

**Judicial Review of Arbitral Awards in the Philippines: A Look into
the Application of the Public Policy Exception Under the New York
Convention Applying United States Precedents ****

MARY JUDE CANTORIAS*

As commercial transactions become increasingly complex with the expansion of international trade, it became practical to include dispute resolution mechanisms in contracts. Arbitration is one such mechanism.¹ By agreeing to arbitrate, parties submit their dispute to a private tribunal, under substantive and procedural laws chosen by the parties,² resulting in a binding and final award reviewable only on limited grounds,³ it is a private dispute resolution process that produces legal force and effect

* The author thanks her former professors at University of Missouri (MU)-Columbia, Prof. S.I. Strong and Prof. Ilhyung Lee, for their comments to the draft. Any error, of course, remains hers alone. In 2010, Ms. Cantorias obtained her Master of Laws in Dispute Resolution from MU-Columbia under the Gibson Rankin Scholarship. In 2011, she went on a yearlong sabbatical from her post as an adjunct professor in Arellano University School of Law to do further research in conflict studies at Teachers College, Columbia University, New York City.

** *Presented at the Eight Biennial Graduate Student Conference at the University of Massachusetts Boston, "Conflict Studies: The New Generation of Ideas," Oct. 22-23, 2010*

¹ Michael H. Strub, Jr. Resisting Enforcement of Foreign Arbitral Awards Under Article V (1)(e) and Article VI of the New York Convention: A Proposal for Effective Guidelines, 68 Tex. L. Rev. 1031; citing Craig, The Uses and Abuses of Appeal From International Arbitration Awards, 1987 Private Investors Abroad—Problems and Solutions in International Business, § 14.01, at 14-1 to -2 (Southwestern Legal Foundation).

² May Lu, The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards: Analysis of the Seven Defenses to Oppose Enforcement in the United State and England, 23 Ariz. J. Int'l. & Comp. L. 747 (Fall 2006); citing Susan Choi, Note, *Judicial Enforcement of Arbitration Awards Under the ICSID and New York Conventions*, 28 N.Y.U.J. INT'L L. & POL. 175, 175 (1997).

³ Gary B. Born, *International Commercial Arbitration*, Kluwer Law International 2009, pp. 64 – 90; Michael H. Strub, Jr. Resisting Enforcement of Foreign Arbitral Awards Under Article V (1)(e) and Article VI of the New York Convention: A Proposal for Effective Guidelines; citing A. van den Berg, Recent Enforcement Problems Under the New York and ICSID Conventions, 5 ARB. INT'L, 2, 2 (1989).

through an award that courts of most countries will likely enforce.⁴ Arbitration is considered domestic if it has no international element and deemed international when it does have an international element,⁵ e.g. the agreement relates to more than one country. Article 1, paragraph 3 of the UNCITRAL Model Law on International Commercial Arbitration (Model Law) states that:

An arbitration is international if: (a) the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States; or (b) one of the following places is situated outside the State in which the parties have their places of business: (i) the place of arbitration if determined in, or pursuant to, the arbitration agreement; (ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected; or (c) the parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one country.

The Model Law has been adopted by some countries into their national arbitration law, like the ADR Act of the Philippines (ADR Act). The ADR Act streamlines procedures and effect consistency with recent international developments in arbitration, particularly with the New York Convention and the Model Law.

⁴ Alan Redfern, Martin Hunter, et al., *Law and Practice of International Commercial Arbitration* (Thomson Sweet & Maxwell 2004) pp. 1 - 53 (2010 Kluwer Law International BV).

⁵ “For purposes of recognition and enforcement one has to distinguish between foreign awards and domestic awards. While the enforcement of domestic awards is solely regulated by the national arbitration laws, foreign awards are primarily enforced under the New York Convention. In general there are no great differences between the enforcement regimes for national and international awards. The (UNCITRAL) Model law and some other laws actually adopted a unified system for the enforcement of foreign and domestic awards.” (Julian D.M. Lew; Loukas A. Mistelis; Stefan M. Kröll, *Comparative International Commercial Arbitration* (Kluwer Law International 2003)).

Parties to international trade need their transactions to be unhampered by disputes; should a dispute arise they want such to be resolved speedily, with outcomes that are predictable and certain. Resorting to the national courts of one country or another may defeat speed, predictability and certainty as parties may be unfamiliar with the vagaries of the rules of domestic court systems.⁶ By utilizing the autonomous process of international arbitration, the uncertainty brought on by a foreign law and forum to resolve disputes may be lessened if not altogether avoided.⁷ Thereafter, enforcement of an arbitral award is greatly facilitated by the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), with the growing liberality of judicial interpretation favoring enforcement.⁸ An arbitral award is generally easier to enforce than a court judgment, largely due to most states' accession to the New York Convention.⁹ The Convention has become a primary instrument providing for a uniform standard by which an international arbitral award may be enforced,¹⁰ i.e. institutionalizing a system where an arbitral award issued in one signatory

⁶ Julian D.M. Lew, Loukas A. Mistelis, et al., *Comparative International Commercial Arbitration* (Kluwer Law International 2003) pp. 187 – 221.

⁷ *Supra* Note 2.

⁸ *Ibid.*

⁹ Emmanuel Gaillard and John Savage (eds), *Fouchard Gaillard Goldman, International Commercial Arbitration* (Kluwer Law International 1999); J. McClendon and R. Goodman, *International Commercial Arbitration* in New York 4 (1986): "Enforcement of arbitral awards is generally easier than enforcement of court judgments in international cases;" cited by Christopher B. Kuner in *The Public Policy Exception to the Enforcement of Foreign Arbitral Awards in the United States and West Germany Under the New York Convention*, *Journal of International Arbitration*, (Kluwer Law International 1990 Volume 7 Issue 4) pp. 71 – 92; Christopher S. Gibson, *Arbitration, Civilization, and Public Policy: Seeking Counterpoise between Arbitral Autonomy and the Public Policy Defense in View of Foreign Mandatory Public Law*, 113 *Penn St. L. Rev.* 1227 (Spring 2009).

¹⁰ *Supra* Note 2.

"According to one report, as of 1996 more than 95% of cases where enforcement was sought the awards were enforced by the courts. In another survey the figure for voluntary enforcement or enforcement by state courts is 98%." (Julian D.M. Lew; Loukas A. Mistelis; Stefan M. Kröll, *Comparative International Commercial Arbitration* (26-2), (Kluwer Law International 2003) pp. 687 – 732, citing Van den Berg, "The New York Convention: Its Intended Effects, Its Interpretation, Salient Problem Areas", in Blessing (ed), *The New York Convention of 1958*, ASA Special Series no 9 (1996) 25).

state may be recognized in another signatory state.¹¹ To date, the New York Convention is in force in 143 countries, including the Philippines.¹² However, to protect “fundamental interests of the parties, society and the rule of law,”¹³ the Convention recognizes certain grounds that may be raised before the courts to oppose enforcement of an arbitral award. These grounds are laid down in Article V¹⁴ of the Convention, which provides that:

Article V- (1) Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that: (a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or (b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or (c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or (d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the

¹¹ Lucy F. Reed and James Freda, *Narrow Exceptions: A Review of Recent U.S. Precedent Regarding the Due Process and Public Policy Defenses of the New York Convention*, *Journal of International Arbitration*, Kluwer Law International 2008 Volume 25 Issue 6, pp. 649 – 656.

¹² http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html

¹³ *Supra* note 11.

¹⁴ The grounds under Article V of the New York Convention are the same grounds that may be invoked by a party to oppose enforcement of a foreign or international arbitral award under the Philippine ADR Act and the Special Rules of Court on ADR.

parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or (e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made; (2) Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that: (a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or (b) The recognition or enforcement of the award would be contrary to the public policy of that country.

This paper focuses on the “public policy” exception under Article V (2)(b) of the Convention. Public policy here is said to be that which reflects “the fundamental economic, legal, moral, political, religious and social standards of every state”¹⁵ where enforcement is sought.¹⁶ It explores how United States courts treat the public policy defense; and drawing therefrom, how the Philippines’ developing arbitration “civilization”¹⁷ can build upon US precedents in approaching public policy defenses. The US jurisdiction is chosen for comparison because of

¹⁵ Supra Note 7 at para 17-32.

¹⁶ “There is some scholarly authority for also considering the public policy of the State where the award was rendered. See Lalive, *Transnational (or Truly International) Public Policy and International Arbitration*. in *Comparative Arbitration Practice and Public Policy in Arbitration* 257, 261 (Sanders, ed. 1987). Nevertheless, the prevailing view considers only the public policy of the State where enforcement is sought.” (A. van den Berg, *The New York Arbitral Convention of 1958*, 369 (1981); cited by Christopher B. Kuner, *The Public Policy Exception to the Enforcement of Foreign Arbitral Awards in the United States and West Germany Under the New York Convention*, *Journal of International Arbitration*, (Kluwer Law International 1990 Volume 7 Issue 4, pp. 71 – 92).

¹⁷ “Building a civilization of arbitration thus implies seeking high achievement, while maintaining cross-cultural encounters as a constituent (not peripheral element). xxx The civilization of international arbitration should thus have a unifying global vision and coherent legal system, yet maintain exchange with other external or national legal systems.” (Christopher S. Gibson, *Arbitration, Civilization and Public Policy: Seeking Counterpoise Between Arbitral Autonomy and the Public Policy Defense in View of Foreign Mandatory Public Law*, 113 *Penn St. L. Rev.* 1227 (Spring 2009), citing Catherine Rogers, *The Vocation of the International Arbitrator*, 20 *Am. U. Int’l. L. Rev.* 957, 1020 (2005).

the close ties between the two countries as reflected in their historical link, the Philippines having been ceded to the US by Spain under the 1898 Treaty of Paris.¹⁸

The US is recognized as a leading jurisdiction for international arbitration, influencing arbitral laws around the world;¹⁹ insofar as the Philippines is concerned, US case laws have persuasive effect.²⁰

¹⁸ Francisco Ed. Lim, Commercial Arbitration in the Philippines, 46 Ateneo LJ 394 (1978), p.397.) During the presence of the American regime in the Philippines, US Judges presided over the Philippine Supreme Court. In the case of *Allen v. Province of Tayabas* 38 Phil. 356 (G.R. No. L-12283), decided in 1918 and penned by Justice Malcolm, the Philippine Supreme Court first recognized arbitration as a method of settling a construction dispute.

¹⁹ Supra Note 2.

²⁰ Philippine courts cite US jurisprudence as having persuasive effect in court decisions, as for instance, where the Philippine Court of Appeals cited the United States case of *Wilko v Swan* (346 U.S. 427 (1953)) interpreting “manifest disregard of the law” and equated this legal principle with “violation of public policy,” as happened in the 2006 case of *Luzon Hydro Corporation vs. Hon. Rommel O. Baybay and Transfield Philippines, Inc* (CA-G.R. Sp. No. 94318, November 29, 2006). *Wilko* was eventually superseded but this has not prevented the Philippine Supreme Court from citing it as authority. In *Asset Privatization Trust v. Court of Appeals, et.al., GR No. 121171, December 29, 1998*, the Philippine Supreme Court reversed the Court of Appeals, which affirmed the decision of the Regional Trial Court confirming the domestic arbitral award rendered by an ad hoc arbitration committee formed after parties agreed to submit their pending court action to arbitration. Said the Philippine Supreme Court in *Asset*:

It should be stressed that while a court is precluded from overturning an award for errors in determination of factual issues, nevertheless, if an examination of the record reveals no support whatever for the arbitrators’ determinations, their award must be vacated. In the same manner, an award must be vacated if it was made in “*manifest disregard of the law*.” Against the backdrop of the foregoing provisions and principles, we find that the arbitrators came out with an award in excess of their powers and palpably devoid of factual and legal basis. (Citing *Storer Broadcasting* and *Wilko* cases, and the US Uniform Arbitration Act).

Subsequent to *Wilko*, the US second circuit court held in the case of *Merill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker* (808 F.2d 930 (2d Cir. 1986)) that to consider an error as a “*manifest disregard of the law*,” an error: must have been obvious and capable of being readily and instantly perceived by the average person qualified to serve as an arbitrator. Moreover, the term ‘disregard’ implies that the arbitrator appreciates the existence of a clearly governing legal principle but decides to ignore or pay no attention to it. The “*manifest disregard of the law*” doctrine is a creation of the US courts and for the most part applies only to domestic arbitration cases. It has been at times touted as a myth in some ways because it rarely succeeds to vacate an arbitral award when invoked, even in the domestic arena. Furthermore, it is incompatible with the grounds for resisting

The concept of public policy, as it applies to enforcement actions in international arbitral awards, is not well established in the Philippines.²¹ Nonetheless, it has made efforts to harmonize its rules with existing international instruments to which it is a signatory, in hopes of obtaining a competitive advantage as arbitration seat.²² Recognizing this need, congress passed the Philippine Alternative Dispute Resolution Act of 2004 (ADR Act),²³ regulating the enforcement of awards in international commercial and foreign²⁴ arbitration, in an effort to reflect the country's pro-arbitration policy.

Understanding the interplay of varying interests of nations

recognition and enforcement under the New York Convention. Nonetheless, it would be prudent for international arbitration practitioners to be aware of this doctrine and its implications as US Courts have extended the reach of this doctrine to international arbitration awards rendered within the US, especially when considering the U.S. as the place of arbitration. (The Myth of the 'Manifest Disregard of the Law' Doctrine: Is this Challenge to the Finality of Arbitral Awards Confined to U.S. Domestic Arbitrations or Should International Arbitration Practitioners be Concerned? Stephan Wilske and Nigel Mackay, *ASA Bulletin*, Kluwer Law International 2006, Volume 24 Issue 2, pp. 216 – 228).

²¹ Domestic arbitration and domestic arbitral awards are not discussed in this paper. The term "domestic arbitration" is defined in Section 32 of the ADR Act simply as "an arbitration that is not international" pursuant to the UNCITRAL Model Law. The grounds to refuse confirmation of a domestic arbitral award are not only different from the grounds for refusing recognition of a foreign or international arbitral award, but they appear to be wider in scope. However, where public policy is concerned, by international standards a "narrower concept of public policy should apply to foreign awards than is applied to domestic awards." Thus parties must determine carefully that their arbitration is considered "international" or "foreign" to ensure a narrow scope of judicial review and to limit defenses that may otherwise defeat recognition and enforcement if it were a domestic arbitral award.

²² "The arbitral situs or seat is the place where the arbitral award will formally be made and the jurisdiction whose laws will ordinarily govern the arbitral proceedings and actions to vacate the arbitral award. It is also the place where many or all of the hearings in the arbitration will be conducted, although the tribunal may generally hold hearings elsewhere for reasons of convenience." (Gary B. Born, *International Arbitration and Forum Selection Agreements: Drafting and Enforcing* (2006), pp. 37 – 95 (2009 Kluwer Law International BV).

²³ Republic Act No. 9285.

²⁴ Philippine arbitration law distinguishes between international and foreign arbitration. Under Rule 1.11 of the Special Rules on ADR, a foreign arbitral award is defined as one made in a country other than the Philippines.

involved in an international arbitration, a national court enforcing or setting aside an arbitral award must endeavor to balance and harmonize these interests when applying its domestic public policy limitations.²⁵ To date, there is no Philippine Supreme Court²⁶ case law that specifically refers to non-enforcement of foreign arbitral awards on grounds of violation of public policy.²⁷ This scarcity of case law in the Supreme Court adds to the difficulty for lower courts in finding guidance when faced with the public policy defense against enforcement, especially so that adherence to judicial precedents is embodied in Article 8 of the Philippine Civil Code;²⁸ hence, the need to develop an arbitration civilization by looking to well-evolved jurisdictions like the US.

Reference to US case law is however not without its difficulty. This is a controversial area of the law, and the US has struggled with it from time to time. As one commentator argues:

Yet it is still far from clear just how a violation of international public policy would differ from a violation of

²⁵ Kenneth-Michael Curtin, *Redefining Public Policy in International Arbitration of Mandatory National Laws*, 64 *Def. Couns. J.* 271.

²⁶ Only decisions by the Supreme Court are considered case law, hence precedents, in the Philippines. “The doctrine of *stare decisis*, embodied in Article 8 of the Civil Code, is enunciated, thus: The doctrine of *stare decisis* enjoins adherence to judicial precedents. It requires courts in a country to follow the rule established in a decision of the Supreme Court thereof. That decision becomes a judicial precedent to be followed in subsequent cases by all courts in the land. The doctrine of *stare decisis* is based on the principle that once a question of law has been examined and decided, it should be deemed settled and closed to further argument.” (*Cristinelli Fermin v. People of the Philippines*, *GR No. 157643, March 28, 2008*).

²⁷ Supreme Court website and Kluwer arbitration websites have yielded negative results for search of Supreme Court decisions on vacating or setting aside foreign arbitral awards specifically based on public policy grounds. This may be reflective of statistics showing that despite the establishment of an international arbitration center in the Philippines since 1996, i.e. the Philippine Dispute Resolution Center Inc. (PDRCI), the Philippines has yet to evolve as a first choice for place or seat of international commercial arbitration. To highlight the point, in 2009, there were 114 international arbitration cases administered by the Singapore International Arbitration Center (SIAC). The Philippine Dispute Resolution Center, Inc. did not have any international case in that same year. (Statistics and Profile of Cases: http://www.siac.org.sg/cms/index.php?option=com_content&view=article&id=204&Itemid=73).

²⁸ Article 8. Judicial decisions applying or interpreting the laws or the Constitution shall form a part of the legal system of the Philippines.

domestic public policy. It has been stated that there are two major ways of viewing international public policy: first as the application of essentially domestic public policy, narrowed somewhat; and second as the application of particular rules especially designed to be used in cases involving international commerce. If this is so, then United States courts have essentially taken the second, more liberal approach, measuring public policy in the area of international arbitration not by the yardstick of domestic public policy, but by the needs of international commerce (despite the worrisome exceptions of *Laminoirs* and *Ardra*).²⁹

This notwithstanding, Philippine courts may still benefit from US arbitration civilization given the US courts' wealth of experience in deciding complex international arbitration issues³⁰ and the now recognized pro-arbitration stance of the US Supreme Court.³¹

The seminal US case in this area of law is *Parsons v. RAKTA*,³² where the Second Circuit Appeals Court affirmed an arbitral award despite claims of public policy violation on the ground that diplomatic relations between Egypt (the respondent's state) and the US had been severed. The court held that the public policy defense is not meant to merely protect national interests; an action that violates American public policy may not

²⁹ Christopher B. Kuner, The Public Policy Exception to the Enforcement of Foreign Arbitral Awards in the United States and West Germany Under the New York Convention, *Journal of International Arbitration*, (Kluwer Law International 1990 Volume 7 Issue 4, pp. 71 – 92).

³⁰ *Ibid.*

³¹ Lucy F. Reed and James Freda, Narrow Exceptions: A Review of Recent U.S. Precedent Regarding the Due Process and Public Policy Defenses of the New York Convention, *Journal of International Arbitration*, Kluwer Law International 2008 Volume 25 Issue 6, pp. 649 – 656; R. Doak Bishop, Elaine Martin, Enforcement of Foreign Arbitral Awards,; citing *Shearson/American Express, Inc., v. McMahon*, 482 U.S. 220, 226 (1987), citing *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983); *Whirlpool Corp. v. Philips Elec., N.V.*, 848 F.Supp. 474, 478 (S.D.N.Y. 1994); *Wall Street Assocs., L.P. v. Becker Paribas, Inc.*, 818 F.Supp. 679, 682 (S.D.N.Y. 1993), *aff'd*, 27 F.3d 845 (2d Cir. 1994).

³² *Parsons Whittemore Overseas Co Inc v Société Générale de l'Industrie du Papier (RAKTA)*, 508 F2d. 969, as cited in Alan Redfern, J. Martin H. Hunter, Nigel Blackaby, Constantine Partasides, *Law and Practice of International Commercial Arbitration*, para. 10-53, (Thomas Sweet & Maxwell 2004), pp. 1-31.

necessarily violate international public policy. Despite the fact that the enforcing courts must necessarily draw from public policy notions of “that State”— that is “essentially national (*i.e.*, it is considered in a national context, namely in the national legal system of the forum)”, a distinction must still be made where public policy is invoked in the field of international commercial arbitration, *i.e.* beyond mere contravention of [domestic] law.

The public policy contemplated under Article V (2) (b) are those which essentially pertains to matters that have international connection or application, taking into account the possible lack of any direct connection to the forum where judicial recognition is sought.³³

The public policy defense should be narrowly construed, especially so where the public policy allegedly violated is not well defined and dominant, taking into account one of the overriding purposes of the Convention to unify the standards by which arbitral awards are enforced in signatory countries. These parameters are consistent with the pro-enforcement bias of the New York Convention.³⁴ The court concluded that refusal to enforce a foreign arbitral award should only be premised on violation of the enforcing state's “most basic notions of morality and justice.”³⁵

In subsequent cases, US Federal courts have likewise narrowly interpreted the public policy defense.³⁶ The Seventh and Ninth Circuit Court of Appeals, respectively, upheld the narrow construction of the public policy defense. In *Baxter v. Abbott*,³⁷ the court affirmed the arbitral award despite claims of violation of US antitrust laws, *i.e.* the award itself created an anomaly that required Baxter to violate the antitrust law. The United States District Court for the Northern District of Illinois, Eastern Division dismissed Baxter's contention that the award violated US public policy (Art. V(2)(b)) because the award-preventing Baxter from selling in

³³ Gary B. Born, *International Commercial Arbitration* (Kluwer Law International 2009) pp. 2730 – 2872, p. 2837.

³⁴ *Supra* note 29.

³⁵ *Supra* Note 4.

³⁶ Howard A. Ellins, Christopher H. Withers, *Judicial Deference to the Authority of Arbitrators to Interpret and Apply Federal Antitrust Laws*, 12 *Am. Rev. Int'l. Arb.* 387 (2001).

³⁷ *Baxter International Incorporated v. Abbott Laboratories*, 325 F.3d 954 (7th Cir. 2003).

the US market the 3-step process produced sevoflurane, a fluorine-based inhalation anaesthetic- as opposed to the one-step process which Abbott is under licensed with Baxter to sell, created an illegal market allocation agreement in violation of the Sherman Act, which forbids every agreement “in restraint of trade”.

The district court found that the non-competition covenant in this case was ancillary to a valid transaction originally entered into between Baxter and Maruishi (the Japanese company to whom Baxter granted worldwide rights to its sevoflurane one-step process patents) and reasonable in its scope and thus valid under Illinois law. Finding no violation of public policy the district court denied the motion to set aside the award and granted the motion to confirm it.

On appeal, the United States Court of Appeals for the Seventh Circuit affirmed the lower court's decision. First the court held that Baxter cannot reargue before the enforcing court an issue that was already decided conclusively by the arbitral tribunal, i.e. antitrust issues are arbitrable. Baxter cannot do indirectly what it cannot do directly, i.e. since the arbitrators had already ruled that the Baxter-Maruisi license does not violate the Sherman Act and Baxter cannot now argue that the award preventing its sale of the 3-step process produced sevoflurane created antitrust law violation.³⁸

In *Northrop v. Triad*,³⁹ the court enforced the arbitral award despite the illegality, under Saudi Arabian Regulations, of paying commissions by Northrop to Triad for soliciting government contracts with the Saudi Arabian Air Force.⁴⁰ The court ruled that the “relevant public policy” in this case was that of the country of enforcement (US) and not that of the country of performance (Saudi Arabia), bearing in mind that the parties agreed to conduct arbitration in California, the laws of which governed the arbitration.⁴¹ These two rulings, consistent with the principles laid down in *Parson*, reflect US courts embracing international,

³⁸ 16 January 2003 – United States Court of Appeals, Seventh Circuit in Albert Jan van den Berg (ed), *Yearbook Commercial Arbitration Volume XXVIII - 2003 XXVIII* (Kluwer Law International 2003) pp. 1154 – 1164.

³⁹ *Northrop Corp. v. Triad International Marketing S.A.*, 811 F. 2d. 1265 (9th Cir. 1987).

⁴⁰ Homayoon Arfazadeh, *In the Shadow of the Unruly Horse: International Arbitration and the Public Policy Exception*, 13 *Am. Rev. Int'l Arb.* 43, citing *Northrop*.

⁴¹ *Supra* Note 2.

and not domestic, public policy as applicable in cases involving Article V (2)(b).⁴²

In rare instances though, US courts may refuse enforcement of an arbitral award for being contrary to public policy. In *Laminoirs v. Southwire Co.*,⁴³ a US Federal District Court sitting in Georgia enforced the arbitral award rendered under French Law but struck down the portion imposing additional interests for delay in the payment of the award. The court, taking heed of the state of Georgia's public policy, deemed this portion as penal in nature and not merely compensatory, therefore contrary to public policy.⁴⁴

Likewise, the approach of Philippine court decisions interpreting national public policies should be consistent with the objectives of the Convention and the public policy interests of other Contracting States, not merely advancing "parochial, local interests."⁴⁵ Philippine court decisions should add to the growing development of an "arbitration civilization" in the Philippines by providing guidance in defining this area of law and

⁴² Supra note 29.

⁴³ *Laminoirs-Trefileries-Cableries de Lens, S.A. v. Southwire Co.*, 484 F. Supp. 1063, 1069 (N.D. Ga. 1980) (May Lu, *The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards: Analysis of the Seven Defenses to Oppose Enforcement in the United States and England*, 23 *Ariz. J. Int'l & Comp. L.* 747 (2006)).

As of this writing, the *Laminoirs* case is the first and seminal case involving international commercial arbitration where the court accepted the public policy defense to set aside an arbitral award, or at least a portion thereof. (Christopher B. Kuner, *The Public Policy Exception to the Enforcement of Foreign Arbitral Awards in the United States and West Germany Under the New York Convention*, *Journal of International Arbitration*, (Kluwer Law International 1990 Volume 7 Issue 4, pp. 71 – 92)).

⁴⁴ Although the *Laminoirs* case may appear as an anomaly at first glance, striking down the penalty interest provision has been done in other US cases, citing *Laminoirs* as authority. In *Brandeis Intsel Ltd. v. Calabrian Chemicals Corp.*, 656 F. Supp. 167, 170 (S.D.N.Y. 1987): "Where a party resisting an arbitration award can demonstrate that the foreign law pursuant to which the arbitrators awarded interest 'is penal only and relates to the punishing of public wrongs as contradistinguished from the redressing of private injuries', the arbitrators' award of interest is unenforceable as contrary to the public policy of this country. *Laminoirs v. Southwire Company*, supra 484 F. Supp. at 1069." (Christopher B. Kuner, *The Public Policy Exception to the Enforcement of Foreign Arbitral Awards in the United States and West Germany Under the New York Convention*, *Journal of International Arbitration*, (Kluwer Law International 1990 Volume 7 Issue 4, pp. 71 – 92)).

⁴⁵ Supra Note 3.

recognizing what is merely frivolous opposition clutching at the public policy “straw”. Finally, it may be an interesting innovation to have specific Supreme Court justices tasked to oversee the development of Philippine jurisprudence in the arbitration field. Such expertise will help in the speedy disposition of arbitration matters brought to court, helping the Philippines emerge as a sophisticated international arbitration hub.⁴⁶

⁴⁶ In Singapore, for instance, three High Court justices were appointed specially tasked to oversee the development of Singapore's case law jurisprudence in the field of arbitration, with the end view of training a group of judges in the High Court that has the necessary depth in terms of knowledge and experience in arbitration matters. It is believed that such expertise will help in the speedy disposition of arbitration matters brought to the High Court and will significantly impact Singapore's continuous aim to make itself as primary choice of arbitration seat in the Asia Pacific region and beyond. Warren B. Chik, *Recent Developments in Singapore on International Commercial Arbitration*, 9 SYBIL 259 (2005).