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Past PDRC President Victor Lazatin is appointed to ICC International Court of Arbitration

The International Court of Arbitration of the International Chamber of Commerce (ICC) announced on its website on June 16, 2016 that it appointed PDRC immediate past President and current Trustee Victor P. Lazatin as one of 16 new members from fourteen countries to serve terms commencing on July 1, 2016 until June 30, 2018. Elections took place in Sao Paulo, Brazil during a meeting of ICC’s supreme governing body, the World Council, in accordance with provisions set out in the ICC constitution and statutes of the Court.

Members of the ICC Court are appointed by the World Council on the proposal of ICC local offices known as national committees and groups, with alternate members appointed by the World Council upon proposal of the Court President.

The elections bring the total number of Court members to 145 and the number of countries they represent from 80 to 84. ICC Court President Alexis Mourre said: “The professional, legal and cultural diversity of Court members reflects the world-class standard and international reach of ICC Arbitration. Users of our services will benefit from our concerted efforts to continue promoting membership diversity in this way.”

(Source: www.iccwbo.org/news/articles/2016/icc-announces-new-members-of-the-court/)

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PART ONE

Traps, tricks, and terrible predicaments in enforcing international arbitral awards in the Philippines

By Jesusito G. Morillos

The following is from a lecture by the author at the symposium on "International Commercial Arbitration: Best Practices to Address Traps, Tricks, and Terrible Predicaments" held on May 5, 2016 at the Ateneo de Manila University Law School. Part 1 analyses if a foreign corporation doing business in the Philippines without a license may sue to enforce an arbitral award.

There are traps, tricks, and terrible predicaments in enforcing international arbitral awards in the Philippines. To help us appreciate these, let me pose a question and provide a suggested answer based on Philippine law and jurisprudence. I will then tweak this question, just enough to trigger entirely different answers, to help us identify where these traps, tricks, and terrible predicaments lie.

Foreign corporate claimants

Section 33 of the Corporation Code provides that "[n]o foreign corporation transacting in the Philippines without a license, or its successors or assigns, shall be permitted to maintain or intervene in any action, suit or proceeding in any court or administrative agency of the Philippines." On this premise, will a petition for recognition and enforcement of a foreign arbitral award filed by a foreign corporation that has been doing business in the Philippines, but without a license to do so, prosper? Assuming the award was made in a country that is signatory to the New York Convention, the answer is yes.

In *Tuna Processing, Inc. v. Phil. Kingford, Inc.*, 667 SCRA 287 (2012), the Supreme Court held that:

- Section 45 of Republic Act 9285 or the Alternative Dispute Resolution Act ("ADR Act") provides that a foreign arbitral award may be refused recognition and enforcement "only on those grounds enumerated under Article V of the New York Convention. Any other ground shall be



disregarded by the regional trial court." Not one of these exclusive grounds touches on the capacity to sue of the party seeking the recognition and enforcement of the award.

- The award may also be recognized and enforced under similar provisions of the Model Law, which was adopted in Section 19 of the ADR Act. The Model Law prescribes substantially identical exclusive grounds for refusing recognition or enforcement of an arbitral award.
- The ADR Act as well as the Model Law and the New York Convention being special laws, these prevail over the Corporation Code, which is a general law.

Article 1(a) of the New York Convention provides that recognition and enforcement may be refused on the ground

that "(t)he parties to the agreement ... were, under the law applicable to them, under some incapacity ..." However, this is different from the capacity to sue referred above.

Award to foreign corporation confirmed by foreign court

If the award were confirmed by a court in a foreign country, would it be recognized and enforced as a foreign judgment instead of a foreign arbitral award? The answer is no.

The award would still be recognized as a foreign arbitral award in accordance with Section 44 of the ADR Act, which expressly states that "[a] foreign arbitral award when confirmed by a court of a foreign country, shall be recognized and enforced as a foreign arbitral award and not a judgment of a foreign court."

What if that foreign arbitral award was made in a country that is not a signatory to the New York Convention? In that case, Section 43 of the ADR Act provides that "The Court may, on the grounds of comity and reciprocity, recognize and enforce a non-convention award as a convention award."

Award issued in the Philippines to foreign corporation

If the award were rendered in the Philippines, instead of abroad, would the petition still prosper? If the party against whom the award is sought to be enforced submitted to the arbitration, then it would be bound by the arbitration agreement and by result of the arbitration, conceding thereby the capacity of the other party to sue.

In an *obiter* in the *Tuna Processing* case, the Supreme Court considered the "wisdom" of then Associate Justice Florida Ruth Romero in her dissent in *Asset Privatization Trust v. Court of Appeals*, 300 SCRA 579 (1998), where it was found that the party against whom the award was sought to be enforced had voluntarily and actively participated in the arbitration. Justice Romero said that not to allow the arbitration to prosper would "destroy the very essence of mutuality inherent in consensual contracts." Note, however, that this *obiter* may apply only in cases of waiver of the defences of lack of capacity to sue, estoppel or *pari delicto*.

Demand to arbitrate by foreign corporation

Let us go back and assume that the respondent rejected the demand to arbitrate of the foreign corporation doing business in the Philippines without a license. Will the arbitration proceed? The Supreme Court in *Tuna Processing* has this to say:

Rule 13.1 of the Special Rules provides that "[a]ny party to a

foreign arbitration may petition the court to recognize and enforce a foreign arbitral award." The contents of such petition are enumerated in Rule 13.5. Capacity to sue is not included. Oppositely, in the Rule on local arbitral awards or arbitrations in instances where the place of arbitration is in the Philippines, it is specifically required that a petition to determine any question concerning the existence, validity and enforceability of such arbitration agreement before the commencement of arbitration and/or a petition for judicial relief from the ruling of the arbitral tribunal on a preliminary question upholding or declining its jurisdiction after arbitration has already commenced should state "[t]he facts showing that the persons named as petitioner or respondent have legal capacity to sue or be sued." [citing Rules 3.6 and 3.16 of the Special ADR]

To avoid confusion, note that the "suit" contemplated in the first question is a petition for the enforcement of a foreign arbitral award (i.e., seated/originated abroad) and the Philippine court is merely an enforcement court; while the "suit" contemplated in this question is a petition to compel the other party to arbitrate or for the enforcement of an international arbitration agreement, where notably the Philippines is the seat or *place of arbitration* and the Philippine court functions as the supervising court.

Notably, the Supreme Court in the *Tuna Processing* case qualified its ruling, as follows: "Inasmuch as the (ADR Act), a municipal law, applies in the instant petition, we do not see the need to discuss compliance with international obligations under the *New York Convention* and the *Model Law*."

Next issue: Enforcement of New York Convention award and implications of Supreme Court decision in Tuna Processing, Inc. v. Phil. Kingbird, Inc.



About the Author

Atty. Jesusito G. Morillos is an experienced arbitrator and advocate in international commercial arbitration. He is an accredited arbitrator of PDRC, Construction Industry Arbitration Commission, and the Intellectual Property Office. He is currently the Dispute Resolution Administrator of the Wholesale Electricity Spot Market (WESM), and manages his firm, Folloso Morillos & Herce. Mr. Morillos studied civil engineering in 1986 at the University of Sto. Tomas and received his Juris Doctor degree from the Ateneo de Manila University in 1992.

IN MEMORIAM



Miguel B. Varela

PDRC Chairman Miguel B. Varela passed away on August 24, 2016 at the age of 76. Mr. Varela was a former president and chairman of the Philippine Chamber of Commerce and Industry (PCCI) as well as president of the Employers' Confederation of the Philippines (ECOP).

He studied law at the Ateneo de Manila University and began his career as a corporate lawyer and management expert when he served as assistant manager in the Planning Research and Development Office of the National Economic and Development Authority in 1966 to 1970.

He took numerous corporate, labor and management courses under the sponsorship of the International Labor Organization (ILO) and the Asian Productivity Organization and the Nikkeren in Japan.

Atty. Varela was the Chairman of the board of HK Securities, Inc.; President of the Transunion Corporation; Director of Union Industries, Inc.; Director of Acoje Holdings, Inc. and Director of Mabuhay Vinyl Corporation. He also served as Chairman of The Lumier Group; Vice President for Corporate Affairs of General Diesel Corporation; Director and Vice President of ASEAN Business Corporation and Vice President and corporate counsel of F.J. Elizalde and Co.

He was a member of the ASEAN Confederation of Employers and the Management Association of the Philippines (MAP). He had an extensive stint in government as a member (representing Employer and Industry Sector) of the Board of Directors of the Technical Education and Skills Development Authority (TESDA); as a commissioner (representing the Business Sector) of the National Labor Relations Commission; and as a commissioner (representing employers) of the Social Security System.

Atty. Varela was a delegate to many ILO conferences and sat in the International Court of Arbitration of the International Chamber of Commerce. He also represented the Philippines in the APEC Business Advisory Council and the East Asia Business Advisory Council.



PDRC Asst. Sec. Gen. Francisco Pabilla, Jr. (5th from left) with PCCI Vice President for North Luzon Area, Alfonso T. Lao; Judd A. Eugenio, Assistant Vice President, Security Bank; Allan B. Gepty, Deputy Director General, Intellectual Property Office-Philippines; Jovito R.E. Gonzales, Division Chief, Technology Application and Promotion Institute, DOST; Mario C. Dulin, PCCI President, Cagayan Chapter; Charles Yuen Lim, PCCI Regional Governor for Region I; and Francisco L. Villanueva, PCCI Regional Governor for Region III.

PDRC pitches domestic arbitration in Tuguegarao

PDRC continued to roll out its domestic road show at the 25th Northern Luzon Area Business Conference (NLABC) on August 4, 2016 in Tuguegarao City, Cagayan. This is the second business conference attended by PDRC following the successful 25th South Luzon Area Business Conference (SLABC) in March 2016 in Boac, Marinduque.

The conference, which was organized by the Philippine Chamber of Commerce and Industry (PCCI), Cagayan Chapter, was participated by representatives of the PCCI Regional Chapters in Northern Luzon. The theme, "Moving Forward through G.I.A.N.T. S.T.E.P.S.," stood for the economic roadmap of **Good** governance, greater spending for **Infrastructure and Agriculture**, **New** era of manufacturing and **Tourism**, which will be supported by **Science and Technology**, **Education**, **People's** skills and **Source** of financing.

Assistant PDRC Secretary General Francisco D. Pabilla, Jr. discussed PDRC's role as an arbitration center and how business could benefit from arbitration as a mode of settling commercial disputes. He highlighted the advantages of arbitration and described the PDRC arbitration process.

Senator Francis "Kiko" Pangilinan was the keynote speaker. Also present during the conference were Cagayan Governor Manuel N. Mamba and Tuguegarao City Mayor Jefferson P. Soriano.

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