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Incorporation Or Independence? - The Court Of Appeal Draws A Line On Arbitration By Reference

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In a commercial landscape where contracts often multiply and overlap, particularly in engineering, energy and infrastructure projects, clarity is a rare commodity. Arbitration clauses, in particular, have long been a breeding ground for dispute: when parties sign several interlinked agreements, which documents actually bind them to arbitrate?

The Court of Appeal's recent decision in *MTC Engineering Sdn Bhd v VME Process Asia Pacific Pte Ltd* [2025] MLJU 3634 offers a sharp answer. Not every cross-reference to a contract containing an arbitration clause automatically brings that clause along for the ride. The court reminded that arbitration must arise from express intention and not osmosis.

A Narrow Gate For Incorporation

Section 9(5) of Malaysia's Arbitration Act 2005 is essentially the statutory embodiment of the UNCITRAL Model Law and permits incorporation by reference where a contract points to another document containing an arbitration clause. But the Court of Appeal has now insisted on something more: the reference must be made *for the purpose of importing that clause*, not merely to situate the agreement within a wider commercial relationship.

That distinction may seem technical. In practice, it is defining.

For over a decade, Malaysian courts have wrestled with the threshold. The Federal Court's decision in *Ajwa for Food Industries Co (MIGOP), Egypt v Pacific Inter-Link Sdn Bhd* [2013] 5 MLJ 625 once suggested that a simple written reference sufficed. But more recent jurisprudence including *Gise Kam Kwan International Trade Ltd v Antara Steel Mills Sdn Bhd* [2024] 6 MLJ 662 has been walking that back, requiring clearer evidence of intention.

The *MTC Engineering* decision continues this trend and does so in an archetypal multi-contract setting.

A Letter Of Undertaking That Stood On Its Own

The dispute arose from a familiar structure. VME, a Singapore-based engineering firm, contracted with SOM, a subsidiary of MTC. The main contract included an arbitration clause referring disputes to SIAC arbitration in Singapore. MTC, however, issued a Letter of Undertaking (LOU) guaranteeing SOM's payment obligations. Although the LOU was attached as an appendix to the main contract, it did not contain an arbitration clause of its own.

When VME sued MTC directly under the LOU, MTC argued that the arbitration clause in the main contract had been incorporated by reference, thus, requiring the dispute to be sent to arbitration. The Court of Appeal disagreed.

Independence Prevails Over Incorporation

The Court of Appeal held that:

(a) The LOU's reference to the main contract was merely contextual, meant to describe the underlying transaction i.e. not to import its dispute resolution machinery.

(b) The LOU was a separate commercial instrument, independently enforceable, and not automatically subject to the arbitration clause governing VME's contract with SOM.

(c) The fact that the main contract treated its appendices as "integral" did not transform the LOU into a document governed by arbitration. Its legal character remained autonomous.

Crucially, the Court distinguished the Federal Court's decision in *CTI Group Inc v International Bulk Carriers SPA* [2017] 5 MLJ 314, which was relied upon by MTC relied. This was on the basis that the *CTI Group* case dealt with enforcement of an arbitral award and not the formation of an arbitration agreement. It therefore provided little support for MTC's argument.

Commercial Clarity Over Convenience

The message is unmistakable that arbitration cannot be assumed in collateral documents such as guarantees, undertakings, performance bonds or side letters. Unless the parties clearly and expressly adopt the arbitration clause, they remain outside its scope.

This echoes a broader judicial sentiment across common law jurisdictions: arbitration is consensual, and courts should be slow to extend its reach absent unequivocal agreement.

For businesses, the implications are real. Project owners and contractors often rely on letters of undertaking and parent company guarantees to secure performance. These instruments may interact with the main contract but they do not automatically share its dispute resolution regime. Where parties intend arbitration to apply across all project documents, they must say so plainly. Silence will be interpreted as independence, not incorporation.

A Strengthened Architecture Of Certainty

The Court of Appeal's judgment strengthens commercial certainty by discouraging opportunistic attempts to rewrite dispute resolution frameworks after the fact. It aligns Malaysia with the cautious approach taken in other arbitration-friendly jurisdictions, emphasising that the gateway to arbitration must be opened deliberately and not by implication or convenience.

In a sector built on complex contractual arrangements, such clarity is welcome. Arbitration remains a powerful tool, but only when parties consciously choose it. The Malaysian courts have now underlined that choice must be unmistakable.

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