



# PHILJA



JANUARY - JUNE 2006 VOL. 8, ISSUE NO. 25

# JUDICIAL JOURNAL

## Conference on Arbitration for the Judiciary







*The*  
**PHILJA**



JANUARY-JUNE 2006 VOL. 8, ISSUE NO. 25

**JUDICIAL  
JOURNAL**



CONFERENCE  
ON ARBITRATION  
FOR THE JUDICIARY

I. SPEECHES

II. LECTURES

III. REFERENCES

**The PHILJA Judicial Journal.**

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## Arbitration and the Courts\*

*Justice Ameurfina A. Melencio Herrera* \*\*

We welcome you warmly to this Conference on Arbitration intended for our Justices of the Court of Appeals, our commercial court judges, and our executive judges who had expressed, in a survey, their interest in the subject matter.

We thank the United States Agency for International Development (USAID) and The Asia Foundation (TAF) for their sustained partnership and collaboration through the years under the USAID Legal Accountability and Dispute Resolution (LADR) Program, which is implemented by TAF.

It all started with Court-Annexed Mediation (CAM) in 1998, then a relatively new field in the Philippines, which is now in place, is on track, and is ready for expansion throughout the country and for continued training of more court-accredited mediators. In time, we hope that it will not only be an alternative mechanism but the mainstream.

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\* Opening and Welcome Remarks delivered at the *Conference on Arbitration for the Judiciary* on March 23, 2006 at the Intercontinental Manila, Makati City, Philippines.

\*\* Madame Justice Ameurfina A. Melencio Herrera has been the Chancellor of the Philippine Judicial Academy (PHILJA) since its institution in March 1996. She was appointed to said position four years after her retirement from the Supreme Court, where she served as Associate Justice from 1979 to 1992.

She is the moving power behind PHILJA, which aims to foster excellence in the Judiciary by providing quality judicial and

With the enactment of Republic Act No. 9285, known as the Alternative Dispute Resolution (ADR) Act of 2004, that promotes mediation and arbitration in the country, we have thought that the time is ripe to start with a companion sphere of interest – the arbitral process already used worldwide. This is also an introductory activity for the establishment of Court-Annexed Arbitration, in this era of judicial reforms, alongside voluntary arbitration, and complementary to CAM.

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legal education to members and aspirants to the Judiciary, court personnel and officials and personnel of quasi-judicial bodies.

Described as the illustrious granddaughter of the President of the First Philippine Republic, General Emilio Aguinaldo, Madame Justice Herrera cut a fulfilling and fruitful career on the Bench from then Court of First Instance of Baler, Quezon to the Highest Court of the land. She has been the recipient of numerous awards, and rendered landmark decisions as Associate Justice of the Supreme Court. She was Chair of the Second Division of the Supreme Court and was Chair of the House of Representatives Electoral Tribunal until she retired in 1992.

The Philippine Bar Association, in awarding Madame Justice Herrera a Plaque of Appreciation in 1991, aptly described her thus: “Born of patrician stock, bred in gentility, raised in affluence, steeped in academics, and enveloped in historical prominence.” She is her own light despite the long shadow cast by her grandfather, the first Philippine President Emilio Aguinaldo; her father, Ambassador Jose P. Melencio, and her husband, University of the Philippines (UP) Chancellor, Dr. Florentino B. Herrera, Jr. Yet, she is the guardian of the legacy of her lineage as she brings forth into full flowering, through her actuations and court adjudications, “the justice that heroes dream of and the freedom that martyrs die for.”

The project came about from discussions between the Philippine Judicial Academy (PHILJA), led by Dean Eduardo de los Angeles, Chair of our ADR and Design Management Committee (DMC), and the Kuala Lumpur Regional Centre for Arbitration (KLRCA), led by its Director, Dato' Syd Ahmad Idid, to respond to a felt need – that of disseminating understanding of arbitration as an ADR mechanism, as a private form of dispute resolution, and as a process already used worldwide, considering the growing proliferation of international contracts with mandatory arbitration clauses.

Joining us in the planning were the Philippine Dispute Resolution Center, Inc. (PDRCI), headed by its President, Atty. Eduardo R. Ceniza, and the Chartered Institute of Arbitrators (CI Arb), led by its Resident Representative to the Regional Subcommittee, Atty. Mario E. Valderrama.

We are grateful to them all for their interest in assisting the Academy in its first venture into arbitration – not for purposes of training arbitrators but to familiarize our judges with possible court involvement in arbitration proceedings.

The emphasis would be on some aspects of both domestic and international arbitration, on how domestic courts can assist arbitral tribunals, and how they can enforce or vacate arbitral awards. We already know, for example, of provisions dealing directly with the enforceability of arbitration clauses in contracts regarding construction and the jurisdiction of the Construction Industry Arbitration Commission (CIAC).

While an arbitral process is, indeed, separate and distinct from a court proceeding, there can be interaction between courts and arbitral tribunals such as in the review of arbitral decisions, their binding effect, the injunctive powers of courts over arbitral

proceedings, and arbitral proceedings as raising prejudicial questions. Domestic courts can have a supervisory and supportive role to play.

By the end of the activity, it is expected that our judges shall have increased their knowledge and understanding of arbitration as an ADR mechanism, the interim measures available during an arbitral proceeding, as well as the recognition, confirmation and enforcement of international arbitral awards.

Indeed, new developments in a globalized landscape come so thick and fast that it is imperative to keep abreast. We trust that this is one PHILJA activity that provides such an opportunity as we look forward to two full days of increasing our knowledge-base on arbitration and the courts.

Again, a very warm welcome. We are most appreciative of your cooperation and your presence.

Thank you for your kind attention.

## Message\*

*Mr. Gerardo A. Porta\*\**

Justice Ameurfina Herrera

Chancellor, Philippine Judicial Academy (PHILJA)

Honorable Members of the Philippine Judiciary

Friends and colleagues in development

Ladies and gentlemen,

*Magandang umaga po sa inyong lahat.*

I am delighted to join you this morning for this Conference on Arbitration, and I congratulate the Philippine Judicial Academy for organizing this important event. We are grateful that the Kuala Lumpur Regional Centre for Arbitration, the Chartered Institute of Arbitrators (CI Arb), and arbitration experts here in the Philippines have agreed to share their expertise with all of us.

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\* Delivered at the *Conference on Arbitration for the Judiciary* on March 24, 2006, at the Intercontinental Manila, Makati City, Philippines.

\*\* Mr. Gerardo A. Porta is currently a Senior Civic Participation Specialist at the Office of Economic Development and Governance, United States Agency for International Development (USAID)/ Philippines. He has held positions in the USAID since 1992 as a Civil Society Development Coordinator of the Civil Society Support and Strengthening Program (USAID/ Indonesia) from August 2001 to August 2004; Team Leader of the Civil Society Program from July 1998 to August 2001; and Project Management Specialist of the Office of Governance and Participation from February 1992 to July 1998. He has also been a Community Development Manager of the Microlink Philippines, Inc. and

I also wish to recognize the participating executive judges, vice executive judges, and commercial court judges in Metro Manila for taking time off their benches to learn more about arbitration as an Alternative Dispute Resolution (ADR) mechanism.

The United States Government in the Philippines is carrying out a broad range of programs with our Philippine partners to

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Faculty Member of the Philippine Business for Social Progress-Social Development Management Institute from June 1986 to February 1992; and a Lecturer at the University of the Philippines and National Coordinator of the International Labour Organization-Women and Disability in the Asia Pacific Project from June 1984 to June 1986.

Mr. Porta has authored and co-authored a number of reports/ publications for the Association of Southeast Asian Nations (ASEAN), the United Nations (Food and Agriculture Organization and International Labour Organization) and USAID. He has been a speaker/resource person in various seminars/conferences on democracy and governance or civil society development-related issues in the Philippines, Singapore, Indonesia, Thailand, Pakistan, Jordan and the United States. He is a recipient of two major individual meritorious honor awards, two outstanding team awards and numerous on-the-spot awards for outstanding performance from the United States Government.

He obtained his Bachelor of Arts in Communication Research degree from the University of the Philippines. He had advanced training in several areas such as democracy and governance, civil society development, policy advocacy, community-based resource management, training and facilitation methodologies, conflict resolution and microfinance in various academic and training institutions worldwide.

promote more sustainable and equitable growth. USAID's Economic Development and Governance Program supports improvements in judicial efficiency, improvements in government policy and administration, and promotion of innovations in trade and investment.

The United States Agency for International Development has a long history of collaboration with The Asia Foundation (TAF) in working with the Philippine Judiciary to improve judicial efficiency. Over the course of that collaboration, we have seen the Philippine Government and the Judiciary effect several landmark reforms to institutionalize ADR processes as a means of decongesting court dockets and improving the efficiency of the courts. I would now like to highlight a few noteworthy achievements.

In April 2004, Republic Act No. 9285, otherwise known as the Alternative Dispute Resolution (ADR) Act of 2004, was signed into law. The law mandated the use of settlement mechanisms such as mediation, conciliation, arbitration, early neutral evaluation and mini-trial to provide quick and impartial settlements of dispute, as these will help decongest the dockets.

Under the leadership of PHILJA, more than 600 mediators involved in the lower courts, the Court of Appeals (CA) and the Department of Justice (DOJ) were trained. In 2004 alone, more than 20,000 cases in the lower courts were referred for mediation under the Court-Annexed Mediation program. Of the 7,600 cases that have already completed the mediation process, 82 percent or more than 6,200 cases were successfully settled. And we understand that the numbers are increasing with its expansion to several areas of the country and with PHILJA's efforts to sustain its ADR initiatives.

Consistent with the spirit of the ADR Act of 2004 and initiatives of the Philippine Government to promote ADR, the USAID-funded Legal Accountability and Dispute Resolution (LADR) Project of TAF also secured the commitment of nine leading business organizations to mediate rather than litigate. In this connection, LADR trained more than 100 business mediators and helped establish business ADR units in Metro Manila and other key cities. In a few months of operation, business mediators have mediated 120 cases with a success rate of 89 percent (107 cases were settled).

We also understand that the value of ADR as an alternative paradigm to traditional litigation is already beginning to take root in the law academe as institutions attempt to incorporate ADR in the law school curriculum, integrate mediation curriculum and training programs, and focus on pedagogy and research.

Today, PHILJA has undertaken another important step in promoting ADR through arbitration, particularly in commercial transactions which typically assume international dimensions but may have implications in Philippine court litigation.

To our esteemed judges, may the substantive input of this conference prove worthy of your precious time and motivate you to find practical applications in your judicial work.

With all your dedication and commitment, USAID is confident that your efforts will contribute not only to sustainable improvements in judicial efficiency, but also to economic development and good governance.

*Maraming salamat po at mabuhay tayong lahat.*

## Closing Message\*

*Dr. Steven Rood\*\**

Chief Justice Artemio V. Panganiban  
Madame Justice Ameurfina A. Melencio Herrera  
Honorable judges  
Our distinguished lecturers and guests,  
Good afternoon!

I understand that our esteemed judges have been in this hall for two days already, listening to different sessions on such topics as the fundamental concept of arbitration, the interaction between the court and arbitral tribunals, and the recognition, confirmation, and enforcement of international arbitral awards. Thus, it is my guess that you would not want to hear another one of those lengthy remarks. I would try then to make this a very short one.

First of all, allow me to thank the Philippine Judicial Academy (PHILJA), the Kuala Lumpur Regional Centre for Arbitration (KLRCA), the Chartered Institute of Arbitrators (CIArb), and our local experts for making this conference happen. In their desire to help us find ways by which to alternatively settle disputes, they

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\* Delivered at the *Conference on Arbitration for the Judiciary* on March 24, 2006, at the Intercontinental Manila, Makati City, Philippines.

\*\* Dr. Steven Rood is The Asia Foundation's representative to the Philippines. Dr. Rood, an expert on local government, decentralization, and public polling has been a consultant to both government and non-government organizations,

have offered to share their expertise for two days, free of charge. I would also like to acknowledge the generous funding of the United States Agency for International Development (USAID) through the Legal Accountability and Dispute Resolution (LADR) program, which enabled us to support this worthwhile activity.

The Asia Foundation (TAF) takes pride in being able to collaborate with both public and private partners towards decongesting the court dockets through the use of Alternative Dispute Resolution (ADR) mechanisms. Initiatives on ADR undertaken by the Foundation in the past years include capability-

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including Associates in Rural Development, Inc., The Social Weather Stations in Manila, and United States Agency for International Development (USAID). Dr. Rood served as a Professor of Political Science at the University of the Philippines-Baguio from 1981 until joining the Foundation in 1999, and was the only foreign faculty member with tenure in the University of the Philippines System.

Dr. Rood is the author of a number of works on Filipino politics, with special focus on democracy and decentralization. His most recent publications are "Decentralization, Democracy and Development," in *The Philippines at the Crossroads (The Asia Society 1998)* by David G. Timberman (ed); "NGOs and Indigenous Peoples," in *Organizing for Democracy: NGOs, Civil Society, and the Philippine State* (Honolulu; University of Hawaii Press, 1998) by G. Sidney Silliman and Lela G. Nobel (eds); "An Exploratory Study of Graft and Corruption in the Philippines" (with Linda Luz B. Guerrero) *The PSSC Social Science Information, Volume 27 Number 1* (January-June 1999); "Elections is Complicated and Important Events in the Philippines" in *How Asia Votes* (John Fuh-Sheng Hsieh and David Newman, New York: Seven Bridges Press, 2002).

building and skills enhancement activities for both Court-Annexed Mediation (including Appellate Court Mediation) and for non-court mediation (such as ADR in business), and efforts that seek to enlarge the promotion of its use among both the private and public sectors. We note that the value of ADR as an alternative paradigm to traditional litigation has taken the interest of the law schools as they begin to develop change agents among its faculty and studentry and to focus on incorporating ADR in the law school curricula.

The Asia Foundation is pleased to witness these positive developments in ADR in the country, particularly in terms of increasing ADR capacities and advocacy, and being able to contribute to this progress.

While I believe that we are already at a point where we need to consolidate our gains, review the lessons of ongoing ADR efforts, and understand the direction in which ADR is advancing, this new undertaking by PHILJA on Court-Annexed Arbitration is another significant step, an additional judicial door, towards strengthening the impact of current ADR work in the decongestion of court dockets and in the over-all administration of justice in the country.

With this additional door for dispute resolution, TAF is excited to hear how stakeholders would opt to settle their disputes and ultimately develop structures and mechanisms among institutions to address the issue of sustainability of all ADR efforts.

The Asia Foundation is confident that the knowledge gained during this conference and the consequent interaction among our judges and experts will contribute to better resolutions that jive with international standards, and meaningful and lasting impact in the way justice is administered in the country.

Thank you very much and good afternoon.

# The Challenge of Alternative Dispute Resolution\*

*Hon. Artemio V. Panganiban\*\**

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## I. INTRODUCTION

I am pleased to meet all of you during this two-day Conference on Arbitration for the Judiciary. Despite my hectic schedule, I cannot pass the chance to attend this closing ceremony because of my special affinity with the cause of arbitration.

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\* Inspirational Message delivered at the *Conference on Arbitration for the Judiciary* on March 24, 2006, at the Intercontinental Manila, Makati City, Philippines.

\*\* Chief Justice Artemio V. Panganiban was appointed to the Supreme Court in 1995. He is the concurrent Chair of the Third Division of the Supreme Court and the House of Representatives Electoral Tribunal (HRET), as well as the Chair of seven committees involved mainly in judicial reforms in the Supreme Court, namely, the Committee on Public Information, the Committee on Computerization, the Committee on Judicial Excellence, the Committee on Legislative-Executive Relations (LERCom), the Committee on Raffle for Division Cases, the Committee on Knowledge-Sharing, and the International

As you may know, among the things I want to focus on during my term as Chief Justice are four acute problems of the judiciary, namely, (a) limited **access** to justice by the poor, (b) **corruption**, (c) **incompetence**, and (d) **delay** in the delivery of quality judgments. I refer to these four as the ACID problems that corrode justice.

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Conference and Showcase on Judicial Reforms. He is also the Vice Chair of the Supreme Court Committee on Publications, a Member of the Supreme Court Executive Committee for the Judicial Reform Program, and a Consultant of the Judicial and Bar Council.

Described by a colleague, Honorable Justice Antonio T. Carpio, as “undoubtedly the most prolific writer of the Court, bar none,” Chief Justice Panganiban has penned, during the last 10 years, more than 1,000 full-length decisions, several thousand minute resolutions disposing of controversies, and the following books; *Love God Serve Man*; *Justice and Faith*; *Battles in the Supreme Court*; *Leadership by Example*; *Transparency, Unanimity and Diversity*; *A Centenary of Justice*; *Reforming the Judiciary*; *The Bio-Age Dawns on the Judiciary*, and *Leveling the Playing Field*. As Honorable Justice Romeo J. Callejo, Sr. puts it, “One book a year and no cases left undecided. This is Mr. Chief Justice Artemio V. Panganiban’s unsurpassed record. It is also the best summation of judicial reform.” Another colleague, Honorable Justice Angelina Sandoval-Gutierrez, lauds his “pre-eminent judicial craftsmanship, social philosophies, and literary style.”

Chief Justice Panganiban obtained his Bachelor of Laws degree from the Far Eastern University (FEU) in 1960, graduating both as *cum laude* and FEU’s Most Outstanding Student. He placed sixth in the Bar Examinations of that same year, with a grade of 89.55 percent. A popular campus figure, he was, among others, a Founder and former President of the National Union of Students of the Philippines.

One of the ways of avoiding **delay** is to resort to Alternative Dispute Resolution (ADR) methods, particularly arbitration. I happen to believe that an out-of-court settlement of a controversy usually works well for the parties and the courts. It is fast and efficient; it also decongests court dockets, thereby allowing judges to concentrate on the bigger issues of national interest.

Of course, I am also always happy to accept an invitation from Justice Ameurfina A. Melencio Herrera, whom I must commend for her tireless efforts to advance alternative modes of settling disputes through the Philippine Judicial Academy (PHILJA). I know she has put in a considerable amount of work and organization in bringing some of you to Manila and liaising with the other sponsors of this Conference: the Chartered Institute of Arbitrators (CI Arb), Kuala Lumpur Regional Centre for Arbitration (KLRCA), Philippine Dispute Resolution Center, Inc. (PDRCI), United States Agency for International Development (USAID) and The Asia Foundation (TAF).

## II. INSTITUTIONALIZING ALTERNATIVE DISPUTE RESOLUTION MECHANISMS

As I have already mentioned, the Philippine Supreme Court is actively behind efforts to institutionalize ADR mechanisms. Upon the recommendation of the PHILJA, it resolved to integrate **Court-Annexed Mediation (CAM)** as a mandatory component of pre-trial at the trial court level.<sup>1</sup> It also recently approved recourse to **mediation** even at the appellate court level.

1. Administrative Matter No. 01-10-S-SC-PHILJA dated, October 16, 2001, designating the PHILJA as the component unit of the Philippine Supreme Court for court-referred and court-related mediation and other alternative dispute resolution mechanisms and establishing the Philippine Mediation Center.

Moreover, it supports **arbitration** by encouraging its use in most civil and commercial controversies. Thus, the Supreme Court always defers to contractual provisions by which the parties voluntarily agree to refer to arbitral bodies disputes that may arise in the course of their relations. The Court encourages ADR especially in business transactions. For these reasons, this concept has been integrated into the many judge-to-judge dialogues to stress the importance of arbitration in de-clogging court dockets, and in speeding up the delivery of justice.

I am sure the papers and lectures on arbitration, which were delivered during the past two days have generated fruitful discussions and exchanges of country experiences and best practices. These exchanges make for a much wider and fuller appreciation of the needs and problems of arbitration. I am certain that the participants from the Philippines have learned tremendously from the papers delivered by speakers from Kuala Lumpur and Hong Kong, as well as those by our own. The presenters from our two neighbor cities have expounded extensively on:

1. Their own and other countries' laws and experiences on arbitration;
2. The United Nations Commission on International Trade Law (UNCITRAL) Model Law, which sets a simple yet effective model arbitration clause, and which has been found useful in interpreting various aspects of international arbitration;
3. Salient features of the arbitration process, particularly the need for an arbitration agreement and party autonomy;
4. The issue of arbitrability, mainly the jurisdiction of arbitral tribunals and the enforceability of their awards; and
5. Recourse and enforceability of arbitral awards.

### III. PROBLEMS ON DIVERSITY OF ARBITRATION LAWS

There is a diversity of arbitration laws of various countries, like those concerning the seat of arbitration, the parties and their arbitration agreements, and the laws of the place of enforcement. Given this diversity, it is but natural that conflicts arise between and among jurisdictions. Among the problems I note are those related to:

1. Existing legislations in our respective countries;
2. Mechanics of providing for an arbitration clause;
3. Choice of an arbitrator especially when multiple parties are involved;
4. Changing people's litigious attitudes;
5. Desirability of involving the courts in or keeping them out of arbitration proceedings; and
6. Effective means to enforce or prevent the execution of an arbitral award. The extent and depth of your discussions on these topics indicate how strongly and deeply committed you are to the cause of arbitration.

Indeed, arbitration has metamorphosed into one big endeavor in the past decade or so. This fact is evident, especially in cases involving many complex issues transcending national boundaries – those arising from global trade and investments.

For courts struggling with clogged dockets and case backlogs, the renewed focus on arbitration has been a welcome development. Needless to say, controversies settled out-of-court free these tribunals from the added pressure of deciding so many cases in so

little time. As Prof. Alfredo F. Tadiar, the Chair of PHILJA's ADR Department, aptly puts it, ADR helps:

restore the role of the judiciary as the forum of last recourse of disputes that have failed earlier efforts of private accommodation and allow it to focus on issues of public interest.

#### IV. HOW COURTS SUPPORT ARBITRATION

Alternative Dispute Resolution – together with efforts to forge and strengthen it – should therefore sit well with the judiciaries of many countries, as it does with the Philippine Supreme Court. I am keenly delighted that you have decided to explore and talk about ways in which courts may support the arbitration process. Some of these ways are:

1. Settling issues of jurisdiction;
2. Providing interim relief or measures of protection;
3. Taking evidence;
4. Enforcing or repudiating arbitral awards; and
5. Ensuring that the parties have a full rein on the arbitration process by finding various means of keeping courts out of it through anti-suit injunctions and stays of parallel court proceedings.

Professor Mario E. Valderrama has presented quite an interesting discussion on the different approaches to court involvement in arbitration. His discussion was complemented by PDRCI President Eduardo R. Ceniza, who talked about the need for courts to provide interim measures in certain cases. These are cases in which the arbitral tribunal possesses no authority to order

provisional or interim measures of protection. Such a scenario is recognized in Sections 28 and 29 of the Philippine ADR Law.

Of course, we all recognize the difficulty of striking the right balance between the role of courts and that of arbitrators. Issues like those brought forth during the conference may linger for a time, while we look for ways of ironing out the wrinkles and providing solutions to problems. New concerns are also most likely to surface in practice, as we grapple with the complexities and nuances of arbitration.

## V. COOPERATING WITH FOREIGN JURISDICTIONS

This has always been the way with all great endeavors. This is the reason why forums such as this are enormously important in:

1. Finding out how other jurisdictions have successfully dealt with their own problems;
2. Sharing what has and has not worked in practice;
3. Seeking ways to solve common concerns and issues; and
4. Continuously hammering out new approaches to challenges as they come along.

Individually, the challenge may seem daunting; but collectively, I am confident we shall all be victorious. As I close, let me again thank you for inviting me to this conference. I commend every one of you for contributing your thoughts and ideas on how best to push for and optimize the use of arbitration. My hope is for you to continue these productive exchanges, so that all may benefit from your combined wisdom and experience. I shall be very happy to receive a copy of your conference report and shall make every effort to respond both to the issues that are within my competence

to address, as well as to changes that the Chief Justice or the Supreme Court has the authority to institute.

To our foreign speakers and participants, I hope you have enjoyed your visit. I bid you *adieu*. Have a pleasant trip home. *Maraming salamat po.*

# Overview of Arbitration in the Philippines and Highlights of the ADR Law of 2004\*

*Prof. Alfredo F. Tadiar\*\**

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\* Delivered at the *Conference on Arbitration for the Judiciary* on March 23, 2006 at the Intercontinental Manila, Makati City, Philippines. *Transcribed.*

\*\* A reformer and an orthodox lawyer, Prof. Alfredo F. Tadiar was appointed Chair of the National Amnesty Commission (NAC) in 1996.

Prior to his appointment at the NAC, he headed a Government Panel constituted by President Fidel V. Ramos to negotiate a peace agreement with the military rebels that sought to topple the Aquino Government in various *coup* attempts in 1993.

Prof. Tadiar has been regarded by the Honorable Chief Justice Hilario G. Davide, Jr. as the “Father of Alternative Dispute Resolution (ADR) in the Philippines.”

Prof. Tadiar is the first Chair of the ADR Department of the Philippine Judicial Academy (PHILJA), and pioneered, among others, the Pilot Testing of Court-Diversion of pending cases for mediation in 1991 and initiated an empirical research study,

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funded by The Asia Foundation, of the efficacy of ADR in 1983.

Prof. Tadiar has been involved in construction arbitration since 1991 and has rendered the most number of decisions/awards (over 115 cases) among those accredited for said profession, including those with the largest sums in dispute and the most complex. He has set the record for speed of resolution and has not been reversed by an appellate court. His wide experience in construction arbitration includes projects related to high rise construction, infrastructure, power generation, architectural and interior design mass housing, and many others. Although retired as UP Law Professor, he continues to be active in law practice, arbitration and mediation. He has presented many papers on various aspects of construction arbitration and has trained several groups of arbitrators.

A product of two Philippine Law Schools, University of the Philippines and Silliman University, AB (*cum laude*) and LLB (*cum laude*), and two American Law Schools: Harvard and Boston University, Prof. Tadiar placed 14<sup>th</sup> in the 1955 Bar Examinations.

## I. INTRODUCTION

Good morning, Your Honors. I have appeared before some of you in the trial courts while some of you have decided some of my cases that have reached the Court of Appeals. Also, in the Court of Appeals, you have given your wholehearted cooperation in the outstanding performance of mediation at the appeals court level, which is still ongoing. To the data that was given by Mr. Gerardo Porta of the United States Agency for International Development (USAID), I would like to add that in the Court of Appeals, we have settled more than a hundred cases through mediation thereby removing them from the backlog of that court.

The objective of this presentation is to provide you with a broader perspective of arbitration in the Philippines, and also to present to you the highlights of the Alternative Dispute Resolution (ADR) Law of 2004.

I would like to present to you the overview from the perspective of height and distance – for you to be able to view the much bigger picture. Take for example that when you are at the top of this 14-storey building, you will be able to view the entire surroundings. This is unlike when you are on the ground level where your horizontal view is very limited. When you are at the top, you will be able to see the whole forest and not just a single tree, the whole city and not just the individual buildings or rooms that we are in. This means that we can have a much wider perspective in the sense that we can look backward at the origin of the project and can also look forward to its future.

What is the big picture that we would want you to see and not just the details? The big picture that we want to call your attention to is that arbitration for which this conference was called,

as well as the ongoing mediation project, as has been extolled by Mr. Porta, are only parts of the total efforts to transform the judiciary and realize the vision of the Action Program for Judicial Reform (APJR). And, that is:

A judiciary that is independent, effective and efficient and very importantly, worthy of public trust and confidence  
x x x.<sup>1</sup>

What is really the ultimate objective of all these efforts to achieve that objective from the big picture? From my point of view, I say that I want to change or we all want to change the litigious attitude of both litigants as well as their counsels, which has resulted in the alarming and overwhelming backlog of court cases, as of 2004. This has resulted to more than 800,000 unresolved cases pending in all levels of the judiciary. This has arisen from what Chief Justice Fred Ruiz Castro has called as “the overuse, the misuse and the abuse of the courts.”

As a corollary measure, we would want to restore the proper role of the Judiciary as the forum of last recourse of disputes where earlier efforts of private accommodation have failed, and thereby allow it to focus its efforts on resolving issues of public interest.

## II. HISTORICAL ANTECEDENTS

Having said that, we would like to take a historical point of view. I would like to provide you a broad overview of the arbitration that we have had with us for more than a hundred years now.

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1. The Davide Watch: Leading the Philippine Judiciary and the Legal Profession Towards the Third Millennium, December 1998.

### A. *Spanish Civil Code of 1889*

The Spanish Civil Code of 1889, as applied to the Philippines, Article 1820, empowers the parties to submit their dispute for an arbitral decision. The second volume of Philippine Reports in the case of *Cordoba v. Conde*,<sup>2</sup> speaks about arbitration and the enforceability of the arbitration clause in A903.

### B. *Civil Code of 1950*

#### I. Article 2044

Sixty years later, three years after achieving our independence in 1946, Congress passed the Civil Code of the Philippines, which became effective in June of 1950, one year after its approval.

Article 2024 of the Civil Code recognizes the validity of an arbitration clause providing that an **arbitral award is final**. I would like to stress that as early as 1950 the matter of the finality of an arbitral award was upheld and continues to be so in the Supreme Court today. Does that provision mean that the arbitral award rendered by an arbitrator cannot be appealed, but can only be subject to a petition for review? It is still an issue pending in the Supreme Court in a case that I handled as a Commercial Arbitrator.

#### 2. Article 2046

Article 2046 of the Civil Code, calls on the Supreme Court to promulgate rules on arbitration regarding the process, the procedure of arbitration, and the appointment

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2. 2 Phil. 445 (1903).

of arbitrators. Did the Supreme Court respond to the Congressional call to ever come up with those rules? The answer is, no.

### ***C. Arbitration Law (Republic Act No. 876)***

Almost four years after the passage of the Arbitration Law or RA No. 876 in June of 1953, again the Legislature stepped into the vacuum created by the inaction of the Supreme Court. Fifty-one years later, the Arbitration Law *provided* what should have been *provided* by the Supreme Court by way of procedural rules for the appointment and the process of arbitration.

### ***D. Construction Industry Arbitration Law (Executive Order No. 1008)***

On February 4, 1985, President Marcos, as sole legislator during the Martial Law, issued Executive Order (EO) No. 1008. It recognizes the importance of the construction industry and the need to establish arbitration as a means to settle construction disputes expeditiously to promote a healthy partnership between government and private sector in furtherance of national development goals.

### ***E. Alternative Dispute Resolution Act of 2004 (Republic Act No. 9285)***

Another 51 years later, from the passage of the Arbitration Law in 1953, the ADR Act of 2004 or RA No. 9285 was passed in April of 2004.

Why am I pointing all these out to you? Because I want you to see how slow indeed are the wheels of reform that grind in this country. It took us more than a hundred years to be where we are now.

### III. KINDS OF ARBITRATION

What are the kinds of arbitration that are now being provided for under the new ADR Law?

1. Domestic Arbitration which is governed by Chapter 5;
2. International Commercial Arbitration (Chapter 4);
3. Individual Arbitration;
4. Institutional Arbitration;
5. Arbitration of Construction Disputes (Chapter 6); and
6. Court-referred Arbitration under Section 24 of RA No. 9285 which provides that:

A court before which an action is brought in a matter which is the subject matter of an arbitration agreement shall, if at least one party so requests not later than the pre-trial conference, or upon the request of both parties thereafter, refer the parties to arbitration unless it finds that the arbitration agreement is null and void, inoperative or incapable of being performed.

### IV. ESSENTIAL CONCEPT OF ARBITRATION

What really is the essential concept of arbitration? It is merely following a trend towards privatization of public service. It is nothing more than a **decision by a private judge**. It utilizes the same method of adjudication as the judiciary which is adversarial. It is merely a **shift from public judging to private judging**. It is akin to the employment of a private prosecutor in

the prosecution of crimes. You have a public prosecutor, you have a private prosecutor.

The definition of arbitration under Section 3(d) of the ADR Law states that:

“Arbitration” means a voluntary dispute resolution process in which one or more arbitrators, appointed in accordance with the agreement of the parties, or rules promulgated pursuant to this Act, resolve a dispute by rendering an award.

That is the statutory definition of arbitration.

### ***A. Differences between a Judge and an Arbitrator***

What then are the differences between a private judge and a public judge? There are six differences that I have identified:

#### 1. Appointment.

A judge is appointed by the government, the President of the Philippines. An arbitrator is appointed, on the other hand, by the parties to arbitration.

#### 2. Term of Office.

The term of office of a judge is for life, that is assuming he lives 70 years. In other countries, I understand that in Nepal, judges have a tenure up to 60 years old only. I suppose that is by reason of the lower longevity rate in Nepal than in the Philippines. What is the term of office of an arbitrator? It is *ad hoc* – up to the termination of the case.

#### 3. Salary or Compensation.

Who pays the salary? The government. What is the compensation of the judge? It is the payment of a regular

monthly salary. Where is the payment of an arbitrator coming from? It is from the fees paid by the parties.

4. Rules of Procedure.

What are the rules of procedure that shall be followed in judging publicly? It is the Rules of Court and of course the statutory provisions. In arbitration, the rules are private rules. The parties are free to agree upon what rules to govern the arbitration. They can choose the rules of the Philippine Dispute Resolution Center, Inc. (PDRCI), they can choose the rules of Singapore, or they can choose the Construction Industry Arbitration Commission (CIAC) rules to govern a particular dispute. They are free to accept whatever rules to govern their dispute. That is true for *ad hoc* arbitration. But if the parties chose to file their dispute before an institution, they are deemed to have accepted its rules of procedure.

5. Appeal.

There is a regular appeal from a judgment of the court. There is a provision in the Civil Code which says that appeal would not normally be applicable if the arbitration clause provides that the **arbitral award is final and not appealable. This has been upheld as a valid contractual provision. However, two things must be noted: 1) an award in a construction dispute is subject to appeal under Rule 43 of the Rules of Court to the Court of Appeals; and 2) review by the certiorari is always available.**

6. Enforcement.

Enforcement of judgments rendered by the Court is regularly done by the sheriff upon a writ of execution. In the case of arbitral awards, however, enforcement needs prior judicial confirmation. Excepted from this requirement is an award rendered in construction disputes which does not need judicial confirmation and may be executed even during the pendency of an appeal unless restrained by the appellate court.

***B. Advantages of Arbitration over Litigation***

What then is the benefit arising from shifting from public judging to private judging? What are the advantages of going into private judging?

I. Expeditiousness and Speed of Resolution.

An illustrative case is that involving the Pacific Plaza Towers, a two-tower building built in Fort Bonifacio under the auspices of Metro Pacific Corporation, which is a subject of a P2.5-billion dispute. As the Chair of the Arbitral Tribunal, it took me one ocular inspection, three days of hearing, and within a month we rendered a decision on that multi-billion peso case.

Another example of expeditiousness is the Skyway Project in Alabang. That is also P2.5-billion case, which also went into arbitration and I was also Chair of the Arbitral Tribunal. We finished that within a month. So we can say that expeditious and speedy resolution is the principal benefit of arbitration.

## 2. Focus of Interest.

Arbitration is specialized. We can say that arbitration proceedings in construction industry cases is different from arbitration proceeding in commercial cases. That is why arbitration is highly specialized depending on the focus of interest. Therefore, as is always the case of specialization, a specialist can diagnose and dispose of a case much faster than a generalist.

### ***C. Procedure for Confirmation and Issues for Resolution***

I had mentioned that in the case of arbitral award, it is provided for in the law – that judicial confirmation of arbitral award is necessary for enforcement. However, there is an exception, there is no need for judicial confirmation of an arbitration award by a construction arbitrator. That is an important distinction. That is why we have to explore whether the CIAC is a good model for a court-annexed arbitration program.

What is the procedure for confirmation of an arbitral award?

#### 1. Prevailing party to file for confirmation.

The prevailing party is the one interested to confirm – he will file a petition for confirmation of the arbitral award in his favor.

#### 2. Venue or where to file.

Where is it to be filed? With the Regional Trial Court (RTC) specified in the arbitration clause, or if none, where a party resides or is doing business, or where the arbitration was conducted.

3. Duration.

The time limit for the petition for confirmation must be within one month from the date of the award.

***D. Issues for Resolution***

What are the issues therefore to be resolved during the confirmation of the award? The only issue is whether or not the arbitrator who rendered it is disqualified from being an arbitrator. What are the grounds for disqualification? These are **R**elationship, **I**nterest and **B**ias or **RIB**. Relationship is either by blood or marriage, or more formally stated, by consanguinity or by affinity. The relationship of any member of the Arbitral Tribunal that is traced to a party must be up to the sixth degree, as in second cousins. However, the relationship is closer if it is to counsel, which means that a counsel who is related to the arbitrator within the fourth degree will cause the arbitrator's disqualification. This is the only issue to be resolved in the confirmation of arbitral award. That is why the proceedings for confirmation is summary in nature.

***E. Grounds to Vacate Award***

The next is a petition that certainly would be filed by the losing party and that is, based on the grounds to vacate the award. There are four grounds under Section 24 of RA No. 876:

1. Award was procured through fraud, corruption, or other undue means.
2. Evident partiality or corruption of any one of the arbitrators.

An issue is whether there is a sufficient ground to vacate the award since there are three or even more arbitrators assigned. Would the corruption of one be sufficient to nullify the award? This was an issue that we grappled with when we formulated the implementing rules and regulations. Parenthetically, we had a hearing of the implementing rules and regulations the other night in the Senate where I presented my objection based on PHILJA's position that once a case is filed in court it is subject to no other rules than the issuance of the Supreme Court. That derailed the proceedings. They had hoped to be able to approve the implementing rules and regulations but because of the constitutional issue that I raised, it was deferred.

The implementing rules and regulations cannot intrude upon the rule-making authority of the Supreme Court in so far as courts are concerned. So we grappled with that and decided on the proposal that the corruption of only one arbitrator would affect the whole award because it is not known what discussions went on in the deliberations, and that the corruption of one may have well affected the integrity of the entire decision.

3. Misconduct on the part of any one among the arbitrators.  
Failure to disclose any ground for disqualification and refusal to admit relevant evidence are forms of serious misconduct that will nullify the arbitral award.
4. Arbitrators exceeded their powers, or so imperfectly executed them, that a mutual, final and definite award upon the subject matter submitted to them was not made.

## V. PROBLEMS OF THE ALTERNATIVE DISPUTE RESOLUTION LAW

The following are the two biggest problems in the implementation of the ADR Law of 2004:

1. The implementing rules of the ADR have not yet been approved by the Joint Congressional Oversight Committee. Please note that normally, the implementing rules of an agency are simply approved by the agency or sometimes with the approval of the President of the Philippines. But this law requires the implementing rules to be approved by Congress, particularly by the Special Oversight Congressional Committee composed of the Senate and the House Committees on Justice, and the Senate and the House Majority and Minority Members.<sup>3</sup>
  2. There had been no rules promulgated by the Supreme Court to implement relevant sections of the ADR Law. There are many sections in the law which states “to be governed by such rules as may be promulgated by the Supreme Court.” None has yet been promulgated. I am also not aware of any committee that has been formed for the purpose of looking into what rules that be promulgated.<sup>4</sup>
- 
3. It has recently been decided to dispense with this requirement, citing a Supreme Court decision that this condition is unconstitutional as a violation of the separation of powers. The Department of Justice is almost ready to promulgate the Implementing Rules and Regulations.
  4. The Special Rules of Court on ADR approved by the Supreme Court, was recently published as required and officially will be effective as of the date stated therein.

These are now the two biggest problems in the implementation of the ADR Law and it is now close to two years after its approval.

## VI. JUDICIAL CONFIRMATION OF ARBITRAL AWARD

Aside from judicial confirmation of arbitral awards, there are other petitions that may be filed, such as to correct or modify the award. The petition to confirm is filed by the prevailing party, while the petition to vacate, is filed by the losing party. Another petition which may be filed by either party, is a petition to correct the award on the ground of an evident miscalculation of figures, and an evident mistake in the description of persons, things or property of an award.

I know that you are all now into computers where you have use of a template. So when you go on to the next decision you put on the template and merely change the names, change the titles and the relevant facts of the current case. Sometimes, you may forget to change some certain things and that is where you need to have a motion to correct an evident mistake in the description of a person.

The fourth on issues, is hardly ever talked about. Jurisdiction, as you very well know is divided into jurisdiction over the subject matter, jurisdiction over territory, jurisdiction over the person, but hardly ever talked about is jurisdiction over the issue. **In arbitration proceedings, the most important document is the terms of reference.** You are compelled to put in all your admitted facts and carefully formulate the issues for resolution. The Arbitral Tribunal can only decide the issues expressly submitted by the parties. A decision outside of those issues formulated by the parties, is one that is outside the jurisdiction of the Arbitral Tribunal. Therefore, a petition is needed to correct an arbitral

award, for an award that has been made upon an issue that has not been formulated by the parties themselves, and any imperfection on the form of the award. These are the three remedies that are available: petition for confirmation, for vacation, and for correction of an arbitral award.

I would like to use an ongoing case<sup>5</sup> to show and highlight a particular problem. I was appointed as sole arbitrator in an international commercial arbitration involving a company here in Manila and a company based in Tokyo. I made efforts to convert myself into a mediator but the parties refused. I was compelled to render an award in three hearings.

This flexibility in the rules is one of the advantages of arbitration. We do not go by 9 a.m. to 5 p.m. like you, or hold hearings from 9 a.m. to 12 noon. In this particular commercial arbitration case, we held hearings from 1 p.m. to 12 midnight at the Tower Hotel and we were able to finish in three hearings. The prevailing party which is the Japan-based company filed a petition for confirmation of an award in Quezon City. The losing party appealed. Note what I had mentioned earlier about the provision in Article 2024 of the Civil Code that a contractual provision that says that the arbitration award is final is valid. Despite that arbitration clause, the losing party went directly to the Court of Appeals on the ground authorized by **Rule 43 or Rule 65** under the Rules of Court. The Japanese company said that it based its petition on RA No. 876, which is a substantive law. Please note that the substantive law contains procedural aspects, and according to prevailing doctrine, the Supreme Court can

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5. The parties subsequently withdrew the case from the Supreme Court which was thereby prevented from making a definitive ruling on the issues raised.

modify a substantive law in so far as the procedural aspect is concerned.

## VII. COMPETING JURISDICTION

We now have two petitions filed in this case: one in the RTC, and another one in the Court of Appeals. The Court of Appeals sustained the petitioner that the jurisdiction is vested in the RTC as provided for by law. The matter is now with the Supreme Court, the ground being, and is also persuasive, as the petitioner in the Supreme Court says, "I am not attacking the integrity of Prof. Tadiar, we are happy with him. We consented to his being appointed. We are, however, attacking his decision as an abuse of discretion." That abuse of discretion is not found in RA No. 876; it is governed by Rule 65. Therefore the issue before the Supreme Court is – which law or rule should prevail? Should it be RA No. 876 because it says that you cannot attack the arbitration award on any ground other than that provided for by law? Certainly, grave abuse of discretion is not found in RA No. 876. So the petitioner in the Supreme Court says, "Am I going to be deprived of the power of judicial review simply because the law does not provide?" That is a vexing question which the answer is now up to the Supreme Court.

## VIII. ACCEPTING THE CHALLENGE

My conclusion from all of these, from having a broader perspective than that which has prevailed for over a hundred years, is that "there is no greater force than an idea whose time has come." The time for arbitration and mediation has indeed now come.

I would like to thank you for accepting the challenge – to change and transform the Judiciary to accomplish Chief Justice Davide’s vision – so that the Judiciary can become once more the effective and efficient instrument of justice that it is meant to be.

Thank you.

# Party Autonomy and Arbitration\*

*Prof. Mario E. Valderrama\*\**

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## I. INTRODUCTION

This paper focuses on arbitration that reflects the features in the term “modern arbitration statutes” as distinguished from its variants that are also called “arbitration.”

The discussions in this paper will not apply to the variants of the process like construction arbitration by the Construction

\* Delivered at the *Conference on Arbitration for the Judiciary* on March 23, 2006 at the Intercontinental Manila, Makati City, Philippines. *Transcribed.*

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He is also a Fellow of the Hong Kong Institute of Arbitrators.

He is an accredited arbitrator for domestic and international disputes in the Philippine Dispute Resolution Center, Inc.

Industry Arbitration Commission (CIAC) and labor arbitration by the Voluntary Arbitration of Labor.

A modern arbitration statute is one based on the principles of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards and also the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration. These are the pillars of modern arbitration law and practice. The New York Convention is the convention on the recognition and enforcement of foreign arbitral awards. To date, there are more than 140 jurisdictions around the world that have adhered to the Convention. All

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(PDRCI) where he is a member of its Board of Trustees, its Deputy Secretary General and concurrently the co-chair of its Education Committee.

He chaired a domestic arbitral tribunal in PDRCI (PDRCI Case No. 19-2002J-SSP) and once served as sole arbitrator in an international commercial dispute by appointment of the International Chamber of Commerce International Court of Arbitration (ICC Case No. 11526/TE, Singapore).

He has been and continues to be a faculty member at the Far Eastern University Institute of Law where he held the JAKA Professorial Seat from 1995-1996 and where he handled a wide range of subjects in Civil, Political and Commercial Law, as well as subjects in legal practice including Arbitration and ADR Seminar. He is also a faculty member at Arellano University School of Law.

He is a former President of the Far Eastern University Law Alumni Association (2000-2001); former President of the Far Eastern University Institute of Law Faculty Club (1996-1997); former Chapter President of the IBP Caloocan-Malabon-Navotas Chapter (1993-1995) and a former chair of the IBP National Committee on Public Services (1997-1999).

jurisdictions that have adhered to the Convention are obliged by treaty to enforce arbitral awards rendered in member countries. The Philippines is one of those that have adhered to the New York Convention of 1958.

Moreover, discussions in this paper will not apply to treaty arbitrations, which are, as a rule, arbitrations without privity. An example would be the International Center for Settlement of Investment Disputes (ICSID) Arbitration whereby there is actually no arbitration clause between the Philippines and Fraport, and yet we find that they are arbitrating in Washington under the ICSID Convention. Take note that as a rule, their process is outside the judicial authority of any country and moreover, their process has no recourse against the award procedure. The Convention promises automatic enforcement of its awards. Treaty arbitrations are also not covered by our discussion.

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As a lawyer, he has extensive practice in litigation, negotiation and contract preparation and administration. For a while, he was an associate attorney in the firm Tanjuatco Oreta Tanjuatco Berenguer and Sanvicente (1987-1989) and was General Counsel in the Philippines for Kumho Construction & Engineering, Inc. (1986-1989), after previously being its Philippine Branch's House Counsel and Administrative Manager (1983-1985).

He obtained his Bachelor of Laws degree from the Far Eastern University Institute of Law in 1982, graduating valedictorian and *magna cum laude*. He was admitted to the Bar in 1983 after placing 12<sup>th</sup> in the 1982 Bar Examinations with a rating of 88.2 percent.

His professional activities include lecturing as resource speaker in ADR and commercial arbitration in mandatory continuing legal education seminars all over the country.

## II. PARTY AUTONOMY

There is party autonomy in the resolution of disputes when the disputants have the capacity to make a choice among viable dispute resolution systems to resolve their disputes and can make the choice for reasons with which they are comfortable with.

The basic premise is the premise underlying contracts. The idea is that, once a person reaches the age of majority, which is 18, he can make informed decisions as an adult. So he has discretion. In the same manner that adults have the capacity to create legal relations by contract, then so too should they be allowed to make their own arrangements in resolving their disputes.

When we talk about the law that is supposed to enhance party autonomy, the law first should allow **viable choices**. The second point is that the law should provide **default workable rules**. These are the rules that will apply in the absence or deficiency in an agreement. An example is a simple mediation clause. We have seen from contracts “any dispute arising out from this contract shall be referred to mediation before the parties can go to arbitration or litigation.” Is this mediation clause workable if there is a recalcitrant party? The answer is no, it is not workable.

A recalcitrant party will ask the following:

1. What kind of mediation are we talking about?
2. Is it facilitative?
3. Is it evaluative?
4. Where are we going to mediate?
5. How many mediators?
6. What will be the language that we are going to use?

7. How about the fees of the mediators?
8. Who is going to pay them and how much?

So we can see that this very simple clause without proper default rules will not be workable if there is a recalcitrant party. In this connection, the law itself must provide the default provisions like:

The parties are free to agree on the place of mediation. Failing such agreement, the place of mediation shall be any place convenient and appropriate to all parties.<sup>1</sup>

Without this clause, without such provisions in the law, then the matters we mentioned earlier will be additional bones of contention if and when an issue or a dispute will arise.

The consent on the categories of choice must be independent. Consent should not be one derived from a higher or a perceived category of choice. A derivative consent is anathema to principles enhancing individual freedom and integrity. We talk about the forum, the rules, the arbitrators, which in all of these categories of choice in arbitration, the consent must be independent rather than derivative. The counterpart of course is that freedom seldom comes without responsibilities. Once a party has agreed to an arbitration clause, then he is bound by that agreement, which must be enforced.

Party autonomy is not absolute but is subject to public policy safeguards. Insofar as this is concerned, the law may step in to protect the disadvantaged in cases where there is a lopsided power imbalance between certain classes of negotiating parties. There

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I. Alternative Dispute Resolution Act of 2004, Republic Act No. 9285, Sec. 15.

are certain instances like in labor contracts where there is a power imbalance between the parties. Certainly, capital has a great negotiating power whereas a prospective employee will have a weak negotiating power. In these instances, it is believed that by controlling or withholding party autonomy from the parties, the laborer or the prospective employee could better bargain on the matters that really matter to him like salaries, employee benefits, and employee perks. In contrast, if given party autonomy, the laborer or prospective employee will be thinking about the future of his children, their roof, the education of his children. This will exert some sort of undue influence on the part of the prospective employee such that if offered a contract of employment, in addition with an arbitration clause, then the employee would simply sign without knowing what he is getting into. As we can see, when a law is proposed to enhance party autonomy, it should have directory provisions and also mandatory provisions.

### III. PARTY AUTONOMY AND “TRUE” ARBITRATION

#### *A. Basic Concept of “True” Arbitration*

##### I. As a Mode of Dispute Resolution

Now we go to true arbitration. Here, we are talking about arbitration as a mode of dispute resolution whereby the parties waive their right to go to court in resolving their dispute and instead agree to accept as final the decision of the third party of their choice; the basis as agreed upon by the parties; the proceedings in a language of their choice; the place of their choice; and following the rules and procedures that they have agreed upon. You will notice that in all of these, we are talking about choices, and consent.

## 2. Parties Waive Their Access to Court Rights

Arbitration is a mode of dispute resolution under jurisdictional classification. Why jurisdictional? Because the arbitrator is given jurisdiction by the parties. Parties to an arbitration agreement waived their access to court rights.<sup>2</sup> This is also applicable to domestic arbitration. Should Your Honors desist an action in the Regional Trial Court (RTC) in an arbitration clause if at least one party so requests not later than the pre-trial conference or upon the request of both, then Your Honors should refer the parties to arbitration.

There are cases when third parties are involved. Here the court shall refer to arbitration those parties who are bound by the arbitration agreement although the civil action may continue as to those who are not bound by such arbitration agreement. It has been said that this provision corrected the ruling in *Del Monte Corporation-USA v. Court of Appeals*.<sup>3</sup> In fairness to the judge who decided this, actually *Del Monte* is compatible with the Model Law provision. The issue in *Del Monte* was whether to suspend or not to suspend the proceedings because of the motion filed. In the motion, the interested party requested a suspension of the proceedings to await the arbitral award. The ruling is correct, it should not be suspended because as we said before:

x x x when the action is commenced by or against multiple parties the Court shall refer to arbitration those parties who are bound although the civil action may continue as to those not bound by the arbitration agreement.<sup>4</sup>

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2. *Id.* Sec. 24.

3. G.R. No. 136154, February 7, 2001, 351 SCRA 373.

4. RA No. 9285, Sec. 25.

Probably, had the other party requested that those bound by the arbitration agreement should be referred to arbitration, then that would be a different matter if there is another ruling. The agreement is to accept as final the decision of the third party of their choice whether the decision be right or wrong.

### 3. Principle of Finality of Arbitral Awards

Arbitration is a consensual agreement to refer matters necessarily involving tax and law to the arbitral tribunal who will have the last word on these issues. We are now talking about the finality of arbitral awards.

Let us take for example two siblings who are quarrelling and agreed that in order to end their dispute, they would go to their father, and whatever his decision, they will follow. That is an arbitration agreement. If that agreement was put in writing, that would qualify as an enforceable arbitration agreement under our domestic arbitration law. Take note that the parties did not say that the decision of the father should be correct or should be right as to the facts or law. They agree to abide by it.

The essence of decisional law is that arbitral award shall put the dispute to rest. Arbitral finality is a core component of the parties' agreement. An arbitration decision is final and conclusive because the parties have agreed that it be so. It vindicates the intention of the parties that the award is final.

A casual condition is dependent on the will of the parties. The arbitrator's decision will be the casual condition from which the liability or obligations of the parties would arise. And therefore, when we enforce an arbitral award, we are actually enforcing the agreement between the parties. What is the agreement? That the parties shall accept as final the decision of the arbitrator. That is

the casual condition. When that award is enforced, what is really being enforced is the agreement between the parties.

The award is not subject to appeal and judicial review. Judicial review of the award is on very limited grounds. There is an opinion in local circles that an award is appealable and this opinion is already incorporated in the proposed implementing rules and regulations. Appeal connotes an attack against the judgment of the tribunal, therefore, it goes against the proposition that an award is final. In this respect, are courts excluded? No, courts are not excluded. An award is subject to judicial review by the RTC on very limited grounds. It is the action of the RTC regarding an award that may be appealed to the Court of Appeals. Let us now look at the following provisions: Section 4I of RA No. 9285 provides that

a party to a domestic arbitration may question the arbitral award with the appropriate Regional Trial Court in accordance with rules of procedure to be promulgated by the Supreme Court only on those grounds enumerated in Section 25 of Republic Act No. 876.<sup>5</sup> Any other ground

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5. **SEC. 25. *Grounds for Modifying or Correcting Award.***

– In any one of the following cases, the court must make an order modifying or correcting the award, upon the application of any party to the controversy which was arbitrated:

- (a) Where there was an evident miscalculation of figures, or an evident mistake in the description of any person, thing or property referred to in the award; or
- (b) Where the arbitrators have awarded upon a matter not submitted to them, not affecting the merits of the decision upon the matter submitted; or

raised against a domestic arbitral award shall be disregarded by the Regional Trial Court.

Then we have Section 29 of RA No. 876,<sup>6</sup> where an appeal may be taken from judgment entered upon an award.

It is the judgment of the RTC that is appealable, not the award. What about in international arbitration? Again let us look at the provisions involved. First is Article 34 of the Model Law<sup>7</sup>

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- (c) Where the award is imperfect in a matter of form not affecting the merits of the controversy, and if it had been a commissioner's report, the defect could have been amended or disregarded by the court.

The order may modify and correct the award so as to effect the intent thereof and promote justice between the parties.

- 6. **SEC. 29. Appeals.** – An appeal may be taken from an order made in a proceeding under this Act, or from a judgment entered upon an award through *certiorari* proceedings, but such appeals shall be limited to questions of law. The proceedings upon such an appeal, including the judgment thereon shall be governed by the Rules of Court in so far as they are applicable.
- 7. **ART. 34. Application for Setting Aside as Exclusive Recourse Against Arbitral Award.**
  - (1) Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of this Article.
  - (2) An arbitral award may be set aside by the court specified in Article 6 only if:
    - (a) the party making the application furnishes proof that:
      - (i) a party to the arbitration agreement referred to in Article 7 was under some incapacity; or the said

on the application for setting aside as exclusive recourse against arbitral award.

Section 45 of RA No. 9285 provides that:

A party to a foreign arbitration proceeding may oppose an application for recognition and enforcement of the

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agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of this State; or

- (ii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or
- (iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, *provided that*, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or
- (iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law; or

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 Regional Trial Court.

This is judicial review of the award on very limited grounds. What can be appealed? A decision of the RTC confirming, vacating, setting aside, modifying or correcting an award may be appealed to the Court of Appeals. It is not the award itself that may be appealed, rather it is the decision of the RTC that is subject to appeal.

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(b) the court finds that:

- (i) the subject matter of the dispute is not capable of settlement by arbitration under the law of this State; or
  - (ii) the award is in conflict with the public policy of this State.
- (3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the award or, if a request had been made under Article 33, from the date on which that request had been disposed of by the arbitral tribunal.
- (4) The court, when asked to set aside an award, may, where appropriate and so requested by a party, suspend the setting aside proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside.

Let us look at a case decided in India. The Indian court decided to correct an award because according to the court the award should have allowed liquidated damages. The ruling clarified that it only applies to domestic arbitration. Nevertheless, it became a subject of sharp criticism inasmuch as it excused the delicate balance between finality of arbitral awards on one hand and permissible judicial review on the other. This is a situation where a court corrected an award.

What would be the discretion of the court? Here, we are talking about the RTC. The discretion of the court is either to reject the award or to uphold the award. In proper cases, the court may refer the award back to the arbitral tribunal to enable the latter to correct the defects in the award. What the court cannot do is to substitute its own judgment over that of the tribunal because to do so amounts to making a contract between the parties.

Remember that the contract between the parties provides that they will accept as final the decision of the third party of their choice. At the moment that was replaced, that is no longer the decision of the third party of their choice. There are only two options – throw it out or confirm it. If it may be corrected, then send it back to the arbitral tribunal so that the arbitral tribunal could make the necessary amendments.

There are certain instances when the enforcement court has before it a petition for enforcement. But at the same time, the loser filed a petition to set aside in the so-called seat of arbitration. In these cases, the enforcement court may either suspend or continue the enforcement proceedings. Let us put it this way, suppose there was an arbitration that was finished here in the Philippines, international arbitration, what the loser will do at this point is to file a petition to set aside. What the winner will do

is to file a petition for enforcement in other countries where the loser has properties. A petition or petitions for enforcement may be filed simultaneously in several countries. So if the Philippines were to lose the arbitration in Singapore, we will end up facing enforcement proceedings in various countries where the Republic of the Philippines has assets. But of course, since there are now two proceedings, then the enforcement proceedings may be suspended.

The agreement is to accept as final the decision of the third party of their choice, the basis as agreed upon by the parties and agreeing further on the place of arbitration and the language of arbitration. The parties will even make their own rules in the arbitration. For that matter, if we are talking about international arbitration, there are several categories of choice insofar as the applicable law is concerned. First, the parties may agree on a system of law that will govern their arbitration agreement. Second, the parties may agree on the system of law that will govern their main contract. Third, the parties may agree on the system of law that will govern their arbitral procedure although at this point we always caution everybody that practically no court in the world will accept the proposition that their **curial law** may be substituted by another **curial law**. If there is an agreement, for example, that the **curial law** of the Philippines will not apply in an ongoing arbitration in the Philippines, then that would probably be not a valid stipulation. Fourth, the parties may agree on the conflict of laws that would apply. For that matter, the parties may agree that no system of law will apply and that the dispute be decided on the basis of equity. So then let us no longer consider the systems of law. Let the arbitral tribunal decide it as amicable compositors or *decision et aequo et bono*.

### ***B. Arbitration Distinguished from Its Variants***

We have been talking about the so-called variants mentioned earlier. When we talk about a variant, it is a creation of law meaning there is a law creating it. When we talk about a true arbitral tribunal, it is a creation of the parties. A variant is considered as an instrumentality of the government if not an administrative agency. That was the decision of our Supreme Court in the case of ***Luzon Development Bank v. Association of Luzon Development Bank Employees***.<sup>8</sup> A true arbitral tribunal is an instrumentality of the parties. They are the third party that is necessary in a casual condition because the decision is left to the will of the third party.

**Jurisdiction.** The jurisdiction of a variant is defined by law. In arbitration, the agreement of the parties defines and limits the jurisdiction of the arbitral tribunal.

**Party Autonomy.** There is no party autonomy in a variant, and consent to the forum and the rules is derivative in those cases where the variant was not the preferred forum.

Let us talk about the construction agreement in Sulu. The parties agreed to an arbitration clause. The agreement is that the arbitral institution will be the Philippine Chamber of Commerce and Industry (PCCI) or the International Chamber of Commerce (ICC). That agreement between the parties is valid in accordance with one decision but most likely can not be enforced here in the Philippines. They have to go to the Construction Industry Arbitration Commission in Manila or in Makati because there is a rule that the hearings or proceedings can only take place within CIAC hearing rooms and since that is in Makati, the parties will

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8. G.R. No. 120319, October 6, 1995, 249 SCRA 162.

have to bring their case from Sulu to Makati. That is the variant. As to arbitration, it is synonymous with arbitration where the consent of the parties to the process, the basis of the award, the forum and the rules are independent.

**Power of Enforcement.** Variants are normally vested by law with the power of enforcement. In contrast, arbitral tribunals have no power to enforce their orders, decisions, and awards.

**Enforceability Outside the Philippines.** If the variant was not the preferred forum, its enforceability outside the Philippines is doubtful. Why? Because immediately there is an objection. The procedure in the forum was not in accordance with the agreement between the parties. In contrast, when we talk about an arbitral award, it is enforceable outside the country of origin by treaty, the New York Convention of 1958.

**Right of Appeal of Award/Decision.** A variant's decision is subject to and may be corrected on appeal; an arbitral award is not appealable.

### ***C. Classification of Arbitration***

#### **I. Ad Hoc Arbitration and Institutional Arbitration**

In an Ad Hoc Arbitration, the parties themselves device the procedures, or the "do it yourself" arbitration.

If we go institutional, then we need to make a decision. Do we want it to be partly administered, where the institution only receives the request for an arbitration and performs certain functions as requested by the parties? The Hong Kong International Arbitration Center is partly administered. The Philippine Dispute Resolution Center, Inc. (PDRCI) had amended its rules, it is now partly administered. The ICC

arbitration is fully administered, where all the necessary things to be done in arbitration proceedings will be under the supervision of the institution until the rendering of the award. In ICC, you have to make reports. The parties will have to do a lot of things because ICC exercises supervision until the rendering of an award.

## 2. Domestic and International Arbitration

Then we have domestic and international arbitration. It is local arbitration if the seat of arbitration is in the Philippines. It is foreign when the seat of arbitration is a country other than the Philippines. Why do we need to classify this? Because different provisions of the law apply to different situations. If the arbitration is domestic, it is governed by RA No. 876 as amended by RA No. 9285. There are also the provisions of the New Civil Code, Title 14 on Compromises and Arbitrations. A local international arbitration is governed by the Model Law on International Arbitration. In a foreign arbitration where the Convention country is the seat of arbitration, the New York Convention shall govern the recognition and enforcement of arbitral awards. Example, in PIATCO, the seat of arbitration is in Singapore so that is foreign arbitration. Singapore is a signatory to the New York Convention, so Singapore is a Convention country.

Suppose now that the arbitral tribunal rendered an award. If that award would be enforced here in our country, what law would be applied by the courts? It is the New York Convention of 1958. But suppose that that arbitration is going on in North Korea. North Korea is not a Convention state and so it is now a foreign arbitration in a non-Convention country. It is enforceable here in the Philippines but based on comity and reciprocity. The enforcement will be as an award, not as a court judgment, even if

confirmed by a court in North Korea. It is the award that will be enforced not the decision of the court on the award. As you may have noticed earlier, it is possible that a petition to set aside is pending in the seat of arbitration. But then the winner will be taking the award already to a country of enforcement and he will now be filing a petition in a country of enforcement. In this case, a confirmation is not needed in international arbitration. As a matter of fact, it is not tactically sound for the winner to file an action for confirmation. Why? He will only provide a strong ground to suspend the enforcement proceedings. If he were to lose, more so, because that is now a ground for the enforcement court to reject also the award. For this reason, there is no need to file a petition for recognition. If you win, proceed immediately to the country where the loser's assets lie and cause the enforcement. Of course it would be different if the award is meant to be enforced at the place or the seat of arbitration.

Thank you very much.

# Approaches to Court Involvement in Arbitration\*

*Prof. Mario E. Valderrama\*\**

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## I. INTRODUCTION

Good afternoon, Your Honors, I will focus my discussion on the approaches of the courts to arbitration.

### ***A. Interventionist Approach***

Initially, the approach of our courts is interventionist in the sense that in various aspects of arbitration, from beginning to end, courts may intervene. This is characterized by the unwillingness of the state to surrender adjudicatory functions to possibly

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He is also a Fellow of the Hong Kong Institute of Arbitrators.

He is an accredited arbitrator for domestic and international disputes in the Philippine Dispute Resolution Center, Inc. (PDRCI) where he is a member of its Board of Trustees, its Deputy Secretary General and concurrently the co-chair of its Education Committee.

He chaired a domestic arbitral tribunal in PDRCI (PDRCI Case No. 19-2002J-SSP) and once served as sole arbitrator in an international commercial dispute by appointment of the International Chamber of Commerce International Court of Arbitration (ICC Case No. 11526/TE, Singapore).

He has been and continues to be a faculty member at the Far Eastern University Institute of Law where he held the JAKA Professorial Seat from 1995-1996 and where he handled a wide range of subjects in Civil, Political and Commercial Law, as well as subjects in legal practice including Arbitration and ADR Seminar. He is also a faculty member at Arellano University School of Law.

He is a former President of the Far Eastern University Law Alumni Association (2000-2001); former President of the Far Eastern University Institute of Law Faculty Club (1996-1997);

“untrained individuals.” There are still opinions up to this time that adjudicatory functions should not be delegated to untrained individuals.

When this Republic Act (RA) No. 9285<sup>1</sup> was being discussed in the Senate, there were objections and suggestions that before one may be appointed as dispute resolver, one should first undergo training and accreditation requirements. But then, we said that

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former Chapter President of the IBP Caloocan-Malabon-Navotas Chapter (1993-1995) and a former chair of the IBP National Committee on Public Services (1997-1999).

As a lawyer, he has extensive practice in litigation, negotiation and contract preparation and administration. For a while, he was an associate attorney in the firm Tanjuatco Oreta Tanjuatco Berenguer and Sanvicente (1987-1989) and was General Counsel in the Philippines for Kumho Construction & Engineering, Inc. (1986-1989), after previously being its Philippine Branch’s House Counsel and Administrative Manager (1983-1985).

He obtained his Bachelor of Laws degree from the Far Eastern University Institute of Law in 1982, graduating valedictorian and *magna cum laude*. He was admitted to the Bar in 1983 after placing 12<sup>th</sup> in the 1982 Bar Examinations with a rating of 88.2 percent.

His professional activities include lecturing as resource speaker in ADR and commercial arbitration in mandatory continuing legal education seminars all over the country.

- I. An Act to Institutionalize the Use of an Alternative Dispute Resolution System in the Philippines and to Establish the Office for Alternative Dispute Resolution System in the Philippines and to Establish the Office for Alternative Dispute Resolution, and for Other Purposes, Republic Act No. 9285, April 2, 2004.

this is actually limiting the freedom of the parties, and nobody has the right to tell another person that the first knows better than the other person, especially if the person appointed to handle the case is an expert on that field or case.

As a result, the legislature sided with us. And so, at present, minimal requirements are required before any person may be appointed as a dispute resolver.

An example of interventionist approach is RA No. 876<sup>2</sup> before its amendment. Under this law, there is too much court intervention. If there is a recalcitrant party, you need to go to court; for appointment of arbitrators, you need to go to court; for replacement of arbitrators, you need to go to court; for issues on jurisdiction of the arbitral tribunal, you need to go to court; for issues on disqualification of the tribunal challenge incidents, you need to go to court. In all of these instances, the arbitral proceedings will be suspended. No wonder that before RA No. 9285, an executive judge commented, "Why should we promote arbitration? Instead of solving our docket, it will only increase our docket problems." Anyway, that has been changed, because this approach has been slowly losing ground.

To be workable, the interventionist approach process has to be accompanied by continuous voluntary party participation from beginning to end.

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2. An Act to Authorize the Making of Arbitration and Submission Agreements, to Provide for the Appointment of Arbitrators and the Procedure for Arbitration in Civil Controversies, and for Other Purposes, Republic Act No. 876, June 19, 1953.

## **B. Non-Involvement**

### I. A National Arbitration

An opposite approach is that courts should not be involved at all in arbitration. We have the concept of a **national arbitration** where transborder commercial arbitrations are completely outside the regulatory reach of national laws and national juridical authority.

### 2. Tempering Concept

The **tempering concept** is *lex loci arbitri*. When the parties designate a country as the seat of arbitration, they are deemed to have entered that country and the arbitration is subject to the sovereign law of the state. For example, when parties agree that the seat of arbitration shall be in Metro Manila of the Republic of the Philippines, they are deemed to have entered our country and the arbitration will be subject to our laws and judicial authority. Because of this concept, the parties would only choose a country which is arbitration-friendly as the seat of arbitration.

And since our country, under RA No. 876 (before RA No. 9285), is not arbitration-friendly where the arbitration involved is court-supervised if not court-controlled, then nobody would come to us. They would rather go to Hong Kong or to Singapore.

### 3. Arbitrations Outside the Court's Regulatory Reach

There are still arbitrations outside the court's regulatory reach. We have the Kuala Lumpur Regional Center for Arbitration (KLRCA). But the perceived problem is – arbitral tribunals may have *ius* but they do not have *imperium*. Before, Malaysian courts would say that Section 34 of Malaysia's Arbitration

Law actually excludes court participation, whether supervisory or assistive. But now, I think, Malaysians know that arbitration needs the courts. A later ruling by the Appellate Court of Malaysia is to the effect that Section 34 did not exclude assistance to be given by the court.

[**Note:** In 1972, Malaysia revised its Arbitration Act (1952) by enacting Section 34, which substantially states that “the provisions of the 1952 Act shall not apply to KLRCA Arbitrations.” It was reported that there were two conflicting decisions reached by the High Court and the Court of Appeals in Malaysia. The first interpreted Section 34 literally such that court assistance is not allowed because Section 34 completely ousts the jurisdiction of courts; the second interpreted Section 34 to mean that courts may not interfere in the arbitration itself but will not prevent the court from supporting the process.<sup>3</sup>]

### *C. The Developing Trend: Deregulated Approach*

A developing trend that we have now is the deregulated approach. As a general proposition, courts do not intervene in the process. Courts come in **after** the process; after an award was already rendered; or during the enforcement or setting aside of the award stage. However, the courts have supervisory and supportive roles in arbitration. But please take note that the supervisory role of the court is limited by the territoriality principle. Your Honors’ rulings will only be valid and binding within the territorial jurisdiction of the Republic of the Philippines. Outside of that, there is a possibility that the foreign courts may not recognize the rulings of local courts.

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3. Colin Ong, “Latest Developments in Arbitration in Malaysia and Brunei,” *Asian Dispute Review*, January 2006, page 8.

[**Note:** A municipal court ruling or judgment may be given effect in foreign soil because of “comity,” “reciprocity,” or “to avoid inconsistent results in the decisions of the court of origin and court of enforcement.” Nevertheless, in enforcement proceedings, the court of enforcement is paramount such that, if it so desires, it could be unfettered by any ruling or decision rendered or to be rendered by courts in other jurisdictions.]

And so, case law in commonwealth countries show the inclination to exercise discretion on whether or not to suspend enforcement proceedings during the pendency of proceedings to set aside the award in the seat of arbitration. And courts in the United States and in France have enforced awards that were previously set aside in the respective courts of origin.]

#### I. Philippines’ New Arbitration Law

Our arbitration law has been changed, we now have RA No. 9285 that reflects this trend. *First*, the mandate is for courts to refer to arbitration parties bound by an arbitration agreement. *Second*, parties can initiate arbitral proceedings without going to court. How is this? If there is a recalcitrant party, *ayaw mag-participate*, *ayaw mag-appoint ng* party-appointed arbitrator, there is no need to go to court. Go to the appointing authority who will make the necessary appointment. Once the tribunal is constituted, then everything will proceed. Courts are excluded in the appointment or replacement of arbitrators also in challenge incidents. All of these functions were transferred from the court to the appointing authority.

Who is the appointing authority? The appointing authority is the authority, the person or the institution designated by the parties. Anyone could be designated as the appointing authority. So it is really up to the parties. If the parties would opt to be governed by the rules of an arbitral institution, then the

presumption is that the arbitral institution is the appointing authority. For example, the parties say that the arbitration will be pursuant to the rules of the Philippine Dispute Resolution Center (PDRC), then the PDRC shall be the appointing authority. Of course, parties may agree that arbitration shall be conducted pursuant to the rules of PDRC, and designate somebody as the appointing authority. That is also possible.

What if the parties did not designate anybody and would like to go *ad hoc*? Now in that case, the appointing authority will be the National President of the Integrated Bar of the Philippines (IBP) or his duly authorized representative, referring to the chapter presidents or the IBP governors. That is the default provision in the law.

When does the court come in? If the appointing authority failed to perform his functions within 30 days, counted from the request for him to do so, then the interested party may renew the application to the court, and by this we mean the Regional Trial Court. In which case, the RTC now may be the appointing authority.

[**Caution:** See the provisions involved. The “bad wording” of Section 27 of ADR Act 2004 may be interpreted to mean that requests for court assistance in establishing the tribunal will have to be made at each instance that the appointing authority failed or refused to perform his functions within 30 days from receipt of request for the latter to do so. And, in Section 27 regarding the IBP President or his authorized representative as the authority who can make the “default appointment” of an arbitrator in *ad hoc* arbitrations where the parties failed to designate an appointing authority, the wording may be interpreted to mean that the IBP President/his representative can only make the “default appointment,” but cannot perform the other functions of an appointing authority.]

We now have *kompetenz kompetenz* in our international arbitration law. As mentioned, this is the jurisdiction of arbitral tribunals to determine their own jurisdiction. Before, under RA No. 876, this had to go to the Court. Unfortunately, the law failed to grant *kompetenz kompetenz* to domestic arbitration, which created a problem. In this connection, the proposed IRR granted *kompetenz kompetenz* to domestic tribunals to cure the deficiency in the law, which to my mind, is invalid.

In the **UNCITRAL Model Law Article 19**, the tribunal may rule on its own jurisdiction including any objection with respect to the existence or validity of the arbitration agreement. You will notice that this is only a preliminary ruling because this may be elevated to the court. As mentioned by Mr. Robin S. Peard, the decision shall not be subject to appeal, but any party may request to decide the matter within 30 days after receiving notice of that ruling in the court specified in Article 6. The court specified in Article 6 in the Philippines is the Regional Trial Court. Let us say for example that the jurisdiction of the arbitral tribunal was questioned, a party would say “Look, your arbitration agreement is invalid, it is contrary to law, it is against public policy.” The tribunal may say “No, we have jurisdiction.” What is now the recourse of the defeated party? The defeated party can go to court. But please take note, as mentioned by Robin, that the tribunal may defer its ruling and just include it in the award on the merits.

*Kompetenz kompetenz* is complemented by the autonomy of the arbitration agreement and so to a certain extent, arbitration agreements are considered independent from the main contract. So it does not follow that if the main contract was void, the arbitration agreement is likewise void because the agreement may be valid although the main contract is void and *vice versa*. This is more important in international arbitration. Courts can only

intervene in the process in the cases so provided by law. More important still, the pendency of court proceedings is not a ground to stay the arbitral proceedings, which can continue up to the rendering of an award.

[**Note:** India's Arbitration Law retained the supportive role of courts, but removed the courts' supervisory role by deleting the power to entertain an objection to the effect that the arbitration agreement is "null and void, inoperative, or incapable of being performed."]

## 2. The Supportive Role of Courts

These are the supportive roles of courts:

- a. In interim measures of protection;
- b. Assistance in taking evidence; and
- c. Performance of functions of the defaulting appointing authority.

## 3. The Supervisory Role of Courts

The supervisory role of courts includes the following:

- a. to make a ruling on the jurisdiction of the arbitral tribunal as a preliminary point;
- b. to correct minor errors and omissions (only in domestic arbitration but is not applicable to international arbitration where the power to do so is vested in the arbitral tribunal);<sup>4</sup>
- c. a recourse against enforcement of awards (only in so far as the issues involved refer to the jurisdiction of the arbitral tribunal).

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4. UNCITRAL Model Law on International Commercial Arbitration, Art. 33.

## II. COURTS INVOLVED: MEANING OF “COMPETENT COURT”

Which court is the competent court? First of all, “competent court” refers to different courts in different jurisdictions depending on the aspect of arbitration involved.

### A. *Administering Institutions/Appointing Authority*

1. As a general proposition, the refusal, failure or inability of the administering institution or appointing authority to perform its functions is subject to review by the court in the jurisdiction where the institution or authority is located.

If we are talking about the **administering institution**, the competent court, as a general proposition, is the court in the jurisdiction where the institution or authority is located. If a person would like to question the action of the PDRC, then he has to file the case before the Regional Trial Court in the Republic of the Philippines.

An equivalent in the Philippines is the ADR Act 2004 Section 27 which says an applicant may renew application to the court if the appointing authority fails or refuses to act within 30 days from receipt of the request for the appointing authority to perform its function/s.

2. But when we talk about the International Chamber of Commerce, the ICC uses the descriptive clause: “any court having jurisdiction as to whether or not there is a binding agreement.”<sup>5</sup> And so an ICC ruling that there is no binding agreement may be questioned here in the Philippines if the

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5. International Chamber of Commerce Rules, Art. 6.2.

Philippines is the seat of arbitration, which of course would be very rare.

[**Caution:** Invoking ADR Act 2004, Section 27 in an ICC Arbitration (with the Philippines as the seat) may close the door to ICC as the appointing authority, with the local court involved taking its place, resulting to several complications.]

## ***B. Other Assistive Roles of Courts***

### **I. Issuance of Interim Measures of Protection**

In interim measures of protection, which will be discussed by Atty. Eduardo R. Ceniza, we are talking about the country where the court has jurisdiction and can enforce the order. If the property is located here and the party would like an interim measure of protection to be issued, then it is the RTC in the Philippines where the petition for an interim measure should be filed. This is the provision in RA No. 9285, Section 47 which states that:

**SEC. 47. Venue and Jurisdiction.** – Proceedings for recognition and enforcement of an arbitration agreement or for vacation, setting aside, correction or modification of an arbitral award, and any application with a court for arbitration assistance and supervision shall be deemed as special proceedings and shall be filed with the Regional Trial Court (i) where arbitration proceedings are conducted; (ii) where the asset to be attached or levied upon, or the act to be enjoined is located; (iii) where any of the parties to the dispute resides or has his place of business; or (iv) in the National Judicial Capital Region, at the option of the applicant.

### **2. Court Assistance in Taking Evidence**

Only the competent court in the seat of arbitration can give assistance in taking evidence. This is in Article 27 of the UNCITRAL Model Law, which states that:

**ART. 27. Court assistance in taking evidence.** – The arbitral tribunal or party with the approval of the arbitral tribunal may request from a competent court of this State assistance in taking evidence. The court may execute the request within its competence and according to its rules on taking evidence.

### *C. On the Supervisory Role of Courts*

What about the supervisory role of the courts? There are two important courts. We have, first, the **supervising court**. This is the court with primary jurisdiction, the court in the seat of arbitration. Let us take for example the *Agan, Jr. v. PIATCO*<sup>6</sup> arbitration. The seat of arbitration is Singapore. So which one is the supervising court? This would be the court in Singapore.

Second is the **enforcement court**, also called the court with secondary jurisdiction. This is the court in the country of enforcement. So if an award is being enforced and the properties are located in the Philippines, necessarily the petition will be filed in our country, the country of enforcement, so our RTCs will be the enforcing courts.

What then is the role of the home court of the parties if it is neither the supervising court nor the enforcement court? It can either refer or refuse to refer the parties to arbitration depending on its findings regarding the validity, workability or enforceability of the arbitration agreement. Can it go farther than that? No. What if it were to do so? Then there is a possibility that its ruling will not be recognized by the parties or by the enforcing court or by the court in the seat of arbitration not even on the basis of

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6. G.R. Nos. 155001, 155547, 155661, May 5, 2003, 402 SCRA 612.

“comity,” “reciprocity,” “a judicial determination in one jurisdiction is entitled to respect in another,” or “to avoid inconsistent results.” Why? The home court is not a competent court.

[**Note:** The usual arguments for a national court to sustain the ruling of a foreign court are (a) comity, (b) reciprocity, (c) a judicial determination in one jurisdiction is entitled to respect in another, and (d) to avoid inconsistent results in different judicial bodies. These arguments are useless if the interfering jurisdiction **is neither the seat of arbitration nor the country of enforcement**. The reason is simple: the interfering jurisdiction is not a “competent court,” hence, its ruling is irrelevant.

An international arbitration agreement with a seat in a foreign country and choice of law clause is similar to a forum selection and choice of law clause in an international contract. Hence, for a national court to assume jurisdiction even if it were not the selected forum may be viewed as an interference in the jurisdiction of the selected forum.]

What about Articles 1, 2, and 8 of the UNCITRAL Model Law? First, we have Article 1. The provisions of this law except Article 8 apply only if the seat of arbitration is in the territory of the state. Article 8 may be applied overseas even outside of the seat of arbitration. And Article 8.1 says:

A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative and incapable of being performed.

But the problem is that, this is not the more important provision of the law. Rather, the more important provision of

the law would be Article 8.2 and the principle of territoriality, if a court, which is not the enforcing court, or which is not the supervising court, will intervene in arbitration. First of all, how can that court interfere in an arbitration taking place elsewhere? Can our court stop or interfere in the arbitration going on in Singapore where the Republic of the Philippines is a respondent? We cannot because of the principle of territoriality.

Second, Article 8.2 provides:

Where an action referred to in paragraph (I) of this Article has been brought, arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the court.

So if and under ordinary circumstances our court cannot stop that arbitration, and our court were to make a ruling, will that matter? If we look at the grounds to set aside, you will see here that the action of the home court of the parties amounts to zero. It is not a ground to set aside the award.

Still on grounds to set aside an award, we see nothing here stating that the ruling of the home court may be used during the enforcement proceedings. Therefore, when the court says that it is not the seat of arbitration, that the arbitration agreement is unenforceable, it would not mean anything to the supervising court or to the enforcement court. It is not a ground to set aside the award.

This was tried by Indonesia. What if the law of the contract or the law of the arbitration agreement is the law of the home jurisdiction of the parties? In *Karaha Bodas Co. LLC v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara (Pertamina)* [2003] 2HKC 200, what Indonesia did, was to say that the law of the contract is Indonesian law, and therefore

pursuant to this provision, we can now intervene in the courts of Indonesia. And using that argument, the court in Indonesia set aside the arbitration agreement and the award.

Well, what is relevant, said a decision I think in Hong Kong, is the curial law not the substantive law. It follows that the applicable curial law will be that of the seat of arbitration. There is no court that will allow the curial law of another country to be the applicable curial law in a particular country. There is a so-called **partial delocalization** allowed. This has something to do with adopting the rules of an institution, or the parties themselves adopting their own rules of proceedings. What if the home country insists on taking jurisdiction and it is an international arbitration? Can we stop it? Mr. Philip Nunn will discuss that in his lecture on the stay of parallel court proceedings.

Would this tactic work – A party getting a favorable decision from his home court? Yes, it can work, if the so-called “defeated” country would acquiesce. For example, the benefited party who filed the court action in his home court has no property outside that jurisdiction. Why will the defeated party insist to go to the seat of arbitration? It will not work. Or maybe the defeated party would not like to offend the local court as when he would wish to continue doing business in that country. But the real question is, what if the defeated party were to opt to ignore the local court? Now we have an issue of choice versus reality. Should our courts preempt or prevent an international arbitration? There is the proposition that if the jurisdiction of the local court has been invoked in appropriate cases, the court has no option except to apply our law and our domestic public policy. The reason is in Article 7 of the New Civil Code (NCC), which provides for the primacy of the law as follows: Constitution, then statutes, with

international treaties as equivalent to statutes. We also cite the last paragraph of Article 17 of the NCC, which states:

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.

So we have to apply our law.

But this is not the reality. That is why we said theory versus reality. The reality is that unless the parties acquiesce, our courts cannot really interfere if the arbitration has a seat elsewhere. Our example here is the arbitration going on in Singapore concerning *PIATCO and the Republic of the Philippines*. We cannot do anything to stop that. And so why should we even try? And if it were to happen now that the parties have designated the Philippines as the seat of arbitration, why should local courts interfere? Unless of course if we want to transmit the message that contracting parties should not make the “mistake” of designating the Philippines as the seat of arbitration. Because if this will be our policy, then let us now see the unintended consequences of an unwarranted court interference.

#### ***D. Unintended Consequences of Unwarranted Court Interference***

First of all, this will have a negative effect on our competitiveness as a possible dispute resolution hub. At present, nobody comes to us to resolve their disputes, particularly international parties. The ICC statistics show that even Filipinos would prefer Australia, first; Singapore, second; and Hong Kong, third. But still, not even Filipinos would not like to arbitrate here in our country.

When Dr. Robert Brenner was here, he used to be the president of the ICC court, I asked him “Now that we have changed our law, would the Philippines be removed from the ICC blacklist?” Well it is not really a blacklist. It is just that in those cases when the ICC may designate the seat of arbitration, the Philippines is not included in the list. So what we would like to do is have the Philippines included in the list. The reason before is because our law was *bad*. Now our law is good. We now have RA No. 9285, we have adopted the UNCITRAL Model Law on International Arbitration. He did not respond directly. He used India as an example and he said “Look, India has a very beautiful law. But then the lawyers and the judges did not cooperate. So until now nobody is coming to India. Directly put, so you are now saying that you are now in a wait-and-see attitude?” The answer – Yes. They are waiting to see how we are going to react to this new law. And by this the emphasis is actually on the lawyers and on the judges.

The second point is we have a negative attitude in improving our country’s sophistication in dispute resolution mechanisms, particularly arbitration. You would agree with me that our level of knowledge in arbitration is very, very low. In international arbitrations, where Philippine corporations are participating using the applicable law of the contract, Philippine law, would you believe that the Chair would most likely be a foreigner? Well, that would refer to party-appointed arbitrators. Serving as party-appointed arbitrators is quite easy, if you do not know what to do, you look for a Chair, and the Chair will most likely make the decision. There was this retired judge, a CIAC-accredited arbitrator who was appointed Director in several government corporations. The government corporations have arbitration clauses with the seat outside of the country and the applicable law is the Philippine

law, and they will employ foreigners as parties' representatives. The parties' representatives' function would be to bring truckloads or suitcase-full of documents to handling counsel so that those documents could be evaluated by the foreign counsel. And he would take witnesses to the foreign counsel so that witnesses could be interviewed by the foreign counsel and their possible testimonies evaluated.

Now the question here is, would we not want to improve our sophistication in dispute resolution just like in other countries? This one brings a very simple, negative effect on foreign investments. This one possible embarrassment is attendant to the court's ruling being ignored, if the "defeated" party were to file a request for arbitration anyway. Look at what happened to us. Our Supreme Court declared the *PIATCO* arbitration agreement as unenforceable. At the end of the day, our government is participating in an arbitration in Singapore pursuant to a judicially declared unenforceable arbitration agreement. So the ruling of our Supreme Court now is being ignored. Look at this:

When a domestic court acts, it acts as an organ of the state for whose actions that state is internationally responsible.

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Most of us are familiar with the concept of *pacta sunt servanda*. A country cannot use its local law to violate a treaty.

Our Republic has entered into a treaty, the New York Convention of 1958, which partly states:

x x x the issuance by a court of an anti-suit injunction that, far from recognizing and enforcing an agreement to arbitrate, prevents or immobilizes the arbitration that seeks

to implement that agreement is inconsistent with the obligations of the state under the New York Convention.<sup>7</sup>

We have discussed this earlier but look at this cautionary word, “the intention to ultimately leave the decision on the issue to the enforcement court is apparent in the UNCITRAL Model Law provision allowing the commencement or continuation and the rendering of an award, as the case may be, of the arbitral proceedings.”<sup>8</sup> These are just reproductions of several provisions.

### ***E. Supervisory Role of Court Distinguished from Its Role in Confirming or Vacating an Award***

A court reviewing an issue or issues involving an arbitration agreement or the jurisdiction of an arbitral tribunal is not reviewing the merits of an award. So, a court in the exercise of its supervisory role may “correct” the ruling of the arbitral tribunal. In contrast, a court, as a general proposition, may not correct an award, insofar as the merits of the dispute are involved.

[**Caution:** The intention to ultimately leave the decision on the issue to the enforcement court is apparent in the UNCITRAL Model Law provision allowing the commencement or continuation and the rendering of an award, as the case maybe, of the arbitral proceedings notwithstanding the filing and during the pendency of a court action involving the validity of an arbitration agreement or the jurisdiction of the arbitral tribunal.<sup>9</sup> And, while the decision

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7. Judge Stephen Schewbel, former President of the International Court of Justice, President of the International Court of Justice, in a paper given in Paris on November 21, 2003 to the *Institut pour l'Arbitrage International*.

8. UNCITRAL Model Law, Art. 8.2.

9. *Ibid.*

of the supervising court will have weight during the enforcement proceedings, still the enforcing court may decide to be unfettered by any judicial decision rendered elsewhere.]

### III. MISCELLANEOUS

#### ***A. Presumptive Venue in Domestic Arbitration***

We have to wait for the rules of procedure to be promulgated by the Supreme Court. Assistive and supervisory roles follow the Rules of Court provisions on venue.

Venue in International Arbitration under Section 47 of RA No. 9285 states that:

Proceedings for recognition and enforcement of an arbitration agreement or for vacation, setting aside, correction or modification of an arbitral award, and any application with a court for arbitration assistance and supervision shall be deemed as special proceedings and shall be filed with the Regional Trial Court (i) where arbitration proceedings are conducted; (ii) where the asset to be attached or levied upon, or the act to be enjoined is located; (iii) where any of the parties to the dispute resides or has his place of business; or (iv) in the National Judicial Capital Region, at the option of the applicant.

#### ***B. Filing Fees***

As we all know, when we talk of an arbitral award it is possible that the amount will be very, very huge more so considering the fact that we will be talking about foreign currency to be converted

to Philippine currency. But we do have a ruling in *Mijares v. Ranada*.<sup>10</sup>

an action to enforce a foreign judgment is an action incapable of pecuniary estimation. We hope that this ruling will also be made applicable to arbitration.

Otherwise, it will be very, very expensive to enforce arbitral awards here in our country.

### ***C. Party Representation***

While it may be true that anybody may represent a party in arbitration, please take note that when somebody files a case before your salas, our local lawyers retain their “exclusive” rights of audience before Philippine courts. So if a foreigner is present, it is disqualified. But if it is an arbitration proceeding, then anybody may represent a party. If the case is brought before the Philippine courts, only Philippine lawyers can appear.

### ***D. Confidentiality and Protective Orders***

Arbitration proceedings including records are confidential. We have the exceptions also in Section 23 of RA No. 9285, which are also applicable to domestic arbitration. It states that:

The arbitration proceedings, including the records, evidence and arbitral award, shall be considered confidential and shall not be published except (1) with the consent of the parties, or (2) for limited purpose of disclosing to the court of relevant documents in cases where resort to the court is allowed herein. *Provided, however*, that the court in which an action of the appeal is pending may issue a

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10. G.R. No. 139325, April 12, 2005, 455 SCRA 397.

protective order to prevent or prohibit disclosure of documents or information containing secret processes, developments, research and other information where it is shown that the applicant shall be materially prejudiced by an authorized disclosure thereof.

Thank you very much.

# Anti-Suit Injunctions and Stay of Parallel Court Proceedings\*

*Mr. Philip Trevor Nunn\*\**

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## I. INTRODUCTION

I am going to talk on how the courts in the Philippines can involve themselves in arbitration proceedings. Professor Mario E. Valderrama has talked about the independence of arbitration

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\* Delivered at the *Conference on Arbitration for the Judiciary* on March 23, 2006 at the Intercontinental Manila, Makati City, Philippines. *Transcribed.*

\*\* Mr. Philip Trevor Nunn is a Chartered Arbitrator and a partner and head of the Dispute Resolution Group. He was admitted as a Solicitor in 1974 and 1981 in England and Wales and in Hong Kong, respectively.

Mr. Nunn has 31 years post-admission experience in dispute resolution matters. He has extensive experience of major litigation and arbitration, including significant experience as an arbitrator. Before joining Simmons & Simmons as a partner in 1986, he was Head of the Lands and Works Unit in the Attorney General's Chambers, responsible for all legal advice to the Government departments implementing development

proceedings. However, there are exceptions to that and a number of ways in which courts can assist and help arbitration proceedings.

I shall focus on three specific topics: The first is about how to prevent court proceedings when there is already a valid arbitration agreement between the parties. The second is how to prevent arbitration proceedings when there is no proper arbitration agreement. And the third is how to assist parties in compiling evidence, thus aiding the successful outcome of the arbitration process.

## II. ANTI-SUIT INJUNCTIONS

First of all, let us look at what happens in the Philippines if somebody recommends court proceedings when in fact there is an arbitration agreement already in existence between the parties. What happens in that situation?

The starting point of course is to look at what kind of arbitration we are dealing with here. If the arbitration is subject to the United Nations Convention on International Trade Law (UNCITRAL) Model Law, which incidentally the Philippines

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and construction projects. He is a Justice of the Peace, a member of the Property Committee of the Kowloon-Canton Railway Corporation, Co-chair of the Appeal Tribunal (Buildings), a member of the HKIAC Panel of Arbitrators, a member of the CIET AC Panel of Arbitrators, a member of the Korean Commercial Arbitration Board Panel of Arbitrators, and a member of the London Court of International Arbitration Panel of Arbitrators. He is also a Fellow of the Chartered Institute of Arbitrators (FCI Arb) and Fellow of the Hong Kong Institute of Arbitrators (FHKI Arb).

has adopted, then the provisions of Article 8 of the UNCITRAL which states that:

A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration x x x.

This is, however, subject to not being later than submission of his first statement on the substance of the dispute. And there is a *caveat*—

x x x unless it finds that the agreement is null and void, inoperative, or incapable of being performed.

Let us review this step by step: if a party requests the court to stay proceedings because it is an arbitration agreement; if he brings his action promptly before he takes any other step in the case; if he has complied with that clause, he is only open to court review as to whether or not the agreement is, for some reason, null and void or inoperative, otherwise the stay is mandatory under the UNCITRAL Model Law.

Most parties, when faced with court proceedings, will take prompt action. Most often, these situations occur at the beginning of the case. But if a party, goes to court to stay proceedings, but does so late in the day, that would be a ground for not allowing the stay of proceedings.

The UNCITRAL Model Law states that the application must be made before a party submits his first statement on the substance of the dispute. You have to be satisfied that the party has not yet participated in the court proceedings; that it has not taken any

substantive action; and he must bring his application in a timely fashion; then he has complied with that provision.

The reason behind that is that the longer the court proceedings are allowed to go on, the less fair it is for the party who does not want to stay the proceedings. The timing of the application is something to be looked into. The other grounds are that the agreement itself is null and void, inoperative, or incapable of being performed. In other words, the court should look at whether there is a valid, binding arbitration agreement.

The parties may bring evidence to the court relating to the arbitration agreement. And the court will have to decide whether or not that agreement is valid and binding. For example, one party may say that it has not signed the agreement, or the agreement was not in writing, or any other valid reason for arguing that the arbitration agreement is invalid. Subject to that, the court's role is to grant stay.

Somebody asked, do you actually dismiss or do you stay? The answer to that is you **stay** the proceedings pending the finalization of the arbitration. Especially so if the arbitration is possible. The arbitration might not necessarily lead to a satisfactory conclusion, in which case the court proceedings, in very rare circumstances, might have to be re-instituted. So you do not have to dismiss the application, you stay it pending the outcome of the arbitration.

That is arbitration subject to UNCITRAL. Now what about domestic arbitration? If somebody brings an arbitration to court, and is not subject to UNCITRAL, then you have a similar tradition in your Arbitration Law, RA No. 876, Section 7, which is very similar to the UNCITRAL regime. It says:

If any suit or proceeding be brought upon an issue arising out of an agreement providing for the arbitration thereof, the court in which such suit or proceeding is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration, shall stay the action or proceeding until an arbitration has been had in accordance with the terms of the agreement. *Provided*, that the applicant, for the stay is not in default in proceeding with such arbitration.

Your Arbitration Law has similar wordings with the UNCITRAL Model Law. Providing there is a valid and binding arbitration agreement, then it basically requires the court to stay the action until an arbitration has been held pursuant to the terms of agreement. This is a situation where you have court proceedings instituted in the Philippines with an arbitration subject to UNCITRAL or domestic arbitration in the Philippines.

What is the position of the Philippines where you have court proceedings instituted overseas? I believe the Philippine courts do have the ability to grant an injunction to try and stay court proceedings in other jurisdictions. In terms of staying court proceedings domestically, the situation seems to me to be rather straightforward.

### **III. INJUNCTIONS RESTRAINING ARBITRATION PROCEEDINGS**

What happens if somebody wants to stop the arbitration proceedings? In other words, somebody is unhappy. He applies to the court saying this arbitration proceeding should not be continued, and applies for an injunction or relief.

The courts would be able to do that but only in very confined circumstances and when it is absolutely clear that the arbitration proceedings have been wrongly brought. Orders should only be granted in exceptional circumstances not because the court deems it more convenient or thinks it is better to have the case dealt within the court. The only exception to the general rule that parties should be directed to follow the arbitration agreement is if there is specific instance of the arbitration being defective.

#### **IV. INJUNCTIONS PROTECTING JURISDICTION/ RESTRAINING PARALLEL COURT PROCEEDINGS**

If the arbitration agreement is invalid, maybe there is some problem with the tribunal itself. For example, the arbitration tribunal might be biased or there is evidence they are not performing their duties correctly. But there must be some good reason for stopping arbitration proceedings in the event that one party recommends arbitration and the other party tries to prevent it. I think the answer in both cases where you are looking to stop court proceedings or to stop arbitration proceedings is that these are really two sides of the same coin. You only have to consider one basic fact for there to be a valid arbitration agreement: is there any reason why that arbitration agreement should not be enforced? The grounds for not enforcing the arbitration agreement should be quite limited, and if so, we should be happy that for some reason the arbitration agreement was not valid.

What do you do if parties in the Philippines have an arbitration agreement that they think is capable of being enforced here, but one of the parties commends his court proceedings somewhere else? What if one of the parties to the arbitration decides to ignore the arbitration agreement in the Philippines and

opts to commence action in the United States or Hong Kong or in some other jurisdiction?

In that situation, there is some guidance from the courts in England and elsewhere. There is a leading court-appealed case on this in England. It is a valuable case because it gives some insights as to how the Philippine courts might approach an application by a party in the Philippines to grant an injunction to prevent court proceedings in another jurisdiction. It is actually quite relevant, I think, as to how the court would exercise its jurisdiction.

In quite a few years, English courts were faced by two decisions of the European Court of Justice which had basically decided that granting injunctions to restrain parties from continuing the foreign court proceedings was not permitted. In these two European cases, the European Court of Justice held that:

courts in the European community should not have issued anti-suit injunctions to restrain a company from proceeding in another court within the European Union, even though the injunction had been based on the grounds that there was a clause in the party's contract conferring its exclusive jurisdiction over disputes in the Austrian courts.

This is a slightly different issue to arbitration clause, because this is where the contract states that the contract will be subject to the exclusive jurisdiction of a particular jurisdiction. In that situation, the European court is overturned. Said in a fairly forthright manner, this is a jurisdiction which should be exercised sparingly and with great caution.

Because of sensitivity to the feelings of a foreign court, there is no good reason for diffidence in granting an injunction to restrain foreign proceedings on a clear and simple ground that a defendant has promised not to bring them. In other words, it is an

arbitration agreement between the parties. There is no real reason why that should be enforced.

This kind of robust line was followed in the *Through Transport v. New India*<sup>1</sup> case where the English Court of Appeals said that we do not accept the submission that the court should not grant an anti-suit injunction in this case. Here, a party to an arbitration agreement begins proceedings in the courts of a contracting state in breach of an arbitration clause in the contract.

Basically, the whole philosophy behind this case in England is that the party should be confined to the arbitration clause and they should not be allowed to breach the clause by going around to different forums to try and institute court proceedings. I think there was some argument in that case as to whether this would be offending the courts in the local jurisdiction. In that case, the Court of Appeals said that there is no reason why any court should be offended by an injunction granted to restrain a party from invoking a jurisdiction in breach of a contractual promise that the dispute should be referred to an arbitration in England. It says that the England court would not be offended if a claimant were enjoined from commencing or continuing proceedings in England in breach of an agreement to arbitrate in another contracting state.

In fact, what the Court of Appeals is saying is that where there is an arbitration clause in the contract, the party should be helped in whatever location the contract provides. For example, if there is a provision in the contract which says arbitration in the Philippines, then why should not the courts in the Philippines have the opportunity to get involved? So the Philippine courts

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1. *Through Transport Mutual Insurance Association (Eurasia) Ltd. v. New India Assurance Co. Ltd.* [2005] EWHC 455.

in that situation could take it upon themselves to issue an injunction to attempt to stop the proceedings in the foreign jurisdiction. Of course you say that is all very well and good, but what if the courts overseas say that they refuse to take any notice of action? Should we take into account the possibility that the court overseas is going to ignore our decision?

The answer to that came out in a very recent case which is only a few months old – a case called *West Tankers v. The Union*.<sup>2</sup> That is exactly what happened in that case because the English court granted an anti-suit injunction to a party in England on a provisional basis. I believe it was related to an action in Italy.

And then the courts in Italy refused to comply with the injunction. They said, “No, we are not going to comply with it and we are going to carry on with the court process.” One of the parties went back to get a permanent injunction and the party opposing the permanent injunction said, “There is no point in granting an injunction in London because it is now going to happen in Italy. You should not do it.” The only ground, they said, for refusing to make this injunction permanent was that the Italian court is going to ignore it at any event.

But the court said, “No that is not really the right reasoning. They should not really take into account whether or not your injunction is going to be obeyed. You should look at your principles first. You should actually decide whether or not the injunction is the right thing to do. You should not really be looking at whether or not your order is going to be complied with.” In any event, I think the court felt that if this injunction was not complied with,

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2. *West Tankers Inc. v. Union Assurance Co. Ltd. & Mauritius Commercial Bank Ltd.* [2006] EWCA Civ. 389.

there may be other remedies that could be obtained against the parties failing to comply with the injunction.

Obviously, if a party is within your own jurisdiction or has assets within your jurisdiction it could amount to contempt of court if he fails to comply with an injunction issued in your jurisdiction. This case clearly allows the court of one jurisdiction in its attempt to interfere with court proceedings in other jurisdictions. There is actually an interesting line of cases and it is quite a complicated issue.

Of course you might say, why should we get involved? In terms of enforcing arbitration agreement, I think the message should be clear from all courts that if there is a valid arbitration agreement that should be complied with. There should not be any reason why court proceedings in other jurisdictions should be allowed to continue.

There is interestingly a second aspect of the decision of the Court of Appeals on *Through Transport* because, even though the court was strongly in favor of granting an injunction based on the arbitration agreement on the actual facts of the case, it actually decided not to grant an injunction. It said that due to a complicated situation between the parties involved in the insurance provisions and policies, it found that one of the parties to the application was not actually a subject to the arbitration agreement at all. Therefore, at the end of the day, it was not able to grant the injunction.

The principle nevertheless remains that the courts in England have taken the view that generally there should be protection given to arbitration agreements. The courts also made some interesting observations in relation to exercising its discretion.

Say, for example, that they should look at whether the company which is being restrained has breached its contract. They should look at whether or not there are any other circumstances which would make it oppressive in the view of the court. The court would then look at all these circumstances, but generally speaking, the overall intent is clear that the courts are definitely in favor of protecting arbitration agreement even to the extent of issuing injunctions which would have an impact overseas.

What does it mean in the Philippines? Let us look at the other side of the coin. Let us say an arbitration proceeding was commenced in Hong Kong by a party and at the same time parallel proceedings are brought to the Philippines. The Hong Kong court issues an injunction to prevent the court proceedings in the Philippines from being continued. The question then that the Philippine courts would need to look at is whether or not they should comply with that injunction; whether or not they should allow the court proceedings in the Philippines to be discontinued because that would conflict with the arbitration provisions in the contract.

Generally speaking, courts in all jurisdictions which have strong ties to arbitration – as the Philippines does – are now subject to UNCITRAL and must have strong arbitration laws. The Philippines is part of the international arbitration community in terms of procedures and laws. In that situation, I think the court should look very carefully whether that injunction should be ignored. Obviously there may be grounds in the Philippines for specifically ignoring that injunction. The courts may decide for some reason that they should not comply with it. But usually, the situation should be that courts can only refuse to comply with that overseas injunction if there were some valid reasons.

For example, the court proceedings were properly brought because the arbitration agreement was invalid; or for some other reason that would generally prevent the arbitration agreement from being enforced in the Philippines. In that situation the Philippine courts should look at the underlying reasons behind the injunction and decide whether in their jurisdiction that injunction should be enforced or not. In a nutshell, the case law in Europe is now certainly protective of arbitration, both in terms of protecting court proceedings in their jurisdiction and also in preventing court proceedings in overseas jurisdictions.

Going now to a different topic, to show how the courts in the Philippines can assist in arbitration. *First*, please refer to Section 28 of RA No. 9285, which specifically allows the courts to assist in the preparation of evidence in further aid of arbitration. It is similar to Article 27 of the Model Law. Basically, the arbitral tribunal or a party with the approval of the tribunal, may request state assistance in taking evidence from a competent court. The court may execute the request in taking evidence according to its rules of evidence.

Generally speaking, the courts in the Philippines do have the power to assist the arbitral tribunal in the whole arbitration process, if the arbitral tribunal finds itself not having sufficient power to do so. For example, an arbitral tribunal may *subpoena* witnesses even though it does not have any power to sanction that witness if he fails to appear before the tribunal. In that situation, you may need a court to issue a *subpoena* to demand a witness to appear. You could also issue a *subpoena* requiring a party to bring documents to an arbitration. You could make an order directing that certain primary evidence be preserved. For example you may have a dispute about quality of materials, or of some products.

In that situation, you may wish to order that particular thing be preserved pending the outcome of the arbitration.

The court has considerable power to assist the arbitral tribunal in the compilation of evidence. In Hong Kong, the assistance of the court is a parallel jurisdiction to the tribunal itself. Often, what will happen is that the tribunal itself will be asked to make a particular order, for example, to order a witness to attend or to order documents to be produced. But if the parties fail to comply, in that situation either the tribunal itself or the parties may need to go to court to get that kind of assistance in the resolution of the arbitration.

That is one area which courts here in the Philippines can be of positive assistance to the arbitration process. It does not mean they are intervening in the decision, it does not mean that they are interfering in the way the arbitral tribunal makes its decision. What they are doing is providing all the tools for the tribunal to be able to make a proper decision. They help the tribunal to force witnesses or to get primary evidence preserved. That is one important area you should be aware of – that you do have the power to assist the arbitral tribunal in the way it manages its caseload.

# Interim Measures: The Role of the Arbitral Tribunal and the Court\*

*Atty. Eduardo R. Ceniza* \*\*

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## I. INTERIM MEASURES; NATURE IN GENERAL

The availability of interim measures can be critical to the effectiveness of arbitration and to the continued viability of the transaction.<sup>1</sup> Indeed, in some cases, an arbitration may be an exercise in futility if interim relief cannot be obtained rapidly, e.g., to secure assets or to enjoin certain conduct.<sup>2</sup> Interim measures include

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An Associate in Arts (with high honors) and Bachelor of Laws (*summa cum laude*) graduate from the Lyceum of the Philippines, Atty. Ceniza has also been named a Leading Litigator in various publications such as the *International Financial Law Review 1000*, *Euromoney Legal Group Guide to the World's Leading Litigation Lawyers*, *Asia-Pacific Legal 500: the Guide to Asia's Commercial Law Firms*, and *International Who's Who in Product Liability Defense Lawyers* from its first edition up to the latest, respectively.

1. Thomas E. Carbonneau, *Cases and Materials on the Law and Practice of Arbitration*, Revised 3<sup>rd</sup> Edition, at 716.
2. Yves Derains & Eric A. Schwartz, *A Guide to the ICC Rules of Arbitration*, 2<sup>nd</sup> Edition, at 294.

a variety of orders designed to protect the essential rights of the parties, such as orders to preserve evidence, to protect assets, or in some way to maintain the *status quo* pending the final resolution of the substantive merits of the dispute. Such orders come in different forms and go by different names, e.g., pre-award relief, interim measures of protection, conservatory measures, provisional remedies, provisional relief, and interim relief. Whatever may be the nomenclature, they operate as holding orders, pending the final outcome of the arbitration proceedings.

## II. WHO CAN ISSUE INTERIM MEASURES?

The threshold question for a party seeking pre-award relief is whether the arbitral tribunal possesses the authority to order provisional or interim measures of protection. In general, that question requires consulting four sources:

1. Any applicable international arbitration convention or treaty, such as the New York Convention or the Inter-American Convention;
2. The applicable national law;
3. Any relevant institutional rules;<sup>3</sup> and
4. The agreement of the parties.

International arbitration conventions have little to say about the authority of arbitral tribunals to order interim or provisional measures. The New York Convention contains no provision

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3. For example, the ACICA Arbitration Rules, HKIAC Arbitration Rules, ICC Arbitration Rules, KLRCIA Arbitration Rules, LCIA Arbitration Rules, PDRCI Arbitration Rules, SIAC Arbitration Rules.

expressly referring to orders for provisional measures by arbitral tribunals.<sup>4</sup> Some US courts, following the ruling in *McCreary*,<sup>5</sup> have interpreted Article II(3) of the New York Convention as forbidding the courts of a signatory State from ordering pre-award attachment in cases where the subject matter is covered by an arbitration agreement. Those courts have not expressly held that the New York Convention addresses the availability of provisional relief from arbitrators, although a likely premise of their analysis is that arbitral tribunals generally enjoy the authority to order preliminary relief.<sup>6</sup> A different view, of course, would result in an unacceptable situation in which provisional relief is not available either from the court or the arbitrator. Likewise, the Inter-American Convention does not provide for interim measures by arbitral tribunal. This is true of the European Convention of 1961 which is silent on the power of arbitral tribunals to grant interim measures.

It used to be that only the courts had the power to issue interim measures in aid of arbitration. There are still some countries – like Italy,<sup>7</sup> Argentina,<sup>8</sup> Greece,<sup>9</sup> and the People's Republic of

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4. Gary B. Born, *International Commercial Arbitration*, 2<sup>nd</sup> Edition, at 922.
  5. *McCreary Tire & Rubber Co. v. CEAT, S.p.A.*, 501 F.2d 1032 (3<sup>rd</sup> Cir. 1974).
  6. Gary B. Born, *op. cit.*, at 922, *see* footnote 11.
  7. ITALIAN CODE OF CIVIL PROCEDURE, Art. 818.
  8. CODE OF CIVIL AND COMMERCIAL PROCEDURE, Art. 753.
  9. GREEK CODE OF CIVIL PROCEDURE, Art. 889.

China<sup>10</sup> – whose arbitration laws do not grant to arbitrators the power to issue interim measures of protection. Today, however, most modern arbitration laws<sup>11</sup> – influenced by the Model Law, which has become a benchmark for many countries seeking to modernize their arbitration laws – grant to arbitrators the power to issue interim measure of protection.

Article 17 of the Model Law expressly stipulates that, unless otherwise agreed by the parties, “the arbitral tribunal may, at the request of a party, order any party to take such interim measures of protection as the arbitral tribunal may consider necessary in respect of the subject matter of the dispute.” And Article 9 of the Model Law expressly recognizes the power of the competent court to grant interim measures of protection upon application of a party before and during arbitral proceedings. Thus, both the

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10. According to the Chinese Arbitration Law, interim measures can only be issued by the Intermediate People’s Court (in foreign arbitration) and the basic-level People’s Court (in domestic arbitration) in the domicile of the party against whom the interim measures are sought or in the place where the property and/or the evidence is located.
11. The following countries have adopted the UNCITRAL Model Law: Australia, **Austria**, Azerbaijan, Bahrain, Bangladesh, Belarus, Bulgaria, Canada, Chile, in China: Hong Kong Special Administrative Region, Macau Special Administrative Region; Croatia, Cyprus, Egypt, Germany, Greece, Guatemala, Hungary, India, Iran (Islamic Republic of), Ireland, Japan, Jordan, Kenya, Lithuania, Madagascar, Malta, Mexico, New Zealand, Nigeria, **Norway**, Oman, Paraguay, Peru, the Philippines, Republic of Korea, Russian Federation, Singapore, Spain, Sri Lanka, Thailand, Tunisia, Ukraine, within the United Kingdom of Great Britain and Northern Ireland: Scotland; in Bermuda,

arbitral tribunal and the competent court have power to grant interim measures of protection. The question then is when does a party apply to the arbitral tribunal and when does it apply to the competent court for interim relief? In some jurisdictions, it is recognized that the courts and the arbitral tribunals have concurrent power to grant interim measures of protection. For instance, Singapore courts have been given concurrent powers to grant interim measures of protection in support of arbitration.<sup>12</sup> This means that a party has the choice to apply to the High Court or to the arbitral tribunal, whichever is expedient.<sup>13</sup>

In the Philippines, the Alternative Dispute Resolution (ADR) Act of 2004 (RA No. 9285), which adopted the Model Law, with some modifications, as the Philippine law on international arbitration, provides in Section 28, paragraph (a) that:

It is not incompatible with an arbitration agreement for a party, before constitution of the arbitral tribunal, to request from a Court an interim measure of protection and for the

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overseas territory of the United Kingdom of Great Britain and Northern Ireland; within the United States of America: California, Connecticut, Illinois, Oregon and Texas; Zambia, and Zimbabwe.

12. **SEC. 12(7)** – The High Court or a Judge thereof shall have, for the purpose of and in relation to an arbitration to which this part applies, the same power of making orders in respect of any of the matters set out in subsection (1)16 as it has for the purpose of and in relation to an action or matter in the court.
13. Prof. Lawrence Boo, “*Interim Measures and the Arbitral Institution: A Singapore Perspective*,” a paper presented at the ICC-SIAC Institutional Arbitration Symposium in Singapore, February 18-19, 2005.

Court to grant such measure. After constitution of the arbitral tribunal and during arbitral proceedings, a request for an interim measure of protection, or modification thereof, may be made with the arbitral tribunal or to the extent that the arbitral tribunal has no power to act or is unable to act effectively, the request may be made with the Court.

The basic assumption in the Philippine ADR Act is that once the arbitral tribunal is constituted, applications for interim measures which are within the power of the arbitral tribunal to grant should be filed with the arbitral tribunal. On the other hand, applications for interim measures should be filed with the competent court (i) before the arbitral tribunal is constituted, and (ii) during arbitral proceedings when the arbitral tribunal has no power to act or is unable to act effectively. To recapitulate, during arbitral proceedings, the application for interim measures should be filed with the arbitral tribunal. Recourse to the competent court should be made only when the arbitral tribunal has no power to act or is unable to act effectively. The delineation of two spheres – one where the arbitral tribunal alone acts and the other where the court acts when the tribunal cannot or is unable to act – underscores the support role of the court in arbitration proceedings. This is similar to the International Chamber of Commerce (ICC) practice that once the arbitral tribunal is in possession of the file, a request for interim or conservatory relief is normally addressed to it, except where the tribunal is without authority to grant the relief or is not otherwise in a position to do so.<sup>14</sup>

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14. Yves Derains & Eric A. Schwartz, *op. cit.*, at 300.

### III. INTERIM MEASURES THE TRIBUNAL CAN GRANT UNDER PHILIPPINE LAW

Section 28 of the Philippine ADR Act enumerates the interim or provisional relief that may be granted during arbitral proceedings, to wit:

- (b) The following rules on interim or provisional relief<sup>15</sup> shall be observed:
  - (1) Any party may request that provisional relief be granted against the adverse party.
  - (2) Such relief may be granted:
    - (i) to prevent irreparable loss or injury;
    - (ii) to provide security for the performance of any obligation;
    - (iii) to produce or preserve any evidence; or
    - (iv) to compel any other appropriate act or omission.
  - (3) The order granting provisional relief may be conditioned upon the provision of security or any act or omission specified in the order.

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15. Dean Custodio O. Parlade is of the view that the enumeration is not exclusive since the enumeration is made by way of example and is focused on the purpose rather than on the manner by which the interim relief may be allowed, precisely to give the tribunal or the court as much flexibility as possible to determine what interim relief is appropriate. Custodio O. Parlade, *Alternative Dispute Resolution Act of 2004 (Annotated)*, at 178.

- (4) Interim or provisional relief is requested by written application transmitted by reasonable means to the Court or arbitral tribunal as the case may be and the party against whom the relief is sought, describing in appropriate detail the precise relief, the party against whom the relief is requested, the grounds for the relief, and the evidence supporting the request.
- (5) The order shall be binding upon the parties.
- (6) Either party may apply with the Court for assistance in implementing or enforcing an interim measure ordered by an arbitral tribunal.
- (7) A party who does not comply with the order shall be liable for all damages resulting from noncompliance, including all expenses, and reasonable attorney's fees, paid in obtaining the order's judicial enforcement.

Additionally, Section 29 of the ADR Act grants to the arbitral tribunal further power to issue, at the request of a party, interim measures of protection in respect of the subject matter of the dispute, which “may include but shall not be limited to preliminary injunction directed against a party, appointment of receivers or detention, preservation and inspection of property that is the subject of the dispute in arbitration.” If a party refuses to obey an order for provisional relief issued by the arbitral tribunal, the other party may apply with the court for assistance in implementing or enforcing the order.

It can thus be seen that the provisions of the Philippine ADR Act of 2004 granting to the arbitral tribunal power to issue interim measures of protection are more expansive than the provisions

found in the Model Law<sup>16</sup> or the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules<sup>17</sup> or the ICC Rules.<sup>18</sup>

#### IV. INSTANCES WHERE THE ARBITRAL TRIBUNAL IS WITHOUT POWER TO ACT OR IS UNABLE TO ACT EFFECTIVELY

The first factor is the inability of the tribunal to act before it is constituted. This seems to be too obvious as to be hardly worth mentioning. However, it should be noted that it takes time to constitute an arbitral tribunal. In the meantime, there might be a need to preserve vital evidence or assets that are in danger of

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##### 16. ART. 17.

Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order any party to take such interim measures of protection as the arbitral tribunal may consider necessary in respect of the subject matter of the dispute. x x x

##### 17. ART. 26(I).

At the request of either party, the arbitral tribunal may take any interim measures it deems necessary in respect of the subject matter of the dispute, including measures for the conservation of the goods forming the subject matter in dispute, such as ordering their deposit with a third person or the sale of perishable goods.

##### 18. ART. 23(I).

Unless the parties have otherwise agreed, as soon as the file has been transmitted to it, the arbitral tribunal may, at the request of a party, order any interim measures it deems appropriate. x x x

being dissipated. In such a case, a party has no other recourse than to apply to the competent court for interim measure of protection.

The second factor is that the powers of the arbitral tribunal are limited to the parties to the arbitration itself. Thus, if the claimant wants to freeze the money of the respondent kept in a bank account, the arbitral tribunal is without power to order the bank to freeze the deposit. Only a competent court has the power to freeze the bank deposit by means of a *writ* of garnishment.

The third factor is that, since the arbitral tribunal does not have jurisdiction over third parties, it cannot compel by *subpoena* the attendance of witnesses who are not parties or who are not employees or agents of the parties. In such a case, the assistance of the competent court is necessary to compel the attendance of the witness or for the taking of the testimony of the witness in accordance with the court's rules.<sup>19</sup> Also, when a party wants to preserve evidence which is in the possession of a third party, the assistance of the competent court is necessary.

The fourth factor is the fact that an arbitral tribunal does not have the power to grant provisional remedies, which by provision of law, can only be granted by the courts, e.g., *writ* of preliminary attachment. Under Philippine law, a *writ* of attachment on real property to be binding on third parties must be recorded in the Registry of Deeds. An order of attachment if issued by an arbitrator will not be accepted for registration by the Register of Deeds. Thus, recourse to the competent court is necessary if a

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19. UNCITRAL Model Law on International Commercial Arbitration, Art. 27. In the US, however, the Federal Arbitration Act 1925, Sec. 7, provides that that arbitrators may summon a person to attend before them and to produce any material documents.

party wants to obtain a preliminary attachment on the properties of the other party.

Another factor is the fact that there is a distinction between an “award” and the “interim orders of an arbitral tribunal.” An award is defined as a decision of the arbitral tribunal on the substance of the dispute and may include any interim, interlocutory or partial award. Orders for interim measures of protection are not decisions on the substance of the dispute and cannot be considered as such even if the document is styled as an award.<sup>20</sup> Thus, in some jurisdictions, an interim measure of an arbitral tribunal, even if stated to be an award, will not be enforceable as such, and this may, as a consequence, limit the effectiveness of such order.<sup>21</sup> Since an interim measure, by definition, does not finally resolve the substantive merits of the dispute and is not intended to be final and irreversible, it does not qualify as a final award that can be recognized and enforced in another country under the New York Convention.<sup>22</sup> When

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20. Art. 23(I) of the ICC Arbitration Rules provides that:

such measure shall take the form of an order, giving reasons, or of an Award, as the Arbitral Tribunal considers appropriate.

21. Yves Derains & Eric A. Schwartz, *op. cit.*, at 298, citing Kojovic, “Court Enforcement of Arbitral Decisions on Provisional Relief,” *Journal of International Arbitration*, Vol. 18, No. 5 (2001), at 511; Pyles, “Interlocutory Orders and Convention Awards: The Case of *Resort Condominiums v. Bolwell*,” *Arb. Int.*, Vol. 10, No. 4 (1994), at 385.

22. Neither the New York Convention nor the UNCITRAL Arbitration Rules define the term “award.” To address this problem, the UNCITRAL Working Group II has been tasked to study the enforceability of interim measures issued by arbitral

there is a need for an interim measure that is to be enforced outside the seat of arbitration, the parties may consider applying for the interim measure to the competent court of the country of enforcement. For example, if the seat of arbitration is in Hong Kong and the property that is the subject matter of the arbitration is located in Makati City, Philippines, the party who wants the property seized and preserved should file the application for the detention and preservation of such property with the proper court in Makati City. Thus, in one case,<sup>23</sup> an arbitration under ICC Rules was commenced in Hong Kong by a Korean car manufacturer, the claimant, against a Philippine car distributor, the respondent. The claim was for the recovery of a large sum of money which respondent owed claimant for the unpaid purchase price of hundreds of cars. In the course of the arbitration proceedings, claimant learned that respondent was disposing off its assets to avoid paying any award that claimant was likely to obtain in the arbitration. The distributorship contract stipulated, *inter alia*, that in the event respondent became delinquent in the payment of its accounts for a period exceeding 120 days, claimant was entitled to

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tribunals. As recommended by the UNCITRAL Working Group II, draft Article 17 *bis* of the Model Law provides as follows:

An interim measure issued by an arbitral tribunal shall be recognized as binding and, unless otherwise provided by the arbitral tribunal, enforced upon application to the competent court, irrespective of the country in which it was issued, subject to the provisions of this article.

UNCITRAL Working Group II A/CN.9/589.

23. The author of this paper represented the claimant in the Philippine proceedings ancillary to the arbitration in Hong Kong.

terminate the contract and to retake possession of all cars that may still be in the possession of respondent. In this situation, it was clear that neither the arbitral tribunal nor the competent court in Hong Kong was in a position to issue any interim measure that could be enforced in the Philippines. The claimant applied to the Regional Trial Court of Makati for the issuance of a *writ* of replevin for the seizure and detention of 550 cars that were in the possession of respondent. The court granted the *writ* upon the security of a replevin bond in an amount double the value of the cars. In due course, the 550 cars were seized by the sheriff and placed in *custodia legis*. Since the arbitral award was not forthcoming soon, claimant applied to the court for authority to sell the cars. It was explained that the cars were depreciating in value due to obsolescence and it would be beneficial for both parties if the cars were sold to avert further depreciation in their value. This application, after notice and hearing, was granted by the court. The proceeds of the sale, after deducting the cost of the judicial proceedings, the expenses for enforcing the *writ* of replevin and the expenses incurred in connection with sale of the cars, were applied in partial payment of the obligation of respondent to claimant. Eventually, claimant won an arbitral award, which was enforced by the Philippine court, pursuant to the New York Convention. This case presents examples of interim measures that were issued by a Philippine court in support of a foreign arbitration and the recognition and enforcement by a Philippine court of a foreign arbitral award.

## V. INTERIM MEASURES TO PRESERVE THE STATUS QUO

There can be cases where one party is committing or threatening to commit an act which, unless restrained, will cause the other

party irreparable and grave injury, such as loss of business opportunities which, although real, is difficult to quantify. The injured party can deal with this problem by filing an application for preliminary injunction, mandatory or prohibitory, as the case may be. The question is: Does an arbitral tribunal have the power to issue a preliminary injunction to preserve the *status quo*? It is doubtful whether an arbitral tribunal operating under the UNCITRAL Arbitration Rules or under any arbitration law that simply repeats the relevant provisions of the Model Law would have the power to do so.<sup>24</sup> This is because an arbitral tribunal's power in such matter is limited to "the subject matter of the dispute" and to "the conservation of the goods forming the subject matter of the dispute." The UNCITRAL Working Group II (Arbitration) at the conclusion of its 43<sup>rd</sup> Session in Vienna (October 3-7, 2005) has come out with a proposed amendment of Article 17 of the Model Law on interim measures and preliminary orders. The proposed draft defines the term "interim measures" and enumerates the different forms of interim measures the tribunal can grant. The draft Article 17 authorizes the tribunal to order a party to "maintain or restore the *status quo* pending determination of the dispute."<sup>25</sup>

The arbitral tribunal would have the power to grant interim relief to preserve the *status quo* where its authority to grant interim measures is less restrictive as in the case of Article 23 of the ICC Arbitration Rules. The ICC case law envisages the rule that ICC tribunals have the authority to grant injunctive relief precisely to

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24. Alan Redfern and Martin Hunter, *Law and Practice of International Commercial Arbitration*, 4<sup>th</sup> Edition, at 405.

25. UNCITRAL Working Group II (Arbitration) A/CN.9/589.

avoid the aggravation of the dispute and to ensure the maintenance of the *status quo* of the parties.<sup>26</sup>

In the Philippines, there is no question that the arbitral tribunal may order a party to cease and desist from doing an act that would disturb the *status quo* by exercising its express power to issue a preliminary injunction<sup>27</sup> to prevent irreparable loss or injury.<sup>28</sup>

## VI. MAY THE ARBITRAL TRIBUNAL ISSUE *EX PARTE* AN INTERIM RELIEF?

A party may need to make an urgent *ex parte* application, for example, to freeze a bank account of the other party who is about to transfer his funds abroad. The laws of the most popular arbitration seats and the rules of the leading institutions do not currently expressly envisage such a power for arbitrators and some leading commentators have suggested that it is incompatible with the consensual nature of arbitration and the respect for due process.<sup>29</sup>

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26. Schwartz, *The Practice and Experience of the ICC Court in Conservatory and Provisional Measures in International Arbitration* (an ICC Publication); ICC Case No. 3896 in Jarvin & Derains, *Collection of Arbitral Awards 1974-1985*, at 161.

27. Alternative Dispute Resolution Act of 2004, Sec. 29.

28. ADR Act, Sec. 28, par. (b)(2).

29. Alan Redfern and Martin Hunter, *Law and Practice of International Commercial Arbitration*, 4<sup>th</sup> Edition, at 397, citing Van Houtte, "Ten Reasons Against a Proposal for *Ex Parte* Interim Measures of Protection in Arbitration," (2004) 20 *Arbitration International* 85 at 89.

The proposed draft of Article 17 of the Model Law,<sup>30</sup> provides that unless otherwise agreed by the parties, a party may file, without notice to any other party, a request for an interim measure together with an application for a preliminary order directing a party not to frustrate the purpose of the interim measure requested. The arbitral tribunal may grant a preliminary order provided it considers that prior disclosure of the request for the interim measure to the party against whom it is directed risks frustrating the purpose of the measure. Such preliminary order does not constitute an award. Immediately after the arbitral tribunal has made a determination in respect of an application for a preliminary order, the arbitral tribunal shall give notice to all of the parties of the request for the interim measure, the application for the preliminary order, the preliminary order, if any, and all other communications, including indicating the content of any oral communication between any party and the arbitral tribunal in relation thereto. At the same time, the arbitral tribunal shall give an opportunity to any party against whom a preliminary order is directed to present its case at the earliest practicable time. A preliminary order shall expire after 20 days from the date on which it was issued by the arbitral tribunal. However, the arbitral tribunal may issue an interim measure adopting or modifying the preliminary order after the party against whom the preliminary order is directed has been given notice and an opportunity to present its case. The arbitral tribunal shall require the applying party to provide security in connection with such preliminary order unless the arbitral tribunal considers it inappropriate or unnecessary to do so. This proposal to permit arbitrators to grant interim relief on an *ex parte* basis has been met with considerable opposition within the UNCITRAL.

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30. UNCITRAL Working Group II (Arbitration) A/CN.9/589.

In the Philippines, it seems reasonable to assume from the express language of the ADR Act of 2004 that the arbitral tribunal has the authority to issue a provisional or preliminary order, e.g., a temporary restraining order for a limited duration, on an *ex parte* application, where irreparable injury would result to the applicant before the matter can be heard on notice. The legal basis for this position is as follows:

Under the Philippine Rules of Court, a temporary restraining order may be issued *ex parte* before an application for preliminary injunction is heard if the court is satisfied that the applicant will suffer great or irreparable injury before the matter can be heard on notice. Section 5, Rule 58 of the Philippine Rules of Court pertinently reads as follows:

**SEC. 5. Preliminary injunction not granted without notice; exception.** – No preliminary injunction shall be granted without hearing and prior notice to the party or person sought to be enjoined. *If it shall appear from the facts shown by affidavits or by the verified application that great or irreparable injury would result to the applicant before the matter can be heard on notice, the court to which the application for preliminary injunction was made, may issue ex parte a temporary restraining order to be effective only for a period of 20 days from service on the party or person to be enjoined, except as herein provided.* Within the said 20-day period, the court must order said party or person to show cause, at a specified time and place, why the injunction should not be granted, determine within the same period whether or not the preliminary injunction shall be granted, and accordingly issue the corresponding order.”  
(Emphasis added)

Now, Section 29 of the ADR Act of 2004 expressly grants the arbitral tribunal the power, *inter alia*, to issue a preliminary injunction following the rules in Section 28, paragraph 2, which, in turn, authorizes the arbitral tribunal to issue a provisional relief, *inter alia*, “(i) to prevent irreparable loss or injury.” It seems plain that these provisions of the ADR Act of 2004 are in *pari materia*<sup>31</sup> with those of Section 5, Rule 58 of the Rules of Court and, therefore, should be construed with reference to each other. When two laws are in *pari materia*, both should be construed to harmonize with each other.<sup>32</sup> The language of Section 28, paragraph 2(i), which authorizes the arbitral tribunal to issue a provisional relief “to prevent irreparable loss or injury,” is materially of the same sense as the language of Section 5, Rule 58 of the Rules of Court which provides that the court may grant *ex parte* a temporary restraining order upon showing by affidavits or the verified application that “great or irreparable injury” will be suffered by the applicant before the matter can be heard on notice. It is the urgent need to avoid “great or irreparable injury” that justifies the court’s power to give *ex parte* relief. It may therefore be assumed to be the law’s intent as well – in the arbitration setting – that the same urgency be addressed by an authority in the arbitral tribunal to give similar appropriate

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31. “On the same subject matter, as laws in *pari materia* must be construed with reference to each other.” Black’s Law Dictionary, 6<sup>th</sup> Edition, at 1115.

32. *Corona v. Court of Appeals*, 214 SCRA 378 [1992]; R.E. Agpalo, *Statutory Construction*, at 521.

relief. There appears to be no good reason to assume the contrary.<sup>33</sup>

Prof. Lawrence Boo, Deputy Secretary General of the Singapore International Arbitration Center (SIAC) and a noted arbitrator, has expressed a similar view:

In Singapore, while legislation prescribes the Tribunal's powers in clear terms, there is no mention of how they are to be exercised. In practice, arbitrators have been known to have exercised the power to grant interim injunctive relief on an *ex parte* basis following the same practice of the courts. Factors considered include whether there is a good or strong ground for the interim relief sought, whether the matter is one of urgency and the ability of the applicant to compensate for losses should the order be eventually considered unmeritorious and set aside by the Tribunal. These considerations balance the interests and rights of the respective parties. The party against whom the order is made is subsequently given the opportunity to address the Tribunal and the Tribunal may reverse, vary or set aside the order. There should therefore not be any issue of denial of the right to be heard.<sup>34</sup>

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33. Eduardo R. Ceniza, "*Interim Measures and the Arbitral Tribunal: The Philippine Setting*," published in *Institutional Arbitration in Asia*, a collection of papers delivered at the ICC-SIAC Symposium on Institutional Arbitration in Asia, February 18-19, 2005, Singapore.

34. Prof. Lawrence Boo, "*Interim Measures and the Arbitral Institution: A Singapore Perspective*," published in the *Institutional Arbitration in Asia*, a collection of papers delivered at the ICC-SIAC Arbitration Symposium, February 18-19, 2005, Singapore.

In the Philippines, CIAC<sup>35</sup> arbitrators are known to issue *ex parte* interim measures of protection by applying the rules and practice of the courts.

## VII. CONCLUSION

Quite often, arbitrations proceed from start to finish without any of the parties applying to the arbitral tribunal or the competent court for interim measures of protection. But it is well that the arbitral tribunal be equipped with the power to issue interim measures of protection which are needed to facilitate the conduct of arbitral proceedings, such as the preservation of evidence, inspection of property, goods or documents; to maintain the *status quo* in order to prevent irreparable and serious injury; to prevent the relief sought in the substantive claim from becoming moot; and to ensure enforcement of a future award, such as the freezing of assets to prevent it from being moved to another country.

It is a welcome development in Philippine arbitration law that the ADR Act of 2004<sup>36</sup> has expanded the otherwise restrictive language of Article 17 of the Model Law which limits interim measures of protection to those that are “necessary in respect of the subject matter of the dispute.” Following the example of modern arbitration laws,<sup>37</sup> the ADR Act does not limit the power of the arbitral tribunal to issue interim measures of protection to those “necessary in respect of the subject matter of the dispute,”

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35. Construction Industry Arbitration Commission.

36. In Secs. 28 and 29.

37. For example, the Singapore International Arbitration Act and the Hong Kong Arbitration Law.

but proceeds to enumerate the various types and forms of interim or provisional relief that the arbitral tribunal may issue and which may or may not be necessarily related to the subject matter of the dispute, including the catch-all power “to compel any other act or omission.” Thus, where the seat of arbitration is in the Philippines, the arbitral tribunal will have in its arsenal a wide array of interim measures of protection that the parties may avail themselves of to facilitate the arbitral proceedings and to prevent any party from defeating the purpose of the arbitration or from frustrating the enforcement of a future award – to the end that the interest of justice may be duly served.

# Salient Features of the Arbitration Process\*

*Dato' Syed Ahmad Idid\*\**

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\* Delivered at the *Conference on Arbitration for the Judiciary* on March 24, 2006 at the Intercontinental Manila, Makati City, Philippines.

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He is a Barrister-at-Law of the Honourable Society of the Inner Temple, London; ABMP (AIM Manila), General Management of Sundridge Centre, United Kingdom (U.K.). He was also an Adjunct Professor in Management at the Golden

## I. INTRODUCTION

Your Ladyship, the Honorable Madame Justice Ameurfina A.  
Melencio Herrera, Chancellor of the Philippine Judicial  
Academy (PHILJA), Supreme Court of the Philippines  
Honorable Justices  
Dean Eduardo De Los Angeles  
Prof. Alfredo F. Tadiar,  
Chair, Alternative Dispute Resolution (ADR) Department  
Honorable Judges, and  
All Good friends,

I am particularly pleased to be here this morning to speak on the  
topic which was selected for me by PHILJA. The Conference is  
useful not only for you but also for the Kuala Lumpur Regional

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Gate University, San Francisco and Universiti Utara Malaysia  
(UUM) (University of North Malaysia).

Dato' Idid's fellowships in various institutions include the  
Institute of Bankers Malaysia; Institute of Management  
Consultants Malaysia; Malaysian Institute of Human Resource  
Management, Malaysian Institute of Arbitrators and of  
London/Goodenough House. He was also a holder of  
Fellowship in the British Institute of Management, the Institute  
of Directors (UK), and of the Institute of Industrial  
Management (UK).

He is a member of the International Bar Association, the  
Commonwealth Lawyers' Association and the Commonwealth  
Magistrates' and Judges' Association.

He is an Arbitrator on several Panels including those of the  
London Court of International Arbitration (LCIA) and China  
International Economic and Trade Arbitration Commission  
(CIETAC).

Centre for Arbitration (KLRCA) as we gauge our importance by the number of friends we make and the increase in the number of people using arbitration whenever they have commercial disputes.

I have included some court cases from various jurisdictions (including Malaysia). I hope that these are sufficient to assist you in your further discussion.

## II. THE NEED FOR AN ARBITRATION AGREEMENT

The United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration (“Model Law”),<sup>1</sup> the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (“The 1958 New York Convention”) and the arbitration law of Malaysia, clearly stipulate the need for an arbitration agreement. I believe the Philippine Republic Act No. 9285 (The Alternative Dispute Resolution Act of 2004) also spells this out. In his book *Arbitration in the Philippines and the Alternative Dispute Resolution Act of 2004 (RA No. 9285)*, Atty. Eduardo P. Lizares writes:

All that the Arbitration Law requires as to the form of the submission agreement or arbitration clause (collectively referred to simply as “arbitration agreement”) is that the agreement must be in writing and subscribed by the parties thereto.<sup>2</sup>

1. See [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/1985Model\\_arbitration.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html). To view the case law thesauri (which includes a guide to case law pertaining to the relevant Model Law provision) see [http://www.uncitral.org/uncitral/en/case\\_law/thesauri.html](http://www.uncitral.org/uncitral/en/case_law/thesauri.html).
2. See page 63 of *“Arbitration in the Philippines and the Alternative Dispute Resolution Act of 2004 (RA No. 9285)”*

The need for an arbitration agreement is expounded by the requirement that the arbitration agreement has to be in writing. The writing requirement is important not only in respect of proving the existence of an arbitration agreement but also when it comes to the enforcement of an arbitration award. Article 7 (Definition and form of arbitration agreement) of the Model Law reads as follows:

1. "Arbitration agreement" is an agreement by the parties to submit to arbitration all or certain disputes which have arisen between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause or in the form of a separate agreement.
2. The arbitration agreement shall be in writing. An agreement is in writing if it is contained in a document signed by the parties or in an exchange of letters, telex, telegrams or other means of telecommunication which

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Eduardo P. Lizares, EPL Publications, 2004. Mr. Lizares goes on to write:

There is no other requirement as to the form of the arbitration agreement. Thus, the arbitration agreement may be made through an exchange of letters or telexes (or facsimile) or by reference to general printed conditions which contain an arbitration clause that are actually appended to the contract or by a mere statement of incorporation in a contract (e.g., bill of lading in contracts of carriage) or the terms of another document (e.g., a charter party) which contains, among other things, the arbitration clause, without such document actually being appended to the contract and/or without any specific stipulation in the contract as to the arbitration. The same rules as to the form of an arbitration agreement in domestic arbitration also apply in international arbitration.

provide a record of the agreement, or in an exchange of statements of claim and defense in which the existence of an agreement is alleged by one party and not denied by another. The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing and the reference is such as to make that clause part of the contract.

Although Section 9 of the Malaysian Arbitration Act of 2005<sup>3</sup> does not adopt Article 7 of the Model Law *in toto*, the essential requirement that the arbitration agreement must be in writing prevails throughout Section 9, which reads as follows:

1. In this Act, “arbitration agreement” means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.
  2. An arbitration agreement may be in the form of an arbitration clause in an agreement or in the form of a separate agreement.
  3. An arbitration agreement shall be in writing.
  4. An arbitration agreement is in writing where it is contained in:
- 
3. In Malaysia, we now have the Arbitration Act 2005 effective March 15, 2006 (See PU(B) 65/2006). It is however useful to note that the old (1952) Arbitration Act of Malaysia defined an arbitration agreement as “*a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not;*” See also *Lim Su Sang v. Teck Guan Construction and Development Co. Ltd.* [1996] 2 MLJ 29.

- a. a document signed by the parties;
  - b. an exchange of letters, telex or facsimile or other means of communication which provide a record of the agreement; or
  - c. an exchange of statement of claim and defense in which the existence of an agreement is alleged by one party and not denied by the other.
5. A reference in an agreement to a document containing an arbitration clause shall constitute an arbitration agreement, provided that the agreement is in writing and the reference is such as to make that clause part of the agreement.

The KLRCA Rules of Arbitration (which is essentially the UNCITRAL Rules of Arbitration 1976) have long recognized the incalculable importance for the parties to agree on arbitration and for that agreement to be in writing, and this is clearly reflected in Rule I of the KLRCA Rules of Arbitration, which states that:

- I. Where the parties to a contract have **agreed in writing** that disputes in relation to that contract shall be settled by arbitration in accordance with the Rules for Arbitration of the Regional Centre for Arbitration Kuala Lumpur (hereinafter referred to as "KLRCA"), then such disputes shall be settled in accordance with the UNCITRAL Arbitration Rules subject to the modifications set forth in these Rules.

In whatever form the written agreement may be, it can never be emphasized enough that there should be a distinct reference to submit to arbitration, and that there be proper identification of the rules governing the arbitration proceedings. The best practice is to incorporate a model arbitration clause into the contract entered into by the parties.

A simple yet effective arbitration clause is the UNCITRAL Model Arbitration Clause:

Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with UNCITRAL Arbitration Rules as at present in force.

The Model Arbitration Clause for the KLRCA is similarly adapted with modifications:

Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be decided by arbitration in accordance with the Rules for Arbitration of the Kuala Lumpur Regional Centre for Arbitration.<sup>4</sup>

Malaysia acceded to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (“The 1958 New York Convention”) on November 5, 1985, with the following *provisos*:

- a. Declarations and reservations (excludes territorial declarations and certain other reservations and
- 
4. Similar to the UNCITRAL Model Arbitration Clause, the KLRCA Model Arbitration Clause further states that the parties may wish to consider adding:
    - a. The appointing authority shall be the Kuala Lumpur Regional Centre for Arbitration.
    - b. The number of arbitrators shall be x x x (one or three).
    - c. The place of arbitration shall be x x x (town or country).
    - d. The language(s) to be used in the arbitral proceedings shall be x x x.
    - e. The law applicable to this contract shall be that of x x x.

declarations of a political nature). This State will apply the Convention only to recognition and enforcement of awards made in the territory of another contracting State.

- b. Declarations and reservations (excludes territorial declarations and certain other reservations and declarations of a political nature). This State will apply the Convention only to differences arising out of legal relationships, whether contractual or not, that are considered commercial under the national law.<sup>5</sup>

Legal relationships that are considered commercial under the national law (of Malaysia) have been traditionally defined in accordance with English law as evident through Section 5 of the Malaysian Civil Law Act of 1956 (Revised 1972) (Act 67).

The 1958 New York Convention entered into force on February 3, 1986 in Malaysia through the Convention on the Recognition and Enforcement of Foreign Arbitral Awards Act 1985 (Act 320). Article II of the 1958 New York Convention reinforces the importance of an arbitration agreement in writing when it stipulates that:

- I. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not,

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5. <http://www.uncitral.org/uncitral/en/uncitral-texts/arbitration/NYConvention.html>. This link provides the status of the 1958 New York Convention. The UNCITRAL updates their website with information, *inter alia*, on the latest membership of the 1958 New York Convention. As viewed on February 19, 2006, there are presently 137 member countries that have acceded to the 1958 New York Convention.

concerning a subject matter capable of settlement by arbitration.

2. The term “agreement in writing” shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.

x x x x

Notwithstanding that the provision in relation to the recognition and enforcement of award under the Model Law is contained in Article 35 (in Malaysia, a similar provision exists under Section 38 of the Arbitration Act of 2005), some countries do not adopt that Article in their legislation. These countries rely instead on the provisions of the 1958 New York Convention. Paragraph (1), Article IV of the 1958 New York Convention stipulates as follows:

To obtain the recognition and enforcement mentioned in the preceding article, the party applying for recognition and enforcement shall, at the time of the application, supply:

- a. the duly authenticated original award or a duly certified copy thereof;
- b. the original agreement referred to in Article II or a duly certified copy thereof.**

Reference is made to the abovementioned Article II of the 1958 New York Convention which sets out the writing requirement for an arbitration agreement.

I shall now share with you some cases which emphasize the importance of and the need to have an agreement to arbitrate. This would include cases where e-mail arbitration agreements and

commencement of arbitration via e-mail have been recognized by the courts in the United States of America and in the United Kingdom.

The first is the High Court of Kuching, Sarawak case of *Shaharuddin Ali & Anor v. Superintendent of Lands and Surveys Kuching Division & Anor* [2004] 4 CLJ, [2005] 2 MLJ 555. The defendant's application for a stay of proceedings pursuant to **Section 6** of *Arbitration Act 1952*<sup>6</sup> in order for a matter to be referred for arbitration under **Section 212 of the Land Code (Sarawak)** was not allowed by the court. A claim for compensation was submitted by the plaintiffs to the first defendant under Section 5(3) of the *Land Code (Sarawak)* following allegations by the plaintiffs that they possess native customary rights over certain parcels of land which were extinguished by virtue of a notification in the government gazette by way of a direction under Section 5(3) and (4) of the *Land Code (Sarawak)*. The learned judge (Clement Skinner J.) made, *inter alia*, the following ruling:

On the facts of this case, the defendants had not made out a case for stay of proceedings. This was because under Section

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6. Section 6 of the Malaysian Arbitration Act 1952 states that:

If any party to an arbitration agreement or any person claiming through or under him commences any legal proceedings against any other party to the arbitration, or any person claiming through or under him, in respect of any matter agreed to be referred to arbitration, any party to the legal proceedings may, before taking any other steps in the proceedings, apply to the court to stay the proceedings, and the court, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the arbitration agreement, and the applicant was at the time when the proceedings were

5(4) of the Land Code, the plaintiffs could not be compelled to refer to arbitration any dissatisfaction they might have had with the decision of the first defendant, the operative word in the subsection being “may.”

The learned judge also made an important ruling with respect to the alleged rights of the plaintiffs under the *Land Code (Sarawak)* as follows:

Although the plaintiffs claimed that their alleged rights (which they claimed to have acquired through persons who had created those rights before 1958) were proprietary in nature, the fact remained that those rights were created or recognized by statute (see Land Code Section 5(1), (2); Land Settlement Ordinance 1933, Section 66). Therefore, **their alleged rights were rights protected by public law and did not arise out of any private contract or arrangement between the plaintiffs and the government. Accordingly, the plaintiffs’ remedy to enforce or protect the rights created or acquired or recognized in accordance with the provisions of the Land Code must be sought under public law and not private law. x x x**

This case was the subject of a comment by Dr. Colin Ong in his article “*Latest Developments in Arbitration in Malaysia and Brunei*”<sup>7</sup> where he wrote that:

In the present case, there was no written agreement between the plaintiffs and the defendants to refer their differences to arbitration.

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commenced and still remains ready and willing to do all things necessary for the proper conduct of the arbitration, may make an order staying the proceedings.

7. January 2006 Asian Dispute Review, at pages 5-II. See page 7.

Understandably, judges would be mindful of their primary duty to the public where there are statutory rights to be protected and in the special circumstances of the High Court of Kuching, Sarawak case, involving claims over native customary rights under the Land Code of Sarawak. The learned judge has made the distinction between public law and private law clearly in that case. Rights that are sought to be protected by private law must be carefully spelt out within the agreement of the parties, hence the importance of the “writing requirement.”

Here the question of “arbitrability” could also be raised, which will be addressed today by Mr. Chong Thaw Sing.

The definition of “writing requirement” for an arbitration agreement has been taken to a whole new level altogether in the United States of America. The United States Court of Appeals for the First Circuit held that employers and employees can enter into a valid and enforceable arbitration agreement through a properly worded e-mail.<sup>8</sup> In ***Campbell v. General Dynamics Government Systems Corp.***, 407 F.3d 546 (1<sup>st</sup> Circuit, May 23, 2005), a former employee had sued for wrongful termination under the Americans with Disability Act. In opposing the employer’s petition to compel arbitration based on a dispute resolution document that had been distributed to employees through the company e-mail, the employee argued, *inter alia*, that an e-mail communication does not constitute writing under the ***Federal Arbitration Act, 9 US Code (USC)*** The court applied the ***Electronic Signatures in Global and National Commerce Act (the E-Sign Act), 15 USC 7001 (a)*** and determined that:

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8. See World Arbitration and Mediation Report of September 2005, Vol. 16, No. 9.

the E-Sign Act prohibits any interpretation of the FAA's 'written provision' requirement that would preclude giving legal effect to an agreement solely on the basis that it was in the electronic form." See also *Specht v. Netscape Communications Corp.*, 306 F.3d 17, 26 n. 11 (2d Cir. 2002).<sup>9</sup>

In *Bernuth Lines Limited v. High Seas Shipping Limited [2005] EWHC 3020 (Commercial Court Decisions)*, The High Court of England and Wales received an application to set aside the Final Award of a London Maritime Arbitration Association (LMAA) Arbitrator, on the basis that the arbitration was purportedly commenced by e-mail but was not effectively served. Justice Christopher Clarke held, *inter alia*, that arbitration proceedings may be validly commenced via e-mail. An e-mail dated May 5, 2005 which was essentially a notice of arbitration under the LMAA Small Claims Procedure was sent to the charterer's e-mail address at info@xxx. The email was sent by the shipowner's lawyers claiming for outstanding hire and bunkers against the charterer. The learned judge held that the e-mail communications constituted effective service in the following manner:

The email of May 5, 2005 and, so it would appear, all subsequent e-mails, were received at an e-mail address that was held out to the world as, and so far as the evidence shows, the only e-mail address of Bernuth. Someone looked at the e-mails on receipt and, apparently, decided that they

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9. See, however, the second argument of the plaintiff employee which was accepted by the Court which refused to enforce the provision for mandatory arbitration. The Court added that the employer could have taken steps to ensure adequate electronic notice.

could be ignored, without making any contact with the sender. The position is, to my mind, no different to the receipt at a company's office of a letter or telex which, for whatever reason, someone at the company decides to discard. In both cases, service has effectively been made, and the document received will, in the first instance, be dealt with by a clerical officer x x x.

On the contents of the e-mail and the status of the e-mail address, the learned judge made the following ruling:

The e-mail of May 5 was sent with High Importance. It referred to a vessel which Bernuth had in fact chartered by the charter party mentioned in it. It identified the shipowner's lawyers, and referred to an outstanding hire claim which had been the subject of earlier correspondence. It purported to initiate arbitration proceedings by calling for agreement as to an arbitrator. I should be surprised if much junk e-mail purports to do that or to emanate, as later e-mails did, from an LMAA arbitrator. If the e-mails never reached the relevant managerial and legal staff, that is an internal failing which does not affect the validity of service and for which Bernuth has only itself to blame. Having put info@xxx into the current Lloyd's Maritime Directory as their only e-mail address, they can scarcely be surprised to find that an e-mail inviting them to agree to the appointment of an arbitrator in a maritime matter was sent to that address. I do not accept that, in an arbitration context, in order for service to be effective it is essential that the e-mail address at which service is purportedly made has been notified to the serving party as an address to be used in the context of the relevant dispute. Section 76 [of the English Arbitration Act 1996] does not say as much and there is no basis upon which that can be implied.

Sometimes an arbitration agreement involves a series of contracts or commercial transactions. In such a situation, the position of the third party or non-signatory must be carefully considered.<sup>10</sup> It was considered in the Swiss Federal Supreme Court in a landmark decision of October 16, 2003<sup>11</sup> even where the arbitration clause or the contract containing the arbitration clause was not signed by the third party. The Court held that:

this formal requirement (contained in Article 178 al. I of the Swiss Law on Private International Law) only applies to the arbitration agreement itself, that is to the agreement x x x by which the initial parties have reciprocally expressed their common will to submit the dispute to arbitration. As to the question of the subjective scope of an arbitration

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10. Mr. Bernard Hanotiau made an interesting introduction to the so-called **“group of companies doctrine”** in Chapter II of his book on *“Complex Arbitrations: Multiparty, Multicontract, Multi-issue and Class Actions,”* Kluwer Law International, 2005, at page 140 when he wrote:

Given the increasing number and complexity of commercial transactions and of national and international groups of companies and the fact that for financial tax or other commercial reasons, there is not always an identity between the individual(s) or company(ies) that has (have) signed the agreement and those that perform it, international arbitrators and national courts are more and more often confronted with the issue as to whether an arbitration agreement concluded by one individual or company may be extended or imputed to other non-signatory individuals or companies or states as additional claimants or defendants.”

11. *X. S.A.L., Y.S.A.L. and A. v. Z, SARL* and ICC Arbitral Tribunal, DFT 129 III 727. See also Bernard Hanotiau’s book, *Ibid* footnote 8 at pages 52-53.

agreement formally valid under article 178 al. 1 – the issue is to determine which are the parties which are bound by the agreement and eventually determine if one or several third parties which are not mentioned therein nevertheless enter into its scope *ratione personae* – it belongs to the merits and should consequently be decided in the light of Article 178 al. 2 LDIP.

In the United States of America, the US District Court for Maryland ruled that a third party who did not sign an arbitration agreement can be bound to arbitrate through apparent authority and incorporation by reference.<sup>12</sup> In ***Sinclair Broadcast Group, Inc. v. Interep National Radio Sales, Inc.***, No. Civ. CCB-05-326, 2005WL1000086 (D.MD April 28, 2005), the plaintiff sued for breach of contract over an agreement to be the defendant's exclusive broadcast time sales representative for stations currently owned and those to be acquired in the future. The defendant sought to compel arbitration. The plaintiff claimed that, because the contracts were between the defendant and the individual stations, the arbitration clause was not enforceable against a third party. The plaintiff had not signed the contracts. The court determined that an executive from the plaintiff company had signed the individual station contracts and under the doctrine of apparent authority under agency law, the signatory binds the principal. The court even ruled that even if apparent authority did not apply, the plaintiff would still be bound as the agreement between the plaintiff and the defendant referred to forthcoming station contracts where the parties intended the additional contracts to complete the original contract. Under the doctrine of incorporation by reference, the court found the two contracts

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12. *Ibid.* footnote 6 at pages 277-278.

were “sufficiently ‘related’ to require the plaintiff’s breach of contract claim to be submitted to arbitration.”<sup>13</sup>

It was observed by Mr. Bernard Hanotiau in his book “*Complex Arbitrations: Multiparty, Multicontract, Multi-issue and Class Actions*,” that French law of international arbitration does not subordinate the validity of the arbitration provision to compliance with formal requirements.

It would appear that in the United States and France, similar views are held that an agreement in writing to arbitrate is necessary but there is no requirement that it be signed. However, the United States Court of Appeals for the Sixth Circuit did hold that signing an arbitration agreement or an acknowledgment of receipt of an arbitration agreement, regardless of whether or not the party actually reads the documents, amounts to consent to the agreement.<sup>14</sup>

It is therefore safe to conclude that the need for an arbitration agreement is spelled out clearly in the Model Law, the 1958 New York Convention and the arbitration laws of and case law in Malaysia and in the Philippines. This need for an arbitration agreement is further propounded when it comes to the enforcement of the arbitration award. However, I would like to

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13. See also *Fisser v. International Bank*, 82 F.2d 231 at 233 (2<sup>nd</sup> Circuit 1960) and *Interocean Shipping Co. v. National Shipping and Trading Corp.*, 523 F.2d 527 at 539 (2<sup>nd</sup> Circuit 1975). See also Bernard Hanotiau’s book *Ibid* footnote 8 at page 53.

14. See *Pennington v. Frisch’s Restaurants, Inc.*, No. 04-4541, 2005 WL 1432759 (6<sup>th</sup> Circuit June 27, 2005). *Ibid* footnote 6 at page 279.

refer to an interesting observation made by Mr. Eduardo P. Lizares:<sup>15</sup>

On the basis of the Dauden-Hernaez ruling, a contract involving arbitration need not also be in writing. The Model Law only states that the agreement to arbitrate “shall be in writing,” without stating that absent the required form the contract is invalid or unenforceable. Hence, this requirement in the Model Law as to the form of an arbitration agreement in international commercial arbitration does not prevent the application of Dauden-Hernaez. This is because a writing evidencing an agreement to arbitrate in both domestic and international commercial arbitration is not necessary for its validity or enforceability or for the agreement to be proved.

### III. PARTY AUTONOMY

In my paper presented during the 19<sup>th</sup> Biennial LAWASIA Downunder 2005 Conference that took place in Gold Coast, Queensland, Australia, I had recommended that:

x x x countries in Asia to enact rules similar to the Supreme Court Civil Procedure Rules of the UK. Philip Wright on **The Woolf Reforms: Largely A Re-Statement of Current Arbitration Practice** states:

Rather ironically it is envisaged a major effect of the Rules will be for Arbitration to re-enter a new renaissance of popularity. This is because parties to an arbitration, unlike parties in civil proceedings can still maintain control; party autonomy is not restricted and there is no disproportionate front end loading of costs (due to the Rule’s emphasis on the identification and analysis of all key issues at the earliest

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15. *Ibid.* footnote 2 at page 66.

possible time – even before proceedings have been commenced). Of course this is subject to the rider that once the arbitrator has had the necessary powers conferred on him or her by the parties under the arbitration agreement and once validly appointed, the arbitrator drives the process forward (Int. American Law Reports (ALR) 1999, 2(5/6), 157-166).

The principle of party autonomy is encapsulated in Articles 6 and 7 of the UNCITRAL Rules of Arbitration when it comes to the appointment of the arbitral tribunal. Article 6 provides for the appointment of the sole arbitrator and Article 7 for the appointment of a three-member arbitral tribunal. However, the KLRCA steps into the picture as the appointing authority where parties fail to agree on the arbitrator (or arbitrators) in question.

Recently in an arbitration case registered with the KLRCA involving a commercial contract for the supply of goods and services, the Centre had to dispense with the list-procedure after having taken into consideration the specific circumstances of that case. Upon registration of the case and the advancement of the deposit for the arbitrator's fees and administrative costs by the parties in equal share, KLRCA proceeded to appoint an arbitrator to hear the arbitral dispute. The respondent refused to attend two preliminary hearings set down by the arbitrator in question and insisted on being provided with a list of arbitrators from the KLRCA. The Director of the KLRCA had exercised his discretion under the exception in Article 6(3) of the UNCITRAL Rules of Arbitration to dispense with the list-procedure. In this particular case, a series of correspondence had been exchanged between the parties where several time limits had been set by the claimant for the respondent to agree on the names of the arbitrators proposed by the claimant. It was only after the expiry of those

time limits that the claimant proceeded to register the arbitration case with KLRCA. The time limits were contained in two of the claimant's letters, one of which was the Notice of Arbitration. Arbitration in that case had commenced on August 11, 2004, when the respondent acknowledged receipt of the Notice of Arbitration and the registration date of that case by the Centre was on January 14, 2005. The Centre also took into consideration the arbitration clause in that particular contract (which is reproduced below for reference purposes):

#### Disputes and Arbitration

Arbitration shall be conducted by a single arbitrator to be agreed between the parties. **If not agreed within 14 days of the parties first conferring on the matter, the arbitrator should be a person appointed by the Director of the AALCC<sup>16</sup> Regional Centre for Arbitration at Kuala Lumpur, Malaysia (“the Centre”)**. The party in whose favor the arbitration award is granted shall be entitled to recover costs and expenses of administration of the arbitration proceedings. Any arbitration award granted shall be final and binding on the parties and is not subject to appeal, and shall be enforceable at any court of competent jurisdiction.

The will of the parties had been clearly expressed in the arbitration clause and it was their will for the Director of the KLRCA to appoint the sole arbitrator should they fail to agree on the sole arbitrator within the specified time limit in the contract. KLRCA had also based the Director's discretion NOT to use the list-procedure on paragraph 53 of the Report of the United

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16. It began as Asian-African Legal Consultative Committee or AALCC but has evolved and developed into the AALCO (Asian-African Legal Consultative Organization).

Nations Commission on International Trade Law on the work of its Eighth Session (Geneva, April 1-17, 1975) (*A/10017*), under Chapter V entitled “International Commercial Arbitration,” which provided that:

where the appointment of a sole arbitrator was to be made by an appointing authority, the list procedure prescribed in this paragraph was undesirable. The appointing authority should be left free to make a direct appointment, and thereby avoid the delay necessarily arising from the list-procedure; such an appointment would also be in conformity with the will of the parties, who had left the choice of the sole arbitrator to the appointing authority.

The primary consideration of the KLRCA Director was to appoint the sole arbitrator as promptly as possible in accordance with the first limb in Article 6(3) of the UNCITRAL Rules of Arbitration. Since the arbitration had commenced on August 11, 2004, the Centre was mindful of the additional time it would take if the list-procedure under Article 6(3)(a) to 6(3)(d) was adopted.

#### **IV. SELECTION OF ARBITRATORS**

Unlike court proceedings, where parties generally have no input into the choice of judge for their case, the parties to an arbitration usually appoint, nominate or at least have some input into the selection of the arbitrator(s) as laid down in Articles 6 and 7 of the UNCITRAL Rules of Arbitration. Most developed arbitration laws require that all the arbitrators be impartial. KLRCA arbitrators, for instance, have to sign a Declaration of Impartiality and Independence which remains in effect throughout the entire duration of the arbitration proceedings. A breach of

this Declaration may see a challenge being instituted against the arbitrator in question under Articles 9 to 12 of the UNCITRAL Rules of Arbitration.

A party can use its choice or input into the selection process to help ensure that, as far as possible, the tribunal will understand the commercial context, the relevant issues and the party's procedural preferences. The parties may agree upon certain criteria<sup>17</sup> for the arbitrators, or for the presiding arbitrator, although care should be taken not to narrow the field so far that there are difficulties in identifying potential candidates. In arbitrations with more than one party on either side, or where other parties might be joined into the proceedings, maintaining the parties' right to choose the arbitrators (rather than simply delegating the choice to an institution) can be particularly challenging. For example, if one party has the right to select an arbitrator but two parties on the other side cannot agree upon a joint selection, the latter could claim that they were not being treated equally. Careful consideration as to the means of appointing the arbitrators is therefore required in such multiple-party scenarios.

In litigation, on the other hand, the vagaries of the court lists may result in an action being heard after a long delay by a judge with no experience in the field in which the dispute arises. In some parts of the world, it is clear that the court system is quite unable to cope with modern commercial disputes and not infrequently there are difficulties caused by corruption and lack

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17. See "Concord and Conflict in International Arbitration" by The Rt. Honorable Sir Michael Kerr (former Lord Justice of Appeal) in 1997. [This is to impress upon young judges that some highly regarded old judges do respect and honor arbitration.]

of independence of the judiciary. These difficulties are not confined to the developing world. The quality, speed and cost of obtaining redress in the courts of those countries which are members of the European Union varies considerably, as anyone who has attempted to bring a commercial law suit in, for example, Italy, Greece or Spain is well aware.

## V. CONFIDENTIALITY

Although the degree of confidentiality afforded by the arbitration law of different jurisdictions (absent express provision by the parties) varies, there can be no doubt that arbitration provides greater privacy<sup>18</sup> and confidentiality than litigation (which is often public). Further, parties can provide for the required degree of confidentiality in their arbitration agreement (at least until such time, if ever, that enforcement through the courts becomes necessary, when confidentiality might be put at risk by the court process).

To quote South Centre ([www.southcentre.org](http://www.southcentre.org)) [which is against the proposal to open the hearings to the public]:

The policies of the International Centre for Settlement of Investment Disputes (ICSID) Convention should not be understood in terms of secrecy from the public. The basic policy is that arbitration hearings could be public only when the parties consent to it, since arbitration is a private dispute resolution process. An important aspect of ICSID arbitration is that in addition to ratifying the ICSID Convention, the parties 'consent' to arbitrate, investment contracts or BITs that remains the basis for exercise of

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18. "The Secret Trade Courts" Editorial in the New York Times September 27, 2004.

jurisdiction. The consensual basis of the dispute remains the important feature of the ICSID framework of arbitration. It is not quite appropriate to undermine the paramount importance of the consent of the parties and the private nature of the dispute by amendment to Arbitration Rules.

The ICSID Secretariat issued their Working Paper on **“Suggested Changes to the ICSID Rules and Regulations”** and amongst the suggested changes was the change to Rule 48 (Rendering of the Award) where it was noted that:

As stated in the Discussion Paper of October 22, 2004, Article 48(5) of the ICSID Convention and the first sentence of Arbitration Rule 48 (4) preclude the Centre from publishing a Convention award without the consent of the parties. **However the Centre may publish excerpts from the legal holdings of the award.** The suggested changes would facilitate the prompt release of excerpts, by making their early publication mandatory, and clarify the wording of the provision. Prompt publication of the excerpts is particularly important in view of the increase in the number of pending cases at the Centre. Similar changes would be made to the corresponding provisions in the Additional Facility Arbitration Rules, Article 53(3).<sup>19</sup>

This move by ICSID may help in “demystifying” arbitration to a certain extent in light of the general principle of confidentiality.

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19. The ICSID Secretariat’s paper is also available online on the ICSID website at <http://www.worldbank.org/icsid/052405-sgmanual.pdf>.

Rule 9 of the KLRCA Rules of Arbitration provides the following:

Unless the parties agree otherwise, the arbitrator and the parties must keep confidential all matters relating to the arbitration proceedings. Confidentiality extends also to the award, except where its disclosure is necessary for purposes of implementation and enforcement.

In an *ad hoc* arbitration that was conducted under the UNCITRAL Rules of Arbitration 1976, the KLRCA published a decision as the appointing authority under Article 12 of the UNCITRAL Arbitration Rules 1976 after hearing a challenge against the arbitrator initiated by the claimant. This challenge arose in the midst of an arbitration proceedings conducted under the UNCITRAL Arbitration Rules (namely at the stage of discovery of documents) where the arbitrator had refused to grant an adjournment to the claimant which the claimant had sought until all documents were produced by the respondent. The learned arbitrator went on with the hearing as scheduled in the absence of the claimant. The KLRCA found that the claimant had failed to support its allegation that the learned arbitrator is not impartial or biased in the circumstances of that case. The KLRCA also found that the claimant was not prejudiced by the learned arbitrator's refusal to grant the adjournment. The full decision of the KLRCA under Article 12 of the UNCITRAL Arbitration Rules was reported in the December 2002 newsletter of the KLRCA.

An international commercial arbitration, unlike proceedings in a court of law, is essentially a private proceeding. Dirty linen may be washed, but it will be washed discreetly and not in public. It has been said, by a highly experienced commentator that parties:

Place the highest value upon confidentiality as a fundamental characteristic of international commercial arbitration.<sup>20</sup>

However, following on the footsteps of ICSID, an institution very much established and revered in the field of investment arbitration, the KLRCA itself aims to provide the latest developments in the field of international commercial arbitration within the Asia-African region, through the publication of our newsletters, once every four months. The introduction of a special column specifically focusing on recent developments within the Asia Pacific region has seen a steady contribution from arbitration centres in Mongolia, Japan, South Korea, and Pakistan<sup>21</sup> being reported in the KLRCA newsletter. The KLRCA also reported the new ADR Act of 2004 for the Philippines in the May 2004 newsletter of the KLRCA. An analysis of the new Philippine law was provided by Atty. Custodio O. Parlade. Atty. Eduardo P. Lizares' book on ***“Arbitration in the Philippines and the Alternative Dispute Resolution Act of 2004”*** was kindly presented to me when I visited the Philippines recently and this was mentioned in the KLRCA January 2006 newsletter. We are always looking out for young talents in Asia!

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20. Law and Practice of International Commercial Arbitration by Redfern and Hunter 1999.

21. See January, May and September 2005 issues and the January 2006 issue of the KLRCA newsletter.

## VI. PLACE OF ARBITRATION

In the new Arbitration Act 2005 of Malaysia, the place of arbitration has been included as part of definition for “*seat of arbitration*”(Section 2 of the Arbitration Act 2005)<sup>22</sup> as follows:

seat of arbitration means the place where the arbitration is based as determined in accordance with Section 22;

and Section 22 states that:

1. The parties are free to agree on the seat of arbitration.
2. Where the parties fail to agree under subsection (1), the seat of arbitration shall be determined by the arbitral tribunal having regard to all the circumstances of the case, including the convenience of the parties.
3. Notwithstanding subsections (1) and (2), the arbitral tribunal may, unless otherwise agreed by the parties, meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for inspection of goods, other property or documents.

The KLRCA is in its nature a neutral venue for conducting arbitration hearings. The Government of Malaysia has been gracious in providing the necessary facilities to the KLRCA in order to carry out the KLRCA’s role as a Regional Centre, serving the 47 member states of the Asian-African Legal Consultative

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22. Contrast with Article 20 of the Model Law which provides for *Place of Arbitration*. However, the contents of both Section 22 of the Malaysian Arbitration Act 2005 and Article 20 of the Model Law are essentially the same.

Organisation (“AALCO”).<sup>23</sup> The Philippines became a member state of the AALCO in 1969. The Centre presently has four hearing rooms, the biggest of which is able to accommodate up to 60 people, a coffee terrace, a large and spacious arbitrators’ lounge, a meeting room and access to a large, green tropical garden. There is ample parking space which is free (rare nowadays in Kuala Lumpur!) and a library *cum* Resource Centre with a sizeable collection of books, materials and papers on international commercial arbitration. The Centre also provides secretarial, translation and interpreters’ services where requested.

As the KLRCA is under the auspices of the AALCO, it operates independently from the Government of Malaysia. On February 29, 1996, the Minister of Foreign Affairs Malaysia, in exercise of the powers conferred on him by Sections 3(I) and 4(I) of the International Organisations (Privileges and Immunities) Act 1992, made the ***Kuala Lumpur Regional Centre for Arbitration (Privileges and Immunities) Regulations 1996***. In Regulation 2, the Minister declared that the Centre is an international organization to which Section 4 of the Act applies. Section 4 deals with privileges and immunities of certain international organizations and persons. Regulation 3 provides that the:

Centre shall have juridical personality and such legal capacities as are necessary for the exercise of its powers and the performance of its functions and shall also have the privileges and immunities specified in the First Schedule to the Act.

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23. Visit the AALCO’s website at [www.aalco.org](http://www.aalco.org) to view the history and background of the AALCO, as well as the present list of member states.

Part One of the First Schedule to the Act (Section 4) states the:

Immunity of the organization, and of the property and assets of, or in the custody of, or administered by, the organization, from suit and from other legal process.

## VII. SHORTCOMINGS OF ARBITRATION

Let me say at once that arbitration can never replace the courts if this will help cool down some courtly tempers in certain countries. Some judges are fearful that their standing and worth in the community may be affected. Such can be affected or reduced by their performance and results they produce in the courts. Their reputation hangs on the judgments they issue. But I can add, and this is secret! – that those knowledgeable of arbitration and its value prefer not to go on the Bench. The fees in arbitration can be huge. In one case, and there are thousands others, an arbitrator's fees enabled him to buy a flat in the UK and a large piece of land in an Asian country. I share this with you because majority here are judges looking forward to retiring and getting into your second retirement. But my caution is this: if the judge(s) has/have been a bad decision-maker on the Bench or if he/she was poor at human relations, then the chances are bleak that any party, much less any counselor solicitor, will engage him/her as an arbitrator. People love a good judge and a good judge is honest, fair and respectful, friendly but not corrupt.

The other quality is that he/she must not overcharge! Start at a reasonable fee which both parties can accept. Then as your standing as an arbitrator grows, your fees can grow. But be warned: at a certain stage, the fees may have to go down because every human can be restricted.

I can tell you of one case (which happily is not a KLRCA matter because we have a scale and we religiously stick to it). The subject claim is 1.3 million. No need for me to specify the currency, whether Singaporean dollars or Australian dollars or Malaysian ringgit or British pound or Philippine pesos. The old (retired judge) arbitrator heard the claims for five to six hours daily at the start after receiving a big kickoff (or start-up) fee. Then he reduced the daily hours to three on the ground he was not well. Everything slowed down and finally the parties found that they had to pay him 750,000. He handed down or rendered an award (not a judgment as we must realize) of 1 million to the claimant. One of the parties decided to go bust (or “insolvent” in legal terms) so as to avoid paying the balance of the fees. And the arbitrator no longer gets any new invitation to arbitrate. All these matters take place in the Asian region.

There is also an interesting case that was reported in the Malaysian papers, the excerpt of which was published in the January 2006 newsletter of the KLRCA. Suffice it to say that this again was NOT a KLRCA arbitration. The arbitration award amounted to RM740 million which consisted of the principal claim at RM669 million, an additional RM61.5 million that represented interest at 8 percent per year and RM3.1 million of arbitration cost, and the remaining RM6.8 million being the legal fees. The Centre did a rough calculation based on the figures reported in the papers and discovered that had the arbitration been registered with the KLRCA, the maximum arbitration cost (tribunal of three and the Centre’s administrative charges) would amount to RM2.3 million (and not RM3.1 million!)

The Centre issues a Guide to Arbitrators in arbitrations conducted under the Rules of the KLRCA where the fees and costs of arbitration are explained in detail.

## VIII. ADVANTAGES OF ARBITRATION

To summarize the most significant advantages of arbitration, allow me to quote from what was written by Mr. Christian Buhring-Uhle:<sup>24</sup>

Clearly the two most significant advantages and presumably the two most important reasons for choosing arbitration as a means of international commercial dispute resolution seem to be the **neutrality of the forum**, i.e., the possibility to avoid being subjected to the jurisdiction of the home court of one of the parties, and the superiority of its legal framework, with treaties like the New York Convention guaranteeing the **international enforcement** of awards (emphasis added).

I would now like to expand on these two most significant advantages of arbitration as seen in the context of the KLRCA.

### *A. Neutrality of the Forum*

This has been covered under the subtitle **Place of Arbitration** in this paper.

### *B. International Enforcement of Awards*

KLRCA Arbitration Awards are enforceable in the courts of Malaysia as well as courts of other countries which are signatories

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24. "A Survey of Arbitration and Settlement in International Business Disputes Advantages of Arbitration" at pages 25-41 of *Towards a Science of International Arbitration, Collected Empirical Research*, Edited by Christopher R. Drahozal and Richard W. Naimark, Kluwer Law International, 2005, at pages 31,32 and 33.

to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958.<sup>25</sup>

The role of the Malaysian Courts has been clearly defined in Section 34(3) of the Malaysian Arbitration Act of 1952 to provide for the enforcement of KLRCA Arbitration Awards, as well as the enforcement of Awards rendered under the 1965 (Washington) Convention on the Settlement of Investment Disputes between States and the Nationals of other States.<sup>26</sup> In his article *“Leaving the Colonial Arbitration Laws Behind: Southeast Asia’s Move into the International Arbitration Arena,”*<sup>27</sup> Mr. Jan Schaefer made this interesting observation of the role of the KLRCA, in that the Centre:

provides for a national arbitration and is therefore different from the other centres. No arbitration institution can provide for a national arbitration unless this approach is backed up by a state. Malaysia did so with the amendment of its Arbitration Act 1952. Section 34, which was added in 1980, provides that no court shall intervene with the arbitration, except to enforce the award.

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25. The 1958 New York Convention was implemented in Malaysia through the 1985 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (Act 320). See also Sec. 34(2) of the Malaysian Arbitration Act of 1952. See now Sec. 38 of the new Arbitration Act 2005 of Malaysia.

26. See also the Convention on the Settlement of Investment Disputes Act of 1966 where Malaysia implemented the Washington Convention. For more information on ICSID, log on to [www.worldbank.org/icsid](http://www.worldbank.org/icsid).

27. *Arbitration International*, Vol. 16, No. 3, 2000 at page 297; see pages 319-320.

In light of the new Arbitration Act of Malaysia 2005, recognition and enforcement of foreign arbitral awards would come within the scope of Section 38.

The other important advantages that were mentioned by Mr. Christian Buhring-Uhle were **confidentiality of the procedure, expertise of the tribunal, the absence of appeals** and the **limited discovery** available in international commercial arbitration. These I have touched in the subtitle **Confidentiality** in the earlier part of this paper. KLRCA has a ready pool of arbitrators, both from within as well as outside Malaysia, who comprise not only of eminent jurists, but also lawyers, former judges, engineers, architects, surveyors, etc. We have been welcoming our new arbitrators in the KLRCA newsletters beginning with the publication of the KLRCA September 2004 issue.<sup>28</sup> As for the absence of appeals, with the introduction of the new Arbitration Act 2005 of Malaysia, this advantage would now rest entirely in the hands of the parties to the arbitration, to determine.

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28. The KLRCA newsletters are published once every four months. To obtain back copies of the KLRCA newsletters, including the September 2004, January 2005, May 2005 and September 2005 issues, please write to the KLRCA at No. 12, Jalan Conlay, 50450 Kuala Lumpur, Malaysia or e-mail us at [enquiry@rcakl.org.my](mailto:enquiry@rcakl.org.my).

## IX. CONCLUSION

In his *“Survey of International Arbitration Procedures,”*<sup>29</sup> Mr. Robert Coulson goes on to conclude that:

Parties expect the administrative agency to facilitate arbitration, to process the cases efficiently, to provide hearing rooms, and to open lines of communication.

He advises that:

The more provisions that are settled in the original contract, the better the likelihood of the parties avoiding subsequent time-consuming court involvement on procedural issues.

KLRCA subscribes to this useful advice. KLRCA offers advice and assistance to parties who approach the Centre in the early drafting stages of the commercial contract. Where two or more business organizations enter into an international commercial transaction, they may wish to adopt the KLRCA model arbitration clause in their agreement so that any dispute arising therefrom may be resolved in accordance with the KLRCA Rules of Arbitration. The KLRCA Model Arbitration Clause was provided in this paper’s section on **The Need for an Arbitration Agreement**.

In light of the new Arbitration Act of Malaysia, it is recommended that parties to an international commercial contract considering arbitration at the KLRCA may wish to include the

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29. “Survey of International Arbitration Procedures” by Robert Coulson in *Towards a Science of International Arbitration: Collected Empirical Research*, Edited by Christopher R. Drahozal and Richard W. Naimark, Kluwer Law International, 2005, page 104.

*proviso* that **“Part III of the Arbitration Act 2005 shall not apply.”** Part III of the Arbitration Act 2005 allows for court interference during the arbitration proceedings or appeals in the courts of Malaysia against the arbitration award.<sup>30</sup> In this respect, it would be useful to reproduce Section 3 of the Arbitration Act 2005 for further study and consideration of the learned judges in understanding the intention of the parties to a domestic or an international arbitration in Malaysia, when they draft the relevant arbitration clauses in their domestic or international commercial contract:

**Application to arbitrations and awards in Malaysia**

3. 1. This Act shall apply throughout Malaysia.
2. In respect of a domestic arbitration, where the seat of arbitration is in Malaysia:
  - a. Parts I, II and IV of this Act shall apply; and
  - b. Part III of this Act shall apply unless the parties agree otherwise in writing.
3. In respect of an international arbitration, where the seat of arbitration is in Malaysia:
  - a. Parts I, II and IV of this Act shall apply; and

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30. It was pointed out by a speaker at a recent public seminar organized by the Bar Council of Malaysia on March 13, 2006 (and supported by the KLRCA) that Secs. 41 and 42 of the Arbitration Act 2005 of Malaysia (which are within Part III of the new Act) would appear to contradict the provision in Sec. 36(I) of the new Act which provides for the arbitration award to be *“final and binding”* subject only to corrections and interpretation as provided for under Sec. 35 of the new Act (both Secs. 35 and 36 are within Part II of the new Act).

- b. Part III of this Act shall not apply unless the parties agree otherwise in writing.
- 4. For purposes of paragraphs 2(b) and (3)(b), the parties to a domestic arbitration may agree to exclude the application of Part III of this Act and the parties to an international arbitration may agree to apply Part III of this Act, in whole or in part.

The KLRCA would prefer the parties honoring their roles and carrying out their duties rather than coming for arbitration, and in the Philippines, we are sure that judges also wish for the same. However, where disputes arise and the parties choose arbitration to resolve such disputes, parties to an international arbitration,<sup>31</sup> if they are non-Malaysians may not be familiar with

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31. An international arbitration has been defined in Sec. 2 of the new Arbitration Act of Malaysia 2005 as *an arbitration where:*

- 1. *One of the parties to an arbitration agreement, at the time of the conclusion of that agreement, has its place of business in any State other than Malaysia;*
- 2. *One of the following is situated in any State other than Malaysia in which the parties have their places of business:*
  - a. *The seat of arbitration if determined in, or pursuant to, the arbitration agreement;*
  - b. *Any place where a substantial part of the obligations of any commercial or other relationship is to be performed or the place with which the subject matter of the dispute is most closely connected; or*

the Malaysian court system. The new Arbitration Act of Malaysia, through Section 3, now provides for complete party autonomy in choosing the extent of court intervention during the arbitration proceedings and upon completion of the proceedings with the rendering of the arbitration award.

And, ladies and gentlemen, let me say this, with a sound system of arbitration working smoothly in any country, that country will enjoy a flow of foreign direct investments which in turn helps to spur the economy. We in KLRCA wish you a happy and fruitful deliberations and look forward to more successes for the Philippine courts and people. Thank you.

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3. *The parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one State.*

The classification of an arbitration as either domestic or international has more or less been established at the KLRCA (even before the introduction of the new Arbitration Act of Malaysia) by consultation with the parties to the arbitration and by referring to the practice of the ICSID. In her article entitled “*Arbitration Act 1952 – Sec. 34 and the Kuala Lumpur Regional Centre for Arbitration – Origins and Implications*” [2002] 2 MLJ CLXXIX, Dato’ P.G. Lim, former Director of the KLRCA, classified an arbitration as international after consulting with both the parties to the arbitration, who did not object to that classification and after referring to an ICSID arbitration case no. ARB/81/1 (*Amco-Asia Corp. et al v. the Republic of Indonesia*). It was determined by the arbitral tribunal in that ICSID arbitration that “*because the company was under foreign management and had foreign capital invested in it, it was to be treated as a national of another contracting state and the tribunal had jurisdiction over the dispute.*”

# **Court-Annexed Arbitration: An Initial Proposal (Interactive Discussion)\***

*Prof. Alfredo F. Tadiar\*\**

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Prior to his appointment at the NAC, he headed a Government Panel constituted by President Fidel V. Ramos to negotiate a peace agreement with the military rebels that sought to topple the Aquino Government in various coup attempts in 1993.

Prof. Tadiar has been regarded by the Honorable Chief Justice Hilario G. Davide, Jr. as the “Father of Alternative Dispute Resolution (ADR) in the Philippines.”

## I. INTRODUCTION

Good morning. I take note that because of the lack of time, Dato' Syed Ahmad Idid was not able to expound on the last portion of his topic, on "the shortcomings of arbitration."

Nevertheless, I would like to pick out some portions of Dato' Idid's presentation wherein he mentioned about parties that are bound by an arbitration agreement through incorporation.

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Prof. Tadiar is the first Chair of the ADR Department of the Philippine Judicial Academy (PHILJA), and pioneered, among others, the Pilot Testing of Court-Diversion of pending cases for mediation in 1991 and initiated an empirical research study, funded by The Asia Foundation, of the efficacy of ADR in 1983.

Prof. Tadiar has been involved in construction arbitration since 1991 and has rendered the most number of decisions/awards (over 115 cases) among those accredited for said profession, including those with the largest sums in dispute and the most complex. He has set the record for speed of resolution and has not been reversed by an appellate court. His wide experience in construction arbitration includes projects related to high rise construction, infrastructure, power generation, architectural and interior design mass housing, and many others. Although retired as UP Law Professor, he continues to be active in law practice, arbitration and mediation. He has presented many papers on various aspects of construction arbitration and has trained several groups of arbitrators.

A product of two Philippine Law Schools, University of the Philippines and Silliman University, AB (*cum laude*) and LLB (*cum laude*), and two American Law Schools: Harvard and Boston University, Prof. Tadiar placed 14<sup>th</sup> in the 1955 Bar Examinations.

Section 35<sup>1</sup> of Republic Act (RA) No. 9285, very clearly states that in construction disputes, we have extended the coverage of arbitration to those that are not expressly or directly covered by the arbitration clause.

For instance, the dispute in construction is generally between the contractor and the project owner, or the project owner *versus* the contractor. They have an arbitration clause, but what about the designer? Here you have a designer who can be included even though he is not part of the construction contract. We have in Section 35 not only the project owner and the contractor but also the subcontractor, the fabricator, the project manager, the design professional, the consultant, the quantity surveyor, the bondsman or issuer of an insurance policy, who, even though they are not parties to the arbitration agreement, are nevertheless bound by the arbitration clause. The Supreme Court has ruled in the case of an insurance company that they are bound because their contract as a surety is merely ancillary to the principal construction contract.

The other thing that I would like to pick out from Dato' Idid's presentation is his stress on the seat of arbitration. In my

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- I. **SEC. 35. Coverage of the Law.** – Construction disputes which fall within the original and exclusive jurisdiction of the Construction Industry Arbitration Commission (the “Commission”) shall include those between or among parties to, or who are otherwise bound by, an arbitration agreement, directly or by reference whether such parties are project owner, contractor, subcontractor, quantity surveyor, bondsman or issuer of an insurance policy in a construction project.

The Commission shall continue to exercise original and exclusive jurisdiction over construction disputes although the arbitration is “Commercial” pursuant to Section 2I of this Act.

previous presentation entitled *Overview of Arbitration in the Philippines and Highlights of the ADR Law of 2004*, I have discussed the essential concept of arbitration as being a shift from public judging to private judging. The parties employ a judge. In effect, it is like asking a person appointed by the parties to be the judge of their dispute, this is in fact private judging.

I have also discussed the benefits of private judging as opposed to public judging. One of the benefits that I have pointed out is the expeditiousness and speed of resolution, this is illustrated by two construction arbitration cases that we did here in the Philippines: one is the Pacific Plaza Towers, a two-tower building built in Fort Bonifacio under the auspices of Metro Pacific Corporation, and the other is the Skyway Project, where the Indonesians and Taiwanese were involved in the construction. Admittedly, had it gone to the courts, it could have taken 10 years to resolve, but we did it in one month.

The other benefit that I could see from private judging is the **flexibility of the rules**. Datu Idid mentioned that the seat is agreed upon. Although it is agreed upon that construction industry arbitration will be here in Manila, it does not prevent us from transferring venue to another place.

For instance, in another construction dispute, economic considerations decided the venue. If the parties would all be coming to Manila from Cebu – two lawyers on both sides, five witnesses on both sides, there would be 10 of them coming to Manila who would be spending two or three days here. That would be a lot of expense for the parties. In comparison, the cost of having the arbitrators go to Cebu, as in our case, three of us went to Cebu plus one staff, four in all, would be so much less. So, the parties requested that the venue be transferred to Cebu and we granted

the motion. We made an ocular inspection; conducted a hearing in one day. We thus saved the parties a lot of expense. That is another advantage of private judging that I know is not for you judges in public judging to do.

In my presentation on the overview of arbitration wherein I **took off** from the perspective of height and distance – standing on the 14<sup>th</sup> floor where we are going to view the entire surroundings – and also see it from a historical perspective, I lamented on how slow the wheels of legal reform are in this country. There is one notable exception in the first legal reform on ADR. I was part of the committee that drafted the Katarungang Pambarangay Law. We worked every week until we finished the law in two months. After we had approved it, I was tasked to provide the justification for that law. We submitted it to President Ferdinand E. Marcos, and on the same day, June 11, 1979, it was approved. That was one of the benefits of Martial Law. Thereafter, we went on a nationwide campaign to convince stakeholders that the Katarungang Pambarangay Law would prove beneficial, and should be acceptable to all to undergo compulsory conciliation before taking recourse to judicial remedy. Outside of that single exception, almost all the reforms that we embarked upon had taken many years to materialize.

Another example, my second involvement in alternative dispute resolution was in the crafting of the Law Student Practice Rule, which took effect in 1989. The Law Student Practice Rule became Rule 138-A of the Rules of Court. It was crafted in the University of the Philippines (UP), where I was the Project Director. We submitted a petition to the Supreme Court. It took seven years before the Supreme Court finally agreed to approve it, with one dissenting opinion. The concept is for a supervised

student practice on the theory that learning does not all take place in the classroom. You can do as much learning by actual practice. But it took seven years before the Court finally approved the rule only after I had pointed out that Papua New Guinea had beaten us to the punch. After Papua New Guinea had approved its Law Student Practice Rule, the Supreme Court finally approved Rule I38-A providing for a supervised law practice for students.

My third involvement is in the Court-Annexed Mediation. I conceptualized the Court-Annexed Mediation in UP. We started this in 1991, and a final report was given to Chief Justice Andres R. Narvasa in 1993. It sat on the shelf and did not see the light of day until 1996, when the Philippine Judicial Academy (PHILJA) was established. Finally, in 1999, the idea of diverting pending court cases to mediation as a means of unclogging and decongesting court dockets caught on. That same year, up to 2006, we have only established 27 Philippine Mediation Centers (PMC). It is our hope that we can establish 50 mediation centers by the end of the year to cover all the regions in the country. Six years for the clinical legal education, seven years for the court-annexed mediation to take root. That is how long it takes. I already mentioned that arbitration took us all of 100 years to be where we are now.

Part of the economics of having a foreign arbitrator come to the Philippines is that our fees in arbitration are generally much lower than expected. It does not cover the fare of Datu Idid during his stay. On the other hand, like any reform, if we reform too much ahead of time, it will not be acceptable. And therefore if we price ourselves out of the market, we can never have arbitration accepted in the Philippines.

## II. COURT-ANNEXED ARBITRATION: AN INITIAL PROPOSAL

I stress the word **initial**. This proposal is just a product of my single mindedness and has not been subjected to the critique of Dean Eduardo D. de los Angeles. I also note that there are still many loose ends from this proposal. There will be controversies for those who feel that party autonomy, which I and Dato' Idid stressed in our presentations, may be infringed upon by a court-annexed mediation. That is an opposing point of view. I am well aware of the opposing points of view and that when I make this proposal there will be some opposition.

### ***A. Objectives***

I propose two things: *first*, a diversion of actual pending court cases to arbitration as a component to court-annexed mediation, and the imposition of a pre-condition to judicial recourse of cases with arbitration clauses. *Second*, through this forum, I want to float the idea and try to determine the acceptability of the proposal to you, who are members of the Judiciary, practicing lawyers, and litigants, and find out how acceptable it is.

### ***B. Rationale of Court-Annexed Arbitration***

The rationale of court-annexed arbitration is to be an additional instrument to accomplish the following purposes:

1. Decongest the presently clogged court dockets;
2. Empower the people to resolve their own disputes. This is in accordance with the presentation of Dato' Idid that the entire idea of empowerment is included in what he had presented to be party autonomy or the freedom of

the parties to make their own arrangement to resolve their own dispute.

3. Restore the proper role of the Judiciary as a forum of last recourse so that you may be able to resolve the disputes that have failed earlier efforts of private accommodation and concentrate on those issues that are of significance to constitutional issues and public matters.

### ***C. Concept of Court-Annexed Mediation***

The concept of court-annexed mediation is that it is a necessary complement of the Katarungang Pambarangay Law.

The Katarungang Pambarangay Law was designed in 1979 as a method of screening out cases that are conciliable. From experience, these cases would normally wash out from the judicial system at the end of a lengthy period. The idea was to give them a chance at the beginning, instead of at the end when the parties have already grown tired of the judicial process. We now give an opportunity to the parties to reconcile their differences through mediation before going to court.

Court-annexed mediation is a complementary measure. The judicial channel from the first level courts all the way to the Supreme Court, is now heavily congested with caseload. Why do we not divert from the mainstream and relieve the pressure from the judiciary and divert it to outside mediation, arbitration or any other alternative dispute resolution mechanisms? Please note that the first of these two measures was introduced in 1979. The second of these measures took place 20 years later.

#### ***D. Purpose of Decreased Caseload of Judges***

What is the purpose of decreasing the caseload of judges? In Cagayan de Oro, there was a testimony made by a judge who had been converted to practice court-annexed mediation. She said: “Last year I have 600 cases. I was bringing all the *rollos*. I was working overnight, overtime to lower the caseload that I have. It was wrecking havoc on my family life. My husband was dissatisfied. When we went into court-annexed mediation my caseload was reduced to 100. Now I have more time to be with my family.”

That was her testimony. Thus, like her, you will have **more time for writing quality decisions**, well-researched and couched in the most persuasive language that may persuade even the losing party to accept defeat and forego a useless appeal. **Thus, we not only decongest the trial courts, but the appellate court as well.**

#### ***E. Mechanics of Implementation***

What are the mechanics of the implementation that I have for my proposal?

- I. Creation of Arbitration Center or Institute of the Philippines.

I propose the creation of a General Arbitration Center or Institute of the Philippines as a complementary measure to the PMC. In Kuala Lumpur, it is called Kuala Lumpur Regional Centre for Arbitration or KLRCA. They claim to have wider scope – beyond their national boundaries. All we want for now is to function just within the Philippines.

But why do I say “General Arbitration?” This is in contrast to “Specialized Arbitration.” Specialized Arbitration is, for instance, in the Construction Industry Arbitration Commission (CIAC), highly specialized. You also have the International Commercial Arbitration (ICA) that is also highly specialized. What we are intending to do is the creation of a General Arbitration Center, or Institute of the Philippines. We do have a Philippine Institute of Arbitrators but it is limited to construction arbitration.

2. Functions of the Center or Institute.

What are the functions with which we would want to vest this center or institution?

1. This center or institution should be vested with sufficient power to recruit, train, and even accredit arbitrators;
2. To accept for direct filing cases where the parties desire that their dispute be arbitrated; and
3. To accept pending cases diverted away from the courts to be arbitrated by reason of contractual arbitration clause or subsequent arbitration agreement.

These are the functions that I feel should be vested in the institution or the center. However, I thought, why not also empower the institute or the center to collect the fees, to collect the arbitration costs, and to see to it that payment of the arbitrator’s fees can be made directly to the center.

You can see that there are many things that will come along as we think more about it. We can modify, we can

add, we can refine this proposal, if you find it to be acceptable.

What is the need for an arbitration center or an institution? I contend that here is a party, they have an arbitration clause. What is the present procedure? He will write to the other party and say, "let us arbitrate in accordance with our arbitration clause." If the other party, like what Dato' Idid has said, does not want to go to arbitration, then he is going to delay it. If he is just going to sleep on it, he is not even going to reply, where will the other party go? He will have to go to court.

My proposal is that, it is this center that could be authorized to enforce a contractual arbitration clause. This is not far-fetched. In some jurisdictions, like in the United States of America (USA) or Canada, they have an official above the clerk of court and below the judge. He is called the Case Master. The Case Master is an official who manages the court dockets. He is an in-between official which we do not have here in the Philippines. He also manages the arbitration and the mediation that the parties may desire. In Canada, he himself engages in mediation.

This is not far-fetched. In the USA, they have bail masters and bail magistrates. The trial court judges are no longer burdened with having to look into bail. The bail is a matter that is going to be taken care of by a lesser official than a judge and you can devote yourself completely to adjudication.

### ***F. Working Model of Arbitration Center or Institute***

What did I use as models? I used two models. One is the Katarungang Pambarangay Law Model and the other is the CIAC Model.

One of the most successful arbitration institutions in the Philippines today, if not by far the most successful, is the CIAC. In 1988, we started training, through the Commission, the arbitrators that do construction arbitration. Despite the long period of time, we only have at the moment 60 arbitrators. We have recently trained arbitrators in Cebu and plan to train arbitrators in Davao. We also plan to have the Commission establish branches wherever there are construction disputes.

That is one of the models I utilized. What do we need? We need a Supreme Court issuance or a law similar to the Katarungang Pambarangay Law. I hope you have not forgotten the Supreme Court Administrative Circular No. 14-93, which would bar the filing of cases with an arbitration clause which has not undergone arbitration. That is applicable to mediation. I am only borrowing it as a model.

Administrative Circular No. 14-93, which I mentioned earlier, is a Supreme Court circular that enjoins trial judges to look into the complaint and find out if the provisions of the Katarungang Pambarangay Law have been substantially performed. If not, it authorizes the dismissal or the suspension of the case and referral back for conciliation. There may be exceptions. And I recognize that there are exceptions. For instance, where there is an urgent need for judicial action to prevent injustice, or where the arbitration clause is repudiated on valid grounds. Again, I contend and I propose that that is a matter left to the arbitration center to resolve.

To continue with my two models, for cases that have been filed in court without having complied with the arbitration pre-conditions, the Supreme Court issuance or the law must authorize the suspension of proceedings on the ground of pre-maturity. This is an established doctrine in the Supreme Court, and as a corollary measure, to refer the suspended case to the General Arbitration Center or Institute.

### ***G. Proposal Akin to Construction Disputes Filed in Court***

What is the legal basis for my proposal? Section 24<sup>2</sup> of RA No. 9285, authorizes the courts to refer pending cases in court with an arbitration clause upon motion of one party not later than pre-trial or upon joint motion of parties that are subsequently to be filed. So there is a provision in our own RA No. 9285. I also liken my proposal to the construction disputes filed in court. Again, I cite Section 39<sup>3</sup> of RA No. 9285, which authorizes RTC to dismiss a construction dispute, that was filed despite an

2. **SEC. 24. Referral to Arbitration.** – A court before which an action is brought in a matter which is the subject matter of an arbitration agreement shall, if at least one party so requests not later than the pre-trial conference, or upon the request of both parties thereafter, refer the parties to arbitration unless it finds that the arbitration agreement is null and void, inoperative or incapable of being performed.
3. **SEC. 39. Court to Dismiss Case Involving a Construction Dispute.** – A Regional Trial Court before which a construction dispute is filed shall, upon becoming aware, not later than the pre-trial conference that the parties had entered into an arbitration to be conducted by the CIAC, unless both parties, assisted by their respective counsel, shall submit to the Regional Trial Court a written agreement exclusive for the court, rather than the CIAC, to resolve the dispute.

arbitration clause in their contract. Please note that under RA No. 9285, even a case that is somehow disguised as a commercial dispute, if by examining the allegations it is found that it is indeed a construction dispute then you must dismiss and refer the case to the CIAC for arbitration upon a motion filed by party not later than the pre-trial. These are the legal bases that I cite as a basis for my proposal.

#### ***H. Enforcement of Arbitral Award***

Now we go to enforcement of an arbitral award. For cases that are directly filed with the arbitration center, I propose that the arbitration award be deposited with the proper court and thereafter a petition to enforce in case of non-compliance, based on Section 17(c)<sup>4</sup> of RA No. 9285. Secondly, for those cases that are referred from a pending case there is a different procedure. There has got to be a confirmation of the award by the judge where the case is pending and enforcement in case of breach and non-compliance. I made this distinction between cases that have reached the court and cases that have already reached the court and are pending.

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#### **4. SEC. 17. *Enforcement of Mediated Settlement Agreement.***

– The mediation shall be guided by the following operative principles:

- c) If the parties so desire, they may deposit such settlement agreement with the appropriate Clerk of Regional Trial Court of the place where one of the parties resides, where there is a need to enforce the settlement agreement, a petition may be filed by any of the parties with the same court, in which case, the court shall proceed summarily to hear the petition, in accordance with such Rules of Procedure as may be promulgated by the Supreme Court.

### III. OPEN FORUM

**Participant A (Not Identified):** Professor, I was wondering why you had to include as an exception, where a judicial action is needed as an urgent matter as provided for by Section 28, that interim measures of protection be made available to the litigants or to the parties?

**Professor Tadiar:** As I said, that is just a proposal. There may be others who have a different point of view. Would we consider the interim measure, at that point in time, sufficient and efficient to be conducted at that stage? Yes, because, as I recall yesterday, in the lecture of Atty. Eduardo R. Ceniza, he did mention that during arbitration proceedings, there were several interim measures that were effectively granted to the parties when they did go to court.

There is this good judge who approached me and said: “You know, you mentioned about Rule 65 on *Certiorari*, which is not provided for under RA No. 876.” The pending issue now in the Supreme Court is whether Rule 65 is available to question the arbitral award. And she says: “But the RTC has a similar jurisdiction. Supposing when there is no petition to confirm, there is no petition to vacate, there is no petition to modify or to correct, and a petition is filed before my court at the RTC level for *certiorari*, shall I take jurisdiction?”

That was one of the issues that this judge raised. That is the good point of having a dialogue. And I answered her, “Take a look at the nature of *certiorari*. Is it not that *certiorari* is directed principally to lower court levels from the one where the *certiorari* is filed? And is there not a doctrine which says that no judge of the same level can enjoin another judge of the same level?”

What I am trying to point out is that there are many loose ends which cannot be covered by the time allotted to us in the conference.

**Participant B (Justice Eliezer R. De Los Santos):** I am just wondering why CIAC would be considered as a working model of arbitration, when in the Court of Appeals, we had been receiving so many cases involving CIAC decision.

**Professor Tadiar:** But you cannot remove the power of judicial review whenever it is provided for in the law. There must be a remedy by which judicial review can be conducted.

The law itself in the CIAC says that the award by an arbitrator shall be final and unappealable, subject only to a review by the Supreme Court on a pure question of law. Contrary to that provision of the substantive law, which is Executive Order No. 1008,<sup>5</sup> the Supreme Court came out with an administrative issuance which was eventually included in Rule 43, that appeals from awards made in construction industry arbitration appeals shall be taken to the Court of Appeals even on questions of fact.

We are now institutionalizing mediation in the Court of Appeals where I mentioned that we have already successfully settled through mediation more than a hundred cases.

**Participant C (Justice Jose L. Sabio, Jr.):** Let me take off from what you mentioned about the Case Manager in Canada. Last year we were there and we had an opportunity to talk to the Case Manager. He was telling us that of the 1,000 cases filed,

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5. Creating an Arbitration Machinery in the Construction Industry of the Philippines, February 4, 1985.

only 200 actually go to court for trial. I was just wondering why you did not make a proposal to that effect because you pointed out that this is a higher level than the Katarungang Pambarangay.

Probably, you still would like to see it as a court-annexed mediation but unlike in Canada where it is really a part of the judicial system. Where you file the case and the Case Manager decides which should be referred to arbitration or it is pointed out when justice demands that jurisdiction be given to the courts.

In other words, the position for Case Manager would probably be warranted under that condition, if we are to achieve the purpose of decongesting the dockets of the courts. Right now, even with the advent of court mediation, judges still go to the process of pre-trial conference and that also takes time. Probably, if we have that situation where all the things that need to be mediated or arbitrated are already taken care of by the Center, then the cases that go to judges will purely be facts and law which cannot be solved by mediation.

**Professor Tadiar:** That is a good point that you have raised. I made this proposal knowing that there would be some resistance on the part of purists. Remember that when Atty. Mario Valderrama spoke about true mediation and the variants – anything that has got to do with the government is a variant. I am aware that if we have a court-annexed arbitration, similar to court mediation, there will be opposition. There are those who oppose and question why PHILJA, through the PMC, should have complete monopoly of court-annexed mediation. Why cannot the parties choose their own mediators outside of those trained by the PMC? It is an opposition that we have to consider. That is why I tempered my proposal, knowing the opposition of purists against those who are suspicious of government intervention.

**Participant D (Atty. Eduardo Lizares):** Previously, you mentioned a requirement for a court action in case a party to an arbitration refuses to proceed with the arbitration. There was an actual case that we handled involving that issue. There was a contract in the arbitration agreement, there was a dispute and we designated. This was a dispute that arose under the old arbitration law before the new arbitration law took effect in 2004. The other party disregarded the demand to arbitrate, which included our nomination or designation of an arbitrator.

Under the old law, because of the refusal of the other party to designate its arbitrator, there was no other choice or party in that particular instance but to proceed with the court action to compel the other party to designate.

In fact we did file a case, and fortunately the trial court affirmed our view that the other party should designate, and if it should fail to designate in 10 days, the court will designate based on a list provided by the petitioner.

That case went up to the Court of Appeals and fortunately the CA sustained our position. That case is now pending in the Supreme Court. But I think that is a situation that prevails under the old arbitration law. Under the new law now, in that particular situation, the aggrieved party need not go to court anymore. All he does is to request the President of the Integrated Bar of the Philippines (IBP) to designate the second arbitrator, and with the two arbitrators they can now designate the chair or the third arbitrator, and the arbitration can therefore proceed. So there would be no need for a court action to compel the refusing party to designate an arbitrator precisely because the Model Law also, which has been formulated over many years by experts on the laws on arbitration, has already provided that remedy.

**Professor Tadiar:** You are talking about International Commercial Arbitration. I am talking about Domestic Arbitration, where there is no similar provision.

**Participant D (Atty. Lizares):** Well, I beg to disagree, Professor Tadiar. Under RA No. 9285, that particular provision of the Model Law is applicable – the Arbitration Law, in Article II Section 3, Chapter on the Composition of the Arbitral Tribunal.

**Professor Tadiar:** That chapter relates to International Commercial Arbitration, the construction. They are divided into different kinds of arbitration.

**Participant D (Atty. Lizares):** I did not invite your attention to Section 33 of RA No. 9285, which says Articles 8, 10, and 11 apply to Domestic Arbitration. So whether it is Domestic or International Arbitration that remedy to ask the IBP Chair to designate the second arbitrator also applies. Therefore, in a sense, the Arbitration Law, or RA No. 9285, has remedied the previous problem or dilemma that an aggrieved party would have if the other party refuses.

**Professor Tadiar:** Thank you for that remark/question. Let me share with all of you my experience. I was appointed an International Commercial Arbitrator, sole arbitrator between a Manila-based company and a Tokyo-based company. The way I was appointed was that the claimant wrote to the other side and proposed the appointment of other arbitrators. The other side did not agree. There were several exchanges of communication until my name was proposed, and I was acceptable to both camps. I was notified of having been chosen by both camps, and we met

in a preliminary conference at which we looked into the terms of reference: the rules governing the arbitration, my fees as arbitrator, the place or venue, among others.

What I mentioned earlier is that all these could have been very easily taken care of if we had a center or institution that would take care of these preliminary matters. As to the provisions of RA No. 9285, that could be placed within the scope of the administration of the center.

I am not in any way defensive about my proposal, because it is just a proposal anyway. In fact, I am going to bring it back to the attention of the PHILJA Alternative Dispute Resolution (ADR) Committee where we are going to discuss and find out where the flaws, loose ends, and others, lie.

***Participant E (Not Identified):*** Professor Tadiar, I agree with you that the rationale of the court-annexed arbitration is to decongest court dockets. However, this is not what happened in the docket of my predecessors.

I noticed that some of them contained referrals for mediation, but there was nothing more to indicate what happened; whether or not the mediation succeeded or failed. In such a case, there was only a temporary decongestion of the docket and a delay in the disposition of the cases because when I took over, the cases were submitted for decision when they could have been decided as early as when the mediation failed. So, I would like to know what action has been taken to remedy this kind of situation?

***Professor Tadiar:*** Thank you for that question. We do have those kinds of problems in court-annexed mediation, and when problems such as those are brought to our attention; we discuss it in a meeting that we call periodically.

At PHILJA, we have two committees on arbitration, one is called the Design and Management Committee in which we design things such as what we are doing now and then try to manage them, this is specially with respect to the Canadian-funded projects. The other is the ADR Committee, which oversees the court-annexed mediation program. Whenever there are glitches, problems for either of the programs, the ADR Committee discusses and redesigns.

Formulating rules is a painstaking process for the ADR Committee. For instance, a problem or proposal such as yours may come. We discuss it, agree on the possible amendment, and then once agreed upon at the committee level, it is brought to the Board of Trustees (BOT) of PHILJA. Although the head of the BOT is the Chief Justice, any amendments we propose have to pass through the Supreme Court *En Banc*.

If the Supreme Court is not fully convinced of what the BOT or the Committee proposes, it usually asks for comments from the Office of the Court Administrator, and then refers the matter to the Revision of Rules Committee. But, as you can see, that is a long process. It really takes a long time to convince the Supreme Court to amend. There are, however, as I mentioned, always exceptions to the rule.

***Participant F (Not Identified):*** This is just a comment, Professor Tadiar. I am now presiding over a special commercial court in the RTC, and previously I was with the Metropolitan Trial Court (MeTC). The level of success in the MeTC was understandably greater than the success of court-annexed mediation now, before the commercial court. I think your proposal is of prime relevance to commercial courts because the

personalities of the arbitrators are more acceptable to the litigants due to the level of expertise needed.

For now, with due respect to the arbitrators sitting in my jurisdiction, you will find low success rate in mediation there. I just do that to comply, because it is mandatory, but there is very little success because of the type of expertise needed in most issues involving commercial court cases.

**Professor Tadiar:** Just a short response here. We have just designed new guidelines pertinent to specialized courts like commercial courts and family courts, but those have not yet been approved by the Supreme Court. The moment it is approved, you will all receive copies of the same.

**Participant G (Judge Reynaldo Daway):** I would like to point out only that in my experience, the enforcement of arbitral awards are not always done by means of petitions for enforcement of arbitral awards. In one case that I handled, there was an arbitral award regarding a conflict between a private water firm and the government in the amount of US\$ 120 million and instead of having this enforced, the private water firm filed a petition for corporate rehabilitation. And that arbitral award was taken up in the rehabilitation plan, and I approved that after the lapse of about no more than two years. So it is now a final order of approval of a rehabilitation plan that includes enforcement of an arbitral award or an order which is final and executory involving US\$ 120 million.

**Professor Tadiar:** What you are saying Judge Daway is that it need not be entitled a petition for confirmation and indeed you are correct. In fact there is nothing in the law which says petition

for enforcement. What is stated there is a petition for confirmation. The only things that are authorized in arbitration under our law are petition for confirmation filed by the prevailing party and a petition to vacate on the part of the losing party and the petition on either side to modify or correct an award. In your case however, you point out that in that particular situation one of the corporate party is in effect bankrupt. Rehabilitation means that it is in effect bankrupt. Am I right Atty. Lizares?

**Participant D (Atty. Lizares):** Well that is for insolvency.

**Participant G (Judge Daway):** It is like a dead man, a bankrupt man if you were to liken it that way. Someone in the Intensive Care Unit (ICU) is someone who can be rehabilitated.

#### IV. CONCLUSION

So my conclusion, therefore, is that there are still a number of loose ends in the proposal and a need for further discussion and refinement by the ADR Committee.

Thank you very much.

# Arbitrability: Changing Limitations\*

*Mr. Chong Thaw Sing\*\**

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During the more than 20 years of practice as consulting engineer, contractor and project manager, he had accumulated substantial technical experience to complement his knowledge in construction-related laws. It is this combination of technical and legal knowledge which he has used with advantage to resolve construction disputes or avoid pitfalls. His experience in handling

## I. INTRODUCTION

Your Ladyship Justice Ameurfina A. Melencio Herrera,  
Chancellor of the Philippine Judicial Academy  
The Honorable Dato' Syed Ahmad Idid,  
Director of the Kuala Lumpur Regional Centre  
for Arbitration

The Honorable Judges of the  
Supreme Court of the Philippines  
Distinguished guests, ladies and gentlemen,

I am truly honored to appear before such an august assembly of jurists, not as a counsel, but to share some of my humble thoughts on this subject of "Arbitrability: Changing Limitations."

Article 34(b)(i) of the United Nations Commission on International Trade Law (UNCITRAL) Model Law (the Model Law)<sup>1</sup> states that an arbitral award may be set aside if the court at the seat of arbitration finds that "the subject matter of the dispute is not capable of settlement by arbitration" under its own law. Similarly, Article V(2)(a) of the New York Convention (NYC), stipulates that:

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construction-related disputes has been reinforced through further qualifications in Master of Construction Law and Arbitration, Master of Laws in Commercial Law, and a Post Graduate Diploma in Arbitration.

Mr. Chong is the Deputy Chairman of the Chartered Institute of Arbitrators, Malaysia Branch, and a 'fellow' of both the Chartered Institute of Arbitrators, UK and of the Malaysia Institute of Arbitrators.

- I. UNCITRAL Model Law on International Commercial Arbitration, 1985.

Recognition and enforcement of the arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that (a) The subject matter of the difference is *not capable of settlement by arbitration* under the law of that country. (Emphasis added)<sup>2</sup>

In the Philippines, the new Alternative Dispute Resolution (ADR) Law,<sup>3</sup> which has adopted the Model Law framework, similarly provides in Chapter I Section 6 an inclusive list of the areas of dispute which an arbitral tribunal has no jurisdiction to resolve.

Quite clearly, many of the jurisdictions which have adopted the Model Law have taken steps to include in their arbitral laws the areas which are not arbitrable. It goes without saying that all parties in arbitrations want their awards to be enforceable in the countries where the losing parties have assets. The NYC provides, as does the Model Law, that an arbitral award may be refused recognition and/or enforcement if the competent authority (at the seat and enforcement country) finds that the subject matter of the dispute is not arbitrable.

The question of arbitrability may arise at the beginning of an arbitration (i.e., “is this dispute capable of being referred to arbitration?”) and/or at the end (“would this dispute have been capable of settlement by arbitration under the law of the enforcement state?”). There is little doubt, therefore, that the issue of “arbitrability” of a dispute “strikes at the root” of the

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2. New York Convention on the Recognition and Enforcement of Foreign Arbitral Award, 1958.

3. Republic Act No. 9285, otherwise known as the Alternative Dispute Resolution Act of 2004.

jurisdiction of the tribunal and the subsequent enforceability of its award. Despite the critical importance of this issue, there is a general lack of coherence among countries as to which subject matters may not be resolved by arbitration and this is a setback. The arbitral fraternity, especially the international arbitral community, will have to continue grappling with such inconsistencies until a unified standard can be agreed upon. The uncertainty over this issue and the unpredictable way in which it has been handled in many countries has forced parties to hotly contested arbitration proceedings to await with trepidation the enforcement of their awards by the courts. This problem is further aggravated as parties at the commencement of an arbitration may have an arbitrable dispute but are frustrated at the enforcement stage because the subject matter is not arbitrable in the country of enforcement, which allows the court to invoke Article V(2) of the NYC to refuse enforcement. Quite often, at the commencement of proceedings in an international arbitration, parties would not know with certainty the countries of enforcement. For example, in *Karaha Bodas v. Pertamina*,<sup>4</sup> the arbitration was held in Switzerland and the award was taken to United States of America (USA), Hong Kong and Singapore for enforcement. If the subject matter is not considered to be arbitrable in any of these countries, its enforcement would likely be refused under Article V(2) of the NYC.

Be that as it may, in principle, any dispute should be as capable of being resolved by a private arbitral tribunal as by the judge of a national court.<sup>5</sup> Article 2059 of the French Civil Code, for example, provides that:

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4. *Karaha Bodas v. Pertamina* (2004) 364 F 3d 274.

5. Hunter, Redfern, Blackaby and Patrides, *Law and Practice of International Arbitration* (4<sup>th</sup> ed., Sweet & Maxwell, 2004), p. 138.

all persons may enter into arbitration agreements relating to the rights that they may freely dispose of.

However, Article 2060 thereof provides that parties may not agree to arbitrate disputes in particular fields, e.g., family law and more generally in all matters of public interests. In the Philippines, the ADR Law provides for areas where dispute resolution is reserved for the national courts, such as:<sup>6</sup>

1. labor disputes covered by Presidential Decree No. 442,
2. the civil status of a person,
3. the validity of a marriage,
4. any ground for legal separation,
5. jurisdiction of the courts,
6. future legitime,
7. criminal liability, and
8. those which by law cannot be compromised.

It is quite conceivable that there are national laws which impose limitations or restrictions on the matters which can be referred to and resolved by arbitration. One of the main effects of submitting a dispute to arbitration is that the parties exclude the jurisdiction of the courts of law on that dispute. The other important effect of arbitration is that the winning party can present the award for enforcement to any court in a country where the losing party has assets.<sup>7</sup>

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6. RA No. 9285, Sec. 6.

7. Provided that the country has ratified the New York Convention of 1958 on Recognition and Enforcement of Foreign Arbitral awards. More than 140 countries have ratified the Convention as of 2005.

In certain countries, especially Third World countries, the desire to embrace the global trend of adopting arbitration as the preferred mode of dispute resolution in commercial transactions is always balanced by the desire of the states to preserve the jurisdiction of their own courts of law in areas that touch on public policy or of special economic or social interest. However, a clear trend can be observed towards reducing the areas in which disputes are not deemed to be arbitrable. In the past decades, the US legal system has undergone a clear shift from an expressed suspicion against arbitration to an arbitration-friendly attitude;<sup>8</sup> a similar evolution can be observed in other legal systems such as the Swedish system.<sup>9</sup> Notwithstanding this trend in favor of arbitrability, however, various areas of law are still deemed to be the exclusive preserve of the law courts. The areas where arbitrability is excluded vary from country to country. As a general rule, arbitration is usually permitted in all matters which parties are able to freely dispose of. This would exclude from the scope of arbitration matters such as taxation, import and export regulations, concession of rights by administrative authorities, bankruptcy, etc.

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8. The Supreme Court judgment recognizing the arbitrability of matters that were previously deemed to be the exclusive competence of the law courts was *Scherk v. Alberto-Culver* (1974) 417 US 506.
  9. See, for example, the evolution of the validity of arbitration clauses which entered into the framework of general conditions of contract, as it appears from the comparison of three Swedish Supreme Court decisions rendered in 1949, 1969 and 1980; Heuman, Lars, *Current Issues in Swedish Arbitration* (Stockholm, 1990), pp. 22ff.

This paper discusses some of the more common areas of dispute which are non-arbitrable. It is not a comprehensive treatment of this subject matter.

## II. LAW APPLICABLE TO THE QUESTION OF ARBITRABILITY

Determination of the law governing arbitrability is of considerable importance. Despite the general prevailing tendency to increase the scope of arbitrable disputes, national laws frequently differ from each other. A number of disputes which are not arbitrable under the law of one country are arbitrable in another where the interests involved are considered to be of lesser importance. The approach to bribery is a case in point: whilst bribery is a vitiating factor in all contracts, it is an issue which can be considered by arbitrators in some countries, but not in others. For example, in a commercial or consultancy arrangement, if allegations of bribery are raised by one party, they cannot be considered by an arbitrator. Consequently, in some countries, consultancy contracts relating to public procurements are not arbitrable because of the prevalence of excessive commissions considered to be bribes.<sup>10</sup> The law governing arbitrability of a dispute may depend on where and at what stage of the proceedings the questions arise.

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10. Another example are disputes arising out of the termination of exclusive distributorships. They are not arbitrable under certain laws such as the Belgian laws.

### III. CHOICE OF GOVERNING LAW IN THE CHALLENGE PHASE

National laws may vary from country to country when it comes to determining what law is applicable to the question of arbitrability in connection with a challenge of an award. The most common criterion seems to be the law of the country where the arbitral tribunal had its seat. The law of the arbitral seat is expressly mentioned by Article 32.4 of the Model Law. It may be argued that the question of arbitrability would also affect the validity of the arbitration agreement and that the invalidity of an arbitration agreement is one of the grounds provided under Article 34.2(a)(i) of the Model Law in which a court may set aside an award.

Many national laws do not expressly mention the law applicable to the question of arbitrability, but it seems possible to designate the law of the arbitral seat by way of a systematic construction of each arbitration law. For example, the Swiss Private International Act defines in Article 177 the disputes which are arbitrable and determines in Article 176 that Swiss arbitration law is applicable to all arbitrations that take place in Switzerland. We have also seen how the ADR Law provides in Section 6 the areas into which arbitrators are not supposed to stray.

### IV. CHOICE OF GOVERNING LAW AT THE PLACE OF ENFORCEMENT

The NYC clearly determines the law governing arbitrability in stating that enforcement of an award may be refused by the enforcement court if:

the subject matter of the difference is not capable of settlement by arbitration under the law of that country.

Clearly, at the enforcement stage, it is the law of the enforcement court that governs whether the dispute was arbitrable or not in the enforcement country. However, Article V (I)(a) of the NYC states very controversially that the enforcement court may refuse to enforce an award on the ground of invalidity of the arbitration agreement. Indirectly, by including Article V(I)(a), the NYC requires that not only should the arbitrability of the disputes be verified in respect of the law of the enforcement court but also in respect of the law governing the arbitration agreement.<sup>11</sup>

The NYC determines the law governing the arbitration agreement as the law chosen by the parties to govern specifically the arbitration agreement and not the dispute or, failing a choice by the parties, the law of the country where the award was made.

## V. APPLICABLE LAWS

The invalidity of an arbitral agreement due to the lack of arbitrability may lead to an annulment or refusal to enforce the award, only if the dispute was not arbitrable according to the law of the seat, which is the law of the enforcement court or the law chosen by the parties to govern the arbitral agreement. The law that governs the merit of the dispute, on the contrary, is not applicable to the question of arbitrability. For an issue such as arbitrability, which so vexed the arbitral fraternity globally, it is

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II. The most authoritative commentator to the NYC excludes the possibility that the question of arbitrability can be considered as falling also within the scope of the validity of the arbitration agreement. See van den Berg, Albert Jan, *The New York Convention of 1958* (1981), 288f.

not uncommon that the courts support the application of different criteria depending on whether the question arises at the referral stage or at the enforcement stage. This problem is well illustrated by the 1986 Belgian case involving an exclusive distributorship between a Swiss and a Belgian party.<sup>12</sup> The contract was subject to Swiss law and contained an arbitration clause. The Belgian party started court proceedings in Belgium relying on a provision of Belgian law that said disputes arising out of distributorship contracts are not arbitrable. The Swiss party asked for the dispute to be referred to arbitration. The application was granted by the Court of Appeal in Brussels, which held that:

[t]he arbitrability of a dispute must be ascertained according to different criteria, depending on whether the question arises when deciding on the validity of the arbitration agreement or when deciding on the recognition and enforcement of the arbitral award.

In the first case, the arbitrability is ascertained according to the law which applies to the validity of the arbitration agreement and ... its object. It is therefore the law of the autonomy which provides the solution of the issue of arbitrability. The arbitrator or court faced with this issue must first determine which law applies to the arbitration agreement and then ascertain whether, according to this law, the specific dispute is capable of settlement by arbitration.

Within the framework of the New York Convention, the expression "concerning a subject matter capable of settlement by arbitration" in Article II(I) does not affect the applicability of the law designated by the uniform

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12. Cour d'appel Brussels, October 4, 1985. *Company M v. MSA* (1989) XIV YBCA 618.

solution of the conflict of laws for deciding on the arbitrability of the dispute at the level of the arbitration agreement. According to the New York Convention, the arbitrability of the dispute under the law of the forum must be taken into consideration only at the stage of recognition and enforcement of the award and not when examining the validity of the arbitration agreement. This rule can be explained by the consideration that the arbitral award will, in the majority of cases, be executed without the intervention of an enforcement court.<sup>13</sup>

An interesting approach was also adopted by the US District Court for the Eastern District of New York in *Meadows Indemnity Co. Ltd. v. Baccala & Shoop Insurance Services Inc.*<sup>14</sup> The claimant initiated court proceedings in the US, despite an arbitration agreement, alleging the dispute in question was not arbitrable under the law of Guernsey, where it was incorporated and where an award would be enforced. The court had to decide whether to enforce the arbitration agreement under Article II New York Convention or whether the claim was not arbitrable. It treated Article II as a substantive rule, providing for an autonomous international concept of arbitrability. The court held that:

[r]eference to the domestic laws of only one country, even the country where enforcement of arbitral award will be sought, does not resolve whether a claim is “capable of settlement by arbitration” under Article II(I) of the Convention. The determination of whether a type of claim

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13. *Ibid.* 619.

14. *Meadows Indemnity Co. Ltd. v. Baccala & Shoop Insurance Services Inc.* 760 Supp 1036-1045 XVII YBCA 686 (1992) (EDNY 1991).

is “not capable of settlement by arbitration” under Article II(I) must be made on an international scale, with reference to the laws of the countries party to the Convention. The purpose of the Convention, to encourage the enforcement of commercial arbitration agreements and the federal policy in favor of arbitral dispute resolution require that the subject matter exception of Article II(I) is extremely narrow.<sup>15</sup>

The approach of the above two cases is in contrast to the majority of cases, which chose to determine the question of arbitrability at the pre-award stage according to their own national law. The approach and the underlying rationale of applying the national law are well illustrated by two Italian cases. In *Fincantieri v. Iraq*, the Court of Appeal in Genoa was faced with the question of whether disputes over the effects of the United Nations embargo against Iraq were arbitrable. Dealing with the question of the applicable law, the court held:

The answer must be sought in Italian law, according to jurisprudential principle that, when an objection for foreign arbitration is raised in court proceedings concerning a contractual dispute, the arbitrability of the dispute must be ascertained according to Italian law as this question directly affects jurisdiction, and the court seized of the action can only deny jurisdiction on the basis of its own legal system. This also corresponds to the principles expressed in Article II and V of the [New York Convention]. Hence,

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15. XVII YBCA 686 (1992) 690. To give the notion “capable of being referred to arbitration” in Article II an autonomous meaning based not on one law goes a step further than admitting that under the national law a broader concept of “arbitrability” exists for international claims. The latter is still a concept of a national law not dependent on foreign laws.

the answer to the question [of arbitrability] can only be that the dispute was not arbitrable due to [Italian embargo legislation].<sup>16</sup>

In the case concerning the arbitrability of European Community competition law, the Bologna Court of First Instance based its reasoning not on the jurisdictional nature of arbitration but on other arguments. The Court held that:

Article II of the said Convention provides that jurisdiction must be denied if the arbitration clause is null and void, inoperative or incapable of being performed, and that this review can only take place in the light of national law.

This principle becomes even clearer if Article II(3) is read in conjunction with Article V(2)(a) of the same Convention, which subordinates the efficacy of the arbitral award to the requirement that its subject matter be capable of settlement by arbitration, according to the law of the State where recognition and enforcement is sought.

This provision not only applies to the field which it directly regulates (the efficacy of an arbitral award already rendered); it also applies when the court obtains its own jurisdiction in the presence of an arbitration clause or agreement for international arbitration. It would be totally useless to recognize the jurisdiction of the arbitrator if the award, when rendered, could in no way be enforced in the legal system of the court which has jurisdiction.<sup>17</sup>

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16. See, e.g., Belgium, Tribunal de Commerce, Brussels, September 20, 1999, *Maternaco SA v. PPM Cranes Inc., et al* XXV YBCA 673; Switzerland Tribunal Federal, April 28, 1992, XVIII YBCA 143 (1993) 146.
17. July 18, 1987, XVII YBCA 534 (1992): The decision was later reversed since it considered disputes relating to EC competition law not arbitrable. See, Corte di Appello Bologna, December 21, 1991, XVIII YBCA 422 (1993).

## VI. ARBITRABILITY

If the issue of arbitrability arises, it is necessary to have regard to the relevant laws of the different states that are or may be of concern. These are likely to include the law governing the party involved, where the agreement is with a state or state entity; the law governing the arbitration agreement; the law of the seat of arbitration; and the law of the place of enforcement of the award.

Whether a particular dispute is arbitrable under a given law is in essence a matter of public policy for the government to determine. It must be recognized, though, that public policy varies from one country to another, and indeed changes with time. It is, therefore, possible at this juncture to provide only a non-exhaustive list of what is arbitrable. The areas where problems of arbitrability have traditionally arisen are in anti-trust and competition, securities transactions, insolvency, intellectual property rights, illegality and fraud, bribery and corruption, and investment in natural resources.

This paper seeks to consider in greater details three common areas where arbitrability is an issue.

### *A. Patents, Trademarks and Copyrights or Intellectual Property Rights*

Intellectual property rights are derived from legal protection granted by a sovereign power, which affords the beneficiary certain exclusive rights to use and to exploit the intellectual property in question. Therefore, any dispute as to their grant or validity is outside the domain of arbitration. However, once a patent or trademark has been registered, all subsequent disputes with other third parties can be arbitrated. For example, the owner of a

trademark or patent frequently issues licenses to one or more corporation or individuals in order to exploit the potential of the patent or trademark. Any dispute between the licensor and licensee may be referred to arbitration. Indeed, disputes over such intellectual property rights violation are commonly referred to international arbitration. Arbitration, as a mode of dispute resolution where intellectual property rights are involved, is particularly attractive as it is a confidential proceeding and parties will have less qualms of revealing their confidential information than in an open court; the parties can also choose arbitrators experienced in such matters to hear the disputes.

Indeed, in two legal systems, the USA and Switzerland, almost all intellectual property disputes are arbitrable. Most other countries do not exclude intellectual property rights as a whole from the jurisdiction of arbitration tribunals, but usually draw a distinction between those rights which have to be registered, e.g., patents and trademarks, as opposed to those which exist independently of any such formality, e.g., copyrights. Issues related to ownership, infringement, transfer or violation of a patent can be freely arbitrated. In respect of intellectual property rights not subject to registration, e.g., copyrights, it appears that arbitration is generally accepted worldwide.

An example of the success of arbitration is in the resolution of disputes over domain names, which is currently being administered by the World Intellectual Property Organization (WIPO). Therefore, except for a very narrow area of registration and granting of such rights by sovereign states, almost all disputes can be arbitrated. In the US and Switzerland, we have two legal regimes which allow almost all intellectual property disputes to be arbitrated.

### ***B. Illegality and Fraud***

Allegations of illegality and fraud have always raised serious problems as to the arbitrability of the dispute. However, an increasing number of legal jurisdictions which accept the doctrine of separability are prepared to recognize that allegations of illegality of a main contract does not necessarily lead to the non-arbitrability of the dispute, unless the illegality is of such a kind as to require the dispute to be decided by state courts. Where a claim put forward is found to be fraudulent, it will be for the arbitral tribunal to dismiss it. In the US, it has long been recognized that a tribunal has jurisdiction to hear a dispute concerning a contract which has allegedly been induced by fraud. In *Prima Paint Corp. v. Food & Conklin Mfg. Co.*,<sup>18</sup> the Supreme Court was faced with the question of whether a claim of fraud in inducing an entire contract was arbitrable under an ordinary arbitration clause which provided for reference of “any controversy or claim arising out of or relating to agreement or breach thereof.” The court held that under the Federal Arbitration Act, the claim should be referred to arbitration, in the absence of any evidence that contracting parties intended to withhold that issue from arbitration.

### ***C. Bribery and Corruption***

The traditional view in many countries is that bribery and corruption, which have been at the center of several arbitrations pertaining to contracts for consultancy and public procurement, are not arbitrable because it offends public policy with frequent criminal element. Therefore, the proponents of such views prefer to leave it to the national courts. It is believed that national courts

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18. 87 S. Ct. 1801, 18 L. Ed. 2d 1270.

have greater means of investigation and sanction power to compel the uncooperative party to submit to national court jurisdiction than to an arbitral tribunal. Allegations of corruption or bribery frequently arise when one party wants to resist claims for payment of fees or commission. This is quite frequently a tactical move by one party to frustrate the arbitral process by claiming that the agreement for payment of fees or commission is actually one for payment of bribes and is therefore void, thus negating the arbitration agreement, knowing very well that an issue of fraud in the procurement of a contract usually raises important questions of public policy.

In 1963, in an ICC case, Judge Lagergren, sitting as a sole arbitrator, concluded that a dispute relating to bribery was not arbitrable. Judge Lagergren held that neither the French law, as the law of the place of arbitration, nor the Argentine law, as the law governing the contract, would permit the dispute to be arbitrated. He continued:

[F]inally, it cannot be contested that there exists a general principle of law recognized by civilized nations that contracts which seriously violate *bonos mores* or international public policy are invalid or at least unenforceable and that they cannot be sanctioned by courts or arbitrators. This principle is especially apt for the “law of the forum” in the ordinary sense of the term.

After weighing all the evidence, I am convinced that a case such as this, involving such gross violations of good morals and international public policy, can have no countenance in any court either in the Argentine or in France or, for that matter, in any other civilized country, nor in any arbitral tribunal. Thus jurisdiction must be declined in this case. It follows from the foregoing, that in concluding that I have

no jurisdiction, guidance has been sought from general principles denying arbitrators to entertain disputes of this nature rather than from national rules on arbitrability. Parties who ally themselves in an enterprise of the present nature must realize that they have forfeited any right to ask for assistance of the machinery of justice (national courts or arbitral tribunals) in settling their disputes.<sup>19</sup>

According to Judge Lagregren, a credible allegation of bribery not only affects the main contract but also makes the dispute non-arbitrable. Therefore, the arbitral tribunal lacks jurisdiction to hear and investigate the truth of those allegations of bribery.

A decision by the Supreme Court of Pakistan followed the view of Judge Lagregren. In *HUBCO v. WAPDA*,<sup>20</sup> the dispute arose out of a contract for the purchase of power from a plant constructed and run by the claimant. The Pakistani respondent alleged that several amendments to the original agreement leading to higher prices were obtained by fraud and bribery of government officials. The Pakistani court held that mere allegations of fraud were insufficient to make disputes non-arbitrable. By contrast, where *prima facie* evidence of such practices existed, public policy matters were raised which required findings about the alleged

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19. ICC Case No. 1110. *Argentine Engineer v. British Company* (1987) 3 Arb Int 282, with note: Wetter, "Issues of Corruption before the International Arbitral Tribunals." The Authentic Text and True Meaning of Judge Gunner Lagregren's 1963 Award in ICC Case No. 1110 (1994) 10 Arb Int 277, (1996) XXI YBCA 47.

20. Supreme Court of Pakistan, June 14, 2000, *The Hub Power Company Ltd. (HUBCO) v. Pakistan WAPDA and Federation of Pakistan* (2002) 15(7) Mealey's IAR A1.

criminality, and the dispute could not therefore be referred to arbitration. The Supreme Court held:

The allegations of corruption in support of which the abovementioned circumstances do provide *prima facie* basis for further probe into the matter judicially and, if proved would render these documents [i.e., the amendments of the original contract] as void; therefore, we are of the considered view that according to the public policy such matters, which requires finding about alleged criminality, are not referable to arbitration.<sup>21</sup>

However, the prevailing view in international arbitration practice, especially in Europe, is to support the arbitrability of disputes involving allegations of corruption and bribery. Relying on the doctrine of separability, arbitral tribunal and courts have come to the conclusion that the arbitration agreement as such is generally not tainted by alleged corruption which only affects the main contract.<sup>22</sup> Despite international public policy implications, it is felt that the tribunal should be allowed to decide whether or not there was bribery or corruption involved. National courts retain control over contracts involving bribery and corruption at the enforcement stage as awards which uphold such contract would be contrary to public policy.

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21. *Ibid.* A17. In support of such an approach, see also Sornarajah, *The Settlement of Foreign Investment Disputes*, p 184.

22. See Switzerland, Tribunal Federel, ATF 119II, 380, 385: *England, Westacre Investment Inc. v. Jugoinport-SPDR Ltd.* [1999] 2 Lloyd's Rep 65; [1999] 1 All ER 865 (CA); Rosell and Prager, "Illicit Commissions and International Arbitration: The Question of Proof" (1999) 15 Arb Int 329, 330.

What should an arbitral tribunal do if there is a dispute as to the performance of an international commercial agreement? This non-performance is, quite often, blamed on the subtle object of the agreement as being the payment of bribes or some other fraudulent inducement. When such a plea is raised in the proceeding, the arbitral tribunal is seized with an arbitrability issue. This issue was first raised in 1963 before eminent Swiss jurist Judge Lagregren, who was acting as sole arbitrator in ICC Arbitration Case No. 1110. His stand then was that the arbitral tribunal lacked jurisdiction to hear the dispute and investigate the truth of those allegations of bribery. Since then, the international arbitration fraternity has taken a more robust approach.

The modern approach based on the concept of separability of the arbitral agreement has now received widespread international acceptance. This is clearly stated in the award and the various decisions in the *Westacre v. Jugoimport*<sup>23</sup> case, which arose out of a consultancy agreement between Westacre Investments Inc. (Westacre) and Jugoimport-SDPR Ltd. The arbitration was subject to Swiss law. The dispute arose out of an abrupt termination of the agreement purportedly because the agreement was illegal pursuant to a circular from the Kuwait Ministry of Defence (KMD) prohibiting the use of agents or intermediaries in public procurements. Westacre started arbitration proceedings for the unpaid monies. The arbitrators awarded Westacre approximately US\$50 million plus interest.

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23. *Westacre Investment Inc. v. Jugoimport-SDPR Holding Co. Ltd. & Ors* [1998] 4 All ER 570 (QBD), [1999] 1 All ER 865 (CA).

In this case, the arbitral tribunal held that the consultancy agreement was not invalid as there was no infringement of *bona mores*. They also held that the respondent had failed to establish that the consultancy agreement was a nullity on grounds that the parties had procured a contract with the Kuwaiti government by illicit means. Accordingly, the tribunal ruled that the consultancy agreement did not violate international public policy. The tribunal further added that lobbying by private enterprises to obtain public contracts was not illegal and as such, the contract to carrying out such activity was not illegal.

The arbitration tribunal made a strong case for separability of the arbitration agreements and the function of illegality as a defense in rendering an agreement void. More importantly, the tribunal expressed a confident opinion that it was entitled to discuss an allegation of bribery. Despite the allegation by the respondent of illegality of the contract, the arbitrators' award was enforced in Kuwait. An attempt by the respondent to petition the Court of Appeal in the United Kingdom (UK) to reopen the case on new evidence that Westacre was a sham company run by the son-in-law of a government official and used by the official as a vehicle of convenience for corruption and bribery failed. The UK Court of Appeal refused to reopen the facts, holding:

that the public policy of sustaining international arbitration awards on the facts of this case outweighs the public policy in discouraging international commercial corruption.<sup>24</sup>

At the heart of those divergent views obviously lie the different weights accorded to the various public policy issues involved in those disputes. There is definitely a clear conflict

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24. *Ibid.*

between the public policies of sustaining parties' agreement to arbitrate all disputes and not enforcing illegal contracts.

## VII. CONCLUSIONS

In the majority of the cases, the non-arbitrability of a dispute is raised by one party seeking to preclude arbitration. There are, however, cases where none of the parties invoke the lack of arbitrability. They had either not realized it or may have had an interest in having the disputes settled in private. The question arises whether the arbitration tribunal has the right to raise the issue of arbitrability itself, even though the parties do not challenge the jurisdiction of the tribunal.

Judge Lagregren, sitting as a sole arbitrator in ICC Case No. 1110, did just that. After studying the pleadings filed by the parties and oral and written witness statements, he raised his jurisdiction *ex officio*.

By and large, the issue of arbitrability has vexed the arbitral fraternity all over the world and it will continue to do so. It is, however, to be noted that "arbitrability" as a concept is dynamic and is in a constant state of flux. It changes with time and any change in the national and international moral values and social conditions affects its definition. Whilst the issue of arbitrability of a dispute goes to the root of the arbitral award, sadly for such a critical concept, one is hard-pressed to find a more definitive guide as to what can or cannot be arbitrated on. This topic will remain elusive and a "slippery slope" on which the arbitral fraternity will have to struggle to find its balance. That is the challenge which arbitrators, both locally and internationally, have

to contend with, especially so when faced with unwilling parties who prefer not to be subjected to the jurisdiction of an arbitral tribunal.

It is undeniable, however, that there is a prevailing international trend towards the narrowing of differences in approaching issues like arbitrability in an effort to attract the largely invisible but hugely lucrative trade in international arbitration services.

In final conclusion, one clear certainty, at least for now, is that there are definite, although evolving, limitations to the perception of what constitutes “arbitrability.”

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## Philippine Perspective on the Issue of Arbitrability\*

*Atty. Eduardo P. Lizares\*\**

The lecture of our distinguished speaker, Mr. Chong Thaw Sing, involves the **issue of arbitrability** of a dispute submitted to arbitration. I was assigned the task of giving a reaction based on our experience in the Philippines. I would like to thank Madam Justice Ameurfina A. Melencio Herrera, Chancellor of the Philippine Judicial Academy, and Dato' Syed Ahmad Idid, Director of the Kuala Lumpur Regional Center for Arbitration (KLRCA), for having given me the privilege of addressing the participants of this lecture series. Allow me to share with you my thoughts on the lecture of Mr. Chong Thaw Sing entitled "Chronicle of Current Issues Affecting International Commercial Arbitration."

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\* Delivered at the *Conference on Arbitration for the Judiciary* on March 24, 2006 at the Intercontinental Manila, Makati City, Philippines.

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Atty. Lizares, who obtained his Master of Laws from Harvard Law School, Bachelor of Laws, *cum laude*, from the

Thank you Mr. Chong for your incisive views.

I would like to discuss the **issue of arbitrability in its relation to our courts, when and under what circumstances** this issue may present itself, **what are the applicable statutory or legal standards or guidelines** in addressing this issue, **what are the possible approaches or methods** that may be adopted by our courts when faced with this issue, and perhaps a suggestion as to **how this issue should be addressed by our courts**.

I will limit myself to discussing the issue of arbitrability in connection with two general types of arbitration recognized in our legal system, both of which I refer to, henceforth, as international arbitration. These two types of international arbitration are: first, **international arbitration held in the Philippines** (i.e., where the **place of arbitration** is the Philippines; whether that place of arbitration is agreed upon by the parties or chosen for them by a third party [usually an international arbitral institution]); and second, **international arbitration held outside the Philippines** (and here, for simplicity, I will limit myself to arbitrations in a country that is a signatory to the 1958 New York Convention on the Recognition of Foreign Arbitral Awards [the “NYC”] to which the Philippines is a signatory).

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We start with the fact that **an arbitration agreement is a contract**; as such, must be entered into with the **consent** of the parties.

Assuming that such **consent** has been given (this is an issue of capacity to contract), an arbitration agreement must also be **lawful**.

The lawfulness of an arbitration agreement means: first, that the agreement must have been entered into by parties with **legal capacity or entitlement to submit their disputes to arbitration**, which is referred to as **subjective arbitrability**, a matter that deals primarily with the **capacity of state and state entities** to submit disputes to arbitration in view of the laws of some (but a decreasing number of) states **prohibiting** state or state entities from submitting their disputes to arbitration based on notions of public policy; and second, **objective arbitrability**, which means that the agreement must relate to **a subject matter that is capable of settlement by arbitration**.

The first type of arbitrability, **subjective arbitrability**, does not pose a serious problem under Philippine law since our Supreme Court has recognized, as a general principle, in *Gascon v. Arroyo*<sup>1</sup> (i.e., **Arroyo** as in “**Joker**” not “**Gloria**”), that the government may validly enter into an agreement to **arbitrate a controversy** with a **private party, the ABS-CBN Broadcasting Corporation**, involving the latter’s claim for the return of a **national television station, Channel 4**. According to the Court, arbitration is simply **an alternative mode of “settlement of controversies [that] is not vested in the courts of justice alone to the exclusion of other agencies**

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I. G.R. No. 78389, October 16, 1989, 178 SCRA 582.

**or bodies.”<sup>2</sup> As a general proposition, in the context of subjective arbitrability, our legal system does not prohibit the state or state entities from submitting to arbitration controversies with private parties in which they are involved.**

**Objective arbitrability**, however, involves another matter altogether. As our distinguished lecturer has pointed out, **Section 6 of Republic Act (RA) No. 9285<sup>3</sup>** (the Alternative Dispute Resolution [ADR] Act of 2004, approved on April 2, 2004) enumerates **specific matters that cannot be the subject of arbitration**. Any agreement to arbitrate any of the matters covered under Section 6 would be considered null and void by our courts as being contrary to law. In fact, any of the subject matters enumerated in pars. (a) to (g) of Section 6 cannot be submitted to arbitration (or to compromise) as a matter of Philippine public policy. Section 6, however, also includes a catch-all phrase, namely, **“those which by law cannot be compromised.”** Our courts will have an increasing and crucial role in defining the contours of this “catch-all” provision.

Objective arbitrability in international arbitration **conducted in the Philippines** (where the place of arbitration, or where the arbitration has its “**seat**”) may present itself in three distinct

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2. *Id.* at 587.

3. **SEC. 6. Exception to the Application of this Act.** – The provisions of this Act shall not apply to resolution or settlement of the following: (a) labor disputes covered by Presidential Decree No. 442, otherwise known as the Labor Code of the Philippines, as amended and its Implementing Rules and Regulations; (b) the civil status of persons; (c) the validity of a marriage; (d) any ground for legal separation; (e) the jurisdiction of courts; (f) future legitime; (g) criminal liability; and (h) those which by law cannot be compromised.

instances: first, **before an award is rendered** (in fact, it would likely present itself even **before** the arbitral tribunal has been constituted); second, **after an award is rendered**, when an aggrieved party seeks to have the award “set aside” or the “**setting aside**” stage; or third, **when the award is being enforced** or during the **enforcement stage**.

It may happen that a party to the arbitration agreement decides, especially once a controversy arises under the main contract, to impugn the agreement and either commences action before a court involving a dispute subject to arbitration or, in case the arbitral panel has been constituted, to ask the court to prohibit the arbitral panel from proceeding to hear the dispute submitted. In this instance, the court seized of such an action, pursuant to **Section 24 of RA No. 9285**, “**shall**” – please note the use of the mandatory “shall” – **refer the parties to arbitration “unless it finds that the arbitration agreement is null and void, inoperative or incapable of being performed.”** Although this section does not specify under what law the validity of the arbitration agreement should be tested, it is evident that the issue of validity of the arbitration agreement should be tested under Philippine law.

A court may also encounter the issue of arbitrability at the **setting aside stage**, after an award has been rendered, in this case, **Article 34 of the Model Law**<sup>4</sup> provides that the “**arbitral**

4. The Model Law has been **incorporated into RA No. 9285** under the Model Law which has been adopted into our legal system (alternatively, incorporated into RA No. 9285) *in toto*. **Sec. 19 of RA No. 9285**. Moreover, in the interpretation of the Model Law, RA No. 9285 states that “regard shall be had to its international origin and to the need for uniformity in its interpretation” (Sec. 20, RA No. 9285) and for this reason “resort may be made to the *travaux preparatoire* and the [**specifically cited**] report of the Secretary General” (*Ibid.*).

**award**” itself may be set aside “**only if**” – in other words **only the grounds specified in Article 34, to the exclusion of other grounds** – the **arbitration agreement “is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of this State** [i.e., Philippine law].” Parties normally do not specify a law applicable to the arbitration agreement. Thus, normally, the parties would simply specify that “this contract shall be governed under Philippine [or another country’s] law.” In the contemplation of Article 34, the indication of the law applicable to the main contract is not an indication of the law applicable to the arbitration agreement.

A court may also encounter the issue of arbitrability in the enforcement stage. There, Article 36 of the Model Law provides that the enforcement of an award may be refused “if the court finds that: (i) the subject matter of the dispute is not capable of settlement by arbitration under the law of this State.” Again, the standard to determine the **issue of arbitrability** is Philippine law.

In international arbitration **held abroad** (again with the limitation that it is held in a country that is a signatory to the NYC) the courts may encounter the issue of arbitrability in two instances: *first*, at any time prior to enforcement; and *second*, at the enforcement stage.

You may note that I excluded the “**setting aside**” stage where any party to the arbitration agreement asks the court to set aside the arbitral award on the grounds specified in Article 34 of the Model Law among which is the issue of arbitrability. The **framework** of the **Model Law does not allow a court, except the court of the country where the arbitration has its “seat,”** from entertaining any action to set aside an arbitral

award made in another country. Thus, Article I(2) of the Model Law states:

The provisions of this Law, except Articles 8, 9, 17 (H)(I)(J), 35 and 36, apply only if the **place of arbitration** is in the territory of this State [i.e., Philippines].

Hence, if the “place of arbitration” is outside the Philippines, a Philippine court cannot entertain any suit for the setting aside under Article 34 of the award made in that other state.

The *first instance* (pre-enforcement stage) is covered by Article II (3) of the NYC which provides that:

**The court of a Contracting State**, when seized of an action in a matter in respect of which the parties have made an agreement to arbitrate x x x shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the **said agreement** is null and void, inoperative or incapable of being performed.

This provision does not specify what law shall be applied by a court, for instance a Philippine court, in deciding whether the arbitration agreement is “null and void” etc. Notwithstanding this silence, it is settled that the court must apply its own law (here, Philippine law) or the “*lex fori*.”<sup>5</sup>

The *second instance* where the issue of arbitrability may present itself is in the enforcement of the foreign arbitral award.

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5. See *Mitsubishi Motors Corp. v. Soler-Chrysler-Plymouth, Inc.*, 723 F.2d 155, 166 (1<sup>st</sup> Cir.). See also, Van Den Berg, *The New York Convention of 1958* (1981), at p. 152.

Here, Article V(2)(a) of the NYC,<sup>6</sup> and similarly Article 36(1)(b)(i), provide that recognition or enforcement of the award may be refused if the court (here, a Philippine court) finds that **“the subject matter of the dispute is not capable of settlement by arbitration under the law of this State.”** Again, it is Philippine law that is applied by a Philippine court in deciding whether the subject matter of the dispute is capable of settlement by arbitration.

It has been observed that in examining the “objective arbitrability” of a dispute, a court applies its own concept of public policy.<sup>7</sup> Further, it has been suggested<sup>8</sup> that when a legal system wishes to ensure that certain matters **affecting public policy** are to be resolved in accordance with the interest of that society, its courts adopt **three possible methods or courses of action to:**

1. Exclude from resolution through arbitration disputes involving **questions of public policy;**
2. Exclude from resolution by arbitration all disputes where one of the parties has been alleged to have **violated public policy;** and
3. Allow the arbitrators to hear the dispute relating to public policy, whether or not the main contract containing the

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6. Art. V of the NYC has been operatively incorporated into Art. 36 (Grounds for refusing recognition or enforcement) of the Model Law.

7. See Fouchard Gaillard Goldman on International Commercial Arbitration (1999), at page. 332.

8. *Id.*

arbitration agreement actually **contravenes public policy**.

The courts will then be able to review the award in the setting aside stage or in the enforcement stage if an action is subsequently brought to set aside or enforce the award.

I would like to refer to certain cases to aid us in our inquiry as to where our approach lies.

It is unfortunate (for the law on arbitration) that the significant cases involving arbitration that have reached the Supreme Court have involved matters of such significance or importance to public interest or public policy that such public interest or public policy has clearly overshadowed the issue of arbitrability that is the subject of our discussion.

Foremost is *Agan, Jr. v. Philippine International Air Terminals Co., Inc.*<sup>9</sup> This involves a concession agreement for the construction, operation and maintenance of the new Ninoy Aquino International Airport (NAIA) for 25 years, awarded through public bidding, between the Manila International Airport Authority (MIAA) and the Philippine Government through the Department of Transportation and Communications (DOTC) and Philippine International Air Terminals Co., Inc. (PIATCO). After the Concession Agreement was entered into, the Government and PIATCO entered into various agreements that effectively amended or revised the Concession Agreement subject of the public process. While the case was pending, PIATCO commenced arbitration proceedings before the International Chamber of Commerce (ICC). Going directly to the issue

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9. G.R. Nos. 155001, 155547, 155661, May 5, 2003, 402 SCRA 612.

involving arbitration, the Court, while noting that arbitration proceedings had been commenced by PIATCO, ruled that such proceedings “**will not oust this Court of its jurisdiction over the cases at bar.**”<sup>10</sup>

The Court ruled that since that arbitration proceedings involved only the parties to the contract (the Government and PIATCO) and not the petitioners (i.e., service providers of the existing NAIA and their workers, who are not privy to the questioned contracts as well as several congressmen), whom the Court found had presented legitimate interests in the resolution of the controversy, the “*interest of justice* would be best served if the trial court hears and adjudicates the case in a *single and complete proceeding.*”<sup>11</sup> Further,

[t]his objective would not be met if this Court were to allow the parties to settle the case by arbitration as there are certain issues involving non-parties to the PIATCO Contract which the arbitral tribunal will not be equipped to resolve.]

Having ruled that it had jurisdiction over the case, the Court then ruled that contracts in question were null and void on the ground that they were illegal and unconstitutional as they, among others, violated the rules of public bidding (the amendments to the concession agreement worked to the prejudice of the government), contained provisions contrary to the Build-Operate-Transfer (BOT) Law (prohibiting the government from giving a direct guarantee) and authorized a monopoly.

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10. *Id.* at 647.

11. *Id.*

On the issue of “**objective arbitrability**,” I read the *PIATCO* for the legal proposition that when a case or controversy, that the Court itself described as one of “**transcendental importance**” (referring to the construction and operation of the country’s premier international airport) involves the **violation** of a law or rule that embodies a matter of **strict public policy** (ensuring a level playing field in public bidding; preventing monopolies; or imposing unauthorized substantial financial burdens on government) the Court will **not** hesitate to assume jurisdiction over the controversy **despite the existence of an arbitration agreement or despite the pendency of an ongoing arbitration.**

Another case worth considering is the case of *Republic v. Sandiganbayan*.<sup>12</sup> A compromise agreement was entered into between Roberto Benedicto and the Presidential Commission on Good Government (PCGG), through its Chairman, which was approved by the Sandiganbayan. The compromise agreement was one in a series of global settlements between the Government and Benedicto involving various assets under which Benedicto and his group-controlled corporations ceded to the government various properties, in exchange for which the Government released from sequestration as ill-gotten wealth other properties. The Government also extended absolute immunity to Benedicto, members of his family and officers and employees of various corporations such that they would be immune from criminal prosecution for acts and omissions prior to February 25, 1986 for violations of penal laws including the Anti-Graft and Corrupt Practices Act (RA No. 3019). The PCGG argued that the

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12. G.R. Nos. 108292, 108368, 108548-49, 108550, September 10, 1993, 226 SCRA 314.

compromise agreement and the subsequent approval by the Sandiganbayan constitute grave abuse of discretion as the same “contained provision **contrary to law, morals, good customs, public policy and public order.**” In other words, the PCGG threw the entire “kitchen sink,” as it were against the compromise agreement. The Supreme Court was not impressed. It dismissed the petition and enjoined the parties to comply with the terms of their compromise agreement. The Court affirmed the Sandiganbayan’s finding that that there was nothing contrary to law, morals, or public policy [in the compromise agreement] and that it was entered into freely and voluntarily by the parties.”<sup>13</sup> The Court ruled that it is already settled that the PCGG had the authority to “enter into compromise agreements in civil cases and to grant immunity, under certain circumstances, in criminal cases.”<sup>14</sup> Moreover, a “specific grant of immunity from criminal prosecutions was also sustained.”<sup>15</sup>

I cited earlier *Gascon v. Arroyo*, that the government may validly enter into an agreement to **arbitrate a controversy** with a **private party, the ABS-CBN Broadcasting Corporation**, involving the ownership of **a national television station.**

If the PCGG or the Government could compromise on the subject matter involved in the *Benedicto* and *ABS-CBN* cases mentioned earlier, does it not follow that they could also have validly submitted the dispute involving the foregoing subject matters to arbitration excepting, of course, the criminal aspect in the *Benedicto* case.

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13. *Id.* at 320.

14. *Id.* at 319.

15. *Id.*

I hope I am not overstretching the *PIATCO* case by saying that it somehow lends its support to the **second approach** in the light of the “**transcendental importance**” of the subject matter of the dispute. The *PCGG* and the *ABS-CBN* cases mentioned earlier, however, seemingly lend their support to the **third approach** (i.e., let the arbitrators decide the case subject to judicial review at the setting aside or enforcement stage).

The *PIATCO* case was decided before the enactment of RA No. 9285. In this connection, I wonder whether the outcome might have been different had the court decided the case under the Model Law.

Under the Model Law, the alleged invalidity of the main contract does not result in the invalidity of the arbitration agreement. Thus:

an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause.<sup>16</sup>

Article 16 of the Model Law embodies what is referred to as the “**separability principle**.” This goes hand-in-hand, of course, with the “**competence-competence**” principle in the first sentence of Article 16 which states that:

The arbitral tribunal may rule on its jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement.

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16. UNCITRAL Model Law, Art. 16.

Although Article 16 of the Model Law has not been made applicable to **domestic arbitration**<sup>17</sup> by **Section 33** of RA No. 9285, the Supreme Court in *Sime Darby Pilipinas, Inc. v. Magsalin*,<sup>18</sup> applied this principle to domestic arbitration holding that an arbitrator has “**plenary jurisdiction and authority**” not only to interpret the agreement to arbitrate **but also “the scope of his own authority,”** subject only to the *certiorari* jurisdiction of the courts.<sup>19</sup>

I leave these issues for your kind consideration.

Before I end, I would like to cite two cases that may lend our courts some guidance in deciding:

1. What method or approach to follow when faced with the issue of arbitrability, especially at the pre-award stage; and
2. What standard(s) to utilize in deciding the issue of arbitrability of a dispute in international arbitration.

The first is the decision of the US Supreme Court in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*<sup>20</sup> I am citing this US case because in many instances involving the interpretation of our laws (running the whole gamut of our law) our courts have not hesitated to rely on the decisions of the US Supreme Court for guidance. That case involved an anti-trust

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17. See EPL’s Book, page 57 on difference between domestic and international arbitration. A domestic arbitration is “an arbitration that is not international as defined in Art. I(3) of the Model Law.” Sec. 32 of RA No. 9285.

18. G.R. No. 90426, December 15, 1989, 180 SCRA 177.

19. *Id.*, at 183.

20. 473 US 614, 105 S.Ct 3346, 87 L. Ed. 2d at 444 (1985).

case in that all Circuit Courts had consistently adhered to the notion that **they were not arbitrable** because, among other things, arbitrators “will pose **too great a danger of innate hostility** to the constraints of business conduct that antitrust laws impose” and that the antitrust laws were primarily concerned with **preserving competition in the national interest**, a concern which an arbitral tribunal may not be adequately be able to address.

Holding the antitrust case arbitrable, the Circuit Courts the US Supreme Court ruled, among others, that:

- [a] It will not “indulge in the presumption that the parties and the arbitral body conducting a proceeding will be unable or unwilling to retain competent, conscientious, and impartial arbitrators;”<sup>21</sup> and
- [b] There is no reason for the Court to hold that the international arbitral tribunal cannot adequately address the interest of the injured competitor to obtain compensation for its injury because they owe no allegiance to any state and therefore no corresponding obligation to vindicate that state’s statutory policies.

Moreover, the Court noted that the NYC reserves the right of each signatory state to refuse enforcement of an award if the “recognition or enforcement of the award would be contrary to the public policy of that country.”<sup>22</sup>

This decision clearly adopts the **third approach** or method in addressing the arbitrability issue.

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21. 473 US 634, 105 S.Ct. 3346, 87 L. Ed. 2d at 460 (1985).

22. 473 US 638, 105 S.Ct. 3346, 87 L. Ed. 2d at 462 (1985).

As to the appropriate standard of review, allow me to cite another US case. *Parsons & Whittemore Overseas*<sup>23</sup> involved an arbitral award rendered against the petitioner, an American construction corporation, for not completing a paperboard mill it had undertaken to construct in Alexandria, Egypt, for an Egyptian corporation. Petitioner brought suit for a declaratory judgment to prevent the Egyptian corporation from satisfying its award against a letter of credit issued in that corporation's favor by the Bank of America at the petitioner's request. Petitioner raised a defense based on American public policy that on account of various official acts of the US government after the severance of US-Egyptian relation, particularly the withdrawal of financial support for Egypt by the United States Agency for International Development (USAID), a branch of the State Department, petitioner, a loyal US national, was compelled to abandon the project. While **recognizing** that **Article V** of the NYC (as we noted, this was essentially reproduced or carried over to **Article 36 of the Model Law**) **sanctioned the application of the forum state's notions of due process**, the Circuit Court of Appeals (2<sup>nd</sup> Cir.) ruled that:

In equating 'national' policy with United States 'public' policy, the appellant quite plainly misses the mark. To read the public policy defense as a **parochial device** protective of national political interests would seriously undermine the Convention's [NYC] utility. The provision was not meant to enshrine the vagaries of international politics under the rubric of 'public policy.' Rather, a circumscribed public

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23. *Parsons & Whittemore Overseas Co. Inc. v. Société Générale de L'Industrie Du Papier RAKTA and Bank of America*, 508 F.2d 969, 974 (2<sup>nd</sup> Cir., 1974).

policy doctrine was contemplated by the Convention's framers and every indication is that the United States, in acceding to the Convention, meant to subscribe to this **supranational emphasis.**

The foregoing case is an invitation to apply a rule of "**public policy**" with "**supranational emphasis.**"

I hope I have been able to convey to you some of my thoughts. I know the topic of international arbitration, including the issue of arbitrability, is not a very easy one to grasp. I hope that with today's discussion those who may encounter the issue of today's lecture may approach it with a healthy regard for the function and nature of arbitration, whether domestic or international, in the resolution of disputes.

Thank you and may you all have a good day.

# Recourse and Enforcement of an Arbitral Award: The Malaysian Experience\*

*Dato' Kevin Woo\*\**

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## I. INTRODUCTION

I wish to express my deepest gratitude to the Supreme Court of the Philippines, to the Honorable Justices of the Court of Appeals, Honorable Judges of the Commercial Courts and Trial Courts, the Philippine Judicial Academy (PHILJA) and most of all to the people of the Philippines for their warmest hospitality since my wife and I arrived in your country for the very first time. Thank you.

I have been entrusted with the task to speak on Recourse and Enforcement of an Arbitral Award, which is essentially Articles I and II and predominantly on Articles III, IV, V, and VI of the New York Convention. To a certain extent, these have been covered by Mr. Robin Somers Peard, who discussed on **Recourse Against and Enforcement of Awards: The Hongkong Experience** and also by Mr. Chong Thaw Sing, who spoke on the topic of Arbitrability. With the limited time allotted to me, I will focus my discussion on the remaining articles of the New York Convention culminating on a very brief insight on the new Malaysian Arbitration Act 2005.

## II. DETERMINING ARBITRABILITY

Arbitrability is determined by:

- I. Law of the enforcing court
  - ***Audi-NSU Union A.G. (F.R. Germany) v. SA Adelin Petit and Cie (Belgium) (1979)***

The Belgium Court held that the termination of distributorship for AUDI cars was not capable of settlement by arbitration.

- Philippines' Republic Act (RA) No. 9285, Section 6:

**SEC. 6. Exception to the Application of this Act.** –The provisions of this Act shall not apply to resolution or settlement of the following: (a) labor disputes covered by Presidential Decree No. 442, otherwise known as the Labor Code of the Philippines, as amended, and its Implementing Rules and Regulations; (b) the civil status of persons; (c) the validity of a marriage; (d) any ground for legal separation; (e) the jurisdiction of courts; (f) future legitime; (g) criminal liability; and (h) those which by law cannot be compromised.

## 2. Public Policy

Interplay between Articles V(2)(a) and (b) of the Convention on question of arbitrability.

Some cases are:

- a. ***Sion Soleimany v. Abner Soleimany (1998)***
  - English court refused to enforce award and give effect to a contract for smuggling carpets out of Iran.
- b. ***Parsons Whittemore Overseas Co.'s case***
  - Public policy test has been expressed as requiring enforcement except in cases which violate our “most basic notions of morality and justice.”

- c. *Westacre Investment Inc. v. Jugoimport-SPDR Holding Co. Ltd. (1999) 2 Lloyd's Rep 65 (CA)*
- Allegations of bribery were found to be baseless and “lobbying” was not an illegal activity, under Swiss Law, which is the governing law in the arbitration.
- d. *Beverly Overseas (2001)*
- Policy does include basic principles of human rights.

### III. ENFORCEMENT METHODS

It is a well-established fact that majority of arbitral awards are internationally enforced. What are these enforcement methods?

#### A. *Voluntary*

Most of them are enforced voluntarily as an implied term of an arbitration agreement and that the parties will carry out their obligations under the award to perform without further delay. That is enshrined in Article 32(2) of the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules which states that:

x x x The award shall be made in writing and shall be final and binding on the parties. The parties undertake to carry out the award without further delay.

If the award is not performed voluntarily, what then is the next recourse available to the parties?

***B. National Courts***

The next course of action will be through the national courts for an order against the assets of the losing party in order to compel performance. This is made possible by the fact that the Philippines is a signatory to the New York Convention and the Philippines' assertion to the Convention is on the basis of a commercial and reciprocity reservation.

***C. New York and Washington Conventions  
and Bilateral Treaty***

The Philippines is also a signatory to the World Bank Convention creating the Washington Convention.

***D. Action on an Award***

The fourth method is to commence an action on an award on the basis of the obligation created by the award as evidence of a debt.

***E. Commercial Pressure***

The fifth and last method is by way of commercial pressure where the winning party may insist on the performance, as failure to do so may strain the existing and subsisting business relationship between the parties.

**IV. INTERNATIONAL CONVENTIONS  
APPLICABLE IN THE PHILIPPINES**

The most important conventions which the Philippines is a signatory to are:

### ***A. New York Convention***

The New York Convention or the Convention, where the Senate Resolution No. 71 concurred to the ratification by the President of the Philippines on December 27, 1965.

### ***B. Washington Convention***

The second important convention is the Washington Convention where the instrument of Ratification was similarly signed on October 17, 1978.

The ensuing sections of my talk will focus on the provisions of the New York Convention. I will discuss the interplay of principles between the various related articles of that New York Convention.

## **V. ENFORCEMENT PROCEDURES**

### ***A. Foreign Arbitral Award***

The enforcement procedures for foreign arbitral award in the Philippines is now codified in Section 42 of RA No. 9285 (Alternative Dispute Resolution Act of 2004), which provides that such enforcement proceedings shall be filed with the Regional Trial Court (RTC) under the rules of procedure to be promulgated by the Supreme Court. These rules are very similar to that of Article IV of the New York Convention, which requires:

1. An **original or authenticated** copy of the **award**;
2. An **original or authenticated** copy of the **arbitration agreement**;

3. The applicant has to establish that the country in which the foreign arbitral award was made is a party to the New York Convention; and
4. The requirement is a **duly certified translation of the award or the arbitration agreement** is not made in any official languages.

The above requirements are necessary under Article IV of the New York Convention and Article 35(2) of the UNCITRAL Model Law, which describes the procedural prerequisite for the commencement of the law enforcement proceedings. I would like to direct your minds to my first case on *ECONERG Ltd. v. National Electric Company AD* (1998). It is a Bulgarian case which was conducted under UNCITRAL Arbitration Rules. The court refused enforcement and reasoned that the authentication of the award must be made at the Swiss court, which is the seat of arbitration. The applicant seeking to enforce an award under the New York Convention must establish that the country in which the foreign award was rendered is a **party to the New York Convention**. What happens if he is not a party to the New York Convention?

### ***B. Non-Convention Awards***

The recognition and enforcement of a foreign arbitral award not covered by the New York Convention or rather a non-convention award shall, pursuant to Section 43 of RA No. 9285, be done in accordance with the procedural rules to be promulgated by the Supreme Court on the basis of international **comity** and **reciprocity**. The court may, on grounds of comity and reciprocity, recognize and enforce a non-convention award as if it was a convention award.

## VI. REFUSAL OF RECOGNITION AND ENFORCEMENT

### *A. Section 45 of Republic Act No. 9285 and Article V of the New York Convention*

Section 45 of the Philippines' RA No. 9285 adopts a restrictive approach and states that the grounds for opposing enforcement are exhaustive and limited grounds as enumerated in Article V of the New York Convention. I stress "any other grounds raised shall be disregarded by the RTC." Bearing this in mind, I would like to contrast this provision with the approach of other common jurisdictions, in particular the common law jurisdiction of Australia in the Supreme Court of Queensland in the case of *Resort Condominium International, Inc. v. Ray Bolwell and Resort Condominiums (Australasia) Pty Ltd.* What happened was that the Supreme Court of Queensland believed that the grounds for refusal of enforcement listed in Article V of the New York Convention left a discretion and that is a residual discretion to refuse enforcement on other grounds as well.

I take a dim view of this decision. It appears to me that Section 45 of RA No. 9285 and Article V of the New York Convention are **pro-enforcement biased provisions**. They are plausible provisions in line with the spirit of their objective and are meant to be construed narrowly to facilitate enforcement of arbitral awards.

What then is Article V of the New York Convention? Article V(1) and (2) provide seven grounds to the party defending enforcement and the party resisting enforcement has that burden of proving the existence of any grounds as enumerated in Article V of the Convention. Article V(2) deals with the topic of arbitrability and violation of public policy under the law of the

forum on which the court may refuse enforcement on its own motion.

What are the three main features of Article V?

1. The grounds for refusal are **exhaustive**.

The grounds, as enumerated in Article V of the New York Convention, are exhaustive. If you will recall, Section 45 of RA No. 9285 states any other grounds raised shall be disregarded by the RTC.

2. **Discretionary** powers of enforcing courts.

There is no review of its merits. The basic rule is that convention awards will be recognized and enforced. That is enshrined in Article III of the New York Convention from which I quote, "Each contracting state shall recognize arbitral awards as binding and enforce them x x x."

3. **Burden of proof**.

The burden of proof rests on the party defending or opposing against the enforcement of the arbitral award. It should be noted that the grounds prescribed for contesting enforcement were prescribed in Article V(1) and (2) as similar to those of Article 34 of the UNCITRAL Model Law. Notwithstanding that it is not made applicable to domestic awards in the Philippines, the ADR Act provides for specific grounds for the court to set aside arbitral award in domestic arbitration. They include cases of corruption, fraud, partiality, misconduct, and disqualification of arbitrators.

### **B. New York Convention**

This session will focus on the grounds of refusal of recognition and enforcement of international arbitral awards under Article V of the New York Convention.

The parties to the agreement referred to in Article II were, under the law applicable to them, under some incapacity or the said agreement is not valid under the law to which the parties have subjected it, or falling any indication thereon, under the law of the country where the award was made.

#### I. Article II(2) and (3)

The first ground for refusal of recognition and enforcement made specific reference to Article II(2) and (3) to clarify the challenges for lack of arbitration agreement *vis-a-vis* whether the parties were under some incapacity or that the agreements were under some invalidity. What this means is whether there is an arbitration agreement in writing. In my first case, ***Kahn Lucas Lancaster, Inc. v. Lark International Ltd.*** 186 F3d 210 (2<sup>nd</sup> Cir 1999), a Philippine case, the court adopted a restrictive approach and construed that an agreement in writing has been made by the two parties. The dispute arose out of a purchase order for a flea garment manufacturer in the Philippines and that the purchase orders were not signed by the respondent party, notwithstanding that there are provisions in Article II(2) which state that the arbitration agreement should be signed and contained in an exchange of letters or telegram. I submit that this provision should be interpreted widely in accordance to the law of contract and that by conduct of the parties there is an existence of a valid contract and that valid arbitration agreement exists to resolve the dispute between the two parties. This is in accord with the spirit

of the New York Convention to enforce an arbitration agreement and to promote an agreement to arbitrate.

The other facet of challenge is under Article II(3) for lack of arbitration agreement where the arbitration agreement is found to be null, void, inoperative or incapable of being performed. I direct your mind to the case of *Eastern Mediterranean Maritime Ltd. (Liechtenstein) v. SpA Cereal Toscana (Italy) (1988)* where the arbitration agreement was found to be ambiguous and that the arbitration clause, “in the event an arbitration is to be performed,” was construed by the parties as foreseeing the possibility of submitting their disputes to an arbitration reference. This is a typical case where careful drafting of the arbitration clause is required and which would have led to more positive results.

I would like to contrast that first ground with Article IV of the New York Convention on the issue of burden of proof. Article IV states that the parties applying for recognition and enforcement shall, at the time of application supply and do A and B. The way it differs is that in Article V(I) the burden of proof rests on the party opposing the enforcement, whereas in Article IV, it seems to me, the burden of proof lies with the party who wants to enforce the award.

There are three cases here:

- a. In *H. & H. Hackenberg's case (1996)*, the court refused enforcement of one of the awards on grounds that there was just an informal photostat copy of the award and not the original, authenticated copy.
- b. In the null case of *Corte di Cassazione's case (1981)*, the court was rather formalistic and refusal of enforcement

was on the grounds that the petitioner had not supplied the arbitration agreement at the time of application. Remember the wordings of Article V(I), “at the time of application, shall supply x x x.”

- c. In the *ECONERG’s case* which I just raised earlier, the authentication of the award must be made at the seat of arbitration.

In Article V of the New York Convention, the burden of proof is reversed and rests on the party resisting the enforcement. How do we rationalize this? It is submitted that as long as the text constitutes *prima facie*, an arbitration agreement, it is the respondent party who has to prove that it is not a valid arbitration agreement as in *Yukos Oil Company v. Dardana Limited (2002)*.

## 2. Article V(I)(b)

Article V(I)(b), the second ground for refusal, is perhaps the most important ground where a party against whom the award is invoked is, firstly, not given proper notice of the appointment of the arbitrator; secondly, not given proper notice of the arbitration proceedings; and thirdly, was otherwise unable to present his case.

In the case of *Danish Buyer v. German Seller (1976)*, the name of the **arbitrator were not made known to the parties**. The court held that this is in contravention and in violation of the fundamental requirements of due process, and therefore refused enforcement. The main thrust of the principle of due process is that parties are given the opportunity to present their case and that they are given a fair hearing. The proceedings should be conducted in a manner that is fair or seen to be fair. Atty. Eduardo P. Lizares mentioned his case, *Parsons &*

*Whittemore Overseas Company, Inc. (USA) v. Societe Generale de L'Industrie du Papier RAKTA (Egypt) & Bank of America (USA) (1974)*. What happened was that *Parsons* was imposed with damages for breach of contract for abandoning a paper mill construction in Egypt. *Parsons* invoked the defense of public policy, which the Court concluded:

The Convention's public policy defense should be construed narrowly. Enforcement of foreign arbitral awards may be denied on this basis only where enforcement would violate the forum state's most basic notions of morality and justice.

Some cases on violation of due process were the following:

- a. In a landmark case of *Iran Aircraft Industries & Iran Helicopter Support & Renewal Company Corporation (1992) v. Avco Corporation (1992)*, the arbitral tribunal specifically advised counsel for *Avco* not to present kilos and kilos of invoices, and approved instead *Avco's* method of proving their case. It later turned out that the arbitral tribunal changed their mind and said that they actually require the submission of all the detailed invoices to substantiate *Avco's* claim. In so misleading *Avco's* counsel, *Avco* was effectively denied its right to present the case, and in this case, enforcement was denied purely on this ground.
- b. Another example of violation of due process is the Hong Kong case of *Paklito Investment Ltd. v. Knockner East Asia Ltd. (1993)* where the denial of the opportunity for the respondent to comment on the reports of the experts appointed by the tribunal was found to be sufficient ground to refuse enforcement.

- c. In the last case of *Bauer & Grossmann OHG (Austria) v. Fratelli Cerrone Alfredo e Raffaele (Italy)* (1982), it was a Court of Appeals case in Naples where enforcement was refused on the ground that the one-month notice given to the Italian respondent to attend a hearing in Vienna was insufficient because at that time there was a major earthquake at the respondent's place.

I just wish to summarize on the second ground that although enjoying great popularity among respondents, Article V(I)(b), on those grounds, was seldom found to be violated. An overview in which due process was held shows clearly they were all involved in improper conduct of the arbitration by the arbitral tribunal or the arbitral institution administering the arbitration. It is clear from the three cases discussed above that refusal to enforcement may be avoided if the arbitral tribunal or the institution had paid closer attention to the procedural conduct of the case.

The violation of due process, I remember in the recent conference I attended in Singapore, Michael Huang, Senior Counsel, called this the violation of the Golden Rule found in Article 18 of the UNCITRAL Model Law, which basically states:

The parties shall be treated with equality and each party shall be given the full opportunity of presenting his case.

### 3. Article V(I)(c) of the Convention

The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration or it contains decisions on matters beyond the scope of submission to arbitration.

Under the third ground of enforcement where enforcement may be refused is when the respondent asserts and proves that the arbitral tribunal has exceeded its jurisdiction.

Challenges to the jurisdiction of the arbitral tribunal may be raised on two grounds. Firstly, it could be a challenge as a first line of defense under Article V(I)(a) for lack of arbitration agreement or validity of arbitration agreement. The second ground where the respondent party may sustain the challenge is that when he mounts the challenge under Article V(I)(c) under this present hearing. The corresponding provision under the Malaysian Arbitration Law is actually Article 39(I)(a) where these grounds of refusal are broken further into two subsections. Bearing this in mind, let us elaborate on the principles of Article V(I)(c) – what it means by “difference not contemplated by or not falling within the terms of reference” and secondly, whether it contains “decisions on matters which are beyond the scope of arbitration submission.”

The **first part of this ground** is when the arbitral tribunal has acted in **excess of its authority** or **has exceeded his jurisdiction**. I bring you a Malaysian case, in *Tiong Huat Rubber Factory SDN BHD v. Wah-Chang International Company Ltd. and Wah-Chang International Corporation Ltd. (1991)*, the arbitration clause provided for arbitration in Malaysia where it reads as follows:

All disputes as to quality or condition of rubber or other disputes arising under this contract regulations shall be settled by arbitration.

In this case, the arbitrators awarded a claim for non-payment by reason of failure to open a letter of credit. The party resisting enforcement in this case asserted that the arbitration clause apply only to claims based on quality, size, weight and conditions of rubber and has nothing to do with non-payment.

The **second part of this ground** demonstrates the concept of **severability** where the part of the award within the arbitrator's jurisdiction may be saved and enforced and not set aside. I highlight the case of *General Organization of Commerce and Industrialisation of Cereals of the Arab Republic of Syria v. SpA SIMER (1981)*, where the arbitration agreement provided for arbitration in Syria for "non-technical" matters and granted partial enforcement on part of the award under the provisionary clause of this Article V(I)(c). This concept of severability is also codified now in the New Malaysian Arbitration Act in Section 3(3) of the Malaysian Arbitration Act.

#### 4. Article V(I)(d) of the Convention

The fourth ground for refusal of recognition and enforcement of an arbitral award is when the **arbitral tribunal** or **arbitral procedure was not in accordance with the agreement of the parties**, or failing such agreement they are not in accordance with the **law of the country where the arbitration took place**.

It is interesting to note the predecessor of the New York Convention, which is the Geneva Convention of 1927. That 1927 Convention provided for refusal of enforcement of the arbitral tribunal of procedure that was not in accordance with both (1) the parties' agreement and (2) the law of the country, the **double requirement**. This double requirement was dropped in the New York Convention. The agreement of the parties comes first; only when there is no agreement of the parties then the law of the country comes in. This principle was demonstrated in the *Charterparty case of Rederi Aktiebolaget Sally (Finland) v. Sri Termarea (Italy) (1978)* where the court held and

reasoned that, according to the provision in Article V(1)(d), the agreement of the parties prevails over the law of the country where the arbitration took place.

The **rationale of this principle** is to **avoid enforcement proceedings being frustrated** if the composition of the arbitral tribunal or the arbitral procedure agreed upon by the parties did not follow the national arbitration law of the country. Having said that, the parties' agreement prevails over the law of the country, though there are contrary views as well.

Let us look at the Hong Kong and China jurisdiction. A contrary view was expressed in *China Nanhai Oil Joint Venture Service Corp. Shenzhen Branch v. Gee Tai Holdings Co. Ltd. (1994)* where the award was **enforced** even though the constitution of the arbitral tribunal was **not in accordance with the agreement of the parties**. The arbitrators who have been appointed were on the Shenzhen list of arbitrators and not on the Beijing list as agreed upon by the parties. There is a new principle being raised by Justice Neil Kaplan. The judge in this case introduced the **Doctrine of Estoppel** and reasoned that the parties had taken part in the arbitration knowing that the arbitrators were not from the correct list of arbitrators. The parties, according to Justice Neil Kaplan, are now estopped from raising objection on this ground and could not seek to profit from their own error. In this case, Justice Kaplan said:

even if a ground for opposition is proved, the court still retains residual discretion. This residual discretion enables the enforcing court to achieve just result in all the circumstances x x x.

The grounds for opposition are not to be inflexibly applied. The residual discretion enables the enforcing court to achieve just result in all circumstances in keeping with the spirit and the objective of the New York Convention.

#### 5. Article V(I)(e) of the Convention

The fifth and the last ground for refusal is when the **award has not yet become binding** on the parties or has been **set aside or suspended by a competent authority**, with focus on the wordings of this provision, “may be refused.” I submit that this provision grants **permissive powers** rather than **mandatory powers** and that the court of enforcement retains discretion either to grant or to deny enforcement regardless of the outcome of the proceedings to set aside an award.

From this provision, two scenarios are envisaged.

**Scenario No. 1:** Enforcement refused when there is an application for setting aside or suspension of award pending before a competent authority.

The first scenario is when the enforcement is refused based on the underlying principles:

1. **to avoid inconsistent and conflicting results** between court of enforcement and setting aside application in the court of origin;
2. to avoid offense to **international comity or uniformity**; and
3. awards set aside by other competent authority can no longer be enforced in other jurisdictions.

*Consortio Rive S.A. de C.V. v. Briggs of Cancun, Inc., et. al. (2003)*

*Fertilizer Corp. of India, et. al. v. IDI Management Inc. (USA) (1981)*

**Scenario No. 2:** Enforcement granted when the award has been set aside or suspended at the court of origin.

The second scenario is when the court takes a robust approach and enforcement is granted based on the underlying principles:

1. the provisions of the New York Convention pro-enforcement bias; and
2. the spirit and language of Article V must be construed to promote the objectives of the Convention by facilitating the recognition and enforcement of arbitral awards.

The courts of civil jurisdiction in US and France have taken a bold step in advocating and enforcing arbitral awards. In the first case of *Hilmarton Ltd. v. Omnium de Traitement et de Valorisation SA (1994)*, the French court enforced the award that has been set aside in Switzerland. Second, in *Chromalloy Aeroservices Inc. v. The Arab Republic of Egypt (1996)*, the US Federal court enforced an award that has been set aside in Egypt. This is in line with the spirit and language of Article V of the New York Convention, which is permissive in nature and not mandatory.

### ***C. Other Reasons for Refusal of Enforcement***

- I. Forum Non Conveniens
2. **Commercial or Reciprocity Reservations** pursuant to Article I(3) and I(1) of the New York Convention, respectively

- Article I(3) permits a state to reserve the applicability of the Convention.

Only to differences arising out of **legal relationships**, whether **contractual or not, which are considered as commercial under the national law** of the state making such declaration.

- Rationale of Article I(3)
  - To **assist civil law countries to distinguish between commercial and non-commercial transactions**, in order to adhere to the New York Convention.

#### ***Taieb Haddad and Hans Barett v. Societe d' Investissement Kal (1993)***

- In this case, the court held that the contract under which the architect undertook design is not “commercial” according to Tunisian Law.
- Reciprocity Reservations

Article I(3) permits a state to reserve the applicability of the Convention.

Recognition and enforcement of awards made in the territory of another contracting state only.

*Splosna Polovba of Piran v. Agretak  
Steamship Corp. (1974)*

3. Lack of Implementing Legislation
4. Arbitrato Irrituale
5. Problems with the Identity of a Party
6. Types of Award
7. Merger of Award into Judgment
8. Conditions for the Request for Enforcement

VII. PRINCIPLES IN DECIDING WHETHER  
TO ADJOURN OR STAY THE ENFORCEMENT  
PROCEEDINGS WHEN FACED WITH  
SETTING ASIDE APPLICATIONS

In sum, the issue before us is what is the standard employed by the court of enforcement in deciding whether to adjourn proceedings when faced with an application for setting aside an award at the country of origin. The court in the case of *Europcar Italia SPA v. Maeillano Tours Inc. (1998)*, attempted to prescribe standards in determining whether or not to adjourn enforcement proceedings under Article VI. The first standard is that the general objective of arbitration to ensure speedy resolution, i.e., whether to award **protracted** and **expensive litigation**. The second standard is the status of **foreign proceedings** and **estimated time required to resolve matter**, the third standard is the **extent of scrutiny of arbitral awards**, fourth is the **characteristics of foreign proceedings**, fifth is the **balance of possible hardships**, and sixth is the other circumstances like

**likelihood of success whether it would be set aside or not at the court of origin.**

In dealing with the *Europcar* case there are two conflicting policy considerations:

1. whether adjourning the proceeding will impede the original goal of arbitration for speedy resolution; and
2. the stay of arbitration proceedings preclude the possibility of conflicting results and consequent offense to international comity.

Under Article V(I) of the New York Convention, it is submitted that:

1. It meant to have independent operation in the scheme of promoting enforceability of arbitral awards;
2. The decision of the court of enforcement is independent of the outcome of the proceedings in the court of origin to set aside the award; and
3. There is no automatic stay and it is not expressly stated in the New York Convention under Article V(I).

So it is meant to be operated independently. Mr. Chong spoke succinctly on Article V(2) on a subject matter not capable of arbitration, which impinges on the issue of arbitrability. If you examine, the provision in Article V(2) differs from Article V(I) defenses in that it does not require the party resisting enforcement to prove anything. The parties are not even required to raise any defenses because the court on its own motion would do so to refuse enforcement, if they find that the subject matter is not capable of settlement by arbitration or that it would be contrary to the public policy of their country.

It is submitted that the setting of an award in the court of its origin (seat) should not be a bar to enforcement in other status. As Prof. Albert Jan Van den Berg says it:

x x x the Convention could be “**undermined**” if “**all kinds of particularities**” of the law of the seat of arbitration were allowed to **frustrate enforcement**.

The intention of the Convention is to ensure enforcement of arbitral awards unless the party resisting it proves **fundamental impropriety** such as:

1. Excess of jurisdiction
2. Wrongful constitution of the arbitral tribunal
3. Denial of the opportunity to be heard.

Article V(2) of the Convention states that 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:

1. The subject matter of the difference is not capable of settlement by arbitration under the law of that country;  
or
2. The recognition and enforcement of the award would be contrary to the public policy of that country.

Article V(2) defenses differ from V(1) defenses in that they do not require the party resisting enforcement to prove anything.

## VIII. THE MALAYSIAN EXPERIENCE

I would like to enlighten you on the historical background of the arbitration laws in Malaysia. We used to have the Arbitration Act

of 1952, revised in 1972, which is now repealed as of 2005. The Act that we had before was *pari materia* with the English Arbitration Act of 1950, which is now replaced by the 1996 English Arbitration Act. While the repealed 1950 Act has merit, some simplicity and clarity, it is vastly outdated, heavily criticized and antiquated. Save for the amendments of 1980, in Section 34, the Act has not kept in tune with the major arbitration developments happening around the world. I am pleased to announce that we now have the new Arbitration Act of 2005, which came into force on March 15, 2006. The new Malaysian Arbitration Act received the royal ascent on December 30, 2005; the date of publication in the gazette was a day after, on December 31, 2005. This new law is basically the adoption of the UNCITRAL Model Law with modifications based on the New Zealand experience of opting in and opting out provision in Part III of the Act. Section 3(2)(b) of our new Act states that:

x x x In respect of a domestic arbitration where the seat of arbitration is in Malaysia – Part III of this Act shall apply, unless the parties agree otherwise in writing.

On the other hand, Section 3(3)(b) states that:

In respect of an international arbitration, where the seat of arbitration is in Malaysia – Part III of this Act shall not apply unless parties agree otherwise in writing.

So there is an opting in and opting out provision in Part III under the new Malaysian Arbitration Act. That is a salient feature of our new Act.

#### ***A. Recourse Against Award***

If you look again, we are talking about refusal of recognition and enforcement, I would like to direct your minds to **recourse**

**against award.** Section 37 of our new Act is treated slightly different from Article 34 of the Model Law. Under the Model Law, it treated arbitral recourse against award as an exclusive recourse against award. The word **exclusive recourse against award** has been removed in our new Malaysian Arbitration Act, but in setting aside **exclusive recourse against award**, it did not, probably, because I refer you to Section 37(6) where our new Act states that:

On an application under subsection (1), the High Court may, where appropriate and so requested by a party, adjourn the proceedings for such period of time as it may determine in order to allow the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside.

This wording is very similar to Article 34 (4)<sup>1</sup> of the Model Law. There is actually a remission procedure. What our new Act did is to take out the wording *exclusive recourse*, which is reflected in Section 37(6). There is a recourse for remission and the opportunity is granted to the tribunal to look for further grounds whether they can eliminate those grounds for refusing enforcement. Section 37(2) of the Malaysian Arbitration Act 2005 is a new provision where it defines public policy and I quote:

- 
- I. **ART. 34(4)** – The court, when asked to set aside an award, may, where appropriate and so requested by a party, suspend the setting aside proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside.

Without limiting the generality of subparagraph (I)(b) (ii), an award is in conflict with the public policy of Malaysia where:

- a.) the making of the award was induced or affected by fraud or corruption; or
- b.) a breach of the rules of natural justice occurred:
  - (i) during the arbitral proceeding; or
  - (ii) in connection with the making of the award.

This new provision was adopted from the New Zealand provision of attempting to define what is in contention to public policy. Further on, as opposed to the UNCITRAL Model Law we now do not have time limits to challenge awards under these circumstances. With regard to time limits and as opposed to the 90-day requirement as in Section 37(4)<sup>2</sup> of our new law and the corresponding Article 34(3)<sup>3</sup> of the UNCITRAL Model Law which has the time requirement of three months, there is now no time limit for applications to set aside on grounds that an award was induced or affected by fraud or corruption. This is in tandem with other jurisdictions like in Ireland and Scotland where they have no time limits. Some other jurisdictions have suggested that

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- 2. **SEC. 37(4)** – An application for setting aside may not be made after the expiry of 90 days from the date on which the party making the application had received the award or, if a request has been made under Section 35, from the date on which that request has been disposed of by the arbitral tribunal.
  - 3. **ART. 34(3)** – An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the award or, if a request had been made under Article 33, from the date on which that request had been disposed of by the arbitral tribunal.

perhaps we should impose a three months time limit upon discovery that the award was procured by fraud, bribery, or corruption. That has been totally removed in the Malaysian Arbitration Act.

### ***B. Concept of Severability***

The concept of severability relies on Section 37(3) where “x x x only that part of the award, which contains a decision on matters not submitted on arbitration may be set aside.” Section 37(3) of the Malaysian Arbitration Act confirms the restrictive basis on which an international award can be set aside in Malaysia, and that is a plausible provision. This is consistent with a recent Singapore court’s decision in *PT Asuransi Jazza Indonesia and Dekshia Van*. In that case, two separate arbitral proceedings are involved but the *ratio* in that case is that that part of the award was upheld on grounds that they were not decided outside the submission of the arbitration agreement.

### ***C. Concept of Security***

The last section is on the concept of security. Section 37(7) of the Malaysian Arbitration Act has an expressed provision for this concept of security that:

**where an application is made to set aside an award, the High Court may order that any money made payable by the award shall be brought into the High Court or otherwise secured pending the determination of the application.**

The rationale of this provision is to prevent abuse by the losing party. This is similar to Article VI of the New York Convention, which in practice shows that in most applications

these do not succeed and that the assets of the losing party have disappeared. So this is just a protection. This provision is not found in Article 34 of the Model Law but it is mirrored in Article 36(2) of the Model Law.

#### ***D. Recognition and Enforcement of Awards***

Section 38 makes no distinction between domestic and international arbitration. It provides for the recognition and enforcement of domestic and convention awards as judgment in terms of an action or by action subject to the grounds for refusal as in Section 39 which is similar to Article 36 of the Model Law. What it did was that it described Section 38 which talks of procedural pre-requisite. Remember I spoke earlier about original, authenticated award of the arbitration agreement. Basically this is the provision on those procedures.

#### ***E. Ground for Refusing Recognition or Enforcement***

For an overview, the ground for refusal of recognition or enforcement of arbitral awards is very similar to the Model Law only with the exception that Article 36 has been broken down into two further sections. That is for clarity and simplicity similar to Section 39 of the Malaysian Arbitration Act. It has been codified in the Malaysian Act under Section 39(1)(a)(iv) and (v) and the rest of the provisions are the same as the Model Law and the New York Convention. There are striking similarities of this new Malaysian Arbitration Act with the Model Law and the New York Convention. I must say that Malaysia starts to gain and remains guided by the body of wealth of case laws both in common law and civil law jurisdiction so that we may all stand guided and understand the utility and the interpretation of the

Model Law and the New York Convention as well. For the sake of completeness, Section 39(1)(b) of the Malaysian Arbitration Act on Arbitrability and Public Policy is exactly the same as Article 36(1)(b) of the UNCITRAL Model Law and Article V(2) of the New York Convention.

## IX. CONCLUSION

In summation, the refusal of recognition and enforcement of international awards in the Philippines is codified in the ADR Act of 2004. The relevant provision is Section 45 of RA No. 9285 and is limited to “those grounds as enumerated under Article V of the New York Convention. **Any other grounds raised shall be disregarded by the Regional Trial Court of the Philippines.**” The international consensus is biased in favor of enforcement and some principles are as follows:

1. **Restrictive Approach.** It adopts a very restrictive approach. Defenses to enforcement are to be construed narrowly “to encourage enforcement” as in the *Parsons & Whittemore Overseas’ case*, which dealt with public policy defenses to be heard before a national court, and applied the forum standard of due process.
2. **No review of merits.** Even if the arbitral tribunal makes a mistake of law and fact as in *Europcar’s case*, there is no review of merits and that is enshrined in Article 3 of the Convention – “arbitral awards as binding and enforce them x x x.”
3. **Burden of proof.** The burden of proof as one of the grounds enumerated in Article V on the balance of probability rests with the party resisting enforcement. This has been deliberated in the case of *Rosseel NV v.*

***Oriental Commercial Shipping (UK) Limited (1991) 2 Lloyd's Rep625.***

4. **Discretionary Powers.** Article V grants the court of enforcement the permissive powers and not mandatory powers to adjourn enforcement proceedings. These discretionary powers give rise to a body of controversial case law. Essentially there are two schools of thought on this – either to stay or may not stay the enforcement proceedings.
5. **Procedural Prerequisite to Enforcement.** You need to have an original or a certified true copy.

A party seeking to enforce an award in an arbitration held in another state must comply with Article IV and produce:

- a. a certified copy of award and arbitration agreement and;
- b. a certified translation of the award (but not if it is in English).

***Medison Co. Ltd. v. Victor (Far East) Ltd. (2000)***

6. **No requirement for double exequature.** No double enforcement proceedings required.

In order to enforce a Convention award, it is not necessary for the award to have been made the subject of any court order or enforcement proceedings in the country of the seat.

I submit that Article V and the grounds for opposing enforcement must be construed narrowly in the light of the spirit and objective of the New York Convention to promote and facilitate recognition and enforcement of foreign arbitral awards.

These discretionary powers are not unfettered and must always be exercised within the bounds of reason, fairness and equity.

Thank you very much.

# Public Policy as a Ground to Vacate an Arbitral Award\*

*Dato' Kevin Woo\*\**

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## I. STATUTORY GROUNDS

Public policy is one of the grounds for a court to set aside an award under Article 34(2)(b)(ii) of the United Nations

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\* Delivered at the *Conference on Arbitration for the Judiciary* on March 24, 2006 at the Intercontinental Manila, Makati City, Philippines. *Transcribed.*

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Convention on International Trade Law (UNCITRAL) Model Law or to refuse enforcement of an arbitral award under Article 36(1)(b)(ii) of the Model Law and also Article V(2)(b) of the New York Convention.

Article V(2)(b) of the New York Convention, states that:

Recognition and enforcement of an arbitral award may be refused if the competent authority in the country where recognition and enforcement is sought finds that:

- a. The **subject matter of the difference is not capable of settlement by arbitration** under the law of the country; or
- b. The recognition and enforcement of the award would be contrary to **public policy of that country**, which is the enforcing country.

Article 34(2)(b)(ii) of the Model Law states that:

An arbitral award may be set aside x x x. If the court finds that the award is in conflict with the public policy of this state.

This provision includes public policy as a ground for setting aside of an award by the court in the seat of arbitration.

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Article 36(1)(b)(ii) provides for public policy as a ground for refusing recognition and enforcement of international awards. These are the statutory grounds relating to public policy.

## II. DEFINITION OF PUBLIC POLICY

Both the New York Convention and the UNCITRAL Model Law do not define public policy. Neither is it capable of being given a precise definition. As in *Nagle v. Feilden (1966) 2QB633*, where the court said:

the law relating to **public policy cannot remain immutable**. It must change with the passage of time. The wind of change blows upon it.

Both the New York Convention and the Model Law do not give any indication of any standard to be followed by the enforcing court. What it does is that it leaves it to the enforcing court to determine whether the award conflicts with the public policy of that enforcing court and to deal with that challenge of the award or its enforcement. Still on definition, perhaps some guidance may be found in the UNCITRAL Report in paragraph 2 (96) where it adopted a fairly broad interpretation to encompass **all fundamental principles of law and justice in substantive as well as procedural aspects**. It is very difficult to give a precise definition as public policy, as Mr. Chong Thaw Sing puts it correctly, varies with the social, moral, political and cultural outlook of different countries.

Public policy has been defined by Percy H. Winfield as “a principle of judicial legislation or interpretation founded on the current **needs of the community**.”

Let us look at some of the case laws for his definition. The Supreme Court of India in the case of *Central Inland Water Transport Corp. Ltd. v. Brojo Nath Ganguly (1986) 35SC156, 21*, held that:

Public policy x x x connotes some matter which concerns the **public good and public interest**. The concept of what is good or in the public interest or what would be injurious or harmful to the public good or interest has varied from time to time.

In the case of *Richardson v. Mellish (1824) 2 Bilg 229*, Justice Burrough protested “against arguing too strong upon public policy; it’s a very unruly horse and once you get astride it, you never know where it will carry you.”

At present, there is, however, an increasing recognition of the positive function of the doctrine of public policy and this doctrine is viewed favorably by Lord Denning, in the case of *Enderby Town Football Club v. Football Association Ltd. (1971) ch 591.600*, where Lord Denning states that:

With a good man on the saddle, the unruly horse can be kept in control. It can jump over obstacles.

### III. UNDERLYING PRINCIPLE OF PUBLIC POLICY

But what is the underlying principle of public policy? The underlying principle is that no national court will give effect to a foreign award or judgment which obliges one party to contravene an imperative law of the forum.

According to K.I. Vidhute:

Its function is basically as a guardian of the fundamental moral convictions or policies of the forum.

Whose public policy? It is the **public policy of the enforcement state**, and who may wish to have the right to refuse to recognize and enforce an arbitration award if it **offends the state's own notions of public policy**. This principle is demonstrated in the case of *Mitsubishi Motors Corporation (Japan) v. Soler Chrysler-Plymouth, Inc. (USA) 723 (1985)*, which was raised earlier by Atty. Eduardo P. Lizares. In the said case, the issue was whether anti-trust issue is barred from resolution by arbitration. What happened was that the court followed the *American Safety Equipment Corporation v. J.P. Maguire & Co., Inc., a Delaware Corporation 391 F2d 821 (1968)* case decision where anti-trust claim is not arbitrable. In this case, the court ruled that a "subject matter capable of settlement by arbitration" must be **tested under the laws of the country where recognition of the agreement is sought – the *lex fori***.

If I may direct you all to Republic Act (RA) No. 9285 on the exclusion of the application of the act on some disputes which are not arbitrable, the following are some of the violations of public policy:

1. Arbitrability;
2. Lack of impartiality and bias;
3. Lack of reasons in award;
4. Egregious errors;
5. Patent illegality;
6. Breach of natural justice;

7. Procedural irregularity;
8. Manifest disregard of the law;
9. Grave faults, and others.

But I would like to direct your mind to three examples of recent instances of violations of public policy that were debated. Firstly, on **egregious errors**. Michael Huang in an International Conference recently said that “awards containing fundamental and serious errors so egregious as to undermine the public confidence in the arbitral system conflict with the fundamental notions and principle of justice.” The next example is, on **patent illegality**, which was demonstrated in the landmark case of *Renusagar Power Co. Ltd. (India) v. General Electric Co. (USA) (1994) Supp(I) SCC 644* and *Oil and Natural Gas Corp. Ltd. v. SAW Pipes AIR 2003 SC 2629* in India. In the *Oil and Natural Gas Corp v. SAW Pipes*, where the court added patent illegality for errors appearing on the face of the award as a possible ground for violation of public policy. On **manifest disregard of the law**, which was demonstrated in the case of *International Standard Electric Corp. v. Bidas Sociedad Anonima Petrolera, Industrial y Commercial (1990)*, it has been observed that the “**manifest disregard of the law** by the arbitrators is a judicially created ground for vacating a work.” What it does is that it refers to errors which are so obvious and capable of being perceived by an averagely qualified arbitrator. These are the cases or new grounds perceived to be public policy violations in the recent years.

An interpretation of public policy was found in the case of *Parsons & Whittemore Overseas Co., Inc. v. Societe Generale de L’Industrie du Papier RAKTA (Egypt) and*

*Bank of America (USA) (1974) 508 F2d969*, where it held that:

The Convention's public policy defense should be construed narrowly. Enforcement of foreign arbitral awards may be **denied** on this basis only where enforcement would **violate the forum state's most basic notions of morality and justice.**

What happened was that *Parsons* abandoned the agreed construction project in Egypt when diplomatic relations between Egypt and US was severe and that United States Agency for International Development (USAID) withdrew financial support and the court further said that to deny enforcement of a word lastly due to the US falling out with Egypt diplomatic relations would mean to convert a defense which was intended to be narrowly applied into a major loophole of the New York Convention.

Let us look at the case of *Copal Co. Ltd. (Japan) v. Fochrome Inc., (USA) 517, F2d (2<sup>nd</sup> Circuit 1975)* where it really treated the view that public policy must be construed narrowly and only applied when it violates the forum state's most "basic notions of morality and justice." In this case, it reaffirmed *Parsons and Whitemore's* decision and further enforced a foreign award though it was contrary to public policy of his country of origin, which is Saudi Arabia, on the ground that such **enforcement does not violate a well-defined and dominant international public policy.** What we have now is a more stringent test. First, it was a violation of fundamental basic morality and justice. Second, it must have violated something which is of international, well-defined, dominant and accepted public policy grounds. So this is a more stringent test.

#### IV. DISTINCTION BETWEEN DOMESTIC AND INTERNATIONAL POLICY

Judicial decisions from both civil and common law jurisdictions show that the application varies under two different circumstances:

- a. When an award is sought to be set aside on the ground that it is in conflict with public policy of the country in which the award was made; and
- b. When the award is sought to be enforced in another country under the New York Convention as in the *Parsons and Whittemore* case.

The decision in *Copal v. Fotochrome* has led us to two basic principles – the basic principles and concepts of domestic public policy and international public policy. International public policy is understood to be narrower than domestic public policy.

In applying the international public policy, which is a narrower concept, the courts recognize and give effect to the principle of comity of nations which requires the award by foreign arbitral tribunals to be given due deference to be enforced. The court also leaned in favor of recognizing the finality of international arbitration awards and having to review the merits of the case which have already been decided by the arbitral tribunal. The distinction between domestic and international public policy means that what pertains to public policy in domestic relations does not necessarily pertain to public policy in international relations.

I would like to cite to you the case of *COSID Inc. (USA) v. Steel Authority of India Ltd. (1985)*. The Delhi High Court of India refused to enforce an award for damages rendered in London against *Steel Authority* of India for failure to supply

hot rolled steel coils to **COSID** because of the Government's ban on the export of such coils. The court in that case held on to Article V(2)(b) which does not contemplate a distinction between what is international and what is domestic. But what it does is to determine whether or not the award is contrary to the public policy of the country where it is enforced. The distinction between domestic and international public policy is gaining acceptance in the international commercial arbitration. Perhaps it is timely for an amendment to Article V(2)(b) of the New York Convention for a uniform interpretation of public policy defenses.

The new French Code of Civil Procedure made a distinction between international public policy (*ordre public international*) and the national public policy, where the new Code provides, "x x x an international arbitral award can be set aside if the recognition or execution is contrary to public policy." In identifying an international public policy, the French law recognizes the existence of two levels of public policy. The international award will not be set aside simply because it fails to comply with French domestic requirements. For instance, lack of reasons in an award could be a possible reason for annulment under the domestic regime, but it may not be set aside and used as international public policy grounds to set aside an international award.

What then is international public policy? It can be broadly described as something that is:

1. Contrary to the basic notions of **morality and justice**;
2. **Offensive to some moral, social or economic principle** so sacrosanct as to require its maintenance at all costs without exception;
3. **Injurious to the public** and **against public good**;

4. **Contrary to the fundamental policy** of the country;  
and
5. **Against the interest of the country.**

All these principles constituting public policy were demonstrated in the earlier cases which I will deal with in greater detail to demonstrate what international public policy is all about.

Why then is the international public policy standard narrower than domestic public policy? In applying this standard, first, the courts recognize and give effect to the principle of comity of nations which requires that awards of foreign arbitral tribunal be given due deference to be enforced. Second, the courts lean in favor of recognizing the finality of international awards and discourage revisiting awards where the issues have been determined by the arbitral tribunal. Notwithstanding the inclination for a narrower standard in international public policy, there is currently an absence of a definite and universal standard of application of the doctrine of public policy.

Before we discuss the various approaches by the other jurisdiction, let us direct our minds to the discussion on the conventions on public policy. Firstly, I would like to call your attention to Article I(2)(a) of Geneva Convention of 1927 that actually draws a distinction between public policy and the law of the country where the award is sought to be enforced. It has been provided:

that the recognition or enforcement of the award is **not contrary to public policy** or to the **principles of the law of the country** in which it is sought to be relied upon.

It was felt that this Geneva Convention of 1927 has certain defects which hampered the speedy resolution of the disputes to arbitration. What it did was, the New York Convention Article V (2)(b) dropped that provision. It aimed at promoting and improving its predecessor, the Geneva Convention of 1927 and it deleted the requirement of satisfying the principles of the law of the country of enforcement. This deletion supports the position that the challenge on the **ground of violation of public policy must invoke something more than the mere violation of the law of the country of enforcement.** Based on this principle, you can look at the case of *Hebei Import and Export Corp. v. Polytek Engineering Co. Ltd. (1999)2 HKC 205*, where it was held that the violation of public policy must go beyond the minimum to justify the setting aside of a domestic judgment or an award. In the Indian case of *Renusagar Power Co. Ltd v. General Electric Co. (1994) Supp (I) SCC 644*, the same principles apply where the Supreme Court of India noted that the application of the doctrine of policy in the field of conflict of law is more limited than in domestic law and the courts are slower to invoke public policy in cases where it involves a foreign element than where it is a purely municipal legal issue. In this case, the Supreme Court of India held:

x x x in order to attract bar of public policy the enforcement of the award must invoke something more than the violation of the law of India.

What is the Indian approach with respect to public policy defenses for refusal of recognition and enforcement of arbitral awards? In *Renusagar Power's* case, the court of India held that since recognition and enforcement of foreign awards under the New York Convention is governed by the principle of private

international law, that expression of public policy under Article V(2)(b) of the New York Convention must therefore be construed in the sense that it applies in the field of private international law. Applying this criteria of private international law it was held that the public policy ground may only be invoked if enforcement is contrary to:

- a. the fundamental policy of Indian law;
- b. the interest of India; and
- c. justice or morality.

In another Indian case, the *Oil and Natural Gas Corp. Ltd. v. SAW Pipes AIR 2003 SC 2629*, the Supreme Court, in dealing with the challenge to domestic award, held that the term public policy of India should be interpreted within the context of the jurisdiction of the court where the validity of the award is challenged, before it becomes final and executable. What happened in this case was that the concept of enforcement of the award after it becomes final is different, and in this case the validity of the award is challenged and it is not required to be given a narrower meaning. In this case, the court added an additional ground that a patently illegal award may be annulled by relying on the public policy ground. That is the Indian approach.

There are two other jurisdictions – the English position in the case of *Vervaeke v. Smith (1983) 1 AC 145 at 164*, which spoke about grounds for public policy where it violates morality, social or economic principle. The other case is *Deutsche Schachtbau-und Tiefbohrergesellschaft mbH (Germany) v. Ras AI Khaimah National Oil Co. (1987) 2 All ER769*, where it says that it is injurious to public good where it is offensive to the ordinary reasonable and fully informed member

of the public, that is again another principle. I went on to the American approach in the case of *Parsons & Whittemore*, which talked about the forum state where it violates morality and justice. It held that:

The general pro-enforcement bias informing the Convention and explaining its supersession of the Geneva Convention points toward a **narrow reading of the public policy defense**. An expansive construction of this defense would vitiate the Convention's basic effort to remove pre-existing obstacles to enforcement x x x. **Enforcement of foreign arbitral awards may be denied on this basis only where the enforcement would violate the forum state's most basic notions of morality and justice.**

I went on to another case of *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc.* 87 L Ed2d 444, it was observed:

We conclude that concerns 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 a contrary result would be forthcoming in a domestic context.

## V. CONCLUSION

### A. *How Successful is Public Policy as a Defense*

How successful then is public policy as a defense? A review showed that the number of cases in which public policy defense has been accepted is very limited. In *Richardson v. Mellish (1824)* 2

**Bing. 229**, Justice Burrough said “it is never argued at all but where other points fail.” Though the defense of public policy is frequently invoked in the enforcement proceedings, experience gathered from reported decisions lead to a conclusion that enforcement is only refused under exceptional circumstances. I quote Albert Wendelberg who said that out of 140 cases as of last year (2005) at the Efficient Consumer Response (ECR) Conference in Beijing, only eight cases were being refused under these grounds.

### ***B. Moving Forward***

What then is our way forward? It is my suggestion that there should be a uniform interpretation of public policy defenses and universal application, and that the enforcement of an award is only refused when it violates a manifest and definite principle of international public policy of the forum. The purpose of the New York Convention is to provide a uniform procedure for enforcement of arbitral award. There is, however, no common international standard to date in regard to a workable definition of what international public policy is all about. It is now required for three main reasons:

1. To provide **consistency and to discourage speculative challenge** by the losing party to resist or delay enforcement of the award against it;
2. To **prevent refusal for enforcement purely on domestic considerations**;
3. To **harmonize the concept** and establish a **common international standard** to be applied for refusing recognition or enforcement of an international award.

Notwithstanding that it will be very difficult to work out a comprehensive definition of what international public policy is all about, perhaps it is timely that we put our heads together to work out a workable definition of international public policy. That would be in keeping with the objective and purpose of the New York Convention and the Model Law which is to provide a **uniform procedure and standards to be followed and applied by** different countries for recognition and enforcement of arbitral awards.

While most of us agree that a more definitive scope of public policy is required with the aid of administrative law concepts, the viability of such an approach remains a matter of speculation. And I quote Albert Wendelberg who said that in applying the principle of *expressio unius*, an expressed definition of international public policy principle, may also mean that what is not expressed is excluded and is not intended, and therefore resulting in an exhaustive and exclusive means of public policy recourse in arbitration award. Whether this will help to develop international arbitration or not is left to be seen, and it is certainly a controversial issue whether to work out a workable definition of what international policy comprises and a debatable issue in most international forums in this case.

With these, I would like to leave you all in this forum to think about some of my views whether we should actually formulate defined principles of international public policy. Thank you all for your attention.

# Chronicle of Current Issues Affecting International Commercial Arbitration\*

*Mr. Chong Thaw Sing\*\**

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During the more than 20 years of practice as consulting engineer, contractor and project manager, he had accumulated substantial technical experience to complement his knowledge in construction-related laws. It is this combination of technical and legal knowledge which he has used with advantage to resolve construction disputes or avoid pitfalls. His experience in handling construction-related disputes has been reinforced through further qualifications in Master of Construction Law and Arbitration, Master of Laws in Commercial Law, and a Post Graduate Diploma in Arbitration.

## I. INTRODUCTION

There can be no doubt, international arbitration in Asia has seen a remarkable growth over the last 25 years. The trend is hardly surprising as the Asian region has emerged as a vibrant region for international trade. The emergence of numerous free trade agreements (FTAs) and the implementation of the Asean Free Trade Area (AFTA) two years ago have contributed to the exponential growth in trade and investment in this region. In tandem with the phenomenal growth in international trade and investment, Asia is likely to experience an unparalleled growth in international commercial arbitrations. In view of this prospect, the region must seize this “window of opportunity” to be equipped and be ready to partake in this process of dispute resolution. In this regard, the Philippine Judicial Academy (PHILJA), The Asia Foundation (TAF) and the Kuala Lumpur Regional Centre for Arbitration (KLRCA) ought to be congratulated for taking this initiative to promote the arbitration culture in the region and within the Philippines’ Judiciary. I must also mention that the Hong Kong International Arbitration Centre (HKIAC), the Singapore International Arbitration Centre (SIAC) and the KLRCA, for many years, have been in the forefront of international arbitrations in Asia and therefore have a good setup of international standards to handle international arbitrations. The International Chamber of Commerce (ICC) and the China International Economic and Trade Arbitration Commission’s (CIETAC) presence in international arbitrations

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Mr. Chong is the Deputy Chairman of the Chartered Institute of Arbitrators, Malaysia Branch, and a ‘fellow’ of both the Chartered Institute of Arbitrators, UK and of the Malaysia Institute of Arbitrators.

in Asia are also being keenly felt now and their impact on international arbitration in Asia will be very visible in the future.

The spectrum of issues affecting international commercial arbitration is admittedly very broad. It affects the pre-arbitration stage, the proceeding stage and also the post-arbitration stage. Whilst, there are multitudes of current issues affecting international commercial arbitration, this paper will discuss several issues which have vexed the international arbitral fraternity.

## II. PRE-ARBITRATION STAGE

The successful commencement of an arbitration process is undoubtedly an important step in any dispute resolution. Unlike litigation, arbitration is a creature of the parties' agreement, therefore, the arbitrator's jurisdiction to adjudicate the dispute is derived from the parties' agreement. Challenge to the arbitrator's jurisdiction, if successful, often is the surest way to delay an arbitration proceeding. Admittedly, the concept of the jurisdiction of an arbitrator is rather abstract and often raised "dispute within a dispute." A simple way to describe "jurisdiction of an arbitrator" is to compare it to the boundary of a farmer's farm, beyond which he cannot cultivate his crops because the land belongs to others. The farmer would have trespassed into the neighbor's land if he has done that. Likewise, if an arbitral tribunal strayed beyond the bounds of its jurisdiction, the decisions and award of the arbitrator would be subjected to challenge and may be set aside by the court of law. In this respect I would like to address two important issues which often occurred at the commencement of the proceeding.

### **A. Determination of the Arbitrator's Jurisdiction**

The powers and jurisdiction of an arbitrator are dependent upon two factors, *i.e.*, the agreement of the parties and the laws of the competent national jurisdiction. Arbitration, as an alternative form of dispute resolution, can only take place if agreed to by the disputants in advance of the dispute. Alternatively, if there is no prior agreement, the dispute can still be submitted to arbitration but it must be by way of an *ad hoc* arbitration agreement where the parties jointly agreed to submit dispute to be determined by a private tribunal. In addition to the agreement of the parties, the relevant national laws, whether directly or indirectly, also influence the effectiveness of the arbitral agreement. If the arbitral agreement does not cover the nature of dispute submitted to the arbitral tribunal or if the subject matter is not arbitrable under the law, the arbitral agreement will be ineffective. In such eventuality, neither the proceedings nor the arbitral award rendered will be recognized by the interested legal systems.

However, the issue is often not determined in such straight forward manner. For example several dubious decisions from national courts in respect of several international arbitrations from this region underlined the importance of the judiciary's thorough understanding of the arbitral process. In ***P.T Perusahaan Dagang Tempo v. P. T. Roche Indonesia***, a dispute related to termination of a distributorship agreement, the court very controversially ignored the arbitration agreement and refused to stay the legal proceeding brought by one party. The court's refusal to stay the legal proceedings stems from their understanding that this dispute was a "legal dispute" and not a "technical" one, therefore they have jurisdiction to hear this dispute. The court's

finding that the arbitral tribunal only had jurisdiction on “technical matters” and not “legal” dispute is quite extra-ordinary.<sup>1</sup>

In another Indonesian case, *P. T. Branita Sandhini v. P. T. Panen Buah Emas (2004)*, the issues of applicable law and the jurisdiction of the arbitral tribunal to hear this dispute were hotly-contested and the court in Indonesia decided, for some obscure reasons, to ignore international practice in an interpretation of the arbitral agreement and ruled that the jurisdiction to hear this case stays with the court in Indonesia and refused to stay the court proceeding. In this case, there was an allegation of a wrongful termination of a cotton processing agreement. The court was seized with this action for US\$ 25-million damages for wrongful termination of the agreement. This arbitration agreement provided for “an arbitration in Singapore in accordance with the Arbitration Rules of the Singapore International Arbitration Centre.” The agreement further provided that the Indonesian law shall govern the agreement. The court held that the arbitration clause involved a conflict as to which law was applicable. The Indonesian court completely misinterpreted Clause 19.I in the agreement which provided that each dispute shall be resolved by arbitration in Singapore according to SIAC rules, as tantamount to arbitration in Singapore according to arbitration law of the Singapore International Arbitration Centre. And since this is not an Indonesian law, which the parties have agreed shall govern the agreement, the tribunal appointed to decide on the dispute that it had no jurisdiction *ab initio*. Clearly, the Indonesian court confused the governing law chosen by the parties with the venue and procedural rules chosen by the parties. Because

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I. Kaplan, Neil “The Good, The Bad and The Ugly” An address to the Chartered Institute of Arbitrators’ Conference, Bangkok on March 27, 2004.

of this conflict, the court decided to retain jurisdiction and refused a stay. Very strangely, the court in denying a stay of proceeding further ruled that termination of an agreement also did not come under the arbitration clause which said:

any dispute arising under this agreement shall be referred to and finally resolved by arbitration.

The court's interpretation of this clause presumably placed disputes arising from termination of an agreement as outside the ambit of the contract and therefore cannot be arbitrated. Such interpretation, ignoring the widely-accepted doctrine of separability, is contrary to current international practice to recognize the primacy of the doctrine of separability in an arbitration agreement.

In another case from this region, one of the parties to an arbitration agreement refused to appoint an arbitrator to resolve their dispute. As a result, the other party applied to the court to appoint one. Instead of acting with dispatch to quickly appoint an arbitrator, the court took 23 months to appoint one. Whilst we are fully sympathetic to the overworked national courts in this region, international arbitration surely cannot operate unless there is a supportive judiciary which is willing to assist when called upon to.

### III. DURING THE ARBITRAL PROCEEDING

Once an arbitral tribunal has been constituted, most of the arbitrations are conducted without the need to refer to national court, even if one of the parties fails or refuses to take part in the proceedings. There may be times, however, when the involvement of a national court is necessary in order to ensure the proper

conduct of the arbitration. The question of the degree of involvement of a national court in arbitration often becomes controversial. When does this “involvement” become an “intervention” and when does the “intervention” become an “interference.” This moot question, unfortunately, has no simple or straightforward answer. Nevertheless, a court’s interference in the arbitration process by granting a party an “anti-arbitration” injunction, either at the place of arbitration or at the place of enforcement, has been a problem. Usually, this problem involved arbitration between a foreign party and a state entity which has signed a clear arbitration agreement.

#### ***A. Anti-Arbitration Injunction***

In an application for an anti-arbitration or anti-suit injunction, one party usually seeks to challenge the jurisdiction of the arbitral tribunal and secure an order requiring the arbitrator and adverse party to suspend or abandon the arbitral proceedings on the threat of daily fine or worse consequence. This problem raised serious challenges to the modern arbitration. In one such case, a subsidiary of a US corporation, *Himpurna*, had entered into a contract with Indonesia’s state electricity corporation, PLN, to explore the geothermal resources in Indonesia and subsequently sell the power to PLN. In the wake of the Asian financial crisis in 1997, PLN failed to purchase the electricity supplied. *Himpurna* relied on the arbitration clause in the contract to commence arbitration under the UNCITRAL Rules against PLN. A final award was made in favor of *Himpurna* which PLN refused to pay. A second arbitration was commenced by *Himpurna* against the Indonesian Government, based on the Indonesian Government’s pledge to secure PLN’s performance. Shortly after serving the Statement of Claim, court proceedings were commenced by both PLN and

the Indonesian Government in an Indonesian court which resulted in an interim injunction to the arbitrator to stay the proceedings. In addition, the court also attached fines of US\$ 1 million a day for any breach of the order. The court's order to suspend the arbitral proceedings was made, apparently, to allow the court to decide on the merits of this case. Notwithstanding the court's order, the tribunal refused to abandon the proceedings. Instead, it moved the hearing of witnesses to The Hague, in the Netherlands. Not satisfied with the tribunal's decisions, the Indonesian Government tried to stop the hearing in The Hague by seeking an injunction from a Dutch court to stop the proceedings, but failed. The final award was issued thereafter.

A similar problem was also encountered by an ICC arbitration between an Ethiopia state agency and a European contractor. The Ethiopia party sought and obtained an injunction from the Ethiopia Supreme Court restraining the arbitration proceedings in Paris. In response to this injunction, the arbitral tribunal ignored the injunction and held that the tribunal has a duty under Article 35 of the ICC Rules to "ensure" that their awards are "enforceable at law," and although in this case the likely place of enforcement was Ethiopia, it did not mean that an arbitral tribunal:

[s]hould simply abdicate to the courts of the seat the tribunal's own judgment about what is fair and right x x x. In the event that the arbitral tribunal considers that to follow a decision of a court would conflict fundamentally with the tribunal's understanding of its duty to the parties, derived from the parties' arbitration agreement, the tribunal must follow its own judgment, even if that requires non-compliance with court order.

The tribunal concluded that to comply with the injunction would lead to a denial of justice. A slightly different problem was encountered in another arbitration held in year 2000, the Supreme

Court of Pakistan had to consider *HUBCO v. WAPDA*.<sup>2</sup> This was a dispute relating to a power project. A local company was incorporated to represent the foreign interests. It entered into an agreement with the Pakistani Government and with a state-owned power entity in Pakistan called WAPDA. A dispute arose as to the tariff which was alleged by the respondent to be too high. The claimant started arbitration proceedings pursuant to the arbitration agreement. The respondent however alleged fraud and illegality on the claimant's action in securing a change in the contract terms to increase the originally agreed tariff to higher tariff. The Respondent made application to the High Court in Lahore for an *ex parte* injunction preventing the claimant from continuing with the London arbitration. The case eventually was brought before the Supreme Court of Pakistan. The Court determined, by a majority of 3-2, that for reason of public policy, the dispute was not within the scope of arbitration.

Fortunately, cases which could potentially delay the arbitral process are not very frequent, nevertheless, it is a setback to the sanctity of party autonomy in arbitration.

#### IV. CONFIDENTIALITY OF THE PROCEEDINGS

It is generally agreed that one of the important pillars of arbitration over litigation is the confidentiality of the proceedings. It has been thought for some time that "confidentiality" is an unassailable implied term of an arbitration process. The current state of the law and practice over the confidential nature of arbitration appears inconsistent across various jurisdictions. The

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2. Supreme Court of Pakistan, June 14, 2000, *The Hub Power Company Ltd. v. Pakistan WAPDA and Federation of Pakistan*, 15(7) Mealey's IAR AI(2000).

UNCITRAL Model Law, for example, does not mention the confidential nature of the award. In practice, some institutions actually either publish or permit the publication of the award.<sup>3</sup> In the Australian case of *Esso Australia Resources Ltd. v. Plowman (Minister of Energy and Minerals)*<sup>4</sup> it became apparent that whilst everyone accepted that arbitration is private, not all however accepted that it is necessarily confidential. In England, confidentiality in arbitration is recognized as the essential corollary to privacy in arbitration<sup>5</sup> and is a term the law will necessarily import into the agreement.<sup>6</sup> Singapore appears to have adopted the English position that the rule to confidentiality is not absolute but subject to exceptions, such as:

1. Where the parties consented to the disclosure;
  2. Disclosure is made pursuant to an order of a court;
  3. If disclosure is reasonably necessary for the protection of the legitimate interests of a party *vis-à-vis* a claim by a third party; or
  4. Where the interest of justice requires disclosure.<sup>7</sup>
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3. The Society of Maritime Arbitrators, New York routinely publishes arbitral awards and make them available for subscription. The Baltic Exchange, until the 1970s, permitted awards to be posted on their notice board to encourage payment by debtors. The ICC publishes arbitral awards rendered since 1973, some fully and some in “sanitized” form.
  4. (1995)128 ALR 391.
  5. *Liverpool City Council v. Irwin* [1977] AC 239, [1976] 2 All ER39
  6. *Ali Shipping Corp. v. Shipyard Trogir* [1988] 2 All ER136, CA.
  7. *London and Leeds Estates Ltd. v. Paribas Ltd.* (No. 2) [1995] E.G.L.R. 102; [1995] 02 E.G. 134, QBD, where the court

In England, the use of documents generated in or obtained during the arbitration for use outside the arbitration is not permissible even when required for use in other related proceedings.<sup>8</sup> In contrast, the rule of confidentiality is not fully embraced in Australia. The High Court of Australia in *Esso Australia Resources Ltd. v. Plowman* could not accept that a duty of confidence must follow from implied right of privacy; distinguishing that while arbitration is private, it is not confidential. The court held that even if contractual duty does exist, it is not an absolute one. It follows that no obligation of confidentiality attaches to witnesses in the arbitral proceedings. The decision, coming from the highest court in Australia has certainly caused much disquiet amongst business community.<sup>9</sup>

A strict application of the rule of confidentiality would mean that a tribunal's findings of what transpired in arbitration may not be referred to in another proceeding, even if the parties and subject matters involved are closely related. Apart from the obvious

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held that if an expert witness in a previous arbitration had expressed views which might contradict those in court proceedings, he might be subpoenaed in the interest of justice to give proof of his evidence in the earlier arbitration. In *Ali Shipping Corp. v. Trogir*, Potter LJ added that he would have done so even if the witness is a witness of fact.

8. *Department of Economic Policy and Development of the City of Moscow v. Banker's Trust Company and Anor* [2004] CA BLR 220.
9. See OAKLEY-WHITE, "Confidentiality Revisited: Is International Arbitration Losing One of its Major Benefits?" 1 Int. ALR (2003) p.29; BAGNER, "Confidentiality: A Fundamental Principle in International Commercial Arbitration?"

waste of time and resources, this could also lead to inconsistent findings by a different tribunal in a similar issue. By and large, the English's position which treats arbitration as private and confidential with exceptions is the preferred view.

Dismantling totally the "confidentiality pillar" of an arbitration process would be unwise as there would then no longer be any advantage in an arbitral process as a "low-key method" of resolving dispute preferred by most businessmen all over the world.

## V. MONEY LAUNDERING

Using the arbitral process to launder money is not something new. In fact the UNCITRAL Model on International Commercial Arbitration, specifically in Article 30 thereof on settlement between the parties stated the following:

If, during arbitral proceedings, the parties settle the dispute, the arbitral tribunal shall terminate the proceedings and, if requested by the parties and *not objected to by the tribunal*, record the settlement in the form of an arbitral award on the agreed terms. (Emphasis added)

Similarly, several arbitral institutional rules including the ICC Rules also contain provisions that the parties, after reaching a settlement, may request the tribunal to issue a consent award. For example, in ICC Rules, Article I 3:

[t]he settlement shall be recorded in the form of an Award made by consent of the parties if so requested by the parties and *if the Arbitral Tribunal agrees to do so*. (Emphasis added)<sup>10</sup>

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10. ICC Rules of Arbitration in force as of January I, 1998.

Quite clearly, the words emphasized in italics have been inserted to allow the tribunal, if the circumstances of the settlement created any doubts of any “impropriety,” to deny any legitimization of such settlement by not rendering an award on agreed terms. An example might be the manufacture of internationally-banned drug, or the smuggling of contrabrand or an agreement which contravenes the various anti-trust or competition laws. At one time various sets of rules (including ICC rules) seemed to leave the tribunal with no discretion, but modern rules and legislations permit the arbitral tribunal an option to refuse to make a consent award.<sup>11</sup> But incidence of such a settlement has been rare.<sup>12</sup> Rare as they be, the situation is heightened by the fear of “illegitimate funds movement” post September 11. Conceivably, situation could arise whereby arbitration award is used as framework by which monies are transferred between parties and potentially “laundered” in the process. It is not a new problem per se, but it may give rise to concerns, for the arbitrator, in the context of new money laundering regulations and legislation in many countries. For example, by providing a consent award which facilitates a financial transaction of “proceeds of crime,” an arbitrator could commit an offense under Section 328 of the Money Laundering (ML) Regulations 2003. Legislations to prevent laundering of money have been enacted in many countries, the tribunal must be extremely careful so as not to run foul of these legislations in being a “conduit of the illegal activity.” In United Kingdom, the authorities have made it clear that it was not the intention of ML Regulations to catch third party dispute resolvers. This, however, should not be relied upon as a substitute

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11. *Ibid.*

12. K. Karshen and A. Berkeley (Eds.), *Dossiers of ICC Institute of World Business Law: Arbitration, Money Laundering, Corruption and Fraud*, September 2003 at p. 157.

for careful review and understanding of the governing regime in the relevant jurisdiction(s) by arbitration counsel and arbitrator alike.<sup>13</sup>

## VI. POST-ARBITRAL PROCEEDING

Challenges to the arbitrator's award is the last-ditch effort by losing litigants to avoid the award being enforced against them, whether in their own country or in foreign countries, where there may be assets to satisfy the award. One such case is in *Tang v. Tan*,<sup>14</sup> where the arbitrator made an award that was "final save as to cost," dismissing Tang's counterclaim, but later made an additional award in which he affirmed his earlier award in favor of Tan. On Tang's application and after further hearing, the arbitrator reversed his earlier decision and awarded the counterclaim to Tang by rendering a further award. Tan challenged the second award before the Singapore High Court. GP Selvam J held that the arbitrator could not revisit an award, which was final so far as matters in the award were concerned. He said that an interim award which is final in nature rendered the arbitral tribunal *functus officio* in respect of the issues decided. The Singapore Court of Appeal, however, held that, as the arbitration fell within the purview of the International Arbitration Act 1995 (Chapter 143A) (IAA), as such the Model Law (MAL) was incorporated under S3(I) IAA 1995 as part of Singapore law. Article 32 (I) of the MAL provides that a final award terminates arbitral proceedings and the arbitrator's mandate. The Court of Appeal held that an

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13. Miles, Wendy, "Money Laundering" The International Comparative Legal Guide to: International Arbitration 2005 p1.

14. *Tang Boon Jek Jeffrey v. Tan Poh Stanley* [2001] 3 SLR 237.

arbitrator is not *functus officio* until a final award is made which disposes of all the issues. Thus, the arbitrator could revisit his interim awards and amend them in the final award. The decision of the Court of Appeal in a way shook the faith of international business community in Singapore because the principle of finality of award which underpins the commercial utility of an arbitration award has been seriously eroded by this decision. It follows that the rationale of choosing to resolve an international commercial dispute through arbitration in Singapore has become untenable.<sup>15</sup> The decision of the Court of Appeal caught many in the international community by surprise and stirred considerable debates, as the decision is a clear affront on the doctrine of party autonomy. However, the Singapore Legislature work with extraordinary speed and efficiency to amend the IAA to clarify certain provisions; Section 19B was inserted:

1. An award made by the arbitral tribunal pursuant to an agreement is final and binding on the parties and on any persons claiming through or under them, and may be relied, upon by any of the parties by way of defense, set-off or otherwise in any proceedings in any court of competent jurisdiction.
2. Except as provided in Articles 33 and 34 of the Model Law, upon an award being made, including an award made in accordance with Section 19A, the arbitral tribunal shall not vary, amend, correct, review, add to, or revoke the award.
3. For all purposes of subsection (2), an award is made when it has been signed and delivered in accordance with Article 31 of the Model Law.
4. This Section shall not affect the right of a person to challenge the award by any available arbitral process

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15. *Tang Boon Jek Jeffrey v. Tan Poh Stanley* [2001] 3 SLR 237.

of appeal or review or in accordance with the provisions of this Act and the Model Law.<sup>16</sup>

The amendment contained in S19B of the International Arbitration (Amendment) Act 2001, which effectively reversed the decision of the Court of Appeal, to some extent restored the international community's faith in Singapore as a place of international arbitration. This additional clause ensures the finality of an award in international arbitrations having their seat in Singapore and prevents the party from applying to the tribunal to reconsider or reverse an interim award once it has been published, unless there is prior agreement.<sup>17</sup>

## VII. CONCLUSIONS

The issues highlighted above are of great concerns to the international arbitral community. Be that as it may, these current issues affecting international commercial arbitration will continue to be contentious. The primary reason for this pessimistic prognosis lies in the flexibility of the rules of interpretation of statutes and the parties' agreement. Quite often, the primacy of national interests outweighs the international acceptance and it forms the backdrop of the decision-making process. This is despite the fact that many countries have chosen to embrace the internationally preferred Model Law as a framework for their national arbitral laws, and the modern international rules and practice in arbitration. The discussions in this paper have highlighted the differences in expectations between the international community and the national courts in Asia.

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16. International Arbitration (Amendment) Act 2001, Singapore.

17. Chiu Hse Yu, "Final, Interim, Interlocutory or Partial Award: Misnomers Apt to Mislead"[2001] 13 SAclJ 467.

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# UNCITRAL Model Law on International Commercial Arbitration

(UNITED NATIONS DOCUMENT

A/40/17, ANNEX I)

(AS ADOPTED BY THE UNITED NATIONS  
COMMISSION ON INTERNATIONAL TRADE LAW  
ON JUNE 21, 1985)

## CHAPTER I GENERAL PROVISIONS

### ARTICLE I. *Scope of application*\*

(1) This Law applies to international commercial\*\* arbitration, subject to any agreement in force between this State and any other State or States.

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\* Article headings are for reference purposes only and are not to be used for purposes of interpretation.

\* \* The term “commercial” should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business cooperation; carriage of goods or passengers by air, sea, rail or road.

- (2) The provisions of this Law, except Articles 8, 9, 35 and 36, apply only if the place of arbitration is in the territory of this State.
- (3) An arbitration is international if:
- (a) the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States; or
  - (b) one of the following places is situated outside the State in which the parties have their places of business:
    - (i) the place of arbitration if determined in, or pursuant to, the arbitration agreement;
    - (ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject matter of the dispute is most closely connected; or
  - (c) the parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one country.
- (4) For the purposes of paragraph (3) of this Article:
- (a) if a party has more than one place of business, the place of business is that which has the closest relationship to the arbitration agreement;
  - (b) if a party does not have a place of business, reference is to be made to his habitual residence.
- (5) This Law shall not affect any other law of this State by virtue of which certain disputes may not be submitted to arbitration or may be submitted to arbitration only according to provisions other than those of this Law.

**ART. 2. *Definitions and rules of interpretation***

For the purposes of this Law:

- (a) “arbitration” means any arbitration whether or not administered by a permanent arbitral institution;
- (b) “arbitral tribunal” means a sole arbitrator or a panel of arbitrators;
- (c) “court” means a body or organ of the judicial system of a State;
- (d) where a provision of this Law, except Article 28, leaves the parties free to determine a certain issue, such freedom includes the right of the parties to authorize a third party, including an institution, to make that determination;
- (e) where a provision of this Law refers to the fact that the parties have agreed or that they may agree or in any other way refers to an agreement of the parties, such agreement includes any arbitration rules referred to in that agreement;
- (f) where a provision of this Law, other than in Articles 25(a) and 32(2)(a), refers to a claim, it also applies to a counter-claim, and where it refers to a defense, it also applies to a defense to such counter-claim.

**ART. 3. *Receipt of written communications***

(I) Unless otherwise agreed by the parties:

- (a) any written communication is deemed to have been received if it is delivered to the addressee personally or if it is delivered at his place of business, habitual residence or mailing address; if none of these can be found after making a reasonable inquiry, a written communication is

deemed to have been received if it is sent to the addressee's last known place of business, habitual residence or mailing address by registered letter or any other means which provides a record of the attempt to deliver it;

(b) the communication is deemed to have been received on the day it is so delivered.

(2) The provisions of this Article do not apply to communications in court proceedings.

**ART. 4. *Waiver of right to object***

A party who knows that any provision of this Law from which the parties may derogate or any requirement under the arbitration agreement has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay or, if a time limit is provided therefor, within such period of time, shall be deemed to have waived his right to object.

**ART. 5. *Extent of court intervention***

In matters governed by this Law, no court shall intervene except where so provided in this Law.

**ART. 6. *Court or other authority for certain functions of arbitration assistance and supervision***

The functions referred to in Articles II(3), II(4), I3(3), I4, I6(3) and 34(2) shall be performed by x x x [Each State enacting this Model Law specifies the court, courts or, where referred to therein, other authority competent to perform these functions.]

## CHAPTER II

### ARBITRATION AGREEMENT

#### **ARTICLE 7. *Definition and form of arbitration agreement***

- (1) “Arbitration agreement” is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.
- (2) The arbitration agreement shall be in writing. An agreement is in writing if it is contained in a document signed by the parties or in an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement, or in an exchange of statements of claim and defense in which the existence of an agreement is alleged by one party and not denied by another. The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing and the reference is such as to make that clause part of the contract.

#### **ART. 8. *Arbitration agreement and substantive claim before court***

- (1) A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.

- (2) Where an action referred to in paragraph (1) of this Article has been brought, arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the court.

**ART. 9. *Arbitration agreement and interim measures by court***

It is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant such measure.

**CHAPTER III  
COMPOSITION OF ARBITRAL TRIBUNAL**

**ARTICLE 10. *Number of arbitrators***

- (1) The parties are free to determine the number of arbitrators.
- (2) Failing such determination, the number of arbitrators shall be three.

**ART. 11. *Appointment of arbitrators***

- (1) No person shall be precluded by reason of his nationality from acting as an arbitrator, unless otherwise agreed by the parties.
- (2) The parties are free to agree on a procedure of appointing the arbitrator or arbitrators, subject to the provisions of paragraphs (4) and (5) of this Article.

- (3) Failing such agreement,
- (a) in an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two arbitrators thus appointed shall appoint the third arbitrator; if a party fails to appoint the arbitrator within 30 days of receipt of a request to do so from the other party, or if the two arbitrators fail to agree on the third arbitrator within 30 days of their appointment, the appointment shall be made, upon request of a party, by the court or other authority specified in Article 6;
  - (b) in an arbitration with a sole arbitrator, if the parties are unable to agree on the arbitrator, he shall be appointed, upon request of a party, by the court or other authority specified in Article 6.
- (4) Where, under an appointment procedure agreed upon by the parties,
- (a) a party fails to act as required under such procedure, or
  - (b) the parties, or two arbitrators, are unable to reach an agreement expected of them under such procedure, or
  - (c) a third party, including an institution, fails to perform any function entrusted to it under such procedure,
- any party may request the court or other authority specified in Article 6 to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.
- (5) A decision on a matter entrusted by paragraph (3) or (4) of this Article to the court or other authority specified in Article 6 shall be subject to no appeal. The court or other authority,

in appointing an arbitrator, shall have due regard to any qualifications required of the arbitrator by the agreement of the parties and to such considerations as are likely to secure the appointment of an independent and impartial arbitrator and, in the case of a sole or third arbitrator, shall take into account as well the advisability of appointing an arbitrator of a nationality other than those of the parties.

**ART. 12. *Grounds for challenge***

- (1) When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. An arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall without delay disclose any such circumstances to the parties unless they have already been informed of them by him.
- (2) An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence, or if he does not possess qualifications agreed to by the parties. A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made.

**ART. 13. *Challenge procedure***

- (1) The parties are free to agree on a procedure for challenging an arbitrator, subject to the provisions of paragraph (3) of this Article.

- (2) Failing such agreement, a party who intends to challenge an arbitrator shall, within 15 days after becoming aware of the constitution of the arbitral tribunal or after becoming aware of any circumstance referred to in Article 12(2), send a written statement of the reasons for the challenge to the arbitral tribunal. Unless the challenged arbitrator withdraws from his office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge.
- (3) If a challenge under any procedure agreed upon by the parties or under the procedure of paragraph (2) of this Article is not successful, the challenging party may request, within 30 days after having received notice of the decision rejecting the challenge, the court or other authority specified in Article 6 to decide on the challenge, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal, including the challenged arbitrator, may continue the arbitral proceedings and make an award.

**ART. 14. *Failure or impossibility to act***

- (1) If an arbitrator becomes *de jure* or *de facto* unable to perform his functions or for other reasons fails to act without undue delay, his mandate terminates if he withdraws from his office or if the parties agree on the termination. Otherwise, if a controversy remains concerning any of these grounds, any party may request the court or other authority specified in Article 6 to decide on the termination of the mandate, which decision shall be subject to no appeal.
- (2) If, under this Article or Article 13(2), an arbitrator withdraws from his office or a party agrees to the termination of the mandate of an arbitrator, this does not imply acceptance of

the validity of any ground referred to in this Article or Article 12(2).

**ART. 15. *Appointment of substitute arbitrator***

Where the mandate of an arbitrator terminates under Article 13 or 14 or because of his withdrawal from office for any other reason or because of the revocation of his mandate by agreement of the parties or in any other case of termination of his mandate, a substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced.

**CHAPTER IV  
JURISDICTION OF ARBITRAL TRIBUNAL**

**ARTICLE 16. *Competence of arbitral tribunal to rule on its jurisdiction***

- (1) The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause.
- (2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defense. A party is not precluded from raising such a plea by the fact that he has appointed, or participated in the appointment of, an arbitrator. A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon

as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings. The arbitral tribunal may, in either case, admit a later plea if it considers the delay justified.

- (3) The arbitral tribunal may rule on a plea referred to in paragraph (2) of this Article either as a preliminary question or in an award on the merits. If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within 30 days after having received notice of that ruling, the court specified in Article 6 to decide the matter, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award.

**ART. 17. *Power of arbitral tribunal to order interim measures***

Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order any party to take such interim measure of protection as the arbitral tribunal may consider necessary in respect of the subject matter of the dispute. The arbitral tribunal may require any party to provide appropriate security in connection with such measure.

**CHAPTER V  
CONDUCT OF ARBITRAL PROCEEDINGS**

**ARTICLE 18. *Equal treatment of parties***

The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case.

**ART. 19. *Determination of rules of procedure***

- (1) Subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.
- (2) Failing such agreement, the arbitral tribunal may, subject to the provisions of this Law, conduct the arbitration in such manner as it considers appropriate. The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence.

**ART. 20. *Place of arbitration***

- (1) The parties are free to agree on the place of arbitration. Failing such agreement, the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties.
- (2) Notwithstanding the provisions of paragraph (1) of this Article, the arbitral tribunal may, unless otherwise agreed by the parties, meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for inspection of goods, other property or documents.

**ART. 21. *Commencement of arbitral proceedings***

Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent.

**ART. 22. *Language***

- (1) The parties are free to agree on the language or languages to be used in the arbitral proceedings. Failing such agreement, the arbitral tribunal shall determine the language or languages to be used in the proceedings. This agreement or determination, unless otherwise specified therein, shall apply to any written statement by a party, any hearing and any award, decision or other communication by the arbitral tribunal.
- (2) The arbitral tribunal may order that any documentary evidence shall be accompanied by a translation into the language or languages agreed upon by the parties or determined by the arbitral tribunal.

**ART. 23. *Statements of claim and defense***

- (1) Within the period of time agreed by the parties or determined by the arbitral tribunal, the claimant shall state the facts supporting his claim, the points at issue and the relief or remedy sought, and the respondent shall state his defense in respect of these particulars, unless the parties have otherwise agreed as to the required elements of such statements. The parties may submit with their statements all documents they consider to be relevant or may add a reference to the documents or other evidence they will submit.
- (2) Unless otherwise agreed by the parties, either party may amend or supplement his claim or defense during the course of the arbitral proceedings, unless the arbitral tribunal considers it inappropriate to allow such amendment having regard to the delay in making it.

**ART. 24. *Hearings and written proceedings***

- (1) Subject to any contrary agreement by the parties, the arbitral tribunal shall decide whether to hold oral hearings for the presentation of evidence or for oral argument, or whether the proceedings shall be conducted on the basis of documents and other materials. However, unless the parties have agreed that no hearings shall be held, the arbitral tribunal shall hold such hearings at an appropriate stage of the proceedings, if so requested by a party.
- (2) The parties shall be given sufficient advance notice of any hearing and of any meeting of the arbitral tribunal for the purposes of inspection of goods, other property or documents.
- (3) All statements, documents or other information supplied to the arbitral tribunal by one party shall be communicated to the other party. Also any expert report or evidentiary document on which the arbitral tribunal may rely in making its decision shall be communicated to the parties.

**ART. 25. *Default of a party***

Unless otherwise agreed by the parties, if, without showing sufficient cause,

- (a) the claimant fails to communicate his statement of claim in accordance with Article 23(1), the arbitral tribunal shall terminate the proceedings;
- (b) the respondent fails to communicate his statement of defense in accordance with Article 23(1), the arbitral tribunal shall continue the proceedings without treating such failure in itself as an admission of the claimant's allegations;

- (c) any party fails to appear at a hearing or to produce documentary evidence, the arbitral tribunal may continue the proceedings and make the award on the evidence before it.

**ART. 26. *Expert appointed by arbitral tribunal***

- (1) Unless otherwise agreed by the parties, the arbitral tribunal
  - (a) may appoint one or more experts to report to it on specific issues to be determined by the arbitral tribunal;
  - (b) may require a party to give the expert any relevant information or to produce, or to provide access to, any relevant documents, goods or other property for his inspection.
- (2) Unless otherwise agreed by the parties, if a party so requests or if the arbitral tribunal considers it necessary, the expert shall, after delivery of his written or oral report, participate in a hearing where the parties have the opportunity to put questions to him and to present expert witnesses in order to testify on the points at issue.

**ART. 27. *Court assistance in taking evidence***

The arbitral tribunal or a party with the approval of the arbitral tribunal may request from a competent court of this State assistance in taking evidence. The court may execute the request within its competence and according to its rules on taking evidence.

**CHAPTER VI**  
**MAKING OF AWARD**  
**AND TERMINATION OF PROCEEDINGS**

**ARTICLE 28. *Rules applicable to substance of dispute***

- (1) The arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute. Any designation of the law or legal system of a given State shall be construed, unless otherwise expressed, as directly referring to the substantive law of that State and not to its conflict of laws rules.
- (2) Failing any designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable.
- (3) The arbitral tribunal shall decide *ex aequo et bono* or as *amiable compositeur* only if the parties have expressly authorized it to do so.
- (4) In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction.

**ART. 29. *Decision making by panel of arbitrators***

In arbitral proceedings with more than one arbitrator, any decision of the arbitral tribunal shall be made, unless otherwise agreed by the parties, by a majority of all its members. However, questions of procedure may be decided by a presiding arbitrator, if so authorized by the parties or all members of the arbitral tribunal.

**ART. 30. *Settlement***

- (1) If, during arbitral proceedings, the parties settle the dispute, the arbitral tribunal shall terminate the proceedings and, if requested by the parties and not objected to by the arbitral tribunal, record the settlement in the form of an arbitral award on agreed terms.
- (2) An award on agreed terms shall be made in accordance with the provisions of Article 31 and shall state that it is an award. Such an award has the same status and effect as any other award on the merits of the case.

**ART. 31. *Form and contents of award***

- (1) The award shall be made in writing and shall be signed by the arbitrator or arbitrators. In arbitral proceedings with more than one arbitrator, the signatures of the majority of all members of the arbitral tribunal shall suffice, provided that the reason for any omitted signature is stated.
- (2) The award shall state the reasons upon which it is based, unless the parties have agreed that no reasons are to be given or the award is an award on agreed terms under Article 30.
- (3) The award shall state its date and the place of arbitration as determined in accordance with Article 20(1). The award shall be deemed to have been made at that place.
- (4) After the award is made, a copy signed by the arbitrators in accordance with paragraph (1) of this Article shall be delivered to each party.

**ART. 32. *Termination of proceedings***

- (1) The arbitral proceedings are terminated by the final award or by an order of the arbitral tribunal in accordance with paragraph (2) of this Article.
- (2) The arbitral tribunal shall issue an order for the termination of the arbitral proceedings when:
  - (a) the claimant withdraws his claim, unless the respondent objects thereto and the arbitral tribunal recognizes a legitimate interest on his part in obtaining a final settlement of the dispute;
  - (b) the parties agree on the termination of the proceedings;
  - (c) the arbitral tribunal finds that the continuation of the proceedings has for any other reason become unnecessary or impossible.
- (3) The mandate of the arbitral tribunal terminates with the termination of the arbitral proceedings, subject to the provisions of Articles 33 and 34(4).

**ART. 33. *Correction and interpretation of award; additional award***

- (1) Within 30 days of receipt of the award, unless another period of time has been agreed upon by the parties:
  - (a) a party, with notice to the other party, may request the arbitral tribunal to correct in the award any errors in computation, any clerical or typographical errors or any errors of similar nature;

- (b) if so agreed by the parties, a party, with notice to the other party, may request the arbitral tribunal to give an interpretation of a specific point or part of the award.

If the arbitral tribunal considers the request to be justified, it shall make the correction or give the interpretation within 30 days of receipt of the request. The interpretation shall form part of the award.

- (2) The arbitral tribunal may correct any error of the type referred to in paragraph (1)(a) of this Article on its own initiative within 30 days of the date of the award.
- (3) Unless otherwise agreed by the parties, a party, with notice to the other party, may request, within 30 days of receipt of the award, the arbitral tribunal to make an additional award as to claims presented in the arbitral proceedings but omitted from the award. If the arbitral tribunal considers the request to be justified, it shall make the additional award within 60 days.
- (4) The arbitral tribunal may extend, if necessary, the period of time within which it shall make a correction, interpretation or an additional award under paragraph (1) or (3) of this Article.
- (5) The provisions of Article 31 shall apply to a correction or interpretation of the award or to an additional award.

## CHAPTER VII

### RECOURSE AGAINST AWARD

#### **ARTICLE 34. *Application for setting aside as exclusive recourse against arbitral award***

- (1) Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of this Article.
- (2) An arbitral award may be set aside by the court specified in Article 6 only if:
- (a) the party making the application furnishes proof that:
    - (i) a party to the arbitration agreement referred to in Article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of this State; or
    - (ii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or
    - (iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or

- (iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law; or
- (b) the court finds that:
  - (i) the subject matter of the dispute is not capable of settlement by arbitration under the law of this State; or
  - (ii) the award is in conflict with the public policy of this State.
- (3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the award or, if a request had been made under Article 33, from the date on which that request had been disposed of by the arbitral tribunal.
- (4) The court, when asked to set aside an award, may, where appropriate and so requested by a party, suspend the setting aside proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside.

**CHAPTER VIII**  
**RECOGNITION AND ENFORCEMENT OF AWARDS**

**ARTICLE 35. *Recognition and enforcement***

- (1) An arbitral award, irrespective of the country in which it was made, shall be recognized as binding and, upon application in writing to the competent court, shall be enforced subject to the provisions of this Article and of Article 36.
- (2) The party relying on an award or applying for its enforcement shall supply the duly authenticated original award or a duly certified copy thereof, and the original arbitration agreement referred to in Article 7 or a duly certified copy thereof. If the award or agreement is not made in an official language of this State, the party shall supply a duly certified translation thereof into such language.\*\*\*

**ART. 36. *Grounds for refusing recognition or enforcement***

- (1) Recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused only:
- (a) at the request of the party against whom it is invoked, if that party furnishes to the competent court where recognition or enforcement is sought proof that:
- (i) a party to the arbitration agreement referred to in Article 7 was under some incapacity; or the said agreement is not valid under the law to which the

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\*\*\* The conditions set forth in this paragraph are intended to set maximum standards. It would, thus, not be contrary to the harmonization to be achieved by the Model Law if a State retained even less onerous conditions.

parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

- (ii) the party against whom the award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or
  - (iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or
  - (iv) the composition of the arbitral tribunal 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; or
  - (v) the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made; or
- (b) if the court finds that:
- (i) the subject matter of the dispute is not capable of settlement by arbitration under the law of this State; or

- (ii) the recognition or enforcement of the award would be contrary to the public policy of this State.
- (2) If an application for setting aside or suspension of an award has been made to a court referred to in paragraph (1)(a)(v) of this Article, the court where recognition or enforcement is sought may, if it considers it proper, adjourn its decision and may also, on the application of the party claiming recognition or enforcement of the award, order the other party to provide appropriate security.

# Republic Act No. 876

## AN ACT TO AUTHORIZE THE MAKING OF ARBITRATION AND SUBMISSION AGREEMENTS, TO PROVIDE FOR THE APPOINTMENT OF ARBITRATORS AND THE PROCEDURE FOR ARBITRATION IN CIVIL CONTROVERSIES, AND FOR OTHER PURPOSES

**SECTION 1. *Short Title.*** – This Act shall be known as “*The Arbitration Law.*”

**SEC. 2. *Persons and matters subject to arbitration.*** – Two or more persons or parties may submit to the arbitration of one or more arbitrators any controversy existing between them at the time of the submission and which may be the subject of an action, or the parties to any contract may in such contract agree to settle by arbitration a controversy thereafter arising between them. Such submission or contract shall be valid, enforceable and irrevocable, save upon such grounds as exist at law for the revocation of any contract.

Such submission or contract may include question arising out of valuations, appraisals or other controversies which may be collateral, incidental, precedent or subsequent to any issue between the parties.

A controversy cannot be arbitrated where one of the parties to the controversy is an infant, or a person judicially declared to be incompetent, unless the appropriate court having jurisdiction approve a petition for permission to submit such controversy to

arbitration made by the general guardian or guardian *ad litem* of the infant or of the incompetent.

But where a person capable of entering into a submission or contract has knowingly entered into the same with a person incapable of so doing, the objection on the ground of incapacity can be taken only in behalf of the person so incapacitated.

**SEC. 3. *Controversies or cases not subject to the provisions of this Act.*** – This Act shall not apply to controversies and to cases which are subject to the jurisdiction of the Court of Industrial Relations or which have been submitted to it as provided by Commonwealth Act No. 103, as amended.

**SEC. 4. *Form of arbitration agreement.*** – A contract to arbitrate a controversy thereafter arising between the parties, as well as a submission to arbitrate an existing controversy shall be in writing and subscribed by the party sought to be charged, or by his lawful agent.

The making of a contract or submission for arbitration described in Section 2 hereof, providing for arbitration of any controversy, shall be deemed a consent of the parties to the jurisdiction of the Court of First Instance of the province or city where any of the parties resides, to enforce such contract or submission.

**SEC. 5. *Preliminary procedure.*** – An arbitration shall be instituted by:

- (a) In the case of a contract to arbitrate future controversies by the service by either party upon the other of a demand for arbitration in accordance with the contract. Such

demand shall set forth the nature of the controversy, the amount involved, if any, and the relief sought, together with a true copy of the contract providing for arbitration. The demand shall be served upon any party either in person or by registered mail. In the event that the contract between the parties provides for the appointment of a single arbitrator, the demand shall set forth a specific time within which the parties shall agree upon such arbitrator. If the contract between the parties provides for the appointment of three arbitrators, one to be selected by each party, the demand shall name the arbitrator appointed by the party making the demand; and shall require that the party upon whom the demand is made shall within 15 days after receipt thereof advise in writing the party making such demand of the name of the person appointed by the second party; such notice shall require that the two arbitrators so appointed must agree upon the third arbitrator within 10 days from the date of such notice.

- (b) In the event that one party defaults in answering the demand, the aggrieved party may file with the Clerk of the Court of First Instance having jurisdiction over the parties, a copy of the demand for arbitration under the contract to arbitrate, with a notice that the original demand was sent by registered mail or delivered in person to the party against whom the claim is asserted. Such demand shall set forth the nature of the controversy, the amount involved, if any, and the relief sought, and shall be accompanied by a true copy of the contract providing for arbitration.

- (c) In the case of the submission of an existing controversy by the filing with the Clerk of the Court of First Instance having jurisdiction, of the submission agreement, setting forth the nature of the controversy, and the amount involved, if any. Such submission may be filed by any party and shall be duly executed by both parties.
- (d) In the event that one party neglects, fails or refuses to arbitrate under a submission agreement, the aggrieved party shall follow the procedure prescribed in subparagraphs (a) and (b) of this Section.

**SEC. 6. *Hearing by court.*** – A party aggrieved by the failure, neglect or refusal of another to perform under an agreement in writing providing for arbitration may petition the court for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days notice in writing of the hearing of such application shall be served either personally or by registered mail upon the party in default. The court shall hear the parties, and upon being satisfied that the making of the agreement or such failure to comply therewith is not in issue, shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. If the making of the agreement or default be in issue, the court shall proceed to summarily hear such issue. If the finding be that no agreement in writing providing for arbitration was made, or that there is no default in the proceeding thereunder, the proceeding shall be dismissed. If the finding be that a written provision for arbitration was made and there is a default in proceeding thereunder, an order shall be made summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

The court shall decide all motions, petitions or applications filed under the provisions of this Act, within 10 days after such motions, petitions, or applications have been heard by it.

**SEC. 7. Stay of civil action.** – If any suit or proceeding be brought upon an issue arising out of an agreement providing for the arbitration thereof, the court in which such suit or proceeding is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration, shall stay the action or proceeding until an arbitration has been had in accordance with the terms of the agreement: *Provided*, That the applicant, for the stay is not in default in proceeding with such arbitration.

**SEC. 8. Appointment of arbitrators.** – If, in the contract for arbitration or in the submission described in Section 2, provision is made for a method of naming or appointing an arbitrator or arbitrators, such method shall be followed; but if no method be provided therein, the Court of First Instance shall designate an arbitrator or arbitrators.

The Court of First Instance shall appoint an arbitrator or arbitrators, as the case may be, in the following instances:

- (a) If the parties to the contract or submission are unable to agree upon a single arbitrator; or
- (b) If an arbitrator appointed by the parties is unwilling or unable to serve, and his successor has not been appointed in the manner in which he was appointed; or
- (c) If either party to the contract fails or refuses to name his arbitrator within 15 days after receipt of the demand for arbitration; or

- (d) If the arbitrators appointed by each party to the contract, or appointed by one party to the contract and by the proper court, shall fail to agree upon or to select the third arbitrator.
- (e) The court shall, in its discretion appoint one or three arbitrators, according to the importance of the controversy involved in any of the preceding cases in which the agreement is silent as to the number of arbitrators.
- (f) Arbitrators appointed under this Section shall either accept or decline their appointments within seven days of the receipt of their appointments. In case of declination or the failure of an arbitrator or arbitrators to duly accept their appointments, the parties or the court, as the case may be, shall proceed to appoint a substitute or substitutes for the arbitrator or arbitrators who decline or failed to accept his or their appointments.

**SEC. 9. *Appointment of additional arbitrators.*** – Where a submission or contract provides that two or more arbitrators therein designated or to be thereafter appointed by the parties, may select or appoint a person as an additional arbitrator, the selection or appointment must be in writing. Such additional arbitrator must sit with the original arbitrators upon the hearing.

**SEC. 10. *Qualifications of arbitrators.*** – Any person appointed to serve as an arbitrator must be of legal age, in full-enjoyment of his civil rights and knows how to read and write. No person appointed to serve as an arbitrator shall be related by blood or marriage within the sixth degree to either party to the controversy. No person shall serve as an arbitrator in any

proceeding if he has or has had financial, fiduciary or other interest in the controversy or cause to be decided or in the result of the proceeding, or has any personal bias, which might prejudice the right of any party to a fair and impartial award.

No party shall select as an arbitrator any person to act as his champion or to advocate his cause.

If, after appointment but before or during hearing, a person appointed to serve as an arbitrator shall discover any circumstances likely to create a presumption of bias, or which he believes might disqualify him as an impartial arbitrator, the arbitrator shall immediately disclose such information to the parties. Thereafter the parties may agree in writing:

- (a) to waive the presumptive disqualifying circumstances; or
- (b) to declare the office of such arbitrator vacant. Any such vacancy shall be filled in the same manner as the original appointment was made.

**SEC. II. *Challenge of arbitrators.*** – The arbitrators may be challenged only for the reasons mentioned in the preceding Section which may have arisen after the arbitration agreement or were unknown at the time of arbitration.

The challenge shall be made before them.

If they do not yield to the challenge, the challenging party may renew the challenge before the Court of First Instance of the province or city in which the challenged arbitrator, or, any of them, if there be more than one, resides. While the challenging incident is discussed before the court, the hearing or arbitration shall be suspended, and it shall be continued immediately after the court has delivered an order on the challenging incident.

**SEC. 12. Procedure by arbitrators.** — Subject to the terms of the submission or contract, if any are specified therein, the arbitrators selected as prescribed herein must, within five days after appointment if the parties to the controversy reside within the same city or province, or within 15 days after appointment if the parties reside in different provinces, set a time and place for the hearing of the matters submitted to them, and must cause notice thereof to be given to each of the parties. The hearing can be postponed or adjourned by the arbitrators only by agreement of the parties; otherwise, adjournment may be ordered by the arbitrators upon their own motion only at the hearing and for good and sufficient cause. No adjournment shall extend the hearing beyond the day fixed in the submission or contract for rendering the award, unless the time so fixed is extended by the written agreement of the parties to the submission or contract or their attorneys, or unless the parties have continued with the arbitration without objection to such adjournment.

The hearing may proceed in the absence of any party who, after due notice, fails to be present at such hearing or fails to obtain an adjournment thereof. An award shall not be made solely on the default of a party. The arbitrators shall require the other party to submit such evidence as they may require for making an award.

No one other than a party to said arbitration, or a person in the regular employ of such party duly authorized in writing by said party, or a practicing attorney-at-law, shall be permitted by the arbitrators to represent before him or them any party to the arbitration. Any party desiring to be represented by counsel shall notify the other party or parties of such intention at least five days prior to the hearing.

The arbitrators shall arrange for the taking of a stenographic record of the testimony when such a record is requested by one or more parties, and when payment of the cost thereof is assumed by such party or parties.

Persons having a direct interest in the controversy which is the subject of arbitration shall have the right to attend any hearing; but the attendance of any other person shall be at the discretion of the arbitrators.

**SEC. 13. *Oath of arbitrators.*** – Before hearing any testimony, arbitrators must be sworn, by any officer authorized by law to administer an oath, faithfully and fairly to hear and examine the matters in controversy and to make a just award according to the best of their ability and understanding. Arbitrators shall have the power to administer the oaths to all witnesses requiring them to tell the whole truth and nothing but the truth in any testimony which they may give in any arbitration hearing. This oath shall be required of every witness before any of his testimony is heard.

**SEC. 14. *Subpoena and subpoena duces tecum.*** – Arbitrators shall have the power to require any person to attend a hearing as a witness. They shall have the power to *subpoena* witnesses and documents when the relevancy of the testimony and the materiality thereof has been demonstrated to the arbitrators. Arbitrators may also require the retirement of any witness during the testimony of any other witness. All of the arbitrators appointed in any controversy must attend all the hearings in that matter and hear all the allegations and proofs of the parties; but an award by the majority of them is valid unless the concurrence of all of them is expressly required in the submission or contract to arbitrate. The arbitrator or arbitrators

shall have the power at any time, before rendering the award, without prejudice to the rights of any party to petition the court to take measures to safeguard and/or conserve any matter which is the subject of the dispute in arbitration.

**SEC. 15. *Hearing by arbitrators.*** – Arbitrators may, at the commencement of the hearing, ask both parties for brief statements of the issues in controversy and/or an agreed statement of facts. Thereafter, the parties may offer such evidence as they desire, and shall produce such additional evidence as the arbitrators shall require or deem necessary to an understanding and determination of the dispute. The arbitrators shall be the sole judge of the relevancy and materiality of the evidence offered or produced, and shall not be bound to conform to the Rules of Court pertaining to evidence. Arbitrators shall receive as exhibits in evidence any document which the parties may wish to submit and the exhibits shall be properly identified at the time of submission. All exhibits shall remain in the custody of the Clerk of Court during the course of the arbitration and shall be returned to the parties at the time the award is made. The arbitrators may make an ocular inspection of any matter or premises which are in dispute, but such inspection shall be made only in the presence of all parties to the arbitration, unless any party who shall have received notice thereof fails to appear, in which event such inspection shall be made in the absence of such party.

**SEC. 16. *Briefs.*** – At the close of the hearings, the arbitrators shall specifically inquire of all parties whether they have any further proof or witnesses to present; upon the receipt of a negative reply from all parties, the arbitrators shall declare the hearing closed unless the parties have signified an intention to file briefs. Then

the hearing shall be closed by the arbitrators after the receipt of briefs and/or reply briefs. Definite time limit for the filing of such briefs must be fixed by the arbitrators at the close of the hearing. Briefs may be filed by the parties within 15 days after the close of the oral hearings; the reply briefs, if any, shall be filed within five days following such 15-day period.

**SEC. 17. *Reopening of hearing.*** – The hearing may be reopened by the arbitrators on their own motion or upon the request of any party, upon good cause, shown at any time before the award is rendered. When hearings are thus reopened the effective date for the closing of the hearings shall be the date of the closing of the reopened hearing.

**SEC. 18. *Proceeding in lieu of hearing.*** – The parties to a submission or contract to arbitrate may, by written agreement, submit their dispute to arbitration by other than oral hearing. The parties may submit an agreed statement of facts. They may also submit their respective contentions to the duly appointed arbitrators in writing; this shall include a statement of facts, together with all documentary proof. Parties may also submit a written argument. Each party shall provide all other parties to the dispute with a copy of all statements and documents submitted to the arbitrators. Each party shall have an opportunity to reply in writing to any other party's statements and proofs; but if such party fails to do so within seven days after receipt of such statements and proofs, he shall be deemed to have waived his right to reply. Upon the delivery to the arbitrators of all statements and documents, together with any reply statements, the arbitrators shall declare the proceedings in lieu of hearing closed.

**SEC. 19. *Time for rendering award.*** – Unless the parties shall have stipulated by written agreement the time within which the arbitrators must render their award, the written award of the arbitrators shall be rendered within 30 days after the closing of the hearings or if the oral hearings shall have been waived, within 30 days after the arbitrators shall have declared such proceedings in lieu of hearing closed. This period may be extended by mutual consent of the parties.

**SEC. 20. *Form and contents of award.*** – The award must be made in writing and signed and acknowledged by a majority of the arbitrators, if more than one; and by the sole arbitrator, if there is only one. Each party shall be furnished with a copy of the award. The arbitrators in their award may grant any remedy or relief which they deem just and equitable and within the scope of the agreement of the parties, which shall include, but not be limited to, the specific performance of a contract.

In the event that the parties to an arbitration have, during the course of such arbitration, settled their dispute, they may request of the arbitrators that such settlement be embodied in an award which shall be signed by the arbitrators. No arbitrator shall act as a mediator in any proceeding in which he is acting as arbitrator; and all negotiations towards settlement of the dispute must take place without the presence of the arbitrators.

The arbitrators shall have the power to decide only those matters which have been submitted to them. The terms of the award shall be confined to such disputes.

The arbitrators shall have the power to assess in their award the expenses of any party against another party, when such assessment shall be deemed necessary.

**SEC. 21. Fees of arbitration.** – The fees of the arbitrators shall be Fifty Pesos (P50) per day unless the parties agree otherwise in writing prior to the arbitration.

**SEC. 22. Arbitration deemed a special proceeding.** – Arbitration under a contract or submission shall be deemed a special proceeding, of which the court specified in the contract or submission, or if none be specified, the Court of First Instance for the province or city in which one of the parties resides or is doing business, or in which the arbitration was held, shall have jurisdiction. Any application to the court, or a judge thereof, hereunder shall be made in manner provided for the making and hearing of motions, except as otherwise herein expressly provided.

**SEC. 23. Confirmation of award.** – At any time within one month after the award is made, any party to the controversy which was arbitrated may apply to the court having jurisdiction, as provided in Section 28, for an order confirming the award; and thereupon the court must grant such order unless the award is vacated, modified or corrected, as prescribed herein. Notice of such motion must be served upon the adverse party or his attorney as prescribed by law for the service of such notice upon an attorney in action in the same court.

**SEC. 24. Grounds for vacating award.** – In any one of the following cases, the court must make an order vacating the award upon the petition of any party to the controversy when such party proves affirmatively that in the arbitration proceedings:

- (a) The award was procured by corruption, fraud, or other undue means; or

- (b) That there was evident partiality or corruption in the arbitrators or any of them; or
- (c) That the arbitrators were guilty of misconduct in refusing to postpone the hearing upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; that one or more of the arbitrators was disqualified to act as such under Section 9 hereof, and willfully refrained from disclosing such disqualifications or of any other misbehavior by which the rights of any party have been materially prejudiced; or
- (d) That the arbitrators exceeded their powers, or so imperfectly executed them, that a mutual, final and definite award upon the subject matter submitted to them was not made.

Where an award is vacated, the court, in its discretion, may direct a new hearing either before the same arbitrators or before a new arbitrator or arbitrators to be chosen in the manner provided in the submission or contract for the selection of the original arbitrator or arbitrators, and any provision limiting the time in which the arbitrators may make a decision shall be deemed applicable to the new arbitration and to commence from the date of the court's order.

Where the court vacates an award, costs, not exceeding Fifty Pesos (P50) and disbursements may be awarded to the prevailing party and the payment thereof may be enforced in like manner as the payment of costs upon the motion in an action.

**SEC. 25. *Grounds for modifying or correcting award.*** – In any one of the following cases, the court must make an order

modifying or correcting the award, upon the application of any party to the controversy which was arbitrated:

- (a) Where there was an evident miscalculation of figures, or an evident mistake in the description of any person, thing or property referred to in the award; or
- (b) Where the arbitrators have awarded upon a matter not submitted to them, not affecting the merits of the decision upon the matter submitted; or
- (c) Where the award is imperfect in a matter of form not affecting the merits of the controversy, and if it had been a commissioner's report, the defect could have been amended or disregarded by the court.

The order may modify and correct the award so as to effect the intent thereof and promote justice between the parties.

**SEC. 26. *Motion to vacate, modify or correct award: when made.*** – Notice of a motion to vacate, modify or correct the award must be served upon the adverse party or his counsel within 30 days after award is filed or delivered, as prescribed by law for the service upon an attorney in an action.

**SEC. 27. *Judgment.*** – Upon the granting of an order confirming, modifying or correcting an award, judgment may be entered in conformity therewith in the court wherein said application was filed. Costs of the application and the proceedings subsequent thereto may be awarded by the court in its discretion. If awarded, the amount thereof must be included in the judgment.

**SEC. 28. *Papers to accompany motion to confirm, modify, correct, or vacate award.*** – The party moving for an order confirming, modifying, correcting, or vacating an award, shall at the time that such motion is filed with the court for the entry of judgment thereon also file the following papers with the Clerk of Court;

- (a) The submission, or contract to arbitrate; the appointment of the arbitrator or arbitrators; and each written extension of the time, if any, within which to make the award;
- (b) A verified copy of the award;
- (c) Each notice, affidavit, or other paper used upon the application to confirm, modify, correct or vacate such award, and a copy of each order of the court upon such application.

The judgment shall be docketed as if it were rendered in an action.

The judgment so entered shall have the same force and effect in all respects, as, and be subject to all the provisions relating to, a judgment in an action; and it may be enforced as if it had been rendered in the court in which it is entered.

**SEC. 29. *Appeals.*** – An appeal may be taken from an order made in a proceeding under this Act, or from a judgment entered upon an award through *certiorari* proceedings, but such appeals shall be limited to questions of law. The proceedings upon such an appeal, including the judgment thereon shall be governed by the Rules of Court in so far as they are applicable.

**SEC. 30. *Death of party.*** – Where a party dies after making a submission or a contract to arbitrate as prescribed in this Act, the

proceedings may be begun or continued upon the application of, or notice to, his executor or administrator, or temporary administrator of his estate. In any such case, the court may issue an order extending the time within which notice of a motion to confirm, vacate, modify or correct an award must be served. Upon confirming an award, where a party has died since it was filed or delivered, the court must enter judgment in the name of the original party; and the proceedings thereupon are the same as where a party dies after a verdict.

**SEC. 31. *Repealing clause.*** – The provisions of Chapters I and II, Title XIV, of the Civil Code shall remain in force. All other laws and parts of laws inconsistent with this Act are hereby repealed. If any provision of this Act shall be held invalid, the remainder shall not be affected thereby.

**SEC. 32. *Effectivity.*** – This Act shall take effect six months after its approval.

Approved: June 19, 1953

# Republic Act No. 9285

## 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

### CHAPTER I GENERAL PROVISIONS

**SECTION 1. *Title.*** – This act shall be known as the “*Alternative Dispute Resolution Act of 2004.*”

**SEC. 2. *Declaration of Policy.*** – It is hereby declared the policy of the State to actively promote party autonomy in the resolution of disputes or the freedom of the party to make their own arrangements to resolve their disputes. Towards this end, the State shall encourage and actively promote the use of Alternative Dispute Resolution (ADR) as an important means to achieve speedy and impartial justice and declog court dockets. As such, the State shall provide means for the use of ADR as an efficient tool and an alternative procedure for the resolution of appropriate cases. Likewise, the State shall enlist active private sector participation in the settlement of disputes through ADR. This Act shall be without prejudice to the adoption by the Supreme Court of any ADR system, such as mediation, conciliation, arbitration, or any combination thereof as a means of achieving speedy and efficient means of resolving cases pending before all courts in the Philippines which shall be governed by such rules as the Supreme Court may approve from time to time.

**SEC. 3. *Definition of Terms.*** – For purposes of this Act, the term:

- (a) *Alternative Dispute Resolution System* means any process or procedure used to resolve a dispute or controversy, other than by adjudication of a presiding judge of a court or an officer of a government agency, as defined in this Act, in which a neutral third party participates to assist in the resolution of issues, which includes arbitration, mediation, conciliation, early neutral evaluation, mini-trial, or any combination thereof;
- (b) *ADR Provider* means institutions or persons accredited as mediator, conciliator, arbitrator, neutral evaluator, or any person exercising similar functions in any Alternative Dispute Resolution system. This is without prejudice to the rights of the parties to choose non-accredited individuals to act as mediator, conciliator, arbitrator, or neutral evaluator of their dispute.

Whenever referred to in this Act, the term “ADR practitioners” shall refer to individuals acting as mediator, conciliator, arbitrator or neutral evaluator;
- (c) *Authenticate* means to sign, execute or adopt a symbol, or encrypt a record in whole or in part, intended to identify the authenticating party and to adopt, accept or establish the authenticity of a record or term;
- (d) *Arbitration* means a voluntary dispute resolution process in which one or more arbitrators, appointed in accordance with the agreement of the parties, or rules promulgated pursuant to this Act, resolve a dispute by rendering an award;

- (e) *Arbitrator* means the person appointed to render an award, alone or with others, in a dispute that is the subject of an arbitration agreement;
- (f) *Award* means any partial or final decision by an arbitrator in resolving the issue in a controversy;
- (g) *Commercial Arbitration* – An arbitration is “commercial” if it covers matter arising from all relationships of a commercial nature, whether contractual or not;
- (h) *Confidential information* means any information, relative to the subject of mediation or arbitration, expressly intended by the source not to be disclosed, or obtained under circumstances that would create a reasonable expectation on behalf of the source that the information shall not be disclosed. It shall include (1) communication, oral or written, made in a dispute resolution proceedings, including any memoranda, notes or work product of the neutral party or non-party participant, as defined in this Act; (2) an oral or written statement made or which occurs during mediation or for purposes of considering, conducting, participating, initiating, continuing of reconvening mediation or retaining a mediator; and (3) pleadings, motions manifestations, witness statements, reports filed or submitted in an arbitration or for expert evaluation;
- (i) *Convention Award* means a foreign arbitral award made in a Convention State;
- (j) *Convention State* means a State that is a member of the New York Convention;

- (k) *Court* as referred to in Article 6 of the Model Law shall mean a Regional Trial Court;
- (l) *Court-Annexed Mediation* means any mediation process conducted under the auspices of the court, after such court has acquired jurisdiction of the dispute;
- (m) *Court-Referred Mediation* means mediation ordered by a court to be conducted in accordance with the Agreement of the Parties when an action is prematurely commenced in violation of such agreement;
- (n) *Early Neutral Evaluation* means an ADR process wherein parties and their lawyers are brought together early in a pre-trial phase to present summaries of their cases and receive a non-binding assessment by an experienced, neutral person, with expertise in the subject in the substance of the dispute;
- (o) *Government Agency* means any government entity, office or officer, other than a court, that is vested by law with quasi-judicial power to resolve or adjudicate dispute involving the government, its agencies and instrumentalities, or private persons;
- (p) *International Party* shall mean an entity whose place of business is outside the Philippines. It shall not include a domestic subsidiary of such international party or a co-venturer in a joint venture with a party which has its place of business in the Philippines. The term *foreigner arbitrator* shall mean a person who is not a national of the Philippines.
- (q) *Mediation* means a voluntary process in which a mediator, selected by the disputing parties, facilitates communication

and negotiation, and assists the parties in reaching a voluntary agreement regarding a dispute.

- (r) *Mediator* means a person who conducts mediation;
- (s) *Mediation Party* means a person who participates in a mediation and whose consent is necessary to resolve the dispute;
- (t) *Mediation-Arbitration* or Med-Arb is a two-step dispute resolution process involving both mediation and arbitration;
- (u) *Mini-Trial* means a structured dispute resolution method in which the merits of a case are argued before a panel comprising senior decision makers with or without the presence of a neutral third person after which the parties seek a negotiated settlement;
- (v) *Model Law* means the Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law on June 21, 1985;
- (w) *New York Convention* means the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards approved in 1958 and ratified by the Philippine Senate under Senate Resolution No. 71;
- (x) *Non-Convention Award* means a foreign arbitral award made in a State which is not a Convention State;
- (y) *Non-Convention State* means a State that is not a member of the New York Convention.

- (z) *Non-Party Participant* means a person, other than a party or mediator, who participates in a mediation proceeding as a witness, resource person or expert;
- (aa) *Proceeding* means a judicial, administrative, or other adjudicative process, including related pre-hearing motions, conferences and discovery;
- (bb) *Record* means an information written on a tangible medium or stored in an electronic or other similar medium, retrievable form; and
- (cc) *Roster* means a list of persons qualified to provide ADR services as neutrals or to serve as arbitrators.

**SEC. 4. *Electronic Signatures in Global and E-Commerce Act.*** – The provisions of the Electronic Signatures in Global and E-Commerce Act, and its Implementing Rules and Regulations shall apply to proceedings contemplated in this Act.

**SEC. 5. *Liability of ADR Providers/Practitioners.*** – The ADR providers and practitioners shall have the same civil liability for the acts done in the performance of their duties as that of public officers as provided in Section 38 (I), Chapter 9, *Book of the Administrative Code of 1987*.

**SEC. 6. *Exception to the Application of this Act.*** – The provisions of this Act shall not apply to resolution or settlement of the following:

- (a) labor disputes covered by Presidential Decree No. 442, otherwise known as the Labor Code of the Philippines, as amended, and its Implementing Rules and Regulations;

- (b) the civil status of persons;
- (c) the validity of a marriage;
- (d) any ground for legal separation;
- (e) the jurisdiction of courts;
- (f) future legitime;
- (g) criminal liability; and
- (h) those which by law cannot be compromised.

## CHAPTER 2 MEDIATION

**SECTION 7. *Scope.*** — The provisions of this Chapter shall cover voluntary mediation, whether *ad hoc* or institutional, other than court-annexed. The term “mediation” shall include conciliation.

**SEC. 8. *Application and Interpretation.*** — In applying and construing the provisions of this Chapter, consideration must be given to the need to promote candor of parties and mediators through confidentiality of the mediation process, the policy of fostering prompt, economical, and amicable resolution of disputes in accordance with the principles of integrity of determination by the parties, and the policy that the decision-making authority in the mediation process rests with the parties.

**SEC. 9. *Confidentiality of Information.*** — Information obtained through mediation proceedings shall be subject to the following principles and guidelines:

- (a) Information obtained through mediation shall be privileged and confidential.
- (b) A party, a mediator, or a nonparty participant may refuse to disclose and may prevent any other person from disclosing a mediation communication.
- (c) Confidential information shall not be subject to discovery and shall be inadmissible in any adversarial proceeding, whether judicial or quasi-judicial, However, evidence or information that is otherwise admissible or subject to discovery does not become inadmissible or protected from discovery solely by reason of its use in a mediation.
- (d) In such an adversarial proceeding, the following persons involved or previously involved in a mediation may not be compelled to disclose confidential information obtained during mediation:
  - (1) the parties to the dispute;
  - (2) the mediator or mediators;
  - (3) the counsel for the parties;
  - (4) the nonparty participants;
  - (5) any persons hired or engaged in connection with the mediation as secretary, stenographer, clerk or assistant; and
  - (6) any other person who obtains or possesses confidential information by reason of his/her profession.
- (e) The protections of this Act shall continue to apply even if a mediator is found to have failed to act impartially.

- (f) A mediator may not be called to testify to provide information gathered in mediation. A mediator who is wrongfully *subpoenaed* shall be reimbursed the full cost of his attorney's fees and related expenses.

**SEC. 10. *Waiver of Confidentiality.*** – A privilege arising from the confidentiality of information may be waived in a record, or orally during a proceeding by the mediator and the mediation parties.

A privilege arising from the confidentiality of information may likewise be waived by a nonparty participant if the information is provided by such nonparty participant.

A person who discloses confidential information shall be precluded from asserting the privilege under Section 9 of this Chapter to bar disclosure of the rest of the information necessary to a complete understanding of the previously disclosed information. If a person suffers loss or damage as a result of the disclosure of the confidential information, he shall be entitled to damages in a judicial proceeding against the person who made the disclosure.

A person who discloses or makes a representation about a mediation is precluded from asserting the privilege under Section 9, to the extent that the communication prejudices another person in the proceeding and it is necessary for the person prejudiced to respond to the representation of disclosure.

**SEC. 11. *Exceptions to Privilege.***

- (a) There is no privilege against disclosure under Section 9 if mediation communication is:

- (1) in an agreement evidenced by a record authenticated by all parties to the agreement;
  - (2) available to the public or that is made during a session of a mediation which is open, or is required by law to be open, to the public;
  - (3) a threat or statement of a plan to inflict bodily injury or commit a crime of violence;
  - (4) intentionally used to plan a crime, attempt to commit, or commit a crime, or conceal an ongoing crime or criminal activity;
  - (5) sought or offered to prove or disprove abuse, neglect, abandonment, or exploitation in a proceeding in which a public agency is protecting the interest of an individual protected by law; but this exception does not apply where a child protection matter is referred to mediation by a court or a public agency participates in the child protection mediation;
  - (6) sought or offered to prove or disprove a claim or complaint of professional misconduct or malpractice filed against mediator in a proceeding; or
  - (7) sought or offered to prove or disprove a claim or complaint of professional misconduct or malpractice filed against a party, nonparty participant, or representative of a party based on conduct occurring during a mediation.
- (b) There is no privilege under Section 9 if a court or administrative agency, finds, after a hearing in camera, that the party seeking discovery of the proponent of the

evidence has shown that the evidence is not otherwise available, that there is a need for the evidence that substantially outweighs the interest in protecting confidentiality, and the mediation communication is sought or offered in:

- (1) a court proceeding involving a crime or felony; or
  - (2) a proceeding to prove a claim or defense that under the law is sufficient to reform or avoid a liability on a contract arising out of the mediation.
- (c) A mediator may not be compelled to provide evidence of a mediation communication or testify in such proceeding.
- (d) If a mediation communication is not privileged under an exception in subsection (a) or (b), only the portion of the communication necessary for the application of the exception for nondisclosure may be admitted. The admission of particular evidence for the limited purpose of an exception does not render that evidence, or any other mediation communication, admissible for any other purpose.

**SEC. 12. *Prohibited Mediator Reports.*** – A mediator may not make a report, assessment, evaluation, recommendation, finding, or other communication regarding a mediation to a court or agency or other authority that make a ruling on a dispute that is the subject of a mediation, except:

- (a) Where the mediation occurred or has terminated, or where a settlement was reached.

- (b) As permitted to be disclosed under Section 13 of this Chapter.

**SEC. 13. *Mediator's Disclosure and Conflict of Interest.***

– The mediation shall be guided by the following operative principles:

- (a) Before accepting a mediation, an individual who is requested to serve as a mediator shall:
  - (1) make an inquiry that is reasonable under the circumstances to determine whether there are any known facts that a reasonable individual would consider likely to affect the impartiality of the mediator, including a financial or personal interest in the outcome of the mediation and any existing or past relationship with a party or foreseeable participant in the mediation; and
  - (2) disclose to the mediation parties any such fact known or learned as soon as is practical before accepting a mediation.
- (b) If a mediator learns any fact described in paragraph (a) (1) of this Section after accepting a mediation, the mediator shall disclose it as soon as practicable.

At the request of a mediation party, an individual who is requested to serve as mediator shall disclose his/her qualifications to mediate a dispute.

This Act does not require that a mediator shall have special qualifications by background or profession unless the special qualifications of a mediator are required in the mediation agreement or by the mediation parties.

**SEC. 14. *Participation in Mediation.*** – Except as otherwise provided in this Act, a party may designate a lawyer or any other person to provide assistance in the mediation. A waiver of this right shall be made in writing by the party waiving it. A waiver of participation or legal representation may be rescinded at any time.

**SEC. 15. *Place of Mediation.*** – The parties are free to agree on the place of mediation. Failing such agreement, the place of mediation shall be any place convenient and appropriate to all parties.

**SEC. 16. *Effect of Agreement to Submit Dispute to Mediation Under Institutional Rules.*** – An agreement to submit a dispute to mediation by any institution shall include an agreement to be bound by the internal mediation and administrative policies of such institution. Further, an agreement to submit a dispute to mediation under international mediation rules shall be deemed to include an agreement to have such rules govern the mediation of the dispute and for the mediator, the parties, their respective counsel, and nonparty participants to abide by such rules.

In case of conflict between the institutional mediation rules and the provisions of this Act, the latter shall prevail.

**SEC. 17. *Enforcement of Mediated Settlement Agreements.*** – The mediation shall be guided by the following operative principles:

- (a) A settlement agreement following successful mediation shall be prepared by the parties with the assistance of their respective counsel if any, and by the mediator.

The parties and their respective counsel shall endeavor to make the terms and condition thereof complete and make adequate provisions for the contingency of breach to avoid conflicting interpretations of the agreement.

- (b) The parties and their respective counsels if any, shall sign the settlement agreement. The mediator shall certify that he/she explained the contents of the settlement agreement to the parties in a language known to them.
- (c) If the parties so desire, they may deposit such settlement agreement with the appropriate Clerk of a Regional Trial Court of the place where one of the parties resides. Where there is a need to enforce the settlement agreement, a petition may be filed by any of the parties with the same court, in which case, the court shall proceed summarily to hear the petition, in accordance with such rules of procedure as may be promulgated by the Supreme Court.
- (d) The parties may agree in the settlement agreement that the mediator shall become a sole arbitrator for the dispute and shall treat the settlement agreement as an arbitral award which shall be subject to enforcement under Republic Act No. 876, otherwise known as the Arbitration Law, notwithstanding the provisions of Executive Order No. 1008 for mediated dispute outside of the Construction Industry Arbitration Commission (CIAC).

### CHAPTER 3 OTHER ADR FORMS

#### **SECTION 18. *Referral of Dispute to other ADR Forms.* –**

The parties may agree to refer one or more or all issues arising in a dispute or during its pendency to other forms of ADR such as but

not limited to (a) the evaluation of a third person or (b) a mini-trial, (c) mediation-arbitration, or a combination thereof.

For purposes of this Act, the use of other ADR forms shall be governed by Chapter 2 of this Act except where it is combined with arbitration in which case it shall likewise be governed by Chapter 5 of this Act.

#### CHAPTER 4 INTERNATIONAL COMMERCIAL ARBITRATION

**SECTION 19. *Adoption of the Model Law on International Commercial Arbitration.*** – International commercial arbitration shall be governed by the Model Law on International Commercial Arbitration (the “Model Law”) adopted by the United Nations Commission on International Trade Law on June 21, 1985 (United Nations Document A/40/17) and recommended approved on December 11, 1985, copy of which is hereto attached as Appendix “A.”

**SEC. 20. *Interpretation of Model Law.*** – In interpreting the Model Law, regard shall be had to its international origin and to the need for uniformity in its interpretation and resort may be made to the *travaux preparatoires* and the report of the Secretary General of the United Nations Commission on International Trade Law dated March 25, 1985 entitled, “International Commercial Arbitration: Analytical Commentary on Draft Trade identified by reference number A/CN.9/264.”

**SEC. 21. *Commercial Arbitration.*** – An arbitration is “commercial” if it covers matters arising from all relationships of

a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to, the following transactions; any trade transaction for the supply or exchange of goods or services; distribution agreements; construction of works; commercial representation or agency; factoring; leasing, consulting; engineering; licensing; investment; financing; banking; insurance; joint venture and other forms of industrial or business cooperation; carriage of goods or passengers by air, sea, rail or road.

**SEC. 22. *Legal Representation in International Arbitration.*** – In international arbitration conducted in the Philippines, a party may be presented by any person of his choice. *Provided*, that such representative, unless admitted to the practice of law in the Philippines, shall not be authorized to appear as counsel in any Philippine court, or any other quasi-judicial body whether or not such appearance is in relation to the arbitration in which he appears.

**SEC. 23. *Confidentiality of Arbitration Proceedings.*** – The arbitration proceedings, including the records, evidence and the arbitral award, shall be considered confidential and shall not be published except:

- (1) with the consent of the parties, or
- (2) for the limited purpose of disclosing to the court of relevant documents in cases where resort to the court is allowed herein. *Provided, however*, that the court in which the action or the appeal is pending may issue a protective order to prevent or prohibit disclosure of documents or information containing secret processes, developments, research and other information where it is shown that the

applicant shall be materially prejudiced by an authorized disclosure thereof.

**SEC. 24. Referral to Arbitration.** – A court before which an action is brought in a matter which is the subject matter of an arbitration agreement shall, if at least one party so requests not later than the pre-trial conference, or upon the request of both parties thereafter, refer the parties to arbitration unless it finds that the arbitration agreement is null and void, inoperative or incapable of being performed.

**SEC. 25. Interpretation of the Act.** – In interpreting the Act, the court shall have due regard to the policy of the law in favor of arbitration. Where action is commenced by or against multiple parties, one or more of whom are parties to an arbitration agreement, the court shall refer to arbitration those parties who are bound by the arbitration agreement although the civil action may continue as to those who are not bound by such arbitration agreement.

**SEC. 26. Meaning of “Appointing Authority.”** – “Appointing Authority” as used in the Model Law shall mean the person or institution named in the arbitration agreement as the appointing authority; or the regular arbitration institution under whose rules the arbitration is agreed to be conducted. Where the parties have agreed to submit their dispute to institutional arbitration rules, and unless they have agreed to a different procedure, they shall be deemed to have agreed to procedure under such arbitration rules for the selection and appointment of arbitrators. In *ad hoc* arbitration, the default appointment of an arbitrator shall be made by the National President of the Integrated Bar of the Philippines (IBP) or his duly authorized representative.

**SEC. 27. *What Functions may be Performed by Appointing Authority.***—The functions referred to in Articles I I(3), I I(4), I3(3) and I4(1) of the Model Law shall be performed by the Appointing Authority, unless the latter shall fail or refuse to act within 30 days from receipt of the request in which case the applicant may renew the application with the Court.

**SEC. 28. *Grant of Interim Measure of Protection.***

- (a) It is not incompatible with an arbitration agreement for a party to request, before constitution of the tribunal, from a Court an interim measure of protection and for the Court to grant such measure. After constitution of the arbitral tribunal and during arbitral proceedings, a request for an interim measure of protection or modification thereof, may be made with the arbitral tribunal or to the extent that the arbitral tribunal has no power to act or is unable to act effectively, the request may be made with the Court. The arbitral tribunal is deemed constituted when the sole arbitrator or the third arbitrator who has been nominated, has accepted the nomination and written communication of said nomination and acceptance has been received by the party making request.
- (b) The following rules on interim or provisional relief shall be observed:
  - (1) Any party may request that provisional relief be granted against the adverse party:
  - (2) Such relief may be granted:
    - (i) to prevent irreparable loss or injury:

- (ii) to provide security for the performance of any obligation;
  - (iii) to produce or preserve any evidence; or
  - (iv) to compel any other appropriate act or omission.
- (3) The order granting provisional relief may be conditioned upon the provision of security or any act or omission specified in the order.
- (4) Interim or provisional relief is requested by written application transmitted by reasonable means to the Court or arbitral tribunal as the case may be and the party against whom the relief is sought, describing in appropriate detail the precise relief, the party against whom the relief is requested, the grounds for the relief, and evidence supporting the request.
- (5) The order shall be binding upon the parties.
- (6) Either party may apply with the Court for assistance in implementing or enforcing an interim measure ordered by an arbitral tribunal.
- (7) A party who does not comply with the order shall be liable for all damages resulting from noncompliance, including all expenses, and reasonable attorney's fees, paid in obtaining the order's judicial enforcement.

**SEC. 29. Further Authority for Arbitrator to Grant Interim Measure of Protection.**— Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order any party to take such interim measures of protection as the arbitral tribunal may consider necessary in respect of the subject matter of the dispute following the rules in Section 28, paragraph 2. Such

interim measures may include but shall not be limited to preliminary injunction directed against a party, appointment of receivers or detention, preservation, inspection of property that is the subject of the dispute in arbitration. Either party may apply with the Court for assistance in implementing or enforcing an interim measure ordered by an arbitral tribunal.

**SEC. 30. *Place of Arbitration.*** – The parties are free to agree on the place of arbitration. Failing such agreement, the place of arbitration shall be in Metro Manila, unless the arbitral tribunal, having regard to the circumstances of the case, including the convenience of the parties shall decide on a different place of arbitration.

The arbitral tribunal may, unless otherwise agreed by the parties, meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts, or the parties, or for inspection of goods, other property or documents.

**SEC. 31. *Language of the Arbitration.*** – The parties are free to agree on the language or languages to be used in the arbitral proceedings. Failing such agreement, the language to be used shall be English in international arbitration, and English or Filipino for domestic arbitration, unless the arbitral tribunal shall determine a different or another language or languages to be used in the proceedings. This agreement or determination, unless otherwise specified therein, shall apply to any written statement by a party, any hearing and any award, decision or other communication by the arbitral tribunal.

The arbitral tribunal may order that any documentary evidence shall be accompanied by a translation into the language or languages agreed upon by the parties or determined in accordance with paragraph I of this Section.

## CHAPTER 5 DOMESTIC ARBITRATION

**SECTION 32. *Law Governing Domestic Arbitration.*** – Domestic arbitration shall continue to be governed by Republic Act No. 876, otherwise known as “The Arbitration Law,” as amended by this Chapter. The term “domestic arbitration” as used herein shall mean an arbitration that is not international as defined in Article I (3) of the Model Law.

**SEC. 33. *Applicability to Domestic Arbitration.*** – Articles 8, 10, 11, 12, 13, 14, 18 and 19 and 29 to 32 of the Model Law and Sections 22 to 31 of the preceding Chapter 4 shall apply to domestic arbitration.

## CHAPTER 6 ARBITRATION OF CONSTRUCTION DISPUTES

**SECTION 34. *Arbitration of Construction Disputes: Governing Law.*** – The arbitration of construction disputes shall be governed by Executive Order No. 1008, otherwise known as the Construction Industry Arbitration Law.

**SEC. 35. *Coverage of the Law.*** – Construction disputes which fall within the original and exclusive jurisdiction of the Construction Industry Arbitration Commission (the “Commission”) shall include those between or among parties to, or who are otherwise bound by, an arbitration agreement, directly or by reference whether such parties are project owner, contractor, subcontractor, quantity surveyor, bondsman or issuer of an insurance policy in a construction project.

The Commission shall continue to exercise original and exclusive jurisdiction over construction disputes although the arbitration is “commercial” pursuant to Section 2I of this Act.

**SEC. 36. *Authority to Act as Mediator or Arbitrator.*** –

By written agreement of the parties to a dispute, an arbitrator may act as mediator and a mediator may act as arbitrator. The parties may also agree in writing that, following a successful mediation, the mediator shall issue the settlement agreement in the form of an arbitral award.

**SEC. 37. *Appointment of Foreign Arbitrator.*** –

The Construction Industry Arbitration Commission (CIAC) shall promulgate rules to allow for the appointment of a foreign arbitrator or co-arbitrator or chair of a tribunal a person who has not been previously accredited by CIAC: *Provided, That:*

- (a) the dispute is a construction dispute in which one party is an international party;
- (b) the person to be appointed agreed to abide by the arbitration rules and policies of CIAC;
- (c) he/she is either co-arbitrator upon the nomination of the international party; or he/she is the common choice of the two CIAC-accredited arbitrators first appointed, one of whom was nominated by the international party; and
- (d) the foreign arbitrator shall be of different nationality from the international party.

**SEC. 38. *Applicability to Construction Arbitration.* –**

The provisions of Section 17 (d) of Chapter 2, and Sections 28 and 29 of this Act shall apply to arbitration of construction disputes covered by this Chapter.

**SEC. 39. *Court to Dismiss Case Involving a Construction Dispute.* –**

A Regional Trial Court before which a construction dispute is filed shall, upon becoming aware, not later than the pretrial conference, that the parties had entered into an arbitration agreement, dismiss the case and refer the parties to arbitration to be conducted by the CIAC, unless both parties, assisted by their respective counsel, shall submit to the Regional Trial Court a written agreement exclusive for the Court, rather than the CIAC, to resolve the dispute.

## CHAPTER 7

### JUDICIAL REVIEW OF ARBITRAL AWARDS

#### **A. *Domestic Awards***

**SECTION 40. *Confirmation of Award.* –** The confirmation of a domestic arbitral award shall be governed by Section 23 of RANo. 876.

A domestic arbitral award when confirmed shall be enforced in the same manner as final and executory decisions of the Regional Trial Court.

The recognition and enforcement of an award in an international commercial arbitration shall be governed by Article 35 of the Model Law.

The confirmation of a domestic award shall be made by the Regional Trial Court in accordance with the rules of procedure to be promulgated by the Supreme Court.

A CIAC arbitral award need not be confirmed by the Regional Trial Court to be executory as provided under EO No. 1008.

**SEC. 41. *Vacation Award.*** – A party to a domestic arbitration may question the arbitral award with the appropriate Regional Trial Court in accordance with the rules of procedure to be promulgated by the Supreme Court only on those grounds enumerated in Section 25 of Republic Act No. 876. Any other ground raised against a domestic arbitral award shall be disregarded by the Regional Trial Court.

#### ***B. Foreign Arbitral Awards***

**SECTION 42. *Application of the New York Convention.*** – The New York Convention shall govern the recognition and enforcement of arbitral awards covered by the said Convention.

The recognition and enforcement of such arbitral awards shall be filed with Regional Trial Court in accordance with the rules of procedure to be promulgated by the Supreme Court. Said procedural rules shall provide that the party relying on the award or applying for its enforcement shall file with the court the original or authenticated copy of the award and the arbitration agreement. If the award or agreement is not made in any of the official languages, the party shall supply a duly certified translation thereof into any of such languages.

The applicant shall establish that the country in which foreign arbitration award was made is a party to the New York Convention.

If the application for rejection or suspension of enforcement of an award has been made, the Regional Trial Court may, if it considers it proper, vacate its decision and may also, on the application of the party claiming recognition or enforcement of the award, order the party to provide appropriate security.

**SEC. 43. *Recognition and Enforcement of Foreign Arbitral Awards Not Covered by the New York Convention.*** – The recognition and enforcement of foreign arbitral awards not covered by the New York Convention shall be done in accordance with procedural rules to be promulgated by the Supreme Court. The Court may, on grounds of comity and reciprocity, recognize and enforce a non-convention award as a convention award.

**SEC. 44. *Foreign Arbitral Award Not Foreign Judgment.*** – A foreign arbitral award when confirmed by a court of a foreign country, shall be recognized and enforced as a foreign arbitral award and not a judgment of a foreign court.

A foreign arbitral award, when confirmed by the Regional Trial Court, shall be enforced as a foreign arbitral award and not as a judgment of a foreign court.

A foreign arbitral award, when confirmed by the Regional Trial Court, shall be enforced in the same manner as final and executory decisions of courts of law of the Philippines.

**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 Regional Trial Court.

**SEC. 46. *Appeal from Court Decisions on Arbitral Awards.*** – A decision of the Regional Trial Court confirming, vacating, setting aside, modifying or correcting an arbitral award may be appealed to the Court of Appeals in accordance with the rules of procedure to be promulgated by the Supreme Court.

The losing party who appeals from the judgment of the court confirming an arbitral award shall be required by the appellate court to post a counterbond executed in favor of the prevailing party equal to the amount of the award in accordance with the rules to be promulgated by the Supreme Court.

**SEC. 47. *Venue and Jurisdiction.*** – Proceedings for recognition and enforcement of an arbitration agreement or for vacation, setting aside, correction or modification of an arbitral award, and any application with a court for arbitration assistance and supervision shall be deemed as special proceedings and shall be filed with the Regional Trial Court (i) where arbitration proceedings are conducted; (ii) where the asset to be attached or levied upon, or the act to be enjoined is located; (iii) where any of the parties to the dispute resides or has his place of business; or (iv) in the National Judicial Capital Region, at the option of the applicant.

**SEC. 48. *Notice of Proceeding to Parties.*** – In a special proceeding for recognition and enforcement of an arbitral award, the Court shall send notice to the parties at their address of record in the arbitration, or if any party cannot be served notice at such

address, at such party's last known address. The notice shall be sent at least 15 days before the date set for the initial hearing of the application.

## CHAPTER 8 MISCELLANEOUS PROVISIONS

### **SECTION 49. *Office for Alternative Dispute Resolution.***

– There is hereby established the Office for Alternative Dispute Resolution as an attached agency to the Department of Justice (DOJ) which shall have a Secretariat to be headed by an Executive Director. The Executive Director shall be appointed by the President of the Philippines.

The objectives of the Office are:

- (a) to promote, develop and expand the use of ADR in the private and public sectors; and
- (b) to assist the government to monitor, study and evaluate the use by the public and the private sector of ADR, and recommend to Congress needful statutory changes to develop, strengthen and improve ADR practices in accordance with world standards.

**SEC. 50. *Powers and Functions of the Office for Alternative Dispute Resolution.*** – The Office for Alternative Dispute Resolution shall have the following powers and functions:

- (a) To formulate standards for the training of the ADR practitioners and service providers;

- (b) To certify that such ADR practitioners and ADR service providers have undergone the professional training provided by the Office;
- (c) To coordinate the development, implementation, monitoring, and evaluation of government ADR programs;
- (d) To charge fees for their services; and
- (e) To perform such acts as may be necessary to carry into effect the provisions of this Act.

**SEC. 51. Appropriations.** – The amount necessary to carry out the provisions of this Act shall be included in the General Appropriations Act of the year following its enactment into law and thereafter.

**SEC. 52. Implementing Rules and Regulations (IRR).** – Within one month after the approval of this Act, the Secretary of Justice shall convene a Committee that shall formulate the appropriate rules and regulations necessary for the implementation of this Act. The Committee, composed of representatives from:

- (a) the Department of Justice;
- (b) the Department of Trade and Industry;
- (c) the Department of the Interior and Local Government;
- (d) the President of the Integrated Bar of the Philippines;
- (e) A representative from the arbitration profession; and
- (f) A representative from the mediation profession; and
- (g) A representative from the ADR organizations,

shall within three months after convening, submit the IRR to the Joint Congressional Oversight Committee for review and approval. The Oversight Committee shall be composed of the Chair of the Senate Committee on Justice and Human Rights, Chair of the House Committee on Justice, and one member each from the majority and minority of both Houses.

The Joint Oversight Committee shall become *functus officio* upon approval of the IRR.

**SEC. 53. *Applicability of the Katarungan Pambarangay.***

– This Act shall not be interpreted to repeal, amend or modify the jurisdiction of the *Katarungang Pambarangay* under Republic Act No. 7160, otherwise known as the Local Government Code of 1991.

**SEC. 54. *Repealing Clause.*** – All laws, decrees, executive orders, rules and regulations which are inconsistent with the provisions of this Act are hereby repealed, amended or modified accordingly.

**SEC. 55. *Separability Clause.*** – If for any reason or reasons, any portion or provision of this Act shall be held unconstitutional or invalid, all other parts or provisions not affected shall thereby continue to remain in full force and effect.

**SEC. 56. *Effectivity.*** – This Act shall take effect 15 days after its publication in at least two national newspapers of general circulation.

Approved: April 2, 2004