

# Empower



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# Note from the Editorial Team

Dear Readers,

Welcome back to our September edition of Empower! We have 4 interesting articles to share with you this time and we hope that they are of interest to you.

The first article in this edition is in regards to the standard operating procedures that apply in conducting a virtual annual general meeting or an extraordinary general meeting for a Joint Management Body. It very succinctly sets out what needs to be done before, during and after the meeting to ensure that the virtual meeting is conducted in a safe and secure manner that is in compliance with the applicable regulations.

The second article is a write up in respect of the recent Federal Court decision in *YKK (Malaysia) Sdn Bhd v Pengarah Tanah & Galian Johor* which was delivered earlier in July this year wherein the issue for determination was whether the alienation of a qualified title by way of a lease by a State Authority under the National Land Code 1965 gives rise to a contract of lease between the State Authority and the lessee that is enforceable in private law.

Our third article titled "Why Bother Adopting an Entire Agreement Clause" would be of interest to all as it is a common term used in many commercial and construction contracts and it is often an overlooked clause which parties pay little attention to. This article explains why it is important to carefully consider the wordings used in the Entire Agreement Clause and why it needs to be drafted with precision and clarity.

The fourth article is another write up in respect of a Federal Court decision in the case of *Masenang Sdn Bhd v Sabanilam Enterprise Sdn Bhd* which sets out expressly the relevancy of the location of the seat of arbitration and how it will determine the identity of the court enjoying supervisory jurisdiction.

Finally, for something lighter, do check out our Inside Out section to have a glimpse of our lawyers at the recent KL Bar Run which was conducted virtually for the first time ever!

Happy reading readers and we hope you have a good read! See you at the next issue!

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All articles in this publication are intended to provide a summary or review of the subject matter and are not intended to be nor should it be relied upon as a substitution for legal or any professional advice.

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# STANDARD OPERATING PROCEDURE IN CONDUCTING VIRTUAL ANNUAL GENERAL MEETING / EXTRAORDINARY GENERAL MEETING FOR JOINT MANAGEMENT BODY

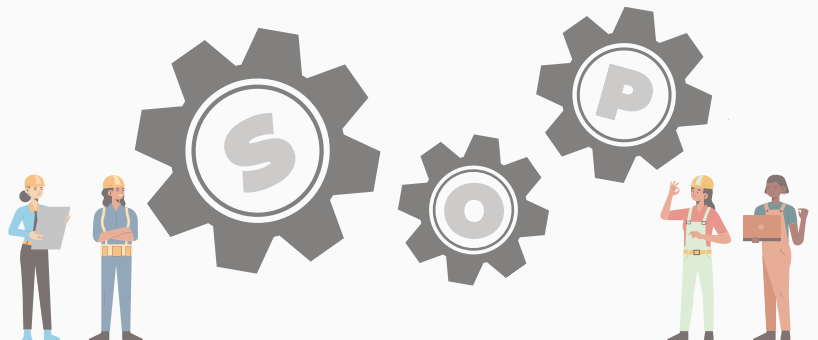
WRITTEN BY JACQUELINE WOON OOI KUAN

Reference is made to our Article dated 31 May 2021, "**HHQ Real Estate Team Successfully Conducted Virtual AGM For JMB**"[1], where the Ministry of Housing and Local Government ("KPKT") permitted an Annual General Meeting ("AGM") and/or Extraordinary General Meeting ("EGM") to be carried out online through certain prescribed procedures to satisfy the legal requirements under the Strata Management Act, 2013.

So what exactly are these procedures? To ensure the validity of the virtual AGM/EGM, the meeting needs to be conducted in line with the guidelines and/or the Standard Operating Procedure ("SOP") determined by (Kementerian Perumahan dan Kerajaan Tempatan) KPKT[2] as listed below:

## **A) BEFORE THE MEETING**

- 1) Notice of Meeting shall be copied to the Commissioner of Building ("COB").
- 2) Notice of Meeting shall be issued by hand, registered post or to be pasted on the last known address of the owners, and such Notice of Meeting shall be copied to the owners through email.
- 3) Notice of Meeting shall state the meeting place, the online platform being used to conduct the meeting, voting methods, method of submitting the proxy form and the agendas of the meeting.
- 4) Relevant documents for the meeting shall be sent to the owners 14 days or 21 days before the meeting manually, through email, QR code scanner or other online methods.
- 5) The list of eligible voters shall be displayed on the notice board and on the website or social media (if applicable) at least 48 hours before the meeting.
- 6) Management shall upload the notice of meeting on the website or social media (if applicable).
- 7) The owners shall submit the proxy form online or send it by hand to the management at least 48 hours before the meeting.
- 8) Management shall be able to identify the participants as owners, proxy or observants during the meeting by providing passcode or identification.
- 9) Management shall ensure the internet is in good condition and has the requisite speed to conduct the virtual meeting effectively.



[1] HHQ Real Estate Team Successfully Conducted Virtual AGM For JMB:  
<https://hhq.com.my/news/hhq-real-estate-team-successfully-conducted-virtual-agm-for-jmb/>

[2] SOP Sektor Pengurusan Strata:  
<https://www.kpkt.gov.my/index.php/pages/view/768>

## **B) DURING THE MEETING**

- 1) The vote-counting system must be in good and functional condition. It shall accommodate both votings by hand and voting by poll (based on share units). The result of each voting session shall be reported.
- 2) The online platform shall be able to receive questions, nominations and record the whole meeting process.
- 3) The registration of the meeting shall commence 2 hours before the meeting. If a quorum is not met, the registration shall be extended for another 30 minutes and at the end of the said period, the meeting shall proceed with the registered owners/attendees who shall constitute as a valid quorum.
- 4) The meeting shall be convened and presided over by the appointed chairman until the end of the meeting. In the event, the chairman fails to or refuses to chair the meeting until the end, a new chairman shall be appointed among the eligible owners.
- 5) The real-time/live result of each voting session shall be reported on the screen.
- 6) The organising committee shall be present at the meeting place.

## **C) AFTER THE MEETING**

- 1) Management shall prepare the Minutes of Meeting and, such minutes prepared shall be shown on the notice board and shall be announced to the public.
- 2) Management shall within 28 days from the date of the meeting to forward the followings documents to the COB:-
  - a) Correspondence of meeting;
  - b) Minutes of meeting;
  - c) Record of Attended Owners, Proxy or Appointed person; and
  - d) Such documents required by COB.

In conclusion, it is important that JMB's adapt to these changing times and familiarize themselves with the processes involved in conducting virtual meetings.

If you have any questions or wish to know what other steps you can take to conduct your meetings in a safe and secure manner that is in compliance with the applicable regulations, please feel free to contact our team and we will be glad to assist you.



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**WHETHER THE ALIENATION OF A  
QUALIFIED TITLE BY WAY OF A LEASE  
BY A STATE AUTHORITY UNDER  
THE NATIONAL LAND CODE, 1965 GIVES RISE TO A  
CONTRACT OF LEASE BETWEEN THE STATE  
AUTHORITY AND THE LESSEE THAT IS  
ENFORCEABLE IN PRIVATE LAW?**

**CASE UPDATE: YKK (MALAYSIA) SDN BHD V  
PENGARAH TANAH DAN GALIAN JOHOR [2021] 1 LNS 930**

WRITTEN BY YANNE TEO SIEW LUO

**BACKGROUND**

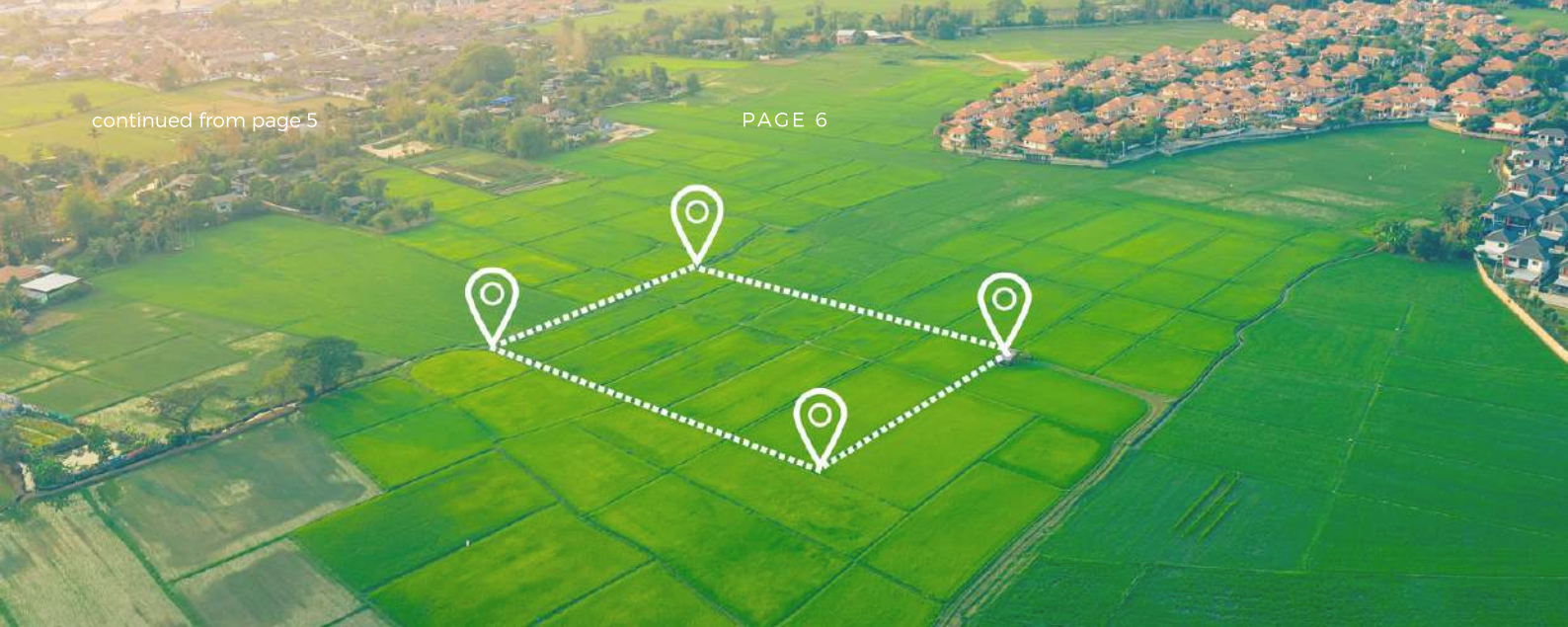
On 31.7.1960, the State Authority alienated a piece of land (“the Land”) to Sri Kemajuan Co. Ltd. for a term of 60 years (the lease). The lease was issued in Form 11A of the National Land Code 1965 (NLC) and was supposed to expire on 30.7.2020. However, before the expiry of the lease, it was acquired by Leong Huat Hardware (Pte.) Ltd. and subsequently by the plaintiff. The plaintiff registered the lease on 9.3.1980, acquiring more than 40 years of the unexpired portion of the lease by relying on the Clause 7 of the Special Conditions of the lease, which provides the plaintiff with an Option To Renew the lease for a new term of 30 years, which reads as follows:

*“7. At **any time not less than six months before the date of expiration of this lease** the lessee may, at his option exercised in writing and upon payment of an appropriate premium based upon the undeveloped value of the land and rent at then current rates, surrender this lease and obtain in exchange therefore a **new lease for the term of 30 years from the date of his exercise of the said option**. Such new lease shall be subject to all the terms and conditions of this lease except the option by this condition conferred.”*

On 13.3.2014, the defendant informed the plaintiff’s representatives during a meeting that a notice of non-renewal of the leases in the Larkin Industrial Area (which the Land was situated) would be issued to give effect to the State Government’s future development plans for the area.

Subsequently, by a letter dated 18.8.2015, the defendant informed the plaintiff that the State Authority has decided to convert the Larkin Industrial Area into a housing area and has accordingly, frozen all lease renewal applications.

Despite being notified by the defendant that it would not be renewing the lease of the land in the Larkin Industrial Area, the plaintiff gave notice to the defendant on 24.8.2015, to exercise the Option To Renew under Clause 7. At the same time, the plaintiff asked the defendant to inform the plaintiff of the appropriate premium based on the undeveloped value of the land and the current rental rate that is payable. The plaintiff alleged that the defendant has refused to provide the relevant renewal forms, including Form 12A, to the Plaintiff despite various attempts to obtain them. Despite a reminder being issued on 12.11.2015 by the plaintiff, the defendant failed to respond to the Renewal Notice. As a result, the plaintiff filed an Originating Summons against the defendant for breach of the Option to Renew under the lease.



## **JUDGMENTS**

- 1) High Court granted judgment in favor of the plaintiff.
- 2) Court of Appeal reversed the judgment of the High Court.
- 3) Federal Court affirmed the decision of Court of Appeal.

## **FINDINGS OF FEDERAL COURT**

The issue is whether Clause 7 creates a **contractual right** in favour of the plaintiff which is binding upon the defendant and hence whether such refusal to renew on the part of the defendant constitutes a **breach** of the plaintiff's right under the same which was a **private law right**.

## **WHETHER CLAUSE 7 CREATES A CONTRACTUAL RIGHT:**

In ***North East Plantations Sdn Bhd v. Pentadbir Tanah Daerah Dungun & 4 Lagi [2011] 4 CLJ 729***, it was held that mere approval of land to be alienated does not bind the State Authority contractually that would prevent the State Authority from revoking such approval, in the absence of registration. This decision is in accordance with the provision of section 78(3) of the NLC, which provides that:

*“The alienation of State land shall take effect upon the registration of a register of title thereto pursuant to the provisions referred to in subsection (1) or (2), as the case may be; and, notwithstanding that its alienation has been approved by the State Authority, the land shall remain State land until that time.”, and*

The court held that alienation of land cannot be given effect without completion of registration and presence of document of title, which established the law that prior to such completion the land still belongs to the disposal of the State Authority.

Hence, Clause 7 is not binding on the State Authority, as it is not in accordance with the NLC, namely section 90A, as it prevents the State Authority from exercising its statutory discretion or performing its statutory duty. Any contract for the disposal of any interest of State lands has to be in accordance with powers as conferred by the NLC. As for the renewal of a lease, section 90A (1) and (5) of the NLC expressly provide for the discretion of the State Authority whether to approve or reject any application for the renewal of the lease.

Apart from the aforesaid, a plain reading of Clause 7 shows that, it does not impose a mandatory obligation on the State Authority to grant an extension of the lease for a further term upon the plaintiff exercising its Option To Renew. The said Clause 7 merely provides for the procedural administrative steps that would follow, **in the event:**

- i) there is an application by the plaintiff for an extension of the term of the lease; **and**
- ii) the State Authority approves such application.

In addition, there has to be an endorsement of the renewal of the lease on the title for the renewal of the lease to be effected. But in the present case, it has not even reached that stage.

In this respect, the Court in North East Plantations Sdn Bhd (supra) explained the administrative steps that would follow upon the approval of the alienation of any land by the State Authority. It concerns section 80(3) of the NLC which reads:

*“The alienation of State land **shall take effect upon the registration of a register of title** thereto pursuant to the provisions referred to in subsection (1) or (2), as the case may be; and, notwithstanding that its alienation has been approved by the State Authority, the land shall remain State land until that time.”, and*

Hence, the word “shall” in section 80(3) of the NLC only applies upon the Registrar carrying out its function **after the approval by the State Authority and the State Authority has directed the Land Administrator to proceed with registration**. In the event the approval by the State Authority is withdrawn, then the Registrar’s act to “prepare, register and issue final title in respect of the land” does not arise.

Therefore, pursuant to the decision of this Court in North East Plantations Sdn Bhd (supra), alienation of land cannot be given effect without the completion of registration and presence of the document of title. In other words, prior to completion of registration, as the land still belongs to the State, it is subject to the disposal of the State Authority. To sum up, the NLC provides the right of a person to land exists only after the land is registered.

Hence, Clause 7 does not create a contractual lease between the State Authority and the lessee which is binding on the State Authority.

#### **WHETHER THE LEASE IS ENFORCEABLE BY PRIVATE LAW -**

#### **THE DICHOTOMY BETWEEN PRIVATE LAW RIGHTS AND THE PUBLIC LAW RIGHTS:**

The court found that the State Authority was performing public function under Section 90A of the NLC when it refused to renew the lease. This clearly injects the element of public law, thus making it amenable to judicial review. It is an exercise of power by a public body under public law which makes public law predominant than the private law element.

Therefore, as the plaintiff is challenging the decision of a public body, the plaintiff could have commenced this action by way of a judicial review application since the public law element was evidently predominant. Thus, the plaintiff’s claim in private law remedy is clearly unsustainable. The Court of Appeal did not err in this respect. The lease is not enforceable by private law.



### **WHETHER CLAUSE 7 IN THE CONDITIONS AFFORDED THE PLAINTIFF A LEGITIMATE EXPECTATION FOR THE LEASE TO BE RENEWED:**

For there to be a legitimate expectation, it must be shown that the public authority has made a representation or promise to the individual within its powers. The representation or promise must be a clear and unambiguous promise.

In the present case, there was nothing shown by the plaintiff that there has been a representation that constituted a clear and unambiguous promise, an established practice or a public announcement that there is to be a renewal of the lease upon the exercise of the Option To Renew by the lessee.

In fact, in 2014 the State Authority already informed the plaintiff and other landowners of the State's plan to develop the land into a housing area and hence the State Authority would not be renewing the lease in the Larkin Area. That was 6 years before the lease for the plaintiff expired.

Thus, it cannot be said that the change of policy was based on irrelevant considerations or as being unreasonable. It has not been proven otherwise anyway.

Therefore Clause 7 in the Conditions does not accord the plaintiff a legitimate expectation for the lease to be renewed, as legitimate expectation cannot override the express statutory provisions of the NLC.

### **WHETHER SPECIFIC PERFORMANCE IS SUSTAINABLE AGAINST THE DEFENDANT:**

As the relief sought by the plaintiff is specific performance against the Director of Lands and Mines, who is an officer of the State Authority, which is a government body, such relief is not sustainable pursuant to section 29 of the Government Proceedings Act 1956. Hence the relief of Specific Performance is not sustainable against the defendant.

### **WHETHER OPTION TO RENEW IN CLAUSE 7 ENDORSED PURSUANT TO SECTION 120 OF THE NLC IN THE TITLE IS CONFORMABLE TO LAW:**

The court did not agree with the Plaintiff's stand that Clause 7 (Option to Renew) created a binding contract of lease between the State Authority and the Plaintiff because if the Plaintiff's stand is upheld, it would have the effect of overruling the statutory provisions of Section 90A(5) of the NLC and that would render Clause 7 to be not conformable to law.

### **CONCLUSION**

Court held that the alienation of land by way of section 76 of the NLC read with Clause 7 does not give rise to a contractual lease between the State and the lessee, the consequence of which, private law remedy is available to renew the lease for another 30 years. Clause 7 does not originate from a contractual bargain in the usual context of contract law which relates to private law remedy. It is part of the Conditions that came with the lease granted to the lessee which is subject to the provisions of the NLC.

The lease secured by the plaintiff is a statutory lease which is not subject to private law. The power to renew the lease conferred on the defendant is derived from the NLC which he exercises under the authority of the State to alienate lands as provided for, under the same.

Therefore, the plaintiff's mode of approaching the court seeking for private law remedy is unsustainable in law.



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# WHY BOTHER ADOPTING AN “ENTIRE AGREEMENT” CLAUSE?

WRITTEN BY LYNN FOO

## **“ENTIRE AGREEMENT” CLAUSE**

An “entire agreement” clause was designed to provide certainty and clarity on the entirety of the agreement between the parties in writing. With an “entire agreement” clause included in the contract, the parties are prevented from relying on any statements, discussions, representations or agreements made by the parties during the negotiations (either written or oral) except for those expressly set out in the written contract. It essentially prevents the parties from claiming that another contract took precedent over the existing agreement.

A typical ‘entire agreement’ clause looks like this:-

*“This Agreement, including its schedule, sets out the entire agreement between the Parties relating to the matters set out herein and supersedes all prior oral or written agreements, arrangements or understandings between them relating to such subject matter. The Parties acknowledge that they are not relying on any representation, agreement, term or condition which is not set out in this Agreement.”*

It is important to note that the “entire agreement” clause often forms part of the boiler plate clauses of commercial or construction agreements which are often overlooked or neglected by the contracting parties. These clauses are the most litigated clauses among the boiler plate clauses of an agreement. Hence, it is important to carefully craft out an “entire agreement” clause.

## **RECENT CASE LAW IN MALAYSIA**

Recent legal cases in Malaysia have highlighted that, it is important to consider the effect of the “entire agreement” clauses carefully when adopting them in contracts.

In ***Master Strike Sdn Bhd v Sterling Heights Sdn Bhd* [2005] 3 MLJ 585**, the Court of Appeal held, in applying the dictum of ***Abdul Aziz Mohammad J in Macronet Sdn Bhd v RHB Bank Sdn Bhd* [2002] 3 MLJ 11** on the effect of an entire agreement clause, the entire agreement clause is an agreement between the parties and in adhering to such a clause they must have been presumed to know the existence of section 92 of the Evidence Act 1950 and its exception and by doing so the parties are in fact agreeing not to resort to the exception.

Likewise, in the Court of Appeal case of ***Hairin Corporation Sdn Bhd v Rimbun Tekad Premix (Trengganu) Sdn Bhd* [2016] 3 MLJ 782**, it was held that, by agreeing to the entire agreement clause, a party is precluded from relying on the document or evidence of any witness to give a different meaning to the subcontract which contains the entire agreement clause. A written contract must be interpreted within its four corners and no extrinsic evidence should be employed in its interpretation.

Also, in ***Berjaya Times Square Sdn Bhd v Twingems Sdn Bhd* [2010] MLJU 1328**, JC Lee Swee Seng (as he then was) had dealt with the “entire agreement” clause in a tenancy agreement. The Learned Judge has referred to an English case of ***Innterpreneur Pub Co v East Crown Ltd* [2000] 3 EGLR 31**. In this case, Lightman J opined on the purpose and the effect of an entire agreement:

*“The purpose of an entire agreement clause is to preclude a party to a written agreement from threshing through the undergrowth and finding, in the course of negotiations, some (chance) remark or statement (often long forgotten or difficult to recall or explain) upon which to found a claim, such as the present, to the existence of a collateral warranty. The entire agreement clause obviates the occasion for any such search and the peril to the contracting parties posed by the need that may arise in its absence to conduct such a search. For such a clause constitutes a binding agreement between the parties that the full contractual terms are to be found in the document containing the clause and not elsewhere, and that, accordingly, any promises or assurances made in the course of the negotiations (which, in the absence of such a clause, might have effect as a collateral warranty) shall have no contractual force, save in so far as they are reflected and given effect in that document.”*

Further, in the recent Federal Court case of ***Wong Yee Boon v Gainvest Builders (M) Sdn Bhd* [2020] 3 MLJ 571** (albeit in a dissenting judgment), the Federal Court held that the implication of the entire agreement clause meant that, no extraneous evidence may be considered to interpret, to supplement or to contradict the appellant’s obligations as set out under Clause 4 of the said agreement and that, the parties is disentitled from importing any other terms to be read into it.



## **PRACTICAL DRAFTING TIPS IN DRAFTING THE “ENTIRE AGREEMENT” CLAUSE**

Based on the above, it appears that the Malaysian courts would generally uphold such clauses. With the existence of such clause, it helps to clarify that the final written agreement in question constitutes the entire or whole agreement made between the contracting parties. The purpose of having such clause is also to reduce or minimise the chances of a dispute relating to contracts preceding the current arrangement.

Below are some practical drafting tips to ensure that the contracting parties' interest is safeguarded: -

- a) The parties should expressly mention which documents, schedule or annexures that they wish to include or exclude in the agreement;
- b) If the parties intend to rely upon any prior agreements, they should incorporate these prior agreements in the final written agreement so that the prior agreements are not excluded by this clause; and
- c) In the event there are multiple contracts forming part of the same transaction, it is important to include all of them in the wording of the “entire agreement” clause in the final written agreement.

## **CONCLUSION**

In short, it is imperative to consider the wording used in the ‘entire agreement’ clause carefully when drafting an agreement, especially in complex contracts or construction agreements. Drafting such clause with precision and clarity with the help of a lawyer will avoid frivolous disputes relating to the agreements preceding the current arrangement.



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# COURT AT SEAT OF ARBITRATION ENJOYS EXCLUSIVE SUPERVISORY JURISDICTION

## CASE UPDATE: MASENANG SDN BHD V SABANILAM ENTERPRISE SDN BHD (CIVIL APPEAL NO: 02(I)-20-03/2020(S))

WRITTEN BY AMY HIEW KAR YI

The Federal Court allowed the appeal, and upheld the Kota Kinabalu High Court's decision to strike out the Respondent's application to set aside an arbitral award on the ground that the Kuala Lumpur High Court, and not the Kota Kinabalu High Court, was the proper supervisory court. This is due to the fact that the seat of arbitration was at Kuala Lumpur.

This decision sets a clear precedent that the location of the seat of arbitration will determine the identity of the court enjoying supervisory jurisdiction, even for domestic arbitrations.

### **THE LAW**

In Malaysia, both domestic arbitrations and international arbitrations are governed by the Arbitration Act 2005 ("**AA 2005**").

Section 2 of the AA 2005 defines "High Court" to mean the "High Court in Malaya and the High Court in Sabah and Sarawak or either of them, as the case may require...".

Section 22 of the AA 2005 which deals with the seat of arbitration, provides that:

#### **"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) ..."*



Further, Section 37 of the AA 2005 provides for the setting aside of arbitral awards, both domestic and international:

*“37. Application for setting aside*

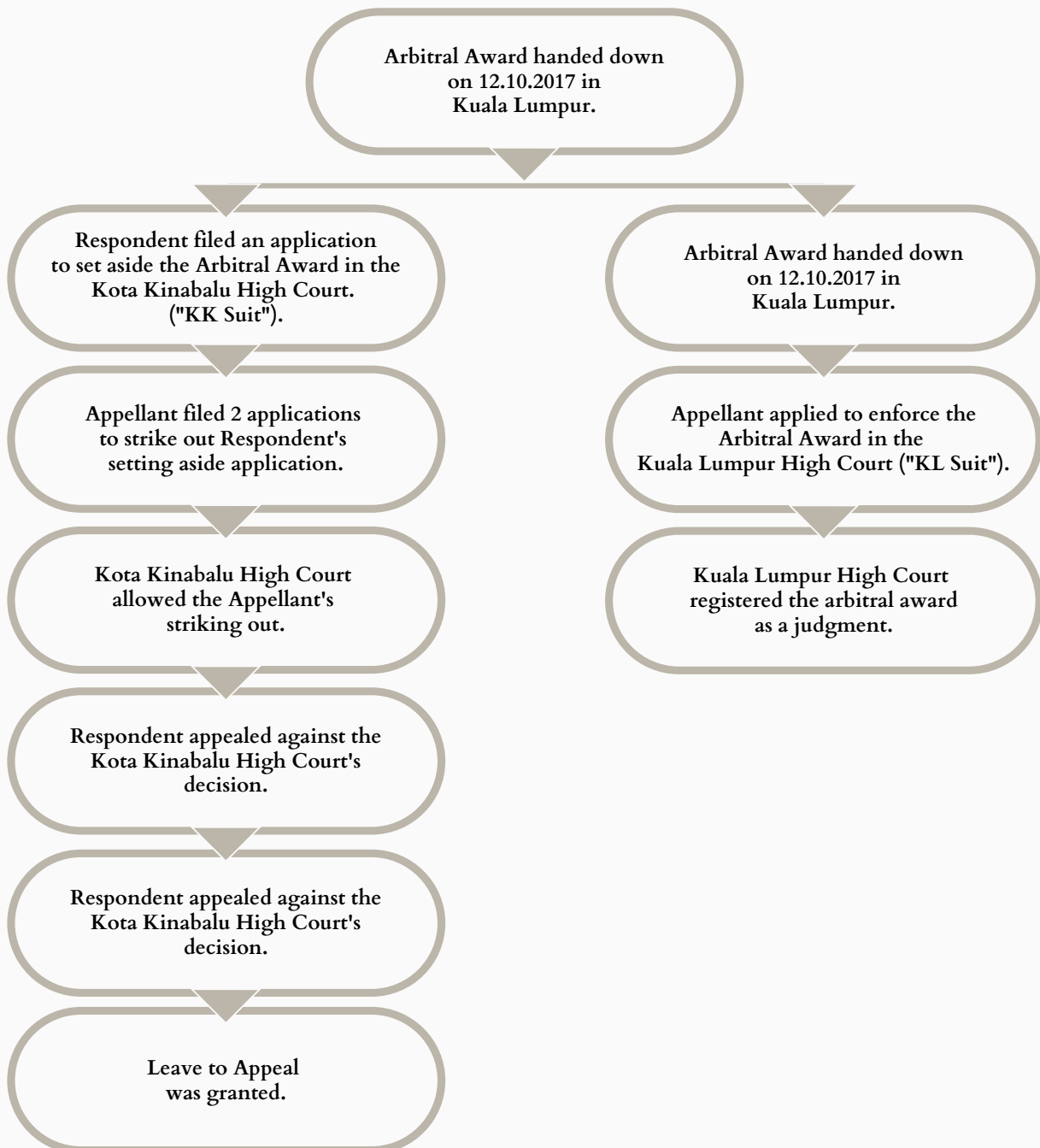
*(1) An award may be set aside by the High Court only if ...”*

It therefore follows that the reference to the “High Court” in Section 37 of AA 2005 is to the High Court in Malaya and the High Court in Sabah and Sarawak or either of them, as the case may require. The confusion is however whether both the High Court in Malaya and the High Court in Sabah and Sarawak each have separate supervisory jurisdictions in Malaysia over arbitrations or arbitral awards.

**THE BACKGROUND FACTS**

The appeal before the Federal Court stemmed from a Court of Appeal decision in reversing the Kota Kinabalu High Court’s decision to strike out the Respondent’s application to set aside the arbitral award.

The chronology of events leading to the appeal in the Federal Court is briefly as follows:



It was the contention of the Appellant that the Respondent's setting aside application ought to be struck out because the seat of arbitration in the instant appeal is Kuala Lumpur. Hence, the Kota Kinabalu High Court is not the supervisory court and does not have jurisdiction over the arbitration or the setting aside application. The Appellant further contended that the concept of "seat of arbitration" is relevant to both domestic and international arbitration as Section 22 of AA 2005 applies to both types of arbitration. As such, the seat of a domestic arbitration may be a state or territory in Malaysia.

On the other hand, the Respondent contended that as the appeal involves a domestic arbitration, both parties are subject to the curial law of the AA 2005. There is therefore no need to undertake an exercise to determine the seat of arbitration because the AA 2005 is the sole curial law for domestic and international arbitrations in Malaysia. The Respondent also relied on section 23 of the Courts of Judicature Act 1964 ("**CJA 1964**") to contend that it had satisfied the requirements therein in filing its application to set aside the arbitral award in the Kota Kinabalu High Court, which is the place where the cause of action arose.

### **DECISION OF THE FEDERAL COURT**

The Federal Court allowed the appeal and overturned the Court of Appeal's decision.

2 main issues were discussed and analysed by the Federal Court:

- i) 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 2005; and
- ii) if the theory of the juridical seat is applicable, then is the court at the seat vested with exclusive jurisdiction to regulate the arbitral proceedings.

*First*, the Federal Court held that the seat of an arbitration is relevant even in the context of a domestic arbitration.

Some of the Federal Court's findings on this issue are as follows:

- i) It is a settled principle that the ascertainment of the juridical seat determines the supervisory court in which jurisdiction vests exclusively. In an international context, 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.
- ii) By the use of words "**either of them, as the case may require**" in Section 2 of the AA 2005, it envisages that the term "High Court" may refer to one or the other of the two High Courts, depending on the circumstances of any particular arbitration. This clearly denotes that for any particular domestic arbitration, the High Court enjoying supervisory jurisdiction will be the Court at the seat of the domestic arbitration.
- iii) Further, there is no distinction made between international and domestic arbitrations in relation to the applicability of the law in either High Court. Thus, the same arbitral law as specified in the AA 2005 is applicable to both international and domestic arbitrations. Consequently, Section 22 of the AA 2005 (which is in Part II of AA 2005) which governs the identification of the seat of arbitration, would apply to domestic arbitrations. A plain reading of Section 22 of the AA 2005 evidences the fact that where the arbitration is in Malaysia, the parties are free to agree to any "place" or "seat" within Malaysia. In the absence of such an agreement, the arbitration tribunal is to determine such a seat.

- iv) Just because the AA 2005 applies throughout Malaysia, it does not mean that 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.
- v) In addition, the use of the phrases "where the seat of arbitration is not in Malaysia" or "whether the seat of arbitration is in Malaysia" in the AA 2005 shows that the Act envisages that the doctrine of "seat" is also applicable to domestic arbitrations where the seat is in Malaysia. The exercise of identifying the 'seat' does not end by simply stating that the 'seat' is in Malaysia as the seat cannot amount to a reference to the entire country.
- vi) Following from the above, 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 of the AA 2005. The choosing of the 'seat' would then amount to choosing the exclusive jurisdiction of the High Court at which the seat is located.
- vii) Section 23 of the CJA 1964 would not be applicable when determining which court enjoys exclusive jurisdiction. The CJA 1964 applies to civil disputes and under civil procedural laws. However, arbitrations are governed by a special law, namely the AA 2005. As such, the law governing civil disputes such as the CJA which determines jurisdiction by ascertaining where the cause of action arose does not apply to arbitrations. It is the AA 2005 and arbitral law that governs.

*Second*, as the theory of the juridical seat is applicable to domestic arbitrations, the Federal Court held 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.

Therefore, if parties have chosen Kuala Lumpur as the juridical seat, or the arbitral tribunal so determines under Section 22 of AA 2005, it would follow that the High Court in Malaya at Kuala Lumpur enjoys exclusive supervisory jurisdiction. To argue otherwise, namely by suggesting that other High Courts (in the other States in Malaysia) also enjoy concurrent jurisdiction, would give rise to confusion.

In line with the above findings, the Federal Court confirmed that as it is the court at the seat of the domestic arbitration that enjoys exclusive jurisdiction, it follows that the decision of the High Court in Malaya at Kuala Lumpur that prevails in the instant appeal. Accordingly, the decision by the Kota Kinabalu High Court that purported to set aside the arbitral award is void.

## **COMMENTS**

This case is crucial as it now sets precedence that the court at the seat of arbitration enjoys exclusive supervisory jurisdiction over the arbitral proceedings and the award. Parties will have to be attentive to the seat of arbitration, even for domestic arbitrations, as this will determine which court has the exclusive jurisdiction to hear applications relating to the arbitration proceedings or arbitral awards.

This case also serves as a reminder that parties will have to put in more thought and consideration when drafting arbitration agreements, to ensure that the seat of arbitration is set out clearly. This will certainly help parties to avoid any dispute as to the seat of arbitration in the future.



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### 7th KL Bar Run 2021

For many years that HHQ has been participating in the KL Bar Run, this year's Bar Run was a special affair because it is virtual. Imagine how running can be done virtually! This year's Bar Run was also special for HHQ & HLP because we participated as a team. Each team consisted of a member from HHQ and HLP. Both of us formed 8 teams. The KL Bar Run was conducted from September 16 from 12.01am to September 19, 2021 at 11.59pm. Registration was done online via Checkpoint Spot platform. Participants may run at any location outdoor for 3 kilometres and running was tracked through the platform. Here are some of the pictures of our colleagues during the run.

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