

**GENERAL INSURANCE & SURETY CORPORATION, PETITIONER,
VS. UNION INSURANCE SOCIETY OF CANTON, LTD., THE BRITISH
OAK INSURANCE CO., LTD., BRITISH TRADERS' INSURANCE CO.,
LTD., BEAVE...**

G.R. Nos. 30475-76. November 22, 1989

Ponente: MEDIALDEA, J.

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MEDIALDEA, J.:

This is a petition for review on certiorari of the decision of the then Court of First Instance of Manila (now Regional Trial Court), Branch XII dated November 21, 1968 in Civil Cases Nos. 68558 and 68559, declaring that there is a genuine controversy or dispute between the parties that is subject to arbitration under their express agreements and ordering herein petitioner to comply with the terms and conditions of the arbitration clause in the said agreements.

Civil Case No. 68558 and Civil Case No. 68559, both praying for a declaration that a dispute exists between the parties that is subject to arbitration, were filed by herein private respondents on February 18, 1967. By agreement of their counsel, the two cases were consolidated and a joint trial was held in view of the fact that, except for the amounts involved in each case, the facts and circumstances are similar (p. 51, Rollo).

The facts as stated in the trial court's decision are as follows:

"The Union Insurance Society of Canton, Ltd. and the British Traders' Insurance Co., Ltd. are insurance corporations organized and existing under the laws of Great Britain and licensed to do business in the Philippines with head offices in Hong Kong and branch offices at Hong Kong Bank Building, No. 117 Juan Luna Street, Manila. The other petitioners are also engaged in insurance business and are mere subsidiaries of the Union Insurance Society of Canton, Ltd. of Hong Kong.

"In Civil Case No. 68558 the petitioners (private respondents herein) and the respondent (petitioner herein) General Insurance & Surety Corporation entered into a First Surplus Reinsurance Agreement which was executed by petitioners in London on January 28, 1959, and by the respondent in Manila on June 3, 1959. The parties agreed on reciprocal reinsurance expressed and payable in pounds sterling between the petitioners and respondent commencing on January 1st, 1959, and terminating on December 31st, 1961. In the said reinsurance agreement, the petitioners and respondent expressly agreed to settle by arbitration all their differences of whatever nature or controversy arising out of the contract, which agreement is embodied in Article XII of the reinsurance agreement which reads:

'In the event of any dispute at any time arising out of or in any way connected with or relating to this Agreement, whether before or after the termination of notice under the Agreement the same shall be referred to the decision of two arbitrators one to be appointed in writing by the London Manager of the Union Insurance Society of Canton, Limited, and the other by the Reinsurer or in case of disagreement between the Arbitrators to the decision of an Umpire to be appointed in writing by the Arbitrators before entering upon the reference and it shall be a condition

precedent that unless and until an award has been made neither party shall have any right of action against the other.

'If either party refuse or neglect to nominate an Arbitrator within thirty days after being required so to do or should the two Arbitrators have failed to appoint an Umpire within thirty days, any appointments so failing to be made shall be left to the choice of the Chairman for the time being of the Fire Offices' Committee, London.

'The Arbitrators and Umpire will not have to undergo any judicial formalities and may abstain from following the strict rules of law.

'The costs of the arbitration and award shall be in the discretion of the Court of Arbitration.'

"The reinsurance agreement was terminated on December 31, 1961, on which date the petitioners claim that there was due from the respondent under the treaties negotiated between the petitioners as ceding companies and the respondent as reinsurer the sum of E4,784.5.1 which respondent should pay to the petitioners in pounds sterling. However, while petitioners requested the respondent to pay the aforesaid sum in pounds sterling or in Philippine pesos at the exchange rate prevailing on the date of payment so that the amount of Philippine pesos to be paid by the respondent will purchase the amount of E4,784.5.1 in which said obligation is payable, respondent refused to pay in pounds sterling and insisted that it should pay the said amount in Philippine pesos at the old official exchange rate of P2.015 to \$1.00. In view of the respondent's refusal to pay in the manner demanded by the petitioners, the latter made a written formal demand upon respondent to proceed with the arbitration of their controversy in the manner provided for in the reinsurance agreement, which demand was received by the respondent on August 18, 1966. In the said communication the petitioners informed the respondent that they had appointed Mr. T. B. Turvey of Victory Insurance Co., Ltd., 7316 King William St., London, E. C. 4, as arbitrator in their behalf and requested respondent to name its own arbitrator. The respondent, however, refused to proceed with the arbitration, contending that there was no controversy or dispute existing between the parties so that there was no need for arbitration. Hence, the filing of this case.

"In Civil Case No. 68559 the petitioners and the respondent entered into a Retrocession Quota Share Fire Pool Agreement executed by the petitioners in London on February 17, 1960, and by the respondent in Manila on April 11, 1960. In said agreement the parties agreed on reciprocal reinsurance arrangements expressed and payable in pounds sterling which would commence on January 1st, 1960, and would terminate on December 31st, 1961. The retrocession agreement entered into by the parties provides in Article XII thereof the following:

'All differences of whatever nature arising out of this Agreement shall be settled according to an equitable rather than a strictly legal interpretation of its provisions. Such differences shall be submitted to a Court of Arbitration in London composed of two independent Fire Insurance experts who shall be Managers of Insurance or Reinsurance Companies of whom each party shall select one and of an Umpire to be chosen by the Arbitrators prior to the hearing of the case and who has only to act in the event of a disagreement between the Arbitrators.

'If either of the parties fail to appoint its Arbitrator within four weeks of the decision to refer the difference to arbitration or if the Arbitrators do not agree upon the choice of their Umpire within four weeks of their nomination such Arbitrator or Umpire respectively shall at the request of either party be appointed by the Chairman for the time being of the Fire Offices' Committee, London.

'The Applicant Company shall formulate its claim within one month of the formation of the Court of Arbitration and the Respondent Company shall lay its reply before the Court of Arbitration within one month of the receipt of such claims.

'The decision of the Arbitrators or the Umpire shall be final and not subject to appeal and they shall also settle regarding the payment of the expenses incurred in connection with the arbitration proceedings.'

"The retrocession agreement was terminated on December 31st, 1961, and on the said date the petitioners claim that there was due from the respondent under the treaties negotiated between the petitioners as ceding companies and the respondent as reinsurer the sum of E1,035.2.7. However, while the petitioners requested the respondent to pay the aforesaid sum in pounds sterling or in Philippine pesos at the exchange rate prevailing on the date of payment so that the amount of Philippine pesos to be paid by respondent will purchase the amount of E1,035.2.7 pounds sterling, respondent refused to pay in pounds and insisted to pay the said amount in Philippine pesos at the old official exchange rate of P2.015 to \$1.00. Because of the respondent's refusal to pay in the manner demanded by the petitioners, the latter made a formal written demand upon the respondent to proceed with the arbitration of their controversy in accordance with their retrocession agreement, which demand was received by the respondent on August 18, 1966. In the said demand the petitioners likewise notified the respondent that they had appointed Mr. T. B. Turvey of Victory Insurance Co., Ltd. of 7316 King William St. London, E. C. 4 as arbitrator in their behalf and requested the respondent to name its own arbitrator. The said formal demand and a supplemental letter were received by the respondent. However, the respondent replied that there was no controversy or dispute existing between the parties so that there was no need for arbitration. In view of this reply of the respondent, the parties filed also this case in court." (pp. 51-56, Rollo)

After a joint trial, the Court ordered both parties to submit their respective memoranda. In its memorandum, petitioner, for the first time, invoked RA 529 as its defense (p. 77, Rollo), which defense however, was not considered by the trial court in its decision.

Judgment was then rendered on November 21, 1968 declaring that a valid controversy existed and the herein petitioner was ordered to submit to arbitration. The dispositive portion of the decision reads:

"IN VIEW OF THE FOREGOING, the Court hereby renders judgment declaring that in Case No. 68558, as well as in Civil Case No. 68559, there is a genuine controversy or dispute between the petitioners and the respondent that is subject to arbitration under their expressed agreements, and orders the respondent to comply with the terms and conditions of the arbitration clause in said agreement. The prayer of the petitioners to require respondent to pay attorney's fees is denied. The respondent is hereby sentenced to pay the costs of these actions.

"SO ORDERED." (p. 66, Rollo)

The motion for reconsideration filed by herein petitioners in the trial court was denied on January 17, 1969 (p. 86, Rollo).

In this petition for review, petitioners raised the following assignment of errors:

"I

THE TRIAL COURT ERRED IN NOT DECLARING NULL AND VOID THE PROVISIONS OF THE REINSURANCE AGREEMENT AND RETROCESSION AGREEMENT WHICH GIVE THE OBLIGEE, RESPONDENTS IN THESE CASES, THE RIGHT TO REQUIRE PAYMENT IN POUND STERLING OR IN AN AMOUNT OF PHILIPPINE MONEY MEASURED THEREBY, NOTWITHSTANDING THAT SAID PROVISIONS ARE CONTRARY TO PUBLIC POLICY STATED IN REPUBLIC ACT NO. 529 AND THUS VOID FROM THE BEGINNING, ACCORDING TO ARTS. 1306 AND 1409(7), NEW CIVIL CODE, AND, FURTHER, IN DRAWING THEREFROM A CONCLUSION THAT THERE IS REALLY A GENUINE CONTROVERSY OR DISPUTE WHICH SUPPOSEDLY AROSE FROM THE RESPONDENTS' CLAIMS, BECAUSE OF THE SAID PROVISIONS IN THE AFORESAID TWO AGREEMENTS, THUS ENTITLING THEM TO ARBITRATION PROVIDED THEREUNDER.

"II

THE TRIAL COURT ERRED ALSO IN NOT HOLDING THAT THE CONTROVERSY CLAIMED BY RESPONDENTS TO HAVE ARISEN OUT OF THE PROVISIONS OF SAID TWO AGREEMENTS, WHICH GIVE THEM, ACCORDING TO THEM, THE RIGHT TO REQUIRE PAYMENT IN POUND STERLING OR ITS EQUIVALENT AMOUNT IN PHILIPPINE MONEY MEASURED THEREBY, AFFECTS PUBLIC INTEREST, AS STATED IN REPUBLIC ACT NO. 529, AND, THEREFORE, FOLLOWING THE ESTABLISHED JURISPRUDENCE ON THE MATTER, SAID CONTROVERSY IS NEITHER ARBITRABLE NOR A PROPER SUBJECT-MATTER FOR SUBMISSION TO ARBITRATION. HENCE, IT, LIKEWISE ERRED IN THUS ORDERING THE PETITIONER TO SUBMIT SAID CONTROVERSY TO ARBITRATION AND TO COMPLY WITH THE TERMS AND CONDITIONS CONTAINED IN THE SAID ARBITRATION AGREEMENTS.

"III

THE TRIAL COURT, LIKEWISE, ERRED IN NOT DECLARING THE ARBITRATION PROVISIONS OF THE REINSURANCE AGREEMENT AND RETROCESSION AGREEMENT NO LONGER IN FORCE AND EFFECT SINCE DECEMBER 31, 1961, BECAUSE SAID AGREEMENTS OF WHICH THE ARBITRATION CLAUSES IN QUESTION ARE THEIR PARTS WERE UNCONDITIONALLY CANCELLED BY BOTH PARTIES EFFECTIVE DECEMBER 31, 1961. THUS IT ALSO ERRED IN ORDERING THE PETITIONER TO COMPLY WITH SAID ARBITRATION CLAUSES BECAUSE THE DEMAND FOR SUBMISSION TO IT WAS MADE ON AUGUST 18, 1966 ONLY, OR ALMOST SIX (6) YEARS AFTER THE CANCELLATION OF THE AGREEMENTS AND WHEN THERE WERE NO MORE ARBITRATION CLAUSES TO ENFORCE.

"IV

THE LOWER COURT ERRED, FURTHERMORE, IN NOT HOLDING THAT THE RESPONDENTS HAVE NO RIGHT TO ASK FOR ARBITRATION UNDER SAID TWO AGREEMENTS BECAUSE THEY ALREADY AGREED IN WRITING (ANNEXES '1' & '2' OF PETITIONER'S ANSWERS, PAGES 146-147 & 148-149, RECORDS) THAT PAYMENTS TO EACH OTHER WOULD BE MADE TO BOTH IN U.S. DOLLARS. AS A MATTER OF FACT, SINCE THEN, ALL PAYMENTS MADE BY PETITIONER WERE ALREADY IN U.S. DOLLARS WITHOUT RESPONDENTS' DEMANDING THAT THEY BE MADE IN POUND STERLING AND WITHOUT RAISING A CLAIM THAT A DISPUTE HAS ARISEN THEREFROM, AND, FURTHER, WITHOUT INVOKING THEIR RIGHT TO SUBMIT THE SAME TO ARBITRATION UNDER SAID TWO AGREEMENTS. HENCE, THE LOWER COURT, UNDOUBTEDLY, ERRED IN NOT DECLARING THAT IN VIEW OF SAID AGREEMENT THAT PAYMENTS WOULD BE MADE IN U.S. DOLLARS, WHICH, IN EFFECT, WAS RELIGIOUSLY FOLLOWED ALL THE WAY DURING THE LIFETIME OF SAID AGREEMENTS, THERE WAS NO ARBITRATION AGREEMENT AT ALL LEFT TO ENFORCE, FOLLOWING THE ESTABLISHED JURISPRUDENCE ON THE MATTER." (pp. 1-4, Petitioner's Brief)

The crux of the controversy boils down to whether or not a controversy or dispute exists under the circumstances to warrant an order compelling the parties to submit to arbitration.

A cursory reading of the petitions (complaints) in the trial court and the answers thereto will readily reveal that indeed, a valid controversy existed between the parties, which is a proper subject for arbitration. The two (2) civil cases brought by herein respondents alleged that there was still some amount payable in pounds sterling due to it from the herein petitioner. This allegation was denied by petitioner in its answer. Petitioner's defenses in the trial court were anchored on three (3) grounds, namely: 1) that there was a previous agreement between the parties that beginning January 1, 1959, the balance under the agreement will be made payable in US dollars; 2) that the

provision to refer to arbitration any dispute arising from the reinsurance and the retrocession agreements can no longer be enforced five (5) years after the termination of both agreements; and 3) as a special alternative defense, that it was in fact the private respondents who owe the petitioner some amount. Since it was not disputed that in both the First Surplus Reinsurance Agreement and the Retrocession Quota Share Fire Pool Agreement the parties had agreed that any dispute arising from these agreements shall be referred to a set of arbitrators, the trial court correctly ordered the parties to submit to arbitration. As found by the trial court:

"It will be seen from the pleadings of the parties that the only and principal issue to be decided by the court is whether or not there is a controversy or dispute between the petitioners and the respondent under their reinsurance agreement in Civil Case No. 68558 and in their retrocession agreement in Civil Case No. 68559 which controversy or dispute was subject to arbitration under their agreements. One of the special defenses of the respondent is that the respondent does not owe any amount to the petitioners. Inasmuch as the court is not called upon to determine the merits of the claim of the petitioners, this special defense of the respondent is immaterial for the purpose of this decision." (p. 56, Rollo; emphasis supplied)

We hold therefore, that as regards the dispute on the amount the parties owe each other, the same is a proper subject of arbitration.

In an attempt to exclude this case from the coverage of their arbitration agreement, petitioner belatedly invoked R.A. 529 as a defense. It contended that the agreement to pay in pounds sterling cannot be legally enforced. Republic Act 529 declares as against public policy, and null and void, provisions in agreements which "purport(s) to give the obligee the right to require payment in gold or in a particular kind of coin or currency other than Philippine Currency or in an amount of money in the Philippines measured thereby." Thus, petitioner continues that the agreement to pay in pounds sterling can be considered as not in existence at all. There was then nothing to arbitrate. But, while petitioner seeks to evade its obligation to pay in pounds sterling as being contrary to public policy, it manifested its willingness to pay in another foreign currency, U.S. dollars.

As already stated, petitioner's invocation of R.A. 529 as a defense was raised for the first time only in its memorandum. It is a basic rule in procedure that defenses and objections not pleaded either in a motion to dismiss or in the answer are deemed waived, the only exceptions recognized under the rule being: 1) a failure to state a cause of action; and 2) lack of jurisdiction (Sec. 2, Rule 9, Rules of Court).

But, even if We were to consider petitioner's defense of R.A. 529, it would not in any way help petitioner's effort to successfully evade its duty, under their agreement, to submit to arbitration.

Whether petitioner agreed to pay its obligation in pounds sterling or in US dollars, " it is settled that, "x x x if there is any agreement to pay the (instant) obligation in a currency other than the Philippine currency, the same is null and void as contrary to public policy (Republic Act No. 529).^{*} However, R.A. 529 does not invalidate the whole contract which gives the obligee the right to demand payment in gold or other foreign currencies. What it declares as null and void is the provision to such effect. Consequently, the transaction or contract subsists. The most that could be demanded is to pay said obligation in Philippine currency. (See Section 1, R.A. 529).

As to what rate of exchange shall prevail has been settled in the case of *Kalalo v. Luz*, L-27782, July 31, 1970, (34 SCRA 353, 354). It was held, thus:

"x x x, if the obligation was incurred prior to the enactment of the Act (R.A. 529) and require payment in a particular kind of coin or currency other than the Philippine currency the same shall be discharged in Philippine currency measured at the prevailing rate of exchange at the time the obligation was incurred. As We have adverted to, Republic Act 529 was enacted on June 16, 1950. In the case now before Us, the obligation of appellant to pay appellee the 20% of \$140,000.00, or the sum of \$28,000.00, accrued on August 25, 1961, or after the enactment of Republic act 529. It follows that the provision of Republic Act which requires payment

at the prevailing rate of exchange when the obligation was incurred cannot be applied. Republic Act 529 does not provide for the rate of exchange for the payment of obligation incurred after the enactment of the said Act. The logical conclusion, therefore, is that the rate of exchange should be that prevailing at the time of payment. This view finds support in the ruling of this court in the case of *Engel vs. Velasco & Co.* where this court held that even if the obligation assumed by the defendant was to pay the plaintiff a sum of money expressed in American currency, the indemnity to be allowed should be expressed in Philippine currency at the rate of exchange at the time of judgment rather than at the rate of exchange prevailing on the date of defendant's breach. This is also the ruling of American courts, as follows:

'The value in domestic money of a payment made in foreign money is fixed with respect to the rate of exchange at the time of payment.' (70 C.J.S., p. 228)

'According to the weight of authority the amount of recovery depends upon the current rate of exchange, and not the par value of the particular money involved (48 C.J.S., 605-606.'

'The value in domestic money of a payment made in foreign money is fixed in reference to the rate of exchange at the time of such payment.' (48 C.J.S., 605)

In this case, the obligation was incurred between the years 1958-1961, or after the enactment of R.A. 529 (June 16, 1950). Hence, the rate of exchange shall be that prevailing at the time of payment.

Finally, petitioner, while admitting the existence of the provision to refer to arbitration any dispute or controversy arising from the reinsurance and the retrocession agreements, likewise contended that said provision can no longer be enforced five (5) years after the termination of both contracts on December 31, 1961.

The above contention of petitioner is not meritorious. The language of the reinsurance contract on arbitration of any dispute between them which may arise before or after the termination of the agreement is clear. Article XII of the Reinsurance Agreement (Annex "A," p. 101, Rollo) of petition, provides:

"ARTICLE XII

"In the event of any dispute at any time arising out of or in any way connected with or relating to this Agreement, whether before or after the termination of notice under the agreement, the same shall be referred to the decision of two arbitrators, one to be appointed in writing by the London Manager of the Union Insurance Society of Canton, Limited, and the other by the Reinsurer or in case of disagreement between the arbitrators to the decision of an Umpire to be appointed in writing by the arbitrators before entering upon the reference and it shall be a condition precedent that unless and until an award has been made neither party shall have any right of action against the other."

On the other hand, the retrocession agreement is also clear that all differences of whatever nature arising out of the agreement shall be submitted to a court of arbitration. No restriction as to time was contemplated by the parties. Further, the provision on arbitration is the remedy by which the parties may resort to for disputes arising from the agreements. While the two agreements have been terminated, the provision requiring arbitration remains as a remedy to settle any dispute/controversy arising from the agreements.

In the case of *Mindanao Portland Cement Corp. v. McDonough Construction Co. of Florida*, L-23390, April 24, 1967, (19 SCRA 814, 815), We ruled that where there is an agreement to arbitrate and one party puts up a claim which the other disputes, the need to arbitrate is imperative.

"Since there obtains herein a written provision for arbitration as well as failure on respondent's part to comply therewith, the court a quo rightly ordered the parties to proceed to arbitration in accordance with the terms of their agreement (Sec. 6, Rep. Act 876). Respondents' arguments touching upon the merits of the dispute are

improperly raised herein. They should be addressed to the arbitrators. This proceedings is merely a summary remedy to enforce the agreement to arbitrate. The duty of the court in this case is not to resolve the merits of the parties' claims but only to determine if they should proceed to arbitration or not. And although it has been ruled that a frivolous or patently baseless claim should not be ordered to arbitration, it is also recognized that the mere fact that a defense exists against a claim does not make it frivolous or baseless. (Butte Minors' Union No. 1, et al. v. Anaconda Co., 159 I Supp. 431, affirmed in 267 F. 2d. 941)."

WHEREFORE, the instant petition is denied. The questioned decision of the trial court is AFFIRMED.

SO ORDERED.

Narvasa, (Chairman), Cruz, Gancayco, and Griño-Aquino, JJ., concur.

* Eastboard Navigation, Ltd. v. Juan Ysmael and Co., Inc., L-9090, September 10, 1957.

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