

SPECIAL SECOND DIVISION

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

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

R E S O L U T I O N

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:

1. 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]
2. 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;
3. 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

- a. 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;
- b. 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 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:

1. 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.
2. That the corresponding writ of execution to enforce Question 31 of the said Third Partial Award, be issued, also in accordance with law.
3. 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? 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