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THE PHILIPPINE
ADR REVIEW
Broadening its scope of arbitration advocacy

WWW.PDRCI.ORG FEBRUARY 2019

PDRC-POC MOU SIGNING. Seated from left: Atty. Roberto Dio, Atty. Edmundo Tan, Mr. Ricky Vargas, and Mr. Joey Romasanta. Standing, from left: Atty. Salvador Panga, Jr., Atty. Charlie Ho, Atty. Alberto Agra, and Mr. Ed Picson

Philippine Olympic Committee is new PDRC partner

After a year of discussions, PDRC signed on January 14, 2018 a Memorandum of Understanding (MOU) with the Philippine Olympic Committee (POC) at its office at the Philippine Sports Arena in Pasig City.

The MOU paves the way for the adoption of a new alternative dispute resolution (ADR) framework to resolve conflicts between POC's member national sports associations (NSAs) and within the NSAs and their members. During PDRC's presentation before the signing, it discussed mediation and arbitration as two possible modes of resolving disputes in sports without going through tedious and costly court litigation.

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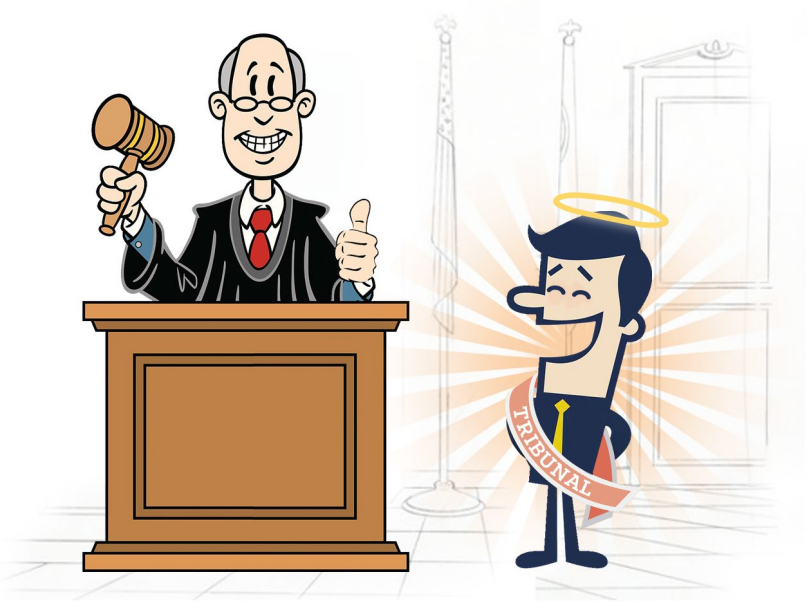
WHAT'S INSIDE

PART 2

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

By Jay Santiago & Nusaybah Muti

Last issue: The authors discussed the Philippine Supreme Court Decision on December 5, 2018 in Mabuhay Holdings Corporation v. Sembcorp Logistics Limited, which applied for the first time a narrow definition of public policy under Art. V (2) (b) of the New York Convention. In this part, the authors offer a critical analysis of the opinion. For easy reading, the quoted portions of the decision are italicized.



Analysis

1. Article V(1)(c) of the New York Convention

The New York Convention does not expressly address the character of the judicial consideration of jurisdictional issues decided by the arbitrators or the preclusive effects of arbitrators' jurisdictional awards (*i.e.*, whether judicial review of a jurisdictional award is *de novo* or whether it accords the arbitrators' jurisdictional determination some measure of deference). The New York Convention leaves the preclusive effects of jurisdictional awards generally to the contracting states.[1]

In *Mabuhay*, the Philippine Supreme Court essentially held that the findings of an arbitral tribunal on jurisdictional issues[2] are binding to courts. The phrase *"[e]ven granting that the court may rule on the issue of whether the dispute is an intra-corporate controversy"* reinforces this conclusion. The Supreme Court supports this conclusion on the basis of the *kompetenz-kompetenz* principle and the finality of the arbitral tribunal's determination of facts or interpretation of law. The ruling is problematic, however.

First, the Supreme Court assumed that under the *kompetenz-kompetenz* principle, enforcement courts are disallowed to review the sole arbitrator's findings. Such interpretation directly conflicts with Rules 2.2 and 2.4 of the Special ADR Rules, which grant an arbitral tribunal a mere "first opportunity"[3] to "initially rule"[4] on its jurisdiction.

Second, the Supreme Court's decision effectively stripped Philippine courts of the power to review the coverage of an arbitration agreement under Article V(1)(c) of the New York Convention in situations where the jurisdictional issue has been raised and decided at the tribunal's level.

Instead of making such sweeping statements, it would have been desirable had the Supreme Court, consistent with Article V(1)(c) of the New York Convention, affirmed its jurisdiction to review the arbitration agreement's scope and tackled the extent of consideration it would give to the findings of the arbitral tribunal.

1 G. Born, International Commercial Arbitration 1057 (2nd ed., 2014).

2 The jurisdictional issue raised was whether the dispute was an intra-corporate controversy, which was not arbitrable under the arbitration agreement.

3 Supra, note 7.

4 Supra, note 6.

5 Supra, note 9, at 3548.

Interestingly, the Supreme Court, on the presumption that it *"may rule on the issue of whether the dispute is an intra-corporate controversy,"* held that *"[i]n the absence of sufficient evidence that Sembcorp acquired the shares of IDHI, the Court finds no cogent reason to disturb the arbitral tribunal's ruling in favor of the latter's jurisdiction over the dispute."* Thus, it appears that, consistent with the practice of many national courts,[5] the Supreme Court intended to give substantial deference over the findings of the sole arbitrator. The reference to the *kompetenz-kompetenz* principle and finality of arbitral tribunals' findings served only to muddle what should have been a sound conclusion from the Supreme Court.

2. Article V(1)(d) of the New York Convention

Where contractual requirements regarding the arbitrators' qualifications are not complied with, an arbitrator may be the subject of an interlocutory judicial challenge (for example, under Article 12(2) of the UNCITRAL Model Law). In institutional arbitrations, an institutional challenge will also ordinarily be available against an arbitrator who lacks contractually-required qualifications. There will also be circumstances in which the arbitral award can be annulled or denied recognition based upon an arbitrator's lack of contractually-agreed qualifications. The latter remedy (of non-recognition) is specifically provided for by Article V(1)(d) of the New York Convention.[6]

In *Mabuhay*, the sole arbitrator was challenged during the arbitral proceedings, and the ICC Court rejected the challenge. When the same issue was raised in the enforcement proceedings, the Supreme Court noted that, under Rule 7.2 of the Special ADR Rules,[7] as the ICC Court has ruled on MHC's challenge, Philippine courts may no longer review the grounds raised in the challenge proceedings. Accordingly, it held that it *"shall not entertain any challenge to the appointment of arbitrator disguised as a ground for refusing enforcement of an award."* Again, this ruling is problematic.

First, the decision highlights the Supreme Court's confusion as regards its role as an enforcement court. As Singapore is the seat of arbitration, the Singapore courts would have the power to deal with the challenge. The Philippine Supreme Court's citation of Rule 7.2 of the Special ADR Rules, which deals with a Philippine courts' role in a challenge procedure, was therefore misplaced.

Second, the Supreme Court has effectively ruled that Philippine courts, when acting as an enforcement court, should not entertain any ground previously raised in a challenge during the arbitral proceedings. This is inconsistent with the enforcement court's power to review the "composition of the arbitral authority" under Article V(1)(d) of the New York Convention.

The Supreme Court's interpretation could lead to the effect that raising a formal challenge during the arbitral proceedings could prejudice an enforcing party in the Philippines. It could be suggested that, as a matter of strategy, it would be best to reserve a qualification objection until the enforcement proceedings, rather than raise it as a formal challenge during the arbitral proceedings. In the former situation, however, complications could arise when one considers the relevant mandatory time limits for challenging the appointment of an arbitrator.[8]

Notwithstanding what may appear to be some unintended worrying effects of the Supreme Court's ruling, it can be gleaned that the Supreme Court intended to be consistent with its pro-enforcement and pro-arbitration policy when it nevertheless decided to deal with the qualification issue and held that: *"At any rate, Mabuhay's contention that the sole arbitrator must have the expertise on Philippine law fails to persuade. If 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 the appointment of a sole arbitrator whose nationality is other than those of the parties."*

It is apparent that the Supreme Court relied heavily on the principle of party autonomy in international arbitration, i.e. the application of the 1998 ICC Rules which provides the appointment of a sole arbitrator with a neutral nationality. Moreover, the ruling is significant to the extent that the Supreme Court acknowledged that an arbitrator need not be a Philippine-qualified lawyer to be considered as one with expertise on an issue relating to the application of Philippine law.[9]

3. Article V(2)(b) of the New York Convention

Before *Mabuhay*, there was no domestic authority or guidance in the Philippines on determining what is contrary to public policy under the New York Convention. The absence of mandatory authority on such issue gave lower courts an almost unbridled discretion to refuse enforcement of foreign arbitral awards on the ground of public policy. An oft-cited Court of Appeals decision to illustrate this consequence is the case of *Luzon Hydro Corporation v. Hon. Rommel O. Baybay and Transfield Philippines*,[10] in which the Court of Appeals applied a broad interpretation of public policy

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6 Id., at 1757.

7 Rule 7.2 states: "When an arbitrator is challenged before the arbitral tribunal under the procedure agreed upon by the parties or under the procedure provided for in Article 13 (2) of the Model Law and the challenge is not successful, the aggrieved party may request the Appointing Authority to rule on the challenge, and it is only when such Appointing Authority fails or refuses to act on the challenge within such period as may be allowed under the applicable rule or in the absence thereof, within thirty (30) days from receipt of the request, that the aggrieved party may renew the challenge in court."

8 The UNCITRAL Model Law and many arbitration rules provide a time limit of 15 days from the constitution of the arbitral tribunal or after becoming aware of any ground, to challenge the appointment of an arbitrator.

that includes "manifest disregard of the law."

The Supreme Court's adoption of the narrow approach in interpreting public policy in *Mabuhay* is a welcome development. This development signals a new era in Philippine arbitration where the "public policy" ground becomes less of a catch-all ground and more of a safeguard against dilatory or unmeritorious oppositions to petitions for recognition or enforcement of foreign arbitral awards in the Philippines.

Conclusion

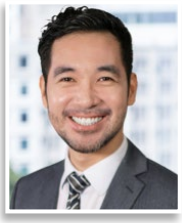
As a landmark decision in the interpretation of "public policy" under the New York Convention, *Mabuhay* is the first Philippine case that dealt with specific grounds for refusal of recognition and enforcement of foreign arbitral awards under the New York Convention. It is in line with past Supreme Court cases that confirm the Philippines' pro-enforcement and pro-arbitration policies, e.g., *Tuna Processing, Inc. v. Philippine Kingford, Inc.*,[11] where the Supreme Court ruled that a foreign corporation is allowed to enforce a foreign arbitral award in the Philippines despite its lack of license to do business in the country,[12] and *Korea Technologies Co, Ltd. v. Hon. Alberto A. Lerma*,[13] where the Supreme Court ruled that an arbitration clause providing for arbitration in a foreign seat does not violate public policy.

In concluding its decision in *Mabuhay*, the Supreme Court reminded the lower courts to apply the Philippine arbitration laws accordingly and highlighted how arbitration contributes to judicial reforms. It stated: *"[a]rbitration, as a mode of alternative dispute resolution, is one of the viable solutions to the longstanding problem of clogged court dockets. . . . In this light, We uphold the policies of the State favoring arbitration and enforcement of arbitral awards, and have due regard to the said policies in the interpretation of Our arbitration laws."*

With such "due regard" to the "policies of the State favoring arbitration and enforcement of arbitral awards," one could see that the Supreme Court in *Mabuhay* made a pro-enforcement attempt to resolve the issues relating to Articles V(1)(c) and (d) and Article V(2)(b) of the New York Convention. Unfortunately, the Supreme Court appears to have supported its ruling with some reasoning that leave much to be desired, at least insofar as resolving issues relating Articles V(1)(c) and (d) of the New York Convention are concerned. As explained, it could be argued that the Supreme Court has effectively stripped Philippine courts of the power to review some issues relating to those grounds – an approach that could be considered to be on the extreme end of the "pro-enforcement policy spectrum."

With an arguably excessively pro-arbitration approach in the enforcement of foreign arbitral awards, riddled with potentially worrying consequences, it remains to be seen whether *Mabuhay* would do more harm than good in practice. What is clear is that the Supreme Court has consistently invoked its commitment to the pro-arbitration and pro-enforcement policies of the Philippines – a move in the right direction and a good enough reason to consider the Philippines as one of the world's increasingly growing pro-arbitration and pro-enforcement jurisdictions.

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.

9 This is in contrast with past Supreme Court decisions that broadly define the practice of Philippine law, which is exclusively reserved to Philippine nationals.

10 CA-G.R. SP No. 94318, Nov. 26, 2006.

11 G.R. No. 185582, Feb. 29, 2012.

12 Under Philippine law, foreign corporations doing business in the Philippines without a license to do business is precluded from commencing legal actions in Philippine courts.

13 G.R. No. 143581, Jan. 7, 2008.

Philippine Olympic Committee is new PDRC partner

(Continued from page 1)

PDRC Sec. Gen. Roberto Dio (second from left) explains how the ADR process works to the members of the Philippine Olympic Committee. From left: PDRC Trustee Charlie Ho, Atty. Dio, PDRC Pres. Edmundo Tan, and PDRC Trustee Salvador Panga, Jr. From right: POC member Alberto Agra, POC Pres. Ricky Vargas and POC members Robert Bachman (partly covered) and Joey Romasanta.

Under its By-Laws, which also serves as its charter, POC is the final arbiter of all intra-NSA conflicts and disputes as well as cases "arising from or in connection with the Olympic Games" or any form of doping offense that cannot not be resolved within the NSA's processes and procedures. Because the POC decision in such disputes may be challenged in court, the POC General Assembly authorized its Board of Trustees to partner with PDRC to formulate a new ADR framework for POC to resolve disputes without going to court.

PDRC and POC are optimistic that once the new ADR framework is put in place and implemented with a successful test case, the same model can be used in all amateur and professional sports in the Philippines. PDRC President Edmundo Tan committed to help POC promote ADR. For his part, POC President Ricky Vargas said that by signing the MOU, the POC was following the model of the International Olympic Committee and the Court of Arbitration in Sports.

Also present during the ceremony were POC First Vice President Joey Romasanta, POC General Counsel Alberto Agra, POC Membership Committee Chair Robert Bachmann, and POC Communications Director Ed Picson. For PDRC, Vice President for External Affairs Atty. Salvador Panga, Jr., Secretary General Atty. Roberto Dio, Trustee Atty. Charlie Ho, and Assistant Secretary General Francisco Pabilla, Jr. witnessed the signing.

MEMBER SPOTLIGHT

Atty. Diosdado E. Trillana is a partner of the law firm of Batuhan Blando Concepcion & Trillana (BBCT Law).

He obtained his Bachelor of Science in Political Science degree from the University of the Philippines, Manila in 1993. He then took up law at the University of the Philippines College of Law, where he obtained his Bachelor of Laws degree in 1997, finishing 23rd in his class.

He joined the law firm of SyCip Salazar Hernandez and Gatmaitan (SSHG) as an associate in October 1997, before passing the Philippine bar examinations in May 1998. After becoming a senior associate at SSHG and working there for almost 10 years, he joined BBCT Law as a partner, specializing in litigation, special projects, corporate services, and labor.

Atty. Trillana has litigated numerous cases from the trial court to the Supreme Court, handled project finance and security transactions for various power producers, and undertaken corporate housekeeping, due diligence and regulatory approvals for various corporate clients.

He is also a member of the Chartered Institute of Arbitrators.

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