

**DALAM MAHKAMAH PERSEKUTUAN MALAYSIA
(BIDANGKUASA RAYUAN)
RAYUAN SIVIL NO 02(f)-1-2008 (W)**

BETWEEN

BOCCARD OIL & GAS SDN. BHD. ... APPELLANT

AND

- 1. TNB ENGINEERING AND CONSULTANCY SDN.BHD**
- 2. PROJASS ENGINEERING SDN. BHD. ... RESPONDENTS**

**([DALAM PERKARA MAHKAMAH RAYUAN MALAYSIA
RAYUAN SIVIL NO W-02-129-2006**

BETWEEN

- 1. TNB Engineering and Consultancy Sdn. Bhd.**
- 2. Projass Engineering Sdn. Bhd. ... Appellants**

AND

Boccard Oil & Gas Sdn. Bhd. ... Respondent]

**[DALAM MAHKAMAH TINGGI MALAYA DI KUALA LUMPUR
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 Bocard Oil & Gas Sdn Bhd

Dan

Dalam Perkara satu Sub-Subkontrak di antara TNB Engineering 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
 2. PROJASS ENGINEERING SDN BHD
...PLAINTIF-PLAINTIF
- DAN
BOCCARD OIL & GAS SDN BHD
...DEFENDAN])

QUORUM

NIK HASHIM NIK AB RAHMAN, F.C.J.
AUGUSTINE PAUL, F.C.J.
ABDUL AZIZ MOHAMAD, F.C.J.

JUDGMENT

This is yet another instance which brings into focus the propriety of questions framed for the purpose of an appeal to this Court pursuant to section 96(a) of the Courts of Judicature Act 1964 (“section 96(a”).

The facts of the case as outlined in the judgment of the Court of Appeal are as follows. 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. 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 September 1996 whereby the Plaintiffs agreed to design, fabricate and deliver Low Pressure Fabricated Pipe and 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”]. Thereafter, the Plaintiffs and the Defendant entered into two sub-subcontracts on 22 January 1997 and 29 January 1997, whereby the Defendant agreed to design, fabricate and deliver Low Pressure Fabricated Pipe and 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”]. 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. Arbitrators were duly appointed. The Plaintiffs and TBV entered into a settlement agreement [“the settlement agreement”] in respect of the sums due under the sub-contracts 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.

The relevant clauses relating to arbitration are contained in Clauses 40 and 41 of the sub-subcontract [‘Clause 40’ and ‘Clause 41’ respectively]. They read as follows:

GC.40-Arbitration

(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.

(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-Law Governing Contract

(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.

(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.

The Plaintiffs filed an Originating Summons dated 16 February 2005 in the High Court seeking for a declaration, inter alia, that

- (i) any dispute between the Plaintiffs and the Defendant in respect of the sub-subcontracts be dealt with by the Courts of Malaysia;
- (ii) the appointment of the arbitrators by the Defendant pursuant to Clause 40 is invalid; and
- (iii) the Defendant be restrained from proceeding further with the arbitration proceedings pending the hearing and disposal of the Originating Summons and/or pending the hearing and disposal of the Plaintiffs' claim against TBV in the D3 action.

The learned High Court Judge took the view that Clause 40 prevailed over Clause 41 and accordingly dismissed the originating summons on 16 January 2006. The Plaintiffs then appealed to the Court of Appeal. The Court of Appeal found that there are common issues of

law involving the Plaintiffs, the Defendant and TBV and that the Plaintiffs ought to bring in the Defendant into the D3 Action to indemnify themselves. It was also found that unless the Plaintiffs can bring the Defendant as a party to the D3 action, or manage to consolidate their action with the one against TBV, the Plaintiffs would be prejudiced. It was further found that the arbitration proceedings would deprive the Plaintiffs of their right to institute third party proceedings against TBV to indemnify them in the Defendant's claim against them under the sub-subcontracts. This would result in duplicity of proceedings. It was also found that the dispute between the Plaintiffs and the Defendant is whether the Plaintiffs owe the Defendant any sum of money and if so, the amount. This dispute is in fact an integral part of the dispute between the Plaintiffs and TBV. Thus the Court of Appeal expressed the view that the Plaintiffs are justified in invoking Order 4 rule 1(1) of the Rules of the High Court in aid of its cause. Finally, it was held that as Clause 40 is inconsistent with Clause 41 it should not be given any effect. The Court of Appeal then allowed the appeal with an order in terms of the declaration as prayed for in the Plaintiffs' originating summons dated 16 February 2005. No order as to costs was made.

The Defendant obtained leave to appeal to this Court pursuant to section 96(a) on the following two questions:

(a) Whether the existence of a valid arbitration clause accepted and agreed to by the Appellant and the Respondents can be disregarded and/or superseded by a governing law clause?

(b) Whether the Court of Appeal has the power and jurisdiction to injunct an arbitration proceeding between two parties for the purpose of consolidation of the said arbitration with a civil suit involving a third party (not a party to the arbitration proceedings) in the absence of any provisions in the arbitration agreement or the Arbitration Act 1952 to enable such a consolidation?

Before dealing with the two questions, it is perhaps necessary to be reminded of the requirements of section 96(a) which reads as follows:

“Subject to any rules regulating the proceedings of the Federal Court in respect of appeals from the Court of Appeal, an appeal shall lie from the Court of Appeal to the Federal Court with the leave of the Federal Court –

(a) from any judgment or order of the Court of Appeal in respect of any civil cause or matter decided by the High Court in the exercise of its original jurisdiction involving a question of general principle decided for the first time or a question of importance upon which further argument and a decision of the Federal Court would be to public advantage.”

It is perhaps necessary to refer to *Joceline Tan Poh Choo & Ors v V Muthusamy* [2008] 6 MLJ 621 where this Court in reviewing section 96 (a) said at pp 631-634:

“In commenting on the criteria to be satisfied in an application for leave to appeal under section 96 (a) Edgar Joseph Jr FCJ said in *Datuk Syed Kechik bin Syed Mohamed & Anor v The Board of Trustees of the Sabah Foundation & Ors* [1999] 1 MLJ 257 at p 265,

‘To sum up, without prejudice to the generality of what we have thus far said, the Federal Court exercises its sensitive power to grant leave to appeal in civil cases sparingly and will not grant such leave unless *both* of the following criteria are satisfied by an intending appellant:

- (1) the judgment of the Court of Appeal has raised a point of general principle *which the Federal Court has not previously decided* or a point of importance upon which further argument and a decision of the Federal Court would be to public advantage; and
- (2) if the point is decided in favour of the intending appellant, there is a *prima facie* case for success in the appeal.’

(Emphasis added)

It must be observed, and with respect, that the use of the words “.... which the Federal Court has not previously decided ...” in criterion (1) may not be an accurate representation of section 96 (a). An analysis of the section will make this clear. It contains two circumstances in which an appeal may be made to this Court. They are:-

Limb (a)

A question of general principle decided for the first time.

It is obvious that this is a reference to a decision of the Court of Appeal for the first time on a question of general principle. As section 96 (a) deals with appeals from the Court of Appeal to the Federal Court the word "...decided ..." in section 96 (a) refers to a decision that has already been made. The use of the word in the past tense makes this manifestly patent. A decision that has been made can only be a reference to a decision of the Court of Appeal.

Limb (b)

A question of importance upon which further argument and a decision of the Federal Court would be to public advantage.

This limb is an unambiguous reference to an issue upon which there have been two or more previous decisions of the Court of Appeal. This is made clear by the purpose of limb (a) and the language of this limb itself. A reference to further argument and the fact that a decision of the Federal Court would be to public advantage has in contemplation two or more previous decisions of the Court of Appeal on the same issue which are, for example, in conflict or are wrong or made in ignorance of a binding precedent or made in following a decision of the Federal Court which is vague or wrong. Such a situation would create confusion to the public in the application of the legal principle involved to their affairs. In

that event further argument and a decision of the Federal Court on the issue involved would be to public advantage as the confusion would be resolved.

It is thus clear that both limb (a) and limb (b) are separate and as they cater for two distinct circumstances they are mutually exclusive. It is now appropriate to consider the use of the words "...which the Federal Court has not previously decided ..." referred to earlier in the passage from *Datuk Syed Kechik bin Syed Mohamed & Anor v The Board of Trustees of the Sabah Foundation & Ors* [1999] 1 MLJ 257 in limb (a). It will be recalled that the reference in that limb to the decision made for the first time is to that of the Court of Appeal. It is true that the fact that the Federal Court has not previously decided on a point may mean that it is also the first time that the Court of Appeal has decided on the point as contemplated by limb (a). But, unfortunately, it can also mean that the Court of Appeal has decided on the point previously and that the Federal Court has not decided on it yet thereby making it a case upon which the Federal Court has not previously decided. It is clear by now that limb (b) becomes relevant only when there are two or more decisions of the Court of Appeal on a certain point. Thus the use of the words "...which the Federal Court has not previously decided ..." in limb (a) in *Datuk Syed Kechik bin Syed Mohamed & Anor v The Board of Trustees of the Sabah Foundation & Ors* [1999] 1 MLJ 257 will create confusion in the proper meaning to be accorded to both the limbs. They ought to be replaced with the words "...decided by the Court of Appeal for the first time

...” as contemplated by section 96 (a). That will remove any confusion that may arise and, additionally, bring into proper focus the underlying distinction between both the limbs.

In an application for leave to appeal an intending appellant must identify the proper limb under which his case falls and address the arguments accordingly.

The next matter for consideration is whether the point if decided in favour of the intending appellant will show that there is a prima facie case for success in the appeal. This would depend on the issue to be raised in the appeal and, thus, on the nature and manner in which the question for appeal is framed. It must be so couched as to incorporate a point of law which has the effect of reversing findings made against the intending appellant without any further evaluation of the evidence. This in turn means that the answer given to the question must be such that it has the effect of reversing the judgment. It is only then that the question of success in the appeal can arise. It must be remembered that the very object of making appeals to this Court subject to leave is to prevent frivolous and needless appeals (see *Kredin Sdn Bhd v OCBC Bank (M) Bhd* [1998] 3 MLJ 78). Leave to appeal on a proposed question will therefore not be granted if there is no hope of success (see *Beatrice a/p AT Fernandez v Sistem Penerbangan Malaysia & Ors* [2005] 3 MLJ 681). This is logical. If the answer to the proposed question is obvious in the sense that it will not be in favour of the intending appellant there will be no basis for a prima facie case for success in the

appeal. Where a decision depends on the application of a well-established principle to an individual set of facts, a further appeal to the Federal Court will be of no utility if it will do nothing to clarify or refine the principle, so as to make it applicable to other situations in the future (see *Datuk Syed Kechik bin Syed Mohamed & Anor v The Board of Trustees of the Sabah Foundation & Ors* [1999] 1 MLJ 257). The question posed must relate to a matter in respect of which a determination has been made by the Court of Appeal as otherwise it will be academic (see *The Minister for Human Resources v Thong Chin Yoong and another appeal* [2001] 4 MLJ 225 and *Raphael Pura v Insas Bhd & Anor* [2003] 1 MLJ 513). It follows that a question cannot be based on an assumption that a finding has been made in respect of it when, as a matter of fact, no such finding has been made. However, a new point of law can be raised if all the facts necessary to support it have been raised in the Court of Appeal (see *Lim Geak Liang v East West UMI Insurance Bhd* [1997] 3 MLJ 517). Needless to say, the parties may by consent reframe or amend the question at the hearing stage of the appeal with the approval of the Court as demonstrated in *The Board of Trustees of the Sabah Foundation & Ors v Datuk Syed Kechik bin Syed Mohamed & Anor* [2008] 5 MLJ 469.

The corollary is that if there is no prospect of success in the appeal the position of the appellant will not be affected and it would be pointless hearing the appeal. In *Sun Life Assurance Co of Canada v Jervis* [1944] 1 All ER 469 Viscount Simon LC said at p 470,

'I do not think that it would be a proper exercise of the authority which this House possesses to hear appeals if it occupies time in this case in deciding an academic question, the answer to which cannot affect the respondent in any way. If the House undertook to do so, it would not be deciding an existing *lis* between the parties who are before it, but would merely be expressing its view on a legal conundrum which the appellant hopes to get decided in its favour without in any way affecting the position between the parties.'

In *Loknath Padhan v Birendra Kumar Sahu* AIR 1974 SC 505

Bhagwati J said at p 508,

' If an issue is purely academic in that its decision one way or the other would have no impact on the position of the parties it would be waste of public time and indeed not proper exercise of authority for the Court to engage itself in deciding it. ... It would be clearly futile and meaningless for the Court to decide an academic question, the answer to which would not affect the position of one party or the other. The Court would not engage in a fruitless exercise. It would refuse to decide a question, unless it has a bearing on some right or liability in controversy between the parties. If the decision of a question would be wholly ineffectual so far as the parties are concerned, it would be not only unnecessary and

pointless but also inexpedient to decide it and the Court would properly decline to do so.’

Thus this Court has the power to decline to answer questions posed in appropriate instances in spite of the fact that leave to appeal had been granted with the result that the appeal must be dismissed without a consideration of its merits. This is demonstrated by cases such as *The Minister for Human Resources v Thong Chin Yoong and another appeal* [2001] 4 MLJ 225, *Raphael Pura v Insas Bhd & Anor* [2003] 1 MLJ 513, *Sri Kelangkota – Rakan Engineering JV Sdn Bhd & Anor v Arab-Malaysian Prima Realty Sdn Bhd & Ors* [2003] 3 MLJ 257, *Perwira Affin Bank Bhd v Lim Ah Hee @ Sim Ah Hee* [2004] 3 MLJ 253 and *Tan Heng Chew & Ors v Tan Kim Hor & Ors* [2006] 5 MLJ 313. “

It is now apposite to consider the two questions posed.

Question No. 1.

Whether the existence of a valid arbitration clause accepted and agreed to by the Appellant and the Respondents can be disregarded and/or superseded by a governing law clause?

Quite obviously the object of this question is to determine whether Clause 40 can be superseded by Clause 41. But the manner in which it is couched does not give such an impression. Firstly, it is anchored on the premise that the arbitration clause is valid and has been accepted and agreed to by both the parties. If it is valid and accepted and agreed to as such by both parties the

question of it being superseded does not and cannot arise as it must prevail. On the contrary the Court of Appeal did not decide that the arbitration clause is valid. It was ruled that it was inconsistent with Clause 41 and was thereby ineffective. This is in direct contrast to the manner in which the question has been framed. Secondly, the question seeks a resolution of the prevailing effect of a “governing law clause”. Such a clause without any qualification is a reference to a clause that deals exclusively with the applicable law. The Court of Appeal did not consider such a position. It dealt with Clause 41 which, apart from dealing with the applicable law, also dealt with the jurisdiction of the courts to hear and determine all actions and proceeding arising out of the contract between the parties. This does not accord with the manner in which the question has been framed which is confined to the prevailing effect of a governing law clause per se. Be that as it may, the question is very general in nature. It merely seeks a resolution of the prevailing effect of a governing law clause over an arbitration clause. Cases like *EJR Lovelock Ltd. v Exportles* [1968] 1 Lloyd’s Rep 163, *Shell International Petroleum Co Ltd v Coral Oil Co Ltd* [1999] 1 Lloyd’s Rep 72 and *Paul Smith Ltd v H & S International Holding Inc* [1991] 2 Lloyd’s Rep 127 make it clear that in such cases it is a matter of the construction of the two conflicting provisions based on the language employed in them that determines which one is to prevail. The question posed makes no reference to a consideration of this critical issue. Thus the question as it stands does not deal with the judgment or order made by the Court of Appeal and, in any event, is very general.

Question No. 2

Whether the Court of Appeal has the power and jurisdiction to injunct an arbitration proceeding between two parties for the purpose of consolidation of the said arbitration with a civil suit involving a third party (not party to the arbitration proceedings) in the absence of any provision in the arbitration agreement or the Arbitration Act 1952, to enable such a consolidation?

This question would be justified if the Court of Appeal had in fact injuncted the arbitration proceeding between the two parties for the purpose of consolidating it with a civil suit. The relevant part of the judgment of the Court of Appeal which deals with the issue of consolidation reads as follows:

“ 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:

‘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; or
- (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.' ”

There is nothing in this part of the judgment of the Court of Appeal to suggest that it enjoined the arbitration proceedings for the purpose of consolidating it with the civil suit which involves a third party (the D3 action). It merely states that the Plaintiffs would be justified in resorting to consolidation in aid of their cause. It must be further observed that the order made by the Court of Appeal was merely in terms of the declarations prayed for in the Plaintiffs' Originating Summons dated 16 February 2005 and the material part of the order made in this regard as reflected in the Order of Court reads as follows:

“DAN ADALAH SELANJUTNYA DIPERINTAHKAN bahawa Responden adalah dilarang dari meneruskan dengan timbangtara sehingga perintah selanjutnya.”

Again there is nothing in this part of the order made by the Court of Appeal to suggest that the arbitration proceeding was enjoined for the purpose of consolidating it with the civil suit. The order was made in the light of the conclusion of the Court of Appeal that Clause 40 is ineffective. Thus, this question also does not deal with the judgment

or order made by the Court of Appeal. On the contrary it is confined to a determination of the power of the Court of Appeal to order consolidation in the circumstances described in the question and is therefore hypothetical.

It follows that as both the question posed do not relate to matters decided by the Court of Appeal they do not come within the ambit of section 96(a). It is therefore not necessary to answer them

My learned brother Nik Hashim bin Nik Ab. Rahman FCJ agrees with this judgment while my learned brother Abdul Aziz bin Mohamad FCJ agrees with the conclusion though for different reasons. In the upshot the appeal is dismissed with costs. Deposit to the respondent on account of taxed costs.

Date: 22nd January 2009

(DATO' SRI AUGUSTINE PAUL)

Judge
Federal Court
Malaysia

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