**IN THE FEDERAL COURT OF MALAYSIA AT KOTA KINABALU**

**(APPELLATE JURISDICTION)**

**CIVIL APPEAL NO: 02(i)-20-03/2020(S)**

**BETWEEN**

**MASENANG SDN BHD … APPELLANT**

**(COMPANY NO.: 172290-T)**

**AND**

**SABANILAM ENTERPRISE SDN BHD … RESPONDENT**

**(COMPANY NO.: 130297-X)**

**[IN THE COURT OF APPEAL OF MALAYSIA AT KOTA KINABALU]**

**CIVIL APPEAL NO: S-02(NCvC)(A)-693-03/2018**

**BETWEEN**

**SABANILAM ENTERPRISE SDN BHD … APPELLANT**

**(COMPANY NO.: 130297-X)**

**AND**

**MASENANG SDN BHD … RESPONDENT**

**(COMPANY NO.: 172290-T)**

**[IN THE HIGH COURT IN SABAH AND SARAWAK**

**AT KOTA KINABALU**

**ORIGINATING SUMMONS NO: BKI-24NCC(ARB)-1/11-2017(HCI)**

**BETWEEN**

**SABANILAM ENTERPRISE SDN BHD … PLAINTIFF**

**(COMPANY NO.: 130297-X)**

**AND**

**MASENANG SDN BHD … DEFENDANT**
**(COMPANY NO.: 172290-T)]**

**CORUM:**

**NALLINI PATHMANATHAN, FCJ**
**VERNON ONG LAM KIAT, FCJ**
**RHODZARIAH BUJANG, FCJ**

**JUDGEMENT**

## Introduction

**[1]** The events giving rise to this dispute, resulting in this appeal, took place in Panampang, near Kota Kinabalu, Sabah. The Appellant, Masenang Sdn. Bhd. ('**Masenang**') is the contractor under a standard PAM construction contract between itself and one Sabanilam Enterprise Sdn Bhd ('**Sabanilam**'), the employer. Disputes arose over the construction works resulting in a resolution of the dispute by way of arbitration.

**[2]** The agreement between the parties is a standard PAM contract 2006. **Clause 34.5** relates to arbitration and is entitled "Disputes referred to arbitration". It is effectively the arbitration agreement and provides as follows:

> *"34.5 In the event that any dispute or difference arises between the Employer and Contractor, either during the progress or after completion or abandonment of the Works regarding:*

*34.5(a) any matter of whatsoever nature arising under or in connection with the Contract;*
*34.5(b)……*
*34.5(c)……..*
*34.5(d)……*
*34.5(e)……*

*Then such disputes or differences shall be referred to arbitration."*

**[3]** And for completion, **clause 34.7** which is entitled "Arbitration Act and Rules" provides:

*"34.7 Upon appointment the arbitrator shall initiate the arbitration proceedings in accordance with the provisions of the Arbitration Act 2005 or any statutory modification or re-enactment to the Act and APM Arbitration Rules or any modification or revision to such rules."*

**[4]** The arbitral dispute was heard fully in Kuala Lumpur and the award handed down there. The Final Award dated 12 October 2017 was handed down in Kuala Lumpur in favour of Masenang in the sum of RM26,765,198.29, payable by Sabanilam.

**[5]** The seat of the arbitration is Kuala Lumpur.

**[6]** Masenang then initiated registration proceedings under **section 38 of the Arbitration Act 2005 ('AA')** in the High Court in Malaya at Kuala Lumpur **('the KL suit'**).

**[7]** Sabanilam, on the other hand, sought to set aside the award under **section 37 AA**, and filed an application to do so two days later, but

initiated the suit in the High Court in Sabah and Sarawak at Kota Kinabalu **('the KK suit')**.

**[8]** In the **KK suit** Sabanilam is the plaintiff, and Masenang the defendant. Conversely, in the registration suit filed in Kuala Lumpur, Masenang is the plaintiff and Sabanilam the defendant.

**[9]** As a consequence of these two sets of proceedings, the issue of the registration and the setting aside of the award has given rise to a multiplicity of proceedings. To add to this, conflicting decisions were handed down by the respective High Courts.

**[10]** It is the decision of the **KK suit** in the High Court in Sabah and Sarawak at Kota Kinabalu, and subsequently the Court of Appeal, that comprises the basis for the present appeal. The **KL suit** is currently also the subject matter of appeal, together with two other appeals, in the Court of Appeal. Suffice to say that at present, there are four appeals pending in the Court of Appeal, arising from this single arbitration relating to these construction works, as a consequence of the filing of the two suits in the High Court in Malaya and the High Court in Sabah and Sarawak, and the conflicting decisions handed down.

**[11]** In short, a single domestic arbitration has spawned no less than four appeals and caused the present state of legal chaos, which is antithetical to the order essential to any rational system of administration of justice. The prosaic legal refrain that a multiplicity of proceedings results in a waste of time and resources, causes vexation and, most significantly, creates a risk of inconsistent outcomes, not to mention the creation of dubious precedents, which will affect the rights of parties in the future, has

rarely proven more true. It is therefore essential to resolve the legal impasse which currently subsists.

## Chronology of Events

**[12]** The chronology of events leading to this appeal is set out as follows:

(a) The arbitration award in this appeal was handed down in Masenang's favour on **12 October 2017 in Kuala Lumpur**. On **8 November 2017**, Masenang sought to have the arbitration award registered for purposes of **enforcement in the Kuala Lumpur High Court** under **section 38 AA** in the **KL suit**.

(b) Sabanilam subsequently filed the **KK suit**, i.e. proceedings in the Kota Kinabalu High Court seeking to set aside the arbitration award, on **10 November 2017**, two days after Masenang had filed its application for registration. At this juncture both parties were unaware of the proceedings undertaken by each of them.

(c) When Masaenang learnt of the proceedings filed by Sabanilam, it applied to transfer the proceedings to the Kuala Lumpur High Court on **27 November 2017**. On **29 December 2017**, it filed two notices of application to strike out the setting aside application on the grounds that the seat of the arbitration was at Kuala Lumpur.

(d) These applications were made under **Order 18 Rule 19 (1)(a) to (d) of the Rules of Court 2012 ('RC')**. On this basis, Masenang asserted that the Kuala Lumpur High Court, and not the Kota Kinabalu High Court, was the proper **supervisory court for the arbitration proceedings, and the Kota Kinabalu High Court**

**lacked jurisdiction to hear the originating summons to set aside the award**.

(e) **Sabanilam contended that the Kota Kinabalu High Court enjoyed jurisdiction under, inter alia, section 23 of the provisions of the Courts of Judicature Act 1964 ('CJA'), as the cause of action arose in Penampang and therefore the High Court in Kota Kinabalu was seized of jurisdiction.**

**The First Decision of the High Court in Sabah & Sarawak at Kota Kinabalu**

(f) On **22 March 2018**, the Kota Kinabalu High Court allowed the application, **striking out the originating summons filed by** Sabanilam to set aside the arbitral award under **Order 18 Rule 19(1)(a) RC 2012**.

(g) On **26 March 2018** Sabanilam filed an appeal against the Kota Kinabalu High Court order striking out the setting aside application. The appeal was disposed of a year later on **22 March 2019.**

(h) On **16 July 2018**, the Kota Kinabalu High Court delivered its grounds of judgement. **It was reasoned that as the seat of the arbitration was at Kuala Lumpur, the court enjoying supervisory jurisdiction over the arbitral award was the High Court in Malaya at Kuala Lumpur**. In short, the learned Judge agreed with Masenang's exposition of the law.

(i) In the interim period, on **27 November 2018**, **the Kuala Lumpur High Court registered the arbitral award as a judgement.**

**The Decision of the Court of Appeal**

(j) On **22 March 2019**, the Court of Appeal reversed the decision of the Kota Kinabalu High Court striking out Sabanilam's application to set aside the arbitral award. It held, *inter alia*, that **as the AA recognised that both the High Court in Malaya and the High Court in Sabah and Sarawak enjoyed concurrent jurisdiction, 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.**

(k) It went on to hold that as there was no issue of any other nation assuming **the 'seat' of the arbitration, the concept of the 'seat' of arbitration became irrelevant**.

(l) The Court of Appeal also stated that there was only one single curial law applicable, namely the **AA**. It went on to hold that under the **AA**, Sabanilam had the right to apply to set aside the award, in as much as Misenang had the right to register the same **in any court in Malaysia**. **In that context, the Kota Kinabalu Court had the jurisdiction to set aside the award in as much as the Kuala Lumpur High Court enjoyed the jurisdiction to register the award. It was incumbent, the Court of Appeal held, for the High Court in Kota Kinabalu to hear and determine that challenge under the provisions of the AA, notwithstanding the fact that the Kuala Lumpur High Court had registered the arbitral award as of 27 November 2018**.

(m) As a consequence of the decision of the Court of Appeal, **Sabanilam proceeded with its application to set aside the arbitral award in the Kota Kinabalu High Court**.

**The Decision of the High Court at Kota Kinabalu on the Application Being Remitted to it by the Court of Appeal**

(n) On **14 June 2019 the Kota Kinabalu High Court set aside certain paragraphs of the arbitral award and remitted the award to the arbitrator for re-determination**.

(o) On **25 September 2019**, the Court of Appeal granted a stay of the Kota Kinabalu order which set aside parts of the arbitral award and remitted the same for re-determination. The stay remains in place pending the disposal of the appeal against the same order.

(p) **As matters currently stand, there are now two diametrically opposed decisions of the High Court in respect of this single arbitral award, one registering the award as a valid judgement, and the other remitting it for redetermination on certain issues before the arbitrator**.

(q) Sabanilam also appealed to the Court of Appeal against the Kuala Lumpur High Court's decision to register the award as a judgement. Hence the four appeals pending in the Court of Appeal.

(r) On **19 February 2020** leave was granted to Masenang against the decision of the Court of Appeal dated 22 March 2019, resulting in the present appeal. Such leave was granted in respect of the setting aside of the arbitral award by the Kota Kinabalu High Court, only.

**The Questions of Law**

**[13]** Pursuant to the grant of leave, the following questions of law were referred for determination before us:

(1) Whether, by reason of the Federal Court's decision in **Hap Seng Plantations (River Estates Sdn Bhd v Excess Interpoint Sdn Bhd [2016] 3 MLJ 553 ('Hap Seng')** inter alia, that the High Court in Malaya and the High Court in Sabah and Sarawak each has its own separate territorial jurisdiction, there exists in law two separate supervisory jurisdictions in Malaysia over arbitrations or arbitration awards, namely one under the High Court in Malaya and one under the High Court in Sabah and Sarawak.

(2) Whether, by reason of the Federal Court's decision **Hap Seng**, *inter alia*, that the High Court in Malaya and the High Court in Sabah and Sarawak each has its own separate territorial jurisdiction, the High Court in Sabah and Sarawak in Kota Kinabalu has supervisory jurisdiction to hear an application to set aside an Arbitration Award issued in Kuala Lumpur.

(3) Whether, in the context of there being two separate territorial jurisdictions in Malaysia, the seat of a domestic arbitration may be a state or a territory within Malaysia.

**The Appeal Before Us**

**[14]** When the matter came before us on **16 February 2021**, the immediate issue that arose for consideration was whether the four

appeals which have yet to be determined by the Court of Appeal ought to be disposed of first. However, we reasoned that it was important to have this appeal disposed of, so that **this issue of the territorial jurisdiction of a court versus the supervisory jurisdiction of a court at the seat of the arbitration of a court in a domestic arbitration is first resolved.**

**[15]** Another factor that was relevant to our minds was the fact that the Court of Appeal, in hearing the appeals before it, would be *prima facie* bound by its previous decision that any High Court throughout Malaysia is at liberty to exercise supervisory jurisdiction over an arbitral award no matter where the juridical seat of the arbitration is.

**[16]** The net effect of that decision would not assist in determining the four appeals, save perhaps on the basis of the general principles of civil procedure, relating to abuse of process. Utilising this principle, the first court in which proceedings were filed would be the court to determine matters. But that in turn would result in parties to an arbitral award rushing to file proceedings to either enforce or set aside an award in a court of their choice, such that the accepted position in law would be 'first to the goal post' wins all. That is not a satisfactory resolution, given the existence of the **AA** and the primacy of the concept of the juridical seat of an arbitration in arbitration law;

**[17]** On **26 March 2021**, we conducted a case management with the parties in this case with the attendance of counsel representing the parties in the four appeals currently before the Court of Appeal, as they would be affected by our decision in this appeal. We were of the view that the lawyers representing the parties in the four appeals ought to be given the opportunity to address the court at the continuation of the part heard

appeal before us. We requested for further submissions on the issue of the multiplicity of proceedings in this case. Ultimately all parties were accorded the opportunity to appear before us and submit on this appeal

## The Submissions of the Respective Parties

**[18]** We do not propose to recite the submissions of the parties as most of their contentions are considered in the course of our analysis and decision below.

### A) The Submissions of the Appellant, Masenang

**[19]** In summary, however, it is the contention of the Appellant, i.e. Masenang, that the Respondent, i.e. Sabanilam's setting aside application and the decision in the KK suit ought to be struck out and the three questions answered as follows:

(a) **Question 1** is to be answered in the affirmative, namely that the High Court in Malaya and the High Court in Sabah and Sarawak enjoy two separate "supervisory" jurisdictions over domestic arbitrations;

(b) **Question 2** is to be answered in the negative in that the High Court in Sabah and Sarawak has no supervisory jurisdiction over the application to set aside;

(c) **Question 3** is to be answered in the affirmative in that the seat of a domestic arbitration can be a state or territory.

**[20]** To support their answers, learned counsel for Masenang submitted *inter alia* that:

(i) The concept of “seat of arbitration” is relevant to both domestic and international arbitration from the location of **section 22 AA** under **Part II AA** which applies to both types of arbitrations;

(ii) There are 3 principles for determining the seat of arbitration, namely there is a strong presumption that the venue or place of arbitration is the “seat”; secondly in the absence of any other place being designated as the “seat” the above presumption is strengthened; and thirdly in the absence of a clear agreement to change the “place” of arbitration, the court would be slow to interfere with the agreement of the parties.

**[21]** Reference was made to case-law including **Shashoua v Sharma [2009] 2 All ER (Comm) 477** which was applied locally in **Sebiro Holdings Sdn Bhd v Bhad Singh [2014] 11 MLJ 761(HC), [2015] 4 CLJ 209 (COA).**

**[22]** In support of their contention that the seat of arbitration in the instant appeal is Kuala Lumpur, the Appellant pointed to the following indicia:

(i) **Article 7 of the PAM Arbitration Rules** clearly stipulate the PAM Arbitration Centre in Kuala Lumpur as the place of the arbitration;
(ii) The arbitration was held in Kuala Lumpur and proceeded for 27 days, with 11 witnesses, presided over by a Kuala Lumpur based arbitrator and parties represented by Kuala Lumpur based solicitors. All this was done with the agreement of the parties;
(iii) The award was published in Kuala Lumpur;

(iv) The cause of action in respect of the respondent's setting aside application arose in Kuala Lumpur.

**[23]** Thus, the seat of the arbitration is Kuala Lumpur and accordingly the High Court in Sabah and Sarawak is not the supervisory court and does not have jurisdiction over the arbitration or the setting aside application. There exist in law two separate supervisory jurisdictions in Malaysia in relation to arbitration, one being the High Court in Malaya and the other being the High Court in Sabah and Sarawak. The seat of a domestic arbitration may be a state or territory in Malaysia. This is recognised in Malaysian case law as well as Commonwealth cases from the United Kingdom, Australia and Hong Kong.

**[24]** It was further submitted that the Court of Appeal erred in relying on **section 23(1) CJA** to clothe the High Court in Sabah and Sarawak with jurisdiction. This provision is inapplicable in the present matter as the cause of action under the construction contract had merged with the award. The setting aside application was not to enforce a cause of action for breach of the construction contract, but was filed under the **AA** to set aside the arbitration award. Accordingly the High Court in Sabah and Sarawak could not set aside the enforcement order granted by the High Court in Malaya which is a court of co-ordinate jurisdiction. To that end, the Court of Appeal erred in reinstating the setting aside application in the High Court in Sabah and Sarawak.

**[25]** Learned counsel for Masenang relied on the Indian authority of **BGS SGS Soma JV v NHPC Ltd. [2020] 3 MLJ 336 (SC) ('BGS Soma')** as well as **Mankatsu Impex Private Limited v Airvisual Limited, 5 March 2020 ('Mankatsu Impex')** which are both decisions of the Indian Supreme

Court dealing with the issue of the supervisory court clothed with jurisdiction to regulate arbitral proceedings including awards in the context of domestic arbitrations.

**[26]** Ultimately Masenang maintained that the cause of the confusion in the instant case is attributable to Sabanilam not filing the setting aside application at the supervisory court. The identity of the supervisory court is to be determined by a determination of the seat of arbitration. It ought to have filed its challenge at the supervisory court and obtained a stay of enforcement of the award. If it had done so, there would be no possibility of concurrent proceedings subsisting both in the High Court in Malaya at Kuala Lumpur and the High Court in Sabah and Sarawak at Kota Kinabalu.

**B) <u>The Submissions of the Respondent, Sabanilam</u>**

**[27]** The Respondent, Sabanilam, on the other hand maintains that in the instant appeal which involves a domestic arbitration, both parties are subject to the curial law of the **AA**. As such, there is no need to undertake an exercise to determine the seat of arbitration and whether it lies in West Malaysia or East Malaysia because the Malaysian **AA** is the sole curial law for domestic and international arbitrations as shown by the provisions of **section 2**. Sabanilam pointed out that **section 3(1) AA** states that the **AA** applies throughout Malaysia and does not distinguish between West Malaysia or East Malaysia.

**[28]** It was also contended that the seat of arbitration is not equivalent to the physical venue of arbitration and cited various textbooks and authorities to support its stance. It was submitted that the approach of the

Court of Appeal is the correct approach to take in this appeal and that the approach of the first decision by the High Court in Sabah and Sarawak at Kota Kinabalu is contrary to settled law.

**[29]** Sabanilam contended that Masenang has wrongly conflated the concepts of the seat of arbitration with that of the separate territorial jurisdictions of the High Court in Malaya and the High Court in Sabah and Sarawak. Relying on **Fung Beng Tiat v Marid Construction Co [1996] 2 MLJ 413 ('Fung Beng Tiat')** it was contended that these High Courts exercise territorial jurisdiction over disputes that arise in the geographical area and court proceedings cannot be transferred between these two High Courts.

**[30]** Sabanilam maintained that it had exercised its statutory rights under the **AA** within the strict time frame but the Appellant, Masenang had unjustly filed a tactical striking out application to summarily deny Sabanilam of its statutory rights.

**[31]** Sabanilam maintained that the Indian Supreme Court decision in **BGS SGS Soma *(above)*** was inapplicable because the court there was interpreting the peculiarly worded provision of **section 2(1)(e)(i)** in the **Indian Arbitration and Conciliation Act 1996**. Reliance was also placed on a subsequent decision of a differently constituted bench of the Indian Supreme Court in **Mankatsu Impex *(above)*** where the court held that venue is not to be conflated with seat and did not rely on **BGS SGS Soma *(above)*** to decide that the seat determined the jurisdiction of the court enjoying supervisory jurisdiction.

**[32]** Sabanilam also (in subsequent submissions) maintained that authorities from other jurisdictions ought not to be relied on, as the legislation is not in *pari materia* with our **AA**.

**[33]** Turning to **section 23 CJA**, Sabanilam argued that Masenang's contention that the section was inapplicable was an attempt to "sidestep the implications" of **section 23 CJA** which the respondent had met and complied with. It was further argued that despite the original causes of action "seemingly" merging into the arbitration award, a party seeking to challenge the award is still seized with statutory causes arising under the **AA**. The respondent had met the requirements of **section 23 of the CJA** in filing its application to set aside the award.

## Questions Posed at the Hearing

**[34]** At the hearing of the appeal, we questioned the respondent on the current conundrum faced by the parties with several conflicting decisions pending in the court below. If parties could file their challenge to an arbitral award wherever they liked or chose, the unavoidable consequence would be the possibility of different and conflicting judgements at first instance in the High Court sitting at different places. There could therefore be no conclusive determination of the matter at first instance, as there would be two decisions on the same matter. The two decisions would then have to go on appeal to the Court of Appeal and then the Federal Court, with the result that the appellate courts would have to determine which of the High Court decisions to affirm or overturn. This we pointed out was contrary to any rational system of adjudication.

**[35]** It would also have a detrimental impact on the future of domestic arbitrations in this jurisdiction. It would amount to the courts endorsing a two-tiered dispute, where the first tier would involve the arbitration, which would be followed by a second tier of dispute/s in the civil courts, relating to where the venue of challenge ought to be.

**[36]** This would also give rise to the unsatisfactory result that whoever first filed an application in relation to the award, be it registration and enforcement, or a challenge in the form of a setting aside, would succeed in wresting control of the proceedings. The alternative of the supervisory court having control of these matters was put to learned counsel for Sabanilam.

**[37]** The response was that the position in relation to the registration and enforcement or setting aside of arbitral proceedings is akin or similar to enforcement proceedings in civil claims, in that a party seeking to enforce a court order would simply file it at the place where the order is sought to be enforced. Applied to the instant appeal it was contended that the correct court is the High Court in Sabah and Sarawak at Kota Kinabalu given that Sabanilam is located in Sabah and its assets are within the jurisdiction of that High Court.

**[38]** Post-hearing submissions were also filed. Sabanilam argued that Indian case-law is inapplicable in the present appeal, given the difference in the respective legislation. It was reiterated that **section 23 CJA** is applicable and that if concurrent proceedings are filed, it is left to either High Court to stay one or the other. If there were procedural concerns this could be dealt with by reference to the Rules Committee which might

require an amendment to **Order 69 RC**. In short the fundamental concept of the lack of a 'seat' in domestic arbitrations was maintained.

## Our Analysis and Decision

**[39]** We have considered the submissions of the parties both oral and written. It appears to us that prior to answering the three questions of law referred, it is necessary to resolve the issues we have set out below. A resolution of these issues will involve a consideration and analysis of the law which will then assist us in answering the questions posed.

**[40]** Following from the decision of the Court of Appeal resulting in this appeal, several important issues arise for consideration and adjudication:

(a) Whether the **theory of the "juridical seat" of an arbitration has relevance or application in domestic arbitrations within Malaysia** which, like international arbitrations are governed by the **AA**;

(b) If the **theory of the juridical seat is applicable to domestic arbitrations governed by the AA**, then is the court at the seat vested with the exclusive jurisdiction to regulate the arbitral proceedings arising out of the agreement between the parties in a domestic arbitration?

(c) If the **theory of the juridical seat is irrelevant and the exercise of ascertaining the seat is inapplicable in domestic arbitrations**, such that the ensuing theory of the exclusive jurisdiction of the court at the seat (as propounded by arbitration

law) is inapplicable, then how is the court enjoying supervisory jurisdiction over the domestic arbitration to be ascertained?

(d) Is the regulation of domestic arbitration to be determined by applying the law governing civil disputes, which specifies or delineates the original territorial jurisdiction of the courts, and is determined primarily by where the cause of action arose?

(e) If parties to the domestic arbitration initiate registration and setting aside proceedings separately in two disparate courts i.e. both at the court of the seat, as well as the court where the cause of action arose, conflicting decisions may well arise, apart from the issue of duplicity, as is the case here. Which decision is to prevail in the event of conflicting decisions?

**[41]** Point (e) is precisely the position the parties find themselves in, in the instant appeal. The present appeal deals with only one segment or a part of the entire series of suits that have evolved from the single domestic arbitration between the parties to this appeal.

**Issue (a): Whether the theory of the "juridical seat" of an arbitration has relevance or application in domestic arbitrations within Malaysia which, like international arbitrations are governed by the AA?**

**[42]** The first issue that falls for consideration is whether the theory of the juridical seat has relevance or application to domestic arbitrations in this jurisdiction. In this context it is imperative to bear in mind that domestic arbitrations like international arbitrations are governed by the **AA**.

**[43]** As stated above, this issue relating to the juridical seat of a domestic arbitration needs to be examined because the Court of Appeal held that the seat of an arbitration is irrelevant in the context of a domestic arbitration. The Court of Appeal reasoned that the concept of the 'juridical seat' becomes irrelevant in a domestic context because the same curial law applies throughout Malaysia, unlike an international arbitration where the curial law of one of two separate and distinct nation states will prevail, depending on where the juridical seat is found to be. Therefore the exercise of ascertaining the "seat" is futile where there is no dispute about the applicable law.

**[44]** However, in so reasoning, the Court of Appeal failed to consider that the theory of the juridical seat is not confined solely to the purpose of ascertaining the relevant curial law. **The identification of the seat has the consequential effect of ascertaining the court that enjoys exclusive jurisdiction to regulate and supervise the arbitration.**

**[45]** This is explained in the renowned textbook by **Redfern (see para 3.54)** ***"the seat of the arbitration is thus intended to be its centre of gravity." [Blackaby, Partasides, Redfern and Hunter (eds.),*** **Redfern and Hunter on International Arbitration (5th Edn., Oxford University Pres, Oxford/New York 2009).**

**[46]** The moment the seat is designated it determines the curial law to be applied.

**[47]** But that is not all. Significantly under arbitral law, it is a settled principle that the ascertainment of the juridical seat also determines the **supervisory court in which jurisdiction vests exclusively**. Put another

way, **the court at the seat enjoys exclusive jurisdiction over the regulation of the arbitration.**

**[48]** By agreeing to the seat, the parties agree that any challenge to an interim or final award is to be made only in the courts of the place designated as the seat of the arbitration.

**[49]** In an international context therefore the seat theory means that the national court of the country in which the seat is situated, regulates the international arbitration. The national laws of the seat country are applied by the courts at the seat to regulate the arbitration. But what happens in a domestic arbitration, where the curial law is the same throughout the country?

**[50]** While the excerpt from **Redfern and Hunter** above clearly contemplates international arbitrations, where the application of the seat theory is immediately apparent, is there any basis on which to conclude that such a well-entrenched and fundamental principle of arbitration law suddenly becomes redundant in a domestic context?

**[51]** It is argued by the Respondents that as the **AA** provides that it is applicable throughout Malaysia, the effective "seat" of the arbitration is Malaysia. There is therefore no place for identification of a particular "seat" within Malaysia. In other words, the Respondent's stance is that Malaysia, as opposed to any particular location or place within Malaysia, is the seat as the same curial law is applicable throughout.

**[52]** The Appellant contends on the other hand that in keeping with the **Federal Constitution** in **Art 121** and the **CJA**, there are two High Courts

and therefore there subsist **"two" supervisory jurisdictions**, as it were, namely that of the High Court in Malaya and the High Court in Sabah and Sarawak.

**[53]** Neither of these propositions appears to us to provide an accurate consideration or analysis of the law. Both contentions result in an amalgamation of the law relating to the original territorial jurisdiction in civil disputes with the law governing arbitral proceedings as outlined in the **AA**.

**[54]** This is because, taking the Respondent's contention, it follows that as there is no identification of the "seat" in domestic arbitrations, the effective 'seat' is the entire country, entitling all courts in Malaysia to assume supervisory jurisdiction over the domestic arbitration. This means in effect that when an arbitration is held in Kuala Lumpur, the High Court sitting at Seremban, Ipoh or even in Kota Kinabalu or Kuching enjoys supervisory jurisdiction on the premise that the same curial law applies.

**[55]** This of course brings the conundrum of determining the court of choice. In order to resolve this conundrum, the Respondent submits that the correct legal approach to adopt is to determine the identity of the court of choice by applying the domestic legislation relating to original territorial jurisdiction (namely the **CJA as well as the procedural law**) to ascertain which court enjoys supervisory jurisdiction over the arbitral proceedings.

**[56]** In short, it is contended that the law which is applicable in civil disputes, is equally applicable to domestic arbitrations. That begs the question of whether that is the purpose and intention of the **AA**, which is a special law enacted for the purposes of arbitration, both domestic and international.

**[57]** The Appellant's contention on the other hand, while accepting that the supervisory court follows from the identification of the juridical seat of the domestic arbitration, goes on to conclude that there are **two "supervisory" jurisdictions in Malaysia, namely that of the High Court in Malaya and the High Court in Sabah and Sarawak**. This proposition also begs the question whether this is what is provided for in the **AA**. It also conflates the regulation of arbitral proceedings as envisaged in the **AA** with the law relating to civil disputes.

**[58]** It appears to us that in order to ascertain whether the concept of a "juridical seat" does subsist, and is applicable in domestic jurisdictions, the starting point must be the **AA**. This is because it comprises the primary source of regulation of arbitration in Malaysia by Parliament.

**The Relevant Provisions of the AA**

**[59]** The **preamble to the AA** stipulates that it is:

> **"An Act to reform the law relating to domestic arbitration, provide for international arbitration, the recognition and enforcement of awards and for related matters."** (emphasis ours)

**[60]** One of the prime objectives of the **AA was to reform the law relating to domestic arbitration.** It is fundamentally distinct from the repealed **Arbitration Act 1952**. That is amply borne out by the fact that the present **AA** is modelled on the UNCITRAL Model Law.

**[61]** In **section 2**, the definition section, the relevant provisions include: The definition of High Court:

> **"High Court" means the High Court in Malaya and the High Court in Sabah and Sarawak <u>or either of them, as the case may require</u>;…."** (emphasis ours)

**[62]** It follows that any reference to the "High Court" may refer to the High Court in Malaya and the High Court in Sabah and Sarawak or one of them. The definition stipulates that the Act encompasses both the High Courts. This in turn means that the law as set out in the **AA** applies both in the High Court in Malaya as well as that of Sabah and Sarawak, making it uniform throughout the country. In this context it is indeed correct to state that the curial law applicable is the same throughout the nation.

**[63]** But the definition, by use of the words **"either of them, as the case may require"** envisages that <u>the term 'High Court' may refer to one or the other of the two High Courts, depending on the circumstances of any particular arbitration</u>. The express words utilised have been included in the definition for a purpose and cannot be simply deemed to be surplusage or irrelevant.

**[64]** Put another way, although both High Courts have jurisdiction to hear and deal with arbitration proceedings and awards, this is not equivalent to saying that both High Courts enjoy a concurrent jurisdiction in respect of any particular domestic arbitration. The words **"or either of them as the case may require"** clearly denote that for any particular domestic arbitration, the High Court enjoying supervisory jurisdiction will be the Court at the seat of the domestic arbitration.

**[65]** Of equal note is that **there is no distinction made between international and domestic arbitrations in relation to the applicability of the law in either High Court**. Therefore the same arbitral law as

specified in the **AA** is applicable to both international and domestic arbitrations. This latter point is of importance in relation to the relevance of the "seat" of the arbitration.

**[66]** The reference to, and definition of the **seat** of arbitration is significant:

> **"seat of arbitration" means the place where the arbitration is based is determined in accordance with section 22;…."** (emphasis ours)

**[67]** It provides for the means of identifying or ascertaining the seat by reference to **section 22 AA. Significantly, there is no distinction made between international and domestic arbitrations. There is no exclusion of domestic arbitrations in relation to the definition of the seat.**

**[68]** In other words, the seat of an arbitration, both domestic and international is to be determined by reference to **section 22 AA**. The only reasonable conclusion to be drawn is that the theory or concept of a **"seat"** is relevant and applicable even in a domestic arbitration. It is not confined to international arbitrations.

**[69]** The difference between an international and domestic arbitration is also defined in **section 2**.

**[70] Section 3 of the AA:**

> "(1) This Act shall apply throughout Malaysia.
>
> "(2) **In respect of a domestic arbitration, where the seat of arbitration is in Malaysia**—
>
> (a) Parts I, II and IV of this Act shall apply; and

(b) Part III of this Act shall apply unless the parties agree otherwise in writing."

(emphasis ours)

**[71]** It provides for **the applicability of the Act throughout Malaysia**. It goes on to identify which Parts of the Act are applicable in a domestic as opposed to an international arbitration. However it is of significance that **when referring to a domestic arbitration, the Act clearly makes reference to a "seat" and the fact that in a domestic arbitration the seat is in Malaysia**. The doctrine of the "seat" of arbitration is expressly referred to and is not excluded. This has bearing on the relevance of the applicability of the doctrine in the context of a domestic arbitration.

**[72]** The fact that the 'seat' is in "Malaysia" cannot be logically assumed to mean that every location or place within Malaysia comprises the seat. The parties have to agree **where** in Malaysia the seat is to be located, failing which the arbitral tribunal will determine the same in accordance with **section 22 AA**. So it is not tenable to construe Malaysia as one location or place in the context of an arbitration, domestic or international. For example, even in an international arbitration where the dispute is between two nation states, if the seat is ascertained to be in Malaysia it will follow that the seat will be for example, Kuala Lumpur, Malaysia or Kota Kinabalu, Malaysia. The applicable law, i.e. the curial law applicable is Malaysian law, but the seat has to be designated as a particular place or location within Malaysia. And if that designated place is Kota Kinabalu then it is the courts at the seat, i.e. Kota Kinabalu that enjoy supervisory jurisdiction.

**[73]** Similarly if it is determined that the seat is in England, then it is not stated that the seat is England as a whole, but London, England. In that context **section 3 AA** has to be understood as:

(a) Allowing for the juridical seat to be identified within Malaysia;
(b) Providing for the applicable curial law to be Malaysian law

**[74]** It does not mean or follow from the definition of **'High Court'** in **section 2(1) AA** and **section 3 AA** that simply because:

(a) The **AA** applies throughout Malaysia; and
(b) The High Court refers to both the High Court in Malaya and Sabah and Sarawak;

both the High Court in Malaya and the High Court in Sabah and Sarawak enjoy concurrent jurisdiction to supervise a particular domestic arbitration or to enforce or set aside an arbitral award ensuing from that domestic arbitration, without any consideration being accorded to the 'seat' of that domestic arbitration.

**[75]** And this in turn is because the High Court enjoying such supervisory powers is inextricably connected to the "juridical seat" of the arbitration which is the 'centre of gravity'. It is this centre of gravity or the seat of arbitration which determines the specific High Court having supervisory powers to intervene in arbitral proceedings or to enforce or annul arbitral awards.

**[76]** The choosing of the 'seat' amounts to choosing the exclusive jurisdiction of the High Court/court at which the seat is located. The

designation of a seat albeit by choice of the parties or following from a decision of the arbitral tribunal as envisaged in **section 22 AA**, is akin to an exclusive jurisdiction clause which has the effect of vesting the seat court with the jurisdiction to enforce, regulate and supervise both the arbitral proceedings and the award.

**[77] Section 10 AA** is set out below:

> **10. Arbitration agreement and substantive claim before court**
> "(1) A court before which proceedings are brought in respect of a matter which is the subject of an arbitration agreement shall, where a party makes an application before taking any other steps in the proceedings, stay those proceedings and refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.
> ……
> (4) This section shall also apply in respect of an international arbitration, where the seat of arbitration is not in Malaysia." (emphasis ours).

**[78]** There are two aspects to **Section 10 AA** which require consideration. First, the section gives primacy to the arbitration agreement between parties, rather than court proceedings which are stayed pending arbitration. This evidences the significance conferred on party autonomy by Parliament, in keeping with the UNCITRAL Model Law.

**[79]** Second, given that there is no distinction made between international and domestic envisage, **section 10 AA** envisages the existence of a seat of arbitration even where the arbitration is a domestic one. It also follows that the existence of a seat in Malaysia must be of significance and not merely irrelevant.

**[80]** While it is true that as the curial law applicable is Malaysian law in domestic arbitrations, that in itself is not the sole purpose of ascertaining the 'seat' of the arbitration within Malaysia, as stated above. It is important to be able to identify the supervisory court which regulates the arbitral proceedings.

**[81]** And that will follow from the identification of the "seat" either by the parties themselves or in accordance with **section 22**. That seat cannot be Malaysia as a whole. To say that the definition to be accorded to the 'seat' of a domestic arbitration being Malaysia, means a reference to the **whole of Malaysia** is to construe the provision so as to give it an irrational/illogical meaning, particularly in arbitral law. That is because it suggests that the arbitration takes place throughout Malaysia. On the contrary, the logical meaning to be accorded to such a reference is that the seat is at a stipulated place **within** Malaysia. Therefore when the legislature provides that the **'seat'** is **in** Malaysia, the only reasonable construction that can be afforded is that the **'seat'** is **within** Malaysia, at some specified place either as agreed by the parties or determined by the arbitral tribunal.

**[82]** The position is similar with **section 11 AA**:

> **"11. Arbitration agreement and interim measures by High Court**
>
> **.....**
>
> (3) This section shall also apply in respect of an international arbitration, **where the seat of arbitration is not in Malaysia**." (emphasis ours).

**[83]** The use of the phrase *"where the seat of arbitration is not in Malaysia"* denotes by way of extrapolation, that the Act envisages that the doctrine

of “seat” is applicable to domestic arbitrations where the seat is in Malaysia.

**[84] Section 19J** also envisages the existence of a seat in Malaysia for domestic arbitrations in like manner. There would be no reason for Parliament to make provision for a seat in domestic arbitrations if the concept or theory is irrelevant.

> **“19J. Court-ordered interim measures**
> (1) The High Court has the power to issue an interim measure in relation to arbitration proceedings, **irrespective of whether the seat of arbitration is in Malaysia**.” (emphasis ours).

**[85]** The next relevant and important section is **22 AA** which provides for the determination of the juridical seat of an arbitration:

> **“22. Seat of arbitration**
> (1) The parties are free to agree on the seat of arbitration.
> (2) Where the parties fail to agree under subsection (1), the seat of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties.
> (3) Notwithstanding subsections (1) and (2), the arbitral tribunal may, unless otherwise agreed by the parties, meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for inspection of goods, other property or documents.”

**[86] Section 22 AA** makes no distinction between domestic and international arbitrations.

**[87] Section 22(1) AA** provides for party autonomy in determining by agreement, the seat of arbitration. It allows the parties to choose a

particular location as the seat. This is true of domestic arbitrations as much as international arbitrations. The section therefore underscores the point that the concept of a 'seat' applies to domestic arbitrations in as much as it does to international arbitrations.

**[88]** The exercise of identifying the seat does not end by simply stating that the 'seat' is Malaysia. As explained above, the seat cannot amount to a reference to the entire country, which is what is suggested by the Respondents.

**[89]** The parties will determine where the arbitration will be held and by what rules it will be governed etc – either PAM or AIAC etc. In determining the location of the arbitration within Malaysia, for example Penang, or in providing that the juridical seat is in Kuala Lumpur, in the arbitral agreement, the parties are ascribing not only to the **AA** as the *lex arbitrii*, but also designating the court at the seat as the court having exclusive jurisdiction to supervise and regulate the arbitration.

**[90]** By way of example, if the seat of an arbitration is in Kuala Lumpur, is it open to one of the parties to seek interim measures in the High Court in Sabah and Sarawak in Kuching, while the other does so in the High Court in Malaya at Kuala Lumpur, for example? Or for one party to seek relief from the High Court in Malaya at Seremban while the other party seeks relief from the High Court in Malaya at Kuala Lumpur?

**[91]** Such a situation would give rise to duplicity and chaos.

**[92]** In summary, a plain reading of **section 22 AA** evidences the fact that where the arbitration is in Malaysia, the parties are free to agree to any

"place" or "seat" within Malaysia, whether Kuala Lumpur, Kota Kinabalu, Penang etc. In the absence of such agreement between the parties, the arbitral tribunal is to determine such a seat, in accordance with **section 22 AA**. And where parties have selected such a seat or it has been so determined by the arbitral tribunal, such selection would amount to an exclusive jurisdiction clause as the parties have effectively agreed that the courts at the "seat" alone would have jurisdiction to regulate, supervise, or deal with challenges against the arbitral award made at the seat.

**[93] Section 22 AA** also stipulates that the award shall cite the seat of the arbitration and that will then be the determinative factor in identifying the court with the exclusive jurisdiction.

**[94] Section 33 AA** is relevant:

> **"33. Form and contents of award**
>
> ……..
>
> (4) An award shall state its date and **the seat of arbitration as determined in accordance with section 22** and **shall be deemed to have been made at that seat**." (emphasis ours).

**[95]** In like manner it is evident that the 'seat' of an arbitration is specified in the award whether it is a domestic or international arbitration. It is equally evident that in a domestic arbitration, the award will not specify the seat simply as Malaysia, thereby denoting the entire country as the seat. The award will specify Kuala Lumpur, Kota Kinabalu etc. followed by Malaysia as the seat. What is clear therefore that when the term 'seat' is referred to in a domestic arbitration, the reference is not to the entire country but to a specific place as agreed to by the parties or as identified by the arbitral tribunal in accordance with **section 22 AA**.

**[96] Section 37 AA** falls next for consideration. It provides for the setting aside of awards, both domestic and international.

> **"37. Application for setting aside**
> (1) An award may be set aside by the High Court only if—……"

**[97]** It proceeds to set out the situations in which a High Court may set aside an award. Of significance to this appeal is what is to be understood by the use of the word "High Court"? Is it any High Court such that both the High Court in Malaya and the High Court in Sabah and Sarawak (not to mention the numerous places at which each of the High Court sits) that may set aside an arbitral award?

**[98]** Recourse should first be had back to **section 2** which defines the 'High Court' as the 'High Court in Malaya **and** the High Court in Sabah and Sarawak' but significantly goes on to state **"or either one of them, as the case may require"**. What then do these words in **section 2** denote? They are certainly not redundant nor surplusage, as we have pointed out earlier. The only plausible meaning of these words is that **the term 'High Court' refers to either the High Court in Malaya OR the High Court in Sabah and Sarawak as the case requires**.

**[99]** And the words **'as the case requires' can only mean that in the context of an arbitration, be it domestic or international, the specific or particular High Court enjoying supervisory jurisdiction**. The identification of the particular High Court, in turn, relates back to the fundamental concept of the juridical seat in arbitration law, which not only determines the applicable curial law but goes on to determine the court

enjoying exclusive jurisdiction to supervise and regulate the arbitral proceedings. This has been discussed above.

## The Territorial Jurisdiction of the Courts

**[100]** Do the sections referred to above, i.e. **section 2, 3 or 37 AA** refer to the law relating to original territorial jurisdiction as is applicable to civil disputes, as contended by Sabanilam, the Respondent? That would require reading into the **AA** the provisions of the **CJA**. That would be an inimical approach to statutory construction, in the absence of any indicia to warrant such a step. It must be borne in mind that the **AA** is modelled on the UNCITRAL Model Law, and designed to accommodate both domestic and international arbitrations and arbitral practice. Accordingly, due cognisance must be given to the fundamental theory of the 'juridical seat' as understood in arbitral law, which prescribes not only curial law but denotes and identifies the court at the seat as having supervisory jurisdiction. The concepts of the original territorial jurisdiction of the courts, applicable in civil suits, is fundamentally different from the theory of the juridical seat of an arbitration which is unique to arbitral law. As the **AA** deals specifically with the law relating to arbitration, it is governed by the concepts and principles applicable to arbitration rather than civil disputes. This issue will be discussed further below.

**[101]** The registration and enforcement of an arbitral award is provided for in **section 38 AA**, which is relevant for the purposes of ascertaining whether the 'seat' is relevant in domestic arbitrations.

> **"38. Recognition and enforcement**

> (1) On an application in writing to the High Court, an award made in respect of an arbitration **where the seat of arbitration is in Malaysia** or an award from a foreign State shall, subject to this section and section 39 be recognized as binding and be enforced by entry as a judgment in terms of the award or by action.……." (emphasis ours).

**[102]** Much like **section 37 AA**, reference is made to **'the High Court'** and our statements in relation to **section 37 AA** would be applicable here. There is moreover, express reference to the seat being in Malaysia meaning domestic as well as international arbitrations. We merely reiterate that the seat of an arbitration being in Malaysia does not mean the seat is referenced to the entire country. Accordingly the relevant High Court would be the one at the seat of the domestic arbitration and not any High Court.

**[103] Section 41 AA** is also pertinent. It provides:

> **"41. Determination of preliminary point of law by court**
> (1) Any party may apply to the High Court to determine any question of law arising in the course of the arbitration—……."

**[104]** Similarly the reference to 'High Court' cannot be to any or both the High Courts as each party to the arbitral proceedings presumes applicable. That is clear from the definition section in **section 2**, as set out *in extenso* above, namely that it refers to either of the High Courts, as the case requires. So depending on the determination of the seat either by the parties or the arbitral tribunal the particular High Court at the seat will enjoy exclusive jurisdiction to supervise the arbitral proceedings.

**The Arbitration Act 2005**

**[105]** It is therefore clear from a consideration of the entirety of the provisions of the **AA** that:

(i) The concept of a **'seat'** of arbitration is expressly provided for in domestic arbitrations in as much as international arbitrations. The **AA** does not prohibit or exclude domestic arbitrations in the context of the **'seat'** of an arbitration. Neither does it distinguish between domestic and international arbitrations in relation to the **'seat'** of an arbitration;

(ii) The fact that the curial law applicable in a domestic arbitration is indisputably Malaysian law, does not make the theory of the **seat** of an arbitration, irrelevant and inapplicable;

(iii) The **AA** stipulates that its provisions are applicable throughout Malaysia in both the High Courts, but expressly recognises by the use of the words *'or either of them as the case may require'* that a choice of court, i.e. a choice between the High Court in Malaya or the High Court in Sabah and Sarawak (or within the numerous locations at which they sit) is necessary in accordance with the particular circumstances of an arbitration, be it domestic or international;

(iv) The references to **'High Court'** throughout the **AA** accordingly cannot refer to any High Court, as each of the parties to the arbitral dispute may decide, but is tied to the 'seat' of the domestic arbitration. That in turn is determined in accordance with **section 22 AA** and is expressly referenced in the arbitral award. Therefore the setting aside or registration and enforcement of an arbitral award is equally tied to the juridical

seat, as it is the court at the seat which enjoys exclusive jurisdiction to regulate and supervise the arbitral proceedings.

**The Law Relating to the Juridical Seat in Arbitration Law**

**[106]** On what basis is it concluded that the seat of an arbitration also determines the identity of the court enjoying exclusive jurisdiction to supervise and regulate the arbitration? We have considered this issue to some extent above, but elaborate further below.

**[107]** While the definition of the **'seat'** of an arbitration is set out in **section 22 of the AA**, the concept of the juridical "seat" and its relationship to the supervisory jurisdiction of a court in dealing with matters regulating the arbitral proceedings (including challenges to arbitral awards) is not expressly provided for in the **AA**. It is important to comprehend the law on what constitutes the "juridical seat" and whether, once the seat is specified in the arbitration agreement, the courts at the place of the seat would alone have exclusive jurisdiction over the arbitral proceedings.

**[108]** This issue has to be analysed and established by reference to the concepts and basis of arbitration law, which is international in nature and practice, bearing in mind that the **AA** is modelled on the UNCITRAL Model Law. In the renowned textbook by **Redfern (see para 3.54)** it is stated that ***"the seat of the arbitration is thus intended to be its centre of gravity." [Blackaby, Partasides, Redfern and Hunter (eds.),*** **Redfern and Hunter on International Arbitration (5th Edn., Oxford)**. All else ensues from the seat. The choice of court enjoying regulation of the arbitral proceedings is derived from the seat. It is the court at the seat that

enjoys exclusive jurisdiction to supervise and regulate those arbitral proceedings.

**Ascertaining the Court Enjoying Supervisory Jurisdiction Over an Arbitration – Domestic or International**

**[109] Section 22 AA** statutorily codifies the concept of the seat of jurisdiction in arbitration law in Malaysia. It is premised on the UNCITRAL Model Law and a similar provision is utilised in many other jurisdictions. We have explained in detail above that it encompasses the concepts of determining the applicable curial law as well as ascertaining the court enjoying supervisory jurisdiction over the regulation of the arbitration proceedings, which encompasses interim measures, registration, enforcement and setting aside an award.

**The Case-Law Relating to Importance of the "Juridical Seat" of an Arbitration and its Link to the Court Enjoying Exclusive Jurisdiction to Regulate Arbitral Proceedings and Awards**

**[110]** We turn to consider the case-law on this subject.

**[111]** In **Roger Shashoua and Others v Mukesh Sharma (2009) EWHC 957 (Comm)** a decision of the English High Court (dealing with an international arbitration), it was held:

> *"The basis for the court's grant of an anti-suit injunction of the kind sought depended upon the seat of the arbitration.* ***An agreement as to the seat of an arbitration brought in the law of that country as the curial law and was analogous to an exclusive jurisdiction clause. Not only was there***

> ***agreement to the curial law of the seat, but also to the Courts of the seat having supervisory jurisdiction over the arbitration, so that, by agreeing to the seat, the parties agreed that any challenge to an interim or final award was to be made only in the courts of the place designated as the seat of the arbitration."*** (emphasis ours)

**[112]** And in the English Court of Appeal decision in **C v D [2008] Bus LR 843; 2007 EWHCA Civ 1282 (CA)** it was said:

> ***"…It follows from this that a choice of seat for the arbitration must be a choice of forum for remedies seeking to attack the award."***

**[113]** And in **A v B (2007) 1 All ER (Comm) 591** it was held:

> *"…**an agreement as to the seat of an arbitration is analogous to an exclusive jurisdiction clause. Any claim for a remedy as to the validity of an existing interim or final award is agreed to be made only in the courts of the place designated as the seat of arbitration."***

**[114]** These authorities reflect the well-entrenched principle of arbitration law that where parties have selected the seat of arbitration in or by agreement, such selection would also amount to an exclusive jurisdiction clause as the parties have now indicated that the courts at the seat would alone have jurisdiction to deal with applications to register or set aside the arbitral award that has been made at the seat. All these cases deal with international arbitrations.

**International versus Domestic Arbitration**

**[115]** The concept of **seat jurisdiction** is clear enough in international arbitrations, where two different nations claim to be the juridical seat for the arbitration. For example New Delhi, India versus Kuala Lumpur, Malaysia may be the competing jurisdictions. Let us say that the cause of action arose in New Delhi, India, while the juridical seat of the arbitration is Kuala Lumpur, Malaysia. The choice of seat would determine not only the curial law applicable, but also the court enjoying supervisory jurisdiction.

**[116]** If the seat of the arbitration is Kuala Lumpur, Malaysia, then the curial law is Malaysian law. The court enjoying supervisory jurisdiction would be the High Court in Malaya sitting at Kuala Lumpur, not any other court.

**[117]** There is no reason why such a concept is not equally applicable in a domestic setting. Certainly the **AA** does not prohibit nor exclude such a concept. On the contrary it makes no distinction between international and domestic arbitrations.

**[118]** In a domestic arbitration, where the cause of action arose in Kuching but the parties have chosen Kuala Lumpur as the **juridical seat**, or the arbitral tribunal so determines under **section 22 AA**, it would follow under arbitration law principles that the High Court in Malaya at Kuala Lumpur enjoys supervisory jurisdiction. It would not be the High Court in Sabah and Sarawak at Kuching, because in arbitration law, the fact that the cause of action arose in Kuching has no bearing on the determination of the seat of the arbitration, which is a matter determined by party

autonomy, or determination of the arbitral tribunal as stipulated by the **AA**. The choice of seat often encapsulates by agreement **a neutral venue other than where the cause of action arose**.

**[119]** The consequence of arguing otherwise, namely by suggesting that both Kuching and Kuala Lumpur enjoy concurrent jurisdiction, would give rise to confusion. Kuala Lumpur is specifically designated the seat of the arbitration. However the cause of action arises in Kuching. If concurrent jurisdiction is the correct position to adopt, then despite the seat having been located and specifically chosen by the parties or determined by the arbitral tribunal, party autonomy would suffer. It would enable applications to be made in Kuching High Court which would be contrary to the stated intention of the parties who have chosen Kuala Lumpur as the seat. This alone means that the parties, or the arbitral tribunal by designating a seat have understood that it carries with it the consequence of the seat court having exclusive jurisdiction over the arbitral process.

**[120]** Therefore the effect of stipulating that the juridical seat is irrelevant in a domestic arbitration, as the court below did, is that it would **not** be possible to determine the court enjoying exclusive supervisory jurisdiction over that arbitration.

**[121]** In point of fact the **concept of the exclusive jurisdiction of the supervisory court located at the seat** would not even come into play.

**[122]** A further consequence of the construction of the law taken by the Court of Appeal in the instant appeal also results in an erroneous application of **section 3 AA,** whereby any Court in either the High Court in Malaya or the High Court in Sabah and Sarawak would enjoy

supervisory jurisdiction. This would run awry of **Art 121 of the Federal Constitution**.

**[123]** How then is one to ascertain which court enjoys exclusive jurisdiction, if all courts enjoy concurrent supervisory jurisdiction? In the instant appeal it appears that this incongruity was dealt with, particularly by Sabanilam, by applying the provisions of the **CJA,** more specifically, **section 23 CJA**, to effectively determine the court enjoying exclusive jurisdiction. In other words, the court enjoying supervisory jurisdiction over the arbitral award was determined by selecting the court where the cause of action arose in accordance with the provisions of the **CJA**.

**[124]** The **CJA** prescribes the choice of court enjoying jurisdiction by applying the principle of original territorial jurisdiction, which is ascertained by identifying where the cause of action arose. It is immediately apparent that this is completely different from arbitral law, where it is the court at the seat that enjoys exclusive jurisdiction. As a consequence, in the instant appeal the provisions of the **CJA** were applied to an arbitration governed by the **AA**, thereby conflating the provisions of the **CJA** with the **AA**.

**[125]** Finally, as a consequence of holding that the High Court at Kota Kinabalu had jurisdiction to hear the setting aside of the arbitral award, notwithstanding its registration at the seat court in Kuala Lumpur, both these courts assumed supervisory jurisdiction giving rise to duplicity and conflicting decisions.

**[126]** The Court of Appeal, with respect, did not consider the consequences of its decision in relation to:

(a) The ensuing possibility of conflict and duplicity in decision making as a result of several courts enjoying jurisdiction;

(b) The effect of such a pronouncement on the correlation between the seat of arbitration and the court at the seat enjoying exclusive jurisdiction;

(c) The possibility of the application of the law relating to territorial jurisdiction under domestic legislation, which governs civil disputes, being applied to arbitration proceedings notwithstanding the unique nature of arbitral law which allows for party autonomy as expressly provided in **section 22 AA**;

(d) Conflating the concept of the juridical seat of the arbitration as applying to the entirety of a nation state and rather than to the location or place agreed by the parties to be the seat or so determined by the arbitral tribunal. The seat is specified as Kuala Lumpur, Malaysia or New Delhi, India or London, England, and not the entirety of Malaysia, India or England. The specific location is in a nation state whose laws, as a sovereign nation determine the lex arbitrii. Therefore it does not follow that both the High Courts in Malaysia enjoy concurrent jurisdiction in all domestic arbitrations. That is a matter to be ascertained by reference to the juridical seat of the domestic arbitration;

(e) The separate and distinct territorial jurisdiction of the two High Courts under **Art 121 of the Federal Constitution** as encapsulated in **section 2 AA**.

**The Distinction between Determining Jurisdiction in Civil Disputes and in Arbitration Proceedings.**

**[127]** To that end therefore, the ascertainment of the seat as set out in **section 22 AA** is important for the purposes of ascertaining which court enjoys exclusive jurisdiction in relation to the regulation of domestic arbitration under the **AA**.

**[128]** However, **Section 22 AA** does not envisage the importation or inclusion of the provisions of the **CJA** in determining the seat of the arbitration, be it domestic or international.

**[129]** There are two different and distinct concepts that arise here:

(a) In civil suits and under civil procedure laws, the jurisdiction of a court to hear a dispute is determined by the doctrine of the **'territorial jurisdiction'** of the Court as defined under the **Federal Constitution in Art 121,** and supplemented by the **CJA**.

(b) This doctrine dictates that the determination of which court enjoys jurisdiction over a civil dispute depends on where the cause of action arose, and is governed by the **CJA** and the codified rules of court;

(c) The other is the **supervisory jurisdiction** of a court in relation to an arbitration where the **juridical seat** is different and separate from where the cause of action arises. Arbitrations are governed by a special law, the **AA**.

**[130]** Under the law relating to arbitration, a reference to a juridical seat refers to a concept by which the parties to the arbitration contract have chosen a neutral venue. That neutral venue cannot be equated with a court having jurisdiction in the context of civil procedure in that no cause of action may have arisen at this neutral venue.

**[131]** It is important to note that the **AA** accommodates the provisions of **Art 121 of the Federal Constitution** in recognising the **separate territorial jurisdictions of the High Court in Malaya and the High Court in Sabah and Sarawak in section 3 AA**.

**[132] Article 121 of the Federal Constitution** provides for two High Courts of co-ordinate jurisdiction and status namely the High Court in Malaya and the High Court in Sabah and Sarawak. The territorial jurisdiction of these two High Courts are separate and distinct. In practice, simply put, this means that matters where the cause of action arises or originates from the States of Malaya are adjudicated upon in the High Court in Malaya, while matters where the cause of action arises in Sabah and Sarawak are adjudicated in the High Court in Sabah and Sarawak.

**[133]** This is commonly referred to as the original territorial jurisdiction of each of these High Courts. However it must be borne in mind that this concept of 'territorial jurisdiction' applies to determine the jurisdiction of a particular High Court to adjudicate on a civil dispute. The former subsists for the resolution of civil disputes under the court adjudication system as provided for in our national domestic legislation. The national domestic legislation such as the **CJA** applies to civil disputes.

**[134]** Arbitration on the other hand, be it domestic or international, is governed by the **AA**, which prescribes its own particular means of dealing with the regulation and supervision of arbitral proceedings by a national court. Arbitration is not a civil dispute in the context envisaged by the **CJA**, warranting the application of the laws relating to the original territorial jurisdiction of the courts, to ascertain which court enjoys jurisdiction over the dispute. In the context of arbitrations, be they domestic or arbitration, **there is no contravention of Art 121 of the Federal Constitution because the ascertainment of the seat in accordance with section 22 will determine the court enjoying supervisory jurisdiction.** That will fall within one of either of the High Courts. To that end, this theory of the court at the seat enjoying exclusive jurisdiction sits harmoniously with **Art 121 of the Federal Constitution**.

**[135]** However that is not the case with respect to a construction of the **AA** that determines that both the High Court in Malaya and Sabah and Sarawak enjoy concurrent jurisdiction in a given domestic arbitration, as held by the Court of Appeal and submitted by Sabanilam. Such a construction contravenes the fundamental and essential theory of separate and distinct territorial jurisdiction as enshrined in the **Federal Constitution**.

**[136]** This means in effect that notwithstanding that the seat of a domestic arbitration is in Kuala Lumpur which falls within the jurisdiction of the High Court in Malaya, the High Court in Sabah and Sarawak enjoys concurrent jurisdiction to regulate that proceeding. That would not be the correct position in law even for civil disputes. The fact that the **AA** recognises the separate territorial jurisdiction of the two High Courts lends weight to the construction we have adopted, namely that the **AA** recognises that the

supervisory court is the court at the seat of the arbitration. No such contravention or conflict with **Art 121 of the Federal Constitution** can arise.

**[137]** The construction adopted by the Court below confuses or conflates the applicable law or *lex arbitrii* of the arbitration with the **jurisdiction of the courts to supervise** the arbitral proceedings and the awards handed down.

**[138]** As the **AA** provides a complete and comprehensive codification of the law relating to arbitration, which sits harmoniously with the **Federal Constitution**, there is no basis to allow for the imposition, inclusion or conflation of the principles of adjudication of civil disputes under domestic legislation, such as **section 23 of the CJA**, to be applied to arbitrations, domestic or international, for the purposes of ascertaining which particular courts enjoy supervisory jurisdiction over a particular arbitration. This latter issue is governed by the **AA**. Put shortly, the issue of the juridical seat and its nexus to the court enjoying supervisory jurisdiction over a particular arbitration remains a matter of arbitration law.

**The AA or the CJA?**

**[139]** Why, it might be asked is that so? It might well be argued that although choosing a seat for arbitration and correspondingly allocating the court at the seat with exclusive jurisdiction to regulate the arbitral proceedings is an autonomy given to the parties under the **AA**, territorial jurisdiction is not something which the parties can decide. A court is conferred with territorial jurisdiction over a particular case if the cause of action arises within the geographical territory of a court, the basis for

which include the provisions of the **CJA** and the codified rules of procedure.

**[140]** To apply the well- known Latin maxim of *generalia specialibus non derogant,* a special law prevails over a general law. In any event, arbitration is a completely distinct and disparate dispute resolution process in comparison to the adjudication of civil disputes. The concepts and philosophy of these two modes of dispute resolution are completely different. These two modes are accordingly governed by distinct and separate legislation. As such, in the present context, the **AA** is the relevant legislation, not the **CJA**. The two ought not to be conflated. In an arbitration dispute, the cause of action which may be, for example, breach of contract, is determined finally. The civil courts are approached not for the purposes of trying the same cause of action, but purely for the purposes of recognition and to a very narrow extent, the setting aside of the arbitral award. In that sense, the jurisdiction of the civil courts as stipulated in the **AA** is not engaged as it would be in a normal civil matter. Therefore this takes the cause of action which has merged in the arbitration award out of the scope of the **CJA** and brings it into the purview of the **AA**.

**[141]** In this context it is important to reiterate again that the provisions of the **CJA** and the **RC** are general codes that provide the substantive and procedural basis for deciding disputes arising from general civil disputes. These laws do not limit nor affect any special law such as the **AA**. The **AA** is a special law codified to govern arbitration proceedings, both domestic and international. It gives effect to the principle of party autonomy by giving the parties the freedom to choose courts under the seat of arbitration that will have supervisory jurisdiction.

**[142]** Therefore special jurisdiction conferred on the court at the seat through the parties' agreement ought not to be limited or affected by legislation relating to the adjudication of civil disputes, domestically or nationally. Party autonomy which comprises the essence of arbitration must be given due cognizance. It follows that the approach of the courts, in keeping with the legislation, should be to uphold the exclusive jurisdiction of the courts of the seat of arbitration, as that is the correct applicable law in relation to the regulation and supervision of arbitrations under the **AA**.

**[143]** The **AA** establishes a regime for arbitration which is comprehensive, whole and disparate from civil disputes in a nation state which is governed by its own substantive and procedural laws. Where the two part is this:

(a) The *lex arbitrii* (law of and governing the arbitration) and the curial law (procedural law) of an arbitration are tied inextricably to the juridical seat. That is not confined to an international arbitration. This is clear from a purposive construction of the **AA** as opposed to a piecemeal approach. The underlying purpose of the **AA** is to facilitate arbitration in consonance with, or as envisaged under the UNCITRAL Model Law which encapsulates the principles underlying the Hague Convention;

(b) There is no distinction between international and domestic arbitration under the **AA**. It would be wrong in law to draw such a distinction when the Act expressly provides otherwise. To construe the concept of a seat of arbitration as being solely applicable to international arbitrations and not domestic arbitrations would give rise to difficulties in discerning the court

enjoying exclusive jurisdiction because all courts would enjoy concurrent jurisdiction. That would be contrary to arbitral principles and more importantly **Art 121 of the Federal Constitution**;

(c) If a construction of **section 3 AA** and the lack of a seat in domestic arbitrations, such as that advocated by the Court of Appeal, is propagated as the correct law there would be confusion and chaos created in the administration of justice. It would also result in the invocation of the law relating to civil disputes namely the **CJA**, when there is no basis to do so, given that the **AA** provides a comprehensive code for the conduct and regulation of arbitrations in this jurisdiction. It comprises the embodiment of the supranational body of law applicable in arbitration law, both international and domestic;

(d) Such a construction would create considerable impediments in the conduct and completion of an arbitration. This is because it would require parties to a domestic arbitration to first resolve their dispute by arbitration, and then embark on a second legal battle in several different courts to determine which court enjoys exclusive jurisdiction. That would result in more than a single judgement being handed down, as is the case here. That is clearly an untenable legal resolution to undertake when a reasoned construction of the law allows for the seat court to resolve the entirety of the regulation of the proceedings and the award.

**Case-Law on the 'Seat' of an Arbitration**

**[144]** There is no case-law in the jurisdiction on this precise issue, and little enough case-law in other jurisdictions to indicate how other nation states have dealt with the choice of a court in a domestic arbitration. In Malaysia, there is however, considerable case law relating to the importance of the juridical seat of an arbitration. The leading authorities all deal with international arbitrations and not domestic arbitrations. None of them deals with the issue of the court at the seat enjoying exclusive jurisdiction in a domestic context. However, all the decisions endorse and support this fundamental principle of arbitration law. That is important as the decisions of this Court accept and advocate the existence of a 'juridical seat' as well as the principle that it is the seat court that enjoys exclusive jurisdiction. The approach we have adopted extends this position in relation to domestic arbitrations.

**[145]** The leading cases are as follows:

(i) **The Government of India v Cairn Energy India Pty Ltd & Anor [2011] 6 MLJ 441 ('Cairn Energy India')**, this Court dealt with a situation where Indian law governed the contract and English law the arbitration, while the seat of arbitration was Kuala Lumpur. This Court, speaking through Richard Malanjum CJSS (later CJ) held:

> *"… It is therefore clear that the English Court of Appeal clearly sets out that the curial law ought to be that of the seat of arbitration. As stated above, our courts have adopted a similar position. Thus, in this*

*case as Kuala Lumpur was selected as the juridical seat of arbitration, the curial law is the law of Malaysia and we so hold."*

(ii) In **Government of India v Petrocon India Limited [2016] 3 MLJ 435 ('Petrocon India')** this Court had to consider circumstances in which the arbitration agreement provided that the 'venue' was Kuala Lumpur but the law governing the underlying agreement was the laws of India. In a decision delivered by the then Chief Justice Tun Arifin Zakaria, he referred with approval to **Cairn Energy India *(above)*** and went on to conclude at paragraph 33:

*"…the seat of arbitration will determine the curial law that will govern the arbitration proceeding.* ***The seat here refers to the legal seat rather than the geographical seat****. It is a permanent or fixed seat which can only be changed by the consent of parties to the arbitration and this must be distinguished from the physical or geographical place where the arbitration was held. In the case of place of arbitration it can be shifted from place to place without affecting the legal seat of the arbitration."*

It is clear from the foregoing that His Lordship was referring to the 'legal seat' as understood in arbitration law and defined under **section 22 of the AA**. It could not have meant the place where the cause of action arose as envisaged in civil disputes governed by the **CJA**.

(iii) And in **Sintrans Asia Services Pte Ltd v Inai Kiara Sdn Bhd [2016] 2 MLJ 660 ('Sintrans Asia Services')**, the Court of Appeal addressed a similar issue in an international charter party

agreement where the issue in dispute was whether the court enjoying supervisory jurisdiction over the arbitral proceedings was the Singapore Court as the arbitration clause expressly provided that the arbitration was to be conducted in Singapore. Prasad Abraham JCA (as he then was) said:

> *"The Arbitration Act 2005 in particular section 22 defines the seat of arbitration.* ***We would hold that seat of arbitration is the juridical seat of the arbitration*** *and it is independent of the venue where hearings or other parts of the arbitral process occurred. The seat prescribed the procedural law of the arbitration (see Russell on Arbitration (2003) p 185, para 5-091)."*

It is again clear that the court recognised the 'seat' of arbitration as a legal concept rather than a geographical venue or place per se. That is why the seat of an arbitration can be a completely neutral place, quite disparate from where the events leading to the dispute took place or where the cause of action arose. This is true of both domestic and international arbitrations, as borne out by **section 22 AA**. Therefore it is incorrect to conflate domestic law relating to civil disputes with the principles of arbitration law or to seek to oust the latter, utilising domestic legislation related to civil disputes.

(iv) In **Thai-Lao Lignite Co Ltd & Anor v Government of The Lao People's Democratic Republic [2017] 9 CLJ 273 ('Thai-Lao Lignite')** the issue before this court was an appeal against the setting aside of an arbitral award arising from an international arbitration where the issue was the identity of the court enjoying supervisory jurisdiction. This Court speaking through Jeffrey Tan

FCJ referred to the earlier decisions of this Court in **Cairn Energy India *(above)*** and **Petrocon India *(above)*** before holding that:

> *"…Both case law and textbooks lean to the view that the law of the seat governs the arbitration agreement because it is also the curial law. The mistake of the appellants was to ignore the curial law and place no value on it. That would not be correct as the arbitration agreement must always be valid under the law of the seat…."*

**[146]** Other case-law relating to the importance of the 'seat' in an arbitration relate again to international arbitrations, rather than domestic ones. (see **ST Group Co Ltd v Sanum Investments Limited [2020] 1 SLR 1 (Singapore Court of Appeal) per Judith Prakash JA ('ST Group Co Ltd');** and **BNA v BNB and Another [2020] 1 SLR 456 per Steven Chong JA ('BNA')**). These cases underscore the principle that it is the court at the seat which enjoys supervisory jurisdiction over the arbitration.

**[147]** Applying these cases to the present appeal, it should similarly follow that it is the court at the seat which enjoys exclusive supervisory jurisdiction over the arbitration. Just because the curial law is the same, this does not detract from the necessity to identify a 'seat' in accordance with the arbitration agreement either by the choice of parties or the arbitral tribunal and then identify the seat court. There is no room, in our view, to forsake the doctrine of the juridical seat of an arbitration and bring into play the law pertaining to territorial jurisdiction given the nature and purpose of the **AA**. The doctrine of the juridical seat helps resolve the conflict of which court will hear the dispute. That is important in an international setting but it should apply equally in a domestic setting where

the written constitution demarcates between two original territorial jurisdictions in the same way international law principally does. This is further supported and supplemented by **section 3 AA** which states "as the case may require".

**[148]** In the United Kingdom, in the case of **Enka Insaat Ve Sanayi A.S. v OOO Insurance Company Chubb [2020] UKSC 38 ('Enka Insaat'), the Supreme Court (Lord Leggatt)** determined which system of national law governed an arbitration agreement as the law governing the contract was different from that of the law governing the seat of the arbitration. It was an international arbitration. **There too, the important and well accepted principle that the seat of an arbitration is a legal concept rather than a physical one, was made**. Further, that the agreement to a 'seat' is to agree that the law AND courts of a particular country will exercise control over an arbitration which has its seat in that country to the extent provided for by that country's law.

**[149]** This too lends weight to the conclusion that even in a domestic arbitration the same principles apply. This is particularly so where our **AA** is premised on the UNCITRAL Model Law.

## Case-law from Other Jurisdictions

**[150]** There is however case-law from India dealing with this interplay between the original territorial jurisdiction of the courts and the court enjoying exclusive supervisory jurisdiction of arbitral proceedings under arbitration law. The relevant legislation in India is the **Arbitration and Conciliation Act 1996 ('Indian AACA')** which is also based on the UNCITRAL Model law.

**[151]** The Supreme Court of India explored the line of distinction between the 'juridical seat' and 'original territorial jurisdiction' in the case of **Indus Mobile Distribution Private Limited v Data wind Innovations Private Ltd. (LNIND 2017 SC 207) ('Indus Mobile v Datawind')** In that case the seat of arbitration was Mumbai, and the Mumbai court was accordingly the seat court. However the Delhi High Court ousted the exclusive jurisdiction of the seat court in Mumbai. The Delhi HC reasoned that no part of the cause of action arose in Mumbai. Only the courts of three territories could have jurisdiction in the matter, namely, Delhi and Chennai (from and to where goods were supplied), and Amritsar (which is the registered office of the appellant company). This decision of the Delhi High Court was challenged.

**[152]** The Supreme Court struck down the judgement of the Delhi High Court and reaffirmed an earlier decision of a constitutional bench, namely **Bharat Aluminium Co (BALCO) v Kaiser Aluminium Technical service, Inc [2012] 6 MLJ 630 ('BALCO')**. It held that with mutual agreement, once a **seat of arbitration is designated to a court of competent jurisdiction** the same would have the effect of an exclusive jurisdiction clause stating, at paragraph 19:

> *"19. A conspectus of all the aforesaid provisions show that the moment the seat is designated, it is akin to an exclusive jurisdiction clause. On the facts of the present case, it is clear that the seat of arbitration is Mumbai and Clause 19 makes it clear that jurisdiction exclusively vests in the Mumbai courts. Under the Law of Arbitration, unlike the Code of Civil Procedure which applies to suits filed in courts, a reference to "seat" is a concept by which a neutral venue can be chosen by the parties to an arbitration clause. The neutral venue may not in the classical sense have jurisdiction – that is, no part of the cause of action may have arisen at the neutral venue and neither would any of the provisions of Section 16*

> *to 21 of the CPC be attracted. In arbitration law however, as has been held above, the moment "seat" is determined, the fact that the seat is at Mumbai would vest Mumbai courts with exclusive jurisdiction for purposes of regulating arbitral proceedings arising out of the agreement between the parties."*
>
> (emphasis ours).

**[153]** It has been pointed out in the course of submissions, by Sabanilam, the Respondent, that due care should be taken in referring to case-law from other jurisdictions such as India as their laws are different. Be that as it may, it is undeniable that the conundrum facing the Supreme Court of India was similar to that faced in the instant appeal. **Indus Mobile v Datawind** is a case dealing with a domestic arbitration like the instant case. The case deals with the seeming conflict between original territorial jurisdiction regulating civil disputes in accordance with domestic legislation versus the concept of a neutral venue comprising the seat of arbitration as envisaged under arbitral law.

**[154]** The Indian legislation is also based on UNCITRAL Model Law. **Section 20 of the Indian AACA** is similar to our **section 22 AA**. However, it does not utilise the word 'seat' but uses the word 'place' instead. It provides that the parties are free to agree on the place of arbitration. If there is no agreement the 'place' of arbitration is to be determined by the arbitral tribunal. And finally it stipulates, as does our legislation, that notwithstanding the provision for the 'place' of the arbitration the arbitral tribunal is free to meet or consult at any place considered appropriate.

**[155]** Ultimately it is the reasoning that is relevant in determining the persuasive value of these authorities.

**[156]** This reasoning has been followed in **BGS SGS Soma *(above)***, which having meticulously traced and considered both Indian and English authorities, reasoned as follows in relation to ascertaining the court enjoying exclusive jurisdiction in a domestic arbitration within India.

**[157]** In **BGS SGS Soma *(above)***, the impugned judgement from the court below determined that since the agreement comprising the subject matter of the dispute was executed in Faridabad, India, part of the cause of action would arise at Faridabad, clothing the Faridabad courts with jurisdiction for the purposes of registering or setting aside the arbitral award. Secondly, it was reasoned that Faridabad was the place where the request for reference to arbitration was received as a result of which part of the cause of action arose in Faridabad. Accordingly the jurisdiction of the Courts of New Delhi was ousted as no part of the cause of action arose there.

**[158]** The arbitration agreement provided that in case of a dispute arising with a foreign contractor, that would amount to an international commercial arbitration within the **Indian AACA**. Further, it provided that if the dispute was with a foreign contractor, arbitration proceedings were to be held at New Delhi **or** Faridabad, India. This amounted to the designation of either of these places, i.e. New Delhi or Faridabad as the 'seat' of arbitration. **This, the Supreme Court reasoned, was because a supranational body of law was to be applied, namely the UNCITRAL Arbitration Rules in conjunction with the AACA.** Therefore the designated seat would be either of these two places, after which it was for the parties to choose as to which of the two places the arbitration was to be finally held.

**[159] The Supreme Court of India then went on to hold that as that was the position with respect to an international arbitration involving a foreign contractor, the same would follow even in a domestic arbitration (see paragraph 99 of the judgement).** The arbitration clause clearly held that "*arbitration proceedings shall be held at New Delhi/Faridabad, India…"* signifying that all the hearings including the making of the award were to take place at either place. It went on to hold that the so-called venue was really the seat of the arbitral proceedings. The AACA which applies a 'national body of rules' to the arbitration that was to be held at either New Delhi or Faridabad, meant that these two places had been designated as the 'seat' of the arbitration proceedings.

**[160]** All proceedings (3 sets of proceedings) had however been held at New Delhi and the awards were signed in New Delhi, and not at Faridabad. That, it was reasoned, led to the conclusion that both parties had chosen New Delhi as the seat of the arbitration under the **Indian AACA**. As such it was concluded that both parties had chosen the courts at New Delhi alone as having exclusive jurisdiction over the arbitral proceedings.

**[161]** The fact that a part of the cause of action may have arisen at Faridabad would not be a relevant factor once the 'seat' had been chosen. **This was because the choice of seat determined in turn the court enjoying exclusive jurisdiction, namely the seat court.** The impugned judgement which sought to oust the jurisdiction of the New Delhi courts was therefore set aside.

**[162]** These cases above reinforce the legal position that once the juridical seat has been chosen, this designates the court at the seat of the

arbitration as enjoying exclusive jurisdiction to exercise a supervisory and regulatory function over the arbitral proceedings. This includes the registration and enforcement as well as the setting aside of the award, as specifically provided for under the **AA**.

**[163]** We find these authorities to be of persuasive authority and relevant in determining the instant appeal. The reasoning is in accordance with international principles of arbitral law and draws a clear distinction between the original territorial jurisdiction of a court in civil disputes, which is governed by the principle of where a cause of action arises, and the concept of the juridical seat of an arbitration vesting exclusive jurisdiction to supervise the arbitration in the court located at the seat.

**The Submissions of the Parties**

**[164]** To that extent, the proposition by Masenang, the Appellant, that the issues of original territorial jurisdiction as expounded in **Hap Seng *(above)*** are applicable to domestic arbitrations, such that pursuant to **section 3 AA** and **Art 121 of the Federal Constitution**, there are **two supervisory jurisdictions** to be found in the High Court in Malaya and the High Court in Sabah and Sarawak in relation to arbitrations is, with respect, untenable.

**[165]** Equally unsustainable is the submission by the Respondents that the exercise of identifying the seat in the context of a domestic arbitration is futile, as the applicable curial law is not in dispute, being the **AA** throughout the country. This has been explained above at some length, in relation to the express provisions of the **AA**. The Respondents' statutory construction results in both the High Court in Malaya and the High Court

in Sabah and Sarawak, enjoying supervisory jurisdiction over a particular domestic arbitration, no matter where the seat of arbitration is. This does not meet the clear provisions of **Art 121 of the Federal Constitution.**

**[166]** The Respondents then go on to utilise domestic national laws governing civil disputes to identify the court enjoying supervisory jurisdiction. This in turn entails the application of the concepts of original territorial jurisdiction to domestic arbitrations. Such a proposition which involves conflating and introducing concepts related to civil disputes into arbitration law, particularly the **AA** is equally unsound.

**[167]** We now turn to the rest of the issues raised at the outset of this judgement.

**Issue (b): If the theory of the juridical seat is applicable to domestic arbitrations governed by the AA , then is the court at the seat vested with the exclusive jurisdiction to regulate the arbitral proceedings arising out of the agreement between the parties in a domestic arbitration?**

**[168]** We have addressed this issue *in extenso* above. The answer to this issue is therefore that the court at the 'seat' is vested with the exclusive jurisdiction to regulate or supervise the arbitral proceedings out of the agreement between the parties in a domestic arbitration, much like an international arbitration.

**Issue (c): If the theory of the juridical seat is irrelevant and the exercise of ascertaining the seat is inapplicable in domestic arbitrations, such that the ensuing theory of the exclusive**

**jurisdiction of the court at the seat (as propounded by arbitration law) is inapplicable, then how is the court enjoying supervisory jurisdiction over the domestic arbitration to be ascertained?**

**[169]** As we have stated in the course of this judgement, the theory of the juridical seat is in point of fact directly relevant and essential in domestic arbitrations. Therefore the theory of the exclusive jurisdiction of the court at the seat is applicable. In view of our conclusions, this issue becomes redundant.

**Issue (d): Is the regulation of domestic arbitration to be determined by applying the law governing civil disputes, which specifies or delineates the original territorial jurisdiction of the courts, and is determined primarily by where the cause of action arose?**

**[170]** Again as we have set out in this judgement the regulation and supervision of domestic arbitration is NOT governed by the law governing civil disputes such as the **CJA** which determines jurisdiction by ascertaining where the cause of action arose. It is the **AA** and arbitral law that governs this issue even in domestic arbitrations.

**Issue (e): If parties to the domestic arbitration initiate registration and setting aside proceedings separately in two disparate courts i.e. at both at the court the seat, as well as the court where the cause of action arose, conflicting decisions may well arise, apart from the issue of duplicity, as is the case here. Which decision is to prevail in the event of conflicting decisions?**

**[171] As we have concluded that it is the court at the seat of the domestic arbitration that enjoys exclusive jurisdiction to exercise supervisory and regulatory powers over the arbitration, it follows that the court where the cause of action arose cannot oust the jurisdiction afforded and vested in the seat court. Accordingly any decision from the court purporting to exercise jurisdiction where the cause of action arose is void.**

**[172] Accordingly it follows that the decision by the High Court in Sabah and Sarawak at Kota Kinabalu that purported to set aside the arbitral award and remitted it for hearing to the arbitral tribunal is void. The decision of the High Court in Malaya at Kuala Lumpur, which is the court located at the seat of the domestic arbitration in Kuala Lumpur is the court enjoying exclusive jurisdiction to supervise and regulate the arbitration. That includes the registration and enforcement as well as the setting aside of the arbitral award.**

**[173] Therefore it is the decision of the High Court in Malaya at Kuala Lumpur that prevails in the instant appeal.**

**Answers to the Three Questions of Law**

**[174]** It remains for us to answer the three questions of law put forward by the Appellant:

**Question 1: Whether, by reason of the Federal Court's decision in Hap Seng Plantations (River Estates Sdn Bhd v Excess Interpoint Sdn Bhd [2016] 3 MLJ 553 ('Hap Seng') *inter alia*, that the High Court in Malaya and the High Court in Sabah and Sarawak each has its own**

**separate territorial jurisdiction, there exists in law two separate supervisory jurisdictions in Malaysia over arbitrations or arbitration awards, namely one under the High Court in Malaya and one under the High Court in Sabah and Sarawak.**

**[175]** As would have been understood from reading this judgement we have determined that the exclusive supervisory jurisdiction of a domestic arbitration is to be ascertained from the juridical seat of the arbitration. **The court at the seat enjoys exclusive supervisory jurisdiction over the arbitral proceedings and the award.**

**[176]** As such it is not correct to state that there subsists in law "two separate supervisory jurisdictions". This is because such a summarisation conflates the doctrine of the exclusive jurisdiction of the court at the juridical seat of the arbitration with the law relating to the territorial jurisdictions of the High Courts in Malaya and Sabah and Sarawak. The **AA** recognises that there are two High Courts with separate territorial jurisdiction.

**[177]** However the location of the seat of the arbitration will determine the identity of the court enjoying supervisory jurisdiction in accordance with arbitral law. In other words, if the seat is Kuala Lumpur it follows that the court at the seat, namely the High Court in Malaya at Kuala Lumpur, that enjoys supervisory jurisdiction. If the seat is at Kota Kinabalu, then it is the High Court in Sabah and Sarawak at Kota Kinabalu that enjoys supervisory jurisdiction.

**[178] The choice of the seat therefore determines the court enjoying exclusive supervisory jurisdiction even in a domestic arbitration.**

**[179]** The question as framed does not reflect the position in law namely that the court at the seat of the arbitration enjoys exclusive jurisdiction by application of arbitral principles. The fact that the two High Courts in Malaysia enjoy a separate territorial jurisdiction is not directly relevant to the identity of the court enjoying exclusive jurisdiction, because that is governed by the seat. And the seat will fall within either of the High Courts because that is expressly recognised in the **AA**. The use of the words **"or either of them as the case may be…"** reiterates this.

**[180]** This question seeks to extrapolate the theory of territorial jurisdiction to meet arbitral concepts by referring to "two supervisory jurisdictions". That is not necessary given the position in arbitral law as we have explained. As such, the question is incorrectly premised, and we do not propose to answer it.

**Question 2: Whether, by reason of the Federal Court's decision Hap Seng, *inter alia*, that the High Court in Malaya and the High Court in Sabah and Sarawak each has its own separate territorial jurisdiction, the High Court in Sabah and Sarawak in Kota Kinabalu has supervisory jurisdiction to hear an application to set aside an Arbitration Award issued in Kuala Lumpur**

**[181]** For the reasons we have fully explained in this judgement, we answer this question by stating that **the High Court in Sabah and Sarawak does NOT have the supervisory jurisdiction to hear an application to set aside an arbitration award where the seat of the domestic arbitration is in Kuala Lumpur.**

**[182]** The decision of this Court in **Hap Seng *(above)*** has no part to play in our determination and adjudication of whether or not the concept of the seat of an arbitration is applicable in domestic arbitrations.

**[183]** The decision of this Court in **Hap Seng *(above)*** relates primarily to the territorial jurisdiction of the two High Courts and that is not a matter in issue, given that the **AA** expressly references this position in law in **sections 2 and 3**. The **AA** recognises that in any given arbitration, the seat will determine the court having exclusive jurisdiction.

**[184]** At risk of repetition if the seat of the domestic arbitration is in Peninsular Malaysia, then the supervising court will follow on from the seat of the arbitration, and accordingly fall within the jurisdiction of the High Court in Malaya. If the seat is in Sabah or Sarawak, then the court enjoying exclusive supervisory jurisdiction will follow on from the seat, and accordingly fall within the jurisdiction of the High Court in Sabah and Sarawak.

**Issue 3: Whether, in the context of there being two separate territorial jurisdictions in Malaysia, the seat of a domestic arbitration may be a state or a territory within Malaysia**

**[185]** Yes, the seat of a domestic arbitration will be a place within Malaysia. The seat of a domestic arbitration cannot simply be said to be Malaysia. The seat is usually specified to be, for example, Kuala Lumpur, Malaysia, or Kota Kinabalu, Malaysia, or Penang, Malaysia, as the parties see fit to choose in their arbitration agreement or as determined by the arbitral tribunal pursuant to **section 22 AA**.

**[186]** For the reasons we have given, we are of the unanimous view that the appeal should be, and is allowed with costs to the Appellant. The decision of the Court of Appeal is set aside. Consequently, it follows that the decision of the High Court in Kota Kinabalu in the KK suit is declared void and also set aside in the sum of Ringgit Malaysia one hundred thousand (RM100,000.00) subject to allocatur.

***signed***

**(NALLINI PATHMANATHAN)**

**JUDGE**

**FEDERAL COURT OF MALAYSIA**

Dated: 3 September 2021

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