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THE PHILIPPINE
ADR REVIEW
Broadening its scope of arbitration advocacy

WWW.PDRCI.ORG NOVEMBER 2017

Supreme Court affirms confidentiality of testimony in arbitration proceedings

By Remy A. Alegre

In an opinion released on November 21, 2016 in G.R. No. 216600, *Federal Express Corporation and Rhicke Jennings v. Airfreight 2100, Inc.* and Alberto D. Lina (2016), the Second Division of the Supreme Court held that the alleged slanderous statements made by a witness during the oral hearings in an arbitration were confidential. Hence, the statements were inadmissible in evidence in the criminal proceedings for grave slander filed against the witness.

When Federal Express Corporation (FedEx) lost its license to engage in international freight forwarding (IFF) in the Philippines, it hired Airfreight 2100, Inc. (Air21), owned by Alberto Lina, to undertake delivery and pick-up services in the country. The parties had several commercial disputes, which they agreed to submit to arbitration.

During the oral hearings, FedEx's witness Rhicke Jennings testified, among others, that the freight-forwarding companies Merit International, Inc. (Merit) and Ace Logistics, Inc. (Ace) were proxies of Air21 and that one of the directors of Ace was Lina's friend. According to Jennings, Merit and Ace were very small companies with meager resources, yet they were able to finance and file an earlier case to question the issuance of FedEx's IFF license. Because of this case, FedEx's license was suspended, leading to FedEx's engagement with Air21 to conduct business in the Philippines.

Aggrieved, Lina filed a criminal complaint for grave slander against Jennings, while FedEx and Jennings consequently applied for a confidentiality/protective order with the Regional Trial Court (RTC).

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WHAT'S INSIDE

PART ONE

The need to harmonize the arbitration laws of ASEAN countries

By: Eduardo R. Ceniza

With the advent of the Association of Southeast Asian apid expansion of cross-border trade and investments among the ASEAN countriesis anticipated. Since disputes often arise in commercial transactions, the parties are well advised to consider the need to include a dispute resolution mechanism in their commercial contracts.

It is accepted in most jurisdictions that transnational commercial disputes are better resolved by international commercial arbitration than by court litigation.

Since the United Nations Commission on International Trade Law (UNCITRAL) model arbitration law ("Model Law") is widely recognized as the benchmark for the harmonization of arbitration laws, it is highly recommended that, as an essential component to the harmonization of ASEAN commercial laws, the national laws on international commercial arbitration of the ASEAN countries be similarly harmonized based on the UNCITRAL Model Law.

ASEAN Model Law jurisdictions

It is heartening to note that Brunei, Cambodia, Malaysia, Myanmar, the Philippines, Singapore, and Thailand have adopted legislation based on the UNCITRAL Model Law. Indonesia, Laos, and Vietnam are not yet Model Law jurisdictions.

To achieve ASEAN integration through harmonization of international commercial arbitration laws, it is imperative that Indonesia, Laos, and Vietnam consider reforming their national laws based on the UNCITRAL Model Law.

Harmonizing some vital Model Law principles

Harmonizing the laws on international commercial arbitration is one positive step towards ASEAN integration. A further step would be the harmonization of the interpretation and application of the law. Let us consider, for example, the divergence in the interpretation of some vital principles enshrined in the Model Law and the New York Convention by different countries, including those in the ASEAN.

Public policy

That "the award is in conflict with the public policy of this State" is both a ground to set aside[1] and to refuse recognition and enforcement[2] under the UNCITRAL Model Law. Notably, "contrary to the public policy of that country"[3] is a ground to refuse recognition and enforcement of an arbitral award under the New York Convention.

The question is: What is public policy?

Both the UNCITRAL Model Law and the New York Convention intentionally did not define public policy and, as expected, its concrete manifestations substantially vary from one jurisdiction to another.[4] In the absence of legislation defining public policy, it remains the task of state courts to define this notion. Courts of different jurisdictions, including those of the ASEAN countries, have adopted either a narrow interpretation or a broad interpretation of public policy.[5]

Within the ASEAN community, public policy has been defined in divergent ways

Within the ASEAN community, public policy has been defined in divergent ways – from narrow to broad.

Singapore courts follow the orthodox, narrow interpretation of public policy.6 Vietnam,[7] Indonesia,[8] Malaysia,[9] and the Philippines[10] follow the broad interpretation of the public policy exception. There are no published data on this issue as regards Cambodia, Brunei, Myanmar, and Thailand.

UNCITRAL made no attempt to harmonize the definition of public policy

Both the UNCITRAL Model Law11 and the New York Convention12 refer to the public policy of the State in which enforcement is sought. There was no overt attempt to harmonize the definition of public policy.13 To be sure, the UNCITRAL left the definition of public policy to the individual States.

According to the IBA Report on the Public Policy Exception, which was based on a survey of various jurisdictions, in none of the covered jurisdictions is public policy defined by law, with two notable exceptions, the United Arab Emirates and Australia.[14]

Indeed, it is notoriously difficult to provide a precise definition of public policy in the context of enforcement of arbitral awards. The International Bar Association's survey of 40 jurisdictions revealed that there were as many definitions of public policy as there were jurisdictions canvassed.

Recommendation: ASEAN should have a harmonized definition of the public policy exception

It is both feasible and desirable for the ASEAN countries to adopt a common standard of the public policy exception. The idea of harmonizing the concept of public policy among several States in a geographical region is not novel. Seventeen Francophone African countries have earlier organized themselves into the Organization for the Harmonization of Business Law in Africa (OHADA).[15]

OHADA has adopted a Uniform Arbitration Law, which provides that recognition and enforcement shall be refused if the "award is manifestly contrary to a rule of international public policy of the member States."[16] This is the first attempt, as shown by the International Law Association (ILA) survey, to harmonize the notion of public policy by several sovereign States in a geographical region.[17]

The OHADA model is a good example that the ASEAN can adopt.

What "public policy" definition should the ASEAN adopt?

If the ASEAN countries reach a consensus to adopt a uniform definition of public policy, should they adopt a narrow or a broad definition?

It should be noted that among the ASEAN countries, Singapore is the most widely- used seat for international commercial arbitration. This attraction to Singapore is mainly due to its modern arbitration laws and facilities and the excellent reputation of its courts. Singapore follows the orthodox narrow definition of public policy.

It is suggested that the ASEAN countries adopt Singapore's narrow definition of public policy.

Next issue: Harmonization of the concept of arbitrability and the creation of an ASEAN Center for the Settlement of Investment Disputes.

About the Author

Eduardo R. Ceniza, FCIArb, FHKIArb, FSIArb, FPIArb, is the Managing Partner of the law firm of Eduardo R. Ceniza & Partners. He is the Chairman of the Philippine Institute of Arbitrators (PIArb) and of the Philippine Chapter of the East Asia Branch of the Chartered Institute of Arbitrators (CIArb). He was a former President of the Philippine Dispute Resolution Center, Inc. (PDRCI) and of the Philippine Institute of Construction Arbitrators and Mediators (PICAM).

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1 UNCITRAL Model Law, Art. 34(2)(b)(ii).

2 UNCITRAL Model Law, Art. 36(1)(b)(ii).

3 New York Convention, Art. V(2)(b).

4 Report on the Public Policy Exception in the New York Convention, IBA Subcommittee on Recognition and Enforcement of Arbitral Awards, Oct. 2015 ("IBA Subcommittee Report"), at p. 1.

5 For non-exclusive and illustrative lists of definitions from civil law jurisdictions and common law jurisdictions, please see Id., at 6-10.

6 PT Asuransi Jasa Indonesia (Persero) v. Dexia Bank S.A., 1 S.L.R 597 (2007), para. 54, cited in Michael Huang and Shaun Lee, "Survey of South East Asian Nations on the Application of the New York Convention," 25 J. Int. Arb. 6, 891; hereafter, "Huang & Lee."

7 Colin Ong, "Asia Pacific Overview: Regional Overview and Recent Developments: Asia Pacific," International Arbitration 2016, July 29, 2016.

8 E.D. & F. Man (Sugar) Ltd. V. Yani Haryanto, cited in Huang & Lee, supra; Karen Mills, "Judicial Attitudes to Enforcement of Arbitral Awards and Other Judicial Involvement in Arbitration in Indonesia," 68 J. Chartered Inst. Arbitrators 106 (2002).

9 Harris Adacom Corp. v. Perkom Sdn. Bhd., 3 M.L.J. 504 (1994).

10 Luzon Hydro Corporation v. Hon. Rommel O. Baybay & Transfield Philippines, Inc., CA-G.R. SP NO. 94318, Nov. 26, 2006.

11 UNCITRAL Model Law, Arts. 34(2)(b)(ii) & 36(1)(b)(ii).

12 New York Convention, Art. V(2)(b).

13 "Interim Report On Public Policy As A Bar To Enforcement Of International Arbitral Awards," Int'l Law Assoc. London Conf. 10 (2000); hereafter, "ILA Interim Report."

14 IBA Subcommittee Report, p. 2.

15 OHADA was created by the Treaty Relating to the Harmonization of Laws in Africa signed on Oct. 17, 1993, at www.refer.org/camer_ct/eco/ecohada/ohada.htm; last accessed on Sept. 19, 2017.

16 ILA Interim Report, p. 11.

17 Id.

MEMBER SPOTLIGHT

Atty. Jose Mario C. Buñag was the founder of three law offices, namely, Buñag & Uy (2007-2010), Buñag & Lotilla (2011-2014), and Buñag & Associates (2002, 2010-2011, 2014-present).

He started his career as an assisting attorney at Chuidian Law Office in Makati. He had a short stint as a legal editor of Securities law at the Commerce Clearing House, Inc. in New Jersey, U.S.A. before joining Sycip Salazar Luna Manalo & Feliciano briefly as an assistant attorney. He then worked for Bancom Development Corporation as an Assistant Treasurer and Lawyer for Regional Banking Group.

Atty. Buñag became a partner at Angara Abello Concepcion Regala & Cruz from 1975 to 1986. He then joined Roco Buñag Kapunan & Migallos law Office as senior partner (1987-2000), co-managing partner (1987-1992), and managing partner (1993-1995).

Atty. Buñag was the Deputy Commissioner of Bureau of Internal Revenue's Legal and Inspection Group from 2002 to 2005. He became Commissioner of Internal Revenue in 2005 and held the position until 2007. He was also the Corporate Secretary and Legal Counsel of Philippine Sugar Corporation from 1986 to 2002 and was the Officer-in-Charge from 1992 to 2002.

He was an examiner in taxation for the 2013 Philippine bar examinations. He taught taxation, criminal procedure, and legal philosophy at the Ateneo College of Law until 1990. Atty. Buñag was also a lecturer at the Philippine Judicial Academy and the Philippine Trust Institute.

Atty. Buñag studied law at the Ateneo de Manila University, *cum laude* and class valedictorian. He placed second in the Philippine bar examinations in 1968. He received a Master of Comparative Jurisprudence degree from the New York University School of Law in 1973 and was a university fellow. He also took the graduate course in taxation at the New York University in 1984 to 1985. Atty. Buñag became a member of the New York Bar in 1989.

He is a member of the Tax Management Association of the Philippines (President, 1991), Philippine Bar Association, Asean Law Association, Rotary Club of Makati Central (President, RY 2010-2011), PCCI Committee on Taxation, and the Philippine Constitutional Association.

Supreme Court affirms confidentiality of testimony in arbitration proceedings

(Continued from page 1)

In the decision penned by Mendoza, J., the Supreme Court reversed the RTC's denial of the application for a confidentiality/protective order, which was as affirmed by the Court of Appeals, and ruled that the written statements and oral testimonies of FedEx's witnesses constituted confidential information under the Alternative Dispute Resolution (ADR) Act of 2004.

The Supreme Court clarified that the term 'confidential information' under the ADR Act was not strictly confined to the discussion of the core issues in dispute; it included any information that might have any connection in identifying the source of the conflict to find a better alternative solution to the parties' dispute. Thus, assuming that Jennings' statements were not fundamental to the issues in question, they were connected to, and propounded by, a witness who relied upon the confidentiality of the arbitration proceedings.

As an ADR proceeding, arbitration guarantees confidentiality in its processes precisely to encourage the parties to ventilate their claims in a less formal and spontaneous manner. Otherwise, arbitration hearings would merely be used as an avenue to gather evidence or lure unsuspecting parties into conveying information that could be potentially used against them in another forum or court.

In its decision, the Supreme Court also cited the Terms of Reference (TOR) adopted by the parties and the arbitral tribunal, which expressly confirmed the confidentiality of the arbitration proceedings between FedEx and Air21. Lina's disregard of the TOR, by itself, was a valid justification to grant the confidentiality/protection order to FedEx and Jennings.

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