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BROADENING ITS SCOPE OF ARBITRATION ADVOCACY

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Unlicensed foreign companies may enforce arbitral awards in the Philippines

By Leonid C. Nolasco

The Philippine Supreme Court recently allowed Tuna Processing, Inc. (TPI), a foreign corporation doing business in the Philippines without a license, to bring suit to enforce an arbitral award rendered by the International Centre for Dispute Resolution in California, United States against Philippine Kingford, Inc., a domestic corporation.

In its Decision rendered on February 29, 2012 in G.R. No. 185582, *Tuna Processing, Inc. vs. Philippine Kingford, Inc.*, the Supreme Court reversed the order of the Regional Trial Court, Makati City, Branch 61 dismissing TPI's petition. The case was resolved by the Supreme Court just over four years after TPI sued to enforce the arbitral award on October 10, 2007.

In upholding TPI, the Supreme Court resolved the apparent conflict between Section 133 of the Corporation Code, which disallowed foreign corporations doing business in the Philippines without a license from suing before Philippine courts, and Republic Act No. 9285 (2004) or the Alternative Dispute Resolution Act of 2004, which allowed foreign corporations to enforce foreign arbitral awards in the Philippines.

According to the Supreme Court, although TPI was doing business in the Philippines by collecting royalties from five domestic tuna processing companies, it could still bring suit in the Philippines to enforce a foreign arbitral award since RA No. 9285, a special law, takes precedence over the Corporation Code, which is a general law on corporations. Further, in petitions for enforcement of foreign arbitral awards

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PART ONE

Evidence *and* procedural due process in commercial arbitration

By Donemark J.L. Calimon

There are two recurring themes in the recent revisions to the 2010 IBA Rules, the 2010 UNCITRAL Rules, and the 2012 ICC Rules, namely: (a) emphasis on providing more efficient, less costly, and fair procedures in arbitration proceedings; and (b) express mandate to the tribunal to consult with the parties for the purpose arriving at an agreed procedure and timetable for the arbitration. Due to the challenge of balancing the discretion of the tribunal to conduct the arbitration and its obligation to protect the parties' right to procedural due process, as exemplified in the recent case of *Pacific China Holdings Ltd v. Grand Pacific Holdings, Ltd,*[1] the adoption of this "meet and consult" approach is quite timely.

Introduction [2]

Procedural due process in commercial arbitration is generally understood to refer to the right of a party to be given equal or full opportunity to present its case in the arbitration proceedings.[3] Whether or not a party is prevented from presenting its case depends to a large extent on how the tribunal treats the evidence submitted or sought to be submitted by a party.[4] One of the key features of arbitration is that the tribunal is given wide latitude to decide how the arbitration should be conducted, including the power to determine the question of admissibility, relevance, materiality and weight of evidence.[5]

With respect to the treatment of evidence, the question is to what extent may an arbitrator exercise his discretion without violating a party's right to procedural due process? Recent decisions[6] by Hong Kong Court of First Instance and the Singapore Court of Appeal suggest that there is no straightforward answer to this question.

A court faced with an application to set aside an award may rule one way or the other, or may apply a different standard. Fortunately, recent revisions to some important international arbitration rules, particularly the IBA Rules,[7] the ICC Rules,[8] and UNCITRAL Rules,[9] suggest a common approach to this issue of how to balance procedural due process with arbitrator discretion, which approach directly relates to treatment of evidence.

2010 IBA Rules on Evidence

In May 2010, significant changes were introduced into the IBA Rules (2010 IBA Rules).

Unlike the previous version, which referred to the rules as intended to govern the taking of evidence in an efficient and economical process, the 2010 IBA Rules clarifies that its intent is to "provide an efficient, economical and fair process for the taking of evidence in international arbitrations". The inclusion of "fair process" is another notable addition.

A new section on consultation on evidentiary issues was introduced. Article 2 requires the tribunal to consult the parties at the earliest appropriate time and invite them to consult with each other for the purpose of agreeing on an efficient, economical and fair process for the taking of evidence. The same article encourages the tribunal

[1] (2011) HKCU 1249.
[2] Author's Note: This paper was written for purposes of the author's presentation at the 6th Regional Arbitral Institutes' Forum (RAFI) Conference held on 5 May 2012 in Bali, Indonesia.
[3] United Nations Convention on the Recognition and Enforcement of Arbitral Award (New York Convention), Article V.1 (b); UNCITRAL Model Law on International Commercial Arbitration (UNCITRAL Model Law), Article 34 (2) (a) (ii) and Article 36 (1) (a) (ii); see also
[4] Procedural due process also requires giving of proper notice of the appointment of the arbitrator or of the arbitration proceedings (New York Convention, Article V.1(b).
[5] UNCITRAL Model Law, Article 19 (2).
[6] This paper discusses two decisions, one from the Singapore Court of Appeal and the other from a Hong Kong Court of First Instance, which dealt with applications to set aside arbitral award on the ground that a party was not given the full opportunity to present its case. The Singapore Court of Appeal allowed enforcement while the Hong Kong Court of First Instance granted the application to set aside.
[7] IBA Rules on the Taking of Evidence in International Arbitration. The revised rules were approved by the IBA Council on 29 May 2010.
[8] Arbitration Rules of the International Chamber of Commerce. The revised rules took effect on 1 January 2012.
[9] The Arbitration Rules of the United Nations Commission on International Trade Law. The revised rules took effect on 15 August 2010.

to identify any issues, material and relevant, and/or for which a preliminary determination is necessary.

The following revisions were also notable:

- Clarification that documents do not have to be in writing and may include "data of any kind, whether recorded or maintained on paper or by electronic, audio visual or any other means." [10]
- Expanded guidelines governing requests for production of documents, including electronic documents.
- Such requests may include documents a requesting party may actually be able to obtain by itself had it not been unreasonably burdensome to do so.
- A party may ask for leave to itself take steps to obtain documents in the possession of third parties.
- Documents, whether submitted or produced, either by a party or non-party, shall be kept confidential both by the tribunal and the other parties.
- Additional guidelines relating to factual or expert witnesses and expert reports, including emphasis on an expert's independence from the parties and their legal advisors and the tribunal.
- Expanded provisions on evidentiary hearings, e.g., use of videoconference or similar technology and express authority for the tribunal to ask questions to witnesses anytime.

2010 UNCITRAL Rules

Shortly after the adoption of the Revised IBA Rules on 29 May 2012, the 2010 UNCITRAL Arbitration Rules ("2010 UNCITRAL Rules") applied to arbitration agreements concluded after 15 August 2010. Article 2 of the 2010 Rules states that "The parties to an arbitration agreement concluded after 15 August 2010 shall be presumed to have referred to the Rules in effect on the date of commencement of the arbitration, unless the parties have agreed to apply a particular version of the Rules. That presumption does not apply where the arbitration agreement has been concluded by accepting after 15 August 2010 an offer made before that date."

Article 17 of the 2010 UNCITRAL Rules now requires the tribunal to "conduct the proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties' dispute." Like the 2010 IBA Rules, the 2010 UNCITRAL Rules recognize increasing concern about the lengthening time and increasing cost of arbitration. To address this, Article 17.2 provides that "as soon as practicable after its constitution and after inviting the parties to express their views, the arbitral tribunal shall establish the provisional timetable of the arbitration."

2012 ICC Rules

Much more recently on 1 January 2012, the new ICC Rules ("2012 ICC Rules") took effect. Article 22 (1) states that "the arbitral tribunal and the parties shall make every effort to conduct the arbitration in an expeditious and cost-effective manner having regard for the complexity and value of the dispute." Article 22 (2) states "in order to ensure effective case management, the arbitral tribunal, after consulting the parties, may adopt such procedural measures as it considers appropriate, provided that they are not contrary to any agreement of the parties." Although the old rules contemplated consultation between the tribunal and the parties, the consultation did not expressly pertain to the adoption of procedural measures.

In addition, Article 24 (1) requires the tribunal, when drafting the Terms of Reference or as soon as possible thereafter, to convene a case management conference to consult the parties on procedural measures that may be adopted, including certain case management techniques incorporated in the new Appendix IV of the rules. These techniques may include bifurcating the proceedings or rendering partial awards, identifying issues that can be resolved by agreement or those to be decided solely on the basis of documents, production of documentary evidence, limiting the length and scope of written submissions and written and oral witness evidence, using telephone or video conferencing, pre-hearing conference with the tribunal, and the settlement of disputes.

To ensure confidentiality, the tribunal may make orders under Article 22 (3) concerning the confidentiality of the arbitration or of any other matter in connection with the arbitration, and may take measures to protect trade secrets and confidential information.

Next issue: The case of *Soh Beng Tee & Company Pte Ltd v. Fairmount Development Pte Ltd.* decided by the Singapore Court of Appeal.

About the Author

Donemark J.L. Calimon is a partner at the Litigation and Dispute Resolution Group of Quisumbing Torres Law Offices, a member firm of Baker & McKenzie International. He is a member and an accredited arbitrator of PDRCI, an associate of the Chartered Institute of Arbitrators, East Asia Branch (Philippine Chapter) and a director/officer of the Philippine Institute of Arbitrators. He obtained his law degree at the University of the Philippines in 2000 and was admitted to the Philippine Bar in 2001.

[10] See Definitions, 2010 Rules of Evidence. The Commentary on the Revised Text of the 2010 IBA Rules on the Taking of Evidence in International Arbitration explains that "minor changes were introduced to the 2010 IBA Rules to ensure that all forms of evidence, including electronic evidence, are subject to the IBA Rules." The Commentary may be accessed at http://www.ibanet.org/LPD/Dispute_Resolution_Section/ Arbitration/Default.aspx.

MEMBER SPOTLIGHT

Atty. Maria Clara B. Tankeh- Asuncion

Maria Clara B. Tankeh-Asuncion manages her own law firm, which specializes in child and family law, civil litigation, commercial and construction arbitration. She has close to 25 years of experience as a lawyer. She launched her solo career in 2005 after practicing with Syquia Law Offices since 1987. She co-founded and edited *The Lawyers Review*, where she also wrote from 1986 up to 1996. She was also editor of the Philippine Bar Association (PBA) Newsletter in 1989.

Clara is an accredited construction arbitrator of the Philippine Construction Industry Arbitration Commission (CIAC) since 2001. In November 2005, she co-drafted the CIAC Rules on Mediation. She served as a Trustee of the Philippine Institute of Construction Arbitrators and Mediators (PICAM) from 2004 to 2009, and has been a member of the Philippine Dispute Resolution Center, Inc. since 2002. She is also an accredited mediator of the Philippine Court of Appeals.

Ms. Asuncion has trained with the Singapore Mediation Centre through auspices of the Philippine Judicial and Bar Council. She served as Chairman of the Committee on Continuing Education in Arbitration and Mediation of PICAM from 2007 to 2009. She is a resource speaker on ADR in construction disputes for the mandatory continuing legal education program of the Integrated Bar of the Philippines.

Atty. Asuncion received her Bachelor of Laws degree, *cum laude*, in 1986 from the University of Santo Tomas (UST) Faculty of Civil Law. She finished Bachelor of Science in Psychology in 1982 at the same university. In November 2006, she was honored with the Fr. Angel de Blas Special Award by the UST Department of Psychology for her outstanding and valuable contributions in the field of law through her conscientious application of psychological principles and her untiring efforts to attain the goals of the science of psychology in the legal profession.

Unlicensed foreign companies...

FROM PAGE 1 ▶ takes precedence over the Corporation Code, which is a general law on corporations. Further, in petitions for enforcement of foreign arbitral awards in the Philippines, parties may only raise as grounds for dismissal only those enumerated under Article V of the New York Convention, which do not include the legal capacity to sue of the party seeking the enforcement.

The Supreme Court concluded with a declaration of support strengthening arbitration in the Philippines. In a sweeping statement, the Tribunal ruled that when a party enters into a contract containing a foreign arbitration clause and submits itself to arbitration, it concedes to the capacity of the other party to cause the implementation of its result. Accordingly, "a foreign arbitral award should be respected not because it is favored over domestic laws and procedures, but because Republic Act No. 9285 has certainly erased any conflict of law question."

The opinion was penned by Associate Justice Jose P. Perez, who acknowledged the policy of non-interference by the courts in the arbitral process in his keynote message at the inauguration of PDRCI's office in June 2011 *(Philippine ADR Review, July 2011 and August 2011)*.

PDRCI President and members to train as adjudicators

The Council of Engineering Consultants of the Philippines (Cecophil) has nominated 10 participants from the Philippines to attend the first training session of the Adjudicator Assessment Workshop to be conducted by Japan International Cooperation Agency (JICA) on August 13 to 17, 2012 in Manila. The workshop, which aims to promote the use of Dispute Boards (DB) for the sound management of construction contracts as well as the creation of national list of adjudicators in Asian countries, will be held at the Asian Development Bank in Mandaluyong City.

Of the ten trainees, seven will come from PDRCI. They are PDRCI President Victor P. Lazatin, Trustees Salvador P. Castro, Jr. and Roberto N. Dio, and members Ray Anthony O. Pinoy, Jesusito G. Morallos, Patricia Kay T. Clemente, and Patricia Anne T. Prodagalidad. The Philippine participants will join 30 other candidates from Indonesia, Sri Lanka and Vietnam, who will train in *Fédération Internationale Des Ingénieurs-Conseils* (FIDIC) Modules 1 and 2. Both modules are designed to provide practical guidance to those who are involved in managing or administration of construction projects where the use of FIDIC forms of contracts is intended.

Twenty participants from the pool of 40 candidates will qualify for the second training session of the Adjudicator Training Workshop to be held on October 29, 2012 to November 7, 2012. Those who pass the qualifying examination and interview will be included in the national list of adjudicators of their respective countries.

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