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Supreme Court rules that the deliberative process privilege can be invoked in arbitration

By: John David C. Atanacio

In its Decision dated June 29, 2016 in G.R. No. 210858, *Department of Foreign Affairs v. BCA International Corporation*, the Second Division of the Supreme Court ruled that the deliberative process privilege can be invoked in a domestic arbitration under Republic Act No. 9285 (2004), the "Alternative Dispute Resolution Act of 2004."

In its appeal by way of petition for review to the Supreme Court, the Department of Foreign Affairs (DFA), who was the party respondent in the *ad hoc* arbitration of its contractual dispute with BCA International Corporation (BCA), invoked deliberative process privilege to assail the resolution of the National Capital Regional Trial Court in Makati City, which granted BCA's petition to issue subpoenas to former government officials to produce certain documents in their custody and to testify in the arbitration hearings.

However, instead of dismissing the DFA appeal for procedural defects, the Supreme Court partially granted it and remanded the case to the trial court to if the documents sought to be produced in the pending arbitration were protected by the deliberative process privilege.

Citing U.S. jurisprudence, the Supreme Court ruled that the deliberative process privilege protects from disclosure advisory opinions, recommendations, and deliberations comprising part of a process by which government decisions and policies are formulated.

Continued on page 4

WHAT'S INSIDE

1 **Supreme Court rules that the deliberative process privilege can be invoked in arbitration**
By: John David C. Atanacio

2-3 **Part Two: Traps, tricks, and terrible predicaments in enforcing international arbitral awards in the Philippines**
By Jesusito G. Morallos

4 Member Spotlight: **Atty. Boni F. Tacardon**

PART TWO

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

By Jesusito G. Morallos

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 2 discusses enforcement of a New York Convention award and the implications of the Supreme Court decision in Tuna Processing, Inc. v. Phil. Kingford, Inc.

Enforcement of New York Convention award

In one of the scenarios earlier, the award was made in the Philippines instead of abroad. Can the losing party raise any grounds to resist enforcement of the award if it fails to file a petition to set aside the award within the statutory period of three months from receipt of the award? The answer is no.

Rule 12.2 states: "A petition to set aside can no longer be filed after the lapse of the three (3) month period. ... *Failure to file a petition to set aside shall preclude a party from raising grounds to resist enforcement of the award.*"

If the award were made in a country that is signatory to the New York Convention, may the losing party raise any grounds to resist enforcement of the award if he did not file a petition to set aside the award within the three months from receipt of the award? Yes, as in fact filing a petition to set aside a foreign arbitral award is not required under the Special ADR Rules. In fact, Rule 13.4 expressly provides that "(a) *Philippine court shall not set aside a foreign arbitral award* but may refuse it ..." This is where the rules on foreign arbitral awards (referenced to the New York Convention) differ from the rules on international commercial arbitration (referenced to the Model Law) seated in the Philippines.

How differently does the Special ADR Rules treats of an international arbitral award made in the Philippines compared with the one made abroad? With respect to the former, Rule 12.2 provides that "(i)f, however, a timely petition to set aside an arbitral award is filed, the opposing party must file therein and in opposition thereto the petition for recognition and enforcement of the same award within the period for filing an opposition."

Firstly, no such rule is provided with respect to an international arbitral award made abroad. Secondly, the said provision appears to prevent *multiplicity of suits*, which only makes sense to the Philippine court functioning as both the supervising court and the enforcing court.

It is probably in the same breadth that Rule 12.2 provides that "(a) petition to set aside can no longer be filed after the lapse of the three (3) month period. ... Failure to file a petition to set aside shall preclude a party from raising grounds to resist enforcement of the award."

Let us assume that the party in *Tuna Processing* against whom the award is being enforced filed with the Supreme Court a motion for reconsideration of its ruling, arguing that the rules on international award for the one made in the Philippines

[Rule 12.4(a)i] and the one made abroad [Rule 13.4(a)i] both allow "incapacity" as a ground to refuse recognition and enforcement of an award.

To quote the identically-worded Rules 12.4(a)i and 13.4(a) i: "(a) party to the arbitration agreement was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it (say, Philippines) or, failing any indication thereof, under the law of the country (say, Philippines) where the award was made."

Would the motion for reconsideration prosper then? My suggested answer is no, because Article V(1)(a) of the New York Convention states:

> The parties to the agreement referred to in Article II were, under the law applicable to them, under some incapacity [appears to point to the Lex Patriae, or perhaps, the Nationality Theory, by virtue of which the status and capacity of an individual are generally governed by the law of his nationality, or to the Lex Domicilii or perhaps the Domiciliary Theory, by virtue of which, in general, the status, condition, rights, obligations, and capacity of a person should be governed by the law of his domicile], or the said agreement is not valid under the law to which the parties have subjected it [appears to point to the Choice of Law] or, failing any indication thereon, under the law of the country where the award was made [appears to point to the Lex Fori].

The Model Law expresses a similar language. Note that Section 19 of the ADR Act provides that international commercial arbitration shall be governed by the Model Law adopted by UNCITRAL in 1985 (see also Rule 13.4 of the Special ADR Rules). Section 20 of the law provides that "in interpreting the Model Law, regard shall be had to its international origin and to the need for uniformity in its interpretation and resort may be made to the *travaux preparatories* and the report of the Secretary General of UNCITRAL in 1985 entitled ICA: Analytical Commentary on the Draft Text identified by ref no A/CN. 9/264."

On the other hand, Section 42 provides that "(t)he New York Convention shall govern the recognition and enforcement of award covered by said Convention."

Corporation Code does not bar enforcement of foreign arbitral award

In any case, Section 133 of the Corporation Code may not be seen as a law of the capacity or incapacity of a party to enter into an arbitration agreement or even to sue to compel the other party to arbitrate or to enforce an arbitral award, let alone the fact that while it does not permit "a foreign corporation in the Philippines without a license ... to maintain or intervene in any action, suit or proceeding in any court ... of the Philippines," it however also provides that "such corporation may be sued or proceeded against before Philippine courts or administrative tribunals on any valid cause of action recognized under Philippine law."

Moreover, it sanctions only foreign corporations. How about natural persons or individuals?

Finally, it does not incapacitate a foreign corporation from entering into a contract or an arbitration agreement but only from being a petitioner or complainant, but not as a respondent or defendant, in a Philippine court.

How about interim reliefs? If made in the Philippines, I believe it is enforceable under Section 29 of the ADR Act, noting that in this case, there is a confluence in the Philippine court of both the "supervising" and "enforcing" functions.

However, the answer would be different if the interim relief were rendered abroad. The Philippines has not adopted (yet) the 2006 Amendments to the Model Law, Article 17, paragraphs H and I of which mandate the recognition and enforcement of an interim measure in the same manner as a final award.

That being the case, the enforcing Philippine court will have to grapple with the New York Convention, Article V(1)(e) of which provides as ground to refuse recognition and enforcement an "award that has not yet become final."

About the Author

Atty. Jesusito G. Morallos is an experienced arbitrator and advocate in international commercial arbitration. He is an accredited arbitrator of PDRCI, 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, Follosco Morallos & Herce. Mr. Morallos studied civil enginering in 1986 at the University of Sto. Tomas and received his Juris Doctor degree from the Ateneo de Manila University in 1992.

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(Continued from page 1)

The Supreme Court added that the privilege serves to assure that government officials will feel free to provide the decision-maker with their uninhibited opinions and recommendations without fear of later being subjected to public ridicule or criticism.

In this light, the Supreme Court ruled that the deliberative process privilege can be invoked in an arbitration under the Alternative Dispute Resolution Act of 2004. Under the Act, orders of an arbitral tribunal are appealable to the courts. Therefore, if a government official is compelled to testify before an arbitral tribunal and the order of an arbitral tribunal is appealed to the courts, such official can be inhibited by fear of later being subjected to public criticism, preventing such official from making candid discussions within his or her agency.

BCA has moved the Supreme Court to review and reconsider its ruling because it is contrary to the Alternative Dispute Resolution Act of 2004 and its previous opinions on arbitration.

MEMBER SPOTLIGHT

Atty. Boni F. Tacardon is the managing partner of Tacardon and Partners, one of the accredited external counsel of the Philippine Deposit Insurance Corporation. He is the incumbent Vice-President of the Integrated Bar of the Philippines (IBP), Quezon City Chapter and is one of the founding members of the IBP Anti-Trafficking in Persons Action Team.

He is the retained counsel of several companies engaged in gas and mineral exploration, advertising, product activation, lending, real estate development and construction, transportation, trading, food manufacturing and printing. He is a member of the Board of Liquidators of Capitol Hills Golf and Country Club, Inc.

Atty. Tacardon studied political science in the University of Sto. Tomas, where he graduated in 1987. He received his law degree from San Beda College of Law in 1991 and was admitted to the Philippine Bar in 1992. He later obtained his Master's Degree in Business Administration from the Ateneo Professional Schools in 2001.

He started his legal career as an associate of the Public Interest Law Center and R.T. Capulong and Associates. He actively participated in the Marcos Human Rights Litigation in Honolulu, Hawaii, which resulted an award for the martial law victims of the late President Ferdinand E. Marcos. He appealed for compensation of the so-called Filipino Comfort Women and other victims of Japanese wartime atrocities. Under the supervision of the Japanese Federation of Bar Associations, he conducted an in-depth research on massacres and cannibalism alleged to have been perpetrated by Japanese soldiers in Southern Luzon, Occidental Mindoro, and Mindanao.

He was directly involved in the handling of criminal cases of well-known political personalities. Atty. Tacardon also served as chief of staff, executive assistant, staff head, and consultant to several high officials in the Philippine government.

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