Introduction

When parties opt for arbitration, the arbitration clause or agreement reflects their mutual consent to resolve disputes through arbitration. However, it is often overlooked that incorrectly drafting the arbitration clause can have significant implications, whether domestic or international.

Among the crucial factors to consider in drafting arbitration clauses are: what is the choice of law to govern the dispute? What is the country, state, or city of jurisdiction? Where is the seat of arbitration? What is the law of arbitration or *lex arbitri* to govern the arbitration proceeding?

These are important questions that come with important consequences. In this article, we will focus on one key element in drafting an arbitration clause: the selection of the seat of arbitration.

What is an arbitration seat?

An arbitration seat extends well beyond merely serving as the venue or geographical location of the arbitration, which many are often confused about. The seat of arbitration represents a location chosen by the parties as the legal locus or home of arbitration, thereby determining the procedural framework of the arbitration or *lex arbitri* that will be applicable whether it be international or domestic. Additionally, it also establishes which court possesses a 'curial role' or supervisory jurisdiction over the arbitration proceedings.[1]

Significance of choosing a seat

Specifying the seat will have a very specific legal effect in either domestic or international arbitration. It will determine which country's procedural laws will apply to the arbitration proceeding. More importantly, the seat of the arbitration will be the place where the award is deemed to have been made.[2]

For example, an arbitration tribunal with its seat in London, specifically the London Court of International Arbitration, may be required to apply the law of Singapore or some other law as the case may be to the substantive issues between the parties. Nevertheless, its own arbitration proceedings will be governed by the London Court of International Arbitration Rules ("**LCIA Rules**").[3]

In essence, when parties select the seat of arbitration in a particular country, they ultimately adopt the legal framework of that country.[4] If the law contains provisions that are mandatory, it must be obeyed and it is not a matter of choice.

Further, specifying a seat will also subsequently determine which court will have jurisdiction over the arbitration. Although courts of other jurisdictions have the jurisdiction to enforce or refuse the recognition of a foreign arbitral award subject to the doctrine of international reciprocity,[5] it does not have jurisdiction to annul or set aside an arbitral award or to hear applications for interim relief.[6]

Simply put, by agreeing to the seat, the parties agree that any application to set aside an interim or final award is to be made only in the courts of the place designated as the seat of the arbitration i.e. referring to the example above, the court in London.

Failure to specify a seat - An analysis of a Federal Court case

If a seat is not specified, which court would then have exclusive jurisdiction? Additionally, if a country is stipulated as a seat without specifying the state or city, does this impact the court's exercise of jurisdiction? To answer these questions, we will explore the Federal Court case of **Masenang Sdn Bhd v Sabanilam Enterprise Sdn Bhd**.[7]

Background facts

Masenang ("**the Appellant**") was appointed by Sabanilam ("**the Respondent**") to carry out a construction contract in Penampang, near Kota Kinabalu, Sabah ("**the Agreement**"). Clause 34.5 of the Agreement specifies that all disputes shall be referred to arbitration and **the seat of the arbitration specified is Kuala Lumpur**. The arbitration took place in Kuala Lumpur and culminated in an award in favour of the Appellant.

Subsequently, the Appellant initiated an application for enforcement of the award as a judgment under Section 38 of the Arbitration Act 2005 in the **Kuala Lumpur High Court**. On the other hand, the Respondent applied to set aside the award under Section 37 of the Arbitration Act 2005 in the High Court in Sabah and Sarawak at **Kota Kinabalu**.

The Appellant then applied to have the Respondent's application struck out on the grounds that the Kuala Lumpur High Court had supervisory jurisdiction over the arbitration proceedings since it took place in Kuala Lumpur and the award was made there.

The Respondent, however, took the view that as the cause of action took place in Penampang, the Kota Kinabalu High Court had jurisdiction under Section 23 of the Courts of Judicature Act 1964 to hear the application to set aside the award. Eventually, the Kota Kinabalu High Court allowed the Appellant's application and struck out the Respondent's application to set aside the award. In the meantime, the Kuala Lumpur High Court registered the award as a judgment.

Appeal at the Court of Appeal

On appeal by the Respondent, the Court of Appeal reversed the decision of the Kota Kinabalu High Court. The Court of Appeal held that the concept of seat of arbitration is irrelevant because the curial law being the Arbitration Act 2005 applies throughout Malaysia. Therefore, both the Kuala Lumpur High Court and the Kota Kinabalu High Court enjoy concurrent jurisdiction whereby the enforcement and/or annulment of the arbitral award could be heard by any domestic court, be it in the High Court in Malaya or the High Court in Sabah and Sarawak. The Court of Appeal remitted the case to the Kota Kinabalu High Court to be determined on merit, notwithstanding the fact that the award had been registered as a judgment by the Kuala Lumpur High Court. The Appellant then appealed to the Federal Court.

Issue(s)

One of the main issues for determination before the Federal Court is whether High Court in Sabah and Sarawak has supervisory jurisdiction to hear the application to set aside the arbitration award issued in Kuala Lumpur.

Decision of the Federal Court

The Federal Court allowed the Appellant's appeal.

Contrary to the Court of Appeal's findings, the Federal Court held the court at the seat of the domestic arbitration enjoyed exclusive jurisdiction to exercise supervisory powers over

the arbitration proceedings. Ascertainment of the seat was therefore relevant and essential in domestic arbitrations and the issue of where the cause of action arose had no bearing in determining the seat of the arbitration.

If the seat is in Peninsular Malaysia, the High Court of Malaya has jurisdiction. If the seat is in Sabah or Sarawak, the jurisdiction falls to the High Court of Sabah and Sarawak.

In this case of Kuala Lumpur being the seat, the Kuala Lumpur High Court exclusively supervises the arbitration and its awards. Consequently, the decision by the Kota Kinabalu High Court to set aside the award is considered void, while the Kuala Lumpur High Court's decision to register and enforce the award is affirmed.

Takeaway

The Federal Court's decision put forth the concept of 'juridical seat' with equal significance in both domestic and international arbitration. This seat determines the exclusive jurisdiction for supervisory and regulatory powers over arbitration proceedings. Unlike the law governing civil disputes such as Section 23 of the Courts of Judicature Act, which determines the jurisdiction of the court by ascertaining where the cause of action arose, the law applicable for arbitration is only governed by the Arbitration Act 2005[8] and arbitration law.

It is crucial for parties to explicitly specify the seat of arbitration, especially in cases where a country or state has multiple courts with coordinate jurisdictions. As for domestic arbitration, the parties should specify a particular place within the country.

The absence of a specified seat can lead to ambiguity, allowing parties to file challenges to arbitral awards in various courts, potentially resulting in conflicting judgments and unnecessary litigation that is avoidable.

Conclusion

In conclusion, when drafting arbitration clauses, parties to an agreement must bear in mind the important key considerations especially when it comes to specifying the seat of arbitration. Parties must agree on the seat and consider how that country's rules and laws will benefit them and the process.

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1. Parsons, Jane (24 January 2018). "Safety First: Choosing a Seat of Arbitration." http://arbitrationblog.practicallaw.com/safety-first-choosing-a-seat-of-arbitration/.
2. Section 33 of Arbitration Act 2005.
3. London Court of International Arbitration Rules.

4. Redfern, Alan and Hunter, Martin on Law and Practice of International Commercial Arbitration (3rd Edition, London Sweet & Maxwell 1999).
5. Zakaria Ariffin Tun, Rajoo Sundra & Koh Philip on Arbitration in Malaysia: A Practical Guide (Sweet & Maxwell, 2016).
6. MoloLamken LLP (2021). "What is the 'Seat' of an Arbitration and Why Does It Matter?" https://www.mololamken.com/knowledge-what-is-the-seat-of-an-arbitration.
7. [2021] 6 MLJ 255; [2021] 9 CLJ 1.
8. Sections 2, 3, 10, 22, 33, 37, 38 and 41 of Arbitration Act 2005.

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28 February 2024

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