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THE PHILIPPINE
ADR REVIEW
Broadening its scope of arbitration advocacy

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PDRC Sec Gen speaks before IBP House of Delegates

PDRC Secretary General Roberto N. Dio discussed how the Philippines can become a center of excellence in international arbitration at the ASEAN Integration Seminar and Workshop held on January 30, 2016 at the recently concluded 22nd House of Delegates Convention of the Integrated Bar of the Philippines in General Santos City.

PDRC Secretary General Roberto N. Dio

Mr. Dio began with the basics of commercial arbitration: what arbitration is and is not. He then discussed the Philippine experience in arbitration, noting the low referral of disputes to arbitration despite the fact that the Philippines was the first in Asia to pass a law on arbitration in 1950 through the New Civil Code and in 1953 with the enactment of the Arbitration law.

He attributed the low utilization of arbitration in the Philippines to (1) a poor legal framework; (2) lack of familiarity with arbitration; (3) lack of trained and experienced arbitrators; (4) bias for litigation; (5) judicial review; (6) interventionist courts; and (7) lack of expertise in commercial and technical disputes.

He proposed the adoption of new laws and policies that favor arbitration to make the Philippines a preferred venue for international commercial arbitration. These were: (1) creation of special ADR courts; (2) setting up an ADR registry of disputes or matters referred to arbitration and other forms of ADR; (3) tax incentives to contracts

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PART 2

Enforcement Of Arbitral Awards In India

By: Dr. Anton G. Maurer, Ll.M., MCIArb

Note: Part 1 discussed the difficulty of enfocring foreign arbitral awards in India before September 7, 2012. Part 2 discusses the changes in Indian arbitration law since then.

Indian courts will no longer set aside foreign awards if the arbitration agreements was executed after September 6, 2012

The landmark decision of *Bharat Aluminium* changed the landscape for all disputes governed by an arbitration agreement executed after September 6, 2012.

In *Bharat Aluminium*, the parties executed an agreement which was governed by the laws of India as substantive law and the laws of England as arbitration law. The place of arbitration was agreed to be London, England. The arbitral tribunal made two awards dated November 10 and 12, 2002.

Bharat Aluminium filed applications under Section 34 of the Arbitration Act 1996 to set aside both awards. The District Judge in Bilaspur as well as the Chattisgarh High Court held that the applications against the two foreign awards were not maintainable and dismissed. One judge of a two Judge Bench of the Supreme Court had reservations on the correctness of the Supreme Court's judgments in *Bhatia International and Venture Global*. By order of November 1, 2011, a three Judge Bench directed the matters to be placed before the Constitution Bench.

The Constitution Bench of five judges analyzed the text of the Arbitration Act 1996 with reference to its legislative history and international conventions ratified by India, taking due notice of the stated objects and reasons for the enactment of the Act. It held that its decision in *Bhatia International* cannot be supported "by either the text or context of Section 1 (2) and proviso thereto". In distinction to the *Bhatia International* court, the Supreme Court was unable to discern any anomaly, or any inconsistency between Section 1 and Section 2 (2). The Supreme Court held "that Parliament by limiting the applicability of Part I to arbitrations which take place in India has expressed a legislative declaration. It has clearly given recognition to the territorial principle. Necessarily therefore, it has enacted that Part I of the Arbitration Act 1996 applies to arbitrations having their place/seat in India."

The Supreme Court reasoned that it is unable to support the conclusion reached in *Bhatia International and Venture Global Engineering*, that Part I would also apply to arbitrations that do not take place in India. Part I and Part II are exclusive of each other. If the arbitration agreement is found or held to provide for a seat/place of arbitration outside India, then only the provision

of Part II of the Arbitration Act 1996 would govern the arbitration proceedings; therefore, Indian Courts are not permitted to exercise supervisory jurisdiction over the arbitration held abroad or foreign arbitral award.

The Indian Supreme Court also made clear that such an award made abroad could be challenged only with the courts of the country in which the arbitration was being conducted. Only this interpretation would comply with the New York Convention as well as the UNCITRAL Model Law. The territorial principle gives effect to the sovereign right of a country to regulate arbitral proceedings held in its own country. Having accepted the principle of territoriality, it is evident that Part I can not be made applicable to Foreign Awards.

Therefore, courts in India only have limited powers to refuse the enforcement of foreign awards given under Art. V of the New York Convention but they are not permitted to annul an international commercial award made outside India. Only the courts at the place of arbitration have the jurisdiction to set aside the arbitral award made in such country.

The Supreme Court noticed that it had annulled foreign arbitral award on the basis that the parties had chosen Indian Law to govern the substance of their dispute, but held that its decisions ignored the spirit underlying the New York Convention to provide a uniform, simple and speedy system for the enforcement of foreign arbitral awards. It reasoned that any interpretation which hinders such enforcement process ought not to be accepted. Therefore, the Indian Supreme Court could no longer accept that a foreign award could be annulled on the exclusive grounds that the Indian law governed the substance of the dispute.

But, contradicting its very strong criticism of the decisions in *Bhatia International and Venture Global*, the Supreme Court failed to restore the proper application and interpretation of the Arbitration Act 1996 and held that the new arbitation law will be applied only prospectively to arbitration agreements executed after September 6, 2012. This means that the Indian Supreme Court confirmed that Indian courts have the power to set aside foreign awards if the arbitration agreement was executed prior September 7, 2012 including the two *Bharat Aluminium* awards. The Supreme Court did not explain why justice would not be served or be incomplete if its judgment would become effective immediately for all arbitration agreements and all cases where the matter was not *res judicata*.

Whenever a new arbitration act was enacted in India, the new act became effective for all new arbitration requests filed after the enactment of the law, whether the arbitration agreement was executed prior or after this enactment. Logically, it cannot be explained why the Indian Supreme Court held that the wrong and distorted interpretation of the Supreme Court in *Bhatia International and Venture Global* shall govern all disputes which are based on arbitration clauses entered into prior to September 7, 2012, especially since the Supreme Court itself realized that the old interpretation is in conflict with India's obligations under the New York Convention, the sovereign rights of the countries in which such foreign awards were made, and the provisions contained in Arbitration Act 1996.

The Supreme Court explicitly held that a foreign arbitral award can be set aside by one court only, e.g., the court competent under the *lex arbitri*, but unfortunately this will apply only for awards which are based on arbitration agreements executed after September 6, 2012.

New definition of Indian public policy for awards issued in arbitration proceedings which started since October 23, 2015

The Arbitration Amendment Act 2015 attempts to restrict the extremely broad interpretation of Indian public policy, but only for foreign arbitral awards which will be issued in arbitration proceedings which are initiated since October 23, 2015; but even this allegedly more restrictive interpretation is still in violation of Art. V (2) (b) of the New York Convention which has to be interpreted narrowly. Foreign arbitral awards which are issued in proceedings initiated since October 23, 2015 based upon arbitration agreements executed until September 6, 2012 may still be set aside if the award was induced or affected by fraud or corruption, is in violation of the confidentiality provision of conciliation proceedings (Sect. 75) or based upon views expressed and admissions made in conciliation proceedings (Sect. 81), is in contravention with the fundamental policy of Indian law or in conflict with the most basic Indian notions of morality and justice. New is that the violation of "the interest of India" is no longer a violation of Indian public policy. New inserted in Sect. 34 (2) are the violations of Sect. 75 and 81. New is also that the test as to an alleged contravention with the fundamental policy of India shall no longer entail a review on the merits of the dispute; however, this does not prohibit such a review with regard to all the other elements of Indian public policy. Positiv is the amendment that a challenge of an award rendered in proceedings initiatied since October 23, 2015 generally will no longer block the enforcement of such an award. But all foreign arbitral awards which are issued upon arbitration agreements executed until September 6, 2012 which are issued in arbitration proceedings which commenced until to October 23, 2015 may still be set aside if the court would find that the foreign award is based upon patent illegality, incorrect evidence assessment, incorrect interpretation of the contract or uneven negotiation power.

Companies should enter into new arbitration agreements with Indian parties

If the parties who concluded an arbitration agreement prior to September 7, 2012 do not enter into a new arbitration agreement, then the interpretation of the arbitration law created by the Indian Supreme Court prior to September 6, 2012 will be applied by Indian courts. This could mean that an Indian court may set aside a foreign arbitral award if the court thinks that it may violate Art. 34 (2) of the Arbitration Act 1996. However, all parties who want to avoid the application of the wrong and distorted interpretation of the Arbitration Act 1996 have the opportunity to replace the presently valid arbitration agreements by concluding new arbitration agreements.

The parties can decide which law shall apply

Many lawyers had high hopes that the Constitution Bench of the Indian Supreme Court would reverse the decisions of the Supreme Court in *Bhatia International and Venture Global*, restore the interpretation of the Arbitration Act 1996, and India's obligations under public international law and especially under the New York Convention. And the Supreme Court in no uncertain terms clearly marked the mentioned decisions as wrong and illegal. But it did so only for arbitration agreements executed after September 6, 2012, and created two sets of arbitration law.

Therefore, prudent parties will speed up the application of the new law set in *Bharat Aluminium* by executing new arbitration agreements, thereby making the decisions in *Bhatia International and Venture Global* obsolete. All parties which want to avoid the possibility that courts in India may set aside foreign arbitral awards will have to enter into new arbitration agreements.

About the Author

Dr. Anton G. Maurer, LL.M. specializes in the arbitration of commercial, post M&A, joint venture, and IP disputes. He has represented clients for 30 years in or with respect to more than 60 countries and more than 90 jurisdictions in the negotiations of commercial, IP, joint venture and M&A agreements up to a value of US$ 1.6 billion, and international arbitration and international litigation. He is the author of the book on "The Public Policy Defense under the New York Convention – History, Interpretation, and Application" and of several arbitration related articles.

MEMBER SPOTLIGHT

Atty. Ruben Gerald V. Ricasata III is a senior associate of Puyat Jacinto & Santos and teaches at Manuel L. Quezon University College of Law. He sits in the Board of Trustees of the Ateneo Law Alumni Association, Inc.

Atty. Ricasata studied philosophy, cum laude, in 2007 at the University of the Philippines Diliman. He finished law, with second honors, in 2011 at the Ateneo de Manila School of Law, ranked 13th in his batch. Aside from being a Dean's lister, he was also the recipient of the Evelio Javier Award for Leadership in 2011 and the Magis Award by the Ateneo Human Rights Center in 2009.

Before joining Puyat Jacinto & Santos, he was an associate of Angara Abello Concepcion Regala & Cruz.

Atty. Ricasata has represented clients in local and international arbitration and in various Philippine courts, including the Office of the Ombudsman. His litigation experience include civil and criminal suits, special proceedings, appellate work, mediation, corporate rehabilitation, and inter- and intra- corporate litigation.

Aside from litigation, he has handled special projects such as applications of power generation companies for the approval of various power sales contracts and the construction of a dedicated point-to-point facility with the Energy Regulatory Commission. He secured a foreign air operator's certificate before the Civil Aviation Authority of the Philippines.

He also acts as general counsel for different corporations. As general counsel, he advises on corporate and tax matters, handles contract review, and prepares corporate documents.

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Edmund Kronenburg

with ADR clauses; (4) tax incentives to ADR practitioners; (5) budgetary support to the Office for Alternative Dispute Resolution, an agency under the Department of Justice; (6) training of ADR practitioners; and (7) development of expertise in commercial and technical arbitration.

Other invited speakers during the convention were Ms. Ma. Cecilia A. Deodores-Labadan of the National Economic Development Authority, who gave an overview of the ASEAN Economic Community; former law dean Merlin M. Magallona, who spoke on preparing lawyers for ASEAN integration; Edmund J. Kronenburg, managing partner of Braddell Bros. LLP Singapore, who shared his insights on the evolving practice of law in Singapore and other countries; and University of Santo Tomas law dean Nilo T. Divina, who discussed how to prepare law students for law practice in the ASEAN.

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