

## FIRST DIVISION

**[ G.R. No. 196171, December 10, 2012 ]**

**RCBC CAPITAL CORPORATION, PETITIONER, VS. BANCO DE ORO UNIBANK, INC., RESPONDENT.**

**[G.R. NO. 199238]**

**BANCO DE ORO UNIBANK, INC., PETITIONER, VS. COURT OF APPEALS AND RCBC CAPITAL CORPORATION, RESPONDENTS.**

### D E C I S I O N

**VILLARAMA, JR., J.:**

Before the Court are two consolidated petitions separately filed by the parties in an arbitration case administered by the International Chamber of Commerce-International Court of Arbitration (ICC-ICA) pursuant to the arbitration clause in their contract.

#### The Case

In **G.R. No. 196171**, a petition for review under Rule 45 of the 1997 Rules of Civil Procedure, as amended, RCBC Capital Corporation (RCBC) seeks to reverse the Court of Appeals (CA) Decision<sup>[1]</sup> dated December 23, 2010 in CA-G.R. SP No. 113525 which reversed and set aside the June 24, 2009 Order<sup>[2]</sup> of the Regional Trial Court (RTC) of Makati City, Branch 148 in SP Proc. Case No. M-6046.

In **G.R. No. 199238**, a petition for certiorari under Rule 65, Banco De Oro Unibank, Inc. (BDO) assails the Resolution<sup>[3]</sup> dated September 13, 2011 in CA-G.R. SP No. 120888 which denied BDO's application for the issuance of a stay order and/or temporary restraining order (TRO)/preliminary injunction against the implementation of the Writ of Execution<sup>[4]</sup> dated August 22, 2011 issued by the Makati City RTC, Branch 148 in SP Proc. Case No. M-6046.

#### Factual Antecedents

On May 24, 2000, RCBC entered into a Share Purchase Agreement<sup>[5]</sup> (SPA) with Equitable-PCI Bank, Inc. (EPCIB), George L. Go and the individual shareholders<sup>[6]</sup> of Bankard, Inc. (Bankard) for the sale to RCBC of 226,460,000 shares (Subject Shares) of Bankard, constituting 67% of the latter's capital stock. After completing payment of the contract price (P1,786,769,400), the corresponding deeds of sale over the subject shares were executed in January 2001.

The dispute between the parties arose sometime in May 2003 when RCBC informed EPCIB and the other selling shareholders of an overpayment of the subject shares,

claiming there was an overstatement of valuation of accounts amounting to P478 million and that the sellers violated their warranty under Section 5(g) of the SPA.<sup>[7]</sup>

As no settlement was reached, RCBC commenced arbitration proceedings with the ICC-ICA in accordance with Section 10 of the SPA which states:

Section 10. **Arbitration**

Should there be any dispute arising between the parties relating to this Agreement including the interpretation or performance hereof which cannot be resolved by agreement of the parties within fifteen (15) days after written notice by a party to another, such matter shall then be finally settled by arbitration under the Rules of Conciliation and Arbitration of the International Chamber of Commerce in force as of the time of arbitration, by three arbitrators appointed in accordance with such rules. The venue of arbitration shall be in Makati City, Philippines and the arbitration proceedings shall be conducted in the English language. Substantive aspects of the dispute shall be settled by applying the laws of the Philippines. The decision of the arbitrators shall be final and binding upon the parties hereto and the expenses of arbitration (including without limitation the award of attorney's fees to the prevailing party) shall be paid as the arbitrators shall determine.<sup>[8]</sup>

In its Request for Arbitration<sup>[9]</sup> dated May 12, 2004, Claimant RCBC charged Bankard with deviating from and contravening generally accepted accounting principles and practices, due to which the financial statements of Bankard prior to the stock purchase were far from fair and accurate, and resulted in the overpayment of P556 million. For this violation of sellers' representations and warranties under the SPA, RCBC sought its rescission, as well as payment of actual damages in the amount of P573,132,110, legal interest on the purchase price until actual restitution, moral damages and litigation and attorney's fees, with alternative prayer for award of damages in the amount of at least P809,796,082 plus legal interest.

In their Answer,<sup>[10]</sup> EPCIB, Go and the other selling individual shareholders (Respondents) denied RCBC's allegations contending that RCBC's claim is one for overpayment or price reduction under Section 5(h) of the SPA which is already time-barred, the remedy of rescission is unavailable, and even assuming that rescission is permitted by the SPA, RCBC failed to file its claim within a reasonable time. They further asserted that RCBC is not entitled to its alternative prayer for damages, being guilty of laches and failing to set out the details of the breach as required under Section 7 of the SPA. A counterclaim for litigation expenses and costs of arbitration in the amount of US\$300,000, as well as moral and exemplary damages, was likewise raised by the Respondents.

RCBC submitted a Reply<sup>[11]</sup> to the aforesaid Answer.

Subsequently, the Arbitration Tribunal was constituted. Mr. Neil Kaplan was nominated by RCBC; Justice Santiago M. Kapunan (a retired Member of this Court) was nominated by the Respondents; and Sir Ian Barker was appointed by the ICC-

ICA as Chairman.

On August 13, 2004, the ICC-ICA informed the parties that they are required to pay US\$350,000 as advance on costs pursuant to Article 30 (3) of the ICC Rules of Arbitration (ICC Rules). RCBC paid its share of US\$107,000, the balance remaining after deducting payments of US\$2,500 and US\$65,000 it made earlier. Respondents' share of the advance on costs was thus fixed at US\$175,000.

Respondents filed an Application for Separate Advances on Costs<sup>[12]</sup> dated September 17, 2004 under Article 30(2) of the ICC Rules, praying that the ICC fix separate advances on the cost of the parties' respective claims and counterclaims, instead of directing them to share equally on the advance cost of Claimant's (RCBC) claim. Respondents deemed this advance cost allocation to be proper, pointing out that the total amount of RCBC's claim is substantially higher – more than 40 times – the total amount of their counterclaims, and that it would be unfair to require them to share in the costs of arbitrating what is essentially a price issue that is now time-barred under the SPA.

On September 20, 2004, the ICC-ICA informed Respondents that their application for separate advances on costs was premature pending the execution of the Terms of Reference (TOR).<sup>[13]</sup> The TOR was settled by the parties and signed by the Chairman and Members of the Arbitral Tribunal by October 11, 2004. On December 3, 2004,<sup>[14]</sup> the ICC-ICA denied the application for separate advances on costs and invited anew the Respondents to pay its share in the advance on costs. However, despite reminders from the ICC-ICA, Respondents refused to pay their share in the advance cost fixed by the ICC-ICA. On December 16, 2004, the ICC-ICA informed the parties that if Respondents still failed to pay its share in the advance cost, it would apply Article 30(4) of the ICC Rules and request the Arbitration Tribunal to suspend its work and set a new time limit, and if such requested deposit remains unpaid at the expiry thereof, the counterclaims would be considered withdrawn.<sup>[15]</sup>

In a fax-letter dated January 4, 2005, the ICC-ICA invited RCBC to pay the said amount in substitution of Respondents. It also granted an extension until January 17, 2005 within which to pay the balance of the advance cost (US\$175,000). RCBC replied that it was not willing to shoulder the share of Respondents in the advance on costs but nevertheless requested for a clarification as to the effect of such refusal to substitute for Respondents' share.<sup>[16]</sup>

On March 10, 2005, the ICC-ICA instructed the Arbitration Tribunal to suspend its work and granted the parties a final time-limit of 15 days to pay the balance of the advance on costs, failing which the claims shall be considered withdrawn, without prejudice to their reintroduction at a later date in another proceeding. The parties were advised that if any of them objects to the measure, it should make a request in writing within such period.<sup>[17]</sup> For the same reason of non-receipt of the balance of the advance cost, the ICC-ICA issued Procedural Order No. 3 for the adjournment of the substantive hearings and granting the Respondents a two-month extension within which to submit their brief of evidence and witnesses.

RCBC objected to the cancellation of hearings, pointing out that Respondents have been given ample time and opportunity to submit their brief of evidence and prepare for the hearings and that their request for postponement serves no other purpose

but to delay the proceedings. It alleged that Respondents' unjustified refusal to pay their share in the advance on costs warrants a ruling that they have lost standing to participate in the proceedings. It thus prayed that Respondents be declared as in default, the substantive hearings be conducted as originally scheduled, and RCBC be allowed to submit rebuttal evidence and additional witness statements.<sup>[18]</sup>

On December 15, 2005, the ICC-ICA notified the parties of its decision to increase the advances on costs from US\$350,000 to US\$450,000 subject to later readjustments, and again invited the Respondents to pay the US\$100,000 increment within 30 days from notice. Respondents, however, refused to pay the increment, insisting that RCBC should bear the cost of prosecuting its own claim and that compelling the Respondents to fund such prosecution is inequitable. Respondents reiterated that it was willing to pay the advance on costs for their counterclaim.<sup>[19]</sup>

On December 27, 2005, the ICC-ICA advised that it was not possible to fix separate advances on costs as explained in its December 3, 2004 letter, and again invited Respondents to pay their share in the advance on costs.

Respondents' response contained in the letter dated January 6, 2006 was still the same: it was willing to pay only the separate advance on costs of their counterclaim.

<sup>[20]</sup> In view of Respondents' continuing refusal to pay its equal share in the advance on costs and increment, RCBC wrote the ICC-ICA stating that the latter should compel the Respondents to pay as otherwise RCBC will be prejudiced and the inaction of the ICC-ICA and the Arbitration Tribunal will detract from the effectiveness of arbitration as a means of settling disputes. In accordance with Article 30(4) of the ICC Rules, RCBC reiterated its request to declare the Respondents as in default without any personality to participate in the proceedings not only with respect to their counterclaims but also to the claim of RCBC.<sup>[21]</sup>

Chairman Ian Barker, in a letter dated January 25, 2006, stated in part:

x x x x

**2. The Tribunal has no power under the ICC Rules to order the Respondents to pay the advance on costs sought by the ICC or to give the Claimant any relief against the Respondents' refusal to pay.** The ICC Rules differ from, for example, the Rules of the LCIA (Article 24.3) which enables a party paying the share of costs which the other party has refused to pay, to recover "*that amount as a debt immediately due from the defaulting party.*"

3. The only sanction under the ICC Rules is contained within Article 30 (4). Where a request for an advance on costs has not been complied with, after consultation with the Tribunal, the Secretary-General may direct the Tribunal to suspend its work. After expiry of a time limit, all claims and counterclaims are then considered as withdrawn. This provision cannot assist a Claimant who is anxious to litigate its claim. Such a Claimant has to pay the sums requested (including the Respondents' share) if it wishes the arbitration to proceed.

**4. It may be possible for a Claimant in the course of the arbitral hearing (or whenever costs are being considered by the Tribunal) to make submissions based on the failure of the Respondents to pay their share of the costs advance. What relief, if any, would have to be then determined by the Tribunal after having heard submissions from the Respondents.**

5. I should be pleased if the Claimant will advise the Tribunal of its intention in relation to the costs advance. If the costs are not paid, the arbitration cannot proceed.<sup>[22]</sup> (*Italics in the original; emphasis supplied*)

RCBC paid the additional US\$100,000 under the second assessment to avert suspension of the Arbitration Tribunal's proceedings.

Upon the commencement of the hearings, the Arbitration Tribunal decided that hearings will be initially confined to issues of liability (*liability phase*) while the substantial issues will be heard on a later date (*quantum phase*).

Meanwhile, EPCIB's corporate name was officially changed to Banco De Oro (BDO)-EPCIB after its merger with BDO was duly approved by the Securities and Exchange Commission. As such, BDO assumed all the obligations and liabilities of EPCIB under the SPA.

On September 27, 2007, the Arbitration Tribunal rendered a Partial Award<sup>[23]</sup> (First Partial Award) in ICC-ICA Case No. 13290/MS/JB/JEM, as follows:

## **15 AWARD AND DIRECTIONS**

15.1 The Tribunal makes the following declarations by way of Partial Award:

- (a) The Claimant's claim is not time-barred under the provisions of this SPA.
- (b) The Claimant is not estopped by its conduct or the equitable doctrine of laches from pursuing its claim.
- (c) As detailed in the Partial Award, the Claimant has established the following breaches by the Respondents of clause 5(g) of the SPA:
  - i) the assets, revenue and net worth of Bankard were overstated by reason of its policy on and recognition of Late Payment Fees;
  - ii) reported receivables were higher than their realisable values by reason of the 'bucketing' method, thus overstating Bankard's assets; and
  - iii) the relevant Bankard statements were inadequate and misleading in that their disclosures caused readers to be misinformed about Bankard's accounting policies on revenue and receivables.
- (d) Subject to proof of loss the Claimant is entitled to damages for the foregoing breaches.
- (e) The Claimant is not entitled to rescission of the SPA.