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Legal Update

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Navigating Implied Agency and the Group of Companies Doctrine in Arbitration:

*PT Wijaya Karya (Persero) TBK & Anor v Zecon
Bhd & Anor [2025] MLJU 1472*

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INTRODUCTION

In today's commercial world, it is common for businesses to operate within a group structure, comprising parent companies and their various affiliates or subsidiaries. But what happens when only one entity in the group signs an agreement containing an arbitration clause, can its non-signatory affiliates also be bound by the same clause?

The Court of Appeal's decision in **PT Wijaya Karya (Persero) TBK & Anor v Zecon Bhd & Anor [2025] MLJU 1472^[1]** addresses this critical question. The ruling provides authoritative guidance on the doctrines of implied agency, and the doctrine of group of companies in arbitration, especially in multi-entity commercial arrangements where corporate formalities may not reflect the commercial reality.

[1]PT Wijaya Karya (Persero) TBK & Anor v Zecon Bhd & Anor [2025] MLJU 1472 (2).pdf

Background Facts

The dispute arose out of a construction project in Kuching, Sarawak involving a design-and-build contract for the **Mydin Retail Mall**. The 1st Respondent, **Zecon Berhad**, engaged the 1st Appellant, **PT Wijaya Karya (Persero) TBK**, to provide project management services and manpower for superstructure works. On 13.8.2014, the 1st Respondent and 1st Appellant executed a **Project Services Agreement ("PMSA-1")** under **Contract No. MY-1/1A/W**, valued at RM13,830,591.00. Subsequently, their respective nominees, the 2nd Respondent and 2nd Appellant, entered into a second **Project Management Service Agreement ("PMSA-2")**, **Contract No. MY-1/14/W-AMD**.

Both agreements contained identical arbitration clauses referring disputes to arbitration under the **AIAC Rules**. Following disputes concerning non-payment for completed works, the Appellants commenced international arbitration proceedings, which resulted in an award of RM4,617,471.70 in their favour.



High Court Decision

By way of an Originating Summons, the Respondents sought to set aside the arbitral award under **Section 37 of the Arbitration Act 2005**. Despite the arbitrator's thorough findings, the High Court **allowed** the application, holding that:



(i) That there is no single arbitration agreement made between all four parties herein, to refer their disputes under the PMSA-1 dated 13.8.2014 between the 1st Appellant and the 1st Respondent and/or PMSA-2 to the arbitral tribunal at all material time and hence it is not valid within the definition of “arbitration agreement” under **Section 9(1) of the Arbitration Act 2005**; and

(ii) That there was a **breach** of the rules of natural justice based on the manner the arbitration proceedings were conducted in particular, the learned Arbitrator's finding that the 2nd Appellant and 2nd Respondent are the agent to their principal, the 1st Appellant and the 1st Respondent.

Court of Appeal's Decision

The Court of Appeal **reversed** the High Court's decision, reinstating the arbitral award and making several key determinations.

Implied Agency in Multi-Entity Structures

The Court of Appeal **affirmed** the arbitrator's finding that the 2nd Appellant and 2nd Respondent had acted as agents for the 1st Appellant and 1st Respondent, respectively. Both PMSA-1 and PMSA-2 were contemporaneously executed and governed the same scope of works. The Court was satisfied that there was no novation or rescission of PMSA-1, but rather a continuation of the relationship under the umbrella of both agreements.

Clause Recital E and Clauses 3.2 and 4 of PMSA-2 expressly acknowledged the role of the respective subsidiaries as nominees, assuming rights and obligations under the primary contract. The Court held that this arrangement constituted implied agency under Malaysian law, particularly under the **Contracts Act 1950**, rendering the principals liable for acts performed by their agents.

Importantly, the issue of implied agency was raised from the outset in the pleadings and throughout the arbitral proceedings. The Court of Appeal found the learned arbitrator made clear and well-reasoned findings on the existence of such agency.

Application of the Group of Companies Doctrine

In further support of the arbitrator's jurisdiction over both signatory and non-signatory parties, the Court of Appeal endorsed the group of companies doctrine. The Court of Appeal cited the seminal ICC case *Dow Chemical France and Ors v Isover Saint Gobain, ICC Award No. 4131, YCA 1984 , at 131 et seq*⁹¹ [2010] *UKSC 48*, where the tribunal held that non-signatory companies within a corporate group may be bound by an arbitration agreement if they appear to be true parties to the arbitration agreement because of their participation in the negotiation, performance or termination of the agreement, provided that this is in accordance with parties' intention.

The Court of Appeal also relied on the Malaysian decision in *Padma Gurtaj Singh & Ors v Axiata Group Berhad & Ors* [2022] *MLRHU 454*, where Ong Chee Kwan JC (as His Lordship then was) adopted the Indian Supreme Court's reasoning in *Mahanagar Telephone Nigam Ltd v Canara Bank & Ors* [2019] *SCC Online SC 995* which allowed the inclusion of a non-signatory party to a single composite arbitration by invoking the 'Group of Companies' doctrine. In his judgment the learned **JC (as His Lordship then was)** stated the followings:

“[85] International arbitral tribunals recognize the concept that when one company in a group of companies signs an arbitration agreement, that agreement can in some cases extend to bind other companies within the same group. The principle is often called the “**Dow Chemicals**” principles named after the decision of the **ICC Court of Arbitration in Paris in Dow Chemicals v Isover-Saint-Gobain, ICC Award NO 4131.**

[86] The Indian Supreme Court in *Mahanagar Telephone Nigam Ltd v Canara Bank & Ors* 2019 *SCC Online SC 995* allowed the inclusion of a non-signatory party to a single composite arbitration by invoking the 'Group Companies' doctrine. It laid down the circumstances in which such doctrine can be invoked

by the Courts. After referring to the ICC award in Dow Chemicals (at 10.4), the Court observed as follows:‘

10.4 ... The ‘Group of Companies’ doctrine has been invoke by courts and tribunals in arbitrations, where an arbitration agreement is entered into by one of the companies in the group; and the non-signatory affiliate, or sister, or parent concern, is held to be bound by the arbitration agreement, if the facts and circumstances of the case demonstrate that it was the mutual intention of all parties to bind both the signatories and the non- signatory affiliates in the group.

The doctrine provides that a non-signatory may be bound by an arbitration agreement where the parent or holding company, or a member of the group of companies is a signatory to the arbitration agreement and the non-signatory entity on the group has been engaged in the negotiation or performance of the commercial contract, or made statements indicating its intention to be bound by the contract, the non-signatory will also be bound and benefitted by the relevant contracts.

The circumstances in which the ‘Group of Companies’ Doctrine could be invoked to bind the non-signatory affiliate of a parent company, or inclusion of a third party to an arbitration, if there is a direct relationship between the party which is a signatory to the arbitration agreement; direct commonality of the subject matter; the composite nature of the transaction between the parties.

A ‘composite transaction’ refers to a transaction which is inter- linked in nature; or, where the performance of the agreement may not be feasible without the aid, execution, and performance of the supplementary or the

ancillary agreement, for achieving the common object, and collectively having a bearing on the dispute.

10.5 The Group of Companies Doctrine has also been invoked in cases where there is a tight group structure with strong organizational and financial links, so as to constitute a single economic unit, or a single economic reality. In such a situation, signatory and non-signatories have been bound together under the arbitration agreement. This will apply in particular when the funds of one company are used to financially support or re-structure other members of the group.” [Emphasis added]

Thus, in Mahanagar, the Court **affirmed** that the group of companies doctrine could apply where:

- (i) There is a direct relationship between the signatory and non-signatory entities;
- (ii) There is commonality in the subject matter and a composite transaction; and
- (iii) The non-signatory played a substantial role in the negotiation, performance, or enforcement of the agreement.

The doctrine may also be invoked where the group operates as a single economic unit, with interdependent financial or organisational structures, such that the non-signatory’s participation in the contract was not incidental but integral.

Applying these principles, the Court of Appeal held that PMSA-2 was a supplementary and collateral agreement, not a novation, that existed alongside PMSA-1. The principal parties, by consenting to and directing their subsidiaries’ involvement, had effectively bound themselves to the arbitration. The factual matrix demonstrated a clear intention to be jointly bound, supporting the arbitrator’s decision to assert jurisdiction over all four parties.



Conclusion

This landmark ruling reinforces **Malaysia's pro-arbitration framework and confirms the applicability of the doctrines of implied agency and the group of companies in complex commercial arrangements.** It highlights **the judiciary's commitment to giving effect to the commercial realities of corporate structures rather than adhering to rigid formalism.** The case serves as a critical precedent for future arbitrations involving composite transactions and affiliated entities.



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