

The Importance of Specificity in Selecting a Seat of Arbitration – Determining the Court of Exclusive Jurisdiction in the Malaysian Context

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Introduction

When drafting arbitration clauses, the selection of the seat is a crucial aspect. It establishes the applicable *lex arbitri* as well as the court which would have supervisory jurisdiction over an arbitration.

In Malaysia, there exists two High Courts with separate territorial jurisdictions – the High Court of Malaya (which has jurisdiction over West Malaysia) and the High Court of Sabah and Sarawak (which has jurisdiction over East Malaysia). The scenario is not dissimilar to other countries in which different states have their own courts of coordinate jurisdiction. In such countries, one question which arises is this: In an arbitration seated in the country, which court would then have exclusive jurisdiction? Would it be the court at the place specified? What if the arbitration agreement merely provides the country and not the specific state (in this context, "Malaysia" rather than the specific state in Malaysia) as the seat?

To answer this question, we explore the Malaysian Federal Court decision of *Masenang Sdn Bhd v Sabanilam Enterprise Sdn Bhd* [2021] 6 MLJ 255 ("**Masenang**"). Here, the Federal Court held where a particular place within Malaysia is chosen as the designated seat, it is the court of that particular place that enjoys supervisory jurisdiction over the arbitration. It is therefore irrelevant where the cause of action arose.

Background Facts

Masenang Sdn Bhd ("**Appellant**") and Sabanilam Enterprise Sdn Bhd ("**Respondent**") were both parties to a standard PAM Contract 2006 in relation to a development project in Sabah. The contract contained an arbitration clause referring any disputes to arbitration seated in Kuala Lumpur. Disputes arose between the parties, leading to the commencement

of arbitral proceedings at the Kuala Lumpur Regional Arbitration Centre (now known as the [Asian International Arbitration Centre](#)). Eventually, the sole arbitrator handed down an award ("**Award**") in favour of the Appellant.

The Appellant filed an application to enforce the said Award at the High Court of Malaya in Kuala Lumpur ("**KL High Court**"), pursuant to section 38 of the Arbitration Act 2005 ("**AA 2005**"). Meanwhile, the Respondent filed an application to set aside the same Award at the High Court of Sabah and Sarawak in Kota Kinabalu ("**KK High Court**"), pursuant to section 37 of the AA 2005.

The Appellant then sought to strike out the Respondent's setting aside application on the ground that the KL High Court had jurisdiction over the Award due to the arbitration being seated in Kuala Lumpur. The KK High Court allowed this striking out application.

On appeal by the Respondent, the Court of Appeal reversed the decision of the KK High Court and held that the AA 2005 recognised the concurrent jurisdiction of both the High Court of Malaya and the High Court of Sabah and Sarawak. Hence, both courts were entitled to hear and determine any application concerning the Award. It was also held that the concept of "seat" is irrelevant in domestic arbitrations as the same curial law – the AA 2005 – applies throughout the country.

The Appellant appealed to the Federal Court.

Holding of the Federal Court

The Federal Court allowed the appeal.

Relevance of seat

Apart from ascertaining the curial law, the seat of arbitration also determines which court would have exclusive jurisdiction over the arbitration. Since the arbitration clause in the parties' contract stipulated Kuala Lumpur as the seat, it was the KL High Court which had regulatory and supervisory jurisdiction over the arbitration award. In arriving at this determination, the Federal Court interpreted sections 2, 3, 10, 22, 33, 37, 38 and 41 of the AA 2005, concluding that there is no distinction between international and domestic arbitrations when it comes to the concept of seat.

The Federal Court also found that it would be insufficient to only state the seat of arbitration as "Malaysia" as the seat cannot amount to a reference to the entire country. While this may be enough to determine the curial law, it still does not distinguish which court would have jurisdiction. This concept is important to avoid conflicting jurisdictions and unnecessary litigation.

Irrelevance of territorial jurisdiction

One argument raised was in respect of section 23 of the Courts of Judicature Act, which concerns the concept of territorial jurisdiction. The Federal Court held that section 23 had no application to an arbitration. The Federal Court emphasised that arbitrations are specially governed by the comprehensive AA 2005, which is modelled after the UNCITRAL Model Law on International Commercial Arbitration 1985.

In so deciding, the Federal Court referred to the Indian Supreme Court case of *BGS SGS Soma JV v NHPC Ltd.* [2020] 3 MLJ 336 (SC) ("**BGS v NHPC**"), with the Indian arbitral legislation being based on the Model Law as well. In *BGS v NHPC*, it was held that the seat of arbitration gave exclusive jurisdiction to the court situated in the seat. The Indian Supreme Court found that the seat was New Delhi, thereby conferring exclusive jurisdiction on the courts of New Delhi.

Concluding Remarks

Masenang is important as it serves to guide contracting parties to designate a specific location/state as the seat of arbitration. This does not only apply to arbitrations seated in Malaysia, but in other countries wherein different states have their own courts of coordinate jurisdiction.

A failure to give due consideration to the seat of arbitration may lead to various complications. In Malaysia, one complication would be restrictions regarding legal representatives. In the Federal Court case of *Samsuri bin Baharuddin & Ors v Mohamed Azahari bin Matiasin and another appeal* [2017] 2 MLJ 141, it was held that only lawyers admitted in Sabah would have the right to act as counsel in arbitrations seated in Sabah. Hence, parties should be mindful of this as representation is a key aspect in international arbitrations.

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