TRANSFIELD PHILIPPINES, INC., PETITIONER, VS. LUZON HYDRO CORPORATION, AUSTRALIA AND NEW ZEALAND BANKING GROUP LIMITED AND SECURITY BANK CORPORATION, RESPONDENTS.

G.R. NO. 146717. May 19, 2006

Ponente: TINGA, J.

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TINGA, J.:

The adjudication of this case proved to be a two-stage process as its constituent parts involve two segregate but equally important issues. The first stage relating to the merits of the case, specifically the question of the propriety of calling on the securities during the pendency of the arbitral proceedings, was resolved in favor of Luzon Hydro Corporation (LHC) with the Court's Decision[1] of 22 November 2004. The second stage involving the issue of forum-shopping on which the Court required the parties to submit their respective memoranda[2] is disposed of in this Resolution.

The disposal of the forum-shopping charge is crucial to the parties to this case on account of its profound effect on the final outcome of the international arbitral proceedings which they have chosen as their principal dispute resolution mechanism.[3]

LHC claims that Transfield Philippines, Inc. (TPI) is guilty of forum-shopping when it filed the following suits:

> - Civil Case No. 04-332 filed on 19 March 2004, pending before the Regional Trial Court (RTC) of Makati, Branch 56 for confirmation, recognition and enforcement of the Third Partial Award in case 11264 TE/MW, ICC International Court of Arbitration, entitled Transfield Philippines, Inc. v. Luzon Hydro Corporation.[4]
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> - ICC Case No. 11264/TE/MW, Transfield Philippines, Inc. v. Luzon Hydro Corporation filed before the International Court of Arbitration, International Chamber of Commerce (ICC) a request for arbitration dated 3 November 2000 pursuant to the Turnkey Contract between LHC and TPI;
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> - G.R. No. 146717, Transfield Philippines, Inc. v. Luzon Hydro Corporation, Australia and New Zealand Banking Group Limited and Security Bank Corp. filed on 5 February 2001, which was an appeal by certiorari with prayer for TRO/preliminary prohibitory and mandatory injunction, of the Court of Appeals Decision dated 31 January 2001 in CA-G.R. SP No. 61901.
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> - CA-G.R. SP No. 61901 was a petition for review of the Decision in Civil Case No. 00-1312, wherein TPI claimed that LHC's call on the securities was premature considering that the issue of default has not yet been resolved with finality; the petition was however denied by the Court of Appeals;
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> - Civil Case No. 00-1312 was a complaint for injunction with prayer for temporary restraining order and/or writ of preliminary injunction dated 5 November 2000, which sought to restrain LHC from calling on the securities and respondent banks from transferring or paying of the securities; the complaint was denied by the RTC.

On the other hand, TPI claims that it is LHC which is guilty of forum-shopping when it raised the issue of

forum-shopping not only in this case, but also in Civil Case No. 04-332, and even asked for the dismissal of the other case based on this ground. Moreover, TPI argues that LHC is relitigating in Civil Case No. 04-332 the very same causes of action in ICC Case No. 11264/TE/MW, and even manifesting therein that it will present evidence earlier presented before the arbitral tribunal.[5]

Meanwhile, ANZ Bank and Security Bank moved to be excused from filing a memorandum. They claim that with the finality of the Court's Decision dated 22 November 2004, any resolution by the Court on the issue of forum-shopping will not materially affect their role as the banking entities involved are concerned.[6] The Court granted their respective motions.

On 1 August 2005, TPI moved to set the case for oral argument, positing that the resolution of the Court on the issue of forum-shopping may have significant implications on the interpretation of the Alternative Dispute Resolution Act of 2004, as well as the viability of international commercial arbitration as an alternative mode of dispute resolution in the country.[7] Said motion was opposed by LHC in its opposition filed on 2 September 2005, with LHC arguing that the respective memoranda of the parties are sufficient for the Court to resolve the issue of forum-shopping.[8] On 28 October 2005, TPI filed its Manifestation and Reiterative Motion[9] to set the case for oral argument, where it manifested that the International Chamber of Commerce (ICC) arbitral tribunal had issued its Final Award ordering LHC to pay TPI US$24,533,730.00 (including the US$17,977,815.00 proceeds of the two standby letters of credit). TPI also submitted a copy thereof with a Supplemental Petition[10] to the Regional Trial Court (RTC), seeking recognition and enforcement of the said award.[11]

The essence of forum-shopping is the filing of multiple suits involving the same parties for the same cause of action, either simultaneously or successively, for the purpose of obtaining a favorable judgment.[12] Forum-shopping has likewise been defined as the act of a party against whom an adverse judgment has been rendered in one forum, seeking and possibly getting a favorable opinion in another forum, other than by appeal or the special civil action of certiorari, or the institution of two or more actions or proceedings grounded on the same cause on the supposition that one or the other court would make a favorable disposition.[13]

Thus, for forum-shopping to exist, there must be (a) identity of parties, or at least such parties as represent the same interests in both actions; (b) identity of rights asserted and relief prayed for, the relief being founded on the same facts; and (c) the identity of the two preceding particulars is such that any judgment rendered in the other action will, regardless of which party is successful, amount to res judicata in the action under consideration.[14]

There is no identity of causes of action between and among the arbitration case, the instant petition, and Civil Case No. 04-332.

The arbitration case, ICC Case No. 11264 TE/MW, is an arbitral proceeding commenced pursuant to the Turnkey Contract between TPI and LHC, to determine the primary issue of whether the delays in the construction of the project were excused delays, which would consequently render valid TPI's claims for extension of time to finish the project. Together with the primary issue to be settled in the arbitration case is the equally important question of monetary awards to the aggrieved party.

On the other hand, Civil Case No. 00-1312, the precursor of the instant petition, was filed to enjoin LHC from calling on the securities and respondent banks from transferring or paying the securities in case LHC calls on them. However, in view of the fact that LHC collected the proceeds, TPI, in its appeal and petition for review asked that the same be returned and placed in escrow pending the resolution of the disputes before the ICC arbitral tribunal.[15]

While the ICC case thus calls for a thorough review of the facts which led to the delay in the construction of the

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project, as well as the attendant responsibilities of the parties therein, in contrast, the present petition puts in issue the propriety of drawing on the letters of credit during the pendency of the arbitral case, and of course, absent a final determination by the ICC Arbitral tribunal. Moreover, as pointed out by TPI, it did not pray for the return of the proceeds of the letters of credit. What it asked instead is that the said moneys be placed in escrow until the final resolution of the arbitral case. Meanwhile, in Civil Case No. 04-332, TPI no longer seeks the issuance of a provisional relief, but rather the issuance of a writ of execution to enforce the Third Partial Award.

Neither is there an identity of parties between and among the three (3) cases. The ICC case only involves TPI and LHC logically since they are the parties to the Turnkey Contract. In comparison, the instant petition includes Security Bank and ANZ Bank, the banks sought to be enjoined from releasing the funds of the letters of credit. The Court agrees with TPI that it would be ineffectual to ask the ICC to issue writs of preliminary injunction against Security Bank and ANZ Bank since these banks are not parties to the arbitration case, and that the ICC Arbitral tribunal would not even be able to compel LHC to obey any writ of preliminary injunction issued from its end.[16]Civil Case No. 04-322, on the other hand, logically involves TPI and LHC only, they being the parties to the arbitration agreement whose partial award is sought to be enforced.

As a fundamental point, the pendency of arbitral proceedings does not foreclose resort to the courts for provisional reliefs. The Rules of the ICC, which governs the parties' arbitral dispute, allows the application of a party to a judicial authority for interim or conservatory measures.[17] Likewise, Section 14 of Republic Act (R.A.) No. 876 (The Arbitration Law)[18] recognizes the rights of any party to petition the court to take measures to safeguard and/or conserve any matter which is the subject of the dispute in arbitration. In addition, R.A. 9285, otherwise known as the "Alternative Dispute Resolution Act of 2004," allows the filing of provisional or interim measures with the regular courts whenever the arbitral tribunal has no power to act or to act effectively.[19]

TPI's verified petition in Civil Case No. 04-332, filed on 19 March 2004, was captioned as one "For: Confirmation, Recognition and Enforcement of Foreign Arbitral Award in Case 11264 TE/MW, ICC International Court of Arbitration, 'Transfield Philippines, Inc. v. Luzon Hydro Corporation (Place of arbitration: Singapore)."[20] In the said petition, TPI prayed:

> - That the THIRD PARTIAL AWARD dated February 18, 2004 in Case No. 11264/TE/MW made by the ICC International Court of Arbitration, the signed original copy of which is hereto attached as Annex "H" hereof, be confirmed, recognized and enforced in accordance with law.
>
> - That the corresponding writ of execution to enforce Question 31 of the said Third Partial Award, be issued, also in accordance with law.
>
> - That TPI be granted such other relief as may be deemed just and equitable, and allowed, in accordance with law.[21]

The pertinent portion of the Third Partial Award[22] relied upon by TPI were the answers to Questions 10 to 26, to wit:

"Question 30 Did TPI [LHC] wrongfully draw upon the security?

Yes

"Question 31 Is TPI entitled to have returned to it any sum wrongfully taken by LHC for liquidated damages?

Yes

"Question 32 Is TPI entitled to any acceleration costs?

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TPI is entitled to the reasonable costs TPI incurred after Typhoon Zeb as a result of LHC's 5 February 1999 Notice to Correct.[23]

According to LHC, the filing of the above case constitutes forum-shopping since it is the same claim for the return of US$17.9 Million which TPI made before the ICC Arbitral Tribunal and before this Court. LHC adds that while Civil Case No. 04-332 is styled as an action for money, the Third Partial Award used as basis of the suit does not authorize TPI to seek a writ of execution for the sums drawn on the letters of credit. Said award does not even contain an order for the payment of money, but instead has reserved the quantification of the amounts for a subsequent determination, LHC argues. In fact, even the Fifth Partial Award,[24] dated 30 March 2005, does not contain such orders. LHC insists that the declarations or the partial awards issued by the ICC Arbitral Tribunal do not constitute orders for the payment of money and are not intended to be enforceable as such, but merely constitute amounts which will be included in the Final Award and will be taken into account in determining the actual amount payable to the prevailing party.[25]

R.A. No. 9825 provides that international commercial arbitrations shall be governed shall be governed by the Model Law on International Commercial Arbitration ("Model Law") adopted by the United Nations Commission on International Trade Law (UNCITRAL).[26] The UNCITRAL Model Law provides:

> ARTICLE 35. Recognition and enforcement
>
> (1) An arbitral award, irrespective of the country in which it was made, shall be recognized as binding and, upon application in writing to the competent court, shall be enforced subject to the provisions of this article and of article 36.
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> (2) The party relying on an award or applying for its enforcement shall supply the duly authenticated original award or a duly certified copy thereof, and the original arbitration agreement referred to in article 7 or a duly certified copy thereof. If the award or agreement is not made in an official language of this State, the party shall supply a duly certified translation thereof into such language.

Moreover, the New York Convention,[27] to which the Philippines is a signatory, governs the recognition and enforcement of foreign arbitral awards. The applicability of the New York Convention in the Philippines was confirmed in Section 42 of R.A. 9285. Said law also provides that the application for the recognition and enforcement of such awards shall be filed with the proper RTC. While TPI's resort to the RTC for recognition and enforcement of the Third Partial Award is sanctioned by both the New York Convention and R.A. 9285, its application for enforcement, however, was premature, to say the least. True, the ICC Arbitral Tribunal had indeed ruled that LHC wrongfully drew upon the securities, yet there is no order for the payment or return of the proceeds of the said securities. In fact, Paragraph 2142, which is the final paragraph of the Third Partial Award, reads:

> 2142. All other issues, including any issues as to quantum and costs, are reserved to a future award.[28]

Meanwhile, the tribunal issued its Fifth Partial Award[29] on 30 March 2005. It contains, among others, a declaration that while LHC wrongfully drew on the securities, the drawing was made in good faith, under the mistaken assumption that the contractor, TPI, was in default. Thus, the tribunal ruled that while the amount drawn must be returned, TPI is not entitled to any damages or interests due to LHC's drawing on the securities.[30] In the Fifth Partial Award, the tribunal ordered:

> 6. Order
>
> 6.1 General
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> 166. This Fifth Partial Award deals with many issues of quantum. However, it does not resolve them all. The

> outstanding quantum issues will be determined in a future award. It will contain a reconciliation of the amounts awarded to each party and a determination of the net amount payable to Claimant or Respondent, as the case may be.
>
> 167. In view of this the Tribunal will make no orders for payment in this Fifth Partial Award. The Tribunal will make a number of declarations concerning the quantum issues it has resolved in this Award together with the outstanding liability issues. The declarations do not constitute orders for the payment of money and are not intended to be enforceable as such. They merely constitute amounts which will be included in the Final Award and will be taken into account in determining the actual amount payable.[31] (Emphasis Supplied.)

Further, in the Declarations part of the award, the tribunal held:

> 6.2 Declarations
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> 168. The Tribunal makes the following declarations:
>
> x x x
>
> 3. LHC is liable to repay TPI the face value of the securities drawn down by it, namely, $17,977,815. It is not liable for any further damages claimed by TPI in respect of the drawdown of the securities.
>
> x x x.[32]

Finally, on 9 August 2005, the ICC Arbitral tribunal issued its Final Award, in essence awarding US$24,533,730.00, which included TPI's claim of U$17,977,815.00 for the return of the securities from LHC.[33]

The fact that the ICC Arbitral tribunal included the proceeds of the securities shows that it intended to make a final determination/award as to the said issue only in the Final Award and not in the previous partial awards. This supports LHC's position that when the Third Partial Award was released and Civil Case No. 04-332 was filed, TPI was not yet authorized to seek the issuance of a writ of execution since the quantification of the amounts due to TPI had not yet been settled by the ICC Arbitral tribunal. Notwithstanding the fact that the amount of proceeds drawn on the securities was not disputed the application for the enforcement of the Third Partial Award was precipitately filed. To repeat, the declarations made in the Third Partial Award do not constitute orders for the payment of money.

Anent the claim of TPI that it was LHC which committed forum-shopping, suffice it to say that its bare allegations are not sufficient to sustain the charge.

WHEREFORE, the Court RESOLVES to DISMISS the charges of forum-shopping filed by both parties against each other.

No pronouncement as to costs.

SO ORDERED.

Puno, (Chairman), Austria-Martinez, Callejo, Sr., and Chico-Nazario, JJ., concur.

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[1] 443 SCRA 307.

[2] Resolution dated 27 April 2005, rollo, 1213-1219.

[3] The growth of international commercial arbitration (ICA) is both a rejection of the non-binding conciliation and mediation process and a retreat from the vicissitudes and uncertainties of international business litigation.

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More positively, the mechanism offers predictability and neutrality as a forum and allows the parties to select and shape the procedures and costs of dispute resolution. On the other hand, ICA procedures are often informal and not laden with legal rights. R. H. Folsom, M. W. Gordon, J. A. Spanogle, Jr., International Business Transactions, pp. 1113-1114 (2nd ed., 1 year published).

[4] The award purportedly held that LHC wrongfully drew on the securities; and that TPI is entitled to the return of the said sums, liquidated damages, and liquidation costs.

[5] Rollo, pp. 1289-1293.

[6] ANZ Bank's Motion to be Excused, id. at 1220; Security Bank's Motion to be Excused, temporary rollo.

[7] Motion for Leave to Set Case for Oral Argument, id. at 1747-1751.

[8] Opposition, id. at 1757-1760.

[9] Id. at 1763-1767.

[10]Id. at 1823-1829.

[11] TPI also submitted a copy of the Award, id. at 1768-1818.

[12] Mondragon Leisure and Resorts Corporation v. United Coconut Planters Bank, G.R. No. 154187, 14 April 2004, 427 SCRA 585, 590.

[13] Roxas v. Court of Appeals, G.R. No. 139337, 15 August 2001, 363 SCRA 207, 217.

[14] Korea Exchange Bank v. Hon. Rogelio C. Gonzales, et al., G.R. Nos. 142286-87, 15 April 2005, 456 SCRA 224, 243, citing Benedicto v. Court of Appeals, G.R. No. 125359, 4 September 2001, 364 SCRA 334.

[15] Rollo, p. 1270.

[16] Id. at 1267.

[17] Art. 23 (2), Rules of Arbitration of the International Chamber of Commerce provides:

Before the file is transmitted to the Arbitral tribunal and in appropriate circumstances even thereafter, the parties may apply to any competent judicial authority for interim or conservatory measures. The application of a party to a judicial authority for such measure or for the implementation of any such measure ordered by an Arbitral tribunal shall not be deemed to be an infringement or a waiver of the arbitration agreement and shall not affect the relevant powers reserved to the Arbitral tribunal. Any such application and any measures taken by the judicial authority must be notified without delay to the Secretariat. The Secretariat shall inform the Arbitral tribunal thereof. (emphasis supplied)

[18] Section 14. Subpoena and subpoena duces tecum. - Arbitrators shall have the power to require any person to attend a hearing as a witness. They shall have the power to subpoena witnesses and documents when the relevancy of the testimony and the materiality thereof has been demonstrated to the arbitrators. Arbitrators may also require the retirement of any witness during the testimony of any other witness. All of the arbitrators appointed in any controversy must attend all the hearings in that matter and hear all the allegations and proofs of the parties; but an award by the majority of them is valid unless the concurrence of all of them is expressly required in the submission or contract to arbitrate. The arbitrator or arbitrators shall have the power at any time, before rendering the award, without prejudice to the rights of any party to petition the court to take measures to safeguard and/or conserve any matter which is the subject of the dispute in arbitration. (Emphasis supplied.)

[19] Sec. 28, R..A. No. 9285. Grant of Interim Measure of Protection. (a) It is not incompatible with an arbitration agreement for a party to request, before constitution of the tribunal, from a Court an interim measure of protection and for the Court to grant such measure. After constitution of the arbitral tribunal and during arbitral proceedings, a request for an interim measure of protection, or modification thereof, may be made with the arbitral tribunal or to the extent that the arbitral tribunal has no power to act or is unable to act effectively, the request may be made with the Court. x x x. (Emphasis supplied.)

[20]Rollo, p. 672.

[21] Id. at 680.

[22]Id. at 661.

[23] Third Partial Award, id. at 114-664.

[24]Id. at 1685-1743.

[25]Id. at 1665-66.

[26] Rep. Act No. 9285, Sec. 19.

[27] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, signed at New York on 10 June 1958, and ratified by the Philippines under Senate Resolution No. 71.

[28] Rollo, p. 663.

[29] Id. at 1685-1703.

[30]Id. at 1703-1705.

[31] Id. at 1741.

[32]Id. at 1741-1742.

[33]Final Award, id. at 1768-1815.

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