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The Philippines' Pro-Arbitration Policy: A Step Forward Gone Too Far?

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On the 60th year of the signing of the New York Convention, the Philippines' Supreme Court, for the first time, declared its adoption of a narrow definition of "public policy" under the said convention. In *Mabuhay Holdings Corporation v Sembcorp Logistics Limited,* G.R. No. 212734, 5 December 2018, it 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 supports the Philippines' pro-enforcement policy. The other pronouncements in the decision, however, raise questions on the Supreme Court's (arguably excessive) "pro-enforcement" interpretation of Articles V(1)(c) and (d) of the New York Convention. One could ask: is this a case where the Supreme Court has "gone too far" in its pro-enforcement approach?

Background

In 1996, Sembcorp Logistics Limited ("Sembcorp") and two Philippine corporations (including Mabuhay Holdings Corporation, "MHC") entered into an agreement under which Sembcorp would receive a minimum accounting return (the "Guaranteed Return") in exchange for its investment in a joint venture.

When MHC failed to pay the Guaranteed Return, Sembcorp commenced a Singapore-seated arbitration under the 1998 ICC Rules. In 2004, the sole arbitrator, a Thai national, rendered a final award in favour of Sembcorp. Sembcorp commenced enforcement proceedings against MHC in Philippine courts. MHC opposed the enforcement on the three grounds discussed below. The Supreme Court rejected MHC's contentions.

Analysis

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

In *Mabuhay*, the jurisdictional issue was whether the dispute referred to arbitration is an intra-corporate controversy – a type of dispute that was expressly excluded from the parties' arbitration

agreement. The Supreme Court held that the findings of an arbitral tribunal on jurisdictional issues relating to the scope of the arbitration agreement are binding on Philippine courts. The Supreme Court supported 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.

First, the Supreme Court's interpretation of the *kompetenz-kompetenz* principle contradicts the rule that arbitral tribunals have a mere first opportunity to initially rule on its jurisdiction.

Second, the Supreme Court's decision effectively stripped Philippine courts the power to review the coverage of an arbitration agreement in situations where such jurisdictional issue has been decided at the arbitral proceedings.

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 coverage and tackled the extent of consideration it would give on the findings of the arbitral tribunal.

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, 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

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, citing a rule that deals with the Philippine courts' role in challenge proceedings, held that Philippine courts may no longer review the grounds raised in the challenge proceedings and that it would *"not entertain any challenge . . . disguised as a ground for refusing enforcement of an award."*

The ruling is problematic.

First, as Singapore is the seat of arbitration, the Singapore courts would have the power to deal with the challenge. The Supreme Court's reference of its rules relating to challenges was therefore misplaced.

Second, the Supreme Court has effectively ruled that Philippine courts 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.

Notwithstanding what may appear to be some unintended worrying effects of the ruling, it can be gleaned that the Supreme Court intended to be consistent with its pro-enforcement 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 arbitration, i.e. the application of the 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.

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. This gave lower courts an almost unbridled discretion to refuse enforcement of foreign arbitral awards on the ground of public policy. An oft-cited decision to illustrate this consequence is *Luzon Hydro Corporation v. Hon. Rommel O. Baybay and Transfield Philippines*, CA-G.R. SP No. 94318, 26 November 2006, in which the Court of Appeals applied a broad interpretation of public policy that includes "manifest disregard of the law."

The Supreme Court's adoption of the narrow approach in interpreting public policy in *Mabuhay* 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

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.

In concluding the *Mabuhay* decision, 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 long-standing 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" one could see that the Supreme Court made a pro-enforcement attempt to resolve the issues relating to the New York Convention. Unfortunately, it appears to have supported parts of its ruling with some reasoning that leave much to be desired. As explained, it could be argued that the Supreme Court has effectively stripped Philippine courts of the power to review some issues relating to Articles V(1)(c) and (d) of the New York Convention – an approach that could be considered to be on the extreme end of the "pro-enforcement policy spectrum." One could also wonder whether this ruling could potentially support an argument that the Philippines has violated its obligations under the New York Convention or any substantive protection under investment treaties (e.g., fair and equitable treatment).

With an arguably excessively pro-arbitration approach riddled with potentially worrying consequences, it remains to be seen whether *Mabuhay* would do more good than harm 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 steer towards 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.

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This entry was posted on Tuesday, April 9th, 2019 at 7:00 am and is filed under Arbitration, Arbitration Awards, Enforcement, New York Convention, Philippines
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