

SECOND DIVISION

[G.R. No. 196723, August 28, 2013]

**ASIAN CONSTRUCTION AND DEVELOPMENT CORPORATION,
PETITIONER, VS. SUMITOMO CORPORATION, RESPONDENT.**

[G.R. No. 196728]

**SUMITOMO CORPORATION, PETITIONER, VS. ASIAN
CONSTRUCTION AND DEVELOPMENT CORPORATION,
RESPONDENT.**

D E C I S I O N

PERLAS-BERNABE, J.:

Before the Court are consolidated petitions for review on *certiorari* which assail separate issuances of the Court of Appeals (CA) in relation to the partial and final awards rendered by the Construction Industry Arbitration Commission's (CIAC) Arbitral Tribunal (Arbitral Tribunal) in CIAC Case No. 28-2008.

In particular, the petition in G.R. No. 196723^[1] filed by Asian Construction and Development Corporation (Asian Construction) seeks to annul and set aside the CA's Resolutions dated July 23, 2010^[2] and April 18, 2011^[3] in CA-G.R. SP No. 112127 which dismissed its appeal from the Arbitral Tribunal's Partial Award^[4] dated December 15, 2009 (Partial Award) on the ground of forum shopping; while the petition in G.R. No. 196728^[5] filed by Sumitomo Corporation (Sumitomo) seeks to annul and set aside the CA's Decision^[6] dated January 26, 2011 and Resolution^[7] dated April 29, 2011 in CA-G.R. SP No. 113828 which modified the Arbitral Tribunal's Final Award^[8] dated March 17, 2010 (Final Award) by way of deleting the award of attorney's fees in Sumitomo's favor.

The Facts

On March 15, 1996, Asian Construction entered into a Civil Work Agreement^[9] (Agreement) with Sumitomo for the construction of a portion of the Light Rail Transit System along the Epifanio Delos Santos Avenue, specifically, from Shaw Boulevard, Mandaluyong City to Taft Avenue, Pasay City for a total cost of US\$19,982,000.00 (Project).^[10] The said Agreement provides that the "validity, interpretation, enforceability, and performance of [the same] shall be governed by and construed in accordance with the law of the State of New York, U.S.A. [(New York State Law)], without regard to, or legal effect of, the conflicts of law provisions thereof"^[11] and that any dispute, controversy or claim arising therefrom "shall be solely and finally settled by arbitration."^[12]

In May 1996, Sumitomo paid Asian Construction the amount of US\$2,997,300.00 as advance payment to be recovered in accordance with the terms of the Agreement. Later, an additional advance payment of US\$1,998,200.00 was made in October 1997.^[13] In all, Asian Construction received from Sumitomo the amount of US\$9,731,606.62, inclusive of the advance payments (before withholding tax of US\$97,308.44).^[14]

On September 1, 1998, Sumitomo informed Asian Construction that it was terminating the Agreement effective September 5, 1998 due to the following reasons: (a) Asian Construction's failure "to perform and complete the civil work for [Notice to Proceed] issued construction areas within the duration of the Time Schedule in [the] 'Contract Specification of Civil and Architectural Works (Station No. 8 to Station No. 13) x x x'"; (b) Asian Construction's failure to "provide adequate traffic management as required in the Scope of Works [pursuant to] subparagraph 5.2.4 of the Contract Specification of Civil and Architectural Work"; and (c) Asian Construction's failure to "[pay] the suppliers of certain materials and equipment used in the construction of the Project in violation of [p]aragraph 3.1.3[,], Article 3 of the Agreement."^[15] In view of the foregoing, Sumitomo requested Asian Construction to "make the necessary arrangements for the proper turnover of the Project x x x."^[16] Asian Construction, however, claimed that the accomplishments under Progress Billing No. (PB) 018^[17] dated June 10, 1998 and PB 019^[18] dated July 6, 1998, as well as other various claims, were still left unpaid.^[19] Hence, on December 22, 1998, it sent Sumitomo a letter,^[20] demanding payment of the total amount of US\$6,371,530.89. This was followed by several correspondences between the parties through 1999 to 2007 but no settlement was achieved.^[21]

The Proceedings Before the Arbitral Tribunal

On September 2, 2008, Asian Construction filed a complaint^[22] with the CIAC, docketed as CIAC Case No. 28-2008, seeking payment for its alleged losses and reimbursements amounting to US\$9,501,413.13, plus attorney's fees in the amount of P2,000,000.00.^[23] As a matter of course, an Arbitral Tribunal was constituted, with Alfredo F. Tadiar being designated as Chairman, and Salvador P. Castro and Jesse B. Grove as Members.^[24]

For its part, Sumitomo filed a Motion to Dismiss,^[25] questioning the CIAC's jurisdiction over the dispute on the ground that the arbitration should proceed in accordance with the Commercial Arbitration Rules of Japan.^[26] However, the aforesaid motion was denied.^[27] As such, Sumitomo filed an Answer,^[28] reiterating the CIAC's alleged lack of jurisdiction and further asserting that the claim was already time-barred. It added that had Asian Construction discharged its obligations under the Agreement to itemize and justify its claims, the same could have been amicably settled years ago. In this respect, it made a counterclaim for the unutilized portion of the advance payments, attorney's fees and costs of litigation in the amount of at least P10,000,000.00.^[29]

Subsequently, the parties signed a TOR,^[30] stipulating the admitted facts and defining the issues to be determined in the arbitration proceedings.

On December 15, 2009, the Arbitral Tribunal rendered the Partial Award^[31] which affirmed its jurisdiction over the dispute but held that the parties were bound by their Agreement that the substantive New York State Law shall apply in the resolution of the issues.^[32] It proceeded to dismiss both the claims and counterclaims of the parties on the ground that these had already prescribed under New York State Law's six-year statute of limitations^[33] and ruled that, in any case, were it to resolve the same on the merits, "it would not produce an affirmative recovery for the claimant."^[34]

Aggrieved, Asian Construction filed before the CA, on January 5, 2010, a Rule 43 Petition for Review,^[35] docketed as CA-G.R. SP No. 112127 (First CA Petition), seeking the reversal of the Partial Award.

Meanwhile, notwithstanding its dismissal of the claims and counterclaims, the Arbitral Tribunal further directed the parties to itemize their respective claims for costs and attorney's fees and to submit factual proof and legal bases for their entitlement thereto.^[36] Pursuant to this directive, Sumitomo submitted evidence to prove the costs it had incurred and paid as a result of the arbitration proceedings.^[37] Asian Construction, on the other hand, did not present any statement or document to substantiate its claims but, instead, submitted an Opposition^[38] dated March 8, 2010 (opposition) to Sumitomo's claim for costs. The Arbitral Tribunal did not act upon the opposition because it was treated, in effect, as a motion for reconsideration which was prohibited under the CIAC Revised Rules of Procedure Governing Construction Arbitration (CIAC Revised Rules).^[39]

On March 17, 2010, the Arbitral Tribunal rendered the Final Award^[40] which granted Sumitomo's claim for attorney's fees in the amount of US\$200,000.00. It held that while the filing of the arbitration suit cannot be regarded as "clearly unfounded" because of the two progress billings that were left unpaid, Asian Construction's disregard of the Agreement to have the dispute resolved in accordance with New York State Law had forced Sumitomo to incur attorney's fees in order to defend its interest.^[41] It further noted that if Asian Construction had accepted the settlement offered by Sumitomo, then, the arbitration proceedings would have even been aborted.^[42] On the other hand, a similar claim for attorney's fees made by Asian Construction was denied by reason of the latter's failure to submit, as directed, proof of its entitlement thereto.^[43] As to the matter of costs, the Arbitral Tribunal declared Sumitomo relieved from sharing *pro-rata* in the arbitration costs and, consequently, directed Asian Construction to shoulder the same costs in full and reimburse Sumitomo the amount of P849,532.45. However, it ordered Sumitomo to bear all the expenses related to the appointment of the foreign arbitrator considering that such service was secured upon its own initiative and without the participation and consent of Asian Construction.^[44]

Dissatisfied with the Arbitral Tribunal's ruling, Asian Construction filed another Rule 43 Petition for Review^[45] before the CA, on May 3, 2010, docketed as CA-G.R. SP No. 113828 (Second CA Petition), this time, to set aside the Final Award. In this light, it claimed gross negligence and partiality on the part of the Arbitral Tribunal and asserted, *inter alia*, that, apart from being a non-arbitrable issue, an award of attorney's fees would be premature since the prevailing party can only be

determined when the case is decided with finality. Moreover, it maintained that both claims of Asian Construction and the counterclaims of Sumitomo had already been dismissed for being time-barred.^[46]

The CA Ruling

On July 23, 2010, the CA rendered a Resolution^[47] (July 23, 2010 Resolution), dismissing Asian Construction's First CA Petition against the Partial Award on the ground of forum-shopping, after it was shown that: (a) the aforesaid petition was filed while the arbitration case was still pending final resolution before the Arbitral Tribunal; and (b) Asian Construction's opposition to Sumitomo's claim for costs filed before the Arbitral Tribunal had, in fact, effectively sought for the same relief and stated the same allegations as those in its First CA Petition. The CA also noted Asian Construction's premature resort to a petition for review because what was sought to be nullified was not a final award, but only a partial one. The CA eventually denied Asian Construction's motion for reconsideration in a Resolution^[48] dated April 18, 2011. Hence, Asian Construction's petition before the Court, docketed as G.R. No. 196723.

Meanwhile, the CA gave due course to Asian Construction's Second CA Petition assailing the Final Award and rendered a Decision^[49] on January 26, 2011, upholding the Arbitral Tribunal's ruling except the award of attorney's fees in favor of Sumitomo. The CA held that the fact that Asian Construction initiated an action or refused to compromise its claims cannot be considered unjustified or made in bad faith as to entitle Sumitomo to the aforesaid award. Consequently, Sumitomo moved for reconsideration,^[50] asserting that Asian Construction's Second CA Petition should have instead been dismissed in its entirety considering their Agreement that the Arbitral Tribunal's decisions and awards would be final and non-appealable. However, in a Resolution^[51] dated April 29, 2011, the CA denied the motion for reconsideration. Thus, Sumitomo's petition before the Court, docketed as G.R. No. 196728.

The Issues Before the Court

The essential issues for the Court's resolution are as follows: (a) in G.R. No. 196723, whether or not the CA erred in dismissing Asian Construction's First CA Petition on the ground of forum shopping; and (b) in G.R. No. 196728, whether or not the CA erred in reviewing and modifying the Final Award which Sumitomo insists to be final and unappealable.

The Court's Ruling

The petitions should be denied.

A. Dismissal of Asian Construction's First CA Petition; forum shopping.

Forum shopping is the act of a litigant who repetitively availed of several judicial remedies in different courts, simultaneously or successively, all substantially founded on the same transactions and the same essential facts and circumstances, and all raising substantially the same issues, either pending in or already resolved adversely by some other court, to increase his chances of obtaining a favorable

decision if not in one court, then in another. More particularly, forum shopping can be committed in three ways, namely: (a) by filing multiple cases based on the same cause of action and with the same prayer, the previous case not having been resolved yet (where the ground for dismissal is *litis pendentia*); (b) by filing multiple cases based on the same cause of action and with the same prayer, the previous case having been finally resolved (where the ground for dismissal is *res judicata*); and (c) by filing multiple cases based on the same cause of action but with different prayers (splitting of causes of action, where the ground for dismissal is also either *litis pendentia* or *res judicata*).^[52] Forum shopping is treated as an act of malpractice and, in this accord, constitutes a ground for the summary dismissal of the actions involved.^[53] To be sure, the rule against forum shopping seeks to prevent the vexation brought upon the courts and the litigants by a party who asks different courts to rule on the same or related causes and grant the same or substantially the same reliefs and in the process creates the possibility of conflicting decisions being rendered by the different fora upon the same issues.^[54]

In this case, the Court finds that the CA committed no reversible error in dismissing Asian Construction's First CA Petition on the ground of forum shopping since the relief sought (*i.e.*, the reconsideration of the Partial Award) and the allegations stated therein are identical to its opposition to Sumitomo's claim for costs filed before the Arbitral Tribunal while CIAC Case No. 28-2008 was still pending. These circumstances clearly square with the first kind of forum shopping which thereby impels the dismissal of the First CA Petition on the ground of *litis pendentia*.

On this score, it is apt to point out that Asian Construction's argument that it merely complied with the directive of the Arbitral Tribunal cannot be given any credence since it (as well as Sumitomo) was only directed to submit evidence to prove the costs it had incurred and paid as a result of the arbitration proceedings. However, at variance with the tribunal's directive, Asian Construction, in its opposition to Sumitomo's claim for costs, proceeded to seek the reversal of the Partial Award in the same manner as its First CA Petition. It cannot, therefore, be doubted that it treaded the course of forum shopping, warranting the dismissal of the aforesaid petition.

In any case, the Court observes that the First CA Petition remains dismissible since the CIAC Revised Rules provides for the resort to the remedy of a petition for review only against a final arbitral award,^[55] and not a partial award, as in this case.

In fine, the Court upholds the CA's dismissal of Asian Construction's petition in CA-G.R. SP No. 112127 (First CA Petition) and based on this, denies its petition in G.R. No. 196723.

B. Review and modification of the Final Award.

Sumitomo Corporation faults the CA for reviewing and modifying a final and non-appealable arbitral award and insists that the Asian Construction's Second CA Petition should have been, instead, dismissed outright. It mainly argues that by entering into stipulations in the arbitration clause – which provides that “the order or award of the arbitrators will be the sole and exclusive remedy between the parties regarding any and all claims and counterclaims with respect to the matter of the arbitrated dispute”^[56] and that “the order or award rendered in connection with