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PRECLUSION OF REMEDIES UNDER ARTICLE 16(3) OF THE UNCITRAL MODEL LAW

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I. INTRODUCTION

International commercial arbitration, as the preferred method of dispute resolution¹ has attained its popularity over litigation, among other reasons, due to the autonomy of the parties to design the tribunal and its process, to resolve disputes in a neutral territory in a speedy manner, and to easily enforce international awards.² The importance of the law of a “neutral” *locus arbitri* is widely accepted³ as in most cases the law of the seat governs the arbitration.⁴ Not only does *lex arbitri* affect the procedural matters of the arbitration, but courts at the seat are also authorized to vacate awards in accordance with the law of the seat of arbitration.⁵ Due to such importance of national arbitration statutes and for the purposes of “harmonization and improvement”⁶ of national laws on international commercial arbitration, in 1985, the United Nations Commission on International Trade Law (*hereinafter* “UNCITRAL” or “Commission”) adopted the Model Law on International Commercial Arbitration (*hereinafter* “Model Law”).⁷

Nowadays, the Model Law represents the best “prototype”

¹ TIBOR VÁRADY, JOHN J. BARCELÓ III & ARTHUR T. VON MEHREN, INTERNATIONAL COMMERCIAL ARBITRATION: A TRANSNATIONAL PERSPECTIVE 1 (3d ed. 2006); GEORGIOS PETROCHILOS, PROCEDURAL LAW IN INTERNATIONAL ARBITRATION 1, ¶1.01 (2004).

² Margaret Wang, *Are Alternative Dispute Resolution Methods Superior to Litigation in Resolving Disputes in International Commerce?* 16 ARB. INT’L 189, 199 (2000).

³ RICHARD GARNETT, HENRY GABRIEL, JEFF WAINCYMER & JUDD EPSTEIN, A PRACTICAL GUIDE TO INTERNATIONAL COMMERCIAL ARBITRATION 20 (2000); GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION: COMMENTARY AND MATERIALS 457 (2d ed. 2001).

⁴ ALAN REDFERN, J. MARTIN HUNTER, NIGEL BLACKABY & CONSTANTINE PARTASIDES, REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION 2, ¶¶1.06-1.07 (2009).

⁵ GARNETT, GABRIEL, WAINCYMER & EPSTEIN, *supra* note 3, at 66, 113; PETROCHILOS, *supra* note 1, at 8, ¶1.20.

⁶ U.N. COMM. ON INT’L TRADE LAW, UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION 1985 WITH AMENDMENTS AS ADOPTED IN 2006, Explanatory Note by the UNCITRAL Secretariat on the 1985 Model Law on International Commercial Arbitration as amended in 2006, at 23, ¶2, U.N. Sales No. E.08.V.4 (2006) [*hereinafter* Model Law].

⁷ Model Law, *supra* note 6; U.N. COMM. ON INT’L TRADE LAW, *Report of the United Nations Commission on International Trade Law on the work of its eighteenth session*, U.N. Doc. A/40/17, GAOR, 40th Sess., Supp. No. 17, Annex I (Aug. 21, 1985), available at <http://www.uncitral.org/uncitral/en/commission/sessions/18th.html> (last visited Apr. 17, 2015).

of a law on international commercial arbitration⁸ ostensibly successful in achieving its goal of harmonization of national laws.⁹ Among others, party autonomy,¹⁰ separability, the principle of *Kompetenz-Kompetenz*,¹¹ and limited scope of court intervention, lie at the heart of the Model Law and shall be respected by each enacting country.¹²

Having become a “common feature of international arbitration,” jurisdictional challenges and related procedural rights have been of growing importance in international commercial arbitration.¹³ While some parties boycott arbitration proceedings, others do not or fail to make use of all remedies available to them at the seat of arbitration.¹⁴ Legal literature sets out several methods of challenging jurisdiction: (1) boycotting the arbitration and once award is made, seeking to (i) annul the award or (ii) resist enforcement (2) raising the objections with the tribunal, (3) applying to national court to determine jurisdiction.¹⁵ However, opting for one specific strategy to challenge jurisdiction of a tribunal may result in preclusion of remedies

⁸ PETER BINDER, *INTERNATIONAL COMMERCIAL ARBITRATION AND CONCILIATION IN UNCITRAL MODEL LAW JURISDICTIONS* 13, ¶1-009 (3d ed. 2009).

⁹ See Bola Ajibola, *Differences between the United Kingdom Arbitration Act 1996 and the UNCITRAL Model Law on International Commercial Arbitration*, in *LAW OF INTERNATIONAL BUSINESS AND DISPUTE RESOLUTION IN THE 21ST CENTURY* 1, 12 (Robert Briner, L. Yves Fortier, Klaus Peter Berger & Jens Bredow eds., 2001); *Sources of International Commercial Arbitration in FOUCHARD, GAILLARD, GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION* 108 (Emmanuel Gaillard & John Savage eds., 1999); Pieter Sanders, *UNCITRAL's Model Law on International and Commercial Arbitration: Present Situation and Future*, 21 *ARB. INT'L* 443, 443 (2005).

¹⁰ ISAAK I. DORE, *ARBITRATION AND CONCILIATION UNDER THE UNCITRAL RULES: A TEXTUAL ANALYSIS* 90 (1986).

¹¹ William W. Park, *The Arbitrability Dicta in First Options v. Kaplan: What Sort of Kompetenz-Kompetenz Has Crossed the Atlantic?*, 12 *ARB. INT'L* 137, 149 (1996).

¹² Binder, *supra* note 8, at 13, ¶1-009.

¹³ Stefan Michael Kröll, *Recourse against Negative Decisions on Jurisdiction*, 20 *ARB. INT'L* 55, 55 (2004); John Yukio Gotanda, *An Efficient Method for Determining Jurisdiction in International Arbitrations*, 40 *COLUM. J. TRANSNAT'L L.* 11, 13 (2001).

¹⁴ Stefan Michael Kröll, *First Experiences with the New Austrian Arbitration Law*, 23 *ARB. INT'L* 553, 570 (2007).

¹⁵ REDFERN, HUNTER, BLACKABY & PARTASIDES, *supra* note 4, at 202, ¶5.2.

at a later stage, highlighting the importance of understanding the exact procedural rights of the parties.¹⁶

While codifying the fundamental principle of *Kompetenz-Kompetenz*¹⁷ in Article 16(1),¹⁸ the Model Law drafters have subjected such power of a tribunal to a subsequent court review, making the tribunal's competence provisional.¹⁹ Before state court says the final word on the question of jurisdiction, however, parties need to go through "two-step" challenge procedure.²⁰ Taking the stance of UNCITRAL Arbitration Rules,²¹ the Model Law requires parties to first make a plea on lack of jurisdiction before the arbitral tribunal no later than submission of the statement of defense.²² Even more so, such plea shall explicitly indicate that the party objects to jurisdiction of the arbitral tribunal.²³

Apart from "exceptional circumstances"²⁴ and *sua sponte* decision on jurisdiction by the tribunal,²⁵ after duly raising the

¹⁶ Gotanda, *supra* note 13, at 29.

¹⁷ Binder, *supra* note 8, at 214, ¶4-003; Park, *supra* note 11, at 149.

¹⁸ Model law, art. 16(1).

¹⁹ Model Law, art. 16(3); See GARNETT, GABRIEL, WAINCYMER & EPSTEIN, *supra* note 3, at 358; Dell Computer Corp. v. Union des consommateurs, [2007] 2 S.C.R. 801 (Jul. 13, 2007) (Can.); GPEC International Ltd. v. Canadian Commercial Corporation, [2008] F.C. 414 (Apr. 2, 2008) (Can.); International Civil Aviation Organization (ICAO) v. Tripal Systems Pty. Ltd., [1994] R.J.Q. 2560 (Sept. 9, 1994) (Can.); PT Tugu Pratama Indonesia v. Magma Nusantara Ltd, [2003] SGHC 204, [2003] 4 SLR(R) 257, (Sept. 10, 2003) (Singapore).

²⁰ See Binder, *supra* note 8, at 217, ¶4-012.

²¹ UNCITRAL Arbitration Rules, G.A. Res. 65/22, U.N. GAOR, 65th Sess., U.N. Doc. A/65/465, art. 23(2) (Dec. 6, 2010) [*hereinafter* UNCITRAL Arbitration Rules].

²² HOWARD M. HOLTZMANN & JOSEPH E. NEUHAUS, A GUIDE TO THE UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION: LEGISLATIVE HISTORY AND COMMENTARY 481 (1989).

²³ Stavros Brekoulakis & Laurence Shore, *United Nations Commission On International Trade Law (UNCITRAL) Model Law On International Commercial Arbitration, 1985/2006*, in CONCISE INTERNATIONAL ARBITRATION 581, 614 (Loukas A. Mistelis ed., 2010); see CLOUT case No. 148, parties unknown, Moscow City Court (Feb. 10, 1995).

²⁴ Public Policy and arbitrability exception from art. 16(2) further elaborated in section 2.3 of the article.

²⁵ Model Law impliedly allows the tribunal to rule on its jurisdiction *sua sponte* in case of "doubts or questions as to its jurisdiction." See U.N. Doc. A/40/17, *supra* note 7, at 30, ¶150; Binder, *supra* note 8, at 215, ¶4-007.

plea on lack of jurisdiction²⁶ the tribunal has discretion to rule on its jurisdiction either as a preliminary question or in an award on the merits.²⁷ Subsequent procedural remedies of the parties are shaped according to the tribunal's use of discretion.

When the tribunal decides to rule on the matter of jurisdiction together with the merits of the case, the review of such decision may be sought in setting-aside proceedings under Article 34²⁸ of the Model Law or enforcement proceedings under Article 36²⁹ of the Model Law.³⁰ In the opposite case, when the tribunal bifurcates the proceedings and renders a preliminary decision confirming its jurisdiction, the Model Law introduces an immediate court's control of such ruling through Article 16(3).³¹ The decision of the court is not subject to appeal, save for exceptions such as Singapore, allowing for appeal with the leave of the High Court.³² While this remedy under Article 16(3) of the Model Law was deemed as an "innovative and sensible compromise"³³ purportedly directed towards faster resolution of jurisdictional issues and obtaining legal certainty, in effect the Model Law has provoked ambiguity by being silent on the

²⁶ Preclusive nature of Article 16(2) further elaborated in Chapter III, sub-section C of the article.

²⁷ Model Law, art. 16(3); see Binder, *supra* note 8, at 219, ¶4-017; KLAUS PETER BERGER, ARBITRATION INTERACTIVE: A CASE STUDY FOR STUDENTS AND PRACTITIONERS 71, ¶5-16 (2002).

²⁸ Model Law, art. 34(1).

²⁹ Model Law, art. 36(1)(a)(i).

³⁰ U.N. COMM. ON INT'L TRADE LAW, *Analytical commentary on draft text of a Model Law on international commercial arbitration, Report of the Secretary-General*, 40, ¶12, U.N. Doc. A/CN.9/264 (Mar. 25, 1985) available at <http://www.uncitral.org/uncitral/en/commission/sessions/18th.html> (last visited Apr. 17, 2015); Model Law, *supra* note 6, at 30, ¶25; Marianne Roth, *UNCITRAL Model Law on International Commercial Arbitration*, in PRACTITIONER'S HANDBOOK ON INTERNATIONAL COMMERCIAL ARBITRATION 953, 1025, ¶14.269 (Frank-Bernd Weigand ed., 2d ed. 2009).

³¹ Model Law, art. 16(3); see U.N. COMM. ON INT'L TRADE LAW, UNCITRAL 2012 DIGEST ON THE MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION at 79, ¶15, U.N. Sales No. E.12.V.9 (2012); Roth, *supra* note 30, at 1025, ¶14.269.

³² International Arbitration Act, enacted on Jan. 27, 1995, (Singapore), Chapter 143A, §10(4), [*hereinafter* SIAA]: "An appeal from the decision of the High Court made under Article 16(3) of the Model Law or this section shall lie to the Court of Appeal only with the leave of the High Court."

³³ HOLTZMANN & NEUHAUS, *supra* note 22, at 486.

consequences of failure to use this remedy.³⁴

Stemming from the nature of international arbitration, the *lex loci arbitri* should be understandable, predictable and easily ascertainable as these laws are also designed for foreign parties, counsels and arbitrators.³⁵ Defeating this purpose, the courts throughout the Model Law jurisdictions have come to contradictory results while interpreting relevant adoptions of Article 16(3) of the Model Law and have failed to develop a uniform approach towards preclusive effects of failure to raise objections within the timeline.³⁶ While German and Canadian courts tend to interpret the article as to have preclusionary effect on subsequent stages, a recent case of the Singapore Court of Appeal has taken far-reaching step in interpreting Article 16(3) not to be an exclusive remedy in case of tribunal's issuance of positive preliminary ruling on its jurisdiction. The court has based its interpretation on the ground of "choice of remedies" policy *i.e.* parties choice between "active" and "passive" remedies. Active remedy is to be understood as an attack on the award through initiating setting aside proceedings,³⁷ while passive remedy is defense against recognition and enforcement of the award.³⁸

Not only the courts, but the scholars have also been unable to observe the uniform interpretation of Article 16(3). Literature has not yet analyzed the question from the standpoint of whether the mechanism falls under the policy of the "choice of remedies." In light of such ambiguity, this article attempts to explore the preclusive effect of Article 16(3) of the Model Law on post award stages and to determine its exclusive character as the remedy to challenge positive jurisdictional ruling of the tribunal.

In search of actual consequences of (mis)use of the availa-

³⁴ UNCITRAL 2012 Digest, *supra* note 31, at 82, ¶27; Kröll, *supra* note 13, at 55.

³⁵ Gerold Herrmann, *The UNCITRAL Arbitration Law: A Good Model of a Model Law*, 3 UNIF. L. REV. 483, 487-488 (1998).

³⁶ UNCITRAL 2012 Digest, *supra* note 31, at 82, ¶27.

³⁷ PT First Media TBK (formerly known as PT Broadband Multimedia TBK) v. Astro Nusantara International BV and others and another appeal, [2013] S.G.C.A. 57, ¶22 (Oct. 31, 2013)(Singapore) [*hereinafter* Lippo v. Astro].

³⁸ *Id.*

ble remedies, Chapter II of the foregoing article starts by exploring whether the Model Law implies “choice of remedies” policy by examining its *travaux préparatoires* (hereinafter “travaux”). It also seeks to determine existence of “alternative system of defences” at cross-border level between remedies at the seat of arbitration and in the enforcement country. Chapter III engages in a determination of general framework of preclusions under the Model Law by analyzing specific provisions such as Article 4, 13 and 16(2).

Chapter IV, by analyzing the *travaux*, determines the primary purpose of the Model Law. It further engages in analysis and discussion of what may affect purported preclusionary nature of Article 16(3) by looking at the form of the preliminary ruling, language of the article and analyzing time limit provided therein.

Subsequently, Chapter V examines the correlation between Article 16(3) and remedies against final award under the Model Law. By detailed analysis of *travaux*, the article determines whether Article 16(3) should fall under the purported “choice of remedies” policy or rather under the framework of preclusion of the Model Law. The chapter engages in examination of pertinent case law and literature in order to reach the conclusion on the preclusiveness Article 16(3) of the Model Law on post-award stages.

Finally, the article provide author’s conclusion on the preclusive nature of Article 16(3) of the Model Law and proposes a possible solution in order to address the problem of ambiguity and inconsistency.

II. “CHOICE OF REMEDIES” POLICY

The decision of the Singapore Court of Appeal in the case of *PT First Media TBK v. Astro Nusantara International BV*³⁹ represents an important precedent for analyzing “choice of remedies” policy and interpreting the nature of Article 16(3) of the Model Law. However, it is worth noting that the case mostly concentrated on the determination of enforcement frame-

³⁹ *Lippo v. Astro*, [2013] S.G.C.A. 57.

work for domestic international awards⁴⁰ rendered in Singapore under section 19 of the International Arbitration Act (*hereinafter* "SIAA")⁴¹ as well as other matters unrelated for the discussion of this article.⁴²

In this case, the Arbitral tribunal seated in Singapore was asked to decide on a dispute related to a failed joint venture between Malaysian Astro Group of companies (*hereinafter* "Astro") and Indonesian Lippo Group of companies (*hereinafter* "Lippo").⁴³ In May 2009, the tribunal issued a preliminary award confirming its jurisdiction in response of jurisdictional challenge raised by Lippo.⁴⁴ The latter did not challenge this preliminary award in accordance with Article 16(3) of the Model Law and fully participated in the proceedings. The arbitral tribunal ruled in favor of the claimant on merits. Only after expiry of the time for an application to set aside the awards did Lippo resist enforcement of the domestic international awards on the ground of lack of jurisdiction of the tribunal.⁴⁵

During enforcement proceedings, among other questions described above, the Singapore Court of Appeal was faced with the dilemma of whether failure to raise a challenge under Article 16(3) precluded the party from challenges during setting aside or enforcement proceedings. In answering the question in

⁴⁰ Singapore has dual system for domestic and international arbitrations. SIAA does not define what "domestic" arbitration is. It defines "international arbitration" under § 5(2). Even when parties to arbitration are Singaporean companies with their place of business in Singapore, the arbitration still can be deemed as international. Such awards will qualify as domestic international awards subject to enforcement in Singapore under relevant SIAA provisions (corresponding to the Model Law articles). *See* Michael Tselentis, Michael Lee and David Lewis, *Singapore*, in *ARBITRATION WORLD JURISDICTIONAL COMPARISONS* 487, 487 (J. William Rowley ed., 3d ed. 2010); Christopher Lau, *Singapore*, in *PRACTITIONER'S HANDBOOK ON INTERNATIONAL COMMERCIAL ARBITRATION* 693, 693, ¶10.01 (Frank-Bernd Weigand ed., 2d ed. 2009).

⁴¹ SIAA, § 19: "*An award on an arbitration agreement may, by leave of the High Court or a Judge thereof, be enforced in the same manner as a judgment or an order to the same effect and, where leave is so given, judgment may be entered in terms of the award.*"

⁴² *Lippo v. Astro*, [2013] S.G.C.A. 57, ¶¶1-3, 5-9.

⁴³ *Astro Nusantara International BV and others v. PT Ayunda Prima Mitra and others*, [2012] S.G.H.C. 212, ¶19 (Oct. 22, 2012) (Singapore) [*hereinafter* *Astro v. Lippo*].

⁴⁴ *Id.* ¶29.

⁴⁵ *Id.* ¶¶34, 37-64.

a negative manner, the Singapore Court of Appeal reversed the decision of the Singapore High Court and concluded that “choice of remedies” was an underlying policy of the Model Law and was even at the “heart of its entire design.”⁴⁶ The court established that, similar to an application for setting aside, failure to use Article 16(3) remedy has no consequence of preclusion on the right to resist the enforcement of an award.⁴⁷ Due to its far-reaching interpretation, *Lippo v. Astro* decision has been under the spotlight in the international arbitration community.

Before this decision, the leading German judgment on the preclusionary nature of Article 16(3) of the Model Law was from the German Federal Supreme Court (Der Bundesgerichtshof),⁴⁸ concluding that failure to raise a plea within the time limit, precludes further challenges during setting aside or enforcement proceedings.⁴⁹ It could be argued, however, that the explicitly preclusive approach of German courts is due to the peculiarity of the German adoption of the Model Law. Namely, after the legal reform of 1998, their new arbitration law has been fully based on the Model Law integrated in the German Code of Civil Procedure (*hereinafter* “ZPO”).⁵⁰ The new German law does not provide an autonomous national regime for domestic and foreign awards and explicitly requires parties to challenge an award by request of setting aside.⁵¹

⁴⁶ *Lippo v. Astro*, [2013] S.G.C.A. 57, ¶65.

⁴⁷ *Id.* ¶¶71, 116.

⁴⁸ Bundesgerichtshof [BGH][Federal Court of Justice], Mar. 27, 2003, NEUE JURISTISCHE WOCHENSCHRIFT [NJW], 133, 2003 (Ger.) [*hereinafter* “Bundesgerichtshof”].

⁴⁹ See other German cases as well as conclusion on relevance of German case law and effect of German adoption of the Model law in Chapter V, subsection B(1) of the article.

⁵⁰ Inka Hanefeld, *Germany*, in PRACTITIONER’S HANDBOOK ON INTERNATIONAL COMMERCIAL ARBITRATION 475, 475, ¶7.01 (Frank-Bernd Weigand ed., 2d ed. 2009).

⁵¹ German Code of Civil Procedure [ZPO][Zivilprozessordnung], enacted on Jan. 1, 1998 (Ger.), Book 10, § 1060(2): “An application for a declaration of enforceability shall be refused and the award set aside if one of the grounds for setting aside under section 1059 subs. 2 exists.” JEAN-FRANÇOIS PLOUDRET & SÉBASTIEN BESSON, COMPARATIVE LAW OF INTERNATIONAL ARBITRATION 804 (Stephen Berti, Annetter Ponti trans., 2d ed. 2007); Stefan Michael Kröll, *Introduction to §§ 1060, 1061*, in ARBITRATION IN GERMANY: THE MODEL LAW IN

However, whether this particularity of the German law has any effect on preclusiveness of Article 16(3) of the Model Law is subject to further discussion.

While determination of the nature of Article 16(3) of the Model Law represents the main aim of this article, the analysis cannot take place without understanding the framework under which this remedy operates. Thus, before going further with the detailed analysis, the present chapter will examine the existence of “choice of remedies” policy under the Model Law and the Convention for the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (*hereinafter* “NY Convention” or “Convention”).⁵²

A. “Choice of Remedies” under the NY Convention and preclusion in case of non-exhaustion of remedies at the seat

Before moving to the Model Law, this article will undergo a general overview of the system provided under the NY Convention with regards to co-relation of “active” and “passive” remedies.

Apart from two grounds exercisable by the enforcing courts *ex officio*,⁵³ Article 5 of the NY Convention has limited grounds for using a “passive” remedy to resist recognition and enforcement of foreign awards based on five deficiencies.⁵⁴ While such an exclusive system of enforcement is provided, the Convention grants parties the right to enforce awards under “more favorable” domestic law.⁵⁵ The rationale behind such provisions has been to make enforcement easier, serving the “pro-enforcement bias”⁵⁶ of the Convention.⁵⁷ Although designed mainly for en-

PRACTICE 479, 483-484, ¶10 (Karl-Heinz Böckstiegel, Stefan M. Kröll & Patricia Nacimiento eds., 2007).

⁵² New York Convention on the Recognition and Enforcement of Foreign Awards, Jun. 10, 1958, 330 U.N.T.S. 38 [*hereinafter* NY Convention or Convention].

⁵³ NY Convention, art. 5(2)(a)-(b).

⁵⁴ NY Convention, art. 5(1)(a)-(e).

⁵⁵ *Id.* art. 7(1); Dirk Otto, *Article VII*, in *RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS: A GLOBAL COMMENTARY ON THE NEW YORK CONVENTION* 444, 448-449 (Herbert Krokne, Patricia Nacimiento, Dirk Otto & Nicola Christine Port eds., 2010).

⁵⁶ ALBERT JAN VAN DEN BERG, *THE NEW YORK ARBITRATION CONVENTION OF 1958* 267 (1981). The principle underlying the NY Convention to encourage

forcing awards coming from other jurisdictions,⁵⁸ the NY Convention is itself silent on the question of whether a party may resist enforcement of the award when the latter has failed to use remedies available at the seat of arbitration. Case law only demonstrates divergence of opinions on this issue.

Prior to enactment of the Arbitration Law on January 1, 1998, the attitude of German courts towards enforcement of foreign awards in Germany was dependent on the use of remedies available at the place of arbitration.⁵⁹ Federal Supreme Court had held in a number of cases that for successful resistance of enforcement of the award in enforcement proceedings in Germany, parties had to make use of all remedies existing at the place of arbitration.⁶⁰ After adoption of the new law, courts have come to divergent views regarding this issue. One line of cases has interpreted silence of the NY Convention on preclusion as an indication of choice existing between the remedies of requesting annulment and of resisting enforcement of the award.⁶¹ The other stream of German cases, however, has

recognition and enforcement of arbitral awards is known as “pro-enforcement bias.” *See* *M/S Brennan v. Zapata Off-shore Co.*, 407 U.S. 1 (1972) (U.S.); *See* *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974) (U.S.).

⁵⁷ *Otto*, *supra* note 55, at 452.

⁵⁸ Article 1(1) of the NY Convention also provides for possibility to enforce non-domestic awards. *See* NY Convention, art. 1(1): “*It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.*”

⁵⁹ German law does not provide autonomous national regime for domestic and foreign awards and regulates them separately. While domestic arbitral awards fall under § 1059 of German ZPO, foreign awards are enforced under the NY Convention (reference made in § 1061 of German ZPO). *See* Kröll, *supra* note 51, at 483-484, ¶10.

⁶⁰ Bundesgerichtshof [BGH] [Federal Court of Justice] Jun. 26, 1969, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 184, 1969 (Ger.); Bundesgerichtshof [BGH] [Federal Court of Justice] Oct. 21, 1971, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 153, 1971 (Ger.); Bundesgerichtshof [BGH] [Federal Court of Justice] May 10, 1984, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 2763, 1984 (Ger.); *see also* Kröll, *supra* note 14, at 570.

⁶¹ Bundesgerichtshof [BGH] [Federal Court of Justice], Dec. 10, 2010, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 2011, 1290 (Ger.); Bayerisches Oberstes Landesgericht [BayObLG] [Bavarian Higher Regional Court], Mar. 16, 2000, 4 Z Sch 50/99, RPS 2/2000 (Ger.) *in* 27 Y.B. Comm. Arb. 445 (2002); Oberlandesgericht [OLG] [Higher Regional Court] Schleswig, Mar. 30, 2000, 16 SchH 5/99, RIW 2000, 706 (Ger.) *in* 31 Y.B. Comm. Arb. 652 (2006).

paid particular attention to a comparison of the levels of protection available in Germany and the seat of arbitration the time limit to request setting aside, and the existence of “more favorable provisions” principle under the NY Convention to arrive at the conclusion that failure to exhaust remedies at the seat results in preclusion to raise challenge during enforcement stage.⁶²

Courts in other jurisdictions have also come to contradictory decisions when dealing with the preclusion question. On the one hand, all courts allowing choice between application of annulment of an award at the place of arbitration and resisting enforcement in a foreign jurisdiction have based their line of argumentation on the lack of explicit indication of preclusion in the NY Convention.⁶³ On the other hand, cases that have come to opposite conclusions have elaborated more on the good faith obligation under the NY Convention and the desirability of making a challenge before the supervisory court at the place of arbitration.⁶⁴

Bearing in mind the above brief overview of the case law,

⁶² Oberlandesgericht [OLG] [Higher Regional Court] Karlsruhe, Mar. 27, 2006, 9 Sch 02/05, SchiedsVZ 2006, 335 (Ger.) *in* 32 Y.B. Comm. Arb. 342 (2007); Oberlandesgericht [OLG] [Higher Regional Court] Karlsruhe, Jul. 3, 2006, 9 Sch 1/06, SchiedsVZ 2006, 281 (Ger.) *in* 32 Y.B. Comm. Arb. 358 (2007); Oberlandesgericht [OLG] [Higher Regional Court] Karlsruhe, Sept. 14, 2007, 9 Sch 02/07, SchiedsVZ 2008, 47 (Ger.) *in* 33 Y.B. Comm. Arb. 541 (2008); Oberlandesgericht [OLG] [Higher Regional Court] Hamm, Sep. 27, 2005, 29 Sch 1/05, SchiedsVZ 2006, 106 (Ger.) *in* 31 Y.B. Comm. Arb. 685 (2006).

⁶³ Paklito Investments Ltd. v. Klockner East Asia Ltd., [1993] 2 H.K.L.R. 39 (Jan. 15, 1993) (Hong Kong), *available at* <http://arb.rucil.com.cn/article/default.asp?id=52>; Smart Systems Technologies Inc. (US) v. Domotique Secant Inc., [2008] Q.C.C.A. 444 (Can.) *in* 33 Y.B. Comm. Arb. 464 (2008); Aloe Vera of America, Inc. v. Asianic Food (S) Pte Ltd and another, [2006] S.G.H.C. 78 (May 10, 2006) (Singapore); Newspeed International Ltd v. Citus Trading Pte Ltd, [2003] 3 S.L.R. 1 (Jun. 4, 2001) (Singapore); Dallah Real Estate and Tourism Holding Co v. Ministry of Religious Affairs of the Government of Pakistan, [2011] 1 A.C. 763 (P.C) (U. K.); Hebei Import & Export Cop. v. Polytek Engineeinr Co. Ltd., [1999] 2 H.K.C. 205 (Feb. 9, 1999) (Hong Kong) *in* 14 Y.B. Comm. Arb. 652 (1999).

⁶⁴ China Nanhai Oil Joint Service Corporation Shenzhen Branch v. Gee Tai Holdings Co. Ltd., [1994] 3 H.K.C 375 (Jul. 13, 1994) (Hong Kong.) *in* 10 Y.B. Comm. Arb. 671 (1995) [*hereinafter* China Nanhai Oil]; Svenska Petroleum Exploration AB v. Government of the Republic of Lithuania & AB Geonafra, [2005] EWHC 2437 (U.K.), *available at* <http://www.unilex.info/case.cfm?pid=1&do=case&id=1122&step=FullText>.

one apparent observation is that the desired uniformity under the Convention is certainly defeated. Literature is also inconsistent on the existence of “choice of remedies” under the NY Convention. While commentary on the NY Convention leans towards preclusion when the basis for the defense during the arbitration has not been established or a party has not challenged the preliminary ruling,⁶⁵ nothing is explicitly stated about the choice between active and passive remedies. Interestingly, on the 50th Anniversary of the NY Convention, Dr. Albert Jan van den Berg proposed the Hypothetical Draft Convention on the International Enforcement of Arbitration Agreements and Awards, stipulating that the Convention “is in need of modernization.”⁶⁶ One of the proposed amendments was the addition of a waiver of a party to rely on grounds to challenge enforcement. Introducing an express waiver provision to be included in the NY Convention, Dr. van den Berg advocated for preclusion of bringing a challenge during the enforcement stage in the event of failure to raise a challenge during earlier proceedings and to exhaust remedies at the place of arbitration.⁶⁷ Indeed, in light of the observation of Dr. Klaus Peter Berger that dissatisfied parties generally use all remedies available at the seat to have it annulled,⁶⁸ it could be understandable why inaction could lead towards preclusion. However, keeping in mind the existing debate on the issue, this analysis lacks the necessary merit to conclusively generate a definitive answer on the co-relation between the remedies under the NY Convention.

⁶⁵ Patricia Nacimiento, *Article V(1)(a), in* RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS: A GLOBAL COMMENTARY ON THE NEW YORK CONVENTION 205, 212 (Herbert Krokne, Patricia Nacimiento, Dirk Otto & Nicola Christine Port eds., 2010).

⁶⁶ Albert Jan van den Berg, *Hypothetical Draft Convention on the International Enforcement of Arbitration Agreements and Awards, in* 50 YEARS OF THE NEW YORK CONVENTION, ICCA CONGRESS SERIES NO. 14 649, 649 (Albert Jan van den Berg ed., 2009).

⁶⁷ *Id.* at 664.

⁶⁸ KLAUS PETER BERGER, INTERNATIONAL ECONOMIC ARBITRATION 9, 648 (1993).

B. "Choice of Remedies" policy under the Model Law

While the research has failed to identify the existence of preclusiveness under the NY Convention in case of failure to use active remedies, this article will continue with an examination of the same issue at the national level under the Model Law. For this purpose, the analysis will be based on an examination of the *travaux* of Articles 34 and 36 of the Model Law. This section will exclusively deal with the existence of a general "choice of remedies" policy between remedies against the final award, without any indication of an Article 16(3) mechanism being covered by the policy.

While the *travaux* generally represents only supplementary means of interpretation of legal texts, they still remain one of the most important sources of interpretation and analysis of meaning behind a particular provision and/or a document as a whole.⁶⁹ Even the General Assembly highlighted the importance of the Model Law *travaux*, while the drafters explicitly requested that the Secretary-General of the United Nations should provide governments with the *travaux* attached to the text of the Model Law.⁷⁰ Thus, we will give particular emphasis to examining all the pertinent documents prepared during the course of drafting the Model Law throughout this article.

Article 34 of the Model Law sets forth the standards according to which courts examine arbitral awards in annulment proceedings.⁷¹ Designed as the sole means of recourse against an award, regulating the process of *vacatur* was "amongst the most difficult ones to be settled" during the drafting process.⁷² Subject to numerous discussions, the Working Group on International Contract Practices (*hereinafter* "Working Group") agreed to equate the grounds for setting aside to the ones available for refusing to enforce an award under Article 5 of the

⁶⁹ Jan Klabbbers, *International Legal Histories: The Declining Importance of Travaux Préparatoires in Treaty Interpretation?*, 50 *NL INT'L L. REV.* 267, 288 (2003).

⁷⁰ HOLTZMANN & NEUHAUS, *supra* note 22, at 15.

⁷¹ *Id.* at 911.

⁷² U.N. Secretary-General, *Report of the Secretary-General: possible features of a model law on international commercial arbitration*, at 91, ¶107, [1981] *Y.B. UNCITRAL* Vol. XII, U.N. Doc. A/CN.9/207 (May 14, 1981), available at <http://www.uncitral.org/uncitral/en/commission/sessions/14th.html> (last visited April 17, 2015).

NY Convention.⁷³ The purpose of this article was to eliminate different ways of “attacking” awards existing under various national laws. Sharing the spirit of the NY Convention, it was agreed that the Model Law should only contain a single and exclusive possibility of recourse against the award in the form of an application for setting aside.⁷⁴ This principle was fully accepted.⁷⁵ However, the Working Group and the Commission observed that initiating or failure to commence setting aside proceedings (an “exclusive recourse” to “actively” attack awards) did not preclude parties from raising the same objection through the “passive” resistance to enforcement on the latter stage.⁷⁶ The Analytical Commentary to the Model Law clarifies that:

[T]he application for setting aside constitutes the exclusive recourse to a court against the award in the sense that it is the only means for actively attacking the award, i.e. initiating proceedings for judicial review. A party retains, of course, the right to defend himself against the award, by requesting refusal of recognition or enforcement in proceedings initiated by the other party (articles 35 and 36).⁷⁷

⁷³ U.N. COMM. ON INT’L TRADE LAW, *Working papers submitted to the Working Group at its seventh session, Composite draft text of a model law on international commercial arbitration: note by secretariat*, at 226, [1984] Y.B. UNCITRAL Vol. XV, U.N. Doc. A/CN.9/WG.II/WP.48 (Mar. 6, 1984) [Fourth Draft], available at http://www.uncitral.org/uncitral/en/commission/working_groups/2Contract_Practices.html (last visited April 17, 2015); U.N. Doc. A/CN.9/264, *supra* note 30, at 72, ¶6.

⁷⁴ U.N. Doc. A/CN.9/207, *supra* note 72, at 91, ¶108.

⁷⁵ U.N. COMM. INT’L TRADE LAW, *Report of the Working Group on International Contract Practices on the work of its fourth session*, 16 U.N. GAOR, at 4, ¶14, U.N. Doc. A/CN.9/232 (Nov. 10, 1982), available at: <http://www.uncitral.org/uncitral/en/commission/sessions/16th.html> (last visited April 17, 2015).

⁷⁶ U.N. Doc. A/40/17, *supra* note 7, at 12; U.N. COMM. ON INT’L TRADE LAW, *Report of the Working Group on the work of its seventh session*, at 204, ¶130, [1984] Y.B. UNCITRAL Vol. XV, U.N. Doc. A/CN.9/246 (Mar. 6, 1984) [Fifth Draft], available at <http://www.uncitral.org/uncitral/en/commission/sessions/17th.html> (last visited April 17, 2015).

⁷⁷ U.N. Doc. A/CN.9/264, *supra* note 30, at 71, ¶2; *See also* U.N. COMM. ON INT’L TRADE LAW, *UNCITRAL Model Law on International Commercial Arbitration: note by the Secretariat*, at 122, ¶41, [1988] Y.B. UNCITRAL Vol. XIX, U.N. Doc. A/CN.9/309 (Apr. 20, 1988), available at <http://www.uncitral.org/uncitral/en/commission/sessions/21st.html> (last visit-

Such co-existence of the two remedies has been agreed upon by countries commenting on the draft,⁷⁸ has been reiterated by the commentators on the Model Law,⁷⁹ and are widely accepted in the modern arbitration world.⁸⁰ However, the existence of only two different types of remedies is not automatically suggestive of “choice” between them.

Egypt, while commenting on the text of the Model Law,⁸¹ highlighted that it would be the first time passive and active remedies were available in one document, and further noted that “the coexistence of two texts establishing two means of attacking the award based on the same grounds may cause confusion.”⁸² It was also correctly pointed out that neither Article 16,⁸³ nor Article 34 or 36 prohibit a party from raising the objection on the same grounds (in this case on the grounds of lack of jurisdiction due to absence of arbitration agreement).⁸⁴

Apparently, during the Seventh Session, the Working Group considered amending Article 34(1) and adding the following language: “only by an application for setting aside [...] or

ed April 17, 2015).

⁷⁸ U.N. COMM. ON INT'L TRADE LAW, *Analytical compilation of comments by Governments and international organizations on the draft text of a model law on international commercial arbitration, Report of the Secretary-General*, at 52, ¶14, U.N. Doc. A/CN.9/263 (Jun. 17, 1985), available at: <http://www.uncitral.org/uncitral/en/commission/sessions/18th.html> (last visited April 17, 2015).

⁷⁹ HOLTZMANN & NEUHAUS, *supra* note 22, at 912. While discussing the issue of choice, the authors note “the Model Law should stipulate a single, exclusive method of juridical recourse against the award (other than resisting recognition of or enforcement).”

⁸⁰ UNCITRAL 2012 Digest, *supra* note 31, at 134, ¶1; Roth, *supra* note 30, at 1101, ¶14.521.

⁸¹ The comments were made on the Fifth Draft of the text. See U.N. Doc. A/CN.9/246, *supra* note 76, at 196, ¶49.

⁸² U.N. COMM. ON INT'L TRADE LAW, *Analytical compilation of comments by Governments and international organizations on the draft text of a model law on international commercial arbitration, Report of the Secretary-General - Addendum*, at 5-6, ¶¶19-20, U.N. Doc. A/CN.9/263/Add.3 (Jul. 31, 1985), available at <http://www.uncitral.org/uncitral/en/commission/sessions/18th.html> (last visited April 17, 2015).

⁸³ The Fifth Draft only contained the possibility to review the jurisdictional decision only at the post-award stage in setting aside proceedings. Immediate court review mechanism was not available and the quotation does not affect the further analysis of the article on preclusiveness of Article 16(3) of the Model Law. See U.N. Doc. A/CN.9/246, *supra* note 76, at 196, ¶49.

⁸⁴ U.N. Doc. A/CN.9/263/Add.3, *supra* note 82, at 4-5, ¶¶16-17.

by a request to refuse recognition or enforcement in accordance with Article 36.”⁸⁵ This would mean that recourse could take place via an application for setting aside, or in the alternative, by requesting refusal of recognition and enforcement. However, this proposition was not adopted since “recourse” has different meanings in different languages, which did not fully correspond to raising objections under Article 36.⁸⁶ On the same session, the delegates heavily discussed the effect of co-relation, in particular, whether failure to request setting aside precluded a party from resisting enforcement on the same grounds.⁸⁷ Based on the discussions, the Working Group considered inclusion of the following wording in Article 36:

If an application for setting aside the award has not been made within the time-limit prescribed in article 34(3), the party against whom recognition or enforcement thereafter is sought may not raise any other objections than those referred to in this article, paragraph (1), subparagraphs (a)(i) or (v) or (b).⁸⁸

While there were different views on whether such wording should have been included in the Model Law, the prevailing position was against adoption of such a provision, since:

It was pointed out that the intended preclusion unduly restricted the freedom of a party to decide on how to raise its objections. [...] **a party should be free to avail itself of the alternative system of defences which was recognized by the 1958 New York Convention and should be maintained in the model law.**⁸⁹

Supporting the prevailing view, the United States clarified that the defense would either be “asserted in a setting aside procedure, or in opposition to an application for recognition and enforcement of the award.”⁹⁰ The Explanatory Note of UNCITRAL, as well as various literature, backs up the interpretation of an alternative existence of setting aside and en-

⁸⁵ U.N. Doc. A/CN.9/246, *supra* note 76, at 204, ¶127.

⁸⁶ *Id.* at 212, ¶197.

⁸⁷ *Id.* at 207, ¶¶153-154.

⁸⁸ *Id.* at 207, ¶153.

⁸⁹ *Id.* at 207, ¶154.

⁹⁰ U.N. Doc. A/CN.9/263, *supra* note 78, at 52, ¶¶14.

forcement proceedings.⁹¹ Excluding the “choice of remedies” policy by German legislators by virtue of section 1060 of the German ZPO mentioned above is also an explicit indication for existence of such a policy under the Model Law.

Therefore, concurring with the conclusion of Singapore Court of Appeal, overall analysis of *travaux* indeed demonstrates the will of the drafters to allowing parties to have an “alternative system of defenses.”⁹² However, it is important to bear in mind that the policy only concerns choice between setting aside and enforcement proceedings, without any indication of its extension to Article 16(3) of the Model Law.

III. GENERAL LEGAL FRAMEWORK OF PRECLUSIONS UNDER THE MODEL LAW

Having established the existence of “choice of remedies” policy under the Model Law, the present chapter identifies the general attitude of the Model Law towards preclusionary matters by analyzing Article 4, Articles 13(2) and 13(3) and Article 16(2) of the Model Law.

A. Waiver under Article 4 of the Model Law and its effect on post-award stage

Article 4 of the Model Law⁹³ sets out the rule of an implied waiver codifying the general principle of “estoppel” or “*venire contra factum proprium*.”⁹⁴ In order for the waiver to apply, the following preconditions have to be met: (a) a procedural requirement in breach is contained in a non-mandatory provision of the Model Law or in the arbitration agreement, (b) the party in failure knew or ought to have known about the non-compliance, (c) objection to non-compliance is not presented without undue delay or within the given time limit, and (d) the party proceeds with the arbitration without any objections.⁹⁵

⁹¹ Model Law, *supra* note 6, at 30, ¶26; Roth, *supra* note 30, at 1025, ¶14.269.

⁹² U.N. Doc. A/40/17, *supra* note 7, at 54, ¶274.

⁹³ Model Law, art. 4.

⁹⁴ U.N. Doc. A/CN.9/264, *supra* note 30, at 17, ¶1; Brekoulakis & Shore, *supra* note 23, at 593.

⁹⁵ Binder, *supra* note 8, at 55-56, ¶1-082.

While failure to use the Article 16(3) challenge mechanism cannot fall under the rule of waiver, since it is not a procedural discrepancy⁹⁶ and is a mandatory provision,⁹⁷ the effect of waiver is of great relevance in favor of the preclusive nature of such article. While a party “shall be deemed to have waived his right to object” if the preconditions set out in Article 4 are met, the Model Law is silent on the consequences of such a waiver. In order to understand the Model Law approach towards this end, this article will consult the *travaux*. The prevailing view of the drafters on the effect of waiver was to be “extensive,”⁹⁸ even affecting the post-award stage *i.e.* annulment or enforcement proceedings.⁹⁹

The above interpretation of the Commission is further substantiated by the Model Law case law. In a German case, while the holding of an oral hearing had been requested, the respondent failed to object to the arbitrator’s initiative to limit proceedings to written submissions only.¹⁰⁰ After the award was rendered, the respondent resisted enforcement based on procedural irregularities. However, High Regional Court of Naumburg effectuated the preclusionary consequence of inaction under Article 4. In denying the motion to refuse enforcement, the court ruled that the party was barred from relying on a procedural irregularity on subsequent stages when the latter

⁹⁶ Brekoulakis & Shore, *supra* note 23, at 593.

⁹⁷ Bundesgerichtshof [BGH][Federal Court of Justice], Feb. 24, 2005, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 157, 2005 (Ger.); *See also* Peter Huber, *Competence of Arbitral Tribunal to Rule on its Jurisdiction*, in ARBITRATION IN GERMANY: THE MODEL LAW IN PRACTICE 248, 249, ¶4 (Karl-Heinz Böckstiegel, Stefan M. Kröll & Patricia Nacimientos eds., 2007).

⁹⁸ U.N. COMM. ON INT’L TRADE LAW, *Working papers submitted to the Working Group at its seventh session, Composite draft text of a model law on international commercial arbitration: some comments and suggestions for consideration: note by the secretariat*, at 223, ¶11, [1984] Y.B. UNCITRAL Vol. XV, U.N. Doc. A/CN.9/WG.II/WP.50 (Mar. 6, 1984), *available at* http://www.uncitral.org/uncitral/en/commission/working_groups/2Contract_Practices.html (last visited Apr. 17, 2015).

⁹⁹ U.N. Doc. A/CN.9/246, *supra* note 76, at 210, ¶181; U.N. Doc. A/40/17, *supra* note 7, at 13, ¶57; *See also* Gerold Herrmann, *UNCITRAL’s Work Towards a Model Law on International Commercial Arbitration*, 4 PACE L. REV. 537, 549 (1983-1984).

¹⁰⁰ Oberlandesgericht [OLG][Higher Regional Court] Naumburg, Feb. 21, 2002, RECHTSPRECHUNG DER OBERLANDESGERICHE IN ZIVILSACHEN, 71, 2002 (Ger.).

had failed to raise an immediate objection previously.¹⁰¹ The Supreme Court of Russian Federation, in annulment proceedings brought based on lack of jurisdiction of the arbitral tribunal, precluded the respondent from raising the claim due to failure to object in due time.¹⁰² Other jurisdictions have similarly confirmed such an extensive effect of the waiver during post-award stage.¹⁰³ Thus, based on the aforementioned, the effect of waiver extends not only to subsequent arbitration proceedings, but also to the post-award stage.

B. Preclusion under Articles 13(2) and 13(3) of the Model Law

1. Article 13(2) of the Model Law

Article 13(2) of the Model Law sets out a fifteen-day rule for challenging the arbitrator before the tribunal itself. The time starts running after constitution of the arbitral tribunal or the moment when the party became aware of the circumstances giving rise to justifiable doubts for challenge.¹⁰⁴ Still silent on the issue of consequences of failure to raise a timely challenge, *travaux* demonstrate that there have been explicit proposals to clarify in the text that failure to raise an objection within the set time limit shall result in preclusion in both setting aside as well as enforcement proceedings.¹⁰⁵ Although the proposal was not explicitly addressed in the text of the Model Law, Holtzmann and Neuhaus have clarified the effect of fail-

¹⁰¹ *Id.*

¹⁰² CLOUT case No. 637, parties unknown, Presidium of the Supreme Court of the Russian Federation [2004] *Mezhdunarodnyy Kommerchiskiy Arbitrazh* [International Commercial Arbitration] 11, (Nov. 24, 1999); see Binder, *supra* note 8, at 62, ¶1-103.

¹⁰³ CLOUT case No. 266, Arbitration Court attached to the Hungarian Chamber of Commerce and Industry, Case No. Vb/97142, May 25, 1999 (Hun.) in 25 Y.B. Comm. Arb. 545 (2000); Oberlandesgericht [OLG][Higher Regional Court] Stuttgart, July 16, 2002, RECHTSPRECHUNG DER OBERLANDESGERICHE IN ZIVILSACHEN, 84, 2002 (Ger.)

¹⁰⁴ Model Law, art. 13(2): “Failing such agreement, a party who intends to challenge an arbitrator shall, within fifteen days after becoming aware of the constitution of the arbitral tribunal or after becoming aware of any circumstance referred to in article 12(2), send a written statement of the reasons for the challenge to the arbitral tribunal.”

¹⁰⁵ U.N. Doc. A/CN.9/263, *supra* note 78, art. 13, ¶2(4).

ure to raise timely challenge as being preclusive.¹⁰⁶ According to the authors, since respecting the time limit is one of the pre-conditions for challenge, after its expiry a party should be barred from bringing a challenge.¹⁰⁷ The commentators also justified such a conclusion from a policy perspective and assumed that a party may not be given the right to attack an award during annulment proceedings or to resist enforcement, if the latter did not make a relevant challenge at the initial stage.¹⁰⁸

2. Article 13(3) of the Model Law

Travaux has demonstrated a significant role that Article 13(3) of the Model Law has played in adopting the immediate court review mechanism under Article 16(3).¹⁰⁹ When the challenge is unsuccessful under the mechanism described above, Article 13(3) of the Model Law gives parties the right to challenge the decision of the tribunal before the state court within thirty days.¹¹⁰ Similar to Article 16(3), the decision of the court is “subject to no appeal” and the arbitral tribunal has discretion to continue proceedings while the request is pending before the court.¹¹¹ Both provisions are in addition considered to be mandatory.¹¹²

Although *travaux* contains limited information on the preclusiveness of Article 13(3), it speaks of “last resort to the court” when challenging under this provision.¹¹³ However, as correctly pointed out by the Singapore Court of Appeal, no further clarification is indicated elsewhere in the *travaux*.¹¹⁴

¹⁰⁶ HOLTZMANN & NEUHAUS, *supra* note 22, at 408.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 409.; See also Heinz Strohbach, *Composition of the Arbitral Tribunal and Making of the Award*, in UNCITRAL'S PROJECT FOR A MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION 103, 112, ¶14 (ICCA Congress Series no. 2, Pieter Sanders ed., 1984).

¹⁰⁹ U.N. Doc. A/40/17, *supra* note 7, art. 16, at 32, ¶161.

¹¹⁰ Model Law, art. 13(3).

¹¹¹ *Id.*

¹¹² U.N. Doc. A/CN.9/264, *supra* note 30, art. 13, at 32, ¶2; Huber, *supra* note 97, at 249, ¶4.

¹¹³ U.N. Doc. A/CN.9/264, *supra* note 30, art. 13, at 33, ¶5.

¹¹⁴ *Lippo v. Astro*, [2013] S.G.C.A. 57, ¶¶126-128.

However, the court failed to observe that the case law is indicative of preclusive effect of failure to raise challenge within the time limit of Article 13(3) of the Model Law.

The Superior Court of Quebec, in a case from 2003, determined that failure to bring a challenge within the appropriate timeframe did not preclude a party from raising a challenge subsequently.¹¹⁵ In fact it concluded that the timeline is not mandatory and thus can be extended by the court and did not cover the issue of preclusiveness. Even if this case is interpreted to support the contention that Article 13(3) of the Model Law is not preclusive, other cases described below tend to disagree with such an interpretation.

In annulment cases before them, Quebec and Jordanian courts held that a party is precluded from the possibility of challenging the validity of an award in setting aside and enforcement proceedings if the latter failed to raise a challenge pursuant to Article 13(3) of the Model Law.¹¹⁶ The Federal Court of Justice of Germany also confirmed that, unless challenge of arbitrator takes place within a one-month period, for the purposes of legal certainty and avoidance of undermining the challenge proceedings, a party is precluded from raising challenge in the annulment or enforcement stages.¹¹⁷ Furthermore, the Austrian version of Article 13(3), which is a verbatim adoption of this article, has been deemed to preclude further recourse in case of failure to raise challenge within the given time limit.¹¹⁸

¹¹⁵ *Groupe de Charles Lacroix c. Syndicat des Travailleurs Horaires de l'Amiante C.S.N. Inc.*, [2003] CanLII 35698, ¶5, 6, 56 (Can.), available at <http://www.canlii.org/fr/qc/qccs/doc/2003/2003canlii35698/2003canlii35698.html>, referral in UNCITRAL 2012 Digest, *supra* note 18, at 69..

¹¹⁶ *Habitations d'Angoulême Inc. v. Létourneau*, [2005] Q.C.C.Q. 12888 (Can.); Parties unknown, Supreme Court of Jordan, Case No. 1242/2007 (Nov. 7, 2007), unpublished decision, referral in UNCITRAL 2012 Digest, *supra* note 18, at 63.

¹¹⁷ Bundesgerichtshof [BGH][Federal Court of Justice], Mar. 04, 1999, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 2370, 1999 (Ger.).

¹¹⁸ Austrian Code of Civil Procedure [Zivilprozessordnung], enacted on Aug. 1, 1895 (Aus.), Chapter IV, § 589(3): "If a challenge under any procedure agreed upon by the parties or under the procedure of paragraph (2) of this Article is not successful, the challenging party may request, within four weeks after having received the decision rejecting the challenge, the court to decide on the challenge, which decision shall be subject to no appeal. While such a request is pending, the arbitral tribunal, including the challenged arbitrator,

In light of the above mentioned, failure to raise challenge before the state court within the timeline provided by Article 13(3) of the Model Law is to be interpreted as preclusion to raise subsequent challenges in setting aside, as well as enforcement proceedings.

C. Preclusion under Article 16(2) of the Model Law and its effect on post-award stages

Finally, the procedural mechanism to challenge jurisdiction in the pre-award stage is given in Article 16(2) of the Model Law, which requires parties to bring the objection prior to submission of the statement of defence.¹¹⁹ The Working Group and the Commission unequivocally clarified the effect of failure to raise a plea on jurisdiction within the timeframe set in Article 16(2) as having a preclusive effect on the post-award stage.¹²⁰

It is true that the suggestion to explicitly include the effect of failure under Article 16(2) in the text of the Model Law was denied in order to allow interpretation of this question by each country adopting the Model Law.¹²¹ However, we should not understand by this fact that the Model Law gives leeway in the interpretation of the preclusive effect of Article 16(2). Rather the drafters solely intended to make sure that such failure could not result in preclusion in such exceptional circumstances as public policy or arbitrability.¹²² There is a general consensus among scholarly writings that a party should not act in a way to give the impression that it accepts the jurisdiction, in breach of principles of good faith and *venire contra factum pro-*

may continue the arbitral proceedings and make an award.” See Benedikt Spiegelfeld, Susanne Wurzer, Heidrun E. Preidt, Chapter II: The Arbitrator and the Arbitration Procedure - Challenge of Arbitrators: Procedural Requirements, in AUST. Y.B. ON INT. ARB. 2010 45, 49 (Christian Klausegger, Peter Klein, et al. eds., 2010).

¹¹⁹ Model Law, art. 16(2).

¹²⁰ U.N. Doc. A/CN.9/246, *supra* note 76, art. 16, at 14, ¶51; U.N. Doc. A/CN.9/264, *supra* note 30, art. 16, at 39, ¶¶8-9.

¹²¹ U.N. Doc. A/40/17, *supra* note 7, art. 34, at 56, ¶¶288-289.

¹²² *Id.* art. 34, at 56, ¶288; ARON BROCHES, COMMENTARY ON THE UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION 81 (1990).

prium and thus should raise the challenge of jurisdiction before the tribunal within the set timeframe in Article 16(2).¹²³

Case law is consistent on the preclusive nature of Article 16(2) of the Model Law as well. One of the first courts to rule on the matter was the Moscow City Court, which gave the failure to object under the article preclusive power for challenges on subsequent post-award proceedings.¹²⁴ Courts in other jurisdictions, such as Canada and Germany, have also agreed with the Russian courts as to the consequence of the failure to object under Article 16(2).¹²⁵ The underlying rationale in all the cases has been the importance to determine jurisdiction at an early stage and avoid the disruptive consequences of latent challenges by the parties.

The only deviation from the stated preclusion policy has been made by the drafters in relation to the “plea that the arbitral tribunal is exceeding the scope of its authority” under Article 16(2) of the Model Law.¹²⁶ According to the Model Law, such a challenge shall be made “as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings.”¹²⁷ However, both the Commission in its report as well as the commentary to the article, suggest that failure to raise a plea on the grounds that the tribunal is exceeding its jurisdiction may not preclude a party from bringing a challenge on the same basis in annulment or enforcement proceedings.¹²⁸ The reason that the Commission came to this conclusion was two-fold. Firstly, there was a potential harsh effect on

¹²³ See HOLTSMANN & NEUHAUS, *supra* note 22, at 483; BROCHES, *supra* note 122, at 81; Roth, *supra* note 30, at 1104, ¶14.534; BERGER, *supra* note 68, at 353.

¹²⁴ CLOUT case No. 148, *supra* note 23.

¹²⁵ CLOUT case No. 637, *supra* note 102; Kanto Yakin Kogyo Kabushiki-Kaisha v. Can-Eng Manufacturing Ltd., [1992] 7 O.R. 3d 779, 791 (Can.); Dunhill Personnel Systems Inc. v. Dunhill Temps Edmonton Ltd., [1994] 13 Alta. L.R. 3d 241 (Can.); Oberlandesgericht [OLG] [Higher Regional Court] Stuttgart, Dec. 20, 2001, 1 Sch 16/01 (1), unpublished decision (Ger.), available at <http://www.dis-arb.de/en/47/datenbanken/rspr/olg-stuttgart-case-no-1-sch-16-01-1-date-2001-12-20-id158> (last visited Apr. 17, 2015).

¹²⁶ Model Law, art. 16(2).

¹²⁷ *Id.*

¹²⁸ U.N. Doc. A/40/17, *supra* note 7, art. 16, at 31, ¶ 155: “Failure to raise the plea at an earlier time should not necessarily preclude its use in setting aside proceedings or in recognition and enforcement proceedings.” See also HOLTSMANN & NEUHAUS, *supra* note 22, at 481.

unsophisticated parties, who might be unable to realize the necessity of promptness of the plea.¹²⁹ Secondly, due to differences in the governing law, in certain instances it is impossible to determine that a matter is beyond the tribunal's authority.¹³⁰ These limitations were specifically directed towards the particular mechanism of Article 16(2) and do not affect the general stance of the Model Law on preclusion matters.

As a result of the above provided analysis, the research leads towards establishing that principles of legal certainty, good faith, quick and efficient decision-making¹³¹ underline the Model Law and preclude parties from raising challenges in subsequent proceedings when a specific timeframe for raising such challenge is provided. Particular attention should be given to Article 13(3) and 16(2) of the Model Law due to the impact on the immediate court review mechanism under Article 16(3) and the similarity of the question at hand (jurisdictional challenge under Article 16(2)).

IV. PURPOSE OF ARTICLE 16(3) OF THE MODEL LAW AND EFFECTS ON ITS NATURE

Having established a "choice of remedies" policy on the one hand and a general framework of preclusions under the Model Law on the other, this chapter determines the main purpose behind the Article 16(3) mechanism through detailed examination of the *travaux*. The article further elaborates on the effects on the nature of Article 16(3) of the Model Law. Namely research analyzes if the form of the preliminary jurisdictional ruling may have any effect on the preclusive nature of Article 16(3). Subsequently, the article examines the meaning of the language used in Article 16(3) as well as the weight of the time limit used in the provision.

¹²⁹ U.N. Doc. A/40/17, *supra* note 7, art. 16, at 30, ¶ 155.

¹³⁰ *Id.*

¹³¹ Huber, *supra* note 97, at 254, ¶20.

A. Primary purpose of Article 16(3) of the Model Law

Departing from what was once a regular course of action, to have judicial review of legality of the arbitration only after the award was made,¹³² the nature of Article 16(3) is so controversial that even its *travaux* is ambiguous. Throughout the drafting process of the Model Law, the issue of court control over the decision on jurisdiction was certainly one of the most debated.¹³³ After highlighting the difficulty related to the possibility of subsequent court review of a tribunal's jurisdiction,¹³⁴ the Working Group reached an agreement to make tribunal's jurisdiction provisional.¹³⁵ However, the agreement could not be easily reached on the question of what was the appropriate stage when the court control could take place.¹³⁶

From early on, the draft text of the Model Law contained an option for the tribunal to decide on its jurisdiction either as a preliminary question or in an award on the merits.¹³⁷ How-

¹³² UNCITRAL Digest, *supra* note 31, at 79, ¶15; La Compagnie Nationale Air France v. Mbaye, [2003] CanLII 35834 (Can.); Simon Greenberg, *Direct Review of Arbitral Jurisdiction under the UNCITRAL Model Law on International Commercial Arbitration: An Assessment of Article 16(3)*, in UNCITRAL MODEL LAW AFTER TWENTY-FIVE YEARS: GLOBAL PERSPECTIVES ON INTERNATIONAL COMMERCIAL ARBITRATION 49, 54 (Frédéric Bachand & Fabien Gélinas eds., 2013).

¹³³ Gerold Herrmann, *UNCITRAL Adopts Model Law on International Commercial Arbitration*, 2 *ARB. INT'L* 2, 5 (1986); HOLTZMANN & NEUHAUS, *supra* note 22, at 484.

¹³⁴ U.N. Doc. A/CN.9/207, *supra* note 72, at 88, ¶89.

¹³⁵ U.N. COMM. ON INT'L TRADE LAW, *Report of the Working Group on International Contract Practices on the work of its third session*, at 21, ¶82, U.N. Doc. A/CN.9/216 (Mar. 23, 1982), available at http://www.uncitral.org/uncitral/en/commission/working_groups/2Contract_Practices.html (last visited Apr. 17, 2015).

¹³⁶ BROCHES, *supra* note 122, at 82.

¹³⁷ U.N. COMM. ON INT'L TRADE LAW, *Note by the Secretariat: Model law on International Commercial Arbitration: Draft articles 25 to 36 on award*, U.N. Doc. A/CN.9/WG.II/WP.38 (Aug. 31, 1982) [First Draft], available at http://www.uncitral.org/uncitral/en/commission/working_groups/2Contract_Practices.html (last visited Apr. 17, 2015); U.N. COMM. ON INT'L TRADE LAW, *Note by the Secretariat: Model law on International Commercial Arbitration: Revised draft articles I to XXVI*, U.N. Doc. A/CN.9/WG.II/WP.40 (Dec. 14, 1982) [Second Draft], available at http://www.uncitral.org/uncitral/en/commission/working_groups/2Contract_Practices.html (last visited Apr. 17, 2015); U.N. COMM. ON INT'L TRADE LAW, *Model Law on international commercial arbitration: redrafted articles I to XII on scope of application, general provisions, arbitration agreement and the courts, and composition of arbitral*

ever, the only possibility to contest such ruling on the jurisdiction was through an action for setting aside of the award.¹³⁸ Early drafts also included Article 17, granting the parties the possibility of concurrent court control,¹³⁹ which was subsequently deleted by the Working Group.¹⁴⁰ While removing the provision, the Working Group reasoned that it was in conflict with the main principle behind Article 16(3) of the Model Law, which at that time allowed parties to contest positive jurisdictional rulings only through an application to set aside an award.¹⁴¹

In commentaries on the fifth draft of the Model Law,¹⁴² Austria, Norway, Poland, Canada, Soviet Union and the IBA suggested inclusion of a procedure allowing for an immediate court review of the tribunal's decision on jurisdiction for the purposes of saving time and money.¹⁴³ The underlying ra-

tribunal: not by the secretariat, U.N. Doc. A/CN.9/WG.II/WP.45 (Sept. 9, 1983) [Third Draft], available at http://www.uncitral.org/uncitral/en/commission/working_groups/2Contract_Practices.html (last visited Apr. 17, 2015); U.N. Doc. A/CN.9/WG.II/WP.48, *supra* note 73.

¹³⁸ U.N. Doc. A/CN.9/WG.II/WP.48, *supra* note 73, art. 16(3), at 223: “*The arbitral tribunal may rule on a plea referred to in paragraph (2) either as a preliminary question or in an award on the merits. [In either case, a ruling by the arbitral tribunal that it has jurisdiction may be contested by any party only in an action for setting aside the arbitral award.]*”

¹³⁹ “The procedure by which an immediate application is made to the courts, following an interim award on jurisdiction by the arbitral tribunal, is known as ‘concurrent control,’” noted in Alan Redfern, *The Jurisdiction of an International Commercial Arbitrator*, 3 J. INT’L. ARB. 19, at 32 (1986).

¹⁴⁰ U.N. Doc. A/CN.9/WG.II/WP.48, *supra* note 73, art. 17, at 223: “(1) [Notwithstanding the provisions of article 16,] a party may [at any time] request the Court specified in article 6 to decide whether or not there exists a valid arbitration agreement and [, if arbitral proceedings have commenced,] whether or not the arbitral tribunal has jurisdiction [with regard to the dispute referred to it]. (2) While such issue is pending with the Court, the arbitral tribunal may continue the proceedings [unless the Court orders a stay or suspension of the proceedings].”

¹⁴¹ U.N. Doc. A/CN.9/246, *supra* note 76, art. 17, at 196, ¶55.

¹⁴² *Id.* art. 16(3), at 196, ¶49: “*The arbitral tribunal may rule on a plea referred to in paragraph (2) either as a preliminary question or in an award on the merits. In either case, a ruling by the arbitral tribunal that it has jurisdiction may be contested by any party only in an action for setting aside the arbitral award.*”

¹⁴³ U.N. Doc. A/CN.9/263, *supra* note 78, art. 16, at 29-30, ¶¶7(a)-(d), art. 17, at 31, ¶10; U.N. COMM. ON INT’L TRADE LAW, *Analytical compilation of comments by Governments and international organizations on the draft text of*

tionale behind supporting immediate court control was two-fold. First, it was to give arbitral tribunal flexibility to balance in each particular case between the risks of dilatory tactics and the waste of time and money.¹⁴⁴ Secondly, there was a need for the parties to an arbitration to gain certainty regarding the arbitral tribunal's jurisdiction.¹⁴⁵

To accommodate two important purposes underlying Article 16(3), the Commission discussed several options for amending Article 16(3).¹⁴⁶ After long deliberations the Commission agreed to opt for the solution provided in Article 13(3) and adopt the language in the same form as it appears now.¹⁴⁷ Due to its elements,¹⁴⁸ the special mechanism adopted under Article 16(3) has been regarded as a suitable solution to balance conflicting policy considerations such as wasting time and money on the one hand, and preventing dilatory tactics on the other, while establishing certainty on the jurisdictional question.¹⁴⁹

In reaching a compromise position on mechanism of Article 16(3), the Commission aimed at guaranteeing certainty on the issue of jurisdiction and to avoid annulment of the award due to lack of jurisdiction after having spent considerable money and time on arbitral proceedings.¹⁵⁰ Both Canada and the UK attached great importance to an early determination of the ju-

a model law on international commercial arbitration, Report of the Secretary-General - Addendum, art. 16, at 12, ¶2, U.N. Doc. A/CN.9/263/Add.1 (Apr. 15, 1985), available at <http://www.uncitral.org/uncitral/en/commission/sessions/18th.html> (last visited Apr. 17, 2015).

¹⁴⁴ U.N. Doc. A/40/17, *supra* note 7, art. 16, at 31, ¶159.

¹⁴⁵ *Id.* art. 16, at 31, ¶160.

¹⁴⁶ *Id.*: "One suggestion was to adopt the solution found in article 13(3) and thus to allow immediate court control in each case where the arbitral tribunal ruled on the issue of its jurisdiction as a preliminary question. Another suggestion was to require the arbitral tribunal, if so requested by a party, to rule on its jurisdiction as a preliminary question, which ruling would be subject to immediate court control. Yet another suggestion was to reintroduce in the text previous draft article 17."

¹⁴⁷ U.N. Doc. A/40/17, *supra* note 7, art. 16, at 32, ¶161.

¹⁴⁸ Time limit, finality of the decision and possibility to continue arbitral proceedings while the court review is pending.

¹⁴⁹ Mary E. McNerney & Carlos A. Esplugues, *International Commercial Arbitration: The UNCITRAL Model Law*, 9 B.C. INT'L & COMP. L. REV. 47, 53 (1986).

¹⁵⁰ U.N. Doc. A/CN.9/264, *supra* note 30, art. 16, at 41, ¶13.

jurisdictional issue for the same reasons as provided above.¹⁵¹ Canada even referred to the case of *Arab Republic of Egypt v. Southern Pacific Properties, Ltd.*, a case decided by the Paris Court of Appeals in 1984 to highlight its point.¹⁵² The dispute arose out of a contract to create touristic complexes in Egypt that was concluded between the Arab Republic of Egypt and a Hong Kong company, Southern Pacific Properties (SPP), to create two tourist complexes in Egypt.¹⁵³ At the outset of the dispute, Egypt made express reservation regarding the jurisdiction of the tribunal. After the tribunal rendered its final award, Egypt brought an action to set it aside in France alleging that it had never waived its immunity of jurisdiction.¹⁵⁴ The court finally decided to set aside the award. Bearing in mind the loss of time and resources due to the latent challenge of the jurisdiction, Canada persisted to have an immediate court review mechanism included in the Model Law.

In light of the background in drafting Article 16(3) of the Model Law, the conclusion can thus be reached that the purpose of the mechanism under this provision was ensuring early determination of jurisdiction, obtaining certainty on the jurisdictional issue in order to avoid a waste of time and resources, and to avoid parties distracting the arbitration proceedings by raising late challenges.¹⁵⁵

The concerns of drafters in 1985 are still of relevance in modern arbitration practice. In the previously cited Singapore judgment, the Court of Appeals challenged the importance of certainty on jurisdictional issues under the Model Law.¹⁵⁶ The court concluded that while certainty and efficiency were indeed

¹⁵¹ U.N. Doc. A/CN.9/263/Add.1, *supra* note 143, art. 16, at 12, ¶2; U.N. COMM. ON INT'L TRADE LAW, Analytical compilation of comments by Governments and international organizations on the draft text of a model law on international commercial arbitration, Report of the Secretary-General - Addendum, art. 34, 36, at 5, ¶17, U.N. Doc. A/CN.9/263/Add.2 (May 21, 1985), available at <http://www.uncitral.org/uncitral/en/commission/sessions/18th.html> (last visited Apr. 17, 2015).

¹⁵² U.N. Doc. A/CN.9/263/Add.1, *supra* note 143, art. 16, at 12, ¶2.

¹⁵³ *Arab Republic of Egypt v. Southern Pacific Properties, Ltd. et. al*, 23 I.L.M 1048, 1049 (1984).

¹⁵⁴ *Id.* at 1051.

¹⁵⁵ Greenberg, *supra* note 132, at 78.

¹⁵⁶ *Lippo v. Astro*, [2013] S.G.C.A. 57, ¶116.

important, it was not intended to be at the expense of derogating from “choice of remedies” policy.¹⁵⁷ The basis for concluding that Article 16(3) is not “certainty-centric”¹⁵⁸ was the existence of the tribunal’s discretion to rule on jurisdiction as a preliminary matter or to decide together with the merits.

Although the Singapore court may be correct in stating that the purpose of certainty would be best served if all jurisdictional decisions were made preliminarily, we should understand why the drafters did not pursue such a possibility. While there was no consensus reached upon at which stage tribunals should decide on jurisdiction,¹⁵⁹ a general desirability of the drafters of the Model Law towards preliminary decision-making can be observed.¹⁶⁰ According to Analytical Commentary, jurisdictional questions would usually be decided separately.¹⁶¹ However, underlining that in some situations the question of jurisdiction might be “intertwined with the substantive issue” the drafters left the possibility of combining the ruling with the final award on the merits.¹⁶² Another reason to retain the discretionary power was to avoid dilatory tactics to obstruct arbitral proceedings in apparent situations of an unfounded plea of lack of jurisdiction.¹⁶³ Thus, drafters had sufficient basis for leaving discretionary power to tribunals, limited only to special circumstances and based on the prevailing view.

Some jurisdictions, such as Germany¹⁶⁴ and Iran,¹⁶⁵ have taken general “desirability” to rule on the jurisdiction as a preliminary matter even further by explicitly providing for this in

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* ¶117.

¹⁵⁹ Gotanda, *supra* note 13, at 14.

¹⁶⁰ U.N. Doc. A/CN.9/264, *supra* note 30, at 40, ¶11.

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ U.N. Doc. A/40/17, *supra* note 7, at 31, ¶159; see NADJA ERK, PARALLEL PROCEEDINGS IN INTERNATIONAL ARBITRATION: A COMPARATIVE EUROPEAN PERSPECTIVE 183 (2014).

¹⁶⁴ German ZPO, § 1040(3): “If the arbitral tribunal considers that it has jurisdiction, it rules on a plea referred to in subsection 2 of this section in general by means of a preliminary ruling.”

¹⁶⁵ Law on International Commercial Arbitration, enacted Nov. 5, 1997 (Iran), art. 16(3): “Where a plea is raised in respect of jurisdiction or the existence or validity of the arbitration agreement the “arbitrator” must (Unless otherwise agreed by the parties), rule on a plea as a preliminary question and before entering the merits of the case.”

their national legislation enacting the Model Law. Based on the prevailing view, leaving the discretionary power to the tribunal is justified and cannot be deemed to contradict the purpose of efficiency and certainty on jurisdictional matters.¹⁶⁶ Therefore, based on all the above, the purpose of Article 16(3) of the Model Law is not undermined by the choice of the drafters to leave room for the tribunal to decide the jurisdiction in certain cases together with the merits.

B. Form of a preliminary jurisdictional ruling

Having determined the primary purpose of Article 16(3) of the Model Law, further analysis of effects on its nature is necessary. One of the caveats of Article 16(3) of the Model Law is lack of clarification on the form of the preliminary ruling, which may become crucial for understanding the application of Article 16(3) and its effects.¹⁶⁷ While the Working Group highlighted that there would be important implications on Articles 34 and 16 if the term “award” was not defined, no such definition was adopted in the text,¹⁶⁸ nor has arbitration scholarship or practice been able to come up with a generally accepted definition thus far.¹⁶⁹ Notwithstanding the above-mentioned, a plain reading of the Model Law demonstrates the tribunal’s authority to issue preliminary or interim awards in addition to the “final award.”¹⁷⁰ The terms “interim,” “partial” and “preliminary” awards are generally used interchangeably and are usually granted to resolve one or more, but not all, claims and are

¹⁶⁶ Greenberg, *supra* note 132 at 55; SIMON GREENBERG, CHRISTOPHER KEE & J. ROMESH WEERAMANTRY, INTERNATIONAL COMMERCIAL ARBITRATION: AN ASIA-PACIFIC PERSPECTIVE 210, ¶5.32 (2011).

¹⁶⁷ Brekoulakis & Shore, *supra* note 23, at 615.

¹⁶⁸ U.N. Doc. A/CN.9/264, *supra* note 30, at 72, ¶3.

¹⁶⁹ JULIAN D. M. LEW, LOUKAS A. MISTELIS & STEFAN M. KRÖLL, COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION 628, ¶24-4 (2003); REDFERN, HUNTER, BLACKABY & PARTASIDES, *supra* note 4, at 514, ¶9.05.

¹⁷⁰ GARNETT, GABRIEL, WAINCYMER & EPSTEIN, *supra* note 3, at 91; *See also* Karl-Heinz Böckstiegel, Stefan M. Kröll & Patricia Nacimiento, *Germany as a Place for International and Domestic Arbitrations - General Overview*, in ARBITRATION IN GERMANY: THE MODEL LAW IN PRACTICE 3, at 45, ¶107 (Böckstiegel, Kröll & Nacimiento eds., 2007).

“final” for those matters resolved.¹⁷¹

When jurisdiction is determined in bifurcated proceedings, giving the status of an “award” to a decision on jurisdiction may have certain consequences.¹⁷² While the sole recourse against an “award” may be an application for setting aside, the mechanism under Article 16(3) departs from a post-award review of the decision and grants an immediate challenge possibility.

The Court of Appeal of Bermuda in *Christian Mutual Insurance Co., v. Ace Bermuda Insurance Limited* has made a far-reaching decision concluding that there can be separate annulment proceedings other than that of Article 16(3), if the form of an award is given to a preliminary ruling.¹⁷³ If such interpretation were to be followed, literature suggests that then every decision named “award” would fall outside the scope of Article 16(3) and introduce the possibility of multiple court proceedings on the same decision: first, under Article 16(3); second, a separate setting aside of the award on jurisdiction (as held in *Ace Bermuda*) and third, setting aside on the merits under Article 34(2)(i).¹⁷⁴

The *travaux* demonstrates the existence of a direct discussion on the question of form. Austria, Norway, and Poland have suggested that there should be an opportunity to make a preliminary ruling in the form of an award, subject to immediate court review.¹⁷⁵ According to the Analytical Commentary, while adopting the view of concurrent court control under Article 16(3), two forms of decision were foreseen: first, rendering an award subject to immediate court control or second, preliminary decision subject to review together with the final award on the merits.¹⁷⁶ By adopting the mechanism of immediate

¹⁷¹ REDFERN, HUNTER, BLACKABY & PARTASIDES, *supra* note 4, at 515, ¶9.08; VÁRADY, BARCELÓ & MEHREN, *supra* note 1, at 709.

¹⁷² REDFERN, HUNTER, BLACKABY & PARTASIDES, *supra* note 4, at 514, ¶9.06.

¹⁷³ *Christian Mutual Insurance Co., Central United Life Insurance Co., Connecticut Reassurance Corp. v. Ace Bermuda Insurance Limited*, [2002] Bda L.R. 1 (Dec. 6, 2002) (Bermuda).

¹⁷⁴ Alan Uzelac, *Jurisdiction of the Arbitral Tribunal: Current Jurisprudence and Problem Areas Under the UNCITRAL Model Law*, 5 INT. ARB. L. REV. 154, 163 (2005).

¹⁷⁵ U.N. Doc. A/CN.9/263, *supra* note 78, art. 16, at 29-30, ¶¶7(a)-(c).

¹⁷⁶ U.N. Doc. A/CN.9/264, *supra* note 30, art. 16, at 41, ¶14.

court review, it can be assumed that the Commission impliedly induced the form of a “preliminary award” to be given to such a preliminary decision.

Confirming the accuracy of the above interpretation, courts in various jurisdictions have established that the form of the preliminary ruling has no effect on the application of Article 16(3) of the Model Law. The High Court of Hong Kong has affirmed in the case of *Weltime Hong Kong Limited & Anor v. Ken Forward Engineering Ltd*, that

[a] ruling on jurisdiction, by its very nature, is a preliminary ruling which much precede an award on the merits. The fact that it may be titled an “award” or an “interim award” does not mean it ceases to be a preliminary ruling on jurisdiction, which it plainly was.¹⁷⁷

Hong Kong and Singapore courts have further ruled that, in determining the application of Article 16(3), substance prevails over the form and the preliminary nature of the decision was decisive for the immediate court review mechanism to come into play.¹⁷⁸ By way of comparison, while German courts have not reached consensus on the form of a preliminary decision on jurisdiction itself,¹⁷⁹ the prevailing view is, whatever the form may be, it is still a preliminary ruling subject to challenge under § 1040(3) ZPO.¹⁸⁰

Following the same rationale as previously referenced in case law and the *travaux*, in searching for due framework for the decisions on jurisdiction, literature clarifies that while the “preliminary award” is the “last word” on the jurisdictional issue,” it is not the final award subject to setting aside under Article 34 and may only be challenged under Article 16(3) of the Model Law.¹⁸¹ Furthermore, Dr. Huber advocates for “*sui gene-*

¹⁷⁷ *Weltime Hong Kong Limited v. Ken Forward Engineering Limited*, [2001] H.K.C.F.I. 831, [2001] 1 H.K.C. 458, ¶5 (Mar. 6, 2001) (Hong Kong).

¹⁷⁸ *The Incorporated Owners of TAK TAI Building v. Leung Yau Building Limited*, [2005] H.K.C.A. 87, [2005] 1 H.K.C. 530, ¶17 (Mar. 9, 2005) (Hong Kong); *PT Asuransi Jasa Indonesia (Persero) v. Dexia Bank S.A.*, [2006] S.G.C.A. 411, [2007] 1 S.L.R. 597 (Dec. 1, 2006) (Singapore).

¹⁷⁹ Hanefeld, *supra* note 50, at 514, ¶7.152.

¹⁸⁰ Böckstiegel, Kröll & Nacimiento, *supra* note 170, at 45, ¶108.

¹⁸¹ Huber, *supra* note 97, at 257, ¶4; Hanefeld, *supra* note 50, at 514, ¶7.152.

ris which is only subject to court control under” the corresponding provision of Article 16(3) of the Model Law in German ZPO § 1040.¹⁸²

Thus, jurisdictional rulings made in bifurcated proceedings as a separate issue will always be subject to exclusive recourse under Article 16(3) of the Model Law due to preliminary nature of such ruling. If made, the decision of the court will have *res judicata* effects on the subsequent proceedings.

C. Language and time limit of Article 16(3) of the Model Law

1. Non-mandatory language of Article 16(3) of the Model Law

Having determined that the form of the preliminary ruling does not have much effect on the Article 16(3) mechanism coming into play, this section will further elaborate on how different elements of the provision influence its preclusiveness.

The language of Article 16(3) of the Model Law reads that any party “may request ... the court ... to decide the matter.”¹⁸³ The courts in *Lippo v. Astro* as well as in *Tan Poh Leng Stanley v. Tang Boon Jek Jeffrey*¹⁸⁴ interpreted this language to be indicative of its optional character. As a result, both courts concluded that failure to challenge does not result in preclusion to raise challenge in subsequent proceedings.

It is true that generally, use of the word “may” is an indication of an option or a possibility.¹⁸⁵ However, any interpretation of the language employed in the article should be put in the context of, and discussed from the standpoint of, a legislative intent.¹⁸⁶ Understanding the purpose of the Model Law

¹⁸² Huber, *supra* note 97, at 257, ¶4; See German ZPO, § 1040(3).

¹⁸³ Model Law, art. 16(3).

¹⁸⁴ *Tan Poh Leng Stanley v. Tang Boon Jek Jeffrey*, [2000] S.G.H.C. 260, [2000] 3 S.L.R.(R), ¶1, (Nov. 30, 2000) (Singapore) [hereinafter “Tan Poh Leng”].

¹⁸⁵ THE NEW SHORTER OXFORD ENGLISH DICTIONARY ON HISTORICAL PRINCIPLES, VOLUME I at 1721 (Lesley Brown ed., 1993): “An instance of what is expressed by the auxiliary verb *may*; a possibility.”; BLACK’S LAW DICTIONARY, at 993 (Bryan A. Garner ed., 7th ed. 1999): “This is the primary legal sense ... ‘permissive’ or ‘discretionary.’”

¹⁸⁶ BLACK’S LAW, *supra* note 185, at 993 “In dozens of cases, court have held *may* to be synonymous with *shall* or *must* usually in an effort to effectuate legislative intent.”

and the legislative intent behind it, the Singapore High Court has in other cases interpreted the wording “may not” to be given the mandatory meaning of “cannot.”¹⁸⁷ As the main purpose of Article 16(3) of the Model Law was early determination of jurisdictional matter, certainty, and efficiency, making the remedy optional would, from the outset, defeat its very purpose.

When describing the nature of the challenge mechanism employed by Article 16(3) of the Model Law, scholars have used mandatory language such as “must be made”¹⁸⁸ or “is forced to have recourse.”¹⁸⁹ However, the main question arises as to whether, if in light of the legislative intent, other language such as “shall” or “must” can be used to demonstrate a possible preclusive effect of Article 16(3) of the Model Law. By way of comparison, resorting to other provisions of the Model Law may be relevant in determining the general language used by the drafters to describe the non-alternative nature of certain provisions. Interestingly, after careful consideration of the Model Law the line between the alternative and preclusive character of provisions even becomes more vague. In Articles 4, 13(2) and 16(2) of the Model Law, which we have already observed to be preclusionary as to effect on the post-award stage, the drafters have used “shall” as a possible indication for such preclusiveness. However, in relation to Articles 13(3), 16(3) and 34, the drafters only used “may” language. This could indeed be used as an indication towards interpreting Article 16(3) as an alternative remedy. However, we should not forget that the text of this provision was highly influenced by Article 13(3), which, although it uses “may,” has been consistently interpreted as preclusionary.

Based on the above, while the language used in Article 16(3) could be a strong indication of the alternative nature of the provision, drawing conclusions merely on this fact is insufficient and more detailed analysis of its character is needed.

¹⁸⁷ ABC Co v. XYZ co. Ltd, [2003] S.G.H.C. 107, [2003] 3 S.L.R.(R) 546, ¶9 (May 8, 2003) (Singapore),

¹⁸⁸ BROCHES, *supra* note 122, at 86.

¹⁸⁹ BERGER, *supra* note 68, at 365.

2. Time limit of Article 16(3) of the Model Law

Generally, failure to raise a challenge against the preliminary decision on the jurisdiction within the time limit prevents parties doing so in setting aside or enforcement proceedings.¹⁹⁰ As clarified by Poudret and Besson, Section 73 of the English Arbitration Act of 1996¹⁹¹ bars challenge of jurisdictional rulings during the annulment or enforcement stage if such a challenge had not been raised within the set time limit.¹⁹² While England is generally not a Model Law jurisdiction, the English Arbitration Act “essentially adopted the solution of the model Law”¹⁹³ and is explicitly indicative of preclusion if the time limit is disregarded. In addition, we have also identified the general framework of preclusions under the Model Law, which pays greater importance to short time limits that result in preclusion.

Summary Records of the Working Group demonstrate extensive discussions on the time limit to raise the challenge under Article 16(3).¹⁹⁴ While the means of recourse under Articles 16(3) and 34 could be deemed similar, the time limit for raising a challenge under the former is considerably shorter.¹⁹⁵ According to Greenberg, this can be understood because these two challenges operate under different circumstances and a short time limit under Article 16(3) may be justified with the need for early identification of the jurisdiction issue.¹⁹⁶

¹⁹⁰ Greenberg, *supra* note 132, at 78.

¹⁹¹ Arbitration Act 1996, Chapter 23, § 73(2) (1996) (U.K.): “Where the arbitral tribunal rules that it has substantive jurisdiction and a party to arbitral proceedings who could have questioned that ruling (a) by any available arbitral process of appeal or review, or (b) by challenging the award, does not do so, or does not do so within the time allowed by the arbitration agreement or any provision of this Part, he may not object later to the tribunal’s substantive jurisdiction on any ground which was the subject of that ruling.”

¹⁹² POUURET & BESSON, *supra* note 51, at 405.

¹⁹³ *Id.*

¹⁹⁴ U.N. COMM. ON INT’L TRADE LAW, *Summary records for meetings on the UNCITRAL Model Law on International Commercial Arbitration*, at 458-59, ¶¶13-28, [1985] Y.B. UNCITRAL Vol. XVI, 320th Meeting (Jun. 12, 1985), available at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_travaux.html (last visited Apr. 17, 2015).

¹⁹⁵ Greenberg, *supra* note 132, at 63.

¹⁹⁶ *Id.*

The prevailing view among scholars has been to attribute utmost importance to the time limit and to prohibit a party to bring a challenge in later proceedings if such a time limit has not been observed.¹⁹⁷ German scholars take the position that failure to make use of the challenge procedure under Article 16(3)¹⁹⁸ within one month excludes any further reliance on the ground of challenge in later proceedings.¹⁹⁹ The rationale behind such a conclusion was the existence of the time limit to raise challenge, which loses relevance if it does not result in preclusion to raise further challenges.²⁰⁰ Other scholars also have explicitly stated that “missing the statutory deadline means that a party loses it right”²⁰¹ of challenging jurisdictional ruling. The Supreme Court of New South Wales judgment concludes on the preclusionary nature of Article 16(3) of the Model Law, primarily basing its argumentation on important weight of time limit.²⁰² Indeed, the limitation of the analysis could be the fact that failure to bring a challenge within a timeline bars parties from bringing this challenge after expiry. This is not automatically the same as being precluded from using other possible remedies. Whether this is true will further be analyzed in chapter 4 below. However establishing such a short time limit definitely indicates the underlying purpose of the Model Law of early determination of jurisdictional rulings.

As a result of the observations made above, it may be concluded that firstly, a preliminary ruling is subject to exclusive recourse under Article 16(3) of the Model Law notwithstanding the form of such a ruling. Secondly, non-mandatory language used in Article 16(3) could be an element towards indication of

¹⁹⁷ POUURET & BESSON, *supra* note 51, at 405.

¹⁹⁸ See German ZPO, § 1040(3).

¹⁹⁹ Stefan Michael Kröll & Peter Kraft, § 1059 - *Application for Setting Aside*, in ARBITRATION IN GERMANY: THE MODEL LAW IN PRACTICE 436, at 459, ¶57 (Karl-Heinz Böckstiegel, Stefan M. Kröll & Patricia Nacimiento eds., 2007).

²⁰⁰ *Id.* at 460, ¶107; Hanefeld, *supra* note 50, at 531, ¶7.238.

²⁰¹ GREENBERG, KEE & WEERAMANTRY, *supra* note 166, at 237, ¶5.127.

²⁰² TeleMates (previously Better Telecom) Pty Ltd v. Standard SoftTel Solutions Pvt. Ltd., [2011] NSWSC 1365, ¶53 (Nov. 11, 2011) (Austl.) [hereinafter “TeleMates”].

its alternative rather than preclusive nature and finally, a short time limit established for challenging the preliminary ruling gives a strong signal towards the intent of the drafters to limit jurisdictional rulings to early stages of arbitral proceedings.

V. CHALLENGE UNDER ARTICLE 16(3) OF THE MODEL LAW BEING “ONE-SHOT REMEDY”

This article has already discussed the general framework of the Model Law in terms of “choice of remedies” policy as well as preclusion and respective effects on post-award stages. In addition, the research has further identified the purpose of Article 16(3) to be aimed at early determination of jurisdictional issues as well as analyzing different effects on the preclusiveness of Article 16(3). Keeping in mind the discussion on language and time limit of Article 16(3) of the Model Law is also of utmost importance.

In the present chapter, by looking at the *travaux*, literature, and case law, the author will firstly analyze whether Article 16(3) of the Model Law may fall under the general “choice of remedies” policy and subsequently will establish its preclusiveness during set aside and enforcement proceedings.

A. Effect of “choice of remedies” policy on Article 16(3) of the Model Law

The most crucial point for understanding the nature of the Model Law is to determine whether it falls under the system of “choice of remedies” or is to be understood in light of the general framework of preclusions identified in section 2. The Singapore Court of Appeal, while concluding the former, itself clarified that “it is plausible that even within a system of ‘choice of remedies’ only certain active remedies can exist alongside passive remedies.”²⁰³

The court in *Lippo v. Astro* pointed out several parts of the *travaux* and demonstrated that Article 16(3) is not an exception from a “choice of remedies” policy. Firstly, it referred to Norway’s suggestion of flexibility in the court’s control of jurisdic-

²⁰³ *Lippo v. Astro* [2013] S.G.C.A. 57, ¶105.

tional rulings.²⁰⁴ Indeed, the proposal was to include that the jurisdiction of the tribunal may be contested only in an action to set aside under Article 34 or as a defense against an action for recognition or enforcement of the award.²⁰⁵ Furthermore, both Norway and the IBA suggested the stipulation that: “a ruling by an arbitral tribunal that it has jurisdiction could also be contested by way of defence against recognition or enforcement of the award.”²⁰⁶ While still referring to the draft of the text that allowed the possibility of reviewing the preliminary award only during setting aside proceedings, the Analytical Commentary clarified the matter on both above stated suggestions:

The solution adopted in article 16(3) is that also in this case judicial control may be sought only after the award on the merits is rendered, namely in setting aside proceedings (and, although this is not immediately clear from the present text [footnote omitted], in any recognition or enforcement proceedings).²⁰⁷

Contrary to the interpretation of the Singapore Court of Appeal,²⁰⁸ none of the above mentioned, including the Analytical Commentary, can be used as grounds for reasoning that Article 16(3) falls within the “choice of remedies” policy. All parts of the *travaux* referred to above and highlighted by the court were in relation to the drafts of Article 16(3) that contained the possibility of challenge only at a post-award stage through setting aside proceedings.²⁰⁹ Having in mind the discussion in section 1.3 and the determination of general policy of “choice of remedies” between setting aside and enforcement proceedings, none of the proposals discussed above come as a surprise. In

²⁰⁴ *Id.* ¶106.

²⁰⁵ U.N. Doc. A/CN.9/263, *supra* note 78, at 29, ¶7(b).

²⁰⁶ *Id.* at 30, ¶8.

²⁰⁷ U.N. Doc. A/CN.9/264, *supra* note 30, at 40, ¶12.

²⁰⁸ *Lippo v. Astro*, [2013] S.G.C.A. 57, ¶109: “it was understood that a party might choose not to challenge the preliminary ruling on jurisdiction at the setting aside stage and yet raise that same challenge in enforcement proceedings.”

²⁰⁹ U.N. Doc. A/CN.9/246, *supra* note 76, art. 16(3), at 13, ¶49: “The arbitral tribunal may rule on a plea referred to in paragraph (2) of this article either as a preliminary question or in an award on the merits. In either case, a ruling by the arbitral tribunal that it has jurisdiction may be contested by any party only in an action for setting aside the arbitral award.”

fact, the important point that the Singapore Court of Appeal failed to indicate was that immediate court review under Article 16(3) appeared in the text of the Model Law only at the end. All subsequent commentaries by countries, the Analytical Commentary as well as the Report of the Commission, concerned post-award stage challenge procedure. The reason for omission in interpretation of the *travaux* by the Singaporean court could be due to the fact, that representatives of Astro never made this point available to the court.

While the Singapore court based its decision on the inapplicable part of *travaux*, it should be pointed out that there are explicit indications to the contrary. After amending the text of the Model Law to reflect immediate court review, the *travaux* draws a clear line between the challenge mechanism under Article 16(3) being the sole recourse on the one side and “choice of remedies” available between setting aside and enforcement proceedings on the other side:

“Where the arbitral tribunal rules as a preliminary question that it has jurisdiction, *article 16(3) provides for instant court control in order to avoid unnecessary waste of money and time.* [...] In those less common cases where the arbitral tribunal combines its decision on jurisdiction with an award on the merits, judicial review on the question of jurisdiction is available *in setting aside proceedings under article 34 or in enforcement proceedings under article 36.*”²¹⁰

The same document in subsequent paragraphs again explicitly reiterates the choice available between setting aside and enforcement proceedings, without any similar language used in relation to Article 16(3).²¹¹ Therefore, nothing in the *travaux* is suggestive of its alternative nature or that it falls under a “choice of remedies” policy of the Model Law. The whole drafting process rather demonstrates that the mechanism of immediate court review was formed as “unique”²¹² and “*sui generis*”²¹³ nature falling outside the general policy. Gary

²¹⁰ U.N. Doc. A/CN.9/309, *supra* note 77, at 120, ¶25 (emphasis added).

²¹¹ *Id.* at 122, ¶41.

²¹² JEFF WAENCYMER, PROCEDURE AND EVIDENCE IN INTERNATIONAL ARBITRATION 1268 (2012).

²¹³ Huber, *supra* note 97, at 257, ¶4; Vladimir Pavić, (*In*)*Appropriate Compromise: Article 16(3) of the Model Law and its Progeny*, in INTERNATIONAL ARBITRATION AND INTERNATIONAL COMMERCIAL LAW: SYNERGY,

Born, in the latest edition of his book, has qualified Article 16(3) to be “specialized judicial review” highlighting that positive judicial rulings are only subject to such review mechanism.²¹⁴ For the sake of fulfilling the main purpose of timely resolution of jurisdictional matters and obtaining legal certainty on this issue, it seems that Article 16(3) of the Model Law was designed to be “carved out” from the system of “choice of remedies.”²¹⁵

B. Consequences of the failure to seek immediate court review under Article 16(3) on the post-award stage

Coming to the final part of the analysis, having determined that Article 16(3) of the Model Law is excluded from the general “choice of remedies” policy, this article will provide an overview of case law and literature to determine the preclusive effect on the post-award stage.

1. Overview of case law on the preclusionary effect of Article 16(3) of the Model Law

Generally, existence of case law on a particular matter does not automatically make it relevant for all circumstances. As noted earlier, German legislation explicitly disregards “choice of remedies” policy. If the research of this article had led towards the assumption that Article 16(3) of the Model Law fell under “choice of remedies” policy, relevance of German case law would have been decreased. However, for the purposes of this analysis, the weight of German cases is not undermined and relevant observations of courts may be relied upon.

As indicated earlier, the leading position of German courts on this issue stems from the landmark case of the German Federal Supreme Court from 2003.²¹⁶ This case was brought

CONVERGENCE AND EVOLUTION 387, 409 (Stefan M. Kröll, Loukas A. Mistelis, Viscasillas P. Perales & Vikki M. Rogers eds., 2011).

²¹⁴ GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION, 3019 (2d ed. 2014); See also Lawrence G. S. Boo, *Ruling on Arbitral Jurisdiction — Is that an Award?*, 3 ASIAN INT’L ARB. J. 125, 140 (2007).

²¹⁵ *Lippo v. Astro*, [2013] S.G.C.A. 57, ¶104.

²¹⁶ Bundesgerichtshof, *supra* note 48.

before the Supreme Court to review the decision of the 9th Civil Division of the Higher Regional Court of Oldenburg of November 15, 2002 regarding the declaration of enforceability of the arbitral award. The Federal Supreme Court clarified the nature of § 1040(3) of German ZPO, referring to the history of adopting the provision, emphasized its purposes to ensure that the jurisdictional question is clarified at an early stage of the proceedings. Keeping in mind such a purpose and the intention of the legislator, the court concluded that in the absence of a explicit indication on the preclusive nature of § 1040(3) in ZPO, such effect is still “clear from the meaning and purpose of § 1040 ZPO” as effective “even for proceedings before the state court to set aside the award and to grant execution.”²¹⁷

Shortly after the decision of the Federal Supreme Court, the High Regional Court of Celle upheld the principle of preclusion established in the above mentioned case and reiterated the preclusive effect of § 1040 of German ZPO.²¹⁸ The case arose out of a contract concluded between the parties for the delivery of 16,000 tone of bitumen. After the non-performance of the defendant, the claimant initiated arbitral proceedings before CIETAC, as per arbitration clause of the contract. The defendant objected to the competence of the tribunal and did not participate in the arbitration proceedings. After rendering an award in favor of the claimant, the defendant moved before the High Regional Court of Celle to refuse enforcement of the foreign award under Article V(1)(a) of the NY Convention. The court clarified that the case dealing with foreign award was different than the situation with domestic international award. The court observed that, had NY Convention contained similar challenge procedures as those of § 1040 of German ZPO, then the defendant would have been precluded from its defense of an invalid arbitration agreement.²¹⁹

While a number of other German courts have taken the same attitude towards exclusiveness of challenge under Article

²¹⁷ *Id.*

²¹⁸ Oberlandesgericht [OLG] [Higher Regional Court] Celle, Sept. 04, 2003, 8 Sch 11/02, SchiedsVZ 2004, 165 (Ger.) *in* 15 Y.B. Comm. Arb. 528 (2005).

²¹⁹ *Id.*

16(3) of the Model Law,²²⁰ the reasoning of the High Regional Court of Köln²²¹ is worth noting. In an application for annulment of two arbitral awards, the court observed that reasons of legal certainty require limitation of the power to assert a challenge to an arbitration agreement and to preclude a party from asserting such a challenge when the latter, with the knowledge of reasons for a challenge, continues to arbitrate.²²² The court further noted that: “under no circumstance should the claimant be allowed to maneuver in such a way with the practice of deferring his challenge and making his challenge dependent on the result of the arbitration.”²²³

Canadian courts, in dealing with the same issue, have come to underline the exclusivity of the Article 16(3) challenge and its preclusive nature. The Supreme Court of Quebec, in the case of *Compagnie Nationale Air France v. Libyan Arab Airlines*, has ruled that the only possibility to challenge the preliminary award is by way of Article 943.1 of the Quebec Code of Civil Procedure (*hereinafter* “QCCP”), which in essence is an adoption of Article 16(3) of the Model Law.²²⁴ Although the application of Article 943.1 QCCP had been excluded in this case, the court still proceeded and determined that the challenge procedure available through the article is the sole mean of contesting the jurisdictional ruling.²²⁵ In another case, *Regionale ARL v. Ghanotakis*, the Supreme Court of Quebec highlighted

²²⁰ Oberlandesgericht [OLG] [Higher Regional Court] Oldenburg, Nov. 15, 2002, 9 SchH 9/02, 2002 (Ger.). Oberlandesgericht [OLG] [Higher Regional Court] Bremen, Nov. 10, 2005, 2 Sch 2/2005, BeckRS 2005, 32835 (Ger.).

²²¹ Oberlandesgericht [OLG] [Higher Regional Court] Köln, Nov. 21, 2008, 19 Sch 12/08, BeckRs 2009, 04423(Ger.).

²²² *Id.* ¶22.

²²³ *Id.*

²²⁴ Quebec Code of Civil Procedure, 1994, c. 73 art. 943.1 (Can.): “*If the arbitrators declare themselves competent during the arbitration proceedings, a party may within 30 days of being notified thereof apply to the court for a decision on that matter. While such a case is pending, the arbitrators may pursue the arbitration proceedings and make their award.*”

²²⁵ *Compagnie Nationale Air France v. Libyan Arab Airlines*, [2000], R.J.Q. 717 (Feb. 15, 2000) (Can.) http://www.newyorkconvention1958.org/index.php?lvl=notice_display&id=963; see also HENRI C. ALVAREZ, NEIL KAPLAN & DAVID W. RIVKIN, MODEL LAW DECISIONS, CASES APPLYING THE UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION 29 (2003).

the fact that the plaintiffs had not challenged the preliminary award on jurisdiction within the timeline stipulated under Article 943.1 QCCP.²²⁶ The Court concluded that due to such failure, the plaintiffs were precluded from requesting to set aside an award on the ground of lack of arbitration agreement.

The Supreme Court of New South Wales, in *TeleMates Pty Ltd v. Standard SoftTel Solutions Pvt Ltd*, highlighted the importance of 30-day time limit and reached a similar conclusion to the courts mentioned above.²²⁷ The court observed that the Model Law had not included any provision on an extension of the time limit and that ignoring it would go against the objects that: “disputes which the parties have submitted to arbitration should be speedily resolved and that intervention of the Court should be minimized.”²²⁸

It is also noteworthy, that in the case of *China Nanhai Oil Joint Service Corporation Shenzhen Branch v. Gee Tai Holdings Co. Ltd*, which did not concern Article 16(3) of the Model Law, the Hong Kong High Court still observed the preclusive nature of Article 16(3) of the Model Law by stating that:

[U]nder Art 16(3) if the tribunal rules that it has jurisdiction any party may request within 30 days, the court to decide the matter. It seems to follow from this that if you do not seek the view of the court, then you cannot raise the matter subsequently at [the] enforcement stage.²²⁹

In light of this stream of cases, Singapore courts have taken different position not only in *Lippo v. Astro* but also in *Tan Poh Leng Stanley v. Tang Boon Jek Jeffrey*.²³⁰ Although not faced with the necessity of any interpretation of challenge procedure under Article 16(3) of the Model Law, as no preliminary ruling was issued in that case, the High Court still observed that challenge of a preliminary decision on jurisdiction “is an option demonstrated by the construction of words “may request”. It finally concluded that failure to raise a challenge un-

²²⁶ ARL Regional Print Ltd. and Rene Laporte v. George Ghanotakis and Jean M. Won, [2004] CanLII 23270 4, ¶18 (Sept. 13, 2004) (Can.) [*hereinafter* “ARL Regional Print”].

²²⁷ *TeleMates*, *supra* note 202, at ¶53.

²²⁸ *Id.*

²²⁹ *China Nanhai Oil*, *supra* note 64, at 676.

²³⁰ *Tan Poh Leng*, *supra* note 184, at ¶1.

der Article 16(3) of the Model Law does not bar a challenge by an application to set aside the award on the ground of lack of jurisdiction.”²³¹

Lastly, the High Court of Hong Kong in the case of Fung Sang Trading Limited made an interesting interpretation.²³² While discussing the avenues for challenge of jurisdiction, the court observed that preliminary ruling is subject to a final review under Article 16(3). However, the court further noted that: “the tribunal's decision may later be considered in an application to set aside the award under art 34 and although art 36 does not apply in Hong Kong (being part of Chapter VIII), the enforcement of the award may be refused under the New York.” This interpretation however seems to be contradictory in itself, since once the court would decide the matter under Article 16(3) of the Model Law, such question would become *res judicata* on the subsequent proceedings.²³³

In light of the above case law, although Singapore courts tend to keep remedies available in order to cause arbitration in Singapore to “flourish” and to make it a more attractive place for arbitration, the prevailing position from other courts tends to lead towards the opposite conclusion. Courts from various jurisdictions referred to above, have preliminarily confirmed the preclusive nature of Article 16(3) of the Model Law in light of the primary purpose behind the mechanism of early determination of jurisdictional issues, legal certainty and efficiency. However, due regard has also been paid to short time limits available for recourse, interpreted as one of the indications of preclusiveness. Although non-mandatory language, as determined in section 3.3.1, could be used as an affirmation for the alternative nature of the remedy, all the courts apart from the Singapore courts tend to read “may” language in light of the exclusive purpose existing behind it.

²³¹ *Id.*

²³² Fung Sang Trading Limited v. Kai Sun Sea Products,[1991] 2 H.K.C. 526 (Oct. 29, 1991) (Hong Kong).

²³³ ARL Regional Print, *supra* note 226, ¶8-9.

2. Scholarly opinion on preclusiveness of Article 16(3) of the Model Law

While a number of scholars have dealt with the issue of preclusiveness of Article 16(3) of the Model Law, as opposed to the analysis provided in this article, all observations have solely been based on the case law without looking at the question in light of the system of “choice of remedies.” Still the question is debated.

One part of legal scholarship seems to support the alternative nature of Article 16(3) of the Model Law. In order to maintain the argument of interpreting Article 16(3) as a choice, the Singapore Court of Appeal referred to a commentary by Holtzmann and Neuhaus:²³⁴

The arbitral tribunal’s power is neither exclusive nor final. Its decision is subject, first, to immediate review by a court under Article 16(3), second, to later court review in a setting aside procedure under Article 34, and, third, to still later review in an action for recognition and enforcement under Article 36.²³⁵

The plain reading of the stated quotation, in the eyes of the author, does not lead towards a conclusion of alternative nature of Article 16(3) of the Model Law. It rather induces questions similar to the *Fung Sang Trading Limited* judgment,²³⁶ whether post-award stage remedies are still available “later” after using the challenge mechanism under Article 16(3) of the Model Law. The answer to such interpretation clearly falls under the principle of *res judicata*.²³⁷ However, if a different interpretation is to be given to this statement then the authors clearly support the non-preclusive nature of Article 16(3) of the Model Law. Furthermore, Dr. Aron Broches, in commenting Article 16(3) also stipulates that: “after having raised the plea before the arbitral tribunal the party in question has a choice between either seeking a decision from the Art. 6 court under paragraph (3) or raising the issue in proceedings under Arts. 34

²³⁴ Lippo v. Astro, [2013] S.G.C.A. 57, ¶120.

²³⁵ HOLTZMANN & NEUHAUS, *supra* note 22, at 479.

²³⁶ Fung Sang Trading, *supra* note 232.

²³⁷ See Anne-Catherine Hahn, *Chapter III: The Award and the Courts, Res Judicata as a Challenge for Arbitral Tribunals*, in AUST. Y.B. ON INT. ARB. 2014 329, 329-30 (Christian Klausegger, Peter Klein, et. al. eds., 2014).

and 36.”²³⁸ However, it seems that the only Singapore court, after failure to observe all the pertinent *travaux*, including those of Article 16(3) under “choice of remedies” policy, tend to support interpretation of the mentioned authors.

The second and greater part of the legal scholarship, support the preclusive nature of Article 16(3) of the Model Law. Prof. Dr. Alan Uzelac has observed that the concept of Article 16(3) could not envisage multiple court proceedings on the same jurisdictional issue.²³⁹ In commenting on Russian adoption of the Model Law, it has been noted that the court has the power to intervene “to finally decide the competence of the arbitral tribunal - Article 16(3).”²⁴⁰ Interestingly, before the *Lippo v. Astro* judgment, even Singapore’s adoption of Article 16(3) of the Model Law was understood to be the last word on the jurisdictional question and to put “to rest the controversy surrounding the jurisdiction of the arbitrator to determine his own jurisdiction.”²⁴¹

In relation to section 1040(3) of German ZPO, scholars have stated that “lack of a challenge to such ruling within the one month time period ... excludes any reliance on that ground in later setting aside proceedings.”²⁴² Prof. Klaus Peter Berger further clarifies that even in cases where there is express reservation of the right to challenge in post-award stages, after the 30-day time limit is expired, the question becomes *venire contra factum proprium*, and makes parties barred from raising the challenge subsequently.²⁴³ Taking into account the importance of time limit and the express desire of the drafters to obtain certainty on the jurisdictional matter at an early stage, constructing Article 16(3) of the Model Law as preclusionary only seems logical.

Furthermore, Prof. Jeffrey Waincymer explains that Article 16(3) of the Model Law has taken the approach that the su-

²³⁸ BROCHES, *supra* note 122, at 88.

²³⁹ Uzelac, *supra* note 174, at 163.

²⁴⁰ Kaj Hobér, *Arbitration in Moscow*, 3 ARB. INT’L 119, 157 (1987).

²⁴¹ Mohan R. Pillay, *The Singapore Arbitration Regime and the UNCITRAL Model Law*, 20 ARB. INT’L 355, 368, ¶(iv) (2004).

²⁴² Kröll & Kraft, *supra* note 199, at 459, ¶57.

²⁴³ BERGER, *supra* note 68, at 365.

pervisory court at the seat has the last word on the jurisdictional question.²⁴⁴ Final determination of jurisdiction at the seat of arbitration has been reiterated by others, based on the economical reasons, not to proceed to merits without having jurisdiction.²⁴⁵ Even the Singapore Court of Appeal in *Lippo v. Astro* observed that: “it appears to us that there is a policy of the Model Law to achieve certainty and finality in the seat of arbitration.”²⁴⁶ However, all of the above mentioned would indeed not necessarily induce understanding of the court under the procedure of Article 16(3) to have the final word. It could be argued that application for *vacatur* of the award under Article 34 could also obtain the same finality and certainty at the “seat.” Nevertheless, if such choice were to be left in favor of challenge during setting aside proceedings, the purpose behind adopting the specialized immediate court review mechanism would be refuted. The Article 34 remedy was already in place without further need to design the mechanism under Article 16(3) of the Model Law.

Furthermore, if finality and certainty at the seat of arbitration is accepted, then the Singapore Court of Appeal strikes against its own conclusion allowing for a “passive” remedy under Article 36 of the Model Law to still apply. Since domestic international award’s enforcement also takes place at the *seat* under Article 36 of the Model Law,²⁴⁷ it is somewhat unclear how desired certainty could be challenged via “passive remedy” of enforcement. Interestingly, in support of its conclusion, the Singapore Court of Appeal interpreted QCCP to also provide for the possibility to refuse enforcement of a domestic international award (homologation) in the same framework as Singapore.²⁴⁸ However, the court failed to observe that relevant case

²⁴⁴ WAINCYMER, *supra* note 212, at 610.

²⁴⁵ W. MICHAEL REISMAN, W. LAURENCE CRAIG, WILLIAM PARK & JAN PAULSSON, INTERNATIONAL COMMERCIAL ARBITRATION: CASES, MATERIALS AND NOTES ON THE RESOLUTION OF INTERNATIONAL BUSINESS DISPUTES 646 (1997).

²⁴⁶ *Lippo v. Astro*, [2013] S.G.C.A. 57, ¶130.

²⁴⁷ It has been stated before that “Section 3 of its International Arbitration Act provides that the Model law has force of law in Singapore but Articles 35 and 36 of the model Law are expressly excluded” Singapore Court of Appeal extended Article 35 and 36 to apply. See GREENBERG, KEE & WEERAMANTRY *supra* note 166, at 451, ¶9.139.

²⁴⁸ While application for annulment would be the only possible recourse against an arbitration award under Article 947 of Quebec Law but still leav-

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law from Quebec goes against the alleged “choice of remedies” policy extension to Article 16(3) and takes the stance of a preclusionary nature of Article 16(3).

Finally, for policy purposes, making the recourse of Article 16(3) merely optional would serve as a promotion of bad faith actions by obstructing the arbitral process and its enforcement by keeping silent and raising objections only after they lose. In the realm of ambiguity as to the preclusive nature of Article 16(3) of the Model Law, to avoid possible opportunistic behaviors from the parties, the tribunal’s jurisdiction should no longer be subject to further challenges at setting aside or enforcement proceedings in the case of unfavorable award on the merits.²⁴⁹ Keeping in mind the *sui generis* mechanism of Article 16(3) and the underlying purposes behind its adoption, the article concludes that it is to be considered as “one shot” remedy which as noted by Prof. Klaus Peter Berger, decides the jurisdiction “once and for all”²⁵⁰ at least within the seat of arbitration.

VI. CONCLUSION

This article provided analysis of the preclusionary character of Article 16(3) of the Model Law, which grants parties the right to immediate court review of the preliminary jurisdictional ruling of the tribunal. While the Model Law itself fails to provide explicit answers on the consequences of failure to raise the challenge within the timeline provided in Article 16(3), diverging interpretations and positions existing in various Model Law jurisdictions as well as among legal scholarship has been observed.

The author has used the case from Singapore providing far-reaching interpretation of Article 16(3) as the departure point of the analysis of this article. As opposed to what already had been written in the literature in relation to Article 16(3) of the Model Law, this article analyzed the preclusive nature of

ing the grounds for refusal of enforcement under Article 946 and retaining “choice of remedies” policy. See *Lippo v. Astro*, [2013] SGCA 57, ¶78-81.

²⁴⁹ ERK, *supra* note 163, at 188.

²⁵⁰ BERGER, *supra* note 68, at 365.

Article 16(3) from all dimensions. Subsequent to determination of lack of clarity on preclusionary matters under the NY Convention, the article solely focused on the analysis within the system of the Model Law. While analyzing the pertinent *travaux* and case law, the article identified the co-existence of two rather conflicting frameworks. Namely, while the Model Law allows for choice between “active” and “passive” remedies, it also establishes strict preclusion rules on waiver as well as challenge procedures closely analogous to Article 16(3) of the Model Law. Moreover, it has been established that the effect of such preclusions also extends to the post-award stages.

For an accurate understanding of what lies at the heart of Article 16(3) of the Model Law, the article identified the main purpose of the challenge mechanism as early determination of jurisdictional challenges and obtaining legal certainty on the question of jurisdiction. For fulfillment of such purposes, only the character of preliminary decisions without regard to the form of the ruling is decisive for the Article 16(3) mechanism to come into play. Thus the Article 34 recourse of setting aside is limited only to final awards. Another important element of immediate court review, serving the purpose indicated above, is the specific short timeframe for the possibility to raise the challenge. Both case law and literature supported the importance of this factor.

Distinctiveness of this research was mostly concerned with analysis of Article 16(3) within the “choice of remedies” policy of the Model Law. After detailed examination of the *travaux*, contrary to the conclusion reached by Singapore Court of Appeal, the present article leaned towards concluding that drafters of the Model Law designed *sui generis* mechanism under Article 16(3) and excluded from the policy of alternative remedies. In light of such determination, a close look at case law and literature on the question directed the conclusion on preclusiveness of the Article 16(3) of the Model Law to be positive. Since allowing later challenges would defeat the purpose of guaranteeing certainty on jurisdictional rulings at an early stage for avoidance of bad faith actions from the parties, Article 16(3) challenge seems to represent “one shot remedy.” While the relevant procedural rights during enforcement of awards in foreign countries under the NY Convention is still under ques-

tion, at least parties may be sure to have the final word on the jurisdictional ruling after expiration of the 30 day time limit at the seat of arbitration. In light of the final result of the article, although the interpretation of *Lippo v. Astro* was to serve the purposes of “flourishing of arbitration in Singapore,”²⁵¹ it may to the contrary create greater ambiguity among the parties and allow obstruction of arbitral proceedings and the post-award stage.

In the author’s opinion, the Model Law, by leaving a lacuna in Article 16(3), defeats the purpose of the Model Law as “readily understandable by people of very different legal cultures.”²⁵² If the interpretation given by the Singapore Court of Appeal is to be followed by other courts as well, the process of jurisdictional challenges will promote last minute attacks to “leave no stone unturned”²⁵³ after the result of the case becomes known to the parties. As one of the primary concerns of the drafters of Model Law was “not to confront the parties with unexpected and surprising legal consequences”²⁵⁴ leeway for opportunistic behaviors should not be part of the modern international commercial arbitration.

As a result of the research and the reached conclusion, it is suggested that it might be the right time for additional changes to the Model Law in order to achieve the necessary degree of certainty on the question of jurisdiction and to obtain clarity as to available remedies to the parties. Desired uniformity and harmonization between the Model Law and the NY Convention require periodic changes. As the arbitration community has witnessed, none of the proposed amendments of the NY Convention have taken place, while the last amendment to the text of the Model Law was made in 2006. Such practical possibility of modifications in the Model law brings confidence to the author in concluding that the next round of changes is desired on

²⁵¹ *Lippo v. Astro*, [2013] S.G.C.A. 57, ¶90.

²⁵² Lord Dervaird, *Scotland and the UNCITRAL Model Law, The Report to the Lord Advocate of the Scottish Advisory Committee on Arbitration Law*, 6 ARB. INT’L 63, 67 (1990).

²⁵³ BERGER, *supra* note 68, at 648.

²⁵⁴ *Id.* at 755.

many points being subject to continuous discussion.²⁵⁵

Indeed, the limitation of the proposed recommendation could be due to the fact that all Model Law jurisdictions would have to amend their domestic legislations. However, in the view of the author, this is not necessarily precise. By its nature a “Model” of a desired national law on international arbitration, countries would not have to make actual amendments within their jurisdictions (unless desired). To the contrary, amendments in the Model Law could draw a clear-cut line in the interpretation of necessary provisions and the courts would have less flexibility as in case of the Singapore Court of Appeal. Such opinions follow the position of Dr. Klaus Peter Berger that “every change or supplementation of the original structure or language of the Model Law has to take into account the important signaling effect that the adoption of the law is intended to have on foreign arbitral practitioners and parties.”²⁵⁶ Due to such important effect, weighing different considerations towards each other should be resolved towards explicit clarification of issues of such significance as determining available remedies of the parties and possible consequences of their (in)actions.

²⁵⁵ For the purposes of the article, to limit conclusion with Article 16 only, there are various issues except for preclusionary effect of the failure to raise the challenge. To name but a few, form to be given to preliminary ruling on positive as well as negative jurisdictional rulings, effects of negative jurisdictional ruling and available recourse against the latter, standard of review under Article 16(3), etc. *See, e.g.*, Kröll, *supra* note 13, at 55; Pavić, *supra* note 213, at 395.

²⁵⁶ BERGER, *supra* note 68, at 753.