aprag
Asia Pacific Regional Arbitration Group

Linking Arbitrability and Public Policy: A Philippine Approach

Angela Ray T. Abala*
angelaabala@smu.edu.sg

Abstract

Philippine law and jurisprudence consistently encourage the use of alternative dispute resolution methods, including international arbitration, to achieve speedy and impartial justice. Yet, what is considered arbitrable in the Philippines is not clear-cut. Arbitrability, a key concept of international arbitration law, determines what types of disputes can and cannot be settled by arbitration. Public policy considerations greatly affect arbitrability. This article seeks to tackle the question of arbitrability and public policy in the Philippines and proposes that courts should look at (1) the underlying statute governing the dispute and (2) whether third-party rights will be affected to determine whether a dispute is arbitrable.

I. INTRODUCTION

The Philippines has long recognized arbitration as an alternative method of resolving disputes.[1] Republic Act No. 876 has governed domestic arbitration since 1953.[2] The Philippines has been a State Party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, or the New York Convention,[3] since 1965. In 2004, with the signing of Republic Act No. 9285 or the Alternative Dispute Resolution Act of 2004,[4] the Philippines adopted the 1985 United Nations Commission on International

* Research Associate, Singapore International Dispute Resolution Academy. Email: angelaabala@smu.edu.sg. The author would like to thank Prof. Anne Marie Whitesell and Alexis Loy for their support.

[1] *Arthur P. Autea,* "*Philippine Arbitration Reform: Fresh Breathing Space from Congested Litigation",* in *The Developing World of Arbitration: A Comparative Study of Arbitration Reform in the Asia Pacific* (Anselmo Reyes and Weixia Gu eds., 2018), p 163-164; *Jan Vincent S. Soliven and Camille Ross G. Parpan*, *"Arbitration in the Philippines"*, Global Arbitration Review, <https://globalarbitrationreview.com/insight/the-asia-pacific-arbitration-review-2020/1193381/philippines>

[2] An Act to Authorize the Making of Arbitration and Submission Agreements, to Provide for the Appointment of Arbitrators and the Procedures for Arbitration in Civil Controversies.

[3] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 3 [hereinafter "NY Convention"].

[4] An Act to Institutionalize the Use of An Alternative Dispute Resolution System in the Philippines and to Establish the Office for Alternative Dispute Resolution, and for Other Purposes.

Trade Law Model Law on International Commercial Arbitration ("UNCITRAL Model Law").[5] Despite the presence of the necessary legal instruments, observers note that arbitration, both domestic and international, remains to be a "small slice of the pie"[6] of the legal practice in the country.[7]

Recently however, there has been a surge of international arbitration in the Philippines.[8] There are now arbitrations seated in the Philippines and several international commercial arbitration cases involving Philippine parties or disputes that have originated in the Philippines.[9]

The Philippine Supreme Court has facilitated capacity building to equip the judiciary with expertise to deal with international commercial arbitration-related cases.[10] Philippine law and how it has been interpreted by the judiciary takes a pro-arbitration policy and encourages parties to resolve their disputes via arbitration.[11]

These developments are unable to fill the gaps in Philippine law that lead to the underutilization of arbitration in the country. One such gap is the question of what subject matter or what types of disputes are arbitrable – those which *can* be settled by arbitration – and those which are non-arbitrable – those which *cannot* be settled by arbitration. Arbitrability, especially in relation to public policy, has yet to be determined by Philippine legislation and jurisprudence. While there are certain disputes outlined in the Alternative Dispute Resolution Act of 2004 that cannot be arbitrated, there is still no clear guidance on what role public policy plays in what is and what is not arbitrable. For instance, the Philippines has yet to deal with the question of arbitrability in relation to insolvency, intellectual property, competition law, and even bribery and corruption. Discussing what arbitrability is and what disputes cannot be arbitrated as it is deemed contrary to public policy to do so is an important concept as it has "the potential to affect the validity of an arbitration agreement, strip an arbitrator of jurisdiction to determine a matter in spite of party agreement or derail enforcement of an award".[12]

---

[5] Alternative Dispute Resolution Act, §19.
[6] Above fn 1, Autea, p 173.
[7] *Jeneline N. Nicolas*, *"Philippines"*, Global Arbitration Review, <https://globalarbitrationreview.com/chapter/1141962/philippines>
[8] Above fn 1, Autea, pp 170-171.
[9] Above fn 1, Autea, p 170.
[10] Above fn 1, Autea, pp 172-173.
[11] Above fn 1, Autea, p 172; Above fn 7; *Loretta Malintoppi and Charis Tan*, "*Investment Protection in Southeast Asia: A Country-By-Country Guide on Arbitration Laws and Bilateral Investment Treaties*" (BRILL, 2016), Chapter 8.
[12] *Joseph Mante*, "*Arbitrability and Public Policy: An African Perspective"* [2016] Arbitration International, Volume 33, Issue 2, June 2017, pp 275-276.

In the following sections, this article will explain the concept of arbitrability (Part II). Part III outlines the arbitration framework in the Philippines. Part IV reviews how the Philippines has defined the concept of public policy in terms of its applicability to contract law and to the extent that it has been applied to international arbitration. Examining countries within the region as a point of comparison, Part V looks at the experiences of Singapore, China, and Thailand. Finally, Part VI provides what the Philippines can learn from these countries. This article is focused on the concept of public policy in terms of how it defines what is capable of being settled through international commercial arbitration.

II. ARBITRABILITY

Arbitrability is a key concept of arbitration law.[13] It deals with resolving what disputes can be settled by arbitration and which must be settled by courts.[14] What kind of disputes can or cannot be arbitrated depends on the laws of a specific country.[15] Countries have excluded some disputes from the domain of arbitration because of its "public importance or a perceived need for judicial protections".[16] States are given free rein to decide which disputes may be resolved by arbitration by taking into account its political, social, and economic policies.[17] Reserving some disputes for resolution by national courts is also seen as an acknowledgment by states that arbitration is "a private proceeding with public consequences".[18] Generally, disputes involving criminal law, bankruptcy or insolvency, and intellectual property are fields of law that are considered non-arbitrable by several countries.[19]

Accordingly, public policy plays a significant role in determining what disputes are arbitrable.[20] By definition, public policy has generally been understood to mean the "most basic notions of morality and

[13] Karim Abou Youssef, "*The Death of Inarbitrability", in Arbitrability: International and Comparative Perspectives* (Loukas A. Mistelis and Stavros Brekoulakis eds., 2009), p 48.
[14] *Nigel Blackaby KC, Constantine Partasides KC and Alan Redfern, "Redfern and Hunter on International Arbitration"* (6th ed. 2015), pp 80, 110; S*undaresh Menon, Rethinking Arbitrability in the Context of Corporate Disputes*, paper presented in the Mauritius International Arbitration Conference 2010.
[15] *Gary B. Born, "International Arbitration: Law and Practice"* (2nd ed. 2016), p 87; Above fn 14, Blackaby, et al., p 12.
[16] Above fn 15, 87.
[17] Above fn 14, Blackaby, et al., pp 81, 111.
[18] *Id.* at 110.
[19] Above fn 14 Blackaby, et al., p 112; Above fn 15, p 87.
[20] *Pierre Mayer and Audley Sheppard, "Final ILA Report on Public Policy as a Bar to Enforcement of International Arbitral Awards"* Arbitration International, Volume 19, Issue 2, 1 June 2003, pp 249, 252*; Stavros Brekoulakis*, "*On Arbitrability: Persisting Misconceptions and New Areas of Concern"*, in *Arbitrability: International and Comparative Perspectives* (Kluwer Law International, 2009), pp 19, 21-22; Above fn 14, Menon.

justice".[21] Yet, the concept of public policy has often been seen as an "unruly horse".[22] This has a lot to do with the fact that defining public policy is a difficult task.[23] The International Law Association Committee on International Commercial Arbitration concluded that "no precise definition [of public policy] is possible".[24] What is considered the "basic notions of morality and justice" differs from state to state.

Public policy however remains crucial in drawing the line between arbitrable and non-arbitrable cases. It has been said that "[a]rbitrability creates a zone for arbitration and that zone is controlled by sovereign States through public policy".[25] It is the state, through considerations of public policy, that exempts some types of disputes even though the very parties to the dispute may have agreed that they would rather arbitrate the matter. Consequently, one type of dispute can be considered arbitrable in one state and non-arbitrable in another.[26] This makes the concept of arbitrability and public policy an important one. A determination of which subject matter is considered arbitrable affects arbitration agreements, what can be decided by an arbitral tribunal and whether an arbitral award can be recognized and enforced.

The New York Convention and the UNCITRAL Model Law reinforces the concept that what is arbitrable is different for every state. The New York Convention provides that recognition and enforcement of an arbitral award may be refused if "the subject matter of the difference is not capable of settlement by arbitration under the law of that country".[27] The UNCITRAL Model Law states that an arbitral award may be set aside if the court finds that "the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State".[28] Article 36(1)(b)(i) of the Model Law also provides that a court may refuse to recognize or enforce an award if the subject-matter of the dispute cannot be settled by arbitration under the laws of that state.

---

[21] *Parsons & Whittemore Overseas Co., Inc.* v. *Societi Generate de I'Industrie du Papier RAKTA and Bank of America* 50 2d 969 (2nd Cir., 1974).

[22] *Richardson v Mellish* (1824) 2 Bing 229 at 252; *Farshad Ghodoosi, "International Dispute Resolution and the Public Policy Exception"* (Routledge, 2017), p 6.

[23] *Loukas A. Mistelis,* "*Arbitrability: International and Comparative Perspectives", in Arbitrability: International and Comparative Perspectives* (Kluwer Law International, 2009), p 2.

[24] Above fn 20, Mayer and Sheppard.

[25] *Murat Sümer,* "*Jurisdiction of Sovereign States and International Commercial Arbitration: A Bound Relationship*" [2008] 1 Ankara Bar Review 55, p 60.

[26] Above fn 12, 278; Above fn 14, Menon.

[27] NY Convention, Article V(2)(a).

[28] UNCITRAL Model Law on International Commercial Arbitration, 24 I.L.M. 1302 (1985), Article 34(2)(b)(i).

Several countries now consider most commercial disputes arbitrable[29] as public policy has been narrowly defined in their jurisdictions.[30] For instance, in the United States, there is a presumption in favour of arbitrability.[31] U.S. courts have expanded the concept of arbitrability "to areas of economic activity heavily impregnated with public interest".[32] There is even a stronger presumption in favour of arbitrability with respect to disputes that involve international commerce.[33] In France, courts have "dissociate[d] arbitrablity from public policy [and] gradually associated it with a more international and less restrictive notion".[34] In America and most of Europe, issues regarding arbitrability focus on patents, trademarks, insolvency, antitrust and competition laws, fraud and bribery, and corruption.[35]

In other parts of the world, the concept of arbitrability and public policy remains to be controversial. In several African countries, public policy still plays a crucial role in determining what is arbitrable.[36] Issues on the arbitrability of matters "concerning constitutional interpretation and enforcement, public or national interests, crime, and environmental issues" are still to be determined in relation to public policy.[37] Matters that are non-arbitrable in several African countries remain to be broader in scope, especially if a commercial dispute touches upon issues regarding constitutional interpretation, tort, public interest, the legality of an underlying agreement between parties,[38] or when a state or public entity is a party to a dispute.[39] Several African countries see public policy as a "vital safeguard [ ] against perceived 'biased arbitral tribunals' who may have as their main objective the satisfaction of commercial interests", making the question of what is arbitrable reliant on national legal, institutional, and economic interests.[40]

In the Philippines, the question of what is arbitrable is increasingly becoming relevant. There has been an uptick of international arbitration cases involving Philippine parties, disputes that have originated in the Philippines, and arbitrations seated in the Philippines.[41] Government entities have now also become

[29] Above fn 14, Blackaby, et al., p 124.
[30] Above fn 20, Brekoulakis, p 21.
[31] *Joseph T. McLaughlin*, *Arbitrability: Current Trends in the United States*, 59 ALB. L. REV. 905, 906 (1996).
[32] Above fn 13, p 56.
[33] *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.,* 473 U.S. 614 (1985).
[34] Above fn 13, p 59.
[35] *Id.* at 292.
[36] Mante, *supra* note 12, at 289.
[37] *Id.*
[38] *BJ Exports & Chemical Processing Co. v. Kaduna Refining and Petrochemical Co.,* 31 October 2002 delivered by Mahmud Mohammed, Justice of the Court of Appeal, Court of Appeal, Kaduna Division, Nigeria (unreported).
[39] Above fn 12, p 294.
[40] *Id.*
[41] Above fn 1, Autea, pp 170-171.

more involved in international transactions that require disputes to be settled by arbitration.[42] Questions now arise in the Philippines as to whether disputes that involve the construction of an expressway or those that arise out of a water concession agreement can be resolved through arbitration. Whether matters that touch upon public or national interests can be arbitrated are yet to be resolved by Philippine courts.

III. FRAMEWORK FOR ARBITRATION LAW IN THE PHILIPPINES

Arbitration in the Philippines is generally seen as an "inexpensive, speedy and amicable" process.[43] The Philippine Supreme Court has called arbitration as the "wave of the future" and has consistently said that it adopts a pro-arbitration stance.[44]

Republic Act No. 9285 or the Alternative Dispute Resolution Act of 2004 ("ADR Act of 2004") outlines the rules that govern mediation and arbitration in the Philippines.[45] Relevantly, Chapter 4 of the ADR Act of 2004 covers international commercial arbitration. Section 19 states that international commercial arbitration is governed by the UNCITRAL Model Law (1985).[46] Section 42 of the law provides that recognition and enforcement of foreign arbitral awards shall be governed by the New York Convention.

Section 2 of the ADR Act of 2004 provides that it is the

> **declared ... policy of the State to actively promote party autonomy in the resolution of disputes or the freedom of the party to make their own arrangements to resolve their disputes.** Towards this end, t**he State shall encourage and actively promote the use of Alternative Dispute Resolution (ADR) as an important means to achieve speedy and impartial justice** and declog court dockets. As such, the State shall provide means for the use of ADR as an efficient tool and an alternative procedure for the resolution of appropriate cases. …[47]

---

[42] *Id.;* Executive Order No. 78, *"Mandating the Inclusion of Provision on the Use of Alternative Dispute Resolution Mechanisms in All Contracts Involving Public-Private Partnership Projects, Build-Operate-Transfer Projects, Joint Venture Agreements Between Government and Private Entities and Those Entered into by Local Government Units"*, Section 1 (2012).
[43] *LM Power Engineering Corporation v. Capitol Industrial Construction Groups, Inc.*, G.R. No. 141833, 26 March 2003, citations omitted**.**
[44] *Id.*
[45] It refers to Republic Act No. 876 for domestic arbitration and Executive Order No. 1008 for the arbitration of construction disputes.
[46] Alternative Dispute Resolution Act, §19.
[47] Emphasis supplied.

Under Chapter 4 on international commercial arbitration, Section 25 specifically mandates that "the court shall have due regard to **the policy of the law in favor of arbitration**".[48]

The ADR Act of 2004 explicitly provides that it does not apply to: (a) labor disputes covered by the Labor Code of the Philippines, (b) the civil status of persons, (c) the validity of a marriage, (d) any ground for legal separation, (e) the jurisdiction of courts, (f) future *legitime*, (g) criminal liability, and (h) those which by law cannot be compromised. These are the only areas thus far that have been identified as not being capable of being settled by arbitration. Whether disputes relating to insolvency, environmental law, intellectual property, competition law, fraud and bribery, or corruption can be arbitrated or cannot be arbitrated because it infringes on Philippine public policy is an open question.

The Implementing Rules and Regulations of the Alternative Dispute Resolution Act of 2004 ("IRR") replicates the Alternative Dispute Resolution Act of 2004 by stating that "in interpreting this Chapter, the court shall have due regard to the policy of the law in favor of arbitration and the policy of the Philippines to actively promote party autonomy in the resolution of disputes or the freedom of the parties to make their own arrangement to resolve their dispute".[49] Article 4.36 of the Implementing Rules and Regulations covers the grounds for refusing recognition and enforcement of New York Convention and non-Convention awards. For New York Convention awards, Article 4.36 essentially reproduces Article V of the New York Convention. Specifically, it provides that Regional Trial Courts in the Philippines may refuse recognition and enforcement if the subject-matter of the dispute is not capable of settlement by arbitration under the law of the Philippines or if the recognition or enforcement of the award would be contrary to the public policy of the Philippines.

The Philippine Supreme Court also issued the Special Rules of Court on Alternative Dispute Resolution (Special ADR Rules)[50] to complement the arbitration and mediation rules in the country. It applies to and governs the following: (a) relief on the issue of existence, validity, or enforceability of the arbitration agreement, (b) referral to alternative dispute resolution, (c) interim measures of protection, (d) appointment of arbitrator, (e) challenge to appointment of arbitrator, (f) termination of mandate of arbitrator, (g) assistance in taking evidence, (h) confirmation, correction or vacation of award in domestic

[48] Emphasis supplied.
[49] Department of Justice, Rules and Regulations Implementing the Alternative Dispute Resolution Act of 2004, Republic Act No. 92585, Article 4.2(c) (2009).
[50] Special Rules of Court on Alternative Dispute Resolution, A.M. No. 07-11-08-SC, 1 September 2009.

arbitration, (i) recognition and enforcement or setting aside of an award in international commercial arbitration, (j) recognition and enforcement of a foreign arbitral award, (k) confidentiality/protective orders, and (l) deposit and enforcement of mediated settlement agreements.[51] In Rule 2.1, the Supreme Court acknowledges and echoes the state policy enshrined in the ADR Act of 2004 and its accompanying IRR, by providing that

> **[i]t is the policy of the State to actively promote the use of various modes of ADR and to respect party autonomy or the freedom of the parties to make their own arrangements in the resolution of disputes with the greatest cooperation of and the least intervention from the courts.** To this end, the objectives of the Special ADR Rules are to encourage and promote the use of ADR, particularly arbitration and mediation, as an important means to achieve speedy and efficient resolution of disputes, impartial justice, curb a litigious culture and to de-clog court dockets.[52]

The Special ADR Rules states that courts may refuse to enforce or set aside awards if the subject-matter of the dispute is not capable of settlement under Philippine law.[53] The Special ADR Rules provides that courts can only set aside an award in an international arbitration based on the grounds found in Article 34 of the UNCITRAL Model Law. If the court is asked to set aside an award based on any ground other than those found in the Special ADR Rules, it can only do so if the ground for setting aside or non-recognition is that there is a violation of public policy.[54]

The Special ADR Rules also adopts the policy of judicial restraint when it comes to arbitration. Rule 19.10 specifically provides that "**[t]he court shall not set aside or vacate the award of the arbitral tribunal merely on the ground that the arbitral tribunal committed errors of fact, or of law, or of fact and law, as the court cannot substitute its judgment for that of the arbitral tribunal**".[55]

Another relevant law is Executive Order No. 78, s. 2012,[56] which mandates that all government contracts involving public-private partnership projects, those that involve the Build-Operate and Transfer Law, and joint venture agreements between government and private entities issued by the National

[51] Above fn 50, Rule 1.1.
[52] Emphasis supplied.
[53] Above fn 50, Rules 12.4(b), 13.4(b).
[54] Above fn 50, Rule 19.10.
[55] Emphasis supplied.
[56] Mandating the Inclusion of Provisions on the Use of Alternative Dispute Resolution Mechanisms in All Contracts Involving Public-Private Partnership Projects, Build-Operate and Transfer Projects, Joint Venture Agreements Between the Government and Private Entities and Those Entered Into by Local Government Units.

Economic and Development Authority shall include provisions on the use of ADR mechanisms at the option and upon agreement of the parties to the said contracts.[57] The Executive Order reiterates that "the State shall encourage and actively promote the use of ADR mechanisms through conciliation and negotiation, mediation and arbitration, in the order of application, as an efficient tool and an alternative procedure in achieving speedy and impartial justice and de-clogging court dockets".[58] More importantly, Section 1(3) of the Executive Order provides that

> [w]hen parties to the abovementioned contracts agree to submit the case for ADR, **the use of either domestic or international ADR mechanisms shall be highly encouraged, giving the parties complete freedom to choose which venue and forum shall govern their dispute, as well as the rules or procedures to be followed in resolving the same**.[59]

By including provisions on ADR mechanisms, including arbitration, in government contracts, the Philippine government hopes that it can aid in generating private investments "by making the resolution of disputes arising out of a contract less expensive, tedious, complex and time-consuming, especially for large-scale intensive infrastructure and development contracts".[60]

IV. PUBLIC POLICY IN THE PHILIPPINES

Despite the long history of the regulatory framework for international arbitration in the Philippines, it has been described to still be in its infancy.[61] There are only a handful of cases decided by the Supreme Court that directly deal with international arbitration. It was only fairly recently that the Court defined what the public policy defence is in the Philippines in terms of challenging an arbitral award. Thus, there is a need to determine how the Philippines defines public policy in terms of which type of disputes are within and outside the purview of the public policy defence in international arbitration.

[57] Above fn 42, Executive Order No. 78, s. 2012, §1(1).
[58] As defined under Section 2, Chapter 2, Title I, Book III of the Administrative Code of 1987, Executive Orders are acts of the President providing for rules of a general or permanent character in implementation or execution of constitutional statutory powers. While an Executive Order can easily be revoked by the issuance of a later Order, Executive Order No. 78, s. 2012 remains to be good law.
[59] Emphasis supplied.
[60] Above fn 42, Executive Order No. 78, s. 2012.
[61] Above fn 1, Soliven and Parpan.

It is a fundamental rule of Philippine civil law that contracts are binding on the contracting parties and that a contract should be respected as it is the law between parties.[62] Parties are free to "establish such stipulations, clauses, terms and conditions as they may deem convenient, provided they are not contrary to law, morals, good customs, public order, or public policy".[63] It is in this context that the Supreme Court has defined public policy as

> that principle under which freedom of contract or private dealing is restricted for the good of the community. Under the principles relating to the doctrine of public policy, as applied to the law of contracts, courts of justice will not recognize or uphold a transaction when its object, operation, or tendency is calculated to be prejudicial to the public welfare, to sound morality or to civic honesty.[64]

Applying this concept to agreements that allow for arbitration to settle disputes, the Supreme Court held that contractually agreeing to arbitrate a dispute before one has arisen is not contrary to public policy. In *Korea Technologies Co., Ltd. v. Hon. Lerma and Pacific General Steel Manufacturing Corporation*,[65] Korea Technologies Co. and Pacific General Steel Manufacturing Corporation ("PGSMC") entered into an agreement that stated that disputes arising out of their contract will be settled through arbitration in Seoul, Korea in accordance with the rules of the Korean Commercial Arbitration Board ("KCAB"). PGSMC sought to have the arbitration clause invalidated by alleging that it was against public policy as it ousts Philippine domestic courts of jurisdiction to deal with their dispute. The lower courts agreed with PGSMC and ruled that the clause was contrary to public policy as the clause ousted courts from jurisdiction over the case and left the determination of legal rights to an arbitral tribunal. The Supreme Court reversed this ruling and ultimately found that an agreement voluntarily entered into to settle disputes via arbitration is valid. The Supreme Court ruled that agreeing to arbitrate is itself a contract.[66] The arbitration clause entered into by the parties was mutually and voluntarily agreed upon and there was no indication that they had dealt with each other on unequal footing. Thus, the Court said that a clause that states that "the arbitration must be done in Seoul, Korea in accordance with the Commercial Arbitration Rules of the KCAB, and that the arbitral award is final and binding, is not contrary to public policy".

---

[62] *Halagueña v. Philippine Airlines, Incorporated*, G.R. No. 172013, 2 October 2009.
[63] An Act to Ordain and Institute the Civil Code of the Philippines [CIVIL CODE], Republic Act No. 386, art. 1306 (1950).
[64] *Power Sector Assets and Liabilities Management Corporation v. Pozzolanic Philippines Incorporated*, G.R. No. 183789, 24 August 2011, citations omitted.
[65] G.R. No. 143581, 7 January 2008.
[66] Citing *Gonzales v. Climax Mining Ltd.*, G.R. No. 161957, 28 February 2005, and *Del Monte Corporation-USA v. Court of Appeals*, G.R. No. 136154, 7 February 2001.

In 2018, the Supreme Court, in *Mabuhay Holdings Corporation v. Sembcorp Logistics Limited*,[67] discussed the parameters of the public policy defence when challenging an arbitral award. Mabuhay Holdings Corporation ("Mabuhay") and Infrastructure Development & Holdings, Inc. ("IDHI") are both duly registered corporations under the laws of the Philippines. These two corporations entered into a Shareholders' Agreement with Sembcorp Logistics Limited ("Sembcorp"), a company incorporated under the laws of Singapore. All three corporations invested in a common carriage by inter-island fast ferry venture in the Philippines. Mabuhay and IDHI jointly guaranteed Sembcorp a minimum accounting return of US$ 929,875.50. The contract between the parties included an arbitration clause, which stated that disputes arising out of or relating to their contract, except intra-corporate disputes, shall be finally settled by arbitration in Singapore in accordance with the rules of the International Chamber of Commerce ("ICC"). Mabuhay and IDHI subsequently failed to pay Sembcorp. Mabuhay admitted its liability but argued that its obligation was only for half the claim. Sembcorp then instituted arbitration proceedings against Mabuhay in accordance with the arbitration clause in the parties' contract. An arbitral award was rendered, ordering Mabuhay to pay half of the minimum accounting return that it guaranteed with IDHI, to pay interest, and reimburse half of the costs of the arbitration. Sembcorp sought to have the arbitral award recognized and enforced in the Philippines and filed the necessary petition before a Regional Trial Court ("RTC"). The RTC refused enforcement, finding that the underlying dispute was an intra-corporate dispute, not within the ambit of the arbitral tribunal's jurisdiction. The RTC's decision was reversed by the Court of Appeals, which found that the RTC had no authority to disturb the arbitral tribunal's determination of facts and/or interpretation of the law. Mabuhay then appealed to the Supreme Court.

The Supreme Court held that Mabuhay failed to establish any of the grounds for refusing enforcement and recognition. The Supreme Court found that the tribunal was constituted in accordance with the arbitration agreement and the ICC Rules. The tribunal had jurisdiction as the dispute did not involve an intra-corporate controversy. The Supreme Court ruled that enforcing the award would not be contrary to public policy. The Court expressly acknowledged that prior to *Mabuhay Holdings*, it **"ha[d] yet to define public policy and what is deemed contrary to public policy in an arbitration case".** To arrive at a conclusion, the Court looked at how other countries resolved the same and found that "[m]ost arbitral jurisdictions adopt a narrow and restrictive approach in defining public policy pursuant to the pro-enforcement policy of the New York Convention". The Court cited Hong Kong, where an award obtained through fraud could not be enforced as fraud is contrary to Hong Kong's fundamental notions of morality

[67] G.R. No. 212734, 5 December 2018.

and justice.[68] The Court also referred to Singapore, where the public policy ground is "entertained by courts" if recognition and enforcement of an award would be "injurious to the public good or… wholly offensive to the ordinary reasonable and fully informed member of the public".[69]

The Supreme Court also surveyed its previous rulings on the definition of public policy and found that

> x x x At any rate, courts should not rashly extend the rule which holds that a contract is void as against public policy. **The term "public policy" is vague and uncertain in meaning, floating and changeable in connotation.** It may be said, however, that, in general, a contract which is neither prohibited by law nor condemned by judicial decision, nor contrary to public morals, contravenes no public policy. In the absence of express legislation or constitutional prohibition, a court, in order to declare a contract void as against public policy, must find that the contract as to the consideration or thing to be done, **has a tendency to injure the public, is against the public good, or contravenes some established interests of society, or is inconsistent with sound policy and good morals, or tends clearly to undermine the security of individual rights, whether of personal liability or of private property**.

An older case, *Ferrazzini v. Gsell*, defined public policy for purposes of determining whether that part of the contract under consideration is against public policy:

> By "public policy," as defined by the courts in the United States and England, is intended **that principle of the law which holds that no subject or citizen can lawfully do that which has a tendency to be injurious to the public or against the public good**, which may be termed the "policy of the law," or "public policy in relation to the administration of the law." Public policy is the principle under which freedom of contract or private dealing is restricted by law for the good of the public. In determining whether

[68] Citing *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, [2009] 12 H.K.C.F.A.R. 84, 100 (C.F.A.) and *Hebei Import & Export Corporation v. Polytek Engineering Company Limited* [1999] 1 HKLRD 665.
[69] Citing *PT Asuransi Jasa Indonesia (Persero) v. Dexia Bank SA* [2007] I SLR(R) 597, *Deutsche Schachtbau-und Tiejbohrgesellschaft m.b.H. v. Shell International Petroleum Co. Ltd., Court of Appeal, England and Wales*, 24 March 1987, [1990] 1 A.C. 295.

> a contract is contrary to public policy the nature of the subject matter determines the source from which such question is to be solved.[70]

Taking all these together, the Supreme Court concluded that

> … pursuant to the State's policy in favor of arbitration and enforcement of arbitral awards, the Court adopts the majority and narrow approach in determining whether enforcement of an award is contrary to Our public policy. Mere 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 Our State's fundamental tenets of justice and morality, or would blatantly be injurious to the public, or the interests of the society.

In *Mabuhay Holdings*, the Supreme Court also appealed to lower courts to apply the ADR Act of 2004 and the Special ADR Rules judiciously. The Court, once again, recognized that arbitration "is undeniably one of the viable solutions to the longstanding problem of clogged court dockets". It also acknowledged that, since international arbitration is the preferred mode of dispute resolution for foreign countries, it would attract foreign investors to do business in the Philippines and boost the economy.

As Philippine parties continue to enter into contracts with international investors, it is expected that there will be an increase in arbitration cases. To further shape the legal framework for arbitration, there are experiences in other jurisdictions that the Philippines can learn from.

V. JURISPRUDENCE FROM SINGAPORE, CHINA, THAILAND

Singapore, China, and Thailand are jurisdictions that have all dealt with the issue of arbitrability and public policy.

[70] Emphasis in the original and citations omitted.

It is significant to look at how Singapore has dealt with this question given that Singapore is one of the most commonly used international commercial arbitration seats.[71] It has a reputation for being an arbitration-friendly jurisdictions that have comprehensive laws governing international arbitration.[72] In *Mabuhay Holdings Corporation v. Sembcorp Logistics Limited,*[73] the Supreme Court expressly referenced Singapore's approach as a pro-enforcement jurisdiction.

China is also an interesting case study as the practice of arbitration in China is continuously being modernized, especially by its Supreme People's Court. More importantly, the Philippine government's pivot to China has led to new foreign investments.[74] Several transactions between government agencies and Chinese companies have also been concluded.[75] A number of these contracts likely include dispute resolution clauses that requires parties to resolve any dispute through arbitration.

Like the Philippines, Thailand is also one of the emerging economies in Southeast Asia.[76] It hopes to be an arbitration hub in the region and is continuously seeking to modernize arbitration in its jurisdiction.[77] Thailand's judiciary has also resolved questions of arbitrability and public policy that involve government entities. Since the Philippine government and its instrumentalities has entered into and continuously enters into agreements with arbitration clauses, it would be significant to look at Thailand's laws and jurisprudence.

A. SINGAPORE

Singapore is perceived to be a very pro-arbitration jurisdiction. It has become a popular seat for arbitration due to the fact that it has comprehensive arbitration legislation, English being widely spoken,

---

[71] *SIDRA, Singapore Management University Yong Pung How School of Law, "SIDRA International Dispute Resolution Survey: 2022 Final Report"*, <https://sidra.smu.edu.sg/sites/sidra.smu.edu.sg/files/survey-2022/index.html?1>, p 16.
[72] *Id.*
[73] G.R. No. 212734, 5 December 2018.
[74] *JC Punongbayan, "Why the Influx of Chinese in the Philippines?"*, *Rappler,* <https://www.rappler.com/thought-leaders/233238-reasons-influx-chinese-philippines>
[75] *Pia Ranada, "List: Deals Signed During Xi Jinping's Trip to Philippines", Rappler,* <https://www.rappler.com/nation/217156-deals-signed-during-xi-jinping-visit-philippines>; *Pia Ranada, "19 deals with Chinese businesses signed during Duterte's China trip", Rappler,* <https://www.rappler.com/nation/229091-deals-signed-with-chinese-businesses-duterte-china-visit-april-2019>
[76] *Tony Andriotis and Noppramart Thammateeradaycho, "Thailand as Regional Arbitration Hub", Global Arbitration Review,* <https://globalarbitrationreview.com/article/1211243/thailand-as-a-regional-arbitration-hub>
[77] *Id.*; *Vanina Sucharitkul, "Thawing the Restrictions on International Arbitration in Thailand", Kluwer Arbitration Blog,* <http://arbitrationblog.kluwerarbitration.com/2019/12/17/thawing-the-restrictions-on-international-arbitration-in-thailand/>

wide availability of facilities for arbitration, and a respected judiciary.[78] It is an UNCITRAL Model Law country and a party to the New York Convention. Thus, Singapore's public policy towards arbitration is in favor of implementing and facilitating arbitration, such that "there is a clearly public interest in promoting the arbitral process and enforcement of awards in Singapore. Any obstacle to this clear objective is a matter of public policy".[79] Its courts also adopt a "minimal curial intervention" approach when it comes to arbitration and highly regards party autonomy.[80] Despite being a pro-arbitration country, this does not mean that Singapore "[rubber-stamps] all disputes to arbitration".[81] Its Court of Appeal has repeatedly ruled that some disputes cannot be resolved by arbitration when it runs counter to public policy concerns.[82]

The International Arbitration Act ("IAA") governs international arbitration in Singapore. On public policy and arbitrability, Section 11 (1) provides that "[a]ny dispute which the parties have agreed to submit to arbitration under an arbitration agreement may be determined by arbitration unless it is contrary to public policy to do so". Unlike the Philippines, Singapore law does not have a list of what is or what is not arbitrable.[83] Case law has been instructive in determining what is arbitrable.[84] Sundaresh Menon, currently Chief Justice of the Supreme Court of Singapore, observed wile still Singapore's Attorney General, that disputes should be considered arbitrable unless "(1) the matter at hand raises issues that affect third parties not party to the dispute; (2) the arbitrator is neither empowered nor well placed to give the remedies sought; or (3) the matter concerns a public interest or the interest of a person not party to the arbitration".[85]

While "there is no exhaustive list of non-arbitrable matters [in Singapore], [ ] it is generally accepted that which may have public interest elements such as citizenship, validity of registration of patents, or winding-up of companies are not arbitrable".[86]

---

[78] *Chan Leng Sun KC*, "*Making Arbitration Work in Singapore",* in *The Developing World of Arbitration: A Comparative Study of Arbitration Reform in the Asia Pacific* (Anselmo Reyes and Weixia Gu eds., 2018), p 143.
[79] *Locknie Hsu*, *Public Policy Considerations in International Arbitration: Costs and Other Issues - A View from Singapore*, 26 Journal of International Arbitration 101, 112 (2009).
[80] *Soh Beng Tee & Co Pte Ltd v. Fairmount Development Pte Ltd*, [2007] S.G.C.A. 28.
[81] Above fn 78, p 151.
[82] *Larsen Oil and Gas Pte Ltd v. Petropod Ltd (in official liquidation of the Cayman Islands and in compulsory liquidation in Singapore),* [2011] SGCA 21; *Tomolugen Holdings Ltd and another v. Silica Investors Ltd and other appeals,* [2015] SGCA 57.
[83] *Id.; "Ch. 04 International and Domestic Arbitration in Singapore", Singapore Law Watch,* <https://www.singaporelawwatch.sg/About-Singapore-Law/Overview/ch-04-international-and-domestic-arbitration-in-singapore>
[84] Above fn 78, p 151.
[85] Above fn 14, Menon.
[86] Above fn 83, Ch. 04 International and Domestic Arbitration in Singapore.

In *Larsen Oil and Gas Pte Ltd v. Petropod Ltd (in official liquidation of the Cayman Islands and in compulsory liquidation in Singapore)*,[87] the Court of Appeal refused to honour an arbitration agreement regarding a dispute surrounding Petropod's avoidance claims against Larsen as there existed a "public interest in the regulation of company insolvency".[88]

To determine whether the insolvency claim could be settled by arbitration, the Court of Appeal surveyed the approach of English, American, and Australian courts. It concluded that

> There are, all in all, strong reasons for supporting a generous approach towards the construction of the scope of arbitration clauses, given that such an approach has received widespread acceptance among the leading commercial jurisdictions, and is strongly supported by the academic community. Such an approach is also consistent with this court's philosophy of facilitating arbitration. Accordingly, we agree that the preponderance of authority favours the view that arbitration clauses should be generously construed such that all manner of claims, whether common law or statutory, should be regarded as falling within their scope unless there is good reason to conclude otherwise.

On non-arbitrability, the Court of Appeal said that

> The concept of non-arbitrability is a cornerstone of the process of arbitration. It allows the courts to refuse to enforce an otherwise valid arbitration agreement on policy grounds. That said, we accept that there is ordinarily a presumption of arbitrability where the words of an arbitration clause are wide enough to embrace a dispute, unless it is shown that parliament intended to preclude the use of arbitration for the particular type of dispute in question (as evidenced by the statute's text or legislative history), or that there is an inherent conflict between arbitration and the public policy considerations involved in that particular type of dispute.

After an examination of the insolvency and bankruptcy regulations of Singapore, the Court concluded that insolvency claims cannot be arbitrated because (1) statutory remedies meant to protect creditors from a company's pre-insolvency management could not be restricted, (2) there is a need to avoid

[87] [2011] SGCA 21.
[88] Above fn 78, p 151.

different findings by different adjudicators, (3) creditors and other entities who are not parties to the arbitration agreement cannot be compelled to arbitrate disputes and would be deprived of their fundamental access to courts, and (4) an insolvent company's creditor cannot be allowed to contract out through arbitration the proof of debt process required under Singapore law. The Court said that "a collective enforcement procedure is clearly in the wider public interest". Arbitration agreements that include insolvency disputes should not be allowed "where the agreement affects the substantive rights of other creditors. Otherwise it will undermine the policy aims of the insolvency regime".

In *Tomolugen Holdings Ltd and another v. Silica Investors Ltd and other appeals,*[89] the Court ruled that there exists a presumption of arbitrability if the parties had entered into an arbitration agreement and that such "presumption may be rebutted by showing that Parliament had intended to preclude a particular type of dispute from arbitration or that it would be contrary to public policy to resolve that type of dispute in private arbitration". In this case, Silica Investors alleged that Tomolugen Holdings conducted its affairs in an oppressive and unfair manner against it as the minority shareholder. To determine whether a shareholder oppression dispute was arbitrable, the Court of Appeal looked at the Companies Act. The Court found that the Companies Act protected the commercial expectations of parties in an agreement and "does not engage [ ] public policy considerations".

Taking all these together, it appears that Singapore courts would "examine the statutes governing the claims to determine whether it is 'contrary to public policy' to arbitrate such a claim. The main point which the Singapore courts seemed to consider when determining whether a claim was arbitrable was whether there would be a restriction of statutory third-party rights".[90]

B. CHINA

In China, arbitration is also considered as the "preferred means of settling business disputes".[91] China's Arbitration Law provides the framework of its arbitration practice. China is a State party to the New York Convention but it has not adopted the UNCITRAL Model Law.[92] Its Supreme People's Court

[89] [2015] SGCA 57.
[90] Above fn 78, p 152.
[91] *Weixia Gu*, *"China's Arbitration Modernisation Under Judicial Efforts and Marketisation Waves",* in *The Developing World of Arbitration: A Comparative Study of Arbitration Reform in the Asia Pacific* (Anselmo Reyes and Weixia Gu eds., 2018), p 17.
[92] *Id.* at 24.

(SPC), the "highest judiciary and a de-facto rule making institution",[93] is the main driver in promoting and refining arbitration. China's judiciary has also been described as generally pro-arbitration.[94]

Article 2 of China's Arbitration Law provides that "disputes over contracts and disputes over property rights and interests, as between citizens, legal persons and other organizations that are equal parties" can be arbitrated. Article 3 states that (1) marital, adoption, guardianship, support and succession disputes; and (2) administrative disputes that shall be handled by administrative organs as prescribed by law may not be arbitrated. When it comes to the public policy defence in recognition and enforcement of foreign arbitral awards, the SPC has ruled that "the infringement of public interest shall be interpreted as a violation of the basic principle, infringement of the national sovereignty, jeopardizing public security, violation of public policy and other circumstances which will infringe the basic public interest".[95]

In 2019, the SPC ruled that anti-monopoly disputes cannot be arbitrated as they involve public law. In *Shell (China) Limited v. Hohot Huli Material Co., Ltd.,*[96] Hohot Huili questioned a horizontal monopoly of distribution agreement supposedly organized by Shell.[97] The agreement between Shell and Hohot Huili provided that all disputes were to be settled by arbitration. In reaching its decision, the SPC looked at China's Anti-Monopoly Law which states that anti-monopoly disputes are to be resolved by law enforcement of government or by civil litigation. No reference is made to arbitration and it is not expressly included in the law as a means to resolve anti-monopoly disputes.[98] The SPC also found that given that this dispute is not one related to contracts or property rights, as enumerated in Article 2 of the Arbitration Law. It is thus implied that a court can take cognizance of the case if one party files a claim with the court.[99] The SPC further held that the dispute involved was one that is of "public interest governed by the Anti-Monopoly Law and should not be regulated by the contractual rights and obligations as stated in the distribution agreement" of the parties.

---

[93] *Id.* at 18.
[94] *Id.* at 26.
[95] *TCL Air-conditioner (Zhongshan) Limited v Castel Electronics Pty Ltd,* Min Si Ta Zi No. 46. [2013].
[96] ([2019] Zhi Min Xia Zhong No. 47)
[97] *Glenn Haley, et al., "Arbitrability of Antitrust Disputes in PRC and Hong Kong"*, *Brighton, Cave, Leighton, Paisner,* <https://www.bclplaw.com/en-US/thought-leadership/arbitrability-of-antitrust-disputes-in-prc-and-hong-kong.html>
[98] *Id.*
[99] *Id.*

More importantly, the decision of the SPC implies that "unless explicitly provided otherwise, claims concerning 'public interest' are non-arbitrable under Article 2 of the Arbitration Law".[100]

C. THAILAND

While Thailand is considered an arbitration-friendly jurisdiction, foreign companies have had difficulty in enforcing arbitration awards, with Thai courts raising the issue of public policy in refusing to enforce awards.[101] Public policy in Thailand has not been clearly defined as well.[102]

Section 40 of Thailand's Arbitration Act B.E. 2545 (2002) provides that a court shall set aside an arbitral award if it "finds that: (a) the award deals with a dispute which is non-arbitrable matter under the law; or (b) the recognition or enforcement of the award would be contrary to the public policy of Thailand". The Arbitration Act has also adopted Article V of the New York Convention on recognition and enforcement.[103] Disputes that can be arbitrated in Thailand refer to "civil matters [ ] not contrary to public policy".[104] Matters relating to the status of persons and validity of marriages are removed from the reach of arbitration.[105]

In *The Expressway and Rapid Transit Authority of Thailand ("ETA") v. BBCD Joint Venture ("BBCD"),*[106] the Supreme Court refused to enforce an award against the State-run ETA on the ground that the underlying agreement between the two parties was contrary to public order and good morals.[107] ETA had entered into a construction contract with BBCD to build an expressway. ETA was obliged to assist BBCD to obtain approvals from the Department of Highways within a particular date. ETA failed to obtain the necessary approvals. This entitled BBCD to seek reimbursement from ETA for additional expenses caused by the delay. BBCD and ETA then extended the completion date of the project. Towards the

---

[100] *Kai-chieh Chan, "China's Top Court Says No to Arbitrability of Private Antitrust Actions"*, *Kluwer Arbitration Blog,* <http://arbitrationblog.kluwerarbitration.com/2020/01/23/chinas-top-court-says-no-to-arbitrability-of-private-antitrust-actions/>

[101] *Veena Anusornsena, Arbitrability and Public Policy in Regard to the Recognition and Enforcement of Arbitral Award in International Arbitration: the United States, Europe, Africa, Middle East and Asia*, (November 2012) (unpublished S.J.D. dissertation, Golden Gate University School of Law) <https://digitalcommons.law.ggu.edu/cgi/viewcontent.cgi?article=1033&context=theses>, p 175.

[102] *Nathee Silacharoen, David Beckstead, Sakolrat Srangsomwong, Norrapat Werajong, "Public policy and its implications on the enforcement of arbitral awards in Thailand"*, *International Bar Association,* <https://www.ibanet.org/public-policy-implications-enforcement-arbitral-awards-Thailand>

[103] Arbitration Act B.E. 2545 (2002), Section 43.

[104] Above fn 101, p 179.

[105] *Id.*

[106] Supreme Court Case No. 7277/2549 (2006) (Deeka 7277/2549).

[107] *Vanina Sucharitkul, Thai Administrative Court Overturns Arbitration Award Against the Government, Kluwer Arbitration Blog*, <http://arbitrationblog.kluwerarbitration.com/2014/10/09/thai-administrative-court-overturns-an-arbitration-award-against-the-government/>

completion of the expressway, BBCD sought to be reimbursed 8 million baht for the delay in the project caused by ETA. ETA confirmed that BBCD had the right to be indemnified but only for 6 million baht. The parties subsequently sought to have their dispute resolved via arbitration. An arbitral award was rendered in favor of BBCD. The Supreme Court refused to enforce the award because the underlying contract between the parties was considered to be an administrative contract and that the transaction was marred with bribery and numerous conflicts of interest.[108] Thai law defines an administrative contract as one that "includes an agreement in which at least one of the parties is an administrative agency or a person acting on behalf of the State, and which exhibits the characteristics of a concession contract, public service contract, or a contract for the provision of public utilities or for the exploitation of natural resources".[109] The Court said that, at the time the contract was made, the governor of the ETA sought to purchase shares of BBCD for his personal gain.

Another landmark case in Thailand is the *ITV Case* against the Office of the Prime Minister.[110] ITV had a concession contract granted by the Office of the Prime Minister to broadcast television programs. The contract had an arbitration clause. An amendment to the contract also provided that the Office of the Prime Minister would not allow other concessionaires with similar businesses to ITV to advertise on their stations and, should ITV sustain financial damages because of advertisements by others, ITV could seek compensation from the Office of the Prime Minister. ITV later won an arbitration case against the Office of the Prime Minister based on the advertisement provision. The arbitral tribunal "also reduced the concession-fee payments from those specified in the contract [and adjusted] the news-to-entertainment ratio of programming".[111] The Supreme Administrative Court refused to enforce the award and nullified the same based on public policy grounds. The Court held that the amended provision on advertising could not bind the Office of the Prime Minister as the provision was not added in compliance with government regulations and infringed upon public order.[112] In addition, the Court found that since broadcasting was a public resource, the arbitral tribunal had no authority to reduce the concession fee or change the news-to-entertainment ration of programming. The Court said that the authority to do so belonged to the government and not to an arbitral tribunal.[113]

---

[108] *Id.*; *Construction Firm Giant Loses Legal Battle, Bangkok Post,* <https://www.bangkokpost.com/thailand/general/1277411/construction-firm-giant-loses-legal-battle>; *"The Baker & McKenzie International Arbitration Yearbook 2008"* (2009), p 69.
[109] The Act on Establishment of Administrative Courts and Administrative Court Procedure (1999); Above fn 108, The Baker & McKenzie International Arbitration Yearbook 2008, p 69.
[110] Supreme Administrative Court Case No. 349/2549.
[111] Above fn 101, p 185.
[112] Above fn 107.
[113] Above fn 101, p 186.

It appears from these cases that Thai courts consider that it is against public policy for arbitral tribunals to tackle fraud, bribery, and the illegality of underlying contracts which contain arbitration agreements.

Thailand has been criticized for its "occasionally broad and unexpected interpretation of public policy [ ] that has led to some surprising and unpredictable results".[114] In 2019, Thailand implemented changes to its arbitration legislation to make it a more arbitration-friendly jurisdiction and more appealing to investors.[115] Its courts have tried to rein in its overly broad interpretation of public policy and have become more willing to uphold arbitration and enforce arbitral awards.[116]

VI. ARBITRABILITY AND PUBLIC POLICY: A PHILIPPINE APPROACH

As illustrated above, arbitrability and public policy are inextricably linked. As Blackaby, et. al, puts it, "[w]hether or not a particular type of dispute is 'arbitrable' under a given law is, in essence, a matter of public policy for that law to determine".[117] Given the rise of international commercial arbitration cases in the Philippines and the increasing involvement of the state and government entities in transactions that include international arbitration clauses, it is imperative to determine what disputes that touch upon public policy issues can be or cannot be resolved through arbitration in the Philippines. Doing so will create more stability in the international commercial arbitration regime of the Philippines, making arbitration more effective and efficient. At the same time, arbitrability offers a chance for the Philippines to "maintain control over important issues affecting [its] existence and welfare through recourse to [its judiciary]".[118] Arbitrability and public policy can then be taken together in a way that safeguards national interest.[119]

If the Philippines wants to uphold its proclaimed state policy in favor of arbitration and hopes to be an arbitration hub, it must resist the temptation to define arbitrability and public policy in a way that would

---

[114] Above fn 107.
[115] *Maximilian Clasmeir, The Kingdom of Thailand And International Arbitration – Ending the Journey On a Winding Tollway?, Kluwer Arbitration Blog*, <http://arbitrationblog.kluwerarbitration.com/2015/12/15/the-kingdom-of-thailand-and-international-arbitration-ending-the-journey-on-a-winding-tollway/>; Above fn 77, Sucharitkul.
[116] *Id.*
[117] Above fn 14, Blackaby, et. Al., p 112.
[118] Above fn 12, p 293.
[119] *Id.*

impede party autonomy by excluding several types of disputes from the ambit of arbitration. As such, any effort to amend the ADR Act of 2004 and future rulings of the Philippine Supreme Court should not automatically and summarily determine that any claim that has a public interest element to it is automatically non-arbitrable. Thailand's approach of prohibiting arbitral tribunals from determining the legitimacy of commercial contracts and arbitration agreements is overly broad and is inconsistent with how the Philippine Supreme Court has characterized arbitration in *Mabuhay Holdings*. The Philippines should move towards letting tribunals determine the legitimacy of commercial contracts, including those agreements entered into by the government and its instrumentalities.

The Philippines can look to the Singaporean model. In determining whether a dispute cannot be arbitrated as it will be contrary to public policy, Philippine courts should examine the underlying statutes governing the dispute and whether statutory third-party rights will be restricted. In *Larsen Oil*, the Singapore Court of Appeal acknowledged that

> **the mere fact that Petroprod's claims against Larsen were avoidance claims did not preclude them from falling within the scope of the Arbitration Clause. The scope of any arbitration clause is based on the parties' expressed intention, and it is conceivable that the parties to a contract may agree that all disputes between them, including disputes arising out of avoidance actions in the event of insolvency, should fall within the scope of the arbitration clause.** This would be a matter of documentary construction.[120]

Subsequently, the Court of Appeal then examined the statutes and the corresponding legislative history relevant to the dispute and studied whether third-party rights would be affected.

Singapore also serves as a good model in looking at the issues of fraud and illegality surrounding an underlying commercial contract. In *AJT v. AJU*,[121] the Court of Appeal ruled that arbitral tribunals are well-equipped to weigh the factual circumstances to determine whether an underlying contract has been marred with fraud or illegality. The Court of Appeal found that the tribunal looked at all the pieces of

[120] Emphasis supplied.
[121] [2011] 4 SLR 739.

evidence before reaching its conclusion.[122] There was no finding that the illegality of an underlying contract was not arbitrable.[123] As such, the Court said that the public policy of Singapore was not at all engaged.

Philippine courts, should they face questions on arbitrability, must move towards the two-step determination in order to find out if a particular subject matter can be settled by arbitration. They should look at the underlying statute governing the dispute and whether third-party rights will be affected. If after conducting this examination, it would appear that the underlying statute removes the dispute from the ambit of arbitration or if the dispute affects third parties or concerns the interest of a person not party to the arbitration,[124] Philippine courts should find that such dispute cannot be arbitrated as it goes against public policy and "tends to clearly undermine the security of individual rights, whether of personal liability or of private property".[125]

Questions of fraud or illegality of the underlying contract should not automatically be considered non-arbitrable for public policy reasons. As illustrated in *AJT v. AJU*, tribunals can be well-equipped to determine fraud or illegality.

VII. CONCLUSION

More and more international commercial arbitration cases involving Philippine parties are being commenced. Arbitration undeniably helps in decongesting court dockets.[126] It is a "viable option to settle disputes… and a better alternative for business and industry".[127] As such, Philippine courts should continuously uphold and respect party autonomy. They should avoid summarily viewing arbitration as incapable of addressing disputes that may have public policy implications. Accordingly, Philippine courts should adopt the two-step approach, where it would look at the statutes governing the claims and determine if third-party rights are involved and restricted. Approaching arbitrability and public policy in this manner

---

[122] *Darius Chan, Singapore Court of Appeal Re-Affirms Commitment to Minimal Intervention of Arbitral Awards at the Intersection of Illegality and Public Policy, Kluwer Arbitration Blog*, <http://arbitrationblog.kluwerarbitration.com/2011/09/12/singapore-court-of-appeal-re-affirms-commitment-to-minimal-intervention-of-arbitral-awards-at-the-intersection-of-illegality-and-public-policy/>
[123] Above fn 14, Menon.
[124] *Id.*
[125] *Leoncio Gabriel v. Monte de Piedad y Caja de Aharros and the Court of Appeals*, G.R. No. L-47806, 14 April 1941.
[126] Above fn 1, Autea, pp 181, 184.
[127] *Francisco Pabilla, Jr., "Chief Justice Sees Arbitration as Viable Alternative To Litigation", The Philippine ADR Review,* <https://www.pdrci.org/web/wp-content/uploads/2019/12/2019-11-Philippine-ADR-Review.pdf>

is practical. It would help ensure that public policy is not a catch-all ground that facilitates dilatory tactics and groundless oppositions to the arbitral process. It would support the practice of arbitration in the Philippines and help it thrive.

Short biography:

Angela Ray T. Abala, Research Associate, Singapore International Dispute Resolution Academy, angelaabala@smu.edu.sg