PDRCI
PHILIPPINE DISPUTE RESOLUTION CENTER, INC.

3/F, Commerce and Industry Plaza
1030 Campus Avenue cor. Park Avenue
McKinley Town Center, Fort Bonifacio
Taguig City 1634

Phone: +63 2 555 0798
Telefax: +63 2 822 4102
Email: secretariat@pdrci.org
Website: www.pdrci.org

THE PHILIPPINE
ADR REVIEW
Broadening its scope of arbitration advocacy

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PDRCI Deputy Sec. Gen. Francisco Pabilla, Jr. (second from left) receives the Certificate of Recognition from Atty. Jewel Bulos (leftmost), University Secretary and Associate Dean, UMAK School of Law; Makati City Mayor Abigail Binay (center), Makati City Vice Mayor Monique Lagdameo, and Ms. Aurora Serrano, UMAK Vice President for Administration and Finance.

UMAK awards Certificate of Recognition to PDRCI

The University of Makati (UMAK) awarded PDRCI a Certificate of Recognition during its Recognition Day for Industry Partners held on November 27, 2018. An annual event organized by UMAK, the Recognition Day is part of UMAK's Industry Partners Program founded on the principle that education must be closely linked with the realities and needs of the industries where its graduates end up working with their industry partners. UMAK and PDRCI had signed in October 2017 a Memorandum of Agreement (MOA) formalizing this partnership.

The Certificate of Recognition was given to Mr. Francisco D. Pabilla, Jr., PDRCI Assistant Secretary General, by Makati Mayor Abigail Binay and Vice-Mayor Monique Lagdameo, and Atty. Jewel Bulos, University Secretary, as an expression of UMAK's gratitude for PDRCI's close ties with UMAK's School of Law under the Deanship of former Vice President Jejomar Binay who is a PDRCI-trained arbitrator.

WHAT'S INSIDE

PART 1

The Philippines' pro-arbitration policy: A step forward gone too far?

By Jay Santiago & Nusaybah Muti

On the 60th year of the signing of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention"), the Philippines Supreme Court, declared for the first time its adoption of a narrow definition of "public policy" under Article V(2)(b) of the New York Convention.1

In *Mabuhay Holdings Corporation v. Sembcorp Logistics Limited*, G.R. No. 212734, Dec. 5, 2018, the Supreme Court held that "[m]ere errors in the interpretation of the law or factual findings would not suffice to warrant refusal of enforcement under the public policy ground. The illegality or immorality of the award must reach a certain threshold such that, enforcement of the same would be against [the Philippines'] fundamental tenets of justice and morality, or it would blatantly be injurious to the public, or the interests of the society."

The ruling is a welcome development that certainly supports the Philippines' new pro-enforcement policy. In particular, the declaration of a narrow definition of "public policy" under Article V(2)(b) of the New York Convention is crucial in establishing the country as a pro-enforcement seat for foreign arbitral awards.

The other pronouncements in the decision, however, raise questions on the Supreme Court's (arguably) "pro-enforcement" interpretation of Articles V(1)(c)[2] and (d)[3] of the New York Convention. One could ask: is this a case where the Supreme Court had "gone too far" in its pro-enforcement approach?

This article analyses the Supreme Court's reasoning in *Mabuhay* and attempts to highlight its potential implications in practice.

Case summary

In 1996, Sembcorp Logistics Limited ("Sembcorp"), a Singaporean company, and two Philippine corporations, Mabuhay Holdings Corporation ("MHC") and Infrastructure Development &

Holdings, Inc. ("IDHI") (collectively, the "Philippine Corporations"), entered into a Shareholders' Agreement (the "Agreement"). Under the Agreement, the Philippine Corporations guaranteed that Sembcorp would receive a minimum accounting return (the "Guaranteed Return") in exchange for Sembcorp's investment in Water Jet Shipping Corporation, a Philippine corporation engaged in the venture of carrying passengers on a common carriage by inter-island fast ferry, and Water Jet Netherlands Antilles N.V., a Curacaoan (then Antillean) company.

The arbitration clause in the Agreement states:

> "19.1 This Agreement and the validity and performance thereof shall be governed by the laws of the Republic of the Philippines.
>
> 19.2 Any dispute, controversy or claim arising out of or relating to this Agreement, or a breach thereof, **other than intra-corporate controversies**, shall be finally settled by arbitration in accordance with the rules of conciliation

1 An analogous provision is found in Rule 13.4 of the Special ADR Rules (infra, note 9) and Article 36(1)(b)(ii) of the UNCITRAL Model Law (1985), which the Philippines adopted pursuant to Republic Act No. 9285, "The Alternative Dispute Resolution Act of 2004."

2 An analogous provision is found in Article 36(1)(a)(iii) of the UNCITRAL Model Law (1985) and Rule 13.4 of the Special ADR Rules (infra, note 9).

3 An analogous provision is found in Article 36(1)(a)(iv) of the UNCITRAL Model Law (1985) and Rule 13.4 of the Special ADR Rules (infra, note 9).

and arbitration of the International Chamber of Commerce by one arbitrator **with expertise in the matter at issue** appointed in accordance with said rules. The arbitration proceeding including the rendering of the award shall **take place in Singapore** and shall be conducted in the English Language. This arbitration shall survive termination of this Agreement. Judgment upon the award rendered may be entered in any court having jurisdiction or application may be made to such court for a judicial acceptance of the award and an order of enforcement, as the case may be."[4]

When MHC failed to pay the Guaranteed Return, Sembcorp commenced an arbitration against MHC under the 1998 Rules of Arbitration of the International Chamber of Commerce ("1998 ICC Rules"). in April 2004, the sole arbitrator rendered an award in favor of Sembcorp (the "Final Award").

In April 2005, Sembcorp commenced enforcement proceedings against MHC in Philippine courts. MHC opposed the enforcement on three grounds:

Article V(1)(c) of the New York Convention, i.e., the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration. According to MHC, the dispute referred to arbitration was an intra-corporate controversy, a dispute expressly excluded from the scope of the arbitration clause;

Article V(1)(d) of the New York Convention, i.e., the composition of the arbitral authority was not in accordance with the parties' agreement. According to MHC, the appointment of the sole arbitrator, a Thai national, was not in accordance with the arbitration clause (which requires "expertise in the matter at issue") as he does not have expertise in Philippine law, the governing law of the Agreement;[5] and

Article V(2)(b) of the New York Convention, i.e., the recognition or enforcement of the award would be contrary to the public policy of the country where recognition or enforcement is sought. According to MHC, the arbitral award contains findings that violate Philippine laws on partnership and interest rates.

The trial court refused the enforcement of the Final Award. On appeal, the Court of Appeals reversed the trial court's ruling and ordered the enforcement of the Final Award. In upholding the Court of Appeal's ruling, the Supreme Court made the following pronouncements:

1. Under the *kompetenz-kompetenz* principle in Rules 2.2[6] and 2.4[7] of the Special Alternative Dispute Resolution Rules ("Special ADR Rules"),[8] an arbitral tribunal may initially rule on its jurisdiction. Under Rule 13.11, "[i]n resolving the petition for recognition and enforcement of a foreign arbitral award … the court shall … not disturb the arbitral tribunal's determination of facts and/or interpretation of law." As the sole arbitrator had determined that the dispute was not an intra-corporate dispute, the courts shall not disturb such determination. In any event, "[e]ven granting that the court may rule on the issue of whether the dispute is an intra-corporate controversy," MHC failed to submit any sufficient evidence to the contrary.

4 Boldface supplied.

5 It bears noting that under Philippine law, only Philippine nationals are entitled to practise law in the Philippines.

6 Rule 2.2 states: "… The Special ADR Rules recognize the principle of competence-competence, which means that the arbitral tribunal may initially rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement or any condition precedent to the filing of a request for arbitration. …"

7 Rule 2.4 states: "Policy implementing competence-competence principle. - The arbitral tribunal shall be accorded the first opportunity or competence to rule on the issue of whether or not it has the competence or jurisdiction to decide a dispute submitted to it for decision, including any objection with respect to the existence or validity of the arbitration agreement. When a court is asked to rule upon issue/s affecting the competence or jurisdiction of an arbitral tribunal in a dispute brought before it, either before or after the arbitral tribunal is constituted, the court must exercise judicial restraint and defer to the competence or jurisdiction of the arbitral tribunal by allowing the arbitral tribunal the first opportunity to rule upon such issues.

Where the court is asked to make a determination of whether the arbitration agreement is null and void, inoperative or incapable of being performed, under this policy of judicial restraint, the court must make no more than a prima facie determination of that issue.

Unless the court, pursuant to such prima facie determination, concludes that the arbitration agreement is null and void, inoperative or incapable of being performed, the court must suspend the action before it and refer the parties to arbitration pursuant to the arbitration agreement."

8 A.M. No. 07-11-08-SC, Sept. 1, 2009.

MEMBER SPOTLIGHT

Atty. Angel Chona Grace Ilagan Valero-Nunez is a lawyer, a devoted public servant, and a passionate teacher.

She obtained her Bachelor of Arts in Public Administration degree from the University of the Philippines, Diliman in 1997, graduating magna cum laude and batch valedictorian. She then studied law and obtained her Bachelor of Laws degree from the Arellano University School of Law in 2005, after attending San Beda College of Law in Mendiola for three years.

She was a member of the Sangguniang Kabataan of Makati City from 1996 to 2002 and, thereafter, a barangay kagawad of Brgy. Poblacion, Makati City from 2002 to 2013. While serving as barangay kagawad, she worked as an associate attorney at Bulos-Soriano Law Office from 2006 to 2013. In 2014, she was appointed Legal Officer of the Makati City Government.

Since 2006, she has been an adjunct professor at the College of Business Administration and at the College of Education of the University of Makati. She is also a lecturer at the VERified (Vital Events Records Certified) Institute. In 2016, she taught Legal Research and Thesis Writing at the Polytechnic University of the Philippines College of Law. She is currently enrolled in the Master of Laws program of the San Sebastian College Recolletos-Manila.

Atty. Valero-Nunez is active in the Integrated Bar of the Philippines (IBP). Among others, she served as one of the Deputy Directors of the IBP National Center for Legal Aid, Chief of Staff and Administrative Officer of the IBP National Office, and Secretary to the Board of IBP Manila 2 Chapter. She also regularly writes for The Bar, the official publication of the IBP. For her exemplary service to the IBP, she was awarded the IBP Presidential Plaque of Merit for three consecutive years from 2015 to 2017.

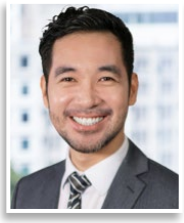
After decades of public service, she went back to private law practice as an associate and, thereafter, junior partner of Cabochan Law, where she continues to provide free legal assistance and consultations to the underprivileged.

2. As MHC previously challenged the sole arbitrator under the 1998 ICC Rules, and the ICC Court decided to reject the challenge, the court shall no longer "entertain any challenge to the appointment of arbitrator disguised as a ground for refusing enforcement of an award." In any event, "[i]f the intent of the parties is to exclude foreign arbitrators due to the substantive law of the contract, they could have specified the same considering that the ICC Rules provide for appointment of a sole arbitrator whose nationality is other than those of the parties."

3. The alleged violations of Philippine law under the Final Award are not sufficient to constitute as violations of the Philippines' public policy for purposes of enforcement of a foreign arbitral award under the New York Convention. In any event, the findings in the Final Award did not violate any Philippine law.

Next issue: The authors will discuss a critical analysis of the opinion.

About the Authors



Atty. Jay Santiago is a dual-qualified lawyer (the Philippines and England & Wales) specialising in international arbitration. He is a senior associate in Quisumbing Torres (a member firm of Baker & McKenzie International), a former Counsel at the Hong Kong International Arbitration Centre, and is currently completing his Master of Laws degree (specialism on International Business Law) as a Chevening scholar at the London School of Economics and Political Science.

Atty. Nusaybah L. Muti is a law clerk of the Supreme Court of the Philippines and an alumna of the International Academy for Arbitration Law in Paris, France, and The Hague Academy of International Law in the Hague, Netherlands.

EDITOR **ROBERTO N. DIO**
CONTRIBUTOR **SHIRLEY ALINEA**
STAFF WRITERS **CHET J. TAN, JR.**
LEONID C. NOLASCO
RICKY A. SABORNAY
GRACE ANN C. LAZARO