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U.S. Court of Appeals allows discovery of evidence for use in foreign arbitrations

By Lindolf F. de Castro

In its January 2020 issue, Financier Worldwide reported that U.S. federal courts now allow parties to apply discovery procedure in U.S. courts to produce evidence in a foreign or international tribunal through 28 U.S.C. Section 1782.

Section 1782 grants a petitioner the right to request a U.S. federal court to order a person or entity "to give his testimony or statement or to produce a document or other thing in order to provide assistance to a foreign or international tribunal."

The opinions of the U.S. Court of Appeals for the Sixth and Second Circuits issued in September and October 2019, respectively, confirmed the applicability of discovery procedures in US courts to foreign arbitrations. In *Application to Obtain Discovery for Use in Foreign Proceedings*,[1] the court held that (a) a private corporation qualifies as a "foreign or international tribunal," thereby interpreting Section 1782 to include private international arbitrations in the scope of "foreign or international tribunals," and (b) Section 1782 may be invoked to obtain documents located abroad.

According to the article written by Matthew H. Kirtland, Katie Connoly, and Eddie Skolnick, in order to use Section 1782, a request must be filed with a U.S. district court. The request will be granted only if (a) the request was made by an "interested person" or a foreign or

1 In re Application to Obtain Discovery for Use in Foreign Proceedings, No. 19-5315 (U.S. Court of Appeals, 6th Circuit, 2019).

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WHAT'S INSIDE

PART 2

Arbitration and Insolvency Proceedings

By Jose Ma. B. Buenagua

Last issue, the author discussed two English cases that upheld the arbitration agreement over the insolvency proceeding of one of the parties. In this issue, the author discusses insolvency and the applicable arbitration law in the Philippines.

Insolvency

The FRIA, which expressly repealed the former Insolvency Law. was enacted to "express the policy of the State to encourage debtors, both juridical and natural persons, and their creditors to collectively and realistically resolve and adjust competing claims and property rights" and to "ensure a timely, fair, transparent, effective, and efficient rehabilitation of liquidation of debtors" (FRIA, Sec. 2).

Under the FRIA, insolvency refers to the financial condition of a debtor who is generally unable to pay its liabilities as they fall due in the ordinary course of business or has liabilities that are greater than its assets (FRIA, Sec. 4). The rationale in enacting the FRIA is to allow the insolvent debtor to recuperate from its financial distress and to restore it to a condition of successful operation and solvency. Unlike arbitration, it is not fundamentally governed by consent but by legislation.

In other countries, the intent of the insolvency law is to put all creditors in equal standing and treatment. It is meant to ensure that the insolvent debtor's assets are shared uniformly by all the creditors, without due preference to any. Thus, no amount of consent, if contrary to law, prevails since it is the statute that governs and is mandatorily complied. In this way, the insolvent debtor's assets are equally shared and maximally utilized.

Belohlavek comments that "Insolvency law prohibits any differentiation among creditors in terms of the means and possibility of legal protection against a debtor that would be afforded to selected creditors while denied to other. ... Insolvency proceedings are based on the presumption that claims against the debtor's insolvency estate cannot be asserted individually."

What applies?

But what does Philippine law really say on the matter? Should contractual autonomy in the face of arbitration, as in Syska and Philpott, prevail over statutory law? Should all creditors, as Belohlavek comments, be actually treated the same?

Several factors are taken into account in arriving at a resolution similar to *Syska* and *Philpott*. International jurisprudence is not binding on Philippine court but at most merely persuasive. Since laws are written differently, interpretations and applications also vary. A wholesale application of *Syska* and *Philpott* is not only incompatible with our prevailing legal theory but may also be contrary to law.

Under the Philippine legal system, disputes arising from a court-supervised rehabilitation plan or any rehabilitation dispute may be referred to arbitration or other modes of dispute resolution. Thus, Section 26, second paragraph of the FRIA states:

> The court may refer any dispute relating to the Rehabilitation Plan or the rehabilitation proceedings pending before it to arbitration or other modes of dispute resolution, as provided for under Republic Act No. 9285, or the Alternative Dispute Resolution Act of 2004, should it determine that such mode will resolve the dispute more quickly, fairly and efficiently than the court.

The same provision, however, should be read together with Rule II, Section 18, third paragraph of the Special ADR Rules, which states:

> The referral to arbitration or other modes of dispute resolution shall not prejudice the one-year period for confirmation of the rehabilitation plan under Section 70 of the Act.

The above provisions, while available in rehabilitation, have no counterpart in liquidation. Thus, unless court-sanctioned, the liquidation proceedings cannot be subjected to arbitration. Under Philippine law, unlike other countries that put a premium on equality in treatment of the creditors, there is concurrence and preference of credits (FRIA, Sec. 133). Thus, liquidation under Philippine law is governed by statute and cannot be subject to contractual agreement.

But this does not mean that parties in bankruptcy are barred from resorting to arbitration. Parties to a rehabilitation or liquidation proceeding may still refer their dispute to an arbitral tribunal even while a petition for rehabilitation or liquidation is pending. Section 24 of the Alternative Dispute Resolution Act of 2004 provides that:

> A court before which an action is brought in a matter which is the subject matter of an arbitration agreement shall, if at least one party so requests not later that the pre-trial conference, or upon the request of both parties thereafter, refer the parties to arbitration unless it finds that the arbitration agreement is null and void, inoperative or incapable of being performed.

The existence of an arbitration agreement gives the option to the parties to proceed with arbitration even after the commencement of an insolvency proceeding. If only one party requests arbitration, it must be done not later than the pre-trial conference. If both parties request arbitration, it may be done even afterwards.

Conclusion

One may argue then that the presence of an arbitral clause is a saving grace. It assures the parties that neither of them may escape from their legal obligations through an insolvency proceeding. This is an important assurance since the insolvency proceeding inadvertently became a legal excuse to not comply with an obligation entered into by the parties. And permissibly allowing this practice will not only wreak havoc to commercial transactions in the country but will also erode our fundamental sense of fair play, equity, and justice.

Hence, under Philippine law, a conflict of law may not really exist. Philippine law gives recognition and premium to contractual autonomy. And such recognition is institutionalized to the extent of a statutory law, enabling and giving due regard to the flourishing of commercial transactions all with the aid and confidence of an efficient and results-driven framework of arbitration.

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international tribunal; (b) the target of the discovery must "reside" or be "found" in the judicial district where the petition is filed; and (c) the evidence sought must be for "use in a proceeding in a foreign or international tribunal."

Additional factors that must be considered before a court may grant discovery under Section 1782 was identified by the U.S. Supreme Court in Intel Corp. v. Advanced Micro Devices, Inc., namely, (a) whether the target of the discovery is a participant in the non-U.S. legal proceeding; (b) the nature of the foreign tribunal, the character of the proceedings and the receptivity of the foreign government or the court or agency to judicial assistance from a U.S. court; (c) whether the request conceals an attempt to circumvent foreign proof-gathering restrictions or other policies of a foreign country or the U.S.; and (d) whether the request is unduly intrusive or burdensome.

The article noted that the recent court opinions overturned an earlier ruling in National Broadcasting Co. v. Bear Stearns & Co., where the U.S. Courts of Appeals for the Second and Fifth Circuits held that the term "foreign or international tribunals" in Section 1782 was limited to "governmental or intergovernmental arbitral tribunals and conventional courts and other state sponsored bodies" and does not include private international arbitrations, stating that the same was not the intention of Congress when it enacted the statute.

As it now stands, discovery in U.S. courts may be applied by virtue of Section 1782 to produce evidence, including those located abroad, for use in foreign arbitrations involving private international arbitrations.

2 Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241 (2004).
3 National Broadcasting Co. v. Bear Stearns & Co., No. 98-7468 (2nd Circuit, 1999).

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