INTERNATIONAL COMMERCIAL ARBITRATION: THE PHILIPPINE EXPERIENCE*

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I. ARBITRATION IN GENERAL

Philippine law recognizes the validity, enforceability and irrevocability of arbitration agreements. This is found in section 2 of Republic Act No. 876, otherwise known as the Arbitration Law:

> SECTION 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.

Philippine law also allows the parties to an arbitration agreement to stipulate that the arbitral award shall be final.

Article 2044 of the Civil Code provides that "(a)ny stipulation that the arbitrators' award or decision shall be final, is valid, without prejudice to articles 2038, 2039, and 2040."

The Philippines is a signatory to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards,[1] otherwise known as the *New York Convention*. As such, the Philippines is bound to recognize arbitration agreements and to enforce arbitral awards made in any Contracting State:

> *Article II*
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> 1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any

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[1] New York, 10 June 1958

> differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.
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> *Article III*
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> Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon .... There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.

In *National Union Fire Insurance Company of Pittsburg v. Stolt-Nielsen Philippines, Inc.*,[2] the Supreme Court reiterates the commitment of the Philippines to observe the *New York Convention*:

> Arbitration, as an alternative mode of settling disputes, has long been recognized and accepted in our jurisdiction (Chapter 2, Title XIV, Book IV, Civil Code). Republic Act No. 876 (The Arbitration Law) also expressly authorizes arbitration of domestic disputes. Foreign arbitration as a system of settling commercial disputes of an international character was likewise recognized when the Philippines adhered to the United Nations "Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958," under the 10 May 1965 Resolution No. 71 of the Philippine Senate, giving reciprocal recognition and allowing enforcement of international agreements between parties of different nationalities within a contracting state....[3]

The Philippines being a signatory to the New York Convention, the same has the force and effect of law.[4]

II. PROBLEM AREAS IN THE PHILIPPINES IN THE PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION

While delay in the hearing and resolution of cases is the most common complaint in traditional litigation, delay in the execution of judgment is the most frustrating. After the parties have managed to bear years of litigation in court, failure to execute the judgment or delay in the execution is the most frustrating part. The same holds true in international commercial arbitration.

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[2] G.R. No. 87958, 184 SCRA 682 (1990).

[3] *Id.*, at 688-689.

[4] Santos v. Northwest Orient Airlines, G.R. No. 101538, 210 SCRA 256, 261 [1992].

A. PRIOR AGREEMENT ON THE FINALITY OF ARBITRAL AWARDS

In all international commercial arbitration cases where the author acted as counsel for one of the parties, it is his consistent observation that parties always agree, either in their arbitration agreements or in their agreed arbitration rules, that the award to be rendered by the arbitrator shall be final and binding. Article 32(2) of the UNCITRAL Arbitration Rules is a typical provision:

> 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 delay.

This kind of provision carries with it a waiver of the right to appeal from an arbitral award. In most cases, the parties expressly agree that they waive their right to any form of appeal from the arbitral award where such waiver may be validly made. At the risk of sounding repetitious, article 2044 of the Civil Code recognizes the validity of any stipulation that the arbitrators' award or decision shall be final.

However, in the author's experience, the losing parties in international commercial arbitration almost always appeal from the arbitral awards even if there is a prior agreement that the award shall be final. Not only do the losing parties appeal, but also in their appeal they also assail the factual findings and the appreciation of the evidence by the arbitrator in the hope of re-litigating anew what the arbitrator had already settled. This kind of strategy does not speak well of the appellant or the appellant's counsel. An honest-to-goodness examination of the available grounds for vacating an arbitral award under section 24 of the Arbitration Law does not allow questions of fact:

> SECTION 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:
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> (a) The award was procured by corruption, fraud, or other undue means; or
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> (b) That there was evident partiality or corruption in the arbitrators or any of them; or
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> (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 nine 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
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> (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.

The Supreme Court lays down a stricter standard in passing upon appeals from arbitral awards. Both questions of fact and questions of law are barred. According to the case of *Asset Privatization Trust v. Court of Appeals*:[5]

> As a rule, the award of an arbitrator cannot be set aside for mere errors of judgment either as to the law or as to the facts. Courts are without power to amend or overrule merely because of disagreement with matters of law or facts determined by the arbitrators. They will not review the findings of law and fact contained in an award, and will not undertake to substitute their judgment for that of the arbitrators, since any other rule would make an award the commencement, not the end, of litigation. Errors of law and fact, or an erroneous decision of matters submitted to the judgment of the arbitrators, are insufficient to invalidate an award fairly and honestly made. Judicial review of an arbitration is, thus, more limited than judicial review of a trial.
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> Nonetheless, the arbitrators' award is not absolute and without exceptions. The arbitrators cannot resolve issues beyond the scope of the submission agreement. The parties to such an agreement are bound by the arbitrators' award only to the extent and in the manner prescribed by the contract and only if the award is rendered in conformity thereto....[6]

Unfortunately, despite the limited appeal from an arbitral award allowed by Philippine law and the unequivocal prohibition on raising factual questions on appeal from an arbitral award, experience shows that many practitioners are either unaware of this or conveniently choose to be unaware in pursuing their appeals as they try to squeeze factual questions into the appeal. The courts have to be strict in enforcing the rule, otherwise, as stated in the *Asset Privatization Trust* case, "any other rule would make an [arbitral] award the commencement, not the end, of litigation."

B. THE ISSUE OF FILING FEE

In the Philippines, the case of *Sun Insurance Office, Ltd. (SIOL) v. Asuncion*[7] teaches the rule that "(i)t is not simply the filing of the complaint or appropriate

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[5] G.R. No. 121171, 300 SCRA 579 (1998).
[6] *Id.*, at 601-602
[7] G.R. Nos. 79937-38, 170 SCRA 274 (1989).

initiatory pleading, but the payment of the prescribed docket fee, that vests a trial court with jurisdiction over the subject matter or nature of the action."[8]

Losing parties in international commercial arbitration raise an issue about filing fee when the winning parties try to obtain judicial confirmation of arbitral awards under section 23 of the Arbitration Law.

> SECTION 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 ... for an order confirming the award ....

Judicial confirmation of the arbitral award is important because it is the winning party's vehicle to obtain compulsory orders from the court, like a writ of execution, to enforce the award and realize his claims.

The problem arises when the losing party insists that the winning party must pay a filing fee based on the amount adjudicated in the arbitral award. This position loses sight of the fact that parties to an international commercial arbitration pay administrative charges to the institution that administers the arbitration such as the International Court of Arbitration of the International Chamber of Commerce, the American Arbitration Association, the Hong Kong International Arbitration Centre, among a few examples. Administrative charges paid to arbitration centers for administering the arbitration partake of the nature of filing fees. They are not loose change. In many cases, they are expensive.

That being the case, the losing party would demand of the Philippine court confirming an international commercial arbitration award that the winning party should pay a filing fee based on the amount of the award. On closer analysis, payment of filing fee based on the arbitral award constitutes a double burden or double vexation. The author disagrees with this position and believes that the real cause of action is "confirmation of arbitral award" which is incapable of pecuniary estimation. The cause of action is not collection of a sum of money where the filing fee may be based on every peso that is sought to be collected.

A contrary view would result in a violation of the *New York Convention* which provides that "there shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards." If a domestic arbitration case were instituted under the Arbitration Law, the filing fee is assessed before the arbitration commences. After

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[8] *Id.*, at 285.

proceedings are held and the arbitrator renders an award, the award may be enforced without having to pay another round of filing fee.

In contrast, if an international commercial arbitration case is held outside the Philippines, the parties pay administrative charges to the arbitration center, and it has been expressed earlier that these administrative charges partake of the nature of filing fees. After proceedings are held and the arbitrator renders an award to be enforced in the Philippines, it would be onerous to assess filing fee based on the amount of the award because it would be similar to a second round of administrative charges, therefore, more onerous – and proscribed under the *New York Convention.*

Nevertheless, since a certain filing fee has to be paid to vest jurisdiction in the Philippine court pursuant to the *Sun Insurance Office, Ltd.* case, the author submits that this local requirement must be reconciled with the treaty obligation of the Philippines under the *New York Convention*, and this can be achieved by considering the case for confirmation of foreign arbitral award under section 23 of the Arbitration Law as constituting a cause of action that is incapable of pecuniary estimation. In such a case, the filing fee will be paid, the Philippine court will acquire jurisdiction, but the filing fee does not have to be based on the amount of the arbitral award sought to be enforced, and therefore, it complies with the provision in the *New York Convention* that "there shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards."

C. BREACH OF THE TEN-DAY LIMIT UNDER THE ARBITRATION LAW

Whether it is the final character of the arbitral award that is raised by the losing party before a Philippine court, or the proper amount of the filing fee to be paid by the winning party seeking confirmation of the arbitral award, or any other issue to frustrate the enforcement of the arbitral award, the ultimate result is delay in execution. Worse, the delay is oftentimes used by the losing party to hide the assets upon which the arbitral award may be enforced. By the time that the dilatory issue has been resolved by the Philippine court, the assets of the losing party can no longer be located.

This can be avoided or, at the very least, the effects mitigated. Under section 6 of the Arbitration Law, it is provided that the court shall decide all motions, petitions or applications within ten (10) days after hearing:

> SECTION 6. *Hearing by court.* – xxx The court shall decide all motions, petitions, or applications filed under the provisions of this Act, within ten days after such motions, petitions, or applications have been heard by it.

While some Philippine courts are able to see through the dilatory tactics of the losing party, and eventually uphold the enforcement of the foreign arbitral award, the sad part is that they are unable to resolve the dilatory issues within the ten-day period under section 6 of the Arbitration Law. Section 6 is honored more in the breach than in the observance. It is probably not an exaggeration to state that it is hardly observed at all.

But if section 6 were to be consciously observed by Philippine courts, the delay that losing parties may interpose will be short-lived and will not succeed in frustrating the enforcement of foreign arbitral awards.

D. IMPLEADING THIRD PARTIES TO AVOID ARBITRATION: THE *DEL MONTE* CASE

The recent case of *Del Monte Corporation-USA v. Court of Appeals* [9] gave rise to a new problem in international commercial arbitration – the inclusion of third parties as additional parties to defeat an arbitration clause.

The facts of that case are as follows. In a distributorship agreement, Del Monte Corporation-USA (hereinafter ferred to as "Del Monte") appointed Montebueno Marketing, Inc. (hereinafter referred to as "Montebueno") as the sole and exclusive distributor of Del Monte products in the Philippines. The agreement provided for the following arbitration clause:

> *Governing Law and Arbitration*
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> This Agreement shall be governed by the laws of the State of California and/or, if applicable, the United States of America. *All disputes arising out of or relating to this Agreement or the parties' relationship, including the termination thereof, shall be resolved by arbitration in the City of San Francisco, State of California, under the Rules of the American Arbitration Association.* The arbitration panel shall consist of three members, one of whom shall be selected by [Del Monte Corporation-USA], one of whom shall be selected by [Montebueno Marketing, Inc.], and third of whom shall be selected by the other two members and shall have relevant experience in the industry. The parties further agree that neither shall commence any litigation against the other arising out of this Agreement or the termination thereof as to any matter not subject to arbitration or with respect to any arbitration proceeding or award,

[9] G.R. No. 136154, 351 SCRA 373 (2001).

> except in a court located in the State of California. Each party consents to jurisdiction over it by and exclusive venue in such a court.[10] (Emphasis supplied)

Montebueno Marketing, Sabrosa Foods, Inc. (the marketing arm of Montebueno), and Liong Liong Sy (the managing director of Montebueno) filed a complaint against Del Monte, Paul E. Derby (as managing director of Del Monte's Export Sales Department and in his personal capacity), Daniel Collins (as regional manager of Del Monte's Export Sales Department and in his personal capacity), Luis Hidalgo (head of Credit Services Department of Del Monte and in his personal capacity), and Dewey Ltd. (owner by assignment of Del Monte's tradarks in the Philippines), for violation of articles 20, 21 and 23 of the Civil Code. According to Montebueno *et al.*, Del Monte products continued to be brought into the country by parallel importers despite the appointment of Montebueno as the sole and exclusive distributor of Del Monte products thereby causing them great embarrassment and substantial damage.

Del Monte *et al.* filed a Motion to Suspend Proceedings invoking the arbitration clause in the distributorship agreement and section 7 of the Arbitration Law (Republic Act No. 876):

> SECTION 7. *Stay of civil action.* – If any suit or proceeding be brought upon an issue arising out of an agreement providing for 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.

The trial court deferred consideration of the Motion to Suspend Proceedings as follows:

> [T]he grounds alleged therein do not constitute [grounds for] the suspension of the proceedings as this action is for damages with prayer for the issuance of Writ of Preliminary Attachment and not on the distributorship agreement.[11]

Subsequently, the trial court issued an order denying the Motion to Suspend Proceedings on the ground that it "will not serve the ends of justice and to allow said suspension will only delay the determination of the issues, frustrate the quest of the parties for a judicious determination of their respective claims, and/or deprive and delay their rights to seek redress."[12]

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[10] *Id.* at 375-376.
[11] *Id.* at 378.
[12] *Id.*

In so disposing, the trial court contravened the doctrine in the case of *Puromines, Inc. v. Court of Appeals*,[13] in which it was held:

> Since there obtains ... a written provision for arbitration as well as failure on respondent's part to comply therewith, the court ... rightly ordered the parties to proceed to their arbitration in accordance with the terms of their agreement. (Sec. 6, Republic Act 876). Respondent's arguments touching upon the merits of the dispute are improperly raised ... They should be addressed to the arbitrators.... The duty of the court in this case is not to resolve the merits of the parties' claims but only to determine if they should proceed to arbitration or not....[14]

On appeal, the Court of Appeals affirmed the decision of the trial court on the ground that "the alleged damaging acts ... required the interpretation of Art. 21 of the Civil Code and that in determining whether [Del Monte, *et al.*] had violated it 'would require a full blown trial.' Arbitration is, therefore, 'out of the question.'"[15]

The Court of Appeals perceived that article 21 of the Civil Code is the applicable provision to determine if either party committed any abuse of right. Be that as it may, the applicability of article 21 by itself does not necessarily mean that arbitration is out of the question. The proper course of action is to let the parties' rights and causes of action be determined according to article 21 but the arbitrator(s) chosen by the parties should be the one to make that determination pursuant to their arbitration clause.

Del Monte filed a Motion for Reconsideration but the motion was denied.

In so disposing, both the Court of Appeals and the trial court contravened the doctrine in the case of *Puromines* to the effect that the duty of a court in a situation where there is an arbitration agreement "is not to resolve the merits of the parties' claims but only to determine if they should proceed to arbitration or not."[16]

Del Monte filed a petition for certiorari with the Supreme Court. On 7 February 2001 the Supreme Court denied the petition, affirmed the decision of the Court of Appeals and directed the trial court to proceed with the hearing of the case. The Supreme Court ruled that the arbitration clause in the distributorship agreement only applied to the parties thereto, explaining as follows:

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[13] G.R. No. 91228, 220 SCRA 281 (1993).

[14] *Id.*, at 290, citing Mindanao Portland Cement Corp. v. McDonough Construction Company of Florida, G.R. No. L-23390, 19 SCRA 808 (1967)

[15] Del Monte Corp.-U.S.A. v. Court of Appeals, G.R. No. 136154, 351 SCRA 373, 378-379 (2001).

[16] Puromines, Inc. v. Court of Appeals, G.R. No. 91228, 220 SCRA 281, 290 (1993).

> [O]nly parties to the Agreement, *i.e.*, petitioners [Del Monte Corporation-USA] and its Managing Director for Export Sales Paul E. Derby, Jr., and private respondents [Montebueno Marketing, Inc.] and its Managing Director Lily Sy are bound by the Agreement and its arbitration clause as they are the only signatories thereto. Petitioners Daniel Collins and Luis Hidalgo, and private respondent [Sabrosa Foods, Inc.], not parties to the Agreement cannot even be considered assigns or heirs of the parties, are not bound by the Agreement and the arbitration clause therein. Consequently, referral to arbitration in the State of California pursuant to the arbitration clause and the suspension of the proceedings in Civil Case No. 2637-MN pending the return of the arbitral award could be called for but only as to petitioners DMC-USA and Paul E. Derby, Jr., and private respondents MMI and Lily Sy, and not as to the other parties in this case. This is consistent with the recent case of *Heirs of Augusto L. Salas, Jr. v. Laperal Realty Corporation* [320 SCRA 610 (1999)], which superseded that of *Toyota Motor Philippines Corp. v. Court of Appeals* [216 SCRA 236 (1992)].
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> In *Toyota*, the Court ruled that 'the contention that the arbitration clause has become dysfunctional because of the presence of third parties is untenable' ratiocinating that 'contracts are respected as the law between the contracting parties' and that 'as such, the parties are thereby expected to abide with good faith in their contractual commitments.' However, in *Salas, Jr.*, only parties to the Agreement, their assigns or heirs have the right to arbitrate or could be compelled to arbitrate. The Court went further by declaring that in recognizing the right of the contracting parties to arbitrate or to compel arbitration, the splitting of the proceedings to arbitration as to some of the parties on one hand and trial for the others on the other hand, or the suspension of trial pending arbitration between some of the parties, should not be allowed as it would, in effect, result in multiplicity of suits, duplicitous procedure and unnecessary delay.
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> The object of arbitration is to allow the expeditious determination of a dispute. Clearly, the issue before us could be speedily and efficiently resolved in its entirety if we allow simultaneous arbitration proceedings and trial, or suspension of trial pending arbitration. Accordingly, the interest of justice would only be served if the trial court hears and adjudicates the case in a single complete proceedings.[17]

The decision of the Supreme Court undermines the policy behind previous pronouncements in a number of cases of encouraging arbitration as an alternative method of dispute resolution. If not reconsidered, a clever party can rely on the *Del Monte* decision in order to defeat an arbitration clause, to which it has previously agreed, by commencing court proceedings and including third parties as additional parties to the case and thereby disregard the arbitration clause.

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[17] Del Monte Corp.-U.S.A. v. Court of Appeals, G.R. No. 136154, 351 SCRA 373, 381-382 (2001).

It is helpful to remember that when parties sign an agreement that contains an arbitration clause, the parties are not yet in dispute; otherwise, they would not sign the agreement in the first place. The parties to the agreement are both optimistic that the subject matter of their commercial contract will succeed. They are both hoping that their joint commercial endeavor will be mutually beneficial, and in most cases, the measure of mutual benefits is expressed in profits. Therefore, at the time that the parties to a commercial contract sign their agreement, they are both hoping that their joint commercial endeavor will be mutually profitable and beneficial. It is not difficult to discern that they have come to the conclusion that they can hope that the end-result will be profitable and beneficial. Under that kind of atmosphere, the parties sign the agreement with clarity of mind.

However, when the dispute arises from the agreement, the atmosphere turns around. The optimism disappears. A sense of distrust starts to affect the parties.

It was with clarity of mind and circumspect thinking that the parties agreed to settle their dispute by arbitration, not by court litigation. Now that the dispute had actually arisen, neither of the parties to the arbitration clause should be allowed to circumvent its provision by the simple expedient of impleading third parties as additional parties to the case.

Del Monte *et al.* filed a Motion for Reconsideration primarily alleging that if the decision was not reconsidered, it would set a dangerous precedent where a party to an arbitration clause can effectively defeat the arbitration clause by the simple expedient of commencing court proceedings with the inclusion of third parties as additional parties to the case.

In a resolution dated 18 July 2001 the Supreme Court denied the Motion for Reconsideration. According to the Supreme Court:

> The inclusion of third parties to defeat the arbitration clause presupposes bad faith; and bad faith is never presumed. In the instant case, it is not alleged nor even hinted at that the inclusion of third parties was specifically and intentionally done to negate the effect of the arbitration clause. Consequently, the pronouncement of the Court in the *Salas* case that only parties to the agreement, their assigns or heirs have the right to arbitrate, or could be compelled to arbitrate, must be adopted....

The author submits that it is irrelevant whether or not there is bad faith in impleading non-parties to the arbitration clause as defendants in court so as to try to justify litigation of the dispute before the court and not through arbitration. The

danger that should be avoided is the unjustified convenience of impleading third parties as defendants that will lead to or have the effect of avoiding arbitration, regardless of whether the act of so impleading was done in good faith or bad faith.

Indeed it may happen that good faith may have attended the act of impleading non-parties to the arbitration agreement as defendants in a court litigation, which then leads to defeating the arbitration clause because of the presence of third parties in the dispute. By way of illustration, a plaintiff and a defendant who are parties to an arbitration agreement may be in dispute. In a black-and-white case, they ought to settle their dispute by arbitration. However, it may happen that the plaintiff is not certain if he can obtain complete relief from that particular defendant alone or if that particular defendant is solvent. Thus, it is not unlikely for that plaintiff to name additional defendants (who are not parties to the arbitration agreement) in the vagueee hope o obtaining complete relief. In this scenario, the plaintiff may not have been motivated by bad faith in naming several defendants. But is this a sufficient justification to order all of them – both the parties and the non-parties to the arbitration agreement – to resolve the dispute by litigation in a single court proceeding in complete disregard of the valid and enforceable arbitration clause between the parties to the arbitration agreement? This is the dangerous doctrine that is taking root in the *Del Monte* decision – as long as the dispute may be shown to involve a non-party to the arbitration agreement, all the disputants may be directed to go to a single court proceeding and forego the arbitration process.

With the *Del Monte* decision, the following pronouncement in *Home Bankers Savings and Trust Company v. Court of Appeals*,[18] inevitably fades into history:

> [A]rbitration, as an alternative method of dispute resolution, is encouraged.... Aside from unclogging judicial dockets, it also hastens solutions especially of commercial disputes. The Court looks with favor upon such amicable arrangement and will only interfere with great reluctance to anticipate or nullify the action of the arbitrator.[19]

This is so because in any arbitration agreement, where one of the parties to the arbitration agreement (i.e., the potential claimant in an arbitration proceeding) wants to collect on an obligation but is apprehensive that the other party to the arbitration agreement (i.e., the potential respondent in an arbitration proceeding) may not be solvent to pay the obligation, then that party who wants to collect (the potential claimant), in order to be able to collect, will certainly be tempted to drag third parties who are not parties to the arbitration, into a court litigation as co-defendants with the other party to the arbitration agreement (the potential

[18] G.R. No. 115412, 318 SCRA 558 (1999).
[19] *Id.*, at 568.

respondent). Such third parties can be any Tom, Dick and Harry who may be directly or indirectly connected to the transaction such as a guarantor, a surety, an alter ego corporation, a parent corporation of a subsidiary, a joint venture partner, a director or officer of a corporation, and the list of possible third parties can go on infinitely. In this situation, all that the plaintiff in the court litigation (i.e., the potential claimant in an arbitration proceeding) has to invoke is the *Del Monte* decision.

Of course, we can expect the other party in the arbitration agreement (i.e., the potential respondent in an arbitration proceeding) to question the commencement of court proceedings in which it is made the co-defendant (together with the other third parties) because of the existence of an arbitration agreement. The challenge to the court proceedings can be done through a motion to dismiss (for failure to comply with a condition precedent, under section 1[j] of Rule 16 of the Rules of Court) or through a motion to suspend proceedings (under section 7, Arbitration Law, Republic Act No. 876). This motion is the root of further appellate proceedings in the future before the Court of Appeals and the Supreme Court. Thus, because the plaintiff's filing of a court case relying on the *Del Monte* decision, the seed of delay is automatically sowed in the court proceeding. This is why the *Del Monte* decision defeats the object of arbitration to allow the expeditious determination of a dispute and it frustrates the arbitration process.

The author submits that the decision of the Supreme Court in the *Del Monte* case threatens to radically depart from established jurisprudence in the subject of arbitration consistently observed by the precedent cases of *Associated Bank v. Court of Appeals*,[20] *Allied Banking Corporation v. Court of Appeals*,[21] *Home Bankers Savings and Trust Company v. Court of Appeals*,[22] and they all spring from the landmark case of *Toyota Motor Philippines Corporation v. Court of Appeals*,[23] which is the authority for the pronouncement that "the contention that the arbitration clause has become dysfunctional because of the presence of third parties is untenable."

In the cases of *Associated Bank* and *Allied Banking Corporation*, the Supreme Court dismissed a third party complaint and directed the parties therein to arbitrate, regardless of the related principal action that was then pending in court.

The disposition of the Supreme Court in the *Del Monte* case that "the interest of justice would only be served if the trial court hears and adjudicates the case in a single and complete proceeding," is contrary to another recent case decided

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[20] G.R. No. 107918, 233 SCRA 137 (1994).
[21] G.R. No. 123871, 294 SCRA 803 (1998).
[22] G.R. No. 115412, 318 SCRA 558 (1999).
[23] G.R. No. 102881, 216 SCRA 236 (1992).

by the Court. In *Home Bankers Savings and Trust Company v. Court of Appeals*,[24] where a dispute gave rise to both (1) an arbitration proceeding between the parties to an arbitration agreement and (2) a court proceeding between the parties to an arbitration agreement and non-parties to the arbitration agreement, the Supreme Court did not direct all of them to just settle everything in the court proceeding. Instead, the Court respected the arbitration agreement and maintained the validity of the arbitration proceeding between the parties to the arbitration agreement; at the same time, the Court maintained the validity of the court proceeding involving the parties and the non-parties to the arbitration agreement. Such disposition maintains genuine fealty to the judicial policy to encourage arbitration. It was in this *Home Bankers* case that the Supreme Court held that:

> [A]rbitration, as an alternative method of dispute resolution, is encouraged by this Court. Aside from unclogging judicial dockets, it also hastens solutions especially of commercial disputes. The Court looks with favor upon such amicable arrangement and will only interfere with great reluctance to anticipate or nullify the action of the arbitrator.[25]

With the declaration of the Supreme Court in the *Del Monte* case that "the recent case of *Heirs of Augusto L. Salas, Jr. v. Laperal Realty Corporation* . . . superseded that of *Toyota Motor Philippines Corp. v. Court of Appeals*", it is the author's position that the *Del Monte* case needs to be revisited. The *Salas* case, which was rendered by a division, cannot overturn the doctrine laid down in *Toyota*, which was rendered by another division, without running afoul with the mandatory provision under article VIII, section 4(3) of the 1987 Constitution, which reads:

> (3) Cases or matters heard by a division shall be decided or resolved with the concurrence of a majority of the Members who actually took part in the deliberations on the issues in the case and voted thereon, and in no case, without the concurrence of at least three of such Members. When the required number is not obtained, the case shall be decided *en banc*. Provided, *that no doctrine or principle of law laid down by the court in a decision rendered en banc or in division may be modified or reversed except by the court sitting en banc.* (Emphasis supplied)

The case of *Republic v. De los Angeles*,[26] declared this constitutional provision as mandatory.

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[24] G.R. No. 115412, 318 SCRA 558 (1999).
[25] *Id.*, at 568.
[26] G.R. No. L-30240, 159 SCRA 264 (1988).

III. CONCLUDING OBSERVATION

There is enough jurisprudence to push international commercial arbitration forward. But there is lack of observance especially in the trial court level. The 10-day limit under Republic Act No. 876 for resolving arbitration-related motions, petitions and applications is honored more in the breach than in the observance

There is lack of understanding of the process of international commercial arbitration. When losing parties question the final character of an arbitral award, despite an express provision in the arbitration clause, they betray a lack of understanding of the process of international commercial arbitration.

There is lack of appreciation why parties agree to include arbitration clauses in their agreements, such as what happened when the trial court ignored the arbitration clause in the *Del Monte* case. In theory, parties agree to arbitration clauses because arbitration is faster than traditional litigation, the proceedings are confidential, and the parties are able to participate in the selection of arbitrators. In the author's experience, foreign investors in the Philippines agree to include arbitration clauses, not only to be spared from the unavoidable delay in traditional litigation, but more importantly to safeguard impartiality. Foreign investors would like to avoid what is commonly referred to as a "hometown decision" and they can avoid it by ensuring their participation in the selection of arbitrators to adjudicate a dispute. In the *Del Monte* case, when the trial court ruled that suspending the litigation, in order to give way to arbitration, "will not serve the ends of justice and to allow said suspension will only delay the determination of the issues, frustrate the quest of the parties for a judicious determination of their respective claims, and/or deprive and delay their rights to seek redress," the specter of a hometown decision, from the point of view of foreign business, reared its ugly head.

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