of the prevailing seat theory, the Singapore Court of Appeal observed in 2013 that it was doubtful whether an enforcement court might recognise and enforce a foreign award which had been set aside by courts in the arbitral seat. This is because the contemplated *erga omnes* effect of a successful application to set aside an award would generally lead to the conclusion that there was simply no award to enforce: see [76] and [77] in *PT First Media TBK v Astro Nusantara International BV and others* ([2013] SGCA 57 ([http://www.uncitral.org/docs/clout/SGP/SGP_311013_FT_1.pdf](http://www.uncitral.org/docs/clout/SGP/SGP_311013_FT_1.pdf)). This observation accords with Professor Peter Sanders’ opinion that if an award is annulled, the courts will refuse enforcement as “there does not longer exist an arbitral award and enforcing a non-existing arbitral award would be an impossibility or even go against the public policy of the country of enforcement” (Peter Sanders, *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 1955(6) Netherlands Int’l Law Review 43 at p. 109-110 ([https://www.arbitration-icca.org/media/1/13378453762270/new_york_convention_on_the_recognition_and_enforcement_of_foreign_arbitral_awards.pdf](https://www.arbitration-icca.org/media/1/13378453762270/new_york_convention_on_the_recognition_and_enforcement_of_foreign_arbitral_awards.pdf)).

**The strict public policy exception in the US**

In *TermoRio S.A. E.S.P. v. Electrantra S.P.*, 487 F.3d 928, 939 (D.C. Cir. 2007), the D.C. Circuit affirmed the District Court’s decision to refuse enforcement of an award on the grounds that Colombia’s
highest administrative court – at the arbitral seat - had annulled the award, accepting that there is a “narrow public policy gloss” on Article V(1) (e) of the New York Convention and that a foreign judgment is unenforceable as against public policy to the extent it is repugnant to fundamental notions of what is decent and just in the United States. The appellants had not alleged or provided any evidence to suggest that the proceedings before the Colombian court or the annulment judgment violated any basic notions of justice. (https://public.fastcase.com/ppbqSQPNDaJE%2F8PlIk0b8PrkFU3pS%2Fnm%2BBqmAUjDak%3D)

In Getma International v Republic of Guinea 862 F. 3d 45 (D.C. Cir, 2017), Getma sought to enforce in the United States an award annulled by the Common Court of Justice and Arbitration of the Organization for the Harmonization of Business Law in Africa (“CCJA”), a court of supranational jurisdiction for Western and Central African States. The D.C. Circuit on 7 July 2017 affirmed the District Court’s decision that Getma had failed to satisfy the standard i.e. that the CCJA’s annulment of the award was repugnant to the fundamental notions of morality and justice. (https://public.fastcase.com/ppbqSQPNDaJE%2F8PlIk0b8FA2mhcajt2IGlulVhnyG5kznuwGJQKB%2B5i5iLlfg)

As was discussed on this blog (http://arbitrationblog.kluwerarbitration.com/2017/08/24/1958-new-york-convention-turning-battle-judgments-latest-us-attitude-towards-enforcement-annulled-awards/), in Thai-Lao Lignite (Thailand) Co, Ltd v. Gov’t of the Lao People’s Democratic Republic 864 F. 3d 172 (2d Cir, 2017), the Second Circuit on 20 July 2017 affirmed inter alia the District Court’s order refusing enforcement of an award annulled by the Malaysian courts. The 2009 award issued by a Malaysian tribunal in favour of the claimants was initially confirmed by the Southern District in 2011 before it was set aside by the Malaysian courts in 2012. The Southern District subsequently vacated its enforcement judgment, finding that the New York Convention required it to give effect to the later Malaysian decision, which did not “rise to the level of violating basic notions of justice such that the Court here should ignore comity considerations.” The Second Circuit decided that the Federal Rule of Civil Procedure 60(b)(5) which permits District Courts to “relieve a party...from a final judgment” when the judgment “is based on an earlier judgment that has been reversed or vacated,” applies to a District Court’s consideration of a motion to vacate a judgment enforcing an arbitral award that has since been annulled by courts at the seat. The enforcement courts analyse the Rule 60(b) considerations, including timeliness and the equities, and assign significant weight to international comity in the absence of a need to vindicate “fundamental notions of what is decent and just” in the United States. (https://public.fastcase.com/ppbqSQPNDaJE%2F8PlIk0b8OQkVmimTaSTIzVeAQnyNHLRWmPv7bbDw2rkkzEP%2F1y).

The public policy exception in the United States - i.e. that the annulment of the award has to run counter to the United States public policy and be repugnant to the fundamental notions of what is decent and just in the United States - is a stringent one. As was discussed on this blog (http://arbitrationblog.kluwerarbitration.com/2016/09/14/perspectives-new-york-convention-laws-united-states-us-public-policy-gloss-article-v1e/), this exception was met in Corporación Mexicana De Mantenimiento Integral, S. De R.L. De C.V. v. Pemex-Exploración Y Producción, No. 13-4022 (2d Cir, 2016) which is the first federal appellate decision to confirm an annulled award. The Second Circuit held that the Southern District did not abuse its discretion in confirming the award annulled by the Mexican courts. The high hurdle of the public policy exception was surmounted in this case “by four powerful considerations: (1) the vindication of contractual undertakings and the waiver of sovereign immunity; (2) the repugnancy of retroactive legislation that disrupts contractual expectations; (3) the need to ensure legal claims find a forum; and (4) the prohibition against government
expropriation without compensation.” (https://public.fastcase.com/ppbqSQpNDaJE%2F8PLlK0b8B JdLY%2F2FOUW4yGkGxJ20OH25U%3D). Normative policing was discussed on this blog (http://arbitrationblog.kluwerarbitration.com/2017/12/13/18965/).

Does the possibility that the award could be annulled at the arbitral seat result in a stay or suspension of the enforcement of the award? This appears to be unlikely. In the judgment on 24 April 2019 of Science Applications International Corporation v The Hellenic Republic (S.D. N.Y. 2019), the District Court decided inter alia not to disturb the 2013 D.C. court decision declining to adjourn enforcement of the award until after the resolution of the annulment action in the Greek courts. An award was rendered against the Hellenic Republic in 2013. The prevailing party successfully obtained a judgment in D.C. confirming the award in 2017 (https://public.fastcase.com/ppbqSQpNDaJE%2F8PLlK0b8Iyn3ugkOhUA%2Bo35lZmacs%3D) and sought to attach the state’s assets to satisfy the judgment, so it moved the District Court in New York for an order finding that a reasonable period of time has elapsed since judgment was entered pursuant to 28 U.S.C. § 1610(c). According to the Foreign Sovereign Immunities Act, the property of an agency or instrumentality of a foreign state within the United States may not be attached “until the court has ordered such attachment and execution after having determined that a reasonable period of time has elapsed following the entry of judgment and the giving of any [required] notice.” Meanwhile, proceedings were ongoing in the Greek courts to invalidate the award. The District Court in New York held that these circumstances did not prevent it from finding that a reasonable period of time, which was 11 months since the D.C Court entered judgment on 29 May 2018, had elapsed. (https://public.fastcase.com/ppbqSQpNDaJE%2F8PLlK0b8Bn%2Fk6 inadvertently added to the text in PDF). According to the international comity test, an annulment decision should be recognised on grounds of comity (i.e. the award is not enforced) unless the annulment decision is “procedurally unfair or contrary to fundamental notions of justice” (William W. Park, Duty and Discretion in International Arbitration, Arbitration of Int’l Bus. Disputes, Oxford (2006, 2nd ed 2012). (http://www.williamwpark.com/documents/Chapter%20II-C-2%20Duty%20and%20Discretion.pdf) The line of cases above-cited indicate that it is incumbent on the parties, seeking to enforce in the United States an annulled award, to prove exceptional facts sufficient to meet the stringent public policy test in order for the annulment decision to be disregarded. Further, the courts may vacate its enforcement judgment if the award is subsequently annulled. Finally, the possibility that an award may be annulled at the seat does not impede enforcement of the award.

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