

**DALAM MAHKAMAH RAYUAN MALAYSIA  
(BIDANGKUASA RAYUAN)  
RAYUAN SIVIL NO. W-02-129-2006**

ANTARA

1. TNB ENGINEERING AND CONSULTANCY  
SDN. BHD. ... PERAYU-
2. PROJASS ENGINEERING SDN. BHD. PERAYU

DAN

BOCCARD OIL & GAS SDN. BHD. ... RESPONDEN

[Dalam Mahkamah Tinggi Malaya Di Kuala Lumpur  
(Bahagian Dagang) Saman Pemula No. D3-24-50-2005

Dalam Perkara Akta Timbangtara 1952

Dan

Dalam Perkara Aturan 7, 15 Kaedah 16, 28,  
29 dan 92 Kaedah-Kaedah Mahkamah 1980.

Dan

Dalam Perkara satu Timbangtara di antara  
TNB Engineering and Consultancy Sdn.  
Bhd., Projass Engineering Sdn. Bhd. dan  
Boccard Oil & Gas Sdn. Bhd.

Dan

Dalam Perkara satu Sub-subkontrak di antara TNB Engineering and Consultancy Sdn. Bhd., Projass Engineering Sdn. Bhd. dan Bocard Oil & Gas Sdn. Bhd. bertarikh 23hb. September 1996 berkenaan dengan “Low Pressure Fabricated Pipe”

Dan

Dalam Perkara satu Sub-subkontrak di antara TNB Engineering and Consultancy Sdn. Bhd., Projass Engineering Sdn. Bhd. dan Bocard Oil & Gas Sdn. Bhd. bertarikh 23hb. September 1996 berkenaan dengan “Low Pressure Pipe Supports”

Antara

1. TNB Engineering and Consultancy Sdn. Bhd. ... Plaintiff-
2. Projass Engineering Sdn. Bhd. Plaintiff

Dan

Bocard Oil & Gas Sdn. Bhd. ... Defendan

Coram: Gopal Sri Ram, J.C.A.  
Zulkefli bin Ahmad Makinudin, J.C.A.  
Raus bin Sharif, J.C.A.

## **JUDGMENT OF THE COURT**

### **Introduction**

The plaintiffs filed an Originating Summons dated 16.2.2005 seeking inter alia, a declaration that (i) any dispute between the plaintiffs and the defendant in respect of the Sub-Subcontracts should be dealt with by the Courts of Malaysia and (ii) the appointment of the arbitrators by the defendant pursuant to Clause 40 of the Sub-Subcontracts is invalid. The plaintiffs' Originating Summons was heard and dismissed by the learned Judge of the High Court on 16.1.2006. The plaintiffs filed the Notice of Appeal dated 8.2.2006 against the said decision.

After the final disposal of the Originating Summons, the plaintiffs filed an application for Erinford Injunction before the High Court seeking a further order that the defendant be restrained from proceeding with the arbitration proceedings initiated by the defendant pending the plaintiffs' appeal to the Court of Appeal. This application for an Erinford Injunction was dismissed by the High Court on 13.7.2006. Thereafter, the plaintiffs filed a Notice of Motion dated 3.8.2006 before the Court of Appeal seeking for the second time an Erinford Injunction to restrain the defendant from proceeding with the arbitration proceedings to determine a dispute between the plaintiffs and the defendant pending the plaintiffs' appeal. When this Notice of Motion came before us for hearing, we directed the parties that we would proceed to hear straight away the plaintiffs' appeal against the decision of the High

Court in dismissing the plaintiffs' Originating Summons dated 16.2.2005 since the relevant Records of Appeal had already been filed before the Court.

### Background Facts

The relevant background facts of the case are as follows:

- (1) TBV Power (Malaysia) Sdn. Bhd. ["TBV"] is a company incorporated in Malaysia and was the contractor for the supply and installation of works for the third phase of Sultan Salehuddin Abdul Aziz Power Station-Phase 3 (Units 5 and 6) located in the vicinity of Kapar for Tenaga Nasional Berhad ["the Project"] and comprising 2

x 500 MW turbine generator units complete with all auxiliary equipment and materials [“the Main Contract Works”].

- (2) In line with the appointment of TBV as the Contractor for the Project, the plaintiffs and TBV entered into two sub-contracts both dated 20.9.1996 whereby the plaintiffs agreed to design, fabricate and deliver Low Pressure Fabricated Pipe (the Sub-Contract for Low Pressure Fabricated Pipe) and Low Pressure Pipe Supports (the Sub-Contract for Low Pressure Pipe Supports) for the Project in accordance with the conditions and specifications set out in Section IV of the sub-contracts for the sum of RM5,890,855.09 and RM1,458,144.92 respectively, [“the Sub-Contracts”].

- (3) Thereafter, the plaintiffs and the defendant entered into two sub-subcontracts issued on 22.1.1997 and 29.1.1997, whereby the defendant agreed to design, fabricate and deliver Low Pressure Fabricated Pipe (the Sub-Subcontract for Low Pressure Fabricated Pipe) and Low Pressure Pipe Supports (the Sub-Subcontract for Low Pressure Pipe Supports) for the Project in accordance with the conditions and specifications set out in Section IV of the sub-subcontracts for the sum of RM5,610,300.00 and RM1,388,700.00 respectively [“ the Sub-Subcontracts”].
- (4) A dispute arose between the plaintiffs and the defendant in respect of the Sub-Subcontracts and

the defendant referred the dispute to arbitration pursuant to the terms of the Sub-Subcontracts.

- (5) The plaintiffs and TBV entered into a Settlement Agreement [“the Settlement Agreement”] in respect of the sums due under the Sub-Contracts entered into between the plaintiffs and TBV. There subsequently arose a dispute in regard to the Settlement Agreement in respect of which the plaintiffs initiated Civil Suit No. D3-22-66-2005 [“the D3 Action”] against TBV. The defendant is not a party to the Settlement Agreement.

### Contention of the Plaintiffs

It is the contention of the plaintiffs that the dispute between the plaintiffs and the defendant should not be

referred to arbitration as there is a conflict between the provisions of clause 40 and clause 41 of the Sub-Subcontracts which result in the Courts of Malaysia having exclusive jurisdiction to hear and determine all actions arising from the Sub-Subcontracts. The plaintiffs further contended that the agreement entered into between the plaintiffs and TBV, a third party precludes the defendant from exercising its contractual rights to refer the dispute between the plaintiffs and the defendant to arbitration. The plaintiffs also contended that the dispute between the plaintiffs and the defendant should be consolidated with the separate and distinct dispute between the plaintiffs and TBV, the third party.

## Contention of the Defendant

It is the defendant's contention on the other hand that the dispute between the plaintiffs and the defendant should be referred to arbitration. The unequivocal terms of the Sub-Subcontracts that are valid and binding on the parties expressly provide that any dispute arising thereunder is to be referred to arbitration. It is clear, upon a proper construction and interpretation, that clause 40 and clause 41 of the Sub-Subcontracts are not inconsistent or contradictory with each other. The defendant also challenged the basis of the plaintiffs' contention that the dispute between the plaintiffs and the defendant should be consolidated with the separate and distinct dispute between the plaintiffs and the third party. To the defendant, any agreement between the plaintiffs and the third party does

not bind the defendant or affect the contractual terms of the Sub-Subcontracts which allow any dispute between the plaintiffs and the defendant to be referred to arbitration. In the circumstances of the case the defendant therefore contended that the reference of the dispute between the plaintiffs and the defendant to arbitration and the appointment of the arbitrators are valid.

### Decision of the Court on Appeal

We have to state at the outset we noted that all the contract documents in the Sub-Contracts (between the plaintiffs and TBV) and in the Sub-Subcontracts (between the plaintiffs and the defendant) are identical in all material particulars. The works undertaken by the defendant as the sub-subcontractors of the plaintiffs are the same works

carried out by the plaintiffs for TBV under the Sub-Contracts. In the event the plaintiffs are held liable to the defendant under the Sub-Subcontracts, TBV ought to indemnify the plaintiffs against all claims by the defendant under the said Sub-Subcontracts.

It is to be noted that at around the same time two claims in relation to the dispute surrounding the parties had been filed. In the first claim, the plaintiffs have instituted a claim against TBV and its directors in the D3 Action. In the second claim, the defendant's arbitration claim against the plaintiffs (under the Sub-Subcontracts) is based on works carried out by the defendant under the Sub-Subcontract on behalf of the plaintiffs in order to fulfill the plaintiffs' obligation under the Sub-Contracts entered into with TBV.

It is necessary that we reproduce here the relevant common clauses 40, 41 and 47 under the provisions of the Sub-Contracts and the Sub-Subcontracts entered into by the respective parties as follows:

GC.40-Arbitration

*“40(i) If at any time any question, or difference shall arise between the Sub-Contractor and the Sub-Subcontractor, either party shall, as soon as reasonably practicable, give to the other notice in writing of the existence of such question dispute, or difference, specifying its nature and the point at issue, and the same shall be referred to the arbitration of a person to be agreed upon or failing such agreement within 6 weeks, to*

*some person appointed on the application of either of the parties to the Contract by the President for the time being of the Institution of Engineers (Malaysia). Any such reference shall be deemed to be as submission to Arbitration under the provision of the Arbitration Act Malaysia 1952 (revised 1972) and/or any statutory modification or re-enactment thereof for the time being in force. The award of the Arbitration shall be final and binding on the parties. Upon every or any such reference the costs of and incidental to the reference and award respectively shall be in the discretion of the Arbitration, who may determine the amount thereof or the basis upon which the same shall be ascertained.*

*40(ii) Performance of the Contract shall continue during arbitration proceeding unless the Subcontractor shall order the suspension thereof or of any part thereof and if any such suspension shall be ordered the reasonable expenses of the Sub-Subcontractor occasioned by such suspension shall be added to the Contract Price.”*

#### GC.41-Arbitration

*“41(i) The Contract shall be governed and construed according to Malaysian Law and the Courts of Malaysia shall have exclusive jurisdiction to hear and determine all actions and proceedings arising out of the Contract and the Sub-Subcontractor hereby submits to the*

*jurisdiction of the Courts in Malaysia, for the purpose of all such actions and proceedings.*

*41(ii) The Sub-Subcontractor binds himself to acknowledge and accepts as final in all respects within the country of domicile of the Sub-Subcontractor or elsewhere any decision or award of an arbitrator or judgment in any court in Malaysia in relation to any dispute between the parties under the Contract whether in respect of payments to be made hereunder or in other matters. This undertaking is valid in all respects in case any such decision, award or judgment is to be enforced in the courts of the country of domicile of the Sub-Subcontractor or elsewhere in any manner.”*

GC.47 – Indemnification

*“To the fullest extent permitted by laws and regulations, the Sub-Subcontractor shall defend, indemnify, and hold harmless Purchaser, Engineer, Contractor and Subcontractor and their officers, directors, partners, consultants, agents and employees from and against all claims, damages, losses, and expenses, direct, indirect, or consequential (including but not limited to fees and charges of engineers, architects, attorneys, and other professionals and court and arbitration costs) arising out of or resulting from the performance of the work by the Sub-Subcontractor, any person or organization directly or indirectly employed by any of them to*

*perform or furnish any of the work or anyone for whose acts any of them may be liable, regardless of whether or not it is caused in part by a party indemnified hereunder or arises by or is imposed by laws and regulations regardless of the negligence of any such party.*

*In any and all claims against Purchaser, Engineer, Contractor or Subcontractor or any of their officers, directors, partners, consultants, agents, or employees by any employee of the Sub-Subcontractor, any person or organization directly or indirectly employed by any of them to perform or furnish any of the work or anyone for whose acts any of them may be liable, this indemnification obligation shall not be limited in any limitation on the amount or type of damages,*

*compensation, or benefits payable by or for the Sub-Subcontractor or any other person or organization under workers' or workmen's compensation acts, disability benefit acts, or other employee benefit acts, nor shall this indemnification obligation be limited in any way by any limitation on the amount or type of insurance coverage provided by the Purchaser, the Contractor, the Subcontractor, or the Sub-Subcontractor."*

In view of the above, we therefore find there are common issues of law and fact involving the three parties, namely the plaintiffs, the defendant and TBV that need to be resolved. It is our considered view that the plaintiffs ought to bring in the defendant into the D3 Action to

indemnify themselves. In the D3 Action instituted by the plaintiffs against TBV, it is the contention of TBV as pleaded under paragraph 7 of its defence that the plaintiffs had failed to take the necessary steps to comply with the terms of the contract (the Sub-Contracts) and that the plaintiffs failed to supervise the progress of works carried out by the Sub-Subcontractors to ensure that the works were completed by the Sub-Subcontractors within the agreed stipulated period. By reason of the plaintiffs' failure, TBV has alleged that it had suffered loss and damage. On this point, we are of the view the party who would be in the best position to explain these allegations by TBV and being the party who did the works for the plaintiffs and possessed all the relevant records and documents of the same, would be the defendant.

It is noted also under paragraph 11 of the defence of TBV in the D3 Action, TBV contended inter alia that if the plaintiffs failed to obtain the assistance of TBV to defend the claim instituted by the defendant, TBV would not be obliged to make payments to the plaintiffs for any award or judgment which the defendant herein may obtain against the plaintiffs. On this point we are of the view unless the plaintiffs can bring the defendant as a party to the D3 Action, or manages to consolidate its action with the action against TBV, the plaintiffs would be prejudiced.

As regards the defendant's agreement to indemnify the plaintiffs for "works" done, we are of the view that the defendant is aware of this link, and has acknowledged it in the Sub-Subcontracts, as can be seen at Form A of the

Form of Agreements at pages 361 and 437 of the Sub-Subcontracts. Form A reads as follows:

*“In consideration of the payment to be made by the Subcontractor to the Sub-Subcontractor as hereinafter mentioned the Sub-Subcontractor hereby covenants with the Subcontractor that the Sub-Subcontractor shall and will duly provide, deliver including technical supervision as required, the works and shall do and perform all other acts and things in the Contract mentioned or described or to be implied therefrom or may reasonably be necessary for the completion of the said works within and at the times and in the manner and subject to the terms and conditions mentioned herein and so as to*

enable the Subcontractor to comply with and satisfy the provisions and requirements of the Main Contract and the Sub-Subcontractor hereby indemnifies the Subcontractor from and against all or any claims, damages, losses, and expenses (both direct and indirect) incurred by the Subcontractors as a result of any such breach by the Sub-Subcontractor.” [Emphasis added]

It is further noted pursuant to clause 47, the defendant is to indemnify inter alia the plaintiffs (Sub-Contractor) and TBV (Contractor) from and against all claims, damages, losses and expenses, direct, indirect, or consequential arising out of or resulting from the performance of the work by the Sub-Subcontractor (i.e. the defendant), any person or

organization directly or indirectly employed by any of them.

We find there is no provision under the Arbitration Act 1952 for the plaintiffs to join TBV and/or the directors of TBV (the defendants in the D3 Action) for an indemnity against the defendants' claim against the plaintiffs under the Sub-Subcontracts. The hearing of the defendants' claim under the Sub-Subcontracts against the plaintiffs in the arbitration proceedings would deprive the plaintiffs of their right to institute third party proceedings against TBV and/or the directors of TBV to indemnify them (the plaintiffs) against the defendants' claim against the plaintiffs under the Sub-Subcontracts. We are of the considered view that the hearing of the defendant's claim under the Sub-Subcontracts against the plaintiffs in the

arbitration proceedings would result in duplicity of proceedings. The dispute between the plaintiffs and the defendant is whether the plaintiffs owe the defendant any sums of money and if so, the amount. This dispute is in fact an integral part of the dispute between the plaintiffs and TBV.

It is our judgment that the Sub-Subcontracts cannot be read in isolation as being between the plaintiffs and the defendant to the exclusion of any other party, in particular, TBV. The Sub-Subcontracts must necessarily be subject to the Sub-Contracts between the plaintiffs and TBV. It is for this reason that we find the plaintiffs are justified in invoking the provision of Order 4 Rule 1(1) of the Rules of the High Court 1980, in aid of its cause and which states as follows:

*“(1) Where two or more causes or matters are pending, then, if it appears to the Court –*

*(a) that some common question of law or fact arises in both or all of them;*

*(b) that the rights to relief claimed therein are in respect of or arise out of the same transaction or series of transactions; or*

*(c) that for some other reason it is desirable to make an order under this rule,*

*the Court may order those causes or matters to be consolidated on such terms as it thinks just or may order them to be tried at the same time or one immediately after another or may order any of them to be stayed until after the determination of any other of them.”*

We would also like to state here that on 25.3.2005, TBV [the defendant in the D3 Action] filed an application for stay of proceedings in the D3 Action under section 6 of the Arbitration Act 1952 [“Application for Stay”]. In the Application for Stay, TBV relied on section 40 of the Sub-Contracts entered into between the plaintiffs and TBV [the defendant in the D3 Action] which provided for reference of disputes and differences between the plaintiffs and TBV to arbitration. Clauses 40 and 41 in the Sub-Contracts between the plaintiffs and TBV [the defendant in the D3 Action] are identical to clauses 40 and 41 in the Sub-Subcontracts between the plaintiffs and the defendant in the Originating Summons herein. In the D3 Action, the learned Judge of the High Court had on 17.8.2005 dismissed the Application by TBV for stay of proceedings. In the circumstances the dispute between the plaintiffs and

TBV under the Sub-Contracts and/or the disputes between the plaintiffs and TBV and the directors of TBV under the Settlement Agreement would be resolved in a trial before the High Court in the D3 Action.

It is our judgment the common clauses 40 and 41 of the Sub-Contracts and the Sub-Subcontracts when read as a whole and in their proper construction would show that under the said clause 41 of each of the Sub-Subcontracts it is the Court which has the exclusive jurisdiction to hear and determine all actions and proceedings which arise out of the Sub-Subcontracts. The provision of clause 40 relating to arbitration in the relevant Sub-Subcontract contradicts and is inconsistent with the said clause 41 of each of the Sub-Subcontract, so much so that the Court ought not give

effect to the same. Such disputes as exist between the parties should be decided by the Court.

### Conclusion

For the reasons already stated we would allow the appeal by the plaintiffs and set aside the orders of the High Court dated 16.1.2006. We would instead make an order in terms of the declaration as prayed for in the plaintiffs' Originating Summons dated 16.2.2005. There will be no order as to costs here and in the Court below. Deposit paid is to be refunded to the plaintiffs.

(DATO' ZULKEFLI BIN AHMAD MAKINUDIN)  
Judge  
Court of Appeal

Dated: 20<sup>th</sup> November 2007.

**Counsel for the Appellants:**

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