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Agenda of February 25, 2025
Item No. __

G.R. No. 238846 – SHELL PHILIPPINES EXPLORATION B.V. and CHEVRON MALAMPAYA LLC, Petitioners, **v. COMMISSION ON AUDIT,** Respondent.

G.R. No. 238852 – PNOC EXPLORATION CORPORATION, Petitioner, **v. COMMISSION ON AUDIT,** Respondent.

G.R. No. 238862 – THELMA M. CERDEÑA and NORA A. TUAZON, Petitioners, **v. COMMISSION ON AUDIT,** Respondent.

Promulgated:
February 25, 2025

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SEPARATE CONCURRING OPINION

HERNANDO, *J.*:

I fully concur in the *ponencia*'s disquisitions. However, I am impelled to amplify the principle that an arbitration ruling should be accorded primacy and highest respect.

The issue in these cases is the alleged under collection of the government's share in the Malampaya Natural Gas Project from 2002 to December 2009 amounting to PHP 53,140,304,739.86.

The present controversy arose from the Service Contract dated December 11, 1990, entered into by the Government of the Republic of the Philippines, through the Department of Energy (DOE), with Occidental Philippines, Inc. and Shell Exploration B.V., the predecessors-in-interest of Shell Exploration B.V. (SPEX), PNOC Exploration Corporation (PNOC-EC), and Chevron Malampaya LLC (Chevron), collectively referred to as the Contractors.[1]

Under Service Contract No. 38, the contractors undertook to perform all petroleum operations and provide all necessary technology and financing, as well as the required services in connection therewith. Moreover, Section 7.3 of the Service Contract provides that 60% of the net proceeds of the petroleum operations shall be remitted to the government, while Section 7.4 allows the

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[1] *Ponencia*, p. 3.

contractors to retain the remaining 40%. In addition, Presidential Decree No. 87[2] exempts the contractors from payment of all taxes except income tax, which is to be paid by the DOE on behalf of the contractors as provided in Section 6.3 of the Service Contract.[3]

On post-audit, DOE Supervising Auditor Dolores T. Barraza (Auditor Barraza) observed that the corporate income taxes of the contractors were deducted from the government's 60% share in the net proceeds, resulting in an understatement of government revenue by PHP 53,140,304,739.86 from 2002 to December 2009. Consequently, Notice of Charge No. 2010-01-151(09) was issued attributing the under collection to petitioners Thelma M. Cerdeña (Cerdeña), Chief of the DOE Compliance Division, Nora A. Tuazon (Tuazon), Officer-in-Charge of the DOE Financial Services, as well as the contractors.[4]

DOE, SPEX, PNOC-EC, and Chevron sought recourse before the Commission on Audit (COA), which denied their appeal.[5] Aggrieved, the contractors, DOE, Cerdeña, and Tuazon filed petitions for review before the COA Proper, but the same were similarly denied. This prompted the contractors, Cerdeña, and Tuazon to file the instant petitions for *certiorari*, essentially imputing grave abuse of discretion amounting to lack or excess of jurisdiction on the part of COA in issuing the challenged Decision and Resolution.[6]

Meanwhile, the contractors submitted the controversy to international arbitration. The International Centre for Settlement of Investment Disputes (ICSID) tribunal, in Case No. ARB/16/22 titled: *Shell Philippines Exploration B.V. v. The Republic of the Philippines*, issued provisional measures enjoining the enforcement of the Notice of Charge pending the proceedings.[7]

On the other hand, the International Chamber of Commerce (ICC) Arbitral Tribunal, in its April 16, 2019 Partial Final Award and December 16, 2019 Final Award in *Shell Philippines Exploration B.V. (the Netherlands) and Chevron Malampaya LLC (USA) v. Government of the Republic of the Philippines*, docketed as ICC Case No. 21096/CYK/PTA, upheld the validity of the DOE's tax assumption of the contractor's income tax and the inclusion thereof in the Government's 60% share in the net proceeds.[8]

In its Comment to the petitions, however, COA insists that it is not bound by the ICC Arbitral Award as it is not a party to the Service Contract and the

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2 The Oil Exploration and Development Act of 1972.
3 *Ponencia*, p. 3.
4 *Id.* at 4.
5 *Id.*
6 *Id.* at 5.
7 *Id.*
8 *Id.* at 6.

arbitration clause therein. It further asserts that the controversy is not subject to arbitration.

As stated at the outset, this opinion shall be confined only to the discussion of the principle that an arbitration ruling should be accorded highest respect and finality.

Our jurisdiction adopts a policy in favor of arbitration. The Alternative Dispute Resolution (ADR) Act of 2004 and A.M. No. 07-11-08-SC or the Special ADR Rules both declare as a policy, that the State shall encourage and actively promote the use of alternative dispute resolution, such as arbitration, as an important means to achieve speedy and impartial justice and declog court dockets.[9] This pro-arbitration policy is further evidenced by the rule on presumption in favor of enforcement of a foreign arbitral award under Special ADR Rules, *viz.*:

> Rule 13.11. *Court action.* - It is presumed that a foreign arbitral award was made and released in due course of arbitration and is subject to enforcement by the court.
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> The court shall recognize and enforce a foreign arbitral award unless a ground to refuse recognition or enforcement of the foreign arbitral award under this rule is fully established.
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> The decision of the court recognizing and enforcing a foreign arbitral award is immediately executory.

Arbitration is a voluntary dispute resolution process "outside the regular court system," where parties agree to submit their conflict to an arbitrator or panel of arbitrators of their own choice. Resort to arbitration requires consent from the parties, either through an arbitration clause in the contract or an agreement to submit an existing controversy between them to arbitration.[10]

In this case, it is undisputed that the Service Contract contains an arbitration clause which reads:

> 12.1 *Disputes, if any, arising between the OFFICE OF ENERGY AFFAIRS and CONTRACTOR relating to this Contract or the interpretation and performance of any of the clauses of this Contract, and which cannot be settled amicably, shall be settled by arbitration.* The OFFICE OF ENERGY AFFAIRS on the one hand and CONTRACTOR on the other hand, shall each appoint one arbitrator within thirty (30) days after receipt of a written request of the other Party to do so, such arbitrator shall, at the request of the other Party, if the parties do not otherwise agree, be appointed by the President of the International Chamber of Commerce. If an arbitrator fails or is unable to act, his[/her] successor will be appointed in the same manner as

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[9] *Mabuhay Holdings Corporation v. Sembcorp Logistics Limited*, 844 Phil. 813, 833 (2018) [Per J. Tijam, First Division].

[10] *Adapon v. Medical Doctors, Inc.*, 903 Phil. 647, 661 (2021) [Per J. Leonen, Third Division].

> the arbitrator whom he[/she] succeeds. Unless the Parties agree otherwise, the Philippines shall be the venue of the arbitration proceedings. The English language shall be the language used.
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> 12.2 *The decision of a majority of the arbitrators shall be final and binding upon the parties.* Judgement upon the award rendered may be entered into by any court having jurisdiction or application may be made to such court for a judicial acceptance of the award and an order of enforcement as the case may be.
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> 12.3 Except as provided in this Section, arbitration shall be conducted in accordance with the Rules of Arbitration of the International Chamber of Commerce, then in effect. (Emphasis supplied)

Clearly, the parties to Service Contract No. 38, i.e., the Government of the Republic of the Philippines, through the DOE, and the contractors, agreed to settle any dispute relating to the Service Contract through arbitration. Thus, when the contractors commenced an arbitration pursuant to the said arbitration clause, they merely exercised their rights under the Service Contract.

COA posits that there is no real dispute between the DOE and the contractors relating to the interpretation of the contract, thereby rendering the arbitration clause inoperative.

This argument fails to persuade.

It is to be recalled that COA itself argued in its Comment to the petitions that the tax assumption clause in the Service Contract effectively increases the 40% share of the contractors and reduces the 60% share of the government in the net proceeds, which is tantamount to exempting the contractors from income tax and the amendatory income tax laws. Otherwise stated, COA argues that the DOE's tax assumption of the contractor's income tax and the inclusion thereof in the Government's 60% share in the net proceeds were invalid as it effectively resulted to the exemption of the contractors from payment of income tax. Contrary therefore to COA's supposition, there exists a dispute as to the interpretation of the Service Contract, which the ICC resolved in ICC Case No. 21096/CYK/PTA, when it upheld the validity of the DOE's tax assumption of the contractor's income tax and the inclusion thereof in the Government's 60% share in the net proceeds.

To stress, the ICC has interpreted Section 6.3 of the Service Contract and found without hesitation that the Philippine income taxes paid by or on behalf of the contractors under Service Contract No. 38 form part of the Government's 60% share of the net proceeds from petroleum operations carried out under the Contract. Accordingly, the Government has already received in full its 60% share of the net proceeds from 2002 until the conclusion of the Hearing in September 2018.[11]

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[11] ICC Partial Final Award, pars. 222 to 223.

Since the core issue as to the legality and enforceability of the tax assumption mechanism under Service Contract No. 38 has already been determined by the ICC which aptly exercised its jurisdiction over the controversy in accordance with the arbitration clause in the Service Contract, the ICC ruling should be accorded highest respect and finality.

It bears stressing that the ICC's April 16, 2019 Partial Final Award and December 16, 2019 Final Award have long attained finality as no appeal is allowed from an international commercial arbitration award. This is clearly provided in Rule 19.7 of the Special ADR Rules thus:

> RULE 19.7. *No appeal or certiorari on the merits of an arbitral award.* – An agreement to refer a dispute to arbitration shall mean that the arbitral award shall be final and binding. Consequently, a party to an arbitration is precluded from filing an appeal or a petition for *certiorari* questioning the merits of an arbitral award. .

In fine, the Court finds no compelling reason to disturb the ICC's categorical findings and conclusions on the matter.

It must be emphasized that the State's declared policy is "to respect party autonomy or the freedom of the parties to make their own arrangements in the resolution of disputes with the greatest cooperation of and the least intervention from the courts."[12] Thus, judicial interference is actively restrained under the Special ADR Rules for arbitration to be a true alternative dispute resolution mechanism, and not merely an added preliminary step to judicial resolution.[13]

Moreover, COA must respect the arbitration agreement in the Service Contract because such arbitration agreement is the law between the parties, hence, they are expected to abide by it in good faith.[14] The arbitration clause should, thus, be given primacy in accordance with the State's policy of upholding the autonomy of arbitral awards.

ACCORDINGLY, I vote to **GRANT** the consolidated Petitions for *Certiorari*.

RAMON PAUL L. HERNANDO
Associate Justice

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[12] *Adapon v. Medical Doctors, Inc.*, 903 Phil. 647, 680 (2021) [Per J. Leonen, Third Division].
[13] *Id.* at 664.
[14] S. COURT RULE ON ADR, Rule 2.2.