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THIRD DIVISION

[G.R. Nos. 198916-17, January 11, 2016]

MALAYAN INSURANCE COMPANY, INC., PETITIONER, VS. ST. FRANCIS SQUARE REALTY CORPORATION, RESPONDENT.

[G.R. NOS. 198920-21]

ST. FRANCIS SQUARE REALTY CORPORATION, PETITIONER, VS. MALAYAN INSURANCE COMPANY, INC., RESPONDENT.

D E C I S I O N

PERALTA, J.:

This resolves the *Petition for Partial Review on Certiorari under Rule 45 of the Rules of Court* filed by Malayan Insurance Company, Inc. and the *Petition for Review* filed by St. Francis Square Realty Corporation, both seeking to reverse and/or modify the Court of Appeals Decision^[1] dated January 27, 2011 in CA-G.R. SP Nos. 109286 and 109298, which affirmed with modifications the Award^[2] dated March 27, 2009 of the Construction Industry Arbitration Commission (CIAC) in CIAC CASE No. 33-2008 entitled "ST. FRANCIS SQUARE REALTY CORPORATION, Claimant, -versus- MALAYAN INSURANCE COMPANY, INC., Respondent."

Malayan Insurance Company, Inc. (*Malayan*) is a duly-organized domestic corporation engaged in insurance business. Formerly known as ASB Realty Corporation (ASB), St. Francis Square Realty Corporation (St. Francis) is a duly-organized domestic corporation engaged in real estate development.

The admitted facts are as follows:

1. The parties' respective juridical existence;

- 1.1 The ASB Group of Companies, which include the ASB Realty Corporation (now St. Francis Square Realty Corp.), is under rehabilitation with the Securities and Exchange Commission (SEC) pursuant to a petition dated May 2, 2000;
2. [Malayan], as Owner, and [St. Francis], as Developer, executed a Joint Project Development Agreement (JPDA) on 09 November 1995 for the construction, development and completion of what was then known as "ASB Malayan Tower" ("the Project"), originally a 50-storey office/residential condominium located at the ADB Avenue cor. Opal St., Ortigas Center, Pasig City.
 3. [Malayan] is the absolute and registered owner of the parcel of land (the Lot) in Pasig City where the Project is located, as evidenced by Transfer Certificate of Title No. PT-78585 xxx;
 4. The Certificate of Registration No. 96-04-2701 issued by the Housing Land Use and Regulatory Board (HLURB) on 12 April 1996 shows that [Malayan] is the Owner and [St. Francis] is the developer xxx;
 5. The License to Sell No. 96-05-2844 issued by the HLURB also refers to [Malayan] as the Owner and [St. Francis] as Developer xxx;
 6. The Master Deed with Declaration of Restrictions of the ASB- Malayan Tower dated 13 May 1996 approved by the FILURB and registered with the Register of Deeds of Pasig City, sets forth Malayan as "the Developer (absolute and registered owner) xxx;
 7. ASB Realty Corporation [now, St. Francis] was not able to complete the Project;
 - 7.1 The parties executed a Memorandum of Agreement (MOA) on 30 April 2002, under which [Malayan] undertook to complete the condominium project then known as "ASB Malayan Project" that later became "Malayan Plaza Tower" xxx;
 8. The MOA was approved by the SEC;
 9. The Lot was the subject of a Contract to Sell between [Malayan] as seller and [St. Francis] as buyer, but [St. Francis] was unable to completely perform its obligation under the Contract to Sell;

10. Under Sec. 2 of the MOA, [Malayan] "*shall invest the amount necessary to complete the Project*", among other obligations;
11. The basis for the distribution and disposition of the condominium units is the parties' respective capital investments in the Project as provided in Sec. 4 of the MOA;
 - 11.1 [St. Francis] represented and warranted to Malayan that Malayan can complete the Project at a cost not exceeding Php452,424,849.00 (the Remaining Construction Cost [RCC]) [Sec. 9 of MOA].
12. The net saleable area included in Schedule 4 of the 30 April 2002 MOA ("Reserved Units") originally covered fifty-three (53) units with thirty-eight (38) parking spaces. The aforesaid 53 Reserved Units became only thirty-nine (39) units after a reconfiguration was done;
13. The aggregate monetary value of the Reserved Units as fixed by [St. Francis], is One Hundred Seventy-Five Million Eight Hundred Fifty-Six Thousand Three Hundred Twenty-Three Pesos and 05/100 (P175,856,323.05);
14. Under the MOA, [Malayan] assumed vast powers and revoked all authorities previously granted to [St. Francis] (Section 8 of the MOA, xxx), with the exception of including [St. Francis] in the bidding committee for bidding of material and services requirements of the Project (Section 9, paragraph v of the MOA, xxx). The general supervision, management and control of the day- to-day operations were undertaken by [Malayan] (Section 5, paragraph b of the MOA, xxx) but under Sec. 9 of the MOA, "Malayan shall allow one (1) representative of [St. Francis] to observe the development and completion of the Project";
15. On 24 August 2006, [St. Francis] sent a letter to [Malayan] seeking to reconcile several items amounting to P133.64 million xxx;
16. There was a change in the specification of the floor finish from Narra Parquet[t] to Kendall Laminated Flooring;
17. [Malayan] made interest expense, amounting to P37,705,346.62 as of August 2006, as part of its actual construction cost on that date;
18. [St. Francis] filed a case against the Register of Deeds of Pasig City and

Atty. Francis Serrano docketed as OMB-C-C-06-0583-J before the Office of the Ombudsman due to alleged alterations on the Condominium Certificates of Title over the units comprising the net saleable area in Schedule 4 of the MOA;

19. [Malayan] has included some of the units under Schedule 4 of the MOA in the condotel pool managed by Quantum Hotels and Resorts from which it derives income;
20. Despite the completion of the Project and the turnover of the units to [St. Francis], [Malayan], and other buyers of units, the issue of actual cost of construction has not been resolved to the mutual satisfaction of the parties; and
21. The parties agreed to submit a list of documents that they admitted the authenticity and due execution thereof.^[3]

On November 7, 2008, St. Francis filed with the CIAC a Complaint with Prayer for Interim Relief against Malayan. St. Francis alleged that in August 2006, it secured a copy of a document entitled "cost to complete" from Malayan which fixed the Actual Remaining Construction Cost (ARCC) at P614,593,565.96. It disputed several cost items in the ARCC, amounting to P145,487,496.42, and argued that their exclusion would entitle it to some reserved units.

On December 8, 2008, Malayan filed a Verified Answer (*With Grounds for Immediate Dismissal*), claiming that St. Francis failed to state a cause of action because the ARCC had already reached P635,018,369.05 as of November 30, 2008, thereby exceeding the Remaining Construction Cost (RCC) [P452,424,849.00] by more than the aggregate value of the reserved units [P175,856,323.05]; hence, St. Francis is no longer entitled to any of such units.

On January 20, 2009, a preliminary conference was held where the parties stipulated on facts, formulated issues, and drafted and signed the Terms of Reference (*TOR*) which would govern the proceedings of the case. Aside from the above-stated admitted facts, the *TOR*, which was later amended, listed the following issues to be determined by the CIAC:

2. What is the meaning or scope of the term Remaining Construction Cost (RCC) as used in the MOA as stated in Par. 11.1 of the Admitted Facts?
 - 2.1. What is the meaning or scope of the term "actual remaining construction

cost" as used in the MOA?

2.2. Specifically, were the following costs and expenses part of the actual remaining construction cost incurred by [Malayan] and questioned by [St. Francis] to wit:

2.2.1. Awarded contracts, specifically those pertaining to Narra Parquet Works, Interior Design Works, Sanitary/Plumbing and Fire Protection Works, Additional Consultant's Fees and Audio Intercom and Paging System;

2.2.2. Change Orders, pursuant to the reconfiguration done on several of the units;

2.2.3. Interest Expense from loans incurred to finance the construction, development and completion of the Project;

2.2.4. Input Value Added Taxes ("VAT") paid to the government for goods and services utilized from the Project;

2.2.5. Attendance Fees;

2.2.6. Alleged Prolongation Costs and Extended Overhead;

2.2.7. Judgment Award in CIAC Case No. 27-2007 (TVI v MICO);
[*Additional issue from TOR Amendment*]

2.2.8. Contractor's All Risk Insurance;

2.2.9. Contingency Costs.

2.2.10 Other costs as mentioned in Exhibit "R-24" [*Additional issue from TOR Amendment*]

3. What is the total capital investment or contribution respectively of [St. Francis] and [Malayan] to the Project per MOA? [*Additional issue from TOR Amendment*]

4. What is the actual remaining construction cost to complete the Project spent by [Malayan] as of today in excess of [St. Francis'] estimate RCC?

5. After completion of the Project and computation of the actual remaining construction costs to complete the same, is [St. Francis] still entitled to any of the Reserved units in Schedule 4 of the MOA?

5.1. If so, is [St.. Francis] entitled to the income therefrom?

6. Is [Malayan] entitled to its Counterclaim for the excess in the actual remaining construction cost it incurred vis-a-vis the value of the Reserved Units?

7. Which party is entitled to attorney's fees?

[7.1] How much?

[8.] Which party shall bear the cost of arbitration?^[4]

On March 2, 2009, St. Francis submitted the *Joint Affidavit of Witnesses of Claimant*, while Malayan submitted the *Joint Affidavit of Respondent's Witnesses*. Thereafter, both parties submitted their respective Joint Reply-Affidavits. Malayan also filed a *Joint Affidavit of Respondent's Witnesses by Way of (1) Evidence for New Issue No. 3 Defined under the Amended Terms of Reference; (2) Sur-Rejoinder Affidavit of Claimant's Witnesses; and (3) Redirect Examination*.

Trial ensued during which the witnesses of St. Francis and Malayan testified. Both parties likewise submitted Lists of Exhibits. After trial, the parties simultaneously filed on April 27, 2009 their respective Memoranda in the form of Draft Decisions.

On May 27, 2009, the CIAC rendered its Award, the dispositive portion of which states:

WHEREFORE, AWARD is hereby made as follows:

FOR THE CLAIMANT[St. Francis]:

GRANT[S] its claims for **DISALLOWANCES** amounting to P52,864,385.00 from the ARCC of **P614,593.565.96** under Exhibit C-3;

ALLOCATES 37.8% ownership over the Reserved Units (**P66,551,993.09/P175,856,325.05**);

As a consequence of these awards, Respondent [Malayan] is hereby **DIRECTED** to deliver possession and transfer title over the Reserved Units in the proportion hereby stated.

GRANTS 37.8% proportionate share of the income realized from rentals of the Reserved Units up to the present date.

As a consequence of these awards, Respondent [Malayan] is hereby **DIRECTED** to pay the Claimant [St. Francis] its proportionate share in the income from the Reserved Units.

FOR THE RESPONDENT [Malayan]:

ALLOCATES 62.2% proportionate share of the income realized from rentals of the Reserved Units up to the present date (**P109,304,331.96/P175,856,325.05**);

GRANTS 62.2% proportionate share of the income realized from rentals of the Reserved Units up to the present date.

FOR BOTH CLAIMANT [St. Francis] and RESPONDENT [Malayan], all their Claims and Counterclaims for Attorney's Fees are DENIED. Arbitration costs are maintained according to the *pro rata* sharing that they had initially shared.

SO ORDERED. ^[5]

Dissatisfied with the CIAC Award, both parties filed with the Court of Appeals (CA) their respective Petitions for Review under Rule 43 of the Rules of Court. On January 27, 2011, the CA affirmed with modifications the CIAC Award, the dispositive portion of the decision reads:

WHEREFORE, premises considered, the CIAC's Award is hereby **AFFIRMED** subject to the following modifications:

- 1) The total amount of deductions should be **P15,135,166.51** and this is, in turn, shall be deducted from the Total Actual Remaining Construction Cost of **P615,880,672.47** to arrive at the Net amount of **P600,745,505.96** as computed above;
- 2) Si. Francis should be entitled to 16% ownership over the reserved units (**₱27,535,668.09/P175,856,325.05**) ownership of the reserved units to be done by drawing of lots with the corresponding interest thereon;
- 3) As a consequence of the above awards, Malayan is hereby **DIRECTED** to deliver possession and transfer title over the reserved units in accordance and in the proportion above-stated and to pay St. Francis its proportionate share in the income from the reserved units reckoned from the date of completion of the Project, that is from June 7, 2006 up to the finality of this decision, and to render full accounting of all the rentals and such other income derived from said reserved units so awarded to St. Francis;

- 4) Arbitration Costs shall be maintained *pro rata* in accordance with their respective shares in the reserved units.
- 5) Malayan and all others claiming rights under it, are enjoined from exercising acts of ownership over the reserved units relative to the proportionate share awarded to St. Francis hereunder;
- 6) The concerned Register of Deeds is directed to immediately reinstate the name of St. Francis Square Realty Corporation (formerly ASB Realty Corporation) as the registered owner in the corresponding Condominium Certificates of Title Covering the reserved units herein awarded to St. Francis; and
- 7) All other awards granted by CIAC in its Award dated 27 May 2009 not affected by the above modifications are affirmed. No costs.

SO ORDERED. ^[6]

Aggrieved by the CA decision, both parties filed their respective motions for reconsideration, which were denied in the Resolution dated October 4, 2011. Hence, the present petitions of both parties.

St. Francis raises the following issues:

I.

The Court of Appeals gravely erred in ruling that interest [expenses] should be part of the actual remaining construction cost. The ruling is contrary to law and the evidence on record.

II.

The Court of Appeals committed serious error in finding that the actual construction cost is P554,583,160.20. The ruling is contrary to law and the evidence on record.

III.

The Court of Appeals erred in considering VAT as part of the ARCC. This is

contrary to the facts and records of the case.

IV.

The Court of Appeals committed grave error in allowing the inclusion of the alleged cost of the Contractor's All Risk Insurance as part of the ARCC. This is contrary to law and the records of the case.

V.

The Court of Appeals committed grave and serious error on its allocation of the reserved units. This is contrary to law and the records of the case.^[7]

On the other hand, Malayan raises the following issues:

A.

THE COURT OF APPEALS COMMITTED SERIOUS LEGAL ERROR IN PLACING THE BURDEN ON MALAYAN TO PROVE THAT IT HAD ACTUALLY INCURRED THE ARCC, DESPITE THE FACT THAT DURING THE ARBITRAL PROCEEDINGS, ST. FRANCIS HAD NEVER DISPUTED, AND THEREFORE, ADMITTED, THAT MALAYAN HAD INCURRED THE ARCC. THE COURT OF APPEALS THUS DECIDED A QUESTION OF SUBSTANCE DEFINITELY NOT IN ACCORD WITH THE BASIC LEGAL PRINCIPLE THAT A PARTY NEED NOT PROVE WHAT HAS NOT BEEN RAISED, DISPUTED OR PUT IN ISSUE.

B.

THE COURT OF APPEALS SERIOUSLY ERRED IN ALLOWING ST. FRANCIS TO BELATEDLY CHANGE ITS THEORY IN ITS DRAFT DECISION FILED WITH THE CIAC AND ITS APPEAL. THE COURT OF APPEALS THUS DECIDED A QUESTION OF SUBSTANCE IN DISREGARD OF THE BASIC DUE PROCESS TENET THAT A PARTY CANNOT CHANGE ITS THEORY AFTER TRIAL OR ON APPEAL BECAUSE IN BOTH CASES THE OTHER PARTY IS DEPRIVED OF THE OPPORTUNITY TO MEET THE NEW ISSUES.

C.

THE COURT OF APPEALS SERIOUSLY ERRED IN DISREGARDING UNCONTROVERTED TESTIMONIAL EVIDENCE THAT MALAYAN HAD ACTUALLY INCURRED ITS ARCC, AND FOCUSING EXCLUSIVELY ON DOCUMENTARY EVIDENCE.

D.

THE COURT OF APPEALS SERIOUSLY ERRED IN EXCLUDING THE FOLLOWING COSTS FROM THE ARCC, DESPITE THE FACT THAT THEY WERE PROPER, NECESSARY AND REASONABLE FOR THE COMPLETION OF THE PROJECT:

1. CHANGE ORDERS DUE TO RECONFIGURATION;
2. CHANGE ORDERS NOT DUE TO RECONFIGURATION;
3. HALF OF THE COSTS FOR THE NARRA PARQUET WORKS;
4. HALF OF THE COSTS FOR THE COMPREHENSIVE ALL- RISK INSURANCE (CARI);
5. HALF OF THE COSTS FOR THE INTERIOR DESIGN WORKS;
6. CONTINGENCY COSTS; AND
7. COSTS INCURRED AND/OR PAID AFTER JUNE 2006.

E.

THE COURT OF APPEALS SERIOUSLY ERRED IN RULING THAT ST. FRANCIS IS ENTITLED TO SOME OF THE RESERVED UNITS. MALAYAN'S ARCC EXCEEDED THE ST. FRANCIS WARRANTED RCC BY MORE THAN THE VALUE OF THE RESERVED UNITS. HENCE, ST. FRANCIS SHOULD NOT GET EVEN ONE OF THE RESERVED UNITS.

F.

THE COURT OF APPEALS SERIOUSLY ERRED IN RULING THAT ST. FRANCIS IS ENTITLED TO THE INCOME RECEIVED BY MALAYAN FROM ST. FRANCIS'S (sic) SHARE IN THE RESERVED UNITS, IF ANY, MALAYAN IS ENTITLED TO ALL OF THE RESERVED UNITS. AND EVEN ASSUMING ARGUENDO THAT ST. FRANCIS IS ENTITLED TO SOME RESERVED UNITS, THE COURT OF APPEALS' DIRECTIVE IS IN DISREGARD OF ARTICLE 1187 OF THE CIVIL CODE.

G.

THE COURT OF APPEALS SERIOUSLY ERRED IN NOT AWARDING MALAYAN ITS COUNTERCLAIMS AS WELL AS ATTORNEY'S FEES, AND IN NOT ORDERING ST. FRANCIS TO BEAR ALL THE COSTS OF ARBITRATION.^[8]

The Court finds partial merit in both the petition for review of St. Francis and the petition for partial review on *certiorari* of Malayan.

In resolving *in seriatim* all the issues raised by both parties, the Court is guided by the rule that findings of fact of quasi-judicial bodies, which have acquired expertise because their jurisdiction is confined to specific matters, are generally accorded not only respect, but also finality, especially when affirmed by the CA. In particular, factual findings of construction arbitrators are final and conclusive and not reviewable by this Court on appeal.^[9]

As exceptions, however, factual findings of construction arbitrators may be reviewed by the Court when the petitioner proves affirmatively that: (1) the award was procured by corruption, fraud or other undue means; (2) there was evident partiality or corruption of the arbitrators or any of them; (3) the arbitrators were guilty of misconduct in refusing to hear evidence pertinent and material to the controversy; (4) one or more of the arbitrators were disqualified to act as such under Section Nine of Republic Act No. 876 and willfully refrained from disclosing such disqualifications or of any other misbehavior by which the rights of any party have been materially prejudiced; or (5) the arbitrators exceeded their powers, or so imperfectly executed them, that a mutual, final and definite award upon the subject matter submitted to them was not made; (6) when there is a very clear showing of grave abuse of discretion resulting in lack or loss of jurisdiction as when a party was deprived of a fair opportunity to present its position before the Arbitral Tribunal or when an award is obtained through fraud or the corruption of arbitrators; (7) when the findings of the CA are contrary to those of the CIAC, and (8) when a party is deprived of administrative due process.^[10] Apart from conflicting findings of fact of the CA and the CIAC as to the propriety of some arbitral awards, mathematical computations, and entitlement to claim certain costs as part of the amount necessary to complete the project, none of the other exceptions above was shown to obtain in this case. Hence, the Court will not disturb those findings where the CA and the CIAC are consistent with each other, but will review their findings which are inconsistent and cannot be reconciled.

The Court will discuss first the issues raised by St. Francis.

I. Interest expense

The CIAC stated that only costs directly related to construction costs can be included in the ARCC because such intention of the parties in the MOA can be inferred from the fact that

the baseline or starting point for the determination of the ARCC is the estimate made by St. Francis based on Schedule 9 of the MOA.^[11] The CIAC held that the ARCC was intended to be spent within and among the four categories above exclusively, subject to adjustments by reason of price increases and awarded contracts. It also rejected Malayan's theory that costs which are not directly incurred for the construction, but which are actually related to it and to the completion of the building, should be included in the ARCC. According to the CIAC, such could not have been the intention of the parties; otherwise, St. Francis would be placed at the complete mercy of Malayan since the determination of what costs are related to construction is left to the latter's entire discretion. Had such been the intention, the parties would have set up standards to guide the discretion in determining what expenses or costs are related to construction so as to be included in the term ARCC. Without such standards, the validity of the MOA would have been questionable, as its interpretation would contravene Article 1308 of the New Civil Code which provides that the performance of a contract cannot be left to the will of one of the parties.

The CA reversed the CIAC ruling and held that Malayan had to obtain loans in order to finance the completion of the project, and in doing so, it incurred interests which are deemed as an accessory of such loans. It added that actual expenditures should not be limited only to traditional construction costs as the parties' intention was to include those relative to the actual completion of the project, for which Malayan had to invest in the form of seeking loan facilities from banking institutions in order to fully finance the obligations set forth in the MOA. It also stressed that it was specifically stated in the MOA that the parties' investment in the project would be distributed in accordance with their respective contributions

St. Francis contends that interest expense should not be included in the computation of the Actual Remaining Construction Cost (ARCC). According to St. Francis, the term ARCC should be understood in its ordinary context or plain meaning. The word "construction" refers to all on-site work on buildings or altering structures from land clearance through completion, including excavation, erection and the assembly and installation of components and equipment. Plainly, ARCC is the actual cost of completing and building the structure which is the condominium/project.

Malayan counters that the MOA itself is replete with provisions recognizing the parties' contractual intent to include the ARCC interest expense and the parties' respective capital contributions or investment in the project. Such intent is confirmed by the parties' contemporaneous and subsequent acts when St. Francis' own interest expense was credited to determine the number of units it was entitled to.

The Court upholds the CIAC ruling to disallow the interest expense from loans secured by Malayan to finance the completion of the project, and thus, reverses the CA ruling that such expense in the amount of P39,348,659.88 should be included in the computation of

the ARCC. As correctly held by the CIAC, only costs directly related to construction costs should be included in the ARCC. Interest expense should not be included in the computation of the ARCC because it is not an actual expenditure necessary to complete the project, but a mere financial cost. As will be discussed later, the term ARCC should be construed in its traditional "construction" sense, rather than in the "investment" sense.

It also bears emphasis that part of Malayan's investment under Section 2 of the MOA^[12] is the payment of P65,804,381.00 as the principal amount of the loan obtained by ASB from the Rizal Commercial Banking Corporation (*RCBC*) to finance the project. If it were the intention of the parties to include interest expense as part of their investments, or even the ARCC, then the MOA would have expressly indicated such intent in the provisions on investments of Malayan and of ASB. Nowhere in the provisions of the MOA can it be gathered that interest expense is included in the computation of the ARCC.

Apart from the ARCC's definition as actual expenditures necessary to complete the project, the closest provision in the MOA that could shed light on the scope and meaning of ARCC is Section 9 on the Remaining Construction Cost (*RCC*) whereby St. Francis represented and warranted that Malayan can complete the project at a cost not exceeding P452,424,849.00 as set forth in ASB's Construction Budget Report, which reads:

Estimated Cost to Complete

I. Balance to Complete Existing Contracts-	Php 161,098,039.86
II. Unawarded Contracts	224,045,419.16
III. Professional Fee	4,138,108.08
IV. Contingencies	<u>63,143,281.10</u>
	Php 452,424,849.10

The Court concurs with the CIAC that the ARCC was intended to be spent within and among the four categories above, subject to adjustments by reason of price increases and awarded contracts. In construction parlance, "contingency" is an amount of money, included in the budget for building construction, that is uncommitted for any purpose, intended to cover the cost of unforeseen factors related to the construction which are not specifically addressed in the budget.^[13] Being a cost of borrowing money, interest expense from bank loans to finance the project completion can hardly be considered as a cost due to unforeseen factors.

That interest expense cannot be considered as part of any of the said categories is further substantiated by the reports of the Davis Langdon Seah Philippines, Inc. (*DLS*) and Surequest Development Associates (*Surequest*), which contain traditional construction cost

components and items, but not investment costs such as interest expense. As the one who engaged the services of both DLS and Surequest to come up with a valuation of the cost to complete the project and to evaluate what had been accomplished in the project prior the take-over, Malayan cannot deny that interest expense is not included in their computation of the construction costs.

As regards the supposed contemporaneous act of St. Francis of including the amount of P207,500,000.00 as interest expense in its claim for reimbursement for its contributions in the project, in the form of several units per Schedules 1 and 3 of the MOA, the Court cannot determine whether or not such expense should be considered as its contribution for purposes of computing the return of capital investment. Unlike the investment of Malayan which is specifically stated under Section 2^[14] of the MOA, but does not include payment of interest of the bank loan to finance the project, the investment of ASB (*now St. Francis*) is merely described as follows:

Section 3. *Recognition of ASB's Investment.* The parties confirm that as of the date hereof, ASB invested in the Project an amount equivalent to its entitlement to the net saleable area of the Building under Section 4 below, including ASB's interest as buyer under the Contract to Sell.

From such vague definition of ASB's investment, the Court cannot rule if St. Francis should also be disallowed from claiming interest expense as part of its investment, unlike Malayan which is disallowed from including interest expense as part of the ARCC contemplated in the MOA, because such financial cost is not an actual expenditure necessary to complete the project. Having in mind the rule that the interpretation of obscure words or stipulations in a contract shall not favor the party who caused the obscurity,^[15] the Court cannot give credence to the August 1, 2000 telefax of Evelyn Nolasco, St. Francis' former Chief Financial Officer (*CFO*), to Malayan's CFO, Gema Cheng, which shows St. Francis' computation for reimbursement, including the claim of P207,500,000.00 as interest expense.

Further negating Malayan's claim that interest expense should be included in the computation of the ARCC is the restrictive construction industry definition of the term "construction cost" which means the cost of all construction portions of the project, generally based upon the sum of the construction contract(s) and other direct construction costs; it does not include the compensation paid to the architect and consultants, the cost of the land, right-of-way, or other costs which are defined in the contract documents as being the responsibility of the owner.^[16] Aside from the fact that such expense is not a directly related construction cost, Section 2 of the MOA states that Malayan's investment includes, among other matters, the amount it had paid to RCBC, on behalf of ASB, for the principal

loan to finance the project, but not the interest thereof. This casts doubt on Malayan's claim that the parties intended interest expense to become part of their capital contribution, let alone the ARCC.

In view of the foregoing discussion, the Court will no longer delve into Malayan's two other contentions on the issue of interest expense, namely: (1) that since St. Francis only claimed that such expense cannot be included as part of the ARCC as the same is not a direct construction cost, it cannot now change its theory and argue that there is no substantial evidence to show that Malayan incurred such expense in completing the project because it is deemed to have admitted the same, and allowing St. Francis to do so would amount to a prohibited change of its theory; and (2) that Malayan was able to prove that it incurred interest expense on loans which were used to finance completion of the project.

II. Scope and total amount of ARCC

According to the CIAC, ARCC refers to actual expenditures made by Malayan to complete the project. What is proper and necessary to complete the project is the essence of the dispute between the parties. As used in the MOA, ARCC should be understood in the traditional "construction" sense rather than in "investment" sense. The dispute is a construction dispute and not an investment dispute which would have taken the dispute outside the ambit of construction arbitration. Notably, the cost component/pay items stated in Exhibit "C-2" (*MOA Schedule 9*), Exhibit "11-7" (*Surequest Report*) and Exhibit "R-8" (*Davis Langdon Seah Report*) contain basic and traditional construction cost, and not investment cost which is broader in scope. As to the amount of the ARCC, CIAC held that it is P614,593,565.96 as stated in Exhibit "C-3"^[17] which was prepared by Malayan itself and submitted to St. Francis. Exhibit "C-3" listed the expenses incurred as of August 10, 2006 which was close enough to the project completion date of June 7, 2006, as a basis to determine what items should be disallowed therefrom.

Reversing the CIAC's ruling, the CA held that actual expenditures should not be limited only to traditional construction cost as the parties' intention when they executed the MOA was to also include expenditures relative to the actual completion of the project. It noted that the clear intention of the parties that whatever expenditures they have spent shall be considered as their investment subject to the proportionate sharing after determining the actual construction cost, can be gleaned from the following provisions of the MOA:

Section 2. Investment of Malayan. Subject to the provisions of Section 9 below, Malayan shall invest the amount necessary to complete the Project and the following amounts:

X X X X

Section 3. Recognition of [St. Francis'] Investment. The parties confirm that as of the date hereof, [St. Francis] invested in the Project an amount equivalent to its entitlement to the net saleable area of the Building under Section 4 below, including [St. Francis'] interest as buyer under the Contract to Sell.

Section 4. Distribution and Disposition of Units - (a) As a return of its capital investment in the Project, each party shall be entitled to such portion of all the net saleable area of the Building that their respective contributions to the Project bear to the actual construction cost. As of the date of the execution hereof, and on the basis of the total costs incurred to date in relation to the Remaining Construction Cost (as defined in Section 9(a) hereof), the parties shall respectively be entitled to the following (which entitlement shall be conditioned on, and subject to, adjustments as provided in sub-paragraph [b] of Section 4 in the event that the actual remaining construction cost exceeds the Remaining Construction Cost):

The CA stressed that based on its reading of the MO A in its entirety, the ARCC clearly means the "investment" incurred as contributed by Malayan in the completion of the project, and that there being no ambiguity in the MOA, its literal meaning is controlling. The CA added that its interpretation is consistent with the rule that when the terms of agreement have been reduced into writing, it is considered as containing all the terms agreed upon by the parties and there can be between the parties and their successors-in-interest, no evidence of such terms other than the contents of the written agreement.

As to the amount of the ARCC, the CA found that the gross ARCC based on evidence is f 554,583,160.20 [Including 1/11% Input VAT and 2% Withholding Tax], while the net payment is P552,152,508.70. According to the CA, St. Francis and Malayan correctly argued that the CIAC mainly relied on Exhibit "C-3" which is a mere summary of the expenses or a tabulation of figures incurred by Malayan without any other supporting documents to prove the contents and authenticity of the figures stated therein. In determining the ARCC, the CA thus reviewed the records and ruled that Exhibit "C-3" and Exhibit "R-24"^[18] [Project Cost to Complete as of October 2008 amounting to P648,266,145.96] should be utilized vis-a-vis Exhibit "R-48-series" which contain construction costs and computations supported by receipts, vouchers, checks and other documents that are necessary to arrive at the final computation of the ARCC. In this regard, St. Francis agrees with the CA that Exhibit "R-48-series" should be taken into account because it contains computations supported by such documentary evidence, but gravely erred in considering only the summaries in such exhibit without actually verifying and counter-checking if the amounts indicated in the summaries actually correspond to the amounts reflected in the supporting documents. St. Francis points out that the ARCC

considered as being claimed by Malayan that are actually receipted is only P514,179,217.94 based on Exhibit "*R-48-series*."

Due to the conflicting findings of the CIAC and the CA on the scope, meaning and computation of the ARCC, the Court is compelled to review them in light of the evidence on record.

As duly noted by the CA, the controversy between St. Francis and Malayan lies in the interpretation of the term "Actual Remaining Construction Cost" (*ARCC*) in relation to the Estimated Remaining Construction Cost (*RCC*), in order to determine the proportionate ownership over the reserved units, if any, as embodied in their Memorandum of Agreement dated April 30, 2002, the pertinent provisions of which read:

Section 4. Distribution and Disposition of Units - (a) As a return of its capital investment in the Project, each party shall be entitled to such portion of all the net saleable area of the Building that their respective contributions to the Project bear to the actual construction cost. As of the date of the execution hereof, and on the basis of the total costs incurred to date in relation to the Remaining Construction Cost (as defined in Section 9(a) hereof), the parties shall respectively be entitled to the following (which entitlement shall be conditioned on, and subject to, adjustments as provided in sub-paragraph [b] of Section 4 in the event that the **actual remaining construction cost** exceeds the Remaining Construction Cost):

x x x

(ii) ASB [now, St. Francis] - the following net saleable area:

(C) provided that the **actual remaining construction costs** do not exceed the Remaining Construction Cost, the net saleable area particularly described in Schedule 4 hereof which shall be delivered to [St. Francis] upon completion of the Project and determination of its actual construction costs. If the **actual remaining construction costs** exceed the Remaining Construction Cost, sub-paragraph (b) of Section 4 shall apply.

(b) In the event that the **actual remaining construction costs** exceed the Remaining Construction Cost as represented and warranted by [St. Francis] to Malayan under Section 9(a) hereof, and Malayan pays for such excess, the pro rata sharing in the net saleable area of the Building, as provided in sub-paragraph (a) of this Section 4 shall be adjusted accordingly. In such event, Malayan shall be entitled to such net saleable area in Schedule 4 that

corresponds to the excess of the **actual remaining cost** over the Remaining Construction Cost.

X X X

Section 9. Remaining Construction Cost - (a) [St. Francis] represents and warrants to Malayan that Malayan can complete the Project at a cost not exceeding Four Hundred Fifty-Two Million Four Hundred Twenty-Four Thousand Eight Hundred Forty-Nine Pesos (P452,424,849) (the Remaining Construction Cost) as set forth in [St. Francis'] Construction Budget Report attached hereto and made an integral part hereof as Schedule 9 that:

X X X

(b) Malayan shall pay for any additional costs and expenses that may be incurred in excess of the Remaining Construction Cost. In such event, it shall be entitled to such net saleable area as indicated in Schedule 4 that corresponds to the increase in remaining construction cost. [St. Francis] shall be entitled to such net saleable area, if any, remaining in the aforesaid Schedule 4.^[19]

The ultimate purpose of determining the ARCC, as simply stated by CIAC, is to determine the proportionate or absolute ownership of the properties over the net saleable area of the building (*Reserved Units*), as provided in sub-paragraph (a) of Section 4 of the MOA, by calculating how much was spent by Malayan to complete the project in excess of the estimate (Remaining Construction Cost) made by St. Francis.

After a careful review of the MOA as to the scope and meaning of the term "ARCC," the Court sustains the CIAC that such term should be understood as the actual expenditures necessary to complete the project, which is the traditional "construction" sense rather than the "investment" sense. The Court thus reverses the CA's ruling that the parties' intention was to also include in the computation of the ARCC whatever expenditures relative to the actual completion of the project, as such expenses are considered as their investment subject to the proportionate sharing after determining the actual construction cost.

It bears stressing that the intent of the parties in entering into the MOA is to provide for the terms and conditions of the completion of the Project and the allocation of the ownership of condominium units in the Project among themselves.^[20] To recall, Malayan and St. Francis (*then ASB*) entered into the Joint Project Development Agreement (*JPDA*) dated November 9, 1995 to construct a thirty-six (36)-storey condominium [but originally a fifty (50)-storey-building] whereby the parties agreed (a) that Malayan would contribute a parcel of land, and ASB would defray the construction cost of the project, and (b) that they

would allocate the net saleable area of the project, as return of their capital investment. In a Contract to Sell dated November 20, 1996, Malayan also agreed to sell the said land to ASB (*now St. Francis*) for a consideration of P640,847,928.48, but the latter was only able to pay P427,231,952.32. however, ASB was unable to completely perform its obligations under the JPDA and the Contract to Sell because it underwent corporate rehabilitation, and the Securities and Exchange Commission suspended, among other things, the performance of such obligations. Since ASB had pre-sold a number of condominium units, and in order to protect the interests of the buyers, to preserve its interest in the project, its goodwill and business reputation, Malayan proposed to complete the project subject to the terms and conditions of the MOA.

Under Section 5(a) of the MOA, Malayan undertook to construct, develop and complete the Project based on the general specifications already agreed upon by the parties and set forth in Schedule 6 of the MOA, within two (2) years from (i) the date of effectivity of Malayan's obligations as provided in Section 21, or (ii) the date of approval of all financing/loan facilities from any financial or banking institution to fully finance the obligations of Malayan under the MOA, whichever of said dates shall come later; or within such extended period as may be agreed upon by the parties. Section 21 of the MOA provides that Malayan shall be bound by and perform its obligations, including the completion of the Project, only upon (i) fulfillment by St. Francis of all its obligations under Section 6, items (a), (b), (c) and (d),^[21] and (ii) approval by the Insurance Commission of the MOA.

Section 5(a) of the MOA also states that that the project shall be deemed complete, and the obligation of Malayan fulfilled, if the construction and development of the Project is finished as certified by the architect of the project. Upon completion of the project, the general provision which governs the distribution and disposition of units is the first sentence of Section 4(a) of the MOA, to wit: "[a]s a return of its capital investment in the Project, each party shall be entitled to such portion of all the net saleable area of the Building that their respective contributions to the Project bear to the actual construction cost." The second sentence^[22] of Section 4(a) provides the specific details on the *pro rata* sharing of units to which the parties are entitled based on the RCC in relation to total costs incurred as of the date of the execution of the MOA dated April 30, 2002. It also states, however, that entitlement to certain units are subject to adjustments in the event that the ARCC exceeds the RCC, and Malayan pays for such excess.

Clearly, the parties foresaw that Malayan may incur additional cost and expenses in excess of the Remaining Construction Cost (RCC) of P452,424,849.00 which amount St. Francis represented and warranted that Malayan would have to spend to complete the project. Section 9(b)^[23] of the MOA thus adds that, in such event, Malayan shall be entitled to such net saleable area as indicated in Schedule 4 that corresponds to the increase in

remaining construction costs, while St. Francis shall be entitled to such net saleable area, if any, remaining in the said Schedule 4. As admitted by the parties in the Amended Terms of Reference, the net saleable area included in Schedule 4 ("*Reserved Units*") originally covered fifty-three (53) units (which was reduced to thirty-nine [39] units after reconfiguration) with thirty-eight (38) parking spaces, and the aggregate monetary value of said units is P175,856,323.05.

In determining the entitlement of the parties to the reserved units in Schedule 4, Malayan insists that the ARCC should include all its capital contributions to complete the project, including financial costs which are not directly related to the construction of the building. It argues that the MOA is replete with provisions recognizing the parties' intent to include in the ARCC their respective capital contributions or investment.

Malayan's argument fails to persuade.

The term ARCC should only be construed in light of its plain meaning which is the actual expenditures necessary to complete the project, and it is not equivalent to the term "investment" under the MOA.

As stated in the MOA, the investment of Malayan is composed of (1) the amount necessary to complete the project, and (2) the following amounts: (a) P65,804,381, representing Malayan's payment on behalf of ASB (*now St. Francis*) of the principal amount of the loan obtained by ASB from the RCBC to finance the project; and (b) P3 8,176,725, representing Malayan's payment on behalf of ASB of the outstanding obligations to project contractors as of the signing of the MOA.^[24] On the other hand, the investment of St. Francis is broadly defined as the ASB's invested amount equivalent to its entitlement to the net saleable area of the Building under Section 4 of the MOA, including ASB's interest as buyer under the Contract to Sell.^[25] Hence, the Court holds that the ARCC, which pertains only to the amount necessary to complete the project, can be considered as part of the capital investment, but they are not synonymous.

Likewise negating Malayan's argument that all its contribution to complete the project should be included in the ARCC is the restrictive construction industry definition of "construction cost", to wit: the cost of all construction portions of the project, generally based upon the sum of the construction contract(s) and other direct construction costs; it does not include the compensation paid to the architect and consultants, the cost of the land, right-of-way, or other costs which are defined in the contract documents as being the responsibility of the owner.^[26]

As to the computation of the ARCC, the Court agrees with the CA that the CIAC erred in relying mainly on Exhibit "C-3," which is a mere summary or tabulation of the cost to

complete the project as of August 10, 2006, and that Exhibit "R-24" (a 26-page Cost to Complete as of October 2008) and Exhibit "R-48-series" (consisting of about 2,230 pages construction costs computation, receipts, vouchers, checks and other documents) should also be considered in determining the ARCC. After a careful review of the records, the Court finds partial merit in the claim of St. Francis that certain items in the computations are unsubstantiated by evidence, while the other costs should either be included or excluded in the ARCC for reasons that will be explained below. Hence, the CA's own computation of the ARCC based on Exhibit "R-48-series" in the total amount of P554,583,160.20 (including 1/11% Input VAT and 2% withholding tax) should be modified in order to arrive at the net ARCC of **P505,391,573.63**, thus:

Construction Cost as per receipts (Exhibit "R-48-series"^[27])
 (with 1/11% Input VAT and 2% withholding tax) -**P554,583,160.20**

Total Inclusion: P8,282,974.82

Award to Total Ventures, Inc.
 (Prolongation costs and extended Overhead)- + 8,282,974.82

Total ARCC: P554,583,160.20+8,282,974.82=**P562,866,135.02**
 (Construction Costs as per receipts + Inclusion)

Total Deductions:P41,705,696.66

Interest expense paid by Malayan to RCBC -	P39,348,659.88
Change orders not due to Reconfiguration -	971,796.29
Contingencies -	631,154.39
Interior Design Works -	+ <u>754,086.10</u>
	P41,705,696.66

Total Exclusions:P15,768,864.73
 (Unsubstantiated Costs)

Item 1.0 ^[28] -	P 9,297,947.22
Items 5.3 and 5.4 ^[29] -	530,563.65
Items 5.3 and 5.4	- 725,877.62
Item 5.7.1 ^[30]	- 50,710.61
Item 6.2.25 ^[31]	- 194,171.00
Item 6. 11 ^[32]	- 3,499.64

Item 6.11	- 1,360.00
Item 6.12.3 ^[33]	- 2,397,047.89 ^[34]
Item F3 ^[35]	- 368,397.52
Item F3	- 448,534.59
Item F3	- 634,232.26
Professional Fees C&D ^[36]	- 427,500.00
Professional Fees N ^[37]	<u>-+ 79,022.73</u>
	P15,768,864.73
(Total Deductions)	P41,705,696.66
(Total Exclusions)	<u>+15,768,864.73</u>
	P57,474,561.39

Total ARCC - Total Deductions & Exclusions = Net ARCC: P505,391,573.63

P562,866,135.02-P57,474,561.39 = P 505,391,573.63

III. Input VAT

St. Francis contends that Input VAT should not be treated as part of construction cost, because it is not part of the costs of goods and services purchased or engaged under Section HO^[38] of the National Internal Revenue Code (NIRC). According to St. Francis, VAT Ruling No. 053-94, February 9, 1994, states that VAT paid by a VAT-registered person on his purchases (*or input tax*) is an asset account in the Balance Sheet and not to be treated as an expense, unless he is exempt from VAT in which case the VAT paid would form part of the cost to acquire what was purchased. In (act, per Malayan's own documentary evidence, cash vouchers in Exhibit "*R-4S-series*," input VAT is indicated as an account separate from the actual cost of services or materials. Also, in Malayan's audited financial statements, input VAT is treated as a separate item and was, in fact, claimed as an asset under the heading "Other Assets."

St. Francis further points out that Malayan's counsel admitted that input VAT is not part of cost when he stated that VAT and interest expense are actually financial cost and part of its capital contribution in the construction, but, strictly speaking, not directly related construction cost. St. Francis claims that even from an accounting standpoint, input tax is not entered into the books as part of cost. While contract prices for contractors or suppliers are VAT inclusive, it does not mean that input VAT is considered part of cost; input VAT is treated as account in a different account, either under "Other assets" or "Input Tax", which is an asset account. Besides, the input VAT claimed by Malayan as part of its construction cost in the usual course of business as a VAT-able entity is offset or credited against output VAT to determine the net VAT due or payable to the government. Since Malayan also has

output VAT from its sales of condo units in the project and from sales of insurance policies, it should be able to credit such input VAT and not charge it as part of the construction cost.

St. Francis finally notes that Malayan admitted that it can apply for refund or issuance of tax credit for excess input tax, and will thus benefit twice from charging input VAT as part of the construction cost. Since input VAT had already been claimed by Malayan, and its audited financial statements show the offsetting of input VAT against output VAT, then justice and equity dictate that it should not be allowed to claim it as part of the ARCC.

The Court finds no compelling reason to disturb the consistent findings of the CA and the CIAC that Input VAT should be allowed to remain in the ARCC. As aptly pointed out by the CA and the CIAC, ARCC refers to the actual expenditures made by Malayan to complete the project. The Court thus agrees with Malayan that in determining whether input VAT should be included as ARCC, the issue is not the technical classification of taxes under accounting rules, but whether such tax was incurred and paid as part of the construction cost. Given that input VAT is, strictly speaking, a financial cost and not a direct construction cost, it cannot be denied that Malayan had to pay input VAT as part of the contract price of goods and properties purchased, and services procured in order to complete the project. Moreover, that the burden of such tax was shifted to Malayan by its suppliers and contractors is evident from the photocopies of cash vouchers and official receipts on record,^[39] which separately indicated the VAT component in accordance with Section 113(B)^[40] of the Tax Code.^[41]

Anent the claim that it would be unjust and inequitable if Malayan would be allowed to include its input VAT in the ARCC, as well as to offset such tax against its output tax, the Court finds that such coincidence does not result in unjust enrichment at the expense of St. Francis. Unjust enrichment claims do not lie simply because one party benefits from the efforts or obligations of others, but instead it must be shown that a party was unjustly enriched in the sense that the term unjustly could mean illegally or unlawfully.^[42] In offsetting its input VAT against output VAT, Malayan is merely availing of the benefits of the tax credit provisions of the law, and it cannot be said to have benefitted at the expense or to the damage of St. Francis. After all, Malayan is justified in including in the ARCC the input VAT it had paid as part of the contract price of the goods, properties and services it had procured to complete the project.

At any rate, St. Francis would also be entitled to avail of the same tax credit provisions upon the eventual sale of its proportionate share of the reserved units allocated and transferred to it by Malayan. It bears emphasis that the allocation of and transfer of such units to St. Francis is subject to output VAT which Malayan could offset against its input VAT. In turn, St. Francis would incur input VAT which it may later offset against its output VAT upon the sale of the said units. This is in accordance with the tax credit method of

computing the VAT of a taxpayer whereby the input tax shifted by the seller to the buyer is credited against the buyer's output taxes when it. in turn sells the taxable goods, properties or services.^[43]

IV. Comprehensive All Risk Insurance (CARI)

St. Francis claims that the CARI should be disallowed from being part of the ARCC because there is no proof of expense on the part of Malayan, and only official receipts were presented. However, the first official receipt in the amount of P2,814,672.81 is not even readable, while in the second receipt, the description of the contract for the CARI appears to be a different project. Considering that the assured in the receipts is not just Malayan but jointly with LANDEV (*project manager*), St. Francis adds that Malayan must prove that it actually paid for this expense.

It bears stressing that both the CIAC and the CA agreed that the CARI should be allowed as part of the ARCC, but differed as to the amount. Due to St. Francis' admission that it would allow inclusion of P1,000,000.00, and considering that no basis has been suggested on how the said amount was arrived at, the CIAC decided to split the amount contested (P2,814,678.80, excluding premium for renewals, per Malayan) into equal shares, and allowed the CARI in the amount of P1,407,336.40 as part of the ARCC. On the other hand, the CA allowed CARI in the amount of P2,168,035.66 as part of ARCC, after reviewing the official receipts^[44] issued by Tokio Marine Insurance Co., and finding that the total amount of the CARI should be P4,336,071.32 which should be split between Malayan and St. Francis.

The Court holds that CARI in the amount of P4,361,291.34 is supported by official receipts;^[45] hence, such amount should be allowed to remain in the ARCC. Although the official receipts of the CARI appear to have been issued in the name of Malayan and/or LANDEV, the minutes of the December 20, 2002 Bids and Awards Committee Meeting, of which St. Francis' President Luke Roxas was a member, proves that it was unanimously agreed upon that the CARI would be secured directly by the owner, Malayan. The official receipts and the said minutes prove that the premium of the policy, as well as the renewals thereof, were shouldered by Malayan as the owner of the project. Against the said substantial evidence of Malayan, the CA and the CIAC have no basis in ruling why the CARI should be split between Malayan and St. Francis. As to the conflict between the CARI premium payments shown in Exhibit "C-3 " (Cost to Complete as of August 10, 2006) in the total amount of P4,006,634.85 and Exhibit "R-48-M-series" (Item 5.0 Project Insurance, Tokio Marine Malayan Insurance Co. Inc.) in the total amount of P4,361,291.34, the latter should prevail as it is supported by official receipts.^[46]

V. Allocation of Reserved Units

St. Francis asserts that the correct ARCC supported by receipts is only P514,179,217.94, [47] and after making all the necessary deductions, the excess ARCC over the warranted RCC [P452,424,849.00] would only be around P16,446,014.66, thus entitling it to the value of the reserved units of around P159,410,310.39, as well as the income therefrom. On the other hand, Malayan insists that St. Francis would no longer be entitled to any reserved units, and it would still be liable for P19,038,339.91, as the ARCC and the RCC exceeded the aggregate value of the reserved and the total aggregate value of the reserved units by such amount.

The CIAC held that the ARCC based on Exhibit "C-3" is P614,593,565.96, and that after deducting the total disallowances of P52,864,385.00, as well as the amount of the RCC, the excess ARCC will be P109,304,331.96 which is equivalent to Malayan's 62.2% share in the total aggregate value of the reserved units (P175,856,325.05). Meanwhile, the remaining 37.8% is the proportionate share of St. Francis in the said units.

Modifying the ruling of the CIAC, the CA ruled that based on Exhibit "C-3", "Exhibit R-24" and Exhibit "R-48-series," the total ARCC is P615,880,672.47. After excluding the deductions in the total amount of P15,135,166.51 and the amount of the RCC, the excess ARCC will be P148,320,656.96 which is equal to Malayan's 84% share in the total aggregate value of the reserved units. The remaining 16% is the proportionate share of St. Francis in the said units.

After a circumspect review of the records, the Court finds that the **30%** of the reserved units should be allocated to Malayan, while **70%** should be allocated to St. Francis. Below is the computation of the parties' proportionate share in the said units:

$$P505,391,573.63 \text{ [Net ARCC]} - P452,424,849.00 \text{ [RCC]} = P52,966,724.63 \text{ [Excess ARCC]}$$

$$P52,966,724.63 \text{ [Excess ARCC]} / P175,856,323.05 \text{ [Total Aggregate Value of Reserved Units]} = .3011 \text{ or } \mathbf{30\% - share of Malayan}$$

$$P122,889,598.42 / P175,856,323.05 = .6988 \text{ or } \mathbf{70\% - share of St. Francis.}$$

Prolongation Costs and Extended Overhead

The CIAC held that Prolongation Costs and Extended Overhead in the amount of P6,000,000.00 should be excluded as part of the ARCC because it would be unfair and unjust for Malayan to pass on its liability to St. Francis after having been found responsible

for the delay. The CIAC pointed out that the resolution of this issue hinges upon whose fault the delay in the construction that gave rise to prolongation costs may be attributed to, and this was resolved in CIAC Case No 27-2007 entitled "Total Ventures and Project, Inc. vs. Malayan Insurance Company, Inc." where the arbitral tribunal awarded in favor of claimant TVI the sum of P7,743,278.89 to compensate for the delay in the completion of construction which has been caused essentially by Malayan.

On the contrary, the CA held that it is but proper to include in the ARCC the amount of P21,948,852.39 which Malayan had paid to Total Ventures, Inc. (TVI) for the settlement in the CIAC Case No. 27-2007.

St. Francis points out that without consideration of its arguments and contrary to CIAC's finding, the CA held that Malayan had paid TVI P21,948,852.39 which should be included in the ARCC. St. Francis states that, assuming *arguendo*, that such settlement in the arbitration case can be considered part of the ARCC, the entire amount thereof cannot be included because the combined total amount of the award of prolongation costs and extended overhead (P7,743,278.89), and the interest (P1,430,127.50) is only (P9,173,405.94). It adds that it is very clear in the decision of the arbitral tribunal that the causes for the delay of TVI that warranted the grant of overhead expenses are actually attributable to Malayan, to *wit*:

Based on the foregoing documentary evidence and the testimony of the witnesses, delays in the project implementation was mainly attributed to the reconfiguration of the room layout of the building at Discovery side and delay in the award by MICO [Malayan] of the subcontract packages for other trade disciplines plus, the delayed delivery of material which had a domino effect on the work of the succeeding packages, and eventually to the overall project completion date which had to be extended to August 31, 2005.^[48]

The CA grossly erred in ruling that the full amount of P21,948,852.39 paid by Malayan to TVI should be included in the ARCC. A careful review of the decision of the arbitral tribunal in CIAC Case No. 27-2007 shows that such full amount consists of net amount due (P20,518,725.94) to TVI after offsetting its various claims against the counterclaims of Malayan, plus the accrued interest of P1,430,127.05.^[49] Based on the said decision and the amount which St. Francis itself has conceded it may be held liable-for, the Court holds that the prolongation costs and extended overhead for the period of January 2005 to August 2005 (P6,313,846.43) and September 1, 2005 to August 31, 2005 (P1,429,432.46) in the total amount P7,743,278.89,^[50] as well as the accrued interest in the amount of P539,695.93,^[51] or a total amount of P8,282,974.82, should be included as part of the

ARCC.

The Court agrees with Malayan that the cause of the delay in the completion of TVI's construction works was the reconfiguration of the room layout of the building along the side facing Discovery Suites hotel. Such delay was, in turn, caused by St. Francis deviation from the original April 12, 1996 floor plans for the 9th to 31st floors of the project, which resulted in units that were more typical of a high-density, low-cost condominium project. Indeed, Malayan had to reconfigure the said layout of several units that St. Francis had constructed as they were smaller and narrower than those provided in the original floor plans, and in order to meet St. Francis' commitment to the buyers of pre-sold units to create a prestigious building and collaborative masterpiece that only the best in interior design, landscape planning and architecture can truly offer, as well as to avoid possible liability under Section 19^[52] of the Subdivision and Condominium Buyers' Protective Decree (*Presidential Decree No. 957*).

The Court will now discuss jointly the first three interrelated issues raised by Malayan.

A. Whether St. Francis had never disputed and therefore admitted that Malayan had incurred the ARCC.

B. Whether the CA erred in allowing St. Francis' to belatedly change its theory in its Draft Decision and in its Appeal.

C. Whether the CA erred in disregarding the uncontroverted testimonial evidence, and focusing solely on documentary evidence.

According to Malayan, the CA overlooked the fact that St. Francis objected only to the perceived impropriety of including certain costs in the ARCC. That Malayan incurred these costs was never in issue during the arbitral proceedings. In view of the rule that all facts not in issue are admitted, and that all facts judicially admitted do not require proof, Malayan claims that it should not bear the burden to prove that it had actually incurred its ARCC.

Malayan also notes that St. Francis' CIAC complaint contained no allegation that Malayan had not actually incurred the costs in its ARCC, nor was there any claim that specific costs items in the ARCC lacked evidentiary basis, or were otherwise fictitious or fabricated. Malayan argues that if its alleged failure to substantiate the ARCC was enough basis to question costs included therein, it follows that St. Francis would already have disputed in its complaint the entire amount of the ARCC. Yet, St. Francis only chose to object to selected items in the ARCC, and not because of the alleged lack of substantiation.

Malayan adds that from the time St. Francis filed its complaint, up to the conclusion of trial, it had the same theory, i.e., although Malayan had indeed spent for its ARCC, some

costs items ought to be excluded as they could not be considered part of the ARCC. It was only belatedly in its Draft Decision and its Petition before the CA that St. Francis argued for the first time that new cost items should also be deducted from the ARCC because they were allegedly unsubstantiated or not fully supported by official receipts. In light of the rule that a party cannot change his theory on appeal when a party adopts a certain theory in the court below, Malayan faults the CA for excluding new cost items from the ARCC due to lack of substantiation. Besides, Malayan claims that its entire ARCC as of February 29, 2009 was expressly affirmed by its witnesses who are competent to testify due to their involvement in the preparation and monitoring of the project's budget.

Stating that it did not have the burden of proving that it incurred the costs in its ARCC because this was never in issue, Malayan concludes that the CA should have held St. Francis to its original theory that Malayan had actually incurred all the items in its ARCC of P647,319,513.96, instead of examining each item included therein and accepting only P615,880,672.47 as supported by documentary evidence. Finally, Malayan insists that there can be no dispute that it incurred the ARCC of P647,319,513.96 based on the unrebutted testimony of its witnesses and the voluminous documents it introduced at trial.

Malayan's contentions are misplaced.

Contrary to the claim that St. Francis admitted that Malayan had incurred the ARCC of P647,319,513.96, the allegations in St. Francis complaint and the Amended Terms of Reference would show that the substantiation of the cost items included in the ARCC and the exact amount thereof are the core issues of the construction arbitration before the CIAC.

For one, the contention that St. Francis' complaint contained no allegation that Malayan had not actually incurred the costs in its ARCC, nor was there any claim that specific costs items in the ARCC lacked evidentiary basis, is belied by the following allegations in same complaint:

2.9 Sometime in August of 2006, [Malayan] presented a cost to complete construction of the Project in the amount of SIX HUNDRED FOURTEEN MILLION FIVE HUNDRED NINETY THREE THOUSAND FIVE HUNDRED SIXTY FIVE PESOS and 96/100 (P614,593,565.96). **Said cost to complete however was a mere tabulation with a listing of items and appurtenant costs. There was no independent proof or basis as well as evidence that claimant incurred these costs, much less, if these costs conform with the actual construction cost as the same is understood under the MOA.** xxx^[53]

For another, one of the admitted facts in the Amended Terms of Reference states that "[d]espite the completion of the Project and the turnover of the units to [St. Francis], [Malayan], and other buyers of units, the issue of actual cost of construction has not been resolved to the mutual satisfaction of the parties."^[54] Not to mention, one of the issues raised before the CIAC is "[w]hat is the actual remaining construction cost to complete the Project spent by [Malayan] as of today in excess of [St. Francis'] estimate RCC?"^[55] Clearly, there is no merit in the claim that St. Francis admitted that Malayan had incurred the ARCC of P647,319,513.96 as of October 2008. It can be gathered from the complaint that, as early as August 2006 when the ARCC was just P614,593,565.96, St. Francis already disputed such amount for lack of independent proof or evidence that Malayan incurred these costs

Anent Malayan's claim that St. Francis argued belatedly in its Draft Decision and its petition before the CA that new cost items should also be deducted from the ARCC because they were allegedly unsubstantiated or not fully supported by official receipts, suffice it to state that whether such cost items should be excluded from the ARCC is impliedly included in the issue of "[w]hat is the actual remaining construction cost to complete the Project spent by [Malayan] as of today in excess of [St. Francis'] estimate RCC?"^[56]

Moreover, in an action arising out of cost overruns on a construction project, the builder who has exclusive control of the project and is in a better position to know what other factors, if any, caused the increases, has the burden of segregating the overruns attributable to its own conduct from overruns due to other causes.^[57] As the co-owner and developer who assumed the general supervision, management and control over the project, and the one in possession of all the checks, vouchers, official receipts and other relevant documents, Malayan bears the burden of proving that it incurred ARCC in excess of the RCC and the total aggregate value of the reserved units, in which case St. Francis would no longer be entitled to a proportionate share in the reserved units pursuant to the MOA.

In view of the foregoing discussion, the Court finds no merit in Malayan's contentions (1) that it did not have the burden of proving that it incurred the costs in its ARCC because this was never in issue; and (2) that there can be no dispute that it had incurred the ARCC of P647,319,513.96 based on the un rebutted testimony of its witnesses and the voluminous documents it introduced at trial.

D. Erroneous Cost Exclusions from the ARCC

D.1. Change Orders due to Reconfiguration

The CIAC held that costs of reconfiguration should be allowed to remain as part of the ARCC on account of the greater savings generated. It found that Malayan has sufficiently established that the reconfiguration did not result in additional costs, and net savings were realized. Since St. Francis only concern was to minimize costs and maximize savings, there is no longer any basis to object to the reconfiguration and the change order that were approved as a results thereof.

In contrast, the CA ruled that the CIAC erred in allowing the increased cost of P7,434,129.85 to be included in the ARCC because it is immaterial whether there were net savings generated from the reconfiguration, and the fact remains that there was an increase in the budgeted construction cost, which Malayan alone should bear.

Finding substantial evidence on record to support the CIAC ruling, the Court reverses the CA ruling and upholds the CIAC that the increased costs of P7,434,129.52 should be included in the ARCC. The Court sustains the CIAC's observation that although such reconfiguration was not really necessary for the completion of the project and was undertaken only to make the units more saleable, St. Francis had consented thereto on the condition that it would result in savings rather than additional costs.^[58] No persuasive reason was shown to disturb the CIAC finding that despite the increased costs of P7,434,129.52 as claimed by St. Francis, and even including the consultants' fees in the aggregate amount of P3,081,725.00, the savings amounting to P14,096,239.07 due to reconfiguration, would still be in excess of the costs of additive change orders.^[59] In arriving at such computation, the CIAC went over the disputed change orders due to reconfiguration, and proceeded to calculate whether the cost of the additive works exceeded the savings realized from the deductive works. Notably, no similar effort was exerted by the CA in arriving at its ruling. Without stating any reason, the CA reversed the CIAC ruling that net savings were generated on account of change orders due to reconfiguration,

D.2. Change Order not due to Reconfiguration

With respect to change orders not due to reconfiguration amounting to P971,796.29, the CIAC held that such costs should be excluded from the computation of the ARCC because they were clearly not within the scope of the original work covered by the MOA, but were plainly additive works ordered by Malayan to improve or enhance the project. It also found no legal or equitable reason to allow Malayan to pass on the costs of such unnecessary improvements or enhancements to St. Francis.

The CA deemed it unnecessary to disturb the CIAC's findings on the change of orders not due to reconfiguration, as the latter had extensively discussed the issue. According to the CA, the CIAC correctly ruled that the change orders not due to reconfiguration cannot be considered as part of the ARCC as these were not within the scope of the work agreed

upon by the parties in the MOA. It also noted that it is clear from Section 5 of the MOA that Malayan shall undertake, among other things, to construct, develop and complete the Project based on the general specifications already agreed upon by the parties and as set forth in the Schedule 6 of the MOA, with full powers to enter into agreement with contractors, subcontractors, and suppliers for the completion of the various phases of work. It concluded that when Malayan undertook additional works, improvements or enhancements not within the specifications agreed upon, it presupposes that it shall bear the costs thereof.

Since the findings of the CIAC and the CA on this issue are consistent, the Court perceives no cogent reason to overturn such findings which are supported by substantial evidence. Besides, the Court takes issue with Malayan's claim that the CA gravely erred in rigidly applying the specifications in Schedule 6 of the MOA, considering that they were "general" in character and "for reference" purposes only. It is noteworthy that Schedule 6^[60] not only provides for the Schedule of Finishes and Materials of ASB Malayan Tower as of 26 October 2000, covering Exterior Works, Interior Works, Elevators, Intercom, Fire Alarm System, Standby Generator Set, Lightning Protection and Pumps, among other things, but also includes the project floor plans from Basement 2 to 6, and levels 4, 5, 7 to 12, 14 to 18, 20, 22 to 31, 33 to 35, penthouse and upper penthouse. When a building contract refers to the plans and specifications and so makes them a part of itself, the contract is to be construed as to its terms and scope together with the plans and specifications.^[61] When the plans and specifications are by express terms made part of the contract, the terms of the plans and specifications will control with the same force as if they were physically incorporated in the very contract itself.^[62] Malayan cannot, therefore, brush aside Schedule 6 as "general" and "for reference only" matters in the interpretation of the MOA.

As to the costs incurred due to the supposed reasonable deviations from specifications in the exercise of its sound discretion as the developer, Malayan would do well to bear in mind that if the terms of a contract are clear and leave no doubt upon the intention of the contracting parties, the literal meaning of its stipulations shall control.^[63] Under Section 5 of the MOA, Malayan undertook to construct, develop and complete the project based on the general specifications already agreed upon by the parties and set forth in Schedule 6 thereof. As duly pointed out by the CIAC, since the parties to the MOA had agreed on the specifications that will control the construction and completion of the project, anything that alters or adds to these specifications which adds to the costs, should not be part of the ARCC.

D.3. Half of Costs for Narra Parquet Works

The CIAC allowed only half of the increased flooring costs [P4,982,798.44] in the amount of P2,491,399.22, plus the original budgeted expense for this item in the amount of

P12,770,000.00, or a total amount of P15,261,399.22, as part of the ARCC. According to the CIAC, since the cause of change in flooring material and the increased cost was a *force majeure* (government log ban) for which no one can be blamed, it is but fair that both parties will equally share the increased cost.

The CA ruled that the CIAC did not err in dividing the increased cost between the parties. It stressed that the dispute pertains to the proportionate entitlement of the parties to the reserved units after determining the actual construction cost. Thus, both parties should share in the reserved units, as it is but fair that the increased cost should also be equally divided between them, and half of the increased amount should be included in the computation of the ARCC.

Although the findings of the CA and the CIAC on this issue are consistent, the Court finds their reasoning contrary to the MOA. The construction cost increase due to the change from Narra parquet to Kendall laminated flooring is undisputedly due to the government logging ban which is a *force majeure*. However, the equal sharing of such cost increase is contrary to the MOA which provides for the proportionate entitlement of the parties to the reserved units, depending on the excess ARCC over the RCC and the total aggregate value of the reserved units. In addition, such increased cost due to *force majeure* falls under the category of "Contingencies" under Schedule 9 of the MOA, which term is defined as an amount of money, included in the budget for building construction, that is uncommitted for any purpose, intended to cover the cost of unforeseen factors related to the construction which are not specifically addressed in the budget.^[64] The Court therefore holds that the entire increased cost of P4,982,798.44 due to the unforeseen necessity of change in flooring materials, should be included in the computation of the ARCC.

D.4. Half of Costs for CARI

As discussed above, the CARI in the amount of P4,361,291.34^[65] is supported by official receipts; hence, such amount should be allowed to remain in the ARCC. Although the official receipts of the CARI appear to have been issued in the name of Malayan and/or LANDEV, the minutes of the December 20, 2002 Bids and Awards Committee Meeting, of which St. Francis' President Luke Roxas was a member, proves that it was unanimously agreed upon that the CARI would be secured directly by the owner, Malayan. The official receipts and the said minutes prove that the premium of the policy, as well as the renewals thereof, were shouldered by Malayan as the owner of the project. Against the said substantial evidence of Malayan, the CA and CIAC have no basis in ruling why the CARI should be split equally between Malayan and St. Francis.

D.5. Half of Costs for Interior Design Works

In resolving this issue, the CIAC noted that it is crucial to determine whether the disputed

amount was spent to improve the original design or to comply with St. Francis' commitments to the buyers. According to the CIAC, *force majeure* (government log ban) also justified the change of flooring materials from wood parquet to homogenous tiles and marble flooring. However, the difficulty in resolving this issue is that the increased cost is not only because of the change of flooring materials, but also due to the change of specifications and the inclusion of gym equipment. Thus, it is impossible to separate the increased cost arising from flooring change and those from causes other than gym equipment which is worth P962,250.00 and the underlay of plywood and rubber pads worth P96,967.73.

The CIAC noted that the budgeted amount for this item of P5,600,000.00 made by St. Francis was increased to P9,000,000.00 in Malayan's budget, and that the difference of P3,400,000.00 reflects the increase from unspecified causes such as supervening price increase. It added that both parties agreed on the increase due to cost of glass doors, hardware and plumbing fixtures amounting to P2,100,415.00. It was convinced that what is being contested by St. Francis is the increase in the actual cost (P14,150,324.73) *vis-a-vis* the Effective Budget for Interior Design Works of P11,100,415.00 or a net increase of P3,049,909.73.

In view of the above stated difficulty in resolving this issue, the CIAC held that the total increase of P3,049,909.73 as cost of interior design works should be equally shared by both parties (P1,524,954.86 each), as well as the cost of the gym equipment (P962,250.00) and the underlay of plywood and rubber pads (P96,967.73), both amounting to P1,059,217.73. In sum, it allowed only P2,054,563.73 or half of the total cost increase (P4,109,127.46) of such works to be included in the ARCC

Upon review of the records under Exhibit "*R-48-series*," the CA found that the official receipts show that the total payment due was P12,642,152.52. It agreed with the CIAC that the increased cost for this item should be divided equally between the parties, but reduced the amount to P1,508,172.21^[66] (or P754,086.10 each), instead of P3,049,909.73. The CA did not also disturb the CIAC's ruling on the disallowance of one-half of the cost of gym equipment and the underlay of plywood, and rubber pads. Having noted a discrepancy in the total amount of P962,250.00 stated in Exhibit "*C-3*" [Cost to Complete as of 10 August 2006], the adjusted contract price of P987,250.00, and the official receipts showing the total payment of P978,275.01, the CA determined that the share of each of the parties should be P493,625.00.

Malayan claims that no explanation was given why the costs for interior design works had to be divided equally between the parties. In any event, the said works were awarded in accordance with the MOA and St. Francis' original marketing representations to the buyers of the pre-sold units, and they were proper and necessary for the completion of the project. As regards the costs incurred for the gym equipment and the underlay of plywood and

rubber pads, they should be included in full in the ARCC because: (1) Section 6 of the MOA provides that the project must have a "Gym/Lounge/Children's Play Area"; (2) the general specifications of the project lists as one of the amenities a gym with equipment; and (3) St. Francis included such amenities in the marketing brochures and fliers it gave to buyers of the pre-sold units.

The Court agrees with the CA and the CIAC rulings that the costs for interior design works should be included in the computation of the ARCC, and that what is being contested is whether the net increase of P3,049,909.73 from the original budget of PI 1,100,415.00. As correctly found by the CA based on the official receipts, the net increase should only be P1,508,172.21. The Court also sustains the CA that such increase should be equally divided between the parties (P754,086.10 each) due to the impossibility of separating the increased cost arising from flooring change and those from causes (change of specifications) other than gym equipment and the underlay of plywood and rubber pads.

However, there being no valid reason to extend such equal sharing of costs with respect to the gym items, the Court reverses the CA and the CIAC in ruling that costs of the gym equipment (P962,250.00) and the underlay of plywood and rubber (P96,967.73) amounting to P1,059,217.73 should be equally shared by the parties. The Court, thus, holds that the full amount thereof should be included in the computation of the ARCC.

D.6. Contingency Costs

The CIAC disallowed the amount of P2,000,000.00 in contingency costs to be included in the ARCC as they are not directly related to the completion of the project. The CIAC noted that what was included in the ARCC is the amount of P631,154.39 as payment for professional services and various expenses connected with the claim for damages to the car that was hit by falling construction debris, but Malayan included the amount of P2,000,000.00 in the ARCC. It added that Malayan, being insured under the CARI, should assert its claim against the insurance company. If Malayan failed to do so, or if it was able to recover less than what it had claimed, it would be unfair to pass on (*to St. Francis*) the amount it failed to claim by adding it as part of the ARCC.

The CA upheld the CIAC's ruling that contingency costs in the amount of P631,154.39 should not be passed on to St. Francis, considering that what was paid as damages and expenses was a consequence of an incident that occurred when a falling debris hit the Volvo car owned by Celestra. The CA noted that Malayan should assert its claim against the insurer to recover whatever damages it incurred in the course of the construction project. It added that legal fees paid to lawyers who defended Malayan against the claim of one Tan-Yee, cannot be considered actual construction cost, as no evidence was submitted relative thereto.

Malayan claims that the incident which led to the payment of contingency costs was construction-related because a case was filed against it as a result of the incident and that a temporary restraining order (*TRO*) was issued enjoining further construction works; hence, the engagement of lawyers was necessary to ensure the immediate resumption of the construction project.

The Court sustains the CA in ruling that the contingency costs in the amount of P631,154.39 should not be included in the computation of the ARCC. As duly noted by the CIAC and the CA, legal fees cannot be considered as part of the ARCC, as they are not directly related to the completion of the project. Despite the allegation that a TRO was issued, no proof of such order was presented by Malayan. Hence, such costs should not be included as part of the ARCC, but should be charged against the party responsible for the incident, or Malayan as the one responsible for the general supervision, management, control over the project.

D.7. Costs Incurred/Paid after June 2006

The CIAC found it is unnecessary to resolve the issue: "What is the actual remaining construction cost to complete the Project spend by [Malayan] as of today [20 January 2009] in excess of St. Francis' estimated RCC?" Instead, it resolved the same issue based on Exhibit "C-3" which is the ARCC amounting to P614,593,565.96 as of August 10, 2006. Noting that Exhibit "C-3" was prepared by Malayan itself and submitted to St. Francis, and was close enough to June 7, 2006 when the project was completed, the CIAC used such evidence as the basis upon which disallowances were to be made, in order to arrive at the ARCC of P561,729,180.96.

The CA agreed with the CIAC that it is important to determine when the project was completed, as costs incurred after the cut-off date should no longer be included in the computation of the ARCC, and that the incontrovertible proof that the project was completed on June 7, 2006 is the Certificate of Occupancy^[67] submitted by C.E. Manzanero, the duly-licensed architect of Malayan.

The Court finds no compelling reason to disturb the CA and the CIAC rulings that are consistent with Section 5 of the MOA which expressly states that the project "shall be deemed complete, and the obligation of Malayan fulfilled, if the construction and development of Project is finished as certified by the architect of the Project." Indeed, costs and expenses incurred after completion of the project cannot be considered as part of the ARCC.

E. Entitlement to Reserved Units

As discussed and computed above, the Court holds that **30%** of the reserved units should

be allocated to Malayan, while **70%** should be allocated to St. Francis.

F. Income from Reserved Units

The CIAC held that income realized from rental of the reserved units during the period from June 7, 2006 and the present date, should be determined as having been received by Malayan in trust for such party that would be determined to be the owner/s thereof. Considering its determination of the excess ARCC over the RCC, the CIAC stated that the said income should be proportionately shared as follows: 37.8% for St. Francis and 62.2% for Malayan. According to the CIAC, based on Sections 4 (a), (ii) (C)^[68] and 4 (b),^[69] ownership of the reserved units is in doubt during the intervening period from completion of the project and final determination of costs because of the phrases "shall be delivered to ASB" and "Malayan shall be entitled." Clearly, that the ownership of the reserved units shall be determined only upon completion of the project and the determination of the ARCC, because only then could it be computed if there is an excess ARCC over the RCC.

The CIAC observed that had the computation been done on the completion date of the project on June 7, 2006, there would already have been an allocation of ownership over the reserved units. Since the determination of the ARCC was done only almost three (3) years later during the arbitration proceedings, the issue had arisen as to who between the parties is entitled to the rental income from the reserved units which are deposited in the account of Malayan.

The CA agreed with the CIAC's ruling but modified the proportionate sharing of the reserved units, thus: 84% for Malayan and 16% for St. Francis. The CA explained that the income realized from rentals and sales of reserved units from June 7, 2006 until the finality of this case shall be considered as having been received by Malayan; thus, it must be subject to proper accounting in order to arrive at the proper sharing in accordance with the general principles of equity, and pursuant to the said proportionate sharing ratio.

Malayan contends that as the owner of the project, it is entitled to all of the civil fruits, including the rents from the lease of the reserved units. With respect to the accruing fruits, Malayan invokes Article 1187^[70] of the New Civil Code, and claims that it is entitled to appropriate all the fruits and interests realized from the reserved units prior to the happening of two (2) suspensive conditions, *i.e.*, the completion of the project and the determination of the ARCC. Malayan adds that it is iniquitous to award St. Francis a share in the income from the reserved units without making it share in the expenses and upkeep thereof.

The Court finds that Malayan's obligation to give the reserved units is unilateral because it was subject to 2 suspensive conditions, *i.e.*, the completion of the project and the determination of the ARCC, the happening of which are entirely dependent upon Malayan,

without any equivalent prestation on the part of St. Francis. Even if the obligation is unilateral, Malayan cannot appropriate all the civil fruits received because it could be inferred from the nature and circumstances of the obligation that the intention of the person constituting the same was different. Section 9(b) of the MOA states that in the event that Malayan shall pay additional cost and expenses in excess of the RCC, it shall be entitled to such net saleable areas indicated in Schedule 4 that corresponds to the increase in the remaining construction costs, while St. Francis shall be entitled to such remaining areas, if any.

As aptly noted by the CIAC, the determination of the ARCC should have been made upon the date of completion of the project on June 7, 2006, but it was only about 3 years later during the arbitration proceedings that such determination was done. Not until now has the issue of the correct computation of the ARCC been finally resolved. Such long delay in the determination of the ARCC and the proportionate distribution of units in the project could not have been the intention of the parties. The Court, therefore, sustains the CA and the CIAC rulings that the income realized from the reserved units from the completion date until present, should be considered as having been received by Malayan in trust for such party that shall be determined to be the owner thereof. In light of the determination of the excess of the ARCC over the RCC, the income should be proportionately shared as follows: 30% for Malayan and 70% for St. Francis. Subject to proper accounting, upkeep expenses for the reserved units should also be shared by the parties in the same proportion.

G. Counterclaims, Attorney's fees and Arbitration costs

Counterclaims

Having determined above that the ARCC does not exceed the RCC and the total aggregate value of the reserved units, the Court joins the CA and the CIAC in ruling that Malayan is not entitled to its counterclaims.

Attorney's fees

The CIAC denied for lack of factual or legal basis the parties' respective claims and counterclaims for the award of attorney's fees. It noted that the parties failed to point out the contractual stipulation on attorney's fees and expenses of litigation in support of their respective claims therefor. According to the CIAC, based on its extensive discussions made in disposing the claims and counterclaims of the parties, it is clear that the two exceptions^[71] under Article 2208 of the New Civil Code cited by St. Francis and Malayan do not obtain in this case. The CIAC explained that Malayan's denial of St. Francis' claims cannot be characterized as made in gross and evident bad faith, and that the disallowances of the ARCC in favor of St. Francis disprove that the filing of the arbitration case was "clearly unfounded." The CA affirmed the CIAC.

Finding that none of the exceptions under Article 2208^[72] of the New Civil Code is present in this case, the Court agrees with the CA and the CIAC that the parties' claims for attorney's fees must be denied. As held in *ABS-CBN Broadcasting Corporation v. Court of Appeals*:^[73]

The general rule is that attorney's fees cannot be recovered as part of damages because of the policy that no premium should be placed on the right to litigate. They are not to be awarded every time a party wins a suit. The power of the court to award attorney's fees under Article 2208 demands factual, legal, and equitable justification. Even when a claimant is compelled to litigate with third persons or to incur expenses to protect his rights, still attorney's fees may not be awarded where no sufficient showing of bad faith could be reflected in a party's persistence in a case other than an erroneous conviction of the righteousness of his cause.

Arbitration costs

The CIAC held that arbitration costs shall be maintained at the same level as initially shared based on the *pro rata* sharing in accordance with the amounts claimed and counterclaimed by the parties. Stating that Section 1, Rule 142^[74] of the Rules of Court suppletorily applies to arbitration proceedings since there is no corresponding provision in the CIAC rules of procedure, the CIAC ruled that there are good reasons to maintain their initial *pro rata* sharing thereof, considering that their respective claims and counterclaims have merits. Thus, it is just and equitable that both Malayan and St. Francis pay for their respective shares based on proportionate cost or amount of the claim. In contrast, the CA ruled that arbitration costs shall be maintained *pro rata* in accordance with the parties' respective shares in the reserved units.

After reviewing the conflicting rulings of the CIAC and the CA on arbitration costs, the Court finds the one rendered by CIAC to be in accord with law. Unlike the CA's ruling which is based only on the MOA provision on distribution and disposition of reserved units, the CIAC's ruling is based on the Amended Terms of Reference (*TOR*) which specifically provides that the costs of arbitration shall be on a *pro rata* basis subject to the determination of the CIAC which of the parties shall eventually shoulder such costs or the mode of sharing thereof.^[75]

Citing Section 1, Rule 142 of the Rules of Court, the CIAC found it just and equitable that both Malayan and St. Francis pay for their respective shares based on the *pro rata* sharing

in accordance with the amounts claimed and counterclaimed by the parties. Under the amended TOR, the Summary of Claims/Counterclaims and the arbitration expenses are as follows:

CLAIMANT [St. Francis]		
Value of Reserved Units being claimed		P 139,519,969.17 <u>41,190,550.59</u>
		P 180,710,519.76
Income		21,150,659.33
Attorney's fees	<u>300,000.00</u>	
		P 202,161,179.09
<u>RESPONDENT</u> [Malayan]		
Actual damages	P24,653,196.08	
Attorney's fees	<u>2,000,000.00</u>	
		P 26,653,196.08
TOTAL SUM IN DISPUTE		P 228,814,375.17

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**IX ARBITRATION EXPENSES BASED ON
A SUM IN DISPUTE OF P228,814,375.17**

Filing Fee	P 91,009.98
Administrative Fee	92,329.98
Arbitrator's Fees	629,566.60
ADF	214,566.60
TOTAL	P 1,064,517.38^[76]

Based on the parties' claims and counterclaims involving the total disputed sum of P228,814,375.17, the arbitration expenses in the total amount of P1,064,517.38 should be shared in the following proportion:

1. St. Francis: $P202,161,179.09 / P228,814,375.17 = 0.88 \times P1,064,517.38 = \mathbf{P936,775.29}$
 2. Malayan: $P26,653,196.08 / P228,814,375.17 = 0.12 \times P1,064,517.38 = \mathbf{127,742.09}$
- Total Arbitration Expenses = **P1,064,517.38**

WHEREFORE, premises considered, the Court of Appeals Decision dated January 27, 2011 in CA-G.R. SP Nos. 109286 and 109298, is **AFFIRMED** with the following **MODIFICATIONS**:

- 1) The total amount of P57,474,561.39 should be deducted and excluded from the gross Actual Remaining Construction Cost (ARCC) of P562,866,135.02 to arrive at the net ARCC of P505,391,573.63;
- 2) Malayan is entitled to 30% ownership over the reserved units (P52,966,724.63/P175,856,325.05), together with the corresponding interest in the income realized thereon in the same proportion; while St. Francis is entitled to 70% (P122,889,598.42/P175,856,325.05) ownership of the said units, as well as to its corresponding share in the said income. The distribution of the parties' proportionate share in the units shall be made by drawing of lots;
- 3) Malayan is directed to deliver possession and transfer title over the reserved units in the proportion above stated, to pay St. Francis its proportionate share of the income from the reserved units reckoned from the date of the completion of the project on June 7, 2006 up to the finality of this decision, and to render full accounting of all the upkeep expenses, rentals and such other income derived from the reserved units so awarded to St. Francis;
- 4) Arbitration costs are maintained pursuant to the *pro rata* sharing that the parties had initially shared in accordance with the amounts claimed and counterclaimed by them, namely, St. Francis: P936,775.29; and Malayan: P 127,742.09;
- 5) Malayan and all others claiming rights under it, are enjoined from exercising acts of ownership over the reserved units relative to the proportionate share awarded to St. Francis;
- 6) The Register of Deeds of Pasig City is directed to immediately reinstate the name of St. Francis Square Realty Corporation (formerly ASB Realty Corporation) as the registered owner in the corresponding Condominium Certificates of Title covering the reserved units awarded to St. Francis; and
- 7) All other awards granted by CIAC in its Award dated May 27, 2009 which are not affected by the above modifications are affirmed. No costs.

SO ORDERED.

Velasco, Jr., (Chairperson), Villarama, Jr., Reyes, and Jardeleza, JJ., concur.

February 11, 2016

NOTICE OF JUDGMENT

Sirs/Mesdames:

Please take notice that on January 11, 2016 a Decision, copy attached hereto, was rendered by the Supreme Court in the above-entitled case, the original of which was received by this Office on February 11, 2016 at 9:37 a.m.

Very truly yours,
(SGD)
WILFREDO V. LAPITAN
Division Clerk of Court

[1] Penned by Associate Justice Stephen C. Cruz, with Associate Justices Isaias P. Dicdican and Jane Aurora C. Lantion, concurring.

[2] Rendered by the Arbitral Tribunal composed of Alfredo F. Tadiar, Chairman, and Victor P. Lazatin and Ricardo B. San Juan, as Members.

[3] *Rollo* (G.R. Nos. 198916-17), Vol. I, pp. 178-179. (Citations omitted)

[4] *Rollo* (G.R. Nos. 108916-17), Vol. 1, pp. 180-181.

[5] *Rollo* (G.R. Nos. 108020-21), p. 618. (Emphasis in the original)

[6] *Rollo* (G.R. Nos. 108016-17), Vol. 1, pp. 134-135.

[7] *Rollo* (G.R. Nos. 198920-21), p. 89.

[8] *Rollo* (G.R.Nos. 198916-17), Vol. 1, pp. 62-63.

[9] *Shinryo (Philippines) Company, Inc. v. RRN, Incorporated*, G.R. No. 172525, October 20, 2010, 634 SCRA 123, 130, citing *IBEX International, Inc. v. Government Service Insurance System*, 618 Phil. 304, 313(2009).

[10] *IBEX International, Inc. v. Government Service Insurance System, Ibid, citing Uniwide Sales Realty and Resources Corporation v. Titan-Ikeda Construction and Development Corporation*, 540 Phil. 350 (2009) and *David v. Construction Industry and Arbitration Commission*, 479 Phil. 578 (2004).

[11] Estimated Cost to Complete

I. Balance to Complete Existing Contracts -	Php 161,098,039.86
II. Unawarded Contracts	P 224,045,419.16
III. Professional Fee	4,138,108.08
IV. Contingencies	<u>63,143,281.10</u>
	Php 452,424,849.10

[12] Section 2. *Investment of Malayan*. Subject to the provisions of Section 9 below, Malayan shall invest the amount necessary to complete the Project and the following amounts:

- a. P65,804,381 representing payment by Malayan, on behalf of ASB, of the principal amount as of signing hereof of the loan obtained by ASB from the Rizal Commercial Banking Corporation to finance the Project; and
- b. P38,176,725 representing payment by Malayan, on behalf of ASB, of ASB's outstanding obligations to contractors of the Project as of signing hereof, (i) by offsetting from said obligations the legally compensable P25,463,771 total advances of said contractors from ASB as set forth in Section 5 (g) and (ii) by paying the net payable to contractors/suppliers in the amount of P12,712,954.

[13] Cyril M. Harris, McGraw-Hill, *Dictionary of Architecture and Construction* (Fourth Edition), p. 251.

[14] Section 2. *Investment of Malayan*. Subject to the provisions of Section 9 below, Malayan shall invest the amount necessary to complete the Project and the following amounts:

- a. P65,804,381 representing payment by Malayan, on behalf of ASB, of the principal amount as of signing hereof of the loan obtained by ASB from the Rizal Commercial Banking Corporation to finance the Project; and
- b. P38,176,725 representing payment by Malayan, on behalf of ASB, of ASB's outstanding

obligations to contractors of the Project as of signing hereof, (i) by offsetting from said obligations the legally compensate P25,463,771 total advances of said contractors from ASB as set forth in Section 5 (g) and (ii) by paying the net payable to contractors/suppliers in the amount of P12,712,954. (Emphasis added)

[15] New Civil Code, Art. 1377.

[16] Cyril M. Harris, McGraw-Hill, *Dictionary of Architecture and Construction* (Fourth Edition), p. 251.

[17] *Rollo* (G.R. Nos. 198920-21), pp. 341-345.

[18] *Id.* at 346-371.

[19] Emphasis added.

[20] Memorandum of Agreement dated April 30, 2002, Sec. 19.

[21] Section 6. *Responsibilities of ASB* [now, St. Francis]. [St. Francis] undertakes to do the following obligations:

a. Within ninety (90) days from date hereof or within such extended period as may be agreed upon by the parties, obtain, whether on its own behalf or for the benefit of Malayan, from local or national government agencies (including, but not limited to, the Housing and Land Use Regulatory Board, the Securities and Exchange Commission, and the Bureau of Internal Revenue) or any other entity or person any and all permits, licenses, approvals or consents necessary to implement the transactions contemplated herein, including, but not limited to, the following final and executory approvals;

i. approval by the Securities and Exchange Commission of the transactions contemplated hereunder; and

ii. approval by the Housing and Land Use Regulatory Board of the transactions contemplated hereunder, including any changes or amendments to the Master Deed of Restrictions, License to Sell, or any other document relating to the Project as Malayan may deem necessary or appropriate and as Malayan shall relay to [St. Francis] prior to the date of signing hereof, such as the change of the name of

the Project to "Malayan Tower" or any other name that Malayan may adopt, or the right of Malayan to convert the units to a condotel/apartelle. For this purpose, Malayan shall grant [St. Francis] a special power of attorney to follow up the processing of said approval;

b. Upon terms and conditions acceptable to Malayan, (i) assign the construction contracts and the amount of P36,731,086 advanced to contractors of the Project set forth in Section 5 (g) to help the parties reduce the cash requirement to complete the Project, with the contractors' conformity and confirmation of the amount of their net advances from [St. Francis] as set forth in Section 5 (g), and/or (ii) obtain the renewal of expiring or expired construction contracts of these contractors;

c. Within thirty (30) days from date hereof, obtain from each contractor with a net claim against [St. Francis] as set forth in Section 5 (g) an irrevocable undertaking to execute the waiver of all its claims against the Project, upon payment by Malayan of its net claim. Such undertaking and waiver shall conform to the undertaking and waiver attached hereto as Schedule 7. [St. Francis] represents and warrant to Malayan that (a) the contractors listed in Section 5 (g) are the only contractors with claims against the Project and (b) their aggregate net claims do not exceed P12,712,954;

d. Within fifteen (15) days from procurement of all approvals mentioned in Section 6 (a) above, transfer to Malayan complete and unhampered possession of the Project and turn over and deliver to Malayan all architectural, engineering and other plans; records and other documents of the Project as set forth in Schedule 8 hereof;

x x x

[22] Section 4. *Distribution and Disposition of Units*, x x x As of the date of the execution hereof, and on the basis of the total costs incurred to date in relation to the Remaining Construction Cost (as defined in Section 9(a) hereof), the parties shall respectively be entitled to the following (which entitlement shall be conditioned on, and subject to adjustments as provided in sub-paragraph (b) of Section 4 in the event that the actual remaining construction cost exceeds the Remaining Construction Cost): x x x

[23] Section 9. *Remaining Construction Cost*. (a) [St. Francis] represents and warrant to Malayan that Malayan can complete the Project at a cost not exceeding Four Hundred Fifty-Two Million Four Hundred Twenty-Four Thousand Eight Hundred Forty-Nine Pesos (P452,424,849[.00]) (the "Remaining Construction Cost") as set forth in [St. Francis']

Construction Budget Report attached hereto and made integral part hereof as Schedule 9, x x x.

(b) Malayan shall pay for any additional costs and expenses that may be incurred in excess of the Remaining Construction Cost. In such event, it shall be entitled to such net saleable area as indicated in Schedule 4 that corresponds to the increase in remaining construction costs. [St. Francis] shall be entitled to such net saleable area, if any, remaining in the aforesaid Schedule 4.

[24] Memorandum of Agreement dated April 30, 2002, Sec. 2.

[25] Id., Sec. 3.

[26] Cyril M. Harris, McGraw-Hill, *Dictionary of Architecture and Construction* (Fourth Edition), p. 251.

[27] *Rollo* (G.R. Nos. 108916-17), Vols. II & IV, pp. 1370-3600.

[28] Id. at 1371 (G.R. Nos. 198916-17), Vol. II, Exhibit "*R-48-A-series*."

[29] Id. at 1661, Id, Exhibit "*R-48-E-4-series*."

[30] Id. at 1787, Id, Exhibit "*R-48-E-20-series*."

[31] Id. at 2349, Id, Exhibit "*R-48-F-27-series*."

[32] Id. at 2477, Id, Exhibit "*R-48-F-43-series*."

[33] Id. at 2520, Id, Exhibit "*R-48-F-47-series*."

[34] P5,100,000.00 [Item 6.12.3 per CA] - P2,702,952.11 [Item 6.12.3 per Exhibit "*R-48-F-47-series*."] = P2,397,047.89

[35] *Rollo* (G.R. Nos. 198916-17), p. 3523, Vol. IV, Exhibit "*R-48-U-series*."

[36] Id. at 3 169, Id, Exhibit "*R-48-H-series*."

[37] Id. at 3265, Id, Exhibit "*R-48-H-6-series.*"

[38] SRC. 110. *Tax Credits.* -

A. *Creditable Input Tax.* -

(1) Any input tax evidenced by a VAT invoice or official receipt issued in accordance with Section 113 hereof on the following transactions shall be creditable against the output tax:

(a) Purchase or importation of goods:

- (i) For sale; or
- (ii) For conversion into or intended to form part of a finished product for sale including packaging materials; or
- (iii) For use as supplies in the course of business; or
- (iv) For use as materials supplied in the sale of service; or
- (v) For use in trade or business for which deduction for depreciation or amortization is allowed under this Code, except automobiles, aircraft and yachts,

(b) Purchase of services on which a value-added tax has been actually paid.

(2) The input tax on domestic purchase of goods or properties shall be creditable:

(a) To the purchaser upon consummation of sale and on importation of goods or properties; and

(b) To the importer upon payment of the value-added tax prior to the release of the goods from the custody of the Bureau of Customs.

However, in the case of purchase of services, lease or use of properties, the input tax shall be creditable to the purchaser, lessee or licensee upon payment of the compensation, rental, royalty or fee.

(3) A VAT-registered person who is also engaged in transactions not subject to the value-added tax shall be allowed tax credit as follows:

(a) Total input tax which can be directly attributed to transactions subject to value-added tax; and

(b) A ratable portion of any input tax which cannot be directly attributed to either activity.

The term "input tax." means the value-added tax due from or paid by a VAT-registered person in the course of his trade or business on importation of goods or local purchase of goods or services, including lease or use of property, from a VAT-registered person. It shall also include the transitional input tax determined in accordance with Section 1 I 1 of this Code. The term "output tax" means the value-added tax due on the sale or lease of taxable goods or properties or services by any person registered or required to register under Section 236 of this Code.

(B) *Excess Output or Input Tax.* - If at the end of any taxable quarter the output tax exceeds the input tax, the excess shall be paid by the Vat-registered person. If the input tax exceeds the output tax, the excess shall be carried over to the succeeding quarter or quarters. Any input tax attributable to the purchase of capital goods or to zero-rated sales by a VAT-registered person may at his option be refunded or credited against other internal revenue taxes, subject to the provisions of Section 112.

(C) *Determination of Creditable Input Tax.* - The sum of the excess input tax carried over from the preceding month or quarter and the input tax creditable to a VAT-registered person during the taxable month or quarter shall be reduced by the amount of claim for refund or tax credit for value-added tax and other adjustments, such as purchase returns or allowances and input tax attributable to exempt sale.

The claim for tax credit referred to in the foregoing paragraph shall include not only those filed with the Bureau of Internal Revenue but also those filed with other government agencies, such as the Board of Investments the Bureau of Customs.

[39] *Rollo* (G.R. Nos. 198916-17), Vols. II & IV, pp. 1370-3600, Exhibit "R-48-series." SEC. 113. *Invoicing and Accounting Requirements for VAT-Registered Persons.* —
X X X X

(B) *Information Contained in the VAT Invoice or VAT Official Receipt.* - The following information shall be indicated in the VAT invoice or VAT official receipt:

(1) A statement that the seller is a VAT-registered person, followed by his taxpayer's identification number (TIN);

(2) The total amount which the purchaser pays or is obligated to pay to the seller with the indication that such amount includes the value-added tax:
Provided, That:

(a) The amount of the tax shall be shown as a separate item in the invoice or receipt;

(b) If the sale is exempt from value-added tax, the term "VAT-exempt

sale" shall be written or printed prominently on the invoice or receipt;

(c) If the sale is subject to zero percent (0%) value-added tax, the term "zero-rated sale" shall be written or printed prominently on the invoice or receipt;

"(d) If the sale involves goods, properties or services some of which are subject to and some of which are VAT zero-rated or VAT-exempt, the invoice or receipt shall clearly indicate the breakdown of the sale price between its taxable, exempt and zero-rated components, and the calculation of the value-added tax on each portion of the sale shall be shown on the invoice or receipt: "Provided, That the seller may issue separate invoices or receipts for the taxable, exempt, and zero-rated components of the sale, x x x

[41] As amended by R..A. 9337 (Effective July 1, 2005).

[42] *University of the Philippines v. Philah Industries, Inc.*, 482 Phil. 693, 709 (2004).

[43] National Internal Revenue Code, Sees. 105 and 110(A).

[44] *Rollo*, (G.R. Nos. 198916-17), Vol. 11, pp. 2815-2821.

[45] *Id.*, Vol. IV, pp. 3327-3333.

[46] *Id.* at 3329-3333.

[47] Exhibit "C-50."

[48] *Rollo* (G.R. Nos. 198916-17), p. 917, Vol. 1. CIAC Decision in Case 27-2007, p. 64 of 68.

[49] *Id.* at 920-921; *Id.* at 67 of 68.

[50] *Id.* at 919; *Id.* at 66 of 68. Accordingly. The amount of **Php 20,518,725.34** adjudged in TVI's favor shall earn interest based on the 30-day regular loan rate of the Land Bank of the Philippines prevailing on the **due date** until the filing of this case with the CIAC.

As of October 30 2006, the prevailing Prime Lending Rate as certified by Land Bank of the Philippines was 8.00% p.a. Time lapsed from October 31, 2006 (date of certification) to

September 14, 2007 (filing of case with C1AC) is 318 days. TVI is, therefore, entitled to accrued interest computed as follows: **Php20,518,725.34**(principal amount) x **.08** (interest rate) x **318/365** (days elapsed) or **Php 1,430,127.05**. (Emphasis in the original)

[51] (P7,743,278.89x.08x3 18/365)

Section 19. *Advertisements*. Advertisements that may be made by the owner or developer through newspaper, radio, television, leaflets, circulars or any other form about the subdivision or the condominium or its operations or activities must reflect the real facts and must be presented in such manner that will not tend to mislead or deceive the public.

The owner or developer shall answerable and liable for the facilities, improvements, infrastructures or other forms of development represented or promised in brochures, advertisements and other sales propaganda disseminated by the owner or developer or his agents and the same shall form part of the sales warranties enforceable against said owner or developer, jointly and severally. Failure to comply with these warranties shall also be punishable in accordance with the penalties provided for in this Decree.

[53] *Rollo* (G.R. Nos. 198020-21), p. 263. (Emphasis added.)

[54] *Rollo* (G.R. Nos. 198916-17), Vol. 1, p. 179.

[55] *Id.* at 180.

[56] *Id.*

[57] 13 Am Jur 2d § 122, Building, Etc. Contracts.

[58] *Rollo* (G.R. Nos. 198920-21), p. 605.

[59] *Id.* at 608.

[60] *Rollo* (G.R. Nos. 198916-17), Vol. 1, pp. 212-237.

[61] 13 Am Jur2 d § 13, Building, Etc. Contracts.

[62] *Id.*

[63] New Civil Code , Art. 1370.

[64] Cyril M. Harris, McGraw-Hill, Dictionary of Architecture and Construction (Fourth Edition), p. 251.

[65] *Rollo* (G.R. Nos. 198916-17), Vol. IV, pp. 3329-3333.

[66] P14,150,324.73 (actual cost) - P12,642,152.52 (total payment) = P1,508,172.21

[67] Exhibit "C-33."

[68] Section 4. *Distribution and Disposition of Units.* (a) As a return of its capital investment in the Project, each party shall be entitled to such portion of all the net saleable area of the Building that their respective contributions to the Project bear to the actual construction cost. As of the date of the execution hereof, and on the basis of the total costs incurred to date in relation to the Remaining Construction Cost (as defined in Section 9(a) hereof), the parties shall respectively be entitled to the following (which entitlement shall be conditioned on, and subject to, adjustments as provided in sub-paragraph (b) of Section 4 in the event that the actual remaining construction cost exceeds the Remaining Construction Cost):

x x x x

(ii) ASB - the following net saleable area: x x x x

(C) provided that the actual remaining construction cost do not exceed the Remaining Construction Cost, the net saleable area, particularly described in Schedule 4 hereof **shall be delivered to ASB** [St. Francis] upon completion of the Project and determination of its actual construction costs. If the actual remaining construction costs exceed the Remaining Construction Cost, sub-paragraph (b) of this Section 4 shall apply. (Emphasis added).[76] Id. at 181-182.

[69] Id. (b) In the event that the actual remaining construction costs exceed the Remaining Construction Cost as represented and warranted by [St. Francis] to Malayan under Section 9(a) hereof, and Malayan pays for such excess, the pro rata sharing in the net saleable area of the Building, as provided in sub-paragraph (a) of this Section 4 shall be adjusted accordingly. In such event, **Malayan shall be entitled** to such net saleable area in Schedule 4 that corresponds to the excess of the actual remaining cost over the Remaining Construction Cost. (Emphasis added).

[70] ART. 1187. The effects of a conditional obligation to give, once the condition has been fulfilled, shall retroact to the day of the constitution of the obligation. Nevertheless, when the obligation imposes reciprocal prestations upon the parties, then fruits and interests during the pendency of the condition shall be deemed to have been mutually compensated. If the obligation is unilateral, the debtor shall appropriate the fruits and interests received, unless from the nature and circumstances of the obligation it should be inferred that the intention of the person constituting the same was different.

[71] Article 2208. In the absence of stipulation, attorney's fees and expenses of litigation, other than judicial costs, cannot be recovered, except:

X X X X

(4) In case of clearly unfounded civil action or proceeding against the plaintiff;

(5) Where the defendant acted in gross and evident bad faith in refusing to satisfy the plaintiffs plainly valid, just and demandable claim;

X X X X

[72] Art. 2208. In the absence of stipulation, attorney's fees and expenses of litigation, other than judicial costs, cannot be recovered, except:

- (1) When exemplary damages are awarded;
- (2) When the defendant's act or omission has compelled the plaintiff to litigate with third persons or to incur expenses to protect his interest;
- (3) In criminal cases of malicious prosecution against the plaintiff;
- (4) In case of a clearly unfounded civil action or proceeding against the plaintiff;
- (5) Where the defendant acted in gross and evident bad faith in refusing to satisfy the plaintiffs plainly valid, just and demandable claim;
- (6) In actions for legal support;
- (7) In actions for the recovery of wages of household helpers, laborers and skilled workers;
- (8) In actions for indemnity under workmen's compensation and employer's liability laws;
- (9) In a separate civil action to recover civil liability arising from a crime;
- (10) When at least double judicial costs are awarded;
- (11) In any other case where the court deems it just and equitable that attorney's fees and expenses of litigation should be recovered.

In all cases, the attorney's fees and expenses of litigation must be reasonable.

[73] 361 Phil. 499, 529(1999).

[74] SECTION 1. *Costs ordinarily follow results of suit.*- Unless otherwise provided in these rules, costs shall be allowed to the prevailing party as a matter of course, but the court shall have power, for special reasons, to adjudge that either party shall pay the costs of an action, or that the same be divided, as may be equitable, x x x

[75] *Rollo* (G.R. Nos. 198916-17), Vol. 1, p. 182.

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