Taming the Unruly Horse: Philippine Public Policy and the New York Convention

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I. INTRODUCTION

> *Public policy is a very unruly horse, and when once you get astride it[,] you never know where it will carry you. It may lead you from the sound law. It is never argued at all but when other points fail.*
>
> — Judge James Burrough[1]

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There is a natural expectation for parties who enter into arbitration agreements that arbitral awards are final. In 1921, the Philippine Supreme Court recognized that arbitration is a means to achieve a "final disposition, in a speedy and inexpensive way, of the matters involved [in a dispute], so that they may not become the subject of future litigation between the parties."[2] While certain scenarios, such as cases where there is fraud or mistake, were carved out of this finality rule, it was nevertheless a step in the right direction.[3]

The expectation of finality particularly holds true in jurisdictions which have adopted the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards,[4] also known as the New York Convention, and the United Nations Commission on International Trade Law Model Law on International Commercial Arbitration, also known as the Model Law.[5] In these jurisdictions, there is a presumption that foreign arbitral awards will be enforced.[6] They may be challenged, but only on very limited grounds.[7]

The overriding policy behind the Convention is *favor arbitrandum* — it espouses a pro-enforcement policy of foreign arbitral awards.[8] The

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1. Mogul Steamship Co. Ltd. v. McGregor, Gow & Co., 66 L. T. Rep. 6 (1892) (U.K.) (citing Richardson v. Mellish, 2 Bing. 229, 252 (1824) (U.K.)).
2. Chan Linte v. Law Union and Rock Ins. Co., etc., 42 Phil. 548, 555 (1921).
3. *Id.* at 554
4. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *adopted* June 10, 1958, 330 U.N.T.S. 4739 (entered into force June 7, 1959) [hereinafter New York Convention].
5. United Nations Commission on International Trade Law, UNCITRAL Model Law on International Commercial Arbitration, U.N. Doc. A/40/17 (June 21, 1985) [hereinafter UNCITRAL Model Law].
6. *Id.* art. 35.
7. *See* UNCITRAL Model Law, *supra* note 5, art. 36 & Dean v. Sullivan, 118 F.3d 1170, 1171 (7th Cir. 1997). *See also* Francesca Richmond, When is an arbitral award final?, *available at* http://kluwerarbitrationblog.com/2009/09/10/when-is-an-arbitral-award-final (last accessed Oct. 31, 2016).
8. Joseph T. McLaughlin & Laurie Genevro, *Enforcement of Arbitral Awards under the New York Convention — Practice in U.S. Courts*, 3 INT'L TAX & BUS. LAW 249, 250 (1986) & Bernard Hanotiau & Olivier Caprasse, *Arbitrability, Due*

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Convention is a product of an international movement to make arbitration a more certain and efficient means of resolving international disputes.[9] As described by the United States (U.S.) Supreme Court in a case —

> The goal of the [New York Convention], and the principal purpose underlying American adoption and implementation of it, was to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries.[10]

Under the Convention, contracting States are generally bound to recognize foreign arbitral awards as binding and to enforce them in their respective jurisdictions.[11] Courts in these States may not refuse enforcement solely because they disagree with the arbitral tribunal's conclusions.[12] Only in a limited number of instances will a domestic court be allowed to refuse enforcement, and that is when any of the grounds under Article V of the New York Convention are shown to exist.[13] Supplementing the New York Convention is the Model Law, which substantially adopts the same limited grounds for refusing the enforcement of arbitral awards.[14] Although not a binding instrument like the New York Convention, the Model Law serves as a guide to national governments in drafting legislation concerning international commercial arbitration.[15]

This legal regime finds special application in the Philippines, which is not only a State Party to the New York Convention,[16] but also a State Party

Process, and Public Policy Under Article V of the New York Convention, 25 J. INT'L ARB. 721, 721 (2008).

9. McLaughlin & Genevro, *supra* note 8, at 251 & Hanotiau & Caprasse, *supra* note 8, at 721.
10. Scherk v. Alberto-Culver Co., 417 U.S. 506, 520, n. 15 (1974).
11. New York Convention, *supra* note 4, art. III.
12. *See* New York Convention, *supra* note 4, art. V.
13. *Id.*
14. UNCITRAL Model Law, *supra* note 5, art 36.
15. United Nations Commission on International Trade Law, FAQ — UNCITRAL Texts, *available at* http://www.uncitral.org/uncitral/en/uncitral_texts_faq.html (last accessed Oct. 31, 2016).
16. New York Arbitration Convention, Contracting States, *available at* http://www.newyorkconvention.org/countries (last accessed Oct. 31, 2016). The New York Convention was approved on 10 June 1958 and ratified by the Philippine Senate under Senate Resolution No. 71 on 6 July 1967. Ben

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which adopted the Model Law.[17] The Philippines also adopted the 1985 version of the Model Law in relation to international commercial arbitration and some aspects of domestic arbitration.[18] In addition to prescribing the laws governing domestic and international arbitration in the Philippines, the Alternative Dispute Resolution Act of 2004[19] (ADR Act) was enacted to serve as the implementing legislation governing recognition and enforcement of foreign arbitral awards.[20] It articulates the Philippine public policy of actively promoting party autonomy in the resolution of disputes.[21] As a result, under Philippine law, foreign arbitral awards may not be challenged on the merits.[22] Only in the very limited instances provided by law may a regular court refuse recognition of, and not even set aside, a foreign arbitral award.[23]

The Convention provides for two categories of grounds for refusing recognition and enforcement of a foreign arbitral award.[24] On the one hand,

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Dominic R. Yap, et al., Philippines — Law and Practice, *available at* http://www.chambersandpartners.com/guide/practice-guides/location/265/7990/2142-200 (last accessed Oct. 31, 2016). *See* 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 [Alternative Dispute Resolution Act of 2004], Republic Act No. 9285, § 3 (w) (2004).

17. *See* Korea Technologies Co., Ltd. v. Lerma, 542 SCRA 1, 23-24 (2008) & Alternative Dispute Resolution Act of 2004, § 19.

18. Alternative Dispute Resolution Act of 2004, § 19.

19. *Id.*

20. *Id.* §§ 42-48.

21. Tuna Processing, Inc. v. Philippine Kingford, Inc., 667 SCRA 287, 300 (2012) & Alternative Dispute Resolution Act of 2004, § 2.

22. *See* Mijares v. Ranada, 455 SCRA 397, 412 (2005).

23. Alternative Dispute Resolution Act of 2004, § 45. This Section states —

> SEC. 45. Rejection of a Foreign Arbitral Award — A party to a foreign arbitration proceeding may oppose an application for recognition and enforcement of the arbitral award in accordance with the procedural rules to be promulgated by the Supreme Court only on those grounds enumerated under Article V of the New York Convention. Any other ground raised shall be disregarded by the [R]egional [T]rial [C]ourt.

Id.

24. New York Convention, *supra* note 4, art. V.

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there are those which may lead to refusal only if they are invoked by the party against whom recognition or enforcement is sought.[25] On the other hand, there are those under Article V (2)[26] — namely: (1) that the dispute is non-arbitrable; or (2) that the enforcement of the award would result in a violation of public policy,[27] also known as the Public Policy Exception — which can be relied on by courts on their own motion.[28]

This Article analyzes from a Philippine law perspective how the Public Policy Exception in Article V (2) of the New York Convention should be applied. Article V (2) (b) provides —

> 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:
>
> ...
>
> (b) The recognition or enforcement of the award would be contrary to the *public policy of that country.*[29]

The scope of the Public Policy Exception for purposes of the Convention is essentially left for domestic courts to determine.[30] The Convention seems to recognize that individual States have the prerogative to define what public policy is.[31]

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25. *Id.* art. V, ¶ 1 & Albert Jan van den Berg, *New York Convention of 1958: Consolidated Commentary of Cases Reported,* 28 Y.B. COM. ARB. 650, 651 (2003) [hereinafter van den Berg, *New York Convention of 1958: Consolidated Commentary of Cases*]. "[T]he party against which enforcement of the award is sought has the burden of proving the grounds for refusal of enforcement listed in the first paragraph." van den Berg, *New York Convention of 1958: Consolidated Commentary of Cases, supra* note 25, at 651.

26. New York Convention, *supra* note 4, art. V, ¶ 2.

27. *Id.*

28. International Bar Association Subcommittee on Recognition and Enforcement of Arbitral Awards (Report on the Public Policy Exception in the New York Convention) 13, *available at* http://www.ibanet.org/Document/Default.aspx?DocumentUid=C1AB4FF4-DA96-49D0-9AD0-AE20773AE07E (last accessed Oct. 31, 2016) [hereinafter IBA Report] & New York Convention, *supra* note 4, art. V, ¶ 2 (b). *See* SPECIAL RULES OF COURT ON ALTERNATIVE DISPUTE RESOLUTION, A.M. No. 07-11-08-SC, rule 12.4 (b) (2) (Sep. 1, 2009).

29. New York Convention, *supra* note 4, art. V, ¶ 2 (b) (emphasis supplied).

30. IBA Report, *supra* note 28, at 2.

31. *Id.*

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Ironically, even domestic laws do not usually give a precise definition of public policy.[32] In a recent study by the International Bar Association (IBA) Subcommittee on Recognition and Enforcement of Arbitral Awards,[33] the IBA concluded that "[i]n the absence of a definition of public policy in most arbitration laws, domestic courts seem, in general, to have difficulty in precisely defining the meaning and the scope of the notion."[34]

Achieving a universal definition of public policy remains to be one of the greatest difficulties of the New York Convention. This uncertainty follows from the very essence of public policy — it is meant to be uncertain and ambiguous,[35] so as to encompass what each State considers a matter of public policy.[36] However, the uncertainty may also go against the Convention's purpose of making arbitration a more certain and efficient means of resolving international disputes.[37] In order to find out whether an award violates public policy, domestic courts may have to go into the merits of the dispute,[38] which may result in a revision of the substantive aspect of the award.[39] This goes against the pro-enforcement bias of the Convention.[40] As commentators have pointed out —

> Despite the overall pro-enforcement bias of the New York Convention, one distinguished commentator observed that it is Article V which 'is most

32. *Id.*

33. *Id.*

34. *Id.* at 7.

35. JULIAN D.M. LEW, APPLICABLE LAW IN INTERNATIONAL COMMERCIAL ARBITRATION 531 (1978) & Gabriel v. de Piedad etc., 71 Phil. 497, 500 (1941). "The uncertainty and ambiguity as to its actual content is one of the essential characteristics of public policy." Martin Hunter & Gui Conde e Silva, *Transnational Public Policy and its Applications in Investment Arbitrations*, 4 J. WORLD INV. 367, 367 (2003) (citing LEW, *supra* note 35, at 531).

36. ALAN REDFERN, ET AL., LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 419 (4th ed. 2004).

37. *Id.*

38. Hanotiau & Caprasse, *supra* note 8, at 722 (citing ALBERT JAN VAN DEN BERG, THE NEW YORK ARBITRATION CONVENTION OF 1958: TOWARDS A UNIFORM JUDICIAL INTERPRETATION 265 (1981) [hereinafter VAN DEN BERG, THE NEW YORK ARBITRATION CONVENTION OF 1958].

39. Hanotiau & Caprasse, *supra* note 8, at 722 (citing JEAN-FRANCOIS POUDRET & SEBASTIEN BESSON, COMPARATIVE LAW OF INTERNATIONAL ARBITRATION 829 (Stephen V. Berti & Annette Ponti trans., 2007)).

40. McLaughlin & Genevro, *supra* note 8, at 258-63.

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> prone to misinterpretation and most open to abuse by national courts, displaying skepticism of non-national sources of law and bias against foreigners who wish to enforce awards in their territories.'[41]

To date, the scope and extent of public policy under Philippine law for purposes of the New York Convention has not been addressed by the Philippine Supreme Court. Thus, this Article first looks into how public policy is treated by other State Parties to the Convention. It then examines how the concept of public policy has been defined and applied in Philippine enforcement cases, both for foreign arbitral awards and foreign judgments. Finally, it offers guidelines for the application of the Public Policy Exception in enforcement of foreign arbitral awards in the Philippines.

II. PUBLIC POLICY — INTERNATIONAL PERSPECTIVE

There is already a consensus with regard to two types of public policy, namely: national or domestic public policy, and international public policy.[42] Another type of public policy, which has not yet gained global consensus, is transnational or "truly international" public policy.[43] A brief analysis of these

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41. Troy L. Harris, *The "Public Policy" Exception to Enforcement of International Arbitration Awards Under the New York Convention — With Particular Reference to Construction Disputes*, 24 J. INT'L ARB. 9, 9 (2007) (citing Jan Paulsson, *The New York Convention in International Practice: Problems of Assimilation*, *in* THE NEW YORK CONVENTION OF 1958 108 (1996 ed.)). *See* Wang Sheng Chang, *The Practical Application of Multilateral Conventions: Experience with Bilateral Treaties Enforcement of Foreign Arbitral Awards in the People's Republic of China*, *in* IMPROVING THE EFFICIENCY OF ARBITRATION AGREEMENTS AND AWARDS: 40 YEARS OF APPLICATION OF THE NEW YORK CONVENTION 502 (1999). "An unlimited interpretation on the 'public policy' ground equally poses a threat to the enforcement of awards, particularly to those awards made in China." *Id.* at 41.

42. Leonardo V.P. de Oliveira & Isabel Miranda, *International Public Policy and Recognition and Enforcement of Foreign Arbitral Awards in Brazil*, 30 J. INT'L ARB. 49, 51 (2013) (citing Karl-Heinz Böckstiegel, *Public Policy and Arbitrability*, *in* COMPARATIVE ARBITRATION PRACTICE AND PUBLIC POLICY IN ARBITRATION 205 (Pieter Sanders ed., 1987) & Pierre Lalive, *Transnational (or Truly International) Public Policy and International Arbitration*, *in* COMPARATIVE ARBITRATION PRACTICE AND PUBLIC POLICY IN ARBITRATION 257 (Pieter Sanders ed., 1987).

43. Hanotiau & Caprasse, *supra* note 8, at 731 (citing JEAN-BAPTISTE RACINE, L'ARBITRAGE COMMERCIAL INTERNATIONAL ET L'ORDRE PUBLIC 394 (1999)).

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types of public policy is helpful in understanding the application of Article V (2) (b) of the Convention.[44]

The traditional concept of national or domestic public policy is comprised of those fundamental rules that are of highest importance to a State's society and from which its citizens and residents cannot derogate.[45] This encompasses both the internal and external public policy of a State,[46] and is thus viewed as the "broad" construction of public policy. This includes customarily recognized national policies, such as upholding of moral standards, discouragement of gambling, facilitation of free trade, and legislation from which parties may not derogate, such as formalities of contracts, credit legislation, and the right to submit to arbitration.[47]

International public policy is generally considered to be narrower in scope than domestic public policy.[48] It is the concept of domestic public policy "as applied in private international law"[49] or as applied to a State's external relationships.[50] Thus, it is still considered part of national or domestic law,[51] albeit construed narrowly.[52] As defined, it is that part of the public policy of a State which "may constitute an obstacle to the application of a foreign law by the courts of that State, or to the recognition of a foreign judgment or arbitral award by such courts."[53] Thus, international public policy is not "international" as public international law is considered

44. *See* IBA Report, *supra* note 28, at 4-5.

45. Catherine Kessedjian, *Transnational Public Policy*, *in* INTERNATIONAL ARBITRATION 2006: BACK TO BASICS? 858 (Albert Jan van den Berg ed., 2007).

46. de Oliveira & Miranda, *supra* note 42, at 51.

47. *Id.*

48. *Id.* at 52 (citing Pierre Mayer & Audley Sheppard, *Final ILA Report on Public Policy as a Bar to Enforcement of International Arbitral Awards*, 19 ARB. INT'L 249, 251-52 (2003)).

49. de Oliveira & Miranda, *supra* note 42, at 51 (citing Pierre Mayer, *Effect of International Public Policy in International Arbitration*, *in* PERVASIVE PROBLEMS IN INTERNATIONAL ARBITRATION 61 (Loukas A. Mistelis & Julian D. M. Lew eds., 2006)).

50. de Oliveira & Miranda, *supra* note 42, at 51.

51. *Id.* at 50-51.

52. VAN DEN BERG, THE NEW YORK ARBITRATION CONVENTION OF 1958, *supra* note 38, at 265.

53. Pierre Mayer, *supra* note 49, at 61.

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"international."[54] While dubbed as "international," the international public policy of one State differs from that of another State.[55] For instance, international public policy includes basic fundamental principles that a State wishes to protect even if it is not directly concerned, like the principle of abuse of rights[56] and the requirement that tribunals be impartial.[57] It also includes rules designed to serve the essential political, social, or economic interests of a State, and the duty of a State to respect its international obligations.[58]

Of recent vintage is the third category, the concept of transnational public policy.[59] In essence, it refers to "the general principles accepted by civilized nations."[60] Unlike domestic public policy and international public policy, which both rely on the laws of specific countries, transnational public policy represents the international consensus on accepted norms of conduct.[61] As such, it may be derived from international conventions, international customs, and the spirit of international treaties, as these may serve as evidence of the existence of such consensus.[62] Moreover, it follows that, as compared to domestic and international public policy, transnational

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54. Hunter & Conde e Silva, *supra* note 35, at 367.

55. *Id.*

56. International Law Association, Resolution 2/2002 (International Law Association Recommendation on the Application of Public Policy as a Ground for Refusing Recognition or Enforcement of International Awards) *available at* http://www.ila-hq.org/download.cfm/docid/032880D5-46CE-4CB0-912A0B91832E11AF (last accessed Oct. 31, 2016) [hereinafter ILA Resolution].

57. ANTON G. MAURER, THE PUBLIC POLICY EXCEPTION UNDER THE NEW YORK CONVENTION: HISTORY, INTERPRETATION AND APPLICATION 102 (2013 ed.) (citing Excelsior Film TV, srl v. UGC-PH, Cour de cassation [Cass.] [Supreme Court for Judicial Matters], Mar. 24, 1998, 24a Y.B. Com. Arb. 643-44 (1999) (Fr.)).

58. ILA Resolution, *supra* note 56, at 1.

59. Lalive, *supra* note 42, at 223.

60. Hunter & Conde e Silva, *supra* note 35, at 2.

61. TUSHAR KUMAR BISWAS, INTRODUCTION TO ARBITRATION IN INDIA: THE ROLE OF THE JUDICIARY 102 (2013 ed.) (citing Mark A. Buchanan, *Public Policy and International Commercial Arbitration*, 26 AM. BUS. L.J. 511, 530 (1988)) & Valentina Vadi, *Jus Cogens in International Investment Law and Arbitration*, 2015 NETH. Y.B. INT'L L. 366 (Maarten den Heijer & Harmen van der Wilt, eds., 2016)).

62. *See* ILA Resolution, *supra* note 56, at 2 & Hunter & Conde e Silva, *supra* note 35, at 369.

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public policy is considerably narrower in scope, but is more uniform among States.[63] Matters usually considered as international public policy include *jus cogens*,[64] fundamental human rights,[65] and norms against corruption.[66]

In a recent report entitled "Report on the Public Policy Exception in the New York Convention" (IBA Report), the IBA summarized how different jurisdictions have applied the Public Policy Exception in the context of enforcement of arbitral awards.[67] The IBA Report observes that in almost all jurisdictions, there is no strict statutory definition of public policy.[68] In the vast majority of jurisdictions covered by the report, a violation of public policy simply implies a violation of fundamental or basic principles.[69] Nevertheless, it concludes that, in the context of enforcement of foreign arbitral award, most countries indeed draw a distinction between domestic public policy, international public policy, and transnational public policy.[70] The purpose of making this distinction is "to narrow down the scope of the public policy" that will be considered in determining whether or not an arbitral award shall be enforced.[71]

Furthermore, the IBA Report found that most domestic courts recognize two dimensions of public policy — procedural and substantive.[72] The IBA Report refers to "procedural public policy"[73] as the most "basic and fundamental procedural rules."[74] The report also notes that procedural

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63. BISWAS, *supra* note 61, at 102.

64. Vadi, *supra* note 61, at 366.

65. HUMAN RIGHTS IN INTERNATIONAL INVESTMENT LAW AND ARBITRATION 60 (Pierre Marie Dupuy, et al. eds., 2009) "[A]rbitrators can ... invoke an issue of blatant violation of fundamental human rights deemed to be incompatible with 'transnational public policy.'" *Id.*

66. *Id.* at 60 (citing Work Ltd. v. Republic of Kenya, ICSID Case No. ARB/00/7, Award, ¶ 157 (Oct. 4, 2006)). "[B]ribery is contrary to the international public policy of most, if not all States, or to use another formula, to transnational public policy." *Id.*

67. IBA Report, *supra* note 28, at 2.

68. *Id.*

69. *Id.* at 2-3.

70. *Id.* at 4.

71. *Id.*

72. *Id.* at 12.

73. IBA Report, *supra* note 28, at 13.

74. *Id.*

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irregularities which would be covered by procedural public policy are, incidentally, also grounds for refusing the enforcement of foreign arbitral awards under Article V (1) (b) and (d) of the Convention:

> (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
>
> ...
>
> (d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place[.][75]

The IBA Report notes that in most jurisdictions, courts employ either the Public Policy Exception or the specific grounds under Article V (1) (b) and (d) to refuse to enforce an award in cases of violation of procedural public policy.[76] For example, a violation of due process, which is "undoubtedly a violation of a fundamental principle of any legal order or of natural justice," can be sanctioned either under Article V (2) (b) or Article V (1) (b).[77] In effect, the court from whom enforcement is sought may also, on its own motion, refuse enforcement of an award for violation of due process on the basis of Article V (2) (b).[78]

The IBA Report concludes that unlike in substantive public policy, violations of procedural public policy are more likely to result in the denial of enforcement of a foreign arbitral award.[79] In particular, it considers the following as universally or generally accepted as violations of public policy, which would result in the refusal of enforcement:

(1) Violation of the right to be heard or of due process;[80]

(2) Violation of equal opportunity to present one's case;[81]

(3) Award obtained by fraud or based on falsified documents;[82]

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75. New York Convention, *supra* note 4, art. V, ¶¶ 1 (b) & (d).

76. IBA Report, *supra* note 28, at 13.

77. *Id.*

78. *Id.*

79. *Id.* at 14.

80. *Id.*

81. *Id.* at 15.

82. IBA Report, *supra* note 28, at 15.

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(4) Award obtained following bribery of or threats to an arbitrator.[83]

(5) Violation of *res judicata*;[84] and

(6) Lack of independence and impartiality of the arbitrators.[85]

As for substantive public policy, it found that the only arbitral awards which are universally accepted as contrary to substantive public policy are awards giving effect to "'universally condemned activities' such as terrorism, drug trafficking, prostitution, [pedophilia], ... corruption, or fraud in international commerce."[86]

III. PUBLIC POLICY UNDER PHILIPPINE LAW

A. Definition of Public Policy

While the concept of public policy has often been employed in Philippine laws and applied by Philippine courts, like many other states, the Philippines does not have a precise definition of the concept of public policy. Philippine law or jurisprudence does not distinguish between domestic, international, or transnational public policy.

The Civil Code of the Philippines generally prohibits contractual stipulations that are "contrary to public policy," but it does not specifically define what public policy is.[87] In this jurisdiction, public policy has been

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83. *Id.*

84. *Id.*

85. *Id.* at 15.

86. *Id.* at 16.

87. An Act to Ordain and Institute the Civil Code of the Philippines [CIVIL CODE], Republic Act No. 386, arts. 6, 1183, 1306, 1346, & 1745 (1950). The only exception is Article 1745, in which the Civil Code enumerates examples of stipulations involving common carriers, which are considered contrary to public policy. In particular, this Article provides —

> Article 1745. Any of the following or similar stipulations shall be considered unreasonable, unjust[,] and contrary to public policy:
>
> (1) That the goods are transported at the risk of the owner or shipper;
>
> (2) That the common carrier will not be liable for any loss, destruction, or deterioration of the goods;
>
> (3) That the common carrier need not observe any diligence in the custody of the goods;

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broadly defined as "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."[88] Ultimately, it is up to the Philippine courts to deal with the uncertainty, and for jurisprudence to develop a more concrete concept of public policy.

The Supreme Court has acknowledged that public policy is inherently a fluid and uncertain concept.[89] In *Gabriel v. de Piedad etc.*,[90] the Supreme Court held that, in general, the concept of "'public policy' is vague and uncertain in meaning, floating[,] and changeable in connotation[.]"[91] Further,

> [t]he freedom of contract is both a constitutional and statutory right and to uphold this right, courts should move with all the necessary caution and prudence in holding contracts void. ... *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*

> (4) That the common carrier shall exercise a degree of diligence less than that of a good father of a family, or of a man of ordinary prudence in the vigilance over the movables transported;
>
> (5) That the common carrier shall not be responsible for the acts or omission of his or its employees;
>
> (6) That the common carrier's liability for acts committed by thieves, or of robbers who do not act with grave or irresistible threat, violence[,] or force, is dispensed with or diminished; [and]
>
> (7) That the common carrier is not responsible for the loss, destruction, or deterioration of goods on account of the defective condition of the car, vehicle, ship, airplane[,] or other equipment used in the contract of carriage.

Id. art. 1745.

88. Gonzalo v. Tarnate, 713 SCRA 224, 233 (2014) (citing Avon Cosmetics, Incorporated v. Luna, 511 SCRA 376, 393-94 (2006)).

89. *Gabriel*, 71 Phil. at 500.

90. Gabriel v. de Piedad etc., 71 Phil. 497 (1941).

91. *Id.* at 500.

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undermine the security of individual rights, whether of personal liability or of private property.[92]

It may be gathered from the foregoing that a contract which is prohibited by the Constitution, proscribed by law or by "express legislation," or condemned by judicial decision may be deemed contrary to public policy.[93]

In *Sy Suan and Price Incorporated v. Regala*,[94] the Supreme Court, in its attempt to define the concept, again gives it a very broad definition.[95] In determining whether a contractual stipulation is contrary to public policy, the Supreme Court held —

> *The test is whether the parties have stipulated for something inhibited by the law or inimical to, or inconsistent with, the public welfare. An agreement is against public policy if it is injurious to the interests of the public, contravenes some established interest of society, violates some public statute, is against good morals, tends to interfere with the public welfare or society, or*[,] ... *is at war with the interests of society and is in conflict with the morals of the time.* An agreement either to do anything which, or not to do anything the omission of which, is in any degree clearly injurious to the public[,] and an agreement of such a nature that it cannot be carried into execution without reaching beyond the parties and exercising an injurious influence over the community at large are against public policy. There are many things which the law does not prohibit, in the sense of attaching penalties, but which are so mischievous in their nature and tendency that[,] on grounds of public policy[,] they cannot be admitted as the subject of a valid contract. The question whether a contract is against public policy depends upon its purpose and tendency, and not upon the fact that no harm results from it. In other words[,] all agreements the purpose of which is to create a situation which tends to operate to the detriment of the public interest are against public policy and void, whether in the particular case the purpose of the agreement is or is not effectuated. *For a particular undertaking to be against public policy*[,] *actual injury need not be shown; it is enough if the potentialities for harm are present.*[96]

Thus, in relation to contracts, the nature of the subject matter thereof may guide the courts in determining whether or not the same is contrary to

92. *Id.* at 500-01 (emphasis supplied).

93. *Id.* at 500 & Rivera v. Solidbank, 487 SCRA 512, 539-40 (2006) (citing Ferrazzini v. Gsell, 34 Phil. 697, 712 (1916)).

94. Sy Suan and Price Incorporated v. Regala, 105 Phil. 1024 (1956).

95. *See Sy Suan and Price Incorporated*, 105 Phil. at 1029.

96. *Sy Suan and Price Incorporated*, 105 Phil. at 1029 (emphasis supplied).

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public policy.[97] Furthermore, the concept of public policy is ultimately determined by the 1987 Philippine Constitution, laws, and judicial decisions. Arturo M. Tolentino, a distinguished civil law expert, notes that what is considered contrary to public policy usually depends on what has been previously condemned by public legislation, judicial decision, or constitutional prohibition.[98]

B. Matters Considered Contrary to Philippine Public Policy

Spread across the Constitution, statutes, and jurisprudence are matters which have been determined to be "expressions of public policy." This Article uses these as starting point in the analysis of Philippine public policy for purposes of the Convention.

1. Contractual Stipulations

Article 1306 of the Civil Code[99] provides for the principle of autonomy of contracts.[100] Contractual stipulations have the force of law between the parties and must be respected, unless the same is shown to be contrary to law, morals, good customs, public order, or public policy.[101] Examples of agreements which have been deemed contrary to public policy are:

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97. *Id.*

98. ARTURO M. TOLENTINO, COMMENTARIES AND JURISPRUDENCE ON THE CIVIL CODE OF THE PHILIPPINES 420 (1961). *See* Cui v. Arellano University, 2 SCRA 205, 209 (1961).

99. CIVIL CODE, art. 1306.

100. *Id.*

101. *See* William Golangco Construction Corporation v. Philippine Commercial International Bank, 485 SCRA 293, 298 (2006). In this case, the Supreme Court upheld the validity of a defects liability period because it was not shown to be contrary to law, morals, good customs, public order, or public policy —

> The provision in the construction contract providing for a defects liability period was not shown as contrary to law, morals, good customs, public order[,] or public policy.
>
> ...
>
> We cannot countenance an interpretation that undermines a contractual stipulation freely and validly agreed upon. The courts will not relieve a party from the effects of an unwise or unfavorable contract freely entered into.

William Golangco Construction Corporation, 485 SCRA at 298.

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(1) Contracts requiring the exercise of a degree of diligence which is less than ordinary diligence,[102] and contracts exempting parties from liability for gross negligence;[103]

(2) Contracts of adhesion, where the provisions have been drafted only by one party and the only participation of the other party is the signing of his signature or his adhesion thereto,[104] and if the "contract ... appears to be heavily weighed in favor of one of the parties so as to lead to an unconscionable result;"[105]

(3) Contracts which constitute undue or unreasonable restraint of trade, such as overly restrictive "non-compete" or exclusivity clauses;[106]

(4) Waivers which exculpate one from liability for future fraud;[107]

(5) Contracts imposing unconscionable and iniquitous interest rates, even if knowingly and voluntarily assumed, which are immoral and unjust, "tantamount to a repugnant spoliation and an iniquitous deprivation of property, repulsive to the common sense of man;"[108] and

(6) Contracts that operate to vest in the mortgagee the ownership of the encumbered property upon default of the mortgagor.[109]

2. Agreements Relating to Procedure

Agreements that deprive a court of its jurisdiction have been generally considered as contrary to public policy.[110] In fact, according to the Civil

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102. Keppel Cebu Shipyard, Inc. v. Pioneer Insurance and Surety Corporation, 681 SCRA 44, 100 (2009).

103. *See* H.E. Heacock Co. v. Macondray & Co., 42 Phil. 205, 208 (1921).

104. Sweet Lines v. Teves, 83 SCRA 361 (1978).

105. Philippines Savings Bank v. Castillo, 649 SCRA 527, 533 (2011). *See* Arquero v. Flojo, 168 SCRA 540, 543 (1988).

106. Tiu v. Platinum Plans Phils., Inc., 517 SCRA 101, 106 (2007) & *Avon Cosmetics, Incorporated*, 511 SCRA at 391.

107. Phil. Commercial International Bank v. Court of Appeals, 255 SCRA 299, 307 (1996).

108. Castro v. Tan, 605 SCRA 231, 232 (2009). *See also* De La Paz v. L & J Development Company, 734 SCRA 364, 377 (2014).

109. Raymundo v. Galen Realty and Mining Corporation, 707 SCRA 515, 528 (2013).

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Code, the matter of the jurisdiction of courts cannot be the subject of compromise.[111]

This rule has changed with respect to arbitration — an agreement to refer disputes to arbitration is no longer considered contrary to public policy.[112] In the case of *Korea Technologies Co., Ltd. v. Lerma*,[113] the Supreme Court held —

> [I]n *LM Power Engineering Corporation v. Capitol Industrial Construction Groups, Inc.*, we declared that [—]
>
> 'Being an inexpensive, speedy[,] and amicable method of settling disputes, arbitration along with mediation, conciliation[,] and negotiation is encouraged by the Supreme Court. Aside from unclogging judicial dockets, arbitration also hastens the resolution of disputes, especially of the commercial kind. It is thus regarded as the wave of the future in international civil and commercial disputes. Brushing aside a contractual agreement calling for arbitration between the parties would be a step backward.
>
> Consistent with the above-mentioned policy of encouraging alternative dispute resolution methods, courts should liberally construe arbitration clauses. Provided such clause is susceptible of an interpretation that covers the asserted dispute, an order to arbitrate should be granted. Any doubt should be resolved in favor of arbitration.'[114]

Agreements which violate the principle of *res judicata* or the rule against splitting of causes of action are considered repugnant to public policy.[115] In *Riviera Gold Club, Inc. v. CCA Holdings, B.V.*,[116] the Supreme Court held that a stipulation allowing the splitting of actions is void for being contrary to public policy.[117] The Supreme Court also explained that the principle of

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110. Molina v. De la Riva, 6 Phil. 12, 15 (1906). *See* Unimasters Conglomeration, Inc. v. Court of Appeals, 267 SCRA 759, 783-84 (1997) (J. Regalado, concurring opinion).

111. CIVIL CODE, art. 2035 (5).

112. Chung Fu Industries (Phils.), Inc. v. Court of Appeals, 206 SCRA 545, 552 (1992).

113. Korea Technologies Co., Ltd. v. Lerma, 542 SCRA 1 (2008)

114. *Id.* at 23 (citing LM Power Engineering Corporation v. Capitol Industrial Construction Groups, Inc., 399 SCRA 562, 569-70 (2003)).

115. Riviera Golf Club, Inc. v. CCA Holdings, B.V., 758 SCRA 691, 707 (2015).

116. Riviera Golf Club, Inc. v. CCA Holdings, B.V., 758 SCRA 691 (2015).

117. *Id.* at 707.

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res judicata is primarily one of public policy, "based on the policy against multiplicity of suits, whose primary objective is to avoid unduly burdening the dockets of the courts."[118]

3. Employer-Employee Relations

The public policy on the protection of labor, which is enshrined in the Constitution itself, has long been upheld by the Supreme Court.[119] This public policy consideration is often applied in relation to the following subjects:

(1) Quitclaims executed by employees in favor of employers — a quitclaim will be deemed invalid or contrary to public policy where there is clear proof that the waiver was wrangled from an unsuspecting or gullible person, or where the terms of settlement are unconscionable on their face.[120]

(2) Security of tenure — if circumstances show that fixed-period employment contracts were imposed to preclude the acquisition of tenurial security of the employee, the period will be struck down as contrary to public policy, morals, good custom, or public order.[121]

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118. *Id.* In this case, the Supreme Court held —

> Public policy is firmly set against unnecessary multiplicity of suits; the rule of *res judicata*, like that against splitting causes of action, are all applications of the same policy, that matters once settled by a Court's final judgment should not thereafter be invoked against. Relitigation of issues already settled merely burdens the Courts and the taxpayers, creates uneasiness and confusion, and wastes valuable time and energy that could be devoted to worthier cases.

Id. at 708.

119. PHIL. CONST. art. XIII, § 3. This Article provides that "[t]he State shall afford full protection to labor, local and overseas, organized and unorganized, and promote full employment and equality of employment opportunities for all." PHIL. CONST. art. XIII, § 3.

120. Radio Mindanao Network, Inc. v. Amurao III, 739 SCRA 64, 72 (2014).

121. Caramol v. National Labor Relations Commission, 225 SCRA 582, 586-87 (1993).

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(3) Enforcement of foreign employment contracts — foreign law cannot be applied in a labor case if "it would contravene the public policy on the protection to labor."[122]

4. Corporate Law

Foreign corporations must acquire a local license in order to do business in the Philippines.[123] If they are doing business in the Philippines without the requisite license, they are barred from suing before Philippine courts.[124] This doctrine of lack of capacity to sue based on the failure to acquire a local license is based on considerations of sound public policy.[125] Particularly, the license requirement was imposed to subject foreign corporations doing business in the Philippines to the jurisdiction of its courts.[126]

C. Public Policy in Enforcement of Foreign Arbitral Awards

There is no Philippine Supreme Court decision that directly deals with the Public Policy Exception under the Convention.[127] The following cases, however, provide significant insight into how the Supreme Court treats challenges against enforcement. However, jurisprudence in this area is still quite undeveloped. The cases tend to show that objections on the ground that the arbitral award is contrary to public policy, as it is traditionally understood, generally do not repel enforcement of the foreign arbitral award.

1. Tuna Processing, Inc. v. Philippine Kingford, Inc.

In *Tuna Processing, Inc. v. Philippine Kingford, Inc.*,[128] the Supreme Court effectively made an exception to the local license requirement for foreign

122. Cadalin v. POEA's Administrator, 238 SCRA 721, 762 (1994).

123. MR Holdings, Ltd. v. Bajar, 380 SCRA 617, 632 (2002).

124. *Id.*

125. Antam Consolidated, Inc. v. Court of Appeals, 142 SCRA 288, 297 (1986).

126. Communication Materials and Design, Inc. v. Court of Appeals, 260 SCRA 673, 688 (1996); National Sugar Trading Corporation v. Court of Appeals, 246 SCRA 465, 470 (1995) & *Antam Consolidated*, 142 SCRA at 297.

127. *See* Nippon Express (Philippines) Corporation v. Court of Internal Revenue, 693 SCRA 456 (2013). "Only decisions of [the Supreme] Court constitute binding precedents, forming part of the Philippine legal system." *Id.* at 466 (citing Commissioner of Internal Revenue v. San Roque Power Corporation, 690 SCRA 336, 411 (2013)).

128. Tuna Processing, Inc. v. Philippine Kingford, Inc., 667 SCRA 287 (2012).

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corporations seeking to do business in the Philippines.[129] As earlier mentioned, based on public policy, Philippine law provides that foreign corporations must first acquire a local license in order to do business in the Philippines; otherwise, they will be barred from suing before Philippine courts.[130] However, in *Tuna Processing, Inc.*, the Supreme Court allowed the enforcement of a foreign arbitral award in the Philippines notwithstanding a violation of the license requirement.[131]

In this case, Tuna Processing Inc. (TPI) entered into an agreement with Philippine Kingford (Kingford).[132] Kingford reneged on its obligation, forcing TPI to file a case before the International Center for Dispute Resolution in the State of California.[133] Eventually, an arbitral award was rendered in TPI's favor, which it sought to enforce in the Philippines.[134]

The trial court dismissed the case due to lack of legal capacity to sue.[135] The court reasoned that TPI is a foreign corporation doing business in the Philippines without the required license.[136] As a result, TPI brought the case to the Supreme Court, arguing that it is entitled to seek recognition and enforcement of the subject arbitral award in accordance with the ADR Act, the Convention, and the Model Law.[137]

The Supreme Court ruled that the ADR Act should prevail over the Corporation Code.[138] It observed that unlike the Corporation Code, which is a general law, the ADR Act is a law especially enacted "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."[139] The Supreme Court found that none of the exclusive grounds under the

129. *Id.* at 301.

130. *MR Holdings, Ltd.*, 380 SCRA at 632.

131. *Tuna Processing, Inc.*, 667 SCRA at 304.

132. *Id.* at 293-94.

133. *Id.* at 295.

134. *Id.* at 295-96.

135. *Id.* at 296.

136. *Id.* at 297.

137. *Tuna Processing, Inc.*, 667 SCRA at 298.

138. *Id.* at 299.

139. *Id.* at 300 (citing Alternative Dispute Resolution Act of 2004, § 2).

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Convention touched on the capacity to sue of the party seeking recognition and enforcement of an arbitral award.[140] The Supreme Court held —

> Indeed, it is in the best interest of justice that in the enforcement of a foreign arbitral award, we deny availment by the losing party of the rule that bars foreign corporations not licensed to do business in the Philippines from maintaining a suit in our courts. When a party enters into a contract containing a foreign arbitration clause and ... in fact submits itself to arbitration, it becomes bound by the contract, by the arbitration[,] and by the result of arbitration, conceding thereby the capacity of the other party to enter into the contract, participate in the arbitration[,] and cause the implementation of the result.
>
> ...
>
> *Clearly, on the matter of capacity to sue, a foreign arbitral award should be respected not because it is favored over domestic laws and procedures, but because* [*the ADR Act*] *has certainly erased any conflict of law question.*[141]

Arguably, between the policy behind the ADR Act — that is, to actively promote party autonomy in the resolution of disputes — and the traditional public policy behind the license requirement under the Corporation Code, the Supreme Court appeared to have favored the former. The Supreme Court observed that if an arbitral award "can simply be ignored by an aggrieved party who ... voluntarily and actively participated in the arbitration proceedings from the very beginning, it will destroy the very essence of mutuality inherent in consensual contracts."[142] The ADR Act has erased any doubt as to the enforceability of arbitral awards.

2. Landoil Resources Corporation v. Al Rabiah Lighting Company

In *Landoil Resources Corporation v. Al Rabiah Lighting Company*,[143] the enforceability of a foreign arbitral award was upheld over objections based on public policy and due process.[144] In this case, a foreign corporation, Al Rabiah Lighting Company (Al Rabiah), was assigned to carry out electrical works in favor of two Philippine corporations, Construction Consortium

140. *Tuna Processing, Inc.*, 667 SCRA at 302.

141. *Id.* at 304-05 (emphasis supplied).

142. *Id.* (citing Asset Privatization Trust v. Court of Appeals, 300 SCRA 579, 632 (1998) (J. Romero, dissenting)).

143. Landoil Resources Corporation v. Al Rabiah Lighting Company, 657 SCRA 126 (2011).

144. *Id.*

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Inc. (CCI) and Landoil Resources Corporation (Landoil) by virtue of a sub-contract agreement.[145]

To collect on payment for unpaid work, Al Rabiah sued Landoil before the Commercial Kully Court of Kuwait for Arbitration (Kully Court).[146] The Kully Court rendered an award in favor of Al Rabiah, declaring that "Land Oil Resources Corporation (Construction Consortium Incorporation) is indebted to [Al] Rabiah Lighting Company by [Kuwaiti Dollar] 108,368.860."[147] Al Rabiah then filed an action in the Philippines to enforce the same against CCI and Landoil.[148]

Landoil argued that it was neither a party to the agreement nor was the "Land Resources Corporation (Construction Consortium Incorporation)," that was mentioned in the dispositive portion of the award.[149] Thus, Landoil postulated that enforcing an award against it would be contrary to public policy as it would be tantamount to executing on properties owned by a third person other than the judgment debtor, amounting to a deprivation of property without due process of law.[150]

The Supreme Court noted that, contrary to Landoil's claims, Landoil repeatedly admitted during the course of the case that it was the same party as the defendant against whom the foreign judgment had been rendered.[151] In fact, the sub-contract agreement itself expressly mentioned Landoil as one of the contracting parties.[152] Thus, the Supreme Court held that Landoil is estopped from denying its participation and liability under the agreement, and is indeed barred from adopting an inconsistent position, attitude, or course of conduct that would cause loss or injury to Al Rabiah.[153]

These cases suggest that mere invocation of a violation of due process or public policy would not render a foreign arbitral award unenforceable, absent a convincing case to support it.[154] Following these cases, in order for

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145. *Id.* at 127.

146. *Id.* at 128.

147. *Id.*

148. *Id.* at 129.

149. *Landoil Resources Corporation*, 657 SCRA at 129.

150. *Id.*

151. *Id.* at 133-34.

152. *Id.* at 136.

153. *Id.* at 135-36.

154. *See generally Landoil Resources Corporation*, 657 SCRA 126.

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a party-litigant to successfully oppose the enforcement of an arbitral award, one must be able to substantiate a public policy violation that outweighs the public policy behind the ADR Act.

D. Public Policy in Relation to Enforcement of Foreign Judgments

Because cases dealing with enforcement of foreign arbitral awards are scarce, this Article briefly examines cases dealing with recognition or enforcement of foreign judgments.

Public policy is a ground to repel recognition of foreign judgments, thus —

> [*It*] *has been recognized that 'public policy' as a defense to the recognition of judgments serves as an umbrella for a variety of concerns in international practice which may lead to a denial of recognition.*
>
> *The viability of the public policy defense against the enforcement of a foreign judgment has been recognized in* [*Philippine*] *jurisdiction. This defense allows for the application of local standards in reviewing the foreign judgment,* especially when such judgment creates only a presumptive right, as it does in cases wherein the judgment is against a person. The defense is also recognized within the international sphere, as many civil law nations adhere to a broad public policy exception which may result in a denial of recognition when the foreign court, in the light of the choice-of-law rules of the recognizing court, applied the wrong law to the case. *The public policy defense can safeguard against possible abuses to the easy resort to offshore litigation if it can be demonstrated that the original claim is noxious to our constitutional values.*[155]

Although recognition or enforcement of foreign judgments and foreign arbitral awards are governed by different procedural rules,[156] in both cases, the party attacking the foreign judgment or arbitral award has the burden of overcoming the presumption of its validity.[157] More importantly, in both

155. *Mijares*, 455 SCRA at 420 (emphases supplied).

156. On one hand, recognition or enforcement of foreign arbitral awards is governed by the New York Convention, the Alternative Dispute Resolution Act of 2004, and the Special Rules of Court on Alternative Dispute Resolution. On the other hand, recognition or enforcement of foreign judgments is governed by the Rules of Civil Procedure, Rule 39, Section 48.

157. Thes C. Gonzales, *Recognition and Enforcement of a Foreign Arbitral Award in the Philippines*, ARELLANO L. & POL'Y REV. 18, 21 (2012) (citing Northwest Orient Airlines, Inc. v. Court of Appeals, 241 SCRA 192, 199 (1995); Oil and Natural Gas Commission v. Court of Appeals, 293 SCRA 26, 47 (1998); & Asiavest Merchant Bankers (M) Berhad v. Court of Appeals, 361 SCRA 489, 298 (2001)).

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cases, recognition or enforcement may be refused if the same would be contrary to public policy. The Implementing Rules and Regulations of the ADR Act[158] expressly make the rule on enforcement of foreign judgments applicable to arbitral awards rendered in non-State Parties to the Convention.[159] Hence, while foreign judgments are different from foreign arbitral awards,[160] cases involving foreign judgments serve to illuminate the scope and extent of the Public Policy Exception.

1. Review of the Merits of Foreign Judgments is Limited

In *Fujiki v. Marinay*,[161] it was emphasized that in actions for recognition of foreign judgment, Philippine courts only perform a limited review of foreign judgments[162] —

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158. Rules and Regulations Implementing the Alternative Dispute Resolution Act of 2004, Republic Act No. 9285 (2009)

159. *Id.* art. 4.36 (B) (a). This provision states —

> Article 4.36. Grounds for Refusing Recognition or Enforcement.
>
> ...
>
> B. Non-Convention Award.
>
> (a) A foreign arbitral award rendered in a state which is not a party to the New York Convention will be recognized upon proof of the existence of comity and reciprocity and may be treated as a convention award. If not so treated and if no comity or reciprocity exists, the non-convention award cannot be recognized and/or enforced but may be deemed as presumptive evidence of a right as between the parties in accordance with Section 48 of Rule 39 of the Rules of Court.

Id.

160. *See* Alternative Dispute Resolution Act of 2004, § 44.

161. Fujiki v. Marinay, 700 SCRA 69 (2013).

162. *Id.* at 92. *See* Bank of the Philippine Islands Securities Corporation v. Guevara, 752 SCRA 342, 369 (2015). The Supreme Court held —

> As stated in Section 48, Rule 39, the actionable issues are generally restricted to a review of jurisdiction of the foreign court, the service of personal notice, collusion, fraud, or mistake of fact or law. The limitations on review [are] in consonance with a strong and pervasive policy in all legal systems to limit repetitive litigation on claims and issues. Otherwise known as the policy of preclusion, it seeks to protect party expectations resulting from previous litigation, to safeguard against the harassment of defendants, to insure that the task of courts not be increased by never-ending litigation of the same disputes, and

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> *For this purpose, Philippine courts will only determine (1) whether the foreign judgment is inconsistent with an overriding public policy in the Philippines; and (2) whether any alleging party is able to prove an extrinsic ground to repel the foreign judgment, i.e.[,] want of jurisdiction, want of notice to the party, collusion, fraud, or clear mistake of law or fact.* If there is neither inconsistency with public policy nor adequate proof to repel the judgment, Philippine courts should, by default, recognize the foreign judgment as part of the comity of nations.[163]

While the Supreme Court recognized that a court may review questions of law or fact, it reiterated the time-honored rule that the courts do not generally delve into the merits of foreign judgments.[164]

2. The Party Attacking a Foreign Judgment has the Burden to Show that There are Grounds to Refuse Enforcement

According to the Supreme Court, once the authenticity of a foreign judgment is proved, the burden to repel it is upon the party challenging the judgment.[165] Otherwise, "[t]he presumption of validity accorded [to] foreign [judgments] would be rendered meaningless were the party seeking to enforce it be required to first establish its validity."[166]

Puyat v. Zabarte[167] emphasizes that absent any special circumstance showing a violation of public policy, especially in purely commercial cases, foreign judgments will be enforced.[168] This case involved an action for enforcement of a foreign judgment involving a money claim arising from a breach of contract.[169] Gil Miguel Puyat (Puyat) lost to Ron Zabarte (Zabarte) in a collection case filed in California.[170] In due course, the

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> — in a larger sense — to promote what Lord Coke in the Ferrer's Case of 1599 stated to be the goal of all law: 'rest and quietness.' If every judgment of a foreign court were reviewable on the merits, the plaintiff would be forced back on his [or] her original cause of action, rendering immaterial the previously concluded litigation.

Bank of the Philippine Islands Securities Corporation, 752 SCRA at 369.

163. *Fujiki*, 700 SCRA at 103 (emphasis supplied).

164. *Id.* at 92.

165. Asiavest Limited v. Court of Appeals, 296 SCRA 539, 549 (1998).

166. *Id.*

167. Puyat v. Zabarte, 352 SCRA 738 (2001).

168. *Id.* at 738.

169. *Id.* at 740.

170. *Id.*

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Superior Court of California issued a judgment ordering Puyat to pay Zabarte.[171] Zabarte then filed an action to enforce the said judgment in the Philippines.[172] In his defense, Puyat claimed that the said judgment must not be recognized because it is contrary to the laws, public policy, and morals obtaining in the Philippines.[173] He averred that the same will result in unjust enrichment.[174]

Ultimately, the Supreme Court ruled in favor of the enforcement of the said judgment.[175] First, it held that Puyat's claim that the two other defendants should be held liable does not constitute a case of unjust enrichment.[176] Second, as regards the claim that the decision was contrary to public policy, the Supreme Court aptly held — "[w]e do not see, either, how the foreign judgment could be contrary to law, morals, public policy[,] or the canons of morality obtaining in the country. [Puyat] owed money, and the judgment required him to pay it. That is the long and the short of this case."[177]

3. Foreign Judgments will be Refused Enforcement Only if the Most Fundamental Principles of Due Process are Violated

a. Non-compliance with the Rules on Service of Summons

Asiavest Limited v. Court of Appeals[178] and *Northwest Orient Airlines, Inc. v. Court of Appeals*[179] illustrate how non-compliance with the rules on summons could result in the non-recognition of a foreign judgment.

Asiavest Limited (Asiavest) filed a petition with the Regional Trial Court of Quezon City praying that Antonio Heras (Heras) be ordered to pay the amounts awarded by a judgment rendered in Hong Kong (H.K.).[180] Heras countered that the judgment may not be enforced because summons was not

171. *Id.*

172. *Id.*

173. *Puyat*, 352 SCRA at 740.

174. *Id.*

175. *Id.*

176. *Id.* at 749.

177. *Id.* at 750.

178. Asiavest Limited v. Court of Appeals, 296 SCRA 539 (1998).

179. Northwest Orient Airlines, Inc. v. Court of Appeals, 241 SCRA 192 (1995).

180. *Asiavest Limited*, 296 SCRA at 541.

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properly served on him.[181] For this reason, he claimed that the foreign judgment contravened the principles of sound morality and the public policy in the Philippines.[182]

The Supreme Court agreed with Heras, and refused to recognize the judgment rendered by the H.K. court.[183] Based on the circumstances, it found that the rules on summons have not been followed, and as a result, jurisdiction over Heras' person was never obtained.[184] Thus, the Supreme Court concluded that Heras overcame the presumption of validity of the said foreign judgment,[185] and held that it cannot be given force and effect in the Philippines for having been rendered without jurisdiction.[186]

In contrast to *Asiavest Limited*, the case of *Northwest Orient Airlines, Inc.* involves a case where a foreign judgment was allowed enforcement because the rules on summons had been sufficiently complied with. A collection case was filed in Japan by Northwest Orient Airlines (Northwest) against C.F. Sharp & Company (Sharp), a Philippine corporation doing business in Japan.[187] Attempts to serve summons on Sharp was unsuccessful, and thus, extraterritorial service of summons was resorted to.[188]

After the rendition of judgment by the Japanese court, Northwest filed a petition for enforcement of the said judgment in the Philippines.[189] Sharp moved to dismiss the same, asserting that jurisdiction over its person was not acquired; thus, the said judgment was contrary to public policy and was rendered without due process of law.[190]

The Supreme Court ruled in favor of Northwest and ordered Sharp to comply with the foreign judgment.[191] The Supreme Court noted that the party attacking a foreign judgment has the burden of overcoming the

181. *Id.* at 542.
182. *Id.* at 547.
183. *Id.* at 539.
184. *Id.* at 557.
185. *Id.* at 539.
186. *Asiavest Limited*, 296 SCRA at 557.
187. *Northwest Orient Airlines, Inc.*, 241 SCRA at 194.
188. *Id.* at 195.
189. *Id.*
190. *Id.* at 195-96.
191. *Id.* at 208.

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presumption of its validity.[192] It ruled that Sharp failed to present evidence as to what Japanese procedural law on the matter was, and to show that under it, the assailed extraterritorial service was invalid.[193] Accordingly, the Supreme Court held that the presumption of validity and regularity of the service of summons, and the decision thereafter rendered by the Japanese court, must be upheld.[194]

b. Violation of the Right to be Heard

Bank of the Philippine Islands Securities Corporation v. Guevara[195] illustrates that the merits of a foreign judgment will generally not be disturbed, provided that the defendant was given reasonable opportunity to present its case before the foreign court.[196] A case was filed against Bank of the Philippine Islands (BPI) with the District Court of Texas, to which BPI responded by filing a counterclaim impleading Edgardo V. Guevara (Guevara).[197] However, the said court dropped Guevara as counter-defendant for lack of evidence,[198] and imposed, through an order, a monetary sanction on BPI based on the U.S. Federal Rules of Civil Procedure, which provides sanctions for frivolous and baseless suits.[199]

Guevara then filed the present case in the Philippines to enforce the said order of the Texas court.[200] In its defense, BPI claimed that the order imposing fines is contrary to public policy and denied BPI of due process.[201] It also asserted that the sanction was imposed as punishment for impleading a party and not prevailing against said party, and thus puts a premium on the right to litigate.[202] The Supreme Court disagreed, observed that BPI's

192. *Id.* at 200.

193. *Northwest Orient Airlines, Inc.*, 241 SCRA at 199.

194. *Id.* at 194.

195. Bank of the Philippine Islands Securities Corporation v. Guevara, 752 SCRA 342 (2015).

196. *Id.* at 348.

197. *Id.*

198. *Id.* at 349.

199. *Id.*

200. *Id.* at 358.

201. *Bank of the Philippine Islands Securities Corporation*, 752 SCRA at 359.

202. *Id.* at 364.

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allegations merely reiterated its claims before the Texas court,[203] and condemned BPI for attempting to re-litigate the merits of the said order —

> *A Philippine court will not substitute its own interpretation of any provision of the law or rules of procedure of another country, nor review and pronounce its own judgment on the sufficiency of evidence presented before a competent court of another jurisdiction.* Any purported mistake [BPI] attributes to the U.S. District Court in the latter's issuance of the Order ... would merely constitute an error of judgment in the exercise of its legitimate jurisdiction, which could have been corrected by a timely appeal before the U.S. Court of Appeals.[204]

The order imposing the sanction on BPI was neither contrary to public policy nor a violation of due process.[205] The sanction does not put a premium on the right to litigate, as it was imposed merely because BPI's counterclaim was frivolous.[206] It also held that BPI cannot anymore claim a violation of due process because it was given reasonable opportunity to present its side before the imposition of the sanction.[207]

Effectively, the Supreme Court took the view that not every invocation of a violation of public policy would merit a refusal to enforce an arbitral award and that it will only deny enforcement if there is a flagrant violation of due process.[208] As long as the losing party is given reasonable opportunity to present its case before the foreign court, the latter's decision will generally not be disturbed.[209]

IV. JUDICIAL RESTRAINT IN APPLYING THE PUBLIC POLICY EXCEPTION

Admittedly, the concept of public policy remains to be a "particularly fleeting"[210] concept. Determining what matters are considered as contrary to public policy is still a broad task left for judges to undertake.

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203. *Id.*

204. *Id.* at 372 (emphasis supplied).

205. *Id.* at 372 & 376.

206. *Id.* at 371-72.

207. *Bank of the Philippine Islands Securities Corporation*, 752 SCRA at 373.

208. *Id.* at 377.

209. *Id.* at 373.

210. Hanotiau & Caprasse, *supra* note 8, at 729 (citing Jacques Ghestin, *L'ordre public, notion à contenu variable en droit privé français*, *in* LES NOTIONS À CONTENU

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As earlier pointed out, the Supreme Court has enumerated the initial steps that may be taken for purposes of considering what constitutes violations of public policy. It is relevant to look at what contrary to a constitutional prohibition, prohibited by law, or declared as such through judicial decisions are.[211]

The task is admittedly simple as regards matters of public policy enshrined in the Constitution. As the highest law of the land, the Constitution should be upheld as against a conflicting arbitral award.[212] The Constitution indicates matters of public policy, among which are the rights of employees,[213] renunciation of war as an instrument of national policy,[214] freedom from nuclear weapons,[215] primacy of human rights,[216] recognition of the right to a balanced and healthful ecology,[217] and agrarian reform.[218] A foreign arbitral award that violates the Constitution would be considered contrary to public policy.

VARIABLE EN DROIT 78 (Chaïm Perelman & Raymond van der Elst eds., 1984)).

211. *Rivera*, 487 SCRA at 539-40 (citing *Ferrazzini*, 34 Phil. at 712) & TOLENTINO, *supra* note 98, at 420. *See Cui*, 2 SCRA at 209.

212. Manila Prince Hotel v. Government Service Insurance System, 267 SCRA 408, 430-31 (1997). In this case, the Supreme Court held —

> Under the doctrine of constitutional supremacy, if a law or contract violates any norm of the [C]onstitution[,] that law or contract whether promulgated by the legislative or by the executive branch or entered into by private persons for private purposes is null and void[,] and without any force and effect. Thus, *since the Constitution is the fundamental, paramount*[,] *and supreme law of the nation, it is deemed written in every statute and contract.*

Id. at 430-31.

213. PHIL. CONST. art. II, § 18. *See* Carmelcraft Corporation v. NLRC, 186 SCRA 393, 397 (1990). *See generally* Marcos v. National Labor Relations Commission, 248 SCRA 146 (1995) & *Caramol*, 225 SCRA 582.

214. PHIL. CONST. art. II, § 2.

215. PHIL. CONST. art. II, § 8.

216. PHIL. CONST. art. II, § 11.

217. PHIL. CONST. art. II, § 16. *See generally* Oposa v. Factoran, 224 SCRA 792, 804-05 (1993).

218. PHIL. CONST. art. II, § 21.

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It is more difficult as regards the two other possible sources of public policy — law and judicial decisions. In this connection, Article 17 of the Civil Code provides — "Prohibitive laws concerning persons, their acts or property, and those which have for their object public order, public policy[,] and good customs shall not be rendered ineffective by laws or judgments promulgated, or by determinations or conventions agreed upon in a foreign country."[219]

Laws, the object of which is public order, public policy, or good customs are left for the courts to decide. Not all violations of law will trigger the application of the Public Policy Exception under the Convention.[220] In *Tuna Processing, Inc.*, the Supreme Court allowed the enforcement of a foreign arbitral award despite the petitioner's violation of Philippine law.[221] Even though the TPI violated the license requirement under the Corporation Code, the Supreme Court observed that a violation of this requirement is not one of the exclusive grounds to refuse enforcement under the Convention.[222]

As for judicial decisions, courts should refer to judicial precedents laid down by the Supreme Court. There have been a lot of cases where the Supreme Court applied the concept of public policy.[223] However, these cases did not deal with enforcement of foreign arbitral awards. Thus, courts are still left to decide whether or not the enforcement of a foreign arbitral award is contrary to public policy.

In cases where the Constitution, legislation, and judicial decisions do not provide clear standards for enforcement, how should trial courts decide? As a general proposition, trial courts should adhere to a policy of "judicial

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219. CIVIL CODE, art. 17.

220. FARSHAD GHODOOSI, INTERNATIONAL DISPUTE RESOLUTION AND THE PUBLIC POLICY EXCEPTION 108 (2016 ed.) "[P]ublic policy is distinct from sheer illegality, as the former has an interpretative, protean character while the latter usually can be readily inferred from the face of the law[.]" *Id.* "First, a distinction must be made between statutory provisions that *cannot* be derogated from, because they protect private interests against a stronger contracting party, and those that *may not* be derogated from, because they protect public interest. The latter only for part of public policy." *Id.* & MAURO RUBINO-SAMMARTANO, INTERNATIONAL ARBITRATION: LAW AND PRACTICE 719 (3d ed. 2014)).

221. *Tuna Processing, Inc.*, 667 SCRA at 309.

222. *Id.* at 302.

223. An extensive discussion of these cases are made in Part III of this Article.

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restraint,"[224] such that enforcement should be refused only in the most serious and flagrant violations of international public policy. Otherwise stated, the Public Policy Exception should be given a "narrow" construction.

As pointed out by Albert Jan van den Berg and other notable commentators on international commercial arbitration, the policy that inspires the Convention is *favor arbitrandum*, or a "pro-enforcement bias."[225] For this reason, the grounds for refusing recognition or enforcement in Article V of the Convention are exhaustive and should be construed narrowly.[226] In fact, the drafters of the Convention explicitly explained that the grounds under Article V of the Convention should have a narrow interpretation.[227]

In the Philippines, whether or not a contract is contrary to public policy depends on the subject matter of the contract, the nature of which "determines the source from which such question is to be solved."[228] Also, if an arbitral award can simply be ignored by a losing party, by one who "voluntarily and actively participated in the arbitration proceedings from the

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224. Judicial restraint has traditionally been used in relation questions of constitutionality of laws — in deciding questions of constitutionality, courts should exercise judicial restraint in declaring a law unconstitutional. *See* Serrano v. Gallant Maritime Services, Inc., 582 SCRA 255, 281 (2009).

225. Albert Jan van den Berg, The New York Convention of 1958: An Overview (Document of the International Council for Commercial Arbitration) 13, *available at* http://www.arbitration-icca.org/media/0/12125884227980/new_york_convention_of_1958_overview.pdf (last accessed Oct. 31, 2016); Hanotiau & Caprasse, *supra* note 8, at 721 (citing Jan Paulsson, *May or Must under the New York Convention: An Exercise in Syntax and Linguistics*, 14 ARB. INT'L 228 (1998)); van den Berg, *New York Convention of 1958: Consolidated Commentary of Cases*, *supra* note 25, at 650; & Maurer, *supra* note 57, at 66.

226. Harris, *supra* note 41, at 9 & van den Berg, *New York Convention of 1958: Consolidated Commentary of Cases*, *supra* note 25, at 650.

227. Maurer, *supra* note 57, at 66.

228. *Rivera*, 487 SCRA at 539-40 (citing *Ferrazzini*, 34 Phil. at 712). "In determining whether a contract is contrary to public policy the nature of the subject matter determines the source from which such question is to be solved." *Rivera*, 487 SCRA at 539-40. "The question whether a contract is against public policy depends upon its purpose and tendency, and not upon the fact that no harm results from it." *Sy Suan and Price Incorporated*, 105 Phil. at 1029.

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very beginning, it will destroy the very essence of mutuality inherent in consensual contracts."[229]

Courts should be mindful of the international nature of the subject matter involved in foreign arbitral awards. While domestic courts still have discretion to refuse enforcement of foreign arbitral awards, not every invocation of a violation of public policy should result in denial of enforcement. In line with the spirit of the Convention, recognition, enforcement, or both, should be refused only in serious cases,[230] and in cases involving violations of international, and not merely domestic, public policy of the State.[231]

A. Application of the Public Policy Exception only in the Most Serious Violations of Public Policy

In line with the narrow construction of the Public Policy Exception, foreign arbitral awards should be refused only in cases of flagrant, effective, and concrete violations of public policy.[232]

Bernard Hanotiau and Oliver Caprasse observe that even if domestic courts are given the discretion to determine whether or not enforcement of a foreign arbitral award is proper, this "does not mean that any violation of public policy should lead to a refusal of enforcement of the award."[233] Hanotiau and Caprasse postulate that only those violations of public policy

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229. *Tuna Processing, Inc.*, 667 SCRA at 305 (citing *Asset Privatization Trust*, 300 SCRA at 631-32 (J. Romero, dissenting)).

230. *See* Hanotiau & Caprasse, *supra* note 8, at 722 & Parsons & Whittemore Overseas Co. v. Société Générale de l'Industrie du Papier (RAKTA), 508 F.2d 969, 974 (2d Cir. 1974) (U.S.)."[T]he Convention's public policy defense should be construed narrowly[.]" *Parsons & Whittemore Overseas Co.*, 508 F.2d at 974.

231. Hanotiau & Caprasse, *supra* note 8, at 729 & *See* FOUCHARD, GAILLARD, GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION 996 (Emmanuel Gaillard & John Savage eds., 1999) [hereinafter FOUCHARD, GAILLARD, GOLDMAN]. "Although the Convention refers to the host country's conception of international public policy, that country must nevertheless exercise caution in applying it, as always with international public policy." FOUCHARD, GAILLARD, GOLDMAN, *supra* note 231, at 997.

232. Hanotiau & Caprasse, *supra* note 8, at 734 (citing Cour de cassation [Cass.] [Supreme Court for Judicial Matters], Mar. 21, 2000, Rev. Arb. 2001, 817, note Y. Derains (Fr.)).

233. Hanotiau & Caprasse, *supra* note 8, at 739.

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which are effective and serious should warrant refusal from enforcement, thus —

> First, the violation should not entail any sanction in a case where the arbitrators would have reached the same result in the absence of a violation of public policy, in consideration of other factors. This is what can be referred to as the 'theory of equivalence.' *Secondly, there should not be any sanction in a case in which the violation of public policy has not been effective*[;] for instance[,] where the arbitrator wrongly decided that an agreement was void for [being contrary] to public policy, when in fact that was not the case. Such an award does not violate public policy, even if the latter has not been correctly applied. *Finally, only a serious violation of the public policy rule and of its goals should have as a consequence a refusal of enforcement of the award.*[234]

Similarly, Christophe Seraglini correctly observes —

> [W]hen the court considers that the arbitrator made a mistake, he must examine the result which the arbitrator reached and the situation created by the award, and compare them to the ones that, in its view, would have been the result of a correct application of the policy law which has not been applied or has not been correctly applied. When a distortion appears between the two situations, the court must evaluate whether it is significant in the light of the aims of the mandatory provision. *Only a concrete and serious violation, not only of the policy law, but also and above all of the aims it pursues, must be sanctioned. It is of no consequence that the interpretation and the reasoning of the award[ ] are not totally convincing in the eyes of the court.*[235]

In the case of *Eco Swiss China Time Ltd. v. Benetton International N.V.*,[236] the European Court of Justice (ECJ) noted that "it is in the interest of efficient arbitration proceedings that review of arbitration awards should be limited in scope and that annulment of or refusal to recognize an award should be possible only in exceptional circumstances."[237]

The case of *Thalès Air Defense v. GIE Euromissiles*,[238] which was decided by the Paris Court of Appeals, had a similar ruling.[239] In this case, a foreign

234. *Id.* at 739 (citing RACINE, *supra* note 43, at 544 (1999) (emphases supplied).

235. Hanotiau & Caprasse, *supra* note 8, at 740 (citing Cours d'appel [CA] [Regional Courts of Appeal] June 14, 2001, Rev. Arb. 2001, 800-01, note Ch. Seraglini (Fr.)) (emphasis supplied).

236. Eco Swiss China Time Ltd. v. Benetton International N.V., Case C-126/97, 1999 E.C.R. I-3055.

237. *Id.* ¶ 35.

238. Cours d'appel [CA] [Regional Courts of Appeal] J.D.I. 2005, 357, note A. Mourre (Fr.).

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arbitral award ordered Thalès Air Defense (Thalès) to pay damages to GIE Euromissiles (Euromissiles) in a dispute concerning a license agreement.[240] Subsequently, Thalès filed a request to have the award set aside, alleging that the agreement violated European competition law, with the consequence that the award, which gave effect to the contract, violated international public policy.[241] The Paris Court of Appeals refused to grant the request.[242]

The Paris Court of Appeals first referred to the *Eco Swiss China Time Ltd.* decision of the ECJ.[243] It confirmed that European competition law belonged to international public policy.[244] Thus, it acknowledged that a violation thereof could lead to the annulment of the award. Nevertheless, the Paris Court of Appeals refused Thalès' request, observing that the public policy exception can be fulfilled only "in the hypothesis where the enforcement of the award would run against [their jurisdiction's] legal order in an unacceptable manner, the violation having to be a manifest breach of a rule of law considered essential, or of a fundamental principle."[245] The Paris Court of Appeals further pointed out that —

> [T]he violation of public policy ... must be flagrant, effective[,] and concrete, that the annulment judge may, in the framework of its disciplinary powers, make an assessment in fact and in law of all the elements contained in the award deferred to its control, but may not decide on the merits of a complex dispute that has never been pleaded nor judged before an arbitrator concerning the mere eventuality of illegality of some contractual provisions. There is no reason to permit Thalès to benefit from the gaps, voluntary or not, in the [defense] of its interests before the arbitrators.[246]

This position has been confirmed by the Paris Court of Appeals in *SNF v. CYTEC Industrie*,[247] where it held that "in the absence of flagrant, real[,]

239. Hanotiau & Caprasse, *supra* note 8, at 735 (citing Cours d'appel [CA] [Regional Courts of Appeal] Nov. 18, 2004, J.D.I. 2005, 357, note A. Mourre (Fr.)).

240. *Id.*

241. *Id.*

242. *Id.*

243. *Id.*

244. *Id.*

245. Hanotiau & Caprasse, *supra* note 8, at 735 (citing Cours d'appel [CA] [Regional Courts of Appeal] Nov. 18, 2004, J.D.I. 2005, 357, note A. Mourre (Fr.)).

246. *Id.*

247. *See* Hanotiau & Caprasse, *supra* note 8, at 735 (citing Pierre Heitzmann & Jacob Grierson, *SNF v. CYTEC Industrie: National Courts Within the EC Apply*

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and concrete violation of international public policy, there was no reason to substitute the Court of Appeal's view in place of the arbitral tribunal."[248]

In the Philippines, while not as pronounced, it appears that the Supreme Court has also adopted this view. As earlier pointed out, *Tuna Processing, Inc.* and *Landoil Resources Corporation* suggest that a mere invocation of a violation of due process or public policy would not render a foreign arbitral award inefficacious, absent a convincing case to support it.[249] In *Bank of the Philippine Islands Securities Corporation*, the Supreme Court ruled in favor of the enforcement a foreign judgment against a claim of violation of public policy, on the basis that the perceived error was a mere error in judgment.[250] Recently, in *Fujiki*, it was held that foreign judgments will be refused enforcement if the same are "inconsistent with an overriding public policy in the Philippines."[251]

B. Application of the Public Policy Exception only to Matters of International Public Policy

In order to construe the Public Policy Exception narrowly, domestic public policy must also be distinguished from international and transnational public policy. van den Berg posits that under Article V (2) (b) of the Convention, domestic courts may enforce an award that violates domestic public policy as long as the violation would not prevent enforcement of the award in an international context.[252]

Different Standards to Review International Awards Allegedly Contrary to Article 81 EC, 2 STOCKHOLM INT'L ARB. REV. 39, 42 (2007)).

248. Heitzmann & Grierson, *supra* note 247, at 42.

249. *See* discussion in Part III (C).

250. *Bank of the Philippine Islands Securities Corporation*, 752 SCRA at 372. The Court stated that —

> Any purported mistake petitioner attributes to the U.S. District Court in the latter's issuance of the Order dated [13 March 1990] would merely constitute an error of judgment in the exercise of its legitimate jurisdiction, which could have been corrected by a timely appeal before the U.S. Court of Appeals.

Id.

251. *Fujiki*, 700 SCRA at 103.

252. VAN DEN BERG, THE NEW YORK ARBITRATION CONVENTION OF 1958, *supra* note 38, at 265.

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Similarly, Hanotiau and Caprasse wrote that distinctions must be made between domestic and international public policy —

> Due to the fundamental character of public policy, its scope is relatively narrow. Moreover, the scope of public policy must be further restricted in the international sphere; a distinction is made between domestic and international public policy. This distinction 'means that what is considered to pertain to public policy in domestic relations does not necessarily pertain to public policy in international relations. According to this distinction, the number of matters considered as falling under public policy in international cases is smaller than that in domestic ones. The distinction is justified by the differing purposes of domestic and international relations.'[253]

In other words, as Philippe Fouchard, Emmanuel Gaillard, and Berthold Goldman point out that

> [n]ot every breach of a mandatory rule of the host country could justify refusing recognition or enforcement of a foreign award. Such refusal is only justified where the award contravenes principles which are considered in the host country as reflecting its fundamental convictions, or as having an absolute, universal value.[254]

According to some commentators, this dichotomy applies to transnational public policy — transnational public policy should also be considered in refusing the enforcement of foreign arbitral awards if the law of the State considers transnational public policy as part of the international public policy of the State.[255]

In some foreign cases, courts have ruled that certain mandatory or prohibitive rules were only "of domestic public policy," and thus should be disregarded in international relations.[256] These include the three U.S. Cases of *The Bremen v. Zapata Off-Shore Co.*,[257] *Scherk v. Alberto-Culver Co.*,[258] and *Mitsubishi v. Soler Chrysler-Plymouth.*[259]

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253. Hanotiau & Caprasse, *supra* note 8, at 729 (citing Albert Jan van den Berg, *The New York Convention: Summary of Courts Decisions*, *in* THE NEW YORK CONVENTION OF 1958, ASA SPECIAL SERIES NO. 9 (Marc Blessing ed., 1996)).

254. *Id.* (citing FOUCHARD, GAILLARD, GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION, *supra* note 231, at 996). *See* Lalive, *supra* note 42, at 259. "[I]n the case law of many countries, a mandatory rule of domestic law does not necessarily prevail in international matters[.]" *Id.*

255. Hanotiau & Caprasse, *supra* note 8, at 729 (citing CHRISTOPHE SERAGLINI, LOIS DE POLICE ET JUSTICE ARBITRALE INTERNATIONALE 154 (2001 ed.)).

256. Lalive, *supra* note 42, at 274.

257. The Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972).

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In *The Bremen*, the U.S. Supreme Court held that in determining the validity of choice of forum clauses, the restrictive tendency of American municipal law should not prevail over the requirements of international trade.[260] In this case, the U.S. Supreme Court upheld a clause in a towage contract selecting a foreign forum for resolution of any disputes, over an objection that the contract's exculpatory clauses were contrary to U.S. public policy.[261] In ruling in this manner, the U.S. Supreme Court noted the growth in international trade and the resulting need for a neutral forum to decide disputes.[262]

Similarly, in *Scherk*, the U.S. Supreme Court, due to the international character of the contract, upheld the validity of an arbitration clause despite the provision under the Securities Exchange Act restricting arbitrability.[263] Even though the dispute would not have been arbitrable if the contract had been wholly domestic, the U.S. Supreme Court enforced the arbitration clause on the basis that the domestic policy of non-arbitrability had to yield to the encouragement of free international trade.[264]

Finally, in *Mitsubishi*, it was held that the principle of non-arbitrability under U.S. anti-trust laws does not extend to international contracts.[265] In this case, the U.S. Supreme Court held —

> [C]oncerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require that we enforce the parties' agreement, even assuming that contrary result would be forthcoming in a domestic context.[266]

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258. Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974).

259. Mitsubishi v. Soler Chrysler-Plymouth, 473 U.S. 614 (1985).

260. *Zapata*, 407 U.S. at 9.

261. *Id.*

262. *Id.* "We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts." *Id.*

263. *Scherk*, 417 U.S. at 519-20.

264. *Id.* at 516. "A contractual provision specifying in advance the forum in which disputes shall be litigated and the law to be applied is, therefore, an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction." *Id.*

265. Lalive, *supra* note 42, at 274 & *Mitsubishi*, 473 U.S. at 629.

266. *Mitsubishi*, 473 U.S. at 629.

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As can be observed in the U.S. cases of *The Bremen*, *Scherk*, and *Mitsubishi*, a rule of purely domestic law, of a mandatory or domestic public policy character, was disregarded in international relations.[267] These cases have persuasive effect in the Philippines, as the Supreme Court itself has recognized that there is no difference in principle between the public policy of the U.S. and of the Philippines.[268]

Similar to these U.S. cases, a commentator cites decisions from Germany, Korea, and Luxembourg wherein courts also distinguished between domestic and international standards for review of arbitration awards:

(1) Germany - "The recognition of foreign arbitral awards [ ] is governed normally by a less stringent regime than domestic awards."[269]

(2) Korea –

> As due regard should be paid to the stability of international commercial order, as well as domestic concerns, [Article V (2) (b)] should be interpreted narrowly. When foreign legal rules applied in an arbitral award are in violation of mandatory provisions of Korean law, such a violation does not necessarily constitute a reason for refusal.[270]

(3) Luxembourg - "The case here concerns the effect in Luxembourg of rights acquired abroad; hence, public policy intervenes only in its attenuated form and is less stringent than if the case concerned the acquisition of the same rights in Luxembourg."[271]

The distinctions between the different concepts of public policy, as discussed in Part II of this Article, should play an important role in the

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267. Lalive, *supra* note 42, at 274.

268. *Rivera*, 487 SCRA at 540 (citing *Ferrazzini*, 34 Phil. at 711-12). "[T]here is no difference in principle between the public policy [(*orden publico*)] in the two jurisdictions (the [U.S.] and the [Philippines]) as determined by the Constitution, laws, and judicial decisions." *Id.*

269. Harris, *supra* note 41, at 13 (citing Case No. 38, Bundesgerichtshof [BGH] [Federal Court of Justice], 27 Y.B. Com. Arb. 503 (ICC Int'l Ct. Arb.) (Ger.)).

270. Harris, *supra* note 41, at 13 (citing Adviso NV v. Korea Overseas Construction Corp., 21 Y.B. Com. Arb. 612 (ICC Int'l Ct. Arb.) (S. Kor.)).

271. Harris, *supra* note 41, at 13 (citing Sovereign Participations Int'l SA v. Chadmore Devs. Ltd., 24a Y.B. Com. Arb. 714 (ICC Int'l Ct. Arb.) (Lux.)).

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construction of the Public Policy Exception — whether or not a matter of public policy is considered merely domestic, international, or transnational would determine whether or not enforcement of an award should be refused. In other words, a violation of public policy in the local context, i.e., a purely domestic dispute, would not necessarily also be a violation of public policy in the international context. Not every violation of law or domestic public policy should lead to a non-enforcement of a foreign arbitral award, as expressed in the U.S. cases of *The Bremen*, *Scherk*, and *Mitsubishi*.

Encapsulating the foregoing principles is International Law Association (ILA) Resolution 2/2002 (ILA Resolution) that enumerates recommendations on the application of the public policy exception under the Convention, [272] which has been regarded as reflective of best international practice.[273]

Specifically, the ILA Resolution states that the finality of awards rendered in the context of international commercial arbitration should be respected save in exceptional circumstances — which may be particularly found to exist if recognition or enforcement of a foreign arbitral award would be against *international* public policy.[274] The ILA Resolution clarifies that international public policy, as distinguished from domestic public policy, includes:

> (1) Fundamental principles, pertaining to justice or morality, that the State wishes to protect even when it is not directly concerned;
>
> (2) Rules designed to serve the essential political, social[,] or economic interests of the State, these being known as '*lois de police*' or 'public policy rules'; and
>
> (3) The duty of the State to respect its obligations towards other States or international organizations.[275]

Further emphasizing that not all matters of public policy may be invoked to refuse recognition or enforcement of arbitral awards, the ILA Resolution states that an arbitral award's violation of a mere "mandatory rule," which

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272. Maurer, *supra* note 57, at 71 (citing ILA Resolution, *supra* note 56, at 2).

273. Maurer, *supra* note 57, at 71-72 (citing INTERNATIONAL COUNCIL FOR COMMERCIAL ARBITRATION, ICCA'S GUIDE TO THE INTERPRETATION OF THE 1958 NEW YORK CONVENTION 107 (2011)).

274. ILA Resolution, *supra* note 56, at 1.

275. *Id.*

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does not form part of a countries' international public policy, should not bar its recognition or enforcement[276] —

> An award's violation of a mere 'mandatory rule' (i.e.[,] a rule that is mandatory but does not form part of the State's international public policy so as to compel its application in the case under consideration) should not bar its recognition or enforcement, even when said rule forms part of the law of the forum, the law governing the contract, the law of the place of performance of the contract[,] or the law of the seat of the arbitration.[277]

Tuna Processing, Inc. can be seen as a Philippine endorsement of this view. Traditionally, in domestic disputes, a foreign corporation doing business in the Philippines without a license has no standing to sue in Philippine courts.[278] While this has been traditionally viewed as a matter of public policy,[279] the Supreme Court nevertheless allowed the enforcement of a foreign arbitral award by a corporation doing business in the Philippines without the requisite license.[280] The Supreme Court held that none of the exclusive grounds under the Convention touched on the capacity to sue of the party seeking the recognition and enforcement of the award.[281] The Supreme Court was, whether knowingly or not, effectively distinguishing between "domestic public policy" and "international public policy."

V. CONCLUSION

This Article proposes that Philippine courts be guided by a policy of "judicial restraint" in applying the Public Policy Exception under Article V (2) (b) of the Convention. The Public Policy Exception should be construed in the narrow sense, that is, foreign arbitral awards should be refused enforcement only (1) if there is a flagrant, effective, and concrete violation of an overriding public policy of State, and (2) provided that the said public policy consideration involves international and transnational, not merely domestic, public policy of the State.

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276. *Id.* at 2.

277. *Id.*

278. *See, e.g., Communication Materials and Design Inc.*, 260 SCRA 673; *Antam Consolidated*, 142 SCRA 288; & National Sugar Trading Corporation v. Court of Appeals, 246 SCRA 465 (1995).

279. *Id.*

280. *See Tuna Processing, Inc.*, 667 SCRA 287.

281. *Id.* at 302.

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In order to fully embrace the pro-enforcement principle under the Convention, it is submitted that Philippine courts should be guided by the following considerations in applying the Public Policy Exception in cases involving enforcement of foreign arbitral awards:

(1) Courts should initially consult the following evidence of public policy:[282]

(a) Public policy under the Constitution — As the highest law of the land, the provisions of the Constitution should be upheld by the courts over an arbitral award violating the same.[283]

(b) Public policy based on statutes, but mindful that not all violations of law will trigger the application of the Public Policy Exception. Only provisions of law dealing with a fundamental rule of overriding importance may result to non-enforcement of a foreign arbitral award.[284]

(c) Public policy as declared by judicial decisions — based on the principle of *stare decisis*, previous decisions of the Supreme Court applying and defining the concept of public policy is authoritative on future cases where the facts are substantially the same.[285]

(2) If, having taken the foregoing steps, the court is presented with a situation potentially involving the Public Policy Exception, the court should exercise "judicial restraint," that is, the court should take a narrow construction of the Public Policy Exception, such that:

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282. *Rivera*, 487 SCRA at 539-40 (citing *Ferrazzini*, 34 Phil. at 712) & TOLENTINO, *supra* note 98, at 420.

283. *See Cadalin*, 238 SCRA at 765. In this case, the Court refused to apply foreign law because the same would contravene the public policy on the protection of labor enshrined in the 1987 Philippine Constitution. *Id.*

284. CIVIL CODE, art. 17.

285. Philippine Carpet Manufacturing Corp. v. Tagyamon, 712 SCRA 489, 500 (2013).

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(1) Enforcement of foreign arbitral awards should be refused only in cases of flagrant, effective, and concrete violations of public policy;[286] and

(2) The public policy violated is not merely national or domestic public policy, but rather, in the nature of international or transnational public policy.[287]

(3) Finally, as a general proposition, Philippine courts should be guided by how the Public Policy Exception under the Convention has been applied in other jurisdictions. As discussed in Part II, the following are considered as universally or generally accepted violations of public policy in the context of the Convention:[288]

(1) Violation of right to be heard or of due process;

(2) Violation of equal opportunity to present one's case;

(3) Award obtained by fraud or based on falsified documents;

(4) Award obtained following bribery of or threats to an arbitrator;

(5) Violation of *res judicata*;

(6) Lack of independence and impartiality of the arbitrators; and

(7) Awards 'giving effect to illegal activities' which are considered as 'universally condemned activities' such as terrorism, drug trafficking, prostitution, pedophilia, corruption[,] or fraud in international commerce.[289]

286. Hanotiau & Caprasse, *supra* note 8, at 734 (citing Cour de cassation [Cass.] [Supreme Court for Judicial Matters], Mar. 21, 2000, Rev. Arb. 2001, 817, note Y. Derains (Fr.)).

287. *See* PHIL. CONST. art. II, § 2. Under Article II, Section 2 of the Constitution or, the "Incorporation Clause," the Philippines adopts the generally accepted principles of international law as the law of the land. Thus, under Philippine law, transnational public policy, otherwise known as "the general principles accepted by civilized nations," is recognized and adopted as part of Philippine law. *See* PHIL. CONST. art. II, § 2.

288. IBA Report, *supra* note 28, at 14-16.

289. *Id.* at 15.

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