

## THE LAW OF THE SEAT: UNTANGLING THE THREADS OF JURISDICTION IN MALAYSIAN ARBITRATION\*

*by*

**Steven Perian KC\*\***

### ABSTRACT

Jurisdictional clarity is the cornerstone of effective arbitration. In Malaysia, the Arbitration (Amendment) Act 2024 introduces section 9A to the Arbitration Act 2005 to address long-running uncertainty about which law governs an arbitration agreement. This article analyses the doctrinal and policy background to that reform, situates Malaysia's choice in a comparative context (Singapore, Hong Kong and England), and explains how the UK's Arbitration Act 2025 has placed England in the same statutory camp. The analysis integrates five leading judgments — *Enka v. Chubb*<sup>[1]</sup> (UK Supreme Court), *Kabab-jl Sal v. Kout Food Group*<sup>[2]</sup> (UK Supreme Court), *BCY v. BCZ*<sup>[3]</sup> (Singapore High Court), *C v. D*<sup>[4]</sup> (Hong Kong Court of Appeal) and *Thai-Lao Lignite Co Ltd & Anor v. Government of The Lao PDR*<sup>[5]</sup> (Malaysian Federal Court) — and concludes with practical drafting guidance, hypotheticals, and predictions for Malaysian courts.

### INTRODUCTION: WHY JURISDICTIONAL CLARITY MATTERS

Arbitration thrives on precision. Unlike litigation, where jurisdiction is rooted in geography and statute, arbitration derives its legitimacy from **party autonomy and contractual architecture**. Yet, when disputes arise over which law governs the arbitration agreement itself, the arbitral process risks derailment.

This problem is neither hypothetical nor esoteric. Courts worldwide have been divided on the issue. Some — notably pre-2025 English courts — presumed that the arbitration agreement follows the **law of the main contract**. Others, such as courts in Singapore and Hong Kong, defaulted to the **law of the seat**. Each approach generates different results in terms

of validity, scope, non-party doctrines, and enforcement. The divergences have sometimes produced inconsistent outcomes across jurisdictions, undermining predictability in international commerce.

Malaysia's legislative intervention *via* the **Arbitration (Amendment) Act 2024** offers a welcome clarification. Section 9A states, in simple terms, that where parties have not agreed on the law governing the arbitration agreement, the law of the seat applies. This is an elegant codification, but it also invites deeper reflection. What does it mean for the “**law of the seat**” to govern? Why does this matter for Malaysia's aspirations as an arbitral hub? And how does Malaysia's reform fit into global trends, including England's own statutory correction in 2025?

### **THE DOCTRINAL PROBLEM: TWO COMPETING DEFAULT RULES**

The separability doctrine teaches that an arbitration agreement is legally distinct from the contract in which it is embedded. Yet separability leaves open the question: **which law governs the arbitration agreement itself?**

Two competing defaults have emerged:

- (1) **Contract-law (or “main contract”) default** — where a court presumes that a choice of law for the underlying contract governs the arbitration agreement as well. This approach treats the arbitration clause as conceptually part of the main contract and applies the same connecting factors used to determine the contract's governing law. The English Supreme Court, before statutory amendment, adopted this line in *Enka* (discussed below).
- (2) **Seat-law default** — where courts treat the arbitration clause as procedurally oriented and governed by the law of the seat when parties have not expressly agreed otherwise. This approach emphasises procedural coherence: the seat provides the supervisory law, appoints courts to supervise arbitrators, and supplies public policy protections. Singapore and Hong Kong courts often favour this approach in practice.

### Which Default is Preferable?

The debate over whether the governing law of the arbitration agreement should follow the law of the main contract or the law of the seat is not merely theoretical. It has direct implications for enforceability, coherence, and the efficiency of the arbitral process.

**The practical and policy arguments in favour of the seat-default are compelling:**

- The seat determines the tribunal's supervisory court and thus naturally supplies the procedural *lex arbitri*.
- Applying the seat law to questions of formation and validity ensures coherence between tribunal procedure and court supervision, particularly in challenges to jurisdiction and enforcement.
- It reduces cross-jurisdictional friction when an award is enforced abroad, since enforcement courts can defer to the law of the seat rather than applying a foreign contract law.
- It promotes drafting precision by encouraging parties to be explicit if they intend a different rule.

The **counterarguments centre on party autonomy**. A choice of law for the contract may be seen as the parties' intention that the entire contractual architecture, including the arbitration clause, should be governed by that law. Yet this expectation can easily be preserved by expressly stating the governing law of the arbitration agreement. Where parties do not, predictability and procedural coherence provide strong reasons for adopting the seat-default rule.

The consequences of uncertainty are significant. The law of the arbitration agreement governs:

- **Validity and formation** — including whether the clause was validly made and whether non-signatories are bound;

- **Scope** — whether a given dispute “*arises out of*” the contract;
- **Defences to enforcement** — particularly under Article V(1)(a) of the New York Convention.

Uncertainty on these points generates jurisdictional challenges, parallel proceedings, and increased costs. The seat-default rule reduces these risks and enhances the systemic integrity of arbitration.

## COMPARATIVE JURISPRUDENCE

The practical arguments for the seat-default rule are persuasive in the abstract. Yet the real test of any default rule comes in the courtroom, when judges must resolve disputes about which law governs an arbitration agreement. Five decisions — two from England, one from Singapore, one from Hong Kong and one from Malaysia — exemplify the competing approaches and their consequences.

### *Enka v. Chubb* — Contract-law Default

The UK Supreme Court in *Enka Insaat v. OOO Insurance Company Chubb*<sup>[6]</sup> (*Enka*) crystallised the English common-law approach. The Court held that, absent an express stipulation, a governing-law clause for the main contract generally governs the arbitration agreement too.

The Supreme Court summarised the principle as follows:

“170. It may be useful to summarise the principles which in our judgment govern the determination of the law applicable to the arbitration agreement in cases of this kind:

- i) Where a contract contains an agreement to resolve disputes arising from it by arbitration, the law applicable to the arbitration agreement may not be the same as the law applicable to the other parts of the contract and is to be determined by applying English common law rules for resolving conflicts of laws rather than the provisions of the Rome I Regulation.

ii) According to these rules, the law applicable to the arbitration agreement will be (a) the law chosen by the parties to govern it or (b) in the absence of such a choice, the system of law with which the arbitration agreement is most closely connected.

iii) Whether the parties have agreed on a choice of law to govern the arbitration agreement is ascertained by construing the arbitration agreement and the contract containing it, as a whole, applying the rules of contractual interpretation of English law as the law of the forum.

iv) Where the law applicable to the arbitration agreement is not specified, a choice of governing law for the contract will generally apply to an arbitration agreement which forms part of the contract.

v) The choice of a different country as the seat of the arbitration is not, without more, sufficient to negate an inference that a choice of law to govern the contract was intended to apply to the arbitration agreement.

vi) Additional factors which may, however, negate such an inference and may in some cases imply that the arbitration agreement was intended to be governed by the law of the seat are: (a) any provision of the law of the seat which indicates that, where an arbitration is subject to that law, the arbitration agreement will also be treated as governed by that country's law; or (b) the existence of a serious risk that, if governed by the same law as the main contract, the arbitration agreement would be ineffective. Either factor may be reinforced by circumstances indicating that the seat was deliberately chosen as a neutral forum for the arbitration.

vii) Where there is no express choice of law to govern the contract, a clause providing for arbitration in a particular place will not by itself justify an inference that the contract (or the arbitration agreement) is intended to be governed by the law of that place.

viii) In the absence of any choice of law to govern the arbitration agreement, the arbitration agreement is governed by the law with which it is most closely connected. Where the parties have chosen a seat of arbitration, this will generally be the law of the seat, even if this differs from the law applicable to the parties' substantive contractual obligations.

ix) The fact that the contract requires the parties to attempt to resolve a dispute through good faith negotiation, mediation or any other procedure before referring it to arbitration will not generally provide a reason to displace the law of the seat of arbitration as the law applicable to the arbitration agreement by default in the absence of a choice of law to govern it."

When the Supreme Court summarised the principle as:

"iv) Where the law applicable to the arbitration agreement is not specified, a choice of governing law for the contract will generally apply to an arbitration agreement which forms part of the contract.

v) The choice of a different country as the seat of the arbitration is not, without more, sufficient to negate an inference that a choice of law to govern the contract was intended to apply to the arbitration agreement."

This presumption drew sharp criticism. First, it risks importing laws hostile to arbitration (for example, rules limiting separability or requiring special formalities). Second, it produces **practical friction**: a tribunal seated in London may find its arbitration agreement governed by Russian law, forcing English courts to apply foreign law to questions of jurisdiction while still supervising the arbitration under English procedural law. Third, it leads to **incoherence** in enforcement: French courts might uphold jurisdiction (applying seat law), while English courts deny it (applying contract law).

### **The *Kabab-jī Sal v. Kout Food Group* Saga**

The global debate over the law applicable to arbitration agreements was vividly illustrated in *Kabab-jī SAL (Lebanon) v. Kout Food Group (Kuwait)*<sup>[7]</sup> (*‘Kabab-jī SAL’*). The dispute arose out of a franchise agreement between Lebanese and Kuwaiti parties. The contract expressly provided that it was governed by English law, but the arbitration clause provided for ICC arbitration seated in Paris.

When arbitration was commenced, the French courts treated the arbitration agreement as governed by French law, by virtue of the Paris seat. The English courts, by contrast, applied English law — the governing law of the contract — and concluded that the non-signatory Kout Food Group was not bound by the arbitration clause. The same arbitration agreement was therefore treated differently in parallel proceedings.

The UK Supreme Court in *Kabab-jī SAL* applied the framework it had earlier set out in *Enka* **where** Lord Hamblen and Lord Leggatt had explained the presumption that, absent express choice, the arbitration agreement is governed by the law of the main contract:

“170. Where the parties have chosen the law to govern their contract, it is natural to infer that they intended that law also to govern the arbitration agreement.”

Applying this presumption in *Kabab-jī SAL*, the Supreme Court held that the arbitration agreement was governed by English law, despite the Paris seat. The outcome created a striking divergence: French courts (seat law) upheld jurisdiction, while English courts (contract law) denied it.

This divergence exposed the practical risks of uncertainty — jurisdictional challenges, inconsistent rulings, and increased costs. It also demonstrated how the *Enka* presumption could generate friction, by importing a foreign law into the arbitration agreement that conflicted with the procedural law of the seat.

This “**fault line**” in English jurisprudence prompted widespread calls for statutory reform.

### ***BCY v. BCZ* — Singapore’s Seat-default Reasoning**

Singaporean jurisprudence has consistently favoured the law of the seat as the governing law of the arbitration agreement where parties are silent. The leading authority is the Singapore High Court decision in *BCY v. BCZ*.<sup>[8]</sup>

The dispute concerned a contract governed by New York law but providing for SIAC arbitration seated in Singapore. The question was whether the arbitration agreement was governed by New York law (the governing law of the contract) or Singapore law (the law of the seat).

Chong J reconsidered the *Sulamérica* test and rejected any mechanical presumption in favour of the contract’s law. He emphasised that the issue truly arises only when there is a “direct competition” between the law of the contract and the law of the seat:

“54. In my view, it was strictly unnecessary, on the facts of FirstLink, for the AR to depart from *Sulamérica* in favour of a starting presumption in favour of the law of the seat. This issue would only arise for consideration in a situation where, in the AR’s words, there is a ‘direct competition’ between the law of the main contract and the law of the seat ...”

The High Court ultimately concluded that Singapore law — the law of the seat — governed the arbitration agreement. This reasoning reflects a clear policy preference for procedural coherence: aligning the arbitration agreement with the seat ensures consistency between arbitral procedure and judicial supervision.

The Court underscored that importing the law of the main contract could, in some cases, “**fundamentally undercut**” the arbitration agreement. The **seat provides procedural coherence**, and absent express stipulation, it is logical that the arbitration agreement should be governed by the same law that supervises the tribunal.



Singaporean jurisprudence thus aligned with the **seat-default approach**, providing predictability and harmonising arbitral procedure with judicial supervision.

***C v. D (HKCA)* — Hong Kong Consistency**

Hong Kong, operating under the UNCITRAL Model Law framework, has also reinforced the central role of the seat courts in supervising arbitration while limiting judicial intervention. The Court of Appeal’s decision in *C v. D*<sup>[9]</sup> illustrates this approach.

The dispute turned on whether failure to comply with a contractual requirement to attempt negotiations before commencing arbitration went to the **jurisdiction** of the tribunal (thus reviewable by the courts under Article 34 of the Model Law) or to the **admissibility** of the claim (a matter for the tribunal).

The Court drew heavily on comparative jurisprudence and endorsed the **jurisdiction–admissibility distinction**:

“There is ... a substantial body of judicial and academic jurisprudence which supports the drawing of a distinction between jurisdiction and admissibility ... and the view that **non-compliance with procedural pre-arbitration conditions such as a requirement to engage in prior negotiations goes to admissibility of the claim rather than the tribunal’s jurisdiction.**” (§§42–43)

On that basis, the Court of Appeal upheld the lower court’s reasoning and confirmed that the objection related to **admissibility, not jurisdiction**. It emphasised that the challenge was directed at the **timing of the claim rather than the tribunal’s authority**.

This reasoning underscores Hong Kong’s pro-arbitration stance. By classifying pre-arbitration procedural requirements as admissibility issues, the Court ensured such objections fall within the arbitral tribunal’s competence, not the courts’ supervisory jurisdiction under Article 34.

The approach preserves efficiency, reduces delay, and aligns Hong Kong with other leading arbitral seats.

### **Malaysian Context Pre-2024**

Malaysia, prior to the 2024 amendment of the Arbitration Act 2005, faced the same ambiguity. The statute was silent on which law should govern the arbitration agreement where parties had not expressly chosen one.

A leading precedent was the Federal Court's decision in *Thai-Lao Lignite Co Ltd & Anor v. Government of the Lao PDR*<sup>[10]</sup> (*'Thai-Lao Lignite'*). The case concerned a power development agreement governed by foreign law, with arbitration seated in Kuala Lumpur. The Federal Court was required to determine whether the parties' choice of seat constituted an implied choice of Malaysian law for the arbitration agreement.

The Court drew a distinction between the law governing arbitral procedure (*lex arbitri*) and the law governing the arbitration agreement:

“[162] The ‘law applicable to the arbitration agreement’ must however be distinguished from the ‘law governing the arbitration’ or ‘arbitration law’.”

Rejecting any automatic assimilation of contract law or seat law, the Court applied conflict-of-laws principles. It held that, in the absence of express choice, the applicable law is that with the “closest and most real connection” to the arbitration agreement:

“[187] Under the conflict of laws rules, the law that has the closest and most real connection to the arbitration agreement is [the law] ... applicable to the arbitration agreement.”

In practical terms, the choice of seat was treated as a decisive connecting factor:

“[165] ... Where the underlying contract does not contain an express governing law clause, the significance of the choice of seat of the arbitration is likely to be ‘overwhelming’.”

On the facts, the Federal Court concluded:

“[187] Only the law of Malaysia had the connection, the closest and most real at that, to the arbitration agreement.”

The result was that Malaysian law governed the arbitration agreement.

*Thai-Lao Lignite* illustrates the Malaysian judiciary’s pragmatic inclination toward treating the seat as the most significant connecting factor. Yet the reliance on a “**closest and most real connection**” test left space for argument and unpredictability. Different factual matrices could have produced different results, and parties remained exposed to costly jurisdictional disputes.

## **MALAYSIA’S LEGISLATIVE RESPONSE: SECTION 9A TO THE ARBITRATION ACT 2005**

### **From Judicial Uncertainty to Legislative Clarity**

The legislative silence that characterised Malaysian arbitration law until 2024 has now been resolved. The Arbitration (Amendment) Act 2024<sup>[11]</sup> introduced a new provision, **section 9A to the Arbitration Act 2005**.

Section 9A, for the first time, codifies the default rule: where parties have not agreed on the law of the arbitration agreement, it is governed by the law of the seat.

However, the Arbitration (Amendment) Act 2024 provides that it shall come into force on a date to be appointed by the Minister, with the possibility of staggered commencement across different provisions. **At the time of writing, section 9A has yet to come into operation, but it is now scheduled to come into force on 1 January 2026.**<sup>[12]</sup>

Section 9A states that:

#### **“Law applicable to arbitration agreement**

9A. (1) The parties are free to agree on the law to be applicable to the arbitration agreement.

(2) Where the parties fail to agree under subsection (1), the law applicable to the arbitration agreement shall be the law of the seat of the arbitration.

(3) The agreement by the parties on the law applicable to an agreement of which the arbitration agreement forms a part shall not constitute an express agreement that the law shall also be applicable to the arbitration agreement.”

Section 9A is a profound intervention. For the first time, Malaysia has a statutory rule that displaces the uncertainty of conflict-of-law analysis. Where once courts had to engage in a contestable search for the “**closest and most real connection**” — as in *Thai-Lao Lignite* — they may now rely on a bright-line default: the seat governs.

The choice of formulation is significant. The rule applies **only in the absence of express agreement**. Parties remain free to designate another law to govern their arbitration agreement. Section 9A thus preserves party autonomy, while also addressing the practical risks of silence.

### **From Case Law to Codification**

The contrast with the pre-2024 judicial position is striking. In *Thai-Lao Lignite*, the Federal Court concluded that Malaysian law governed because it had the closest connection. But the Court reached that conclusion only after extensive analysis of connecting factors, a method that left scope for argument in future cases.

Section 9A eliminates that uncertainty. It elevates the **seat** from a strong connecting factor to a legislatively mandated default rule. In this respect, Malaysia has joined other Model Law jurisdictions — such as Singapore and Hong Kong — that anchor the law of the arbitration agreement to the seat.

## Implications for Party Autonomy

While section 9A resolves uncertainty, it also carries a subtle lesson for contract drafters. Silence now carries consequences. If parties intend their arbitration agreement to be governed by the substantive law of the contract, they must say so expressly. A blanket clause providing that “*this contract shall be governed by the law of X*” will not suffice unless it specifically extends to the arbitration agreement.

In this way, section 9A does not undermine autonomy — it channels it. The default applies only if parties fail to exercise their autonomy clearly.

Put simply, section 9A codifies a **seat-default rule** and requires express choice for any divergence from that default. This is a clear legislative answer to the *Enka* problem. Malaysia now joins Singapore and Hong Kong in prioritising procedural coherence.

## A Regional and Global Alignment

By introducing section 9A, Malaysia has aligned itself with a growing international consensus. In *BCY v. BCZ*, the Singapore High Court held that the law of the seat governs the arbitration agreement in the absence of express choice. Similarly, Hong Kong courts have adopted a seat-centred approach, reflecting the Model Law framework.

## ENGLAND’S STATUTORY SHIFT: ARBITRATION ACT 2025—SECTION 6A AND ITS PRACTICAL EFFECT

The United Kingdom has now addressed the same issue through legislative reform. The Arbitration Act 2025 amends the Arbitration Act 1996 by inserting a new provision—section 6A—which expressly determines the law applicable to an arbitration agreement. Having come into force on 1 August 2025, this provision is now in effect, providing statutory clarity and aligning English law with prevailing international best practices.

Section 6A of the Arbitration Act 1996 states that:

**“6A. Law applicable to arbitration agreement**

(1) The law applicable to an arbitration agreement is—

(a) the law that the parties expressly agree applies to the arbitration agreement, or

(b) where no such agreement is made, the law of the seat of the arbitration in question.

(2) For the purposes of subsection (1), agreement between the parties that a law applies to the contract of which the arbitration agreement forms a part does not amount to an express agreement that the law applies to the arbitration agreement.

(3) Subsection (1) does not apply to an arbitration agreement derived from a standing offer to submit disputes to arbitration where the offer is contained in—

(a) a treaty, or

(b) legislation of a country or territory outside the United Kingdom.

(4) In this section—

“legislation” includes any provision of a legislative character;

“treaty” includes any international agreement (and any protocol or annex to a treaty or international agreement).”

**The Practical Effect of Section 6A in England**

The Arbitration Act 2025 marks a statutory correction of the uncertainty exposed in *Enka* by expressly addressing the law applicable to arbitration agreements. England now adopts the same seat-default rule as jurisdictions such as Malaysia, Singapore, and Hong Kong, reinforcing international consensus and predictability in arbitral practice. Crucially, Section 6A

clarifies that a contract's governing-law clause no longer suffices to determine the law of the arbitration agreement.

Under this reform, the principle is clear: express choice prevails—if parties specify a law for the arbitration clause, that law governs. In the absence of express choice, the law of the seat applies. Importantly, a general governing-law clause for the main contract will not automatically be treated as an express choice for the arbitration agreement. This distinction resolves a long-standing ambiguity and affirms party autonomy while anchoring default rules in the seat of arbitration.

This reform brings England into alignment with the Model Law world and enhances London's appeal as a seat.

## **HOW SECTION 9A TO THE ARBITRATION ACT 2005 FITS THE INTERNATIONAL TREND AND WHY IT MATTERS FOR PRACTITIONERS**

### **Convergence and policy rationale**

Malaysia's section 9A formalises a trend toward treating **the law of the seat** as the natural procedural anchor for the arbitration agreement unless the parties say otherwise. There are three strong policy reasons for convergence:

- (1) **Procedural coherence:** The seat is the legal system that provides supervisory jurisdiction over the tribunal (e.g. measures relating to arbitrator challenges, interim relief, annulment, court assistance). It is logical that the law determining the arbitration agreement's validity is the same law that supervises the arbitration's procedural architecture.
- (2) **Enforcement predictability:** Awards are recognised or refused under New York Convention grounds often framed by the law of the place where the award was made (or the law chosen by the parties). Seat-default reduces cross-border mismatch.

- (3) **Encourages precision:** Requiring an express choice for the arbitration agreement reduces implicit assumptions and encourages drafters to state clear choices, thereby improving legal certainty.

### **Why Malaysia's choice matters commercially**

Malaysia's codification is commercially significant for two reasons:

- (1) **ASEAN hub competition:** By aligning its arbitration statute with leading Model Law jurisdictions in Asia (Singapore and Hong Kong) and, now, with England by statute, Malaysia signals that Kuala Lumpur is a seat that values procedural predictability — an attractive message to cross-border parties.
- (2) **Reduces jurisdictional skirmishes:** Parties litigating in different enforcement forums will face a consistent starting point: absent express choice, the law of the seat governs the arbitration agreement. This reduces forum friction and the risk of incompatible rulings in different courts.

### **Limits and caveats**

- (1) **Transitional effect and commencement:** A key practical question is whether section 9A of the Arbitration Act 2005 applies to arbitration agreements made before the amendment comes into force. The answer is clear. Although the Arbitration (Amendment) Act 2024 was gazetted on 1 November 2024, it takes effect only on 1 January 2026 under PU(B) 368/2025. Section 12(2) of the Amendment Act contains a saving clause providing that arbitration agreements concluded before that date continue to be governed by the unamended Act. In short, section 9A operates prospectively: it applies only to arbitration agreements made on or after 1 January 2026.
- (2) **Multi-seat and hybrid structures:** Complex arrangements (multi-contract projects, cascading arbitration clauses, ad-hoc tribunals or multi-seat processes) raise questions about which “**seat**” is relevant,



or whether seat selection is ambiguous. Courts will have to develop doctrines for these edge cases.

- (3) **Public policy and mandatory rules:** Seat-default does not displace mandatory public policy rules of other jurisdictions. For cross-border matters, parties and counsel must still monitor mandatory rules that may affect enforcement or validity.

## DRAFTING GUIDANCE

### Practical Guidance for Drafting Arbitration Clauses

The comparative jurisprudence and recent legislative reforms offer one overarching lesson: **clarity pays dividends**. Parties who neglect to specify the law governing their arbitration agreement invite uncertainty, litigation, and cost. Conversely, a carefully drafted clause can eliminate disputes at the threshold and ensure that the parties' expectations are respected.

#### *Checklist for Drafting Clarity*

Practitioners should consider the following steps when drafting arbitration clauses:

- (1) **Specify the seat of arbitration:** This determines the procedural *lex arbitri*, the supervisory court, and, in many cases, the law of the arbitration agreement.
- (2) **Specify the governing law of the main contract:** This will govern substantive rights and obligations.
- (3) **Specify the law of the arbitration agreement:** If parties wish the arbitration agreement to be governed by a law other than the seat, this must be stated expressly. Neither section 9A (Malaysia) nor section 6A (England) treats a contract-wide governing-law clause as sufficient.
- (4) **Consider enforceability:** Draft with the New York Convention in mind: will the chosen law support validity and broad arbitrability?

- (5) **Anticipate challenges:** Reflect on how local courts at the seat interpret arbitration agreements, including doctrines on non-signatories, separability, and scope.

### *Sample Clauses*

**(a) Aligned default (seat law applies to both):**

“This contract shall be governed by the laws of Japan. The seat of arbitration shall be Kuala Lumpur, Malaysia. The arbitration agreement shall be governed by the laws of Malaysia.”

Here, the seat’s law governs the arbitration agreement, ensuring coherence.

**(b) Divergent choice (different from seat law):**

“This contract shall be governed by the laws of France. The seat of arbitration shall be Kuala Lumpur, Malaysia. The arbitration agreement shall be governed by the laws of France.”

This clause makes an explicit choice of French law for the arbitration agreement, overriding the statutory default.

**(c) Contract-wide clause (insufficient if not repeated):**

“This contract shall be governed by the laws of Singapore. The seat of arbitration shall be Kuala Lumpur, Malaysia.”

Under section 9A and section 6A, this wording alone would not suffice to make Singapore law govern the arbitration agreement. In the absence of express wording, Malaysian law (as the seat) would apply.

### *Lessons from Case Law*

- (1) From *Enka*: Do not rely on a governing-law clause for the main contract to carry the arbitration agreement with it — both Malaysia and England have closed that door legislatively.

- (2) From *BCY*: Recognise that where contract law and seat law pull in different directions, the seat often prevails for reasons of coherence.
- (3) From *C v. D*: Remember that many procedural preconditions (such as escalation clauses) are matters of **admissibility**, not **jurisdiction**, and tribunals will generally retain authority. Draft clauses accordingly to minimise scope for dilatory tactics.

### *Broader Practice Points*

- (1) **Institutional Rules:** Many institutions (e.g., AIAC, SIAC, HKIAC) offer model clauses. These are good starting points, but often omit the explicit choice of arbitration-agreement law. Practitioners should add this where appropriate.
- (2) **Cross-border Contexts:** Where the main contract law is from a jurisdiction with restrictions on arbitration (e.g., mandatory local forum rules), it is prudent to opt expressly for the law of the seat to govern the arbitration agreement.
- (3) **Multi-party or Multi-contract Deals:** The risk of non-signatory issues increases. Choosing the seat law as the governing law of the arbitration agreement provides a consistent framework for joinder and consolidation.
- (4) **Investor-State Contracts:** While treaty arbitration is usually insulated from domestic statutes, domestic contracts with states may still invoke section 9A. Practitioners should be clear whether they want state law, contract law, or seat law to govern the arbitration clause.

## **HYPOTHETICALS AND CASE STUDIES**

These hypotheticals show that the seat-default rule offers **coherence, predictability, and enforceability** across diverse contexts. They also highlight the practical importance of **express drafting**: where parties want

a different law to govern the arbitration agreement, they must state it clearly.

### (1) Cross-Border Joint Venture

A Malaysian company and a Japanese partner enter into a joint venture. The contract specifies that it is governed by **Japanese law**, but the arbitration clause provides for arbitration seated in **Kuala Lumpur**. The parties make no express reference to the law of the arbitration agreement.

- **Outcome under section 9A:** Malaysian law governs the arbitration agreement, because the parties did not expressly choose another law.
- **Practical effect:** Questions of validity, scope, and non-signatory enforcement are determined under Malaysian law. Enforcement abroad benefits from the predictability of a seat-default approach.

### (2) International Supply Contract with Escalation Clause

An Australian supplier and a Malaysian distributor sign a contract governed by **Australian law**, with arbitration seated in Kuala Lumpur. The clause requires the parties' CEOs to meet before arbitration may commence.

- **Potential dispute:** The supplier commences arbitration without CEO-level negotiations. The distributor argues a lack of jurisdiction.
- **Outcome under Malaysian law (influenced by C v. D):** The failure to negotiate is an **admissibility** issue, not a **jurisdictional** defect. The tribunal decides whether the condition was met; the arbitration proceeds.

### (3) State Contract with a Foreign Investor

A foreign investor signs a concession agreement with a Malaysian state-owned enterprise. The contract is governed by **local Malaysian law**, with

arbitration seated in Kuala Lumpur. No mention is made of the arbitration agreement's law.

- **Outcome under section 9A:** Malaysian law applies to the arbitration agreement by default.
- **Practical consequence:** Non-signatory and capacity issues are resolved under Malaysian law. The state-owned entity cannot later argue that the arbitration agreement is subject to a different system of law.

#### (4) Multi-Contract Construction Project

A multinational contractor and subcontractors sign multiple agreements, some governed by **English law**, others by **Singapore law**, all with arbitration seated in Kuala Lumpur. The arbitration agreements do not specify governing law.

- **Outcome under section 9A:** Malaysian law applies to all arbitration agreements.
- **Practical effect:** This creates a unified framework for joinder and consolidation. Disputes across multiple contracts can be administered more coherently under Malaysian law.

#### (5) Enforcement Abroad

Suppose a Malaysian-seated tribunal issues an award. The losing party resists enforcement in New York, arguing that the arbitration agreement is invalid under the governing law of the main contract (say, Saudi Arabian law).

- **Outcome under section 9A:** The relevant law is Malaysian law (the seat), not Saudi law. New York courts, applying Article V(1)(a) of the New York Convention, will defer to Malaysian law for validity.
- **Practical effect:** This reduces cross-border friction and enhances the award's enforceability.

## CHALLENGES, RESIDUAL UNCERTAINTIES, AND STRATEGIC CONSIDERATIONS

The introduction of section 9A marks a significant step forward in providing certainty for arbitration in Malaysia. Yet its impact will depend on how courts, practitioners, and institutions interpret and implement the new provision. Several challenges and opportunities lie ahead.

### Transitional and retrospective questions

A practical issue in Malaysia concerns the temporal reach of section 9A. Although the Arbitration (Amendment) Act 2024 was gazetted on **1 November 2024**, it comes into force on **1 January 2026**. Section 12(2) of the Amendment Act provides an express saving clause: arbitration agreements made before that date are to be dealt with under the principal Act “as if the principal Act had not been amended.” This means section 9A operates **prospectively** only—it applies to arbitration agreements concluded on or after 1 January 2026 and to proceedings arising from them. By contrast, the United Kingdom’s 2025 Act addresses the point expressly. Section 17(4) provides that amendments made by sections 1 to 14 (which include new section 6A) **do not apply to arbitral proceedings commenced before commencement, or to court proceedings connected with such arbitrations or awards**. But subject to that saving, the new rules “*otherwise apply in relation to an arbitration agreement whenever made*.” Accordingly, under English law, section 6A governs all arbitration agreements, whenever concluded, so long as the arbitration commences on or after 1 August 2025.

### Multi-seat and “seatless” arbitration

Modern dispute resolution sometimes uses hybrid or multi-seat arrangements (e.g., arbitration “in several seats” or forums where the seat is not clearly stated in the clause). Courts will need to develop a doctrine for identifying the relevant “**seat**” for section 9A. If no seat is specified, the default seat may be determined by tribunal practice or by looking at the

arbitration rules/infrastructure. Section 9A contemplates the seat being determinative only where it can be identified.

### **Interaction with non-party doctrines and equitable estoppel**

Section 9A's explicit denial that the main contract's governing law constitutes an express choice for the arbitration agreement will affect how courts treat non-party doctrines (e.g., estoppel, agency, assignment). Different legal systems have varying doctrinal receptivity to third-party reliance on arbitration clauses; by shifting the default to the seat law, section 9A will direct courts to apply Malaysian law (if Malaysia is the seat) to such doctrines. That uniformity may reduce enforcement friction, but it will highlight differences between jurisdictions where the seat defaults elsewhere.

### **CONCLUSION: CLARITY AS A CULTURAL AND COMMERCIAL VALUE**

Jurisdictional clarity is more than a technical refinement of arbitration law. It embodies a **cultural commitment to fairness, transparency, and trust**. When parties agree to arbitrate, they expect their disputes to be resolved efficiently, without procedural traps or conflicting judicial interpretations.

The long-standing debate over whether the arbitration agreement should be governed by the law of the main contract or the law of the seat has now reached a decisive turning point. Judicial experience — from the **contract-law default of *Enka*** to the **seat-default reasoning in *BCY v. BCZ*** and the **tribunal autonomy protected in *C v. D*** — revealed both the risks of uncertainty and the benefits of coherence. Legislatures have responded.

The insertion of section 9A *via* the Arbitration (Amendment) Act 2024 is an elegantly simple rule that brings Malaysia into a global movement favouring seat-anchored procedural coherence. By making the law of the seat the default for arbitration agreements (subject to express party choice), Malaysia reduces cross-forum uncertainty, encourages better drafting, and positions itself as a credible seat for international disputes.

For practitioners, the message is unambiguous: **precision matters**. Drafting arbitration clauses without expressly addressing the law of the arbitration agreement leaves the issue to statutory default. If you want the law of the arbitration agreement to be different from the seat, put it in black and white in the arbitration clause. If not, accept the seat as the procedural anchor and draft with an eye to the law of the seat.

In light of these developments, the case for bringing section 9A into force was compelling. Its commencement on 1 January 2026 would not only harmonise Malaysia's arbitration framework with international standards but also provide much-needed clarity for practitioners and parties alike. As jurisdictions such as England, Singapore, and Hong Kong continue to refine their legislative regimes, Malaysia must act decisively to maintain its standing as a modern and arbitration-friendly seat. The statutory architecture is in place—what remains is the political will to activate it.

The future will depend on how Malaysian courts interpret and apply section 9A in complex cases. Yet the direction of travel is clear: Malaysia has embraced a model of clarity that not only strengthens its domestic framework but also enhances its reputation on the global arbitration stage.

In arbitration, where parties from diverse jurisdictions must place their trust in a neutral framework, clarity is not merely a legal virtue—it is a cultural and commercial imperative. Malaysia's adoption of the seat-default rule affirms its standing in the international arbitral community, not simply as a venue, but as a principled voice for **coherence, certainty, and fairness**.

---

\*Copyright © 2025 Messrs Rosli Dahlan Saravana Partnership.

\*\* Fellow of the Chartered Institute of Arbitrators (UK); Member of the Civil Mediation Council (UK); Barrister at 2 King's Bench Walk (UK); Partner at Rosli Dahlan Saravana Partnership (Malaysia); Arbitrator and Mediator with the Asian International



Arbitration Centre, and accredited Mediator with the Malaysian International Mediation Centre.

**Endnotes:**

<sup>[1]</sup> *Enka Insaat v. OOO Insurance Company Chubb* [2020] UKSC 38.

<sup>[2]</sup> *Kabab-jl SAL (Lebanon) v. Kout Food Group (Kuwait)* [2021] UKSC 48.

<sup>[3]</sup> [2016] SGHC 249.

<sup>[4]</sup> [2022] HKCA 729 (CACV 387/2021).

<sup>[5]</sup> [2017] 9 CLJ 273.

<sup>[6]</sup> [2020] UKSC 38.

<sup>[7]</sup> [2021] UKSC 48.

<sup>[8]</sup> [2016] SGHC 249.

<sup>[9]</sup> [2022] HKCA 729 (CACV 387/2021).

<sup>[10]</sup> [2017] 9 CLJ 273.

<sup>[11]</sup> The Arbitration (Amendment) Act 2024 was passed by the Dewan Rakyat on 16 July 2024 and by the Dewan Negara on 24 July 2024. It was gazetted on **1 November 2024** and is scheduled to come into operation on **1 January 2026**. The Act introduces a number of reforms to the Arbitration Act 2005 (Act 646), including a broadened definition of “in writing”, institutional reforms at the AIAC, procedural clarifications, and — centrally — the insertion of section 9A concerning the law applicable to arbitration agreements.

<sup>[12]</sup> See PU(B) 368/2025 gazetted on 13 October 2025.