Setting Aside of Arbitration Award : Group of Companies Doctrine and Binding Non-Signatories to Arbitration Agreements

PT Wijaya Karya (Persero) TBK & Anor v Zecon Berhad & Anor [2025] CLJU 1220

29th August 2025

ISSUES

It is not uncommon for a group of companies to deploy multiple entities within the group to carry out a project undertaken by one of its companies (the "Principal Company"). This often occurs when assistance from other group entities is required to support the performance of a contract signed by the Principal Company.

But what if the main agreement signed by the Principal Company contains an arbitration clause, while the other entities assisting in contract performance are not parties to that agreement?

Would these other group entities also be bound by the arbitration clause they did not sign? If so, under what circumstances?

These questions were examined by the Court of Appeal in the recent case **of PT Wijaya Karya (Persero) TBK & Anor v Zecon Berhad & Anor** [2025] CLJU 1220.

BRIEF FACTS

The brief facts of the case are as follows:-

(a) The dispute arose out of a project management arrangement for the construction of a retail mall in Kuching, Sarawak.

(b) The 1st Appellant, PT Wijaya Karya (Persero) TBK, is company incorporated in Indonesia, while the 2nd Appellant, Wijaya Karja Persero Sdn Bhd is its Malaysian private limited subsidiary.

(c) The 1st Respondent, Zecon Berhad, is a Malaysian public company and the 2nd Respondent, Zecon Construction (Sarawak) Sdn Bhd, is its subsidiary.

(d) On 13.08.2014, the 1st Appellant and the 1st Respondent entered into a Project Management Services Agreement ("**PSMA-1**") for project management and manpower supply services for superstructure works, for a contract sum of RM13,830,591.00.

(e) On 12.11.2014, their respective nominees and agents, the 2nd Appellant and the 2nd Respondent, executed a second Project Management Services Agreement ("**PSMA-2**"), for a contract sum of RM11,485,397.00.

(f) Both agreements contained identical arbitration clauses providing for final and binding arbitration under KLRCA Rules (now AIAC), with the original seat in Kuala Lumpur, subsequently amended to Kuching by agreement of parties.

(g) The Appellants commenced arbitration via Notice of Arbitation dated 20.06.2018, with the 1st Appellant being the principal and the 2nd Appellant being the nominee, against the 1st Respondent as principal and 2nd Respondent as nominee, pursuant to the arbitration clause under PMSA-1.

(h) In the arbitration, the Appellants claimed RM6,731,753.61 in outstanding sum, interest and general damages. The Respondents denied liability and counterclaimed, amongst others, for RM6,122,041.37.

(i) The arbitration was conducted by a sole arbitrator appointed by the Director of the AIAC.

(j) The Respondents' pleaded case was that the 1st Appellant and 1st Respondent should not have been parties to the arbitration, as PMSA-2 was not a supplementary agreement to PMSA-1. They contended that the 1st Appellant and 1st Respondent had *"nominated and assigned"* their obligations under PMSA-1 to the 2nd Appellant and 2nd Respondent, respectively.

(k) In contrast, the Appellants pleaded that PMSA-2 was a *"supplementary or collateral agreement"*, that existed contemporaneously with the principal agreement, PMSA-1. Both the 1st Appellant and 1st Respondent had, through their conduct, assigned their contractual obligations under PMSA-1 to their respective nominee (2nd Appellant and 2nd Respondent) *"with the aim to facilitate the administration of the contract"*.

(l) In the arbitration, the Arbitrator found, among others, that:-

(i) PMSA-1 and PMSA-2 contained identical provisions relating to parties' rights, obligations and dispute resolution.

(ii) The arbitration was commenced and proceeded as a single international arbitration, with the parties having agreed to submit their pleadings accordingly.

(iii) The parties also agreed that preliminary issues, such as whether there should be two separate arbitrations (arising from the two agreements), or whether the 1st Appellant and 1st Respondent should be excluded on the basis that PMSA-2 superseded PMSA-1, would be dealt with together the merits of the dispute.

(m) On 25.01.2021, the learned Arbitrator issued a final award in favour of the Appellants for RM4,731,753.61, dismissed the counterclaim, and awarded interest ("**Award**").

PROCEEDINGS BEFORE THE HIGH COURT

The Respondents filed an application under section 37 of the Arbitration Act 2005 ("**AA 2005**") to set aside the Award. On 25.01.2021, the High Court allowed the application and set aside the Award on the following grounds:-

(i) There was no single arbitration agreement between all four parties, and therefore no valid arbitration agreement within the meaning of the AA 2005;

(ii) The dispositive portion of the Award was uncertain, as it allegedly *"failed to identify a party to perform the Award and a party to benefit from the Award"*; and

(iii) There was a breach of natural justice arising from the Arbitrator's findings that the 2nd Appellant and Respondent were acting as agents for the 1st Appellant and Respondent, respectively.

Dissatisfied with the High Court's decision, the Appellants appealed to the Court of Appeal.

ISSUES BEFORE THE COURT OF APPEAL

The main issues canvassed before the Court of Appeal were as follow:-

(1) Whether there was a valid arbitration agreement binding all four parties ("**Jurisdiction Issue**");

(2) Whether there was an uncertainty in the dispositive portion of the Award ("**Uncertainty**");

(3) Whether there was any breach of natural justice when the Arbitrator found that the 2nd Appellant and 2nd Respondent were acting as agents of the 1st Appellant and 1st Respondent ("**Breach of Natural Justice**").

JURISDICTION ISSUE

At the heart of this issue is whether the Arbitrator has jurisdiction to hear and render an award involving all four parties, considering that they were parties to two separate agreements, each containing its own arbitration clauses.

The Court of Appeal found that the Arbitrator has jurisdiction premised on the following:-

(a) Parties had consented to the jurisdiction of the Tribunal;
(b) Implied Agency;
(c) The Group of Companies Doctrine.

- Consent to Jurisdiction

The Court of Appeal noted that the Parties had expressly consented to the Tribunal's jurisdiction and agreed that the jurisdictional challenge and the merits of the dispute would be dealt together. As such, the Tribunal had rightly exercised its power to investigate and determine its own jurisdiction.

The Court of Appeal further held that the jurisdictional issue was so closely connected with the merit of the dispute that they could not be determined in isolation:-

> *"[23] Foremost, we find that it is undisputed that the parties had consented to the jurisdiction of the Tribunal as reflected in the Tribunal's Order for Direction No.1 dated 24.5.2019, and/or Order for Direction No.1A dated 3.9.2019 which states:-*
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> > *"this arbitration was commenced as a single international arbitration. Parties agree to submit their pleadings as a single international arbitration and consider these issues as they arise in the pleadings. If appropriate, this may be dealt with as a Preliminary issue."*
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> *[24] We further find that the **Respondents had also consented that their jurisdiction challenge was to be joined and dealt with by the arbitral tribunal together with the merits of the dispute towards the end**. Since parties had mutually agreed, we are of the considered view that the arbitral tribunal rightfully exercised its power to investigate and decide its own jurisdiction relating to the Respondents' jurisdictional challenge under the doctrine of **kompetenz-kompetenz** in accordance with s.18 (7) of the Act which states that:*

"18 (7) The arbitral tribunal may rule on a plea referred to in subsection (3) or (5), either as a preliminary question or in an award on the merits."

[25] We are also of the considered view that the Respondents' jurisdictional challenge/preliminary issues were closely connected with the merits of the dispute and that it is impossible to determine one without the other."

[Emphasis added]

The learned Arbitrator found that the 1st Appellant and 1st Respondent had *"not agreed to any new contract, nor rescind or alter the original contract"*. Their intention, instead, was to have their respective subsidiaries or nominees, i.e. the 2nd Appellant and 2nd Respondent, to take over the performance of the works.

The Arbitrator also held that both PMSA-1 and PMSA-2 continued to subsist, and that an **implicit agency relationship** had been established. The 2nd Appellant and 2nd Respondent were acting for their principals, the 1st Appellant and 1st Respondent, respectively. The Arbitrator concluded that the principals were **liable for the acts of their wholly owned subsidiaries under normal agency principles**, as provided for under the Contracts Act 1950.

On this issue, the Court of Appeal agreed with the Arbitrator's findings. The Court held that the agency relationship was fortified by the fact that both PMSA-1 and PMSA-2 were involved the **same scope of work**. Although PMSA-2 was worded as replacing PMSA-1 and the parties thereto, there was **no novation, recission, or alteration** of PMSA-1 by the principals.

*"[28] We agree with the findings made by the learned Arbitrator. We find that **both PMSA-1 and PMSA-2 are for the same scope of works and as such the learned Arbitrator's finding of agency is fortified**. Further, the wordings of PMSA-2 convey the intention for PMSA-2 was to replace PMSA-1 and the parties thereto. This could be gleaned inter alia from…*

*[29] However, **the parties to PMSA-2 did not have the capacity to rescind or alter or novate the PMSA-1 and there was no rescission or alteration or novation of PMSA-1, executed by both the 1st Appellant and 1st Respondent as principal companies.** We further find that there was no dispute that PMSA-2 was entered into between the 2nd Appellant and 2nd Respondent with the consent of both the 1st Respondent and 1st Appellant."*

[Emphasis added]

Accordingly, the Court of Appeal also affirmed the Arbitrator's finding that the 1st Appellant and 1st Respondent were **the proper parties to the arbitration under PMSA-1**, while the 2nd Appellant and 2nd Respondent were properly included as their **agents under PMSA-2**.

> *"[30] Apparently, work had already commenced pursuant to PMSA-1 before PMSA-2 was executed and Payment Certificate No.1-23 were issued by the 1st Respondent. It is our finding that the learned Arbitrator was factually and legally right in finding that the **1st Appellant and 1st Respondent are both liable to each other under PMSA-1 and their agents, the 2nd Appellant and the 2nd Respondent under the PMSA-2**. The learned Arbitrator did not err in finding **that the 1st Appellant and 1st Respondent are the proper parties in the International Arbitration via PMSA-1, whilst the 2nd Appellant and the 2nd Respondent were in the same international arbitration in their capacity as agents to their principals, the 1st Appellant and the 1st Respondent**."*
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> [Emphasis added]

- Group of Companies Doctrine

The Court of Appeal also discussed the ***group of companies*** doctrine, originating from the **Dow Chemical** case, where an arbitration agreement entered into by one company in a corporate group may bind the other group entities. This applies where the non-signatory entities have participated in the negotiation, performance or termination of the contract, and where such intention can be inferred from the parties' conduct.

> *"[31] It may not be unusual for companies within the same group to be involved in carrying out various parts of a project, even without formal contracts setting out their roles. We have read the principles laid down in the case of **Dow Chemical France and Ors vs Isover Saint Gobain, ICC Award No. 4131, YCA 1984, at 131 et seq91 [2010] UKSC 48**. This is a case where the doctrine of 'group of companies' was revealed where **the arbitrators found that the arbitration agreement directly entered by certain companies might bind other entities of their group** if the latter 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**."*
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> [Emphasis added]

The Court of Appeal noted that the doctrine has been recognised in Malaysia. In ***Padda Gurtaj Singh & Ors v. Axiata Group Berhad & Ors [2022] MLRHU 454***, High Court cited the Indian Supreme Court in ***Mahanagar Telephone Nigam Ltd v. Canara Bank & Ors 2019 SCC Online***

SC 995. That case laid down the **circumstances under which non-signatory affiliates may be bound by an arbitration clause**:-

> *"[32] Our attention was brought to the case of **Padda Gurtaj Singh & Ors v. Axiata Group Berhad & Ors [2022] MLRHU 454** where the Dow Chemical Principle was discussed. In that case, Ong Chee Kwan JC (as His Lordship then was) had cited the Indian Supreme Court case of **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 that case, the circumstances in which such doctrine can be invoked by the Courts was laid down by the High Court**. In his judgment the learned JC (as His Lordship then was) stated the followings…*
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> > *[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:*
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> > *'10.4 ...*
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> > ***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.***
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> > ***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 performance of the commercial contract, or made statements signatory will also be bound and benefitted by the relevant entity on the group has been engaged in the negotiation or indicating its intention to be bound by the contract, the non- 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.***
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> *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.***
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> *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]

- Decision on Jurisdiction

In the circumstances, the Court of Appeal held that the High Court had erred in setting aside the Award on the ground that there was no single arbitration agreement binding all four parties. The Court found that PMSA-2 was a supplementary or collateral agreement that existed contemporaneously with PMSA-1.

Further, the 1st Appellant and the 1st Respondent had, by their conduct assigned their obligations under PMSA-1 to their respective nominees, the 2nd Appellant and 2nd Respondent, with the aim of facilitating the administration of the contract.

> *"[33] It is our considered view and based from the facts and law found by the learned Arbitrator, the learned High Court Judge erred in setting aside the Award on the ground that there is no single arbitration agreement made between all four parties herein…. We find that **PMSA-2 is a supplementary***

or collateral agreement, exist contemporaneously with the - principal agreement, PMSA-1*. We further find that* ***the 1st Appellant and 1st Respondent had consented, through their conduct, assigned their contractual obligation under the primary agreement, PMSA-1 to their respective nominee****, namely the 2nd Appellant and 2nd Respondent with the aim to facilitate the administration of contract."*

[Emphasis added]

UNCERTAINTY

The Court of Appeal rejected the Respondents' argument that the dispositive portion of the Award was uncertain. The Court held that the Award was clear in identifying the 1st Respondent, being the principal of the 2nd Respondent, as liable to the 1st Appellant, being the principal of the 2nd Appellant.

"[34] In setting aside the Award, the learned High Court Judge further agreed with the Respondents' argument that the dispositive portion of the Award failed to identify a party to perform the Award and a party to be benefitted from the Award, resulting in it being uncertain as to its meaning, effect, impact and/or duties imposed.…

…On the contrary, in the present matter, in view of the findings of the learned Arbitrator as stated earlier, there is no confusion at all in the dispositive portion of the Award. We find that the dispositive portion of the Award is clear in that the 1st Respondent being the principal to the 2nd Respondent is liable to the 1st Appellant being the principal to the 2nd Appellant. The Award must be read in totality in determining the Respondents' application to set aside the Award which was made strictly pursuant to s. 37 and not s. 38 of the Act."

BREACH OF NATURAL JUSTICE

The Respondents contended that there had been a breach of natural justice, arguing that the Learned Arbitrator's finding of ***"implied agency"*** was not a pleaded issue and had only been introduced via the Tribunal Queries. They claimed that they were not afforded a fair and reasonable opportunity to defend or argue the issue extensively.

This argument was rejected by the Court of Appeal. The Court of Appeal found that the Appellants had consistently advanced the agency position from the commencement of arbitration and it was **not a new or extraneous issue** raised for the first time through the Tribunal Queries. Importantly, the Respondents were found to have had ample opportunity to address the matter and in fact, did submit on it:-

> *"[41] We have scrutinized the cause papers, the proceedings in the arbitral tribunal (the lines of questioning of Appellants' counsel) and written submissions of the parties herein. We find that from the commencement of the arbitration, the Appellants' stance is apparent in that the 1st Respondent has entered PMSA-1 with the 1st Appellant and their nominees the 2nd Respondent and 2nd Appellant had entered PMSA-2 which is a supplementary agreement to facilitate the contract. The stance taken by the Appellants is not something extraneous that was taken into consideration by the learned Arbitrator and was not raised for the first time during the Tribunal Queries No.1. We find the Appellants have been consistent in their stance whilst the Respondents for that matter have been consistent in disputing the stance. Importantly, there was nothing to stop the Respondent from further replying to or rebut the position taken by the Appellants. We find that there was a reply filed by the Respondents after Tribunal's Queries No.1 but upon perusal of the Respondents' Reply No. 2 subsequent to their Reply No. 1, rebuttal to the Appellants' reliance on the principle of agency did not surface. In fact, there were four (4) written submissions by the Respondents prior to the delivery of the Award which we found to be thorough where all issues were fully addressed. We cannot avoid to observe that the objection relating to the agency principle arose after the change of the Respondents' solicitor."*

The Court of Appeal further held that the Respondents failed to demonstrate how the alleged breach of natural justice met the threshold set out in the Federal Court case of **Master Mulia Sdn Bhd v Sigur Ros Sdn Bhd [2020] 6 MLRA 51**, namely, that the breach must be significant and capable of affecting the outcome of the arbitration.

DECISION OF THE COURT OF APPEAL

In conclusion, the Court of Appeal **allowed the Appeal**, reaffirming the policy of encouraging **arbitral finality** and **minimalist judicial intervention**.

> *"[43] The Courts must adhere to the policy of encouraging arbitral finality and minimalist intervention and it is our considered view that the decision of the High Court in setting aside the Award is plainly wrong warranting the Court's intervention. Premised on the foregoing, we unanimously find that there is no compelling grounds necessitating the setting aside of the Award."*

KEY TAKEAWAYS

Following the decision, it is important to note that:-

(a) A company within a corporate group may be bound by an arbitration agreement it did not sign, where it can be shown, through conduct, performance, or shared commercial

interest, that the parties intended to bind both signatories and non-signatories. The Court of Appeal endorsed both the *Group of Companies* doctrine and the principle of implied agency in such circumstances.

(b) Where one contract is supplementary or collateral to another, and both exist contemporaneously, the arbitration agreement in the principal contract may extend to bind parties under the supplementary agreement, especially where there are clear intention and performance by related entities.

(c) The Court of Appeal reinforced the judiciary's commitment to upholding arbitral finality. Allegations of natural justice breaches must meet the high threshold of materiality and causative effect.

If you have any questions or comments on this article, please contact:-

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