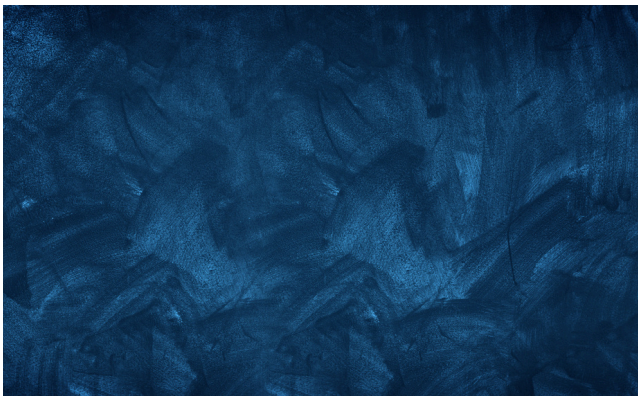

# JUDICIAL SHIFT IN MALAYSIA: NON-SIGNATORIES MAY BE BOUND BY ARBITRATION AGREEMENTS

**PT WIJAYA KARYA (PERSERO) TBK & ANOR v ZECON BERHAD & ANOR**
[Civil Appeal No: Q-02(C)(A)-1971-10/2021]

In a landmark decision, the Court of Appeal in *PT Wijaya Karya (Persero) TBK & Anor v Zecon Berhad & Anor*[1] signalled a clear departure from the traditionally narrow and rigid interpretation of consent in arbitration. The Court embraced a more flexible and commercially realistic approach, recognising that consent to arbitrate may be implied through conduct and surrounding circumstances — not merely through express agreement. This judicial shift aligns Malaysia with prevailing international arbitration practices, better reflecting the complexities of modern commercial relationships and providing greater legal certainty in multi-party, cross-border disputes[2].

**Key takeaway**: Corporate groups must exercise diligent oversight and maintain clear governance when engaging affiliates and third parties in contractual assignments, recognising that implied consent or conduct may bind non-signatory entities to arbitration obligations — even in the absence of a formal agreement.

## Background Facts

PT Wijaya Karya (Persero) TBK[3] ("**1st Appellant**") and Zecon Berhad[4] ("1st Respondent") are the parent companies of their respective subsidiaries, Wijaya Karya Perseron Sdn Bhd[5] ("**2nd Appellant**") and Zecon Construction (Sarawak) Sdn Bhd[6] ("**2nd Respondent**").

The 1st Respondent engaged with the 1st Appellant for a scope of project management services and manpower supply for the superstructure works. Subsequently, two (2) agreements were drawn for the same scope of works: (i) **PMSA-1** — between the parent companies; and (ii) **PMSA-2** — between the subsidiaries three (3) months later.

A dispute arose between the Appellants and Respondents[7] due to the Respondents' failure to make payments, leading to the termination of both PMSA-1 and PMSA-2. In response, the Appellants referred the dispute to arbitration, invoking the arbitration clause in PMSA-1. The arbitral tribunal issued an award in favour of the Appellants. Dissatisfied, the Respondents applied to the Kuching High Court to set aside the award on the ground, among others, that there was no valid arbitration agreement binding all four (4) parties to the arbitration.

[1] Civil Appeal No: Q-02(C)(A)-1971-10/2021
[2] Grounds of Judgment of *PT Wijaya Karya (Persero) TBK & Anor v Zecon Berhad & Anor* Civil Appeal No: Q-02(C)(A)-1971-10/2021 ("GOJ"), [37].
[3] A company incorporated under the laws of the Republic of Indonesia.
[4] A public company incorporated under the laws of Malaysia.
[5] A private limited company incorporated under the laws of Malaysia.
[6] A company incorporated under the laws of Malaysia.
[7] The 1st Appellant and 2nd Appellant are collectively referred to as the "**Appellants**," and the 1st Respondent and 2nd Respondent are collectively referred to as the "**Respondents**."

# Findings of the Court of Appeal

The Court of Appeal upheld the arbitral award, affirming that a valid and binding arbitration agreement existed in respect of all four (4) parties[8]. The Court's legal reasoning was grounded in the application of agency principles[9], based on the following findings:

(i) PMSA-1 and PMSA-2 covered the same scope of obligations[10].

(ii) PMSA-2 was executed by the subsidiary companies with the consent of their respective parent companies[11].

(iii) PMSA-2 was a supplementary or collateral agreement to PMSA-1[12]. The parent companies, as principals, had consented to assigning their contractual obligations under PMSA-1 to the respective subsidiaries in PMSA-2, as agents or nominees[13]. The word "nominee" was expressly used multiple times in PMSA-2[14].

(iv) The subsidiary companies lacked the authority to rescind, alter, or novate PMSA-1[15].

(v) The parent companies remained liable to each other under PMSA-1, and concurrently through their agents, i.e., the subsidiary companies, under PMSA-2[16].

Further, the Court of Appeal turned its attention to the group of companies doctrine, an area of jurisprudence that, until now, remained largely unexplored in Malaysia. Though previously touched upon in *Padda Gurtaj Singh v Axiata Group Berhad & Ors*[17] as a mere orbiter, the Court of Appeal in the present case gave the doctrine substantive consideration by acknowledging the possibility of binding affiliates to arbitration agreements[18], citing the ICC award in *Dow Chemical v Isover-Saint-Gobain*[19] and the Indian Supreme Court's decision in *Mahanagar Telephone Nigam Ltd v Canara Bank*[20], both of which similarly endorsed the doctrine.

In essence, these findings from the Court of Appeal are best understood through the lens of the **extension principle** — a doctrine that allows arbitration agreements or proceedings to be extended to non-signatories. Rooted in jurisprudence rather than statute, the principle recognises that implied consent, corporate relationships, or participation in contract performance may suffice to bind non-signatories to arbitration. Its application varies across jurisdictions and depends heavily on case-specific facts and the surrounding legal culture.

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[8] GOJ, [33].
[9] GOJ, [28].
[10] *Ibid*.
[11] GOJ, [29].
[12] GOJ, [33].
[13] *Ibid*.
[14] GOJ, [28].
[15] GOJ, [29].
[16] GOJ, [30].
[17] [2022] 8 CLJ 695 (HC) [84-88].
[18] GOJ, [31] where the beginning of the paragraph utters "*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*."
[19] GOJ, [31]; ICC Interim Award of September 23, 1982 in No. 4131.
[20] GOJ, [32]; 2019 SCC Online SC 995.

Key doctrines that fall under or relate to this umbrella of the extension principle include:

(i) **Group of Companies Doctrine** — A non-signatory affiliate may be bound if there was a common intention to arbitrate, inferred from its role in negotiating, performing, or terminating the contract;

(ii) **Agency and Implied Consent** — A non-signatory principal may be bound where an agent had actual or apparent authority; conduct or representation implying acceptance of the arbitration clause may also suffice;

(iii) **Estoppel and Piercing the Corporate Veil** — A non-signatory may be estopped from denying an arbitration clause where it induced reliance or gained benefit; the corporate veil may also be lifted to enforce arbitration obligations and prevent misuse of the corporate structure; and

(iv) **Assignment and Succession** — Legal successors may be bound by contractual obligations, including arbitration clauses, transmitted to third parties by operation of law or contract.

Comparative approaches show that **civil law jurisdictions** (e.g., France) tend to apply these doctrines more liberally, based on commercial reality and implied consent, while **common law jurisdictions** (e.g., England, Singapore) adopt a more conservative, consent-focused stance. Institutional rules, such as those of the **AIAC**, **SIAC**, and **ICC**, also reflect this global evolution by allowing mechanisms like joinder and consolidation, which can bring non-signatories into arbitration in appropriate circumstances.

# Don’t Get Caught Off Guard: How to Future-Proof Your Arbitration Clauses

The Malaysian courts’ recognition of non-signatories within a single composite arbitration, anchored in agency principles, marks a significant evolution in arbitration law. This development compels commercial parties to move beyond rigid, formalistic requirements, embracing a more purposive and fact-driven approach, where conduct, performance, and the realities of inter-party relationships take precedence over mere signatures.

For businesses, this shift presents both opportunity and caution. On one hand, it provides a potent tool to hold operationally involved or financially viable entities accountable through arbitration, even if they have not formally signed the contract. On the other, it heightens legal risks, particularly where nominee or agency relationships lack clear documentation or active management.

While the group of companies doctrine remains persuasive rather than mandatory in Malaysia, the landmark *PT Wijaya Karya* decision signals a growing judicial openness to expand this doctrine where the factual context warrants it. This signals a likely trend towards broader application in future disputes.

In light of these developments, companies are strongly advised to proactively revisit and refine their arbitration clauses and contract governance frameworks. Doing so is essential to manage risks effectively, safeguard their commercial interests, and stay prepared for the evolving realities of arbitration in Malaysia.

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