BOOK REVIEW:
INTERNATIONAL COMMERCIAL ARBITRATION: AN ASIA-PACIFIC PERSPECTIVE BY SIMON GREENBERG, CHRISTOPHER KEE AND J. ROMESH WEERAMANTRY*

*Jun P. Bautista***

The Philippine jurisdiction affords an obvious home-court advantage for Filipino lawyers. The rules after all had been crafted by fellow Filipino lawyers steeped in the Philippine legal and cultural traditions that had shaped these rules into a form appropriate to our society. The Philippine legal education, as well as the bar examinations, are mostly geared towards the mastery of our own legal system, and those forged in this crucible are often complacent in belief that they are already sufficiently armed for the practice of law in the 21st century.

Some aspects of arbitration are antithetical to the traditional judge-based methodology of adjudication, as it is essentially a private resolution of disputes where the parties retain significant control of the process.[1] There will be that contingent of lawyers who will view arbitration – much less international arbitration – as a less-than-credible contrivance that abdicates from the majesty of the adversarial/juridical paradigm that has shaped our rules of procedure. Crude as it may be sometimes, still, the shape of law is fashioned less by the intellectual designs of legal scholars than by the current needs and conveniences of society. One such reality is that corporations and enterprises frequently interact across national borders, engaging in commercial transactions and contracts which have

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** Jun Bautista is an associate specializing in international arbitration at Baker Botts LLP. He is based in the firm's Hong Kong office. He is a professorial lecturer for international commercial arbitration at the University of the Philippines College of Law. This article represents the personal views of the author and should not be interpreted to represent the views of Baker Botts, the other members of his firm or the firm's clients.

[1] D. E. Maclaren, *Effective Use of International Commercial Arbitration: A Primer for In-house Counsel.* 19 J. INT'L. ARB. 473 (2002).

force and effect in multiple jurisdictions[2], and which have potentially momentous consequences.[3] While local legal systems accommodate this reality to some degree, the increasing preference of the parties to the contracts is to assign all disputes arising from the interpretation and execution of the commercial agreement to a developing international arbitral regime instead to a less predictable judicial system.[4] What has ensued is the increasing prevalence of this international arbitration paradigm that is outside the comfort zone of many Filipino lawyers.

Books such as *International Commercial Arbitration: An Asia-Pacific Perspective* (Simon Greenberg, Christopher Kee, and J. Romesh Weeramantry, Cambridge University Press) will increasingly form part of the law library of any Filipino lawyer or law firm which intends to maintain a relevant legal practice. This volume is especially recommended as it puts into specific focus the prevailing conventions and immediate concerns of arbitration practice in the Asia-Pacific region. While the genesis of the present arbitration regime may be traced to international instruments such as the 1923 Geneva Protocol and the 1927 Geneva Convention, the subsequent adoption of national arbitration practices and procedures through domestic law has all but ensured the retention of local flavors indigenous to where arbitration is undertaken. What the authors have produced is the first international arbitration text book which discusses the principles of international arbitration using as a basis arbitration laws and case law from jurisdictions in the Asia-Pacific Region as well as scholarly writing from authors based in the region. The resulting tome is especially appropriate for those who engage in or foresee extensive arbitration practice in Asian commercial hubs such as Hong Kong, Singapore and Beijing.

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[2] *Id.* at 473. "With the explosive globalization of trade and investment, there has been a corresponding increase in commercial disputes between parties across national boundaries. If your company is doing business with parties in other countries, it is probably inevitable that at some point you will confront the possibility of litigating or otherwise responding to international disputes."

[3] G. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 65 (KLUWER LAW INTERNATIONAL, 2009). "In today's global economy, business enterprises of every description can find themselves parties to contracts with foreign companies (and states) from around the world, as well as parties to litigation before courts in equally distant locales. The consequences of these proceedings – and of losing them – are often enormous.-A contract means no more than what it is interpreted to say, and corrupt, incompetent, or arbitrary decisions can rewrite a party's agreements or impose staggering liabilities and responsibilities."

[4] *Id.* at 65-66. "More pointedly, the competence and integrity of judicial officers also vary substantially among different forums; annual corruption indices and other studies leave little doubt as to the uneven levels of integrity in some national judiciaries. Those indices are, regrettably, confirmed by contemporary anecdotal experience as to the corruption endemic in civil litigation in some jurisdictions."

This contextualization affords obvious benefits to those already engaged in international arbitration practice. How about the fledgling or dynamic practitioner seeking a more basic understanding of arbitration? This may be an obvious concern of Philippine lawyers, given the previous lack of dedicated instruction on domestic, much less international arbitration practice in the standard law school curriculum. Fortunately, *International Commercial Arbitration: An Asia-Pacific Perspective* is equally efficient as a basic text on arbitration, as it is understood and practiced within the international sphere. As one who teaches international arbitration subjects, I have found the text responsive and informative in those subject areas where my students have found difficulty in grasping.

One seemingly counter-intuitive notion that is basic in arbitration law is the doctrine of separability – or that the arbitration agreement is separate and distinct from the underlying commercial agreement, even if it is physically embodied in the latter.[5] This doctrine is codified under Article 16(1) of the Model Law.[6] For Philippine lawyers weaned on ancillary contracts that attach to the principal contract containing the animating transaction, the idea that the arbitration agreement may survive even if the commercial agreement is nullified, never executed or declared as never having existed may seem baffling. Interestingly, the authors do cite foremost the doctrine of separability as restated by the Philippine Supreme Court in *Gonzales v. Climax Mining*[7], but they also contend with the theoretical ramifications behind such doctrine of separability. Elaborating on this, the authors assert:

> The core problem identified by those arguing that the doctrine is a legal fiction is that if a contract is void ab initio then as a matter of law it never had any effect; necessarily implying that the arbitration agreement never had any legal effect either. In our view, it is incorrect to describe the doctrine of separability as a legal fiction. The argument fails to recognise modern forms

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[5] S. GREENBERG, C. KEE & J.R. WEERAMANTRY, INTERNATIONAL COMMERCIAL ARBITRATION: AN ASIA-PACIFIC PERSPECTIVE 155 (CAMBRIDGE UNIVERSITY PRESS: 2011). "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."

[6] *Id.* at 87, 514. The Model Law, which was prepared in 1985, is a suggested model of an international arbitration law recommended by the UNCITRAL. It has been used as a basis for the arbitration laws of about 60 jurisdictions around the world, including the Philippines.

[7] G.R. No. 161957, 22 January 2007, *citing* P. CAPPER, INTERNATIONAL ARBITRATION: A HANDBOOK 12 (3RD ED. 2004).

> of contracting such as point by point negotiation. All that is necessary is a finding that the parties intended to treat their arbitration agreement separately. There has been some debate about whether this would need to be explicit. However, it seems likely that implicit presumptive intent is sufficient.[8]

Another concept in arbitration that befuddles law students and lawyers alike pertains to the relationship between the arbitration proceedings and the "law of the seat of arbitration". The seat of arbitration is the place where the contracting parties agree to arbitrate, and as a consequence, it is the law of said jurisdiction that enables arbitration. The seat provides the *lex arbitri*, or the law of the arbitration, and this is composed of those statutes, codes or case law, which might not even specifically deal with arbitration but which relates to the basic legal framework of international arbitrations seated there.[9] In essence, *lex arbitri* refers to the law that gives arbitration its nationality and legal validity.[10]

Yet even as the *lex arbitri* establishes the basic legal framework for a particular arbitral proceeding, it often happens that the parties adopt arbitration rules relating to the mechanism and processes of arbitration and regulate the conduct of arbitration from its initiation until the final award is rendered.[11] Generally, the parties are free to select the arbitration rules that are to govern their particular proceedings, and most arbitral institutions offer a set of arbitral rules for the parties' choosing.

The authors perform a commendable job of explaining through these potentially confusing concepts, as well as the related issue of "delocalisation" – the concept that there need be no link between the seat of arbitration and arbitration proceedings taking place in that jurisdiction.[12] The authors point out the little known fact that prior to Malaysia's adoption of its 2005 Arbitration Act, its arbitration law did not allow recourse to its own courts for arbitral awards which were seated in Malaysia and decided under the Arbitration Rules of the Kuala

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[8] *Supra* note 5 at 156.
[9] *Supra* note 5 at 58.
[10] *Supra* note 5 at 60.
[11] *Supra* note 5 at 59.
[12] *Supra* note 5 at 68.

Lumpur Regional Centre for Arbitration (KLRCA).[13] No other Asia-Pacific country has adopted pure delocalization then or since, and it is refreshing to see the Malaysian example cited in an international arbitration textbook. In discussing delocalisation, other texts have confined themselves to citing Belgium, which had also previously adopted a similar delocalised arbitration law.[14] In the Belgian example, the state had adopted the delocalized approach for arbitrations involving parties who were not Belgian nationals and who did not have a business establishment in Belgium. It was hoped that the resulting hands-off approach from Belgian courts would make said country a more attractive seat for arbitration. In the end though, many parties preferred having available recourse to Belgian courts, leading to the end of pure delocalization experience in Belgium. It would be interesting to learn if Malaysia underwent a similar experience that possibly could have led to the 2005 Arbitration Act.

The authors also carry out a laudable job of demystifying one of those definitive characteristics of arbitration – the party-nominated arbitrator. I have encountered both students and practitioners who are skeptical about the inherent fairness of arbitration precisely because parties are often empowered to choose one or some of the members of the arbitral tribunal. Party-nominated arbitrators are of course obligated to act with impartiality and independence, and the authors are well aware that a due diligence of potential arbitrators is par for the course, referring to the oft-cited quip by Martin Hunter that "when I am representing a client in an arbitration, what I am really looking for in a party-nominated arbitrator is someone with the maximum predisposition towards my client but with the minimum appearance of bias."[15] The presumption of bias when it comes to a party-nominated arbitrator may especially take hold in emerging nations such as the Philippines, where institution-building measures remain a work in progress. Still, the authors offer caution in presuming that appointing presumably biased arbitrators works to the benefit of a party.

> Whether the selection of an arbitrator sympathetic to an argument actually helps in the long term is difficult to prove empirically. One can project that if at least one arbitrator understands certain reasoning or sympathises with a line of argument, some of that reasoning or argument should be transposed

[13] *Supra* note 5 at 75.

[14] *See e.g.* M. MOSES, THE PRINCIPLES AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 57 (CAMBRIDGE UNIVERSITY PRESS: 2008).

[15] *Supra* note 5 at 263.

> into the award and into any decisions taken by the arbitral tribunal. On the other hand, if a co-arbitrator's views are markedly different from those of the chairperson this may lead to confrontation or tension, and could thus be counterproductive to the nominating party's interests.[16]

The authors note the view of several commentators that if an arbitrator unduly advocates for the arguments of the party that nominated such person, "a good chairperson is likely to detect such partiality and treat with considerable suspicion and caution any suggestions made by that arbitrator."[17] For that reason, the authors correctly advise that "it is vital for party-nominated arbitrators to act fairly and impartially with regard to arguments submitted by the party that did not appoint them."[18] Not only is this view in line with commonly-held notions of fair play and justice, the persistence of such a culture of neutrality is necessary for arbitration to gain currency as a neutral and impartial mechanism for resolving disputes that is apart from the traditional judicial system.

Presumptions of neutrality may sometimes yield to actual determinations on whether or not an arbitrator is in fact impartial and independent. These determinations are often undertaken by arbitral institutions themselves, or by domestic courts. With respect to the assessments made by arbitral institutions, the authors note recent movement towards transparency, by some of these institutions, particularly the London Court of International Arbitration (LCIA) and the International Chamber of Commerce International Court of Arbitration (ICC), by providing guidance into their thinking when determining these challenges regarding partiality and lack of independence.[19] The LCIA said in 2006 that it would publish challenge decisions on its website (but to this day has yet to do so), and the ICC , on the other hand, publishes articles describing the ICC's practice and cites examples and trends relating to challenge decisions. The authors remind the readers that challenges in international arbitrations must be decided on a case–by-case basis and while transparency is laudable, there is a danger that publication of challenge decisions will lead to precedent which is not desirable.[20] Of particular interest is their contention that the emergence of a body of precedent

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[16] *Supra* note 5 at 263.
[17] *Supra* note 5 at 264.
[18] *Id.*
[19] *Supra* note 5 at 280.
[20] *Id.*

(similar to case law) due to the regular publication of challenge decisions could detract from the notion of case-by-case determination which has served arbitration well so far.[21] With respect to those determinations made by domestic courts, the authors usefully explore the various tests[22] employed by courts in Asia and perhaps are the first to demonstrate the dichotomy in the application of these tests.

"Drafting Arbitration Agreements" in Chapter 4 is useful for lawyers tasked with drafting agreements and those who are asked for the first time to compose arbitration clauses without any prior experience in arbitration practice. This section does not confine itself to a one-style-fits-all template, but explores the interpretations of arbitration clauses adopted in various Asian jurisdictions, to the end of giving the reader informed variety of choice. Usefully too, the authors provide tips on what *not* to include in an arbitration agreement.[23]

What ultimately distinguishes *International Commercial Arbitration: An Asia-Pacific Perspective* from other arbitration texts is, as hinted in the title, its contextualization of arbitration as it is practiced in the Asia-Pacific region. The timeliness of such an approach is evident. The emergence of several Asian economies over the last few decades has all but assured the rise of arbitration centers in Asia. After all, the more commercial agreements, the more arbitration clauses. The authors recognize though the somewhat sensitive fact that some Asian countries are perceived as more arbitration-friendly than others. Hong Kong and Singapore readily come to mind, and it is no coincidence that these jurisdictions are also reputed as being investor-friendly. In contrast, nations such as India, Indonesia, Vietnam, Thailand and China are widely believed to be less hospitable to the arbitration regime. As China exerts greater pull in international commerce, it will be interesting to see if its growth will correspond to the institution of a more arbitration-friendly environment in the Mainland.

One Asian-oriented field which the authors touch upon is that hybrid of arbitration and mediation popularly known as "arb-med", which is rarely seen in

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[21] *Id.*

[22] *Supra* note 5 at 282-284. The "reasonable apprehension" test introduced in *R v. Sussex Justices; Ex Parte McCarthy*, [1924] 1KB 356 (King's Bench, High Court); the "real likelihood of bias" test, see *Tracomin SA v. Gibbs Nathaniel (Canada), Ltd* [1985] 1 Lloyd's Rep 586; and the "Gough test" as well as it's offshoot, the *Porter* test, see *R v. Gough*, [1993] AC 646 and *Porter v. Magill*, [2002] AC 357.

[23] *Supra* note 5 at 198-199.

Western arbitrations but not in Asian arbitrations.[24] Under arb-med, the arbitrating parties may agree that their arbitrator may act as a mediator in the same dispute at some point during the arbitral proceedings.[25] Japan and India are among some Asian countries that have enabled arb-med procedures in its domestic legislation.[26] The authors cautiously advert to some observations that several Asian cultures have mediation or conciliation ingrained as the norm in their cultures[27] and even have a general reluctance to litigate.[28] Engaging in cultural stereotyping often leads to a slippery slope, and the authors themselves emphatically point out that there is no concrete empirical or unequivocal anecdotal evidence supporting the theory of litigation-adverse Asians.[29] They do though cite a more defensible and empirical proposition – that most Asian courts "do not provide dispute resolution services that are market-responsive, reliable or reciprocal."[30]

Arbitration of course does not insulate the dispute from judicial processes. One area where judicial cooperation is ultimately necessary to the resolution of the arbitrable dispute is in the enforcement of the arbitral award. Chapter 9, on "The Award: Challenge and Enforcement", discusses some of the problems in having arbitrations and enforcing arbitral awards in such countries such as China, India, Indonesia, Malaysia, the Philippines, Thailand and Vietnam. Arbitral awards are final and binding on the parties, but that has not prevented the institution of challenges to the award before the competent court at the seat of arbitration. Moreover, the authors cite several examples of various Asian courts setting aside arbitration awards which in some cases, were rendered in a foreign seat of arbitration.[31] The authors correctly observe that it is not sufficient for countries to ratify the New York Convention and for countries to enact arbitration statutes. Countries must take effective measures to ensure that its laws and the

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[24] *Supra* note 5 at 46.

[25] *Supra* note 5 at 333.

[26] *Supra* note 5 at 334. *See* footnote 142.

[27] *Supra* note 5 at 46.

[28] *Supra* note 5 at 47.

[29] *Id.*

[30] *Id.*, *citing* V.L. TAYLOR AND M. PRYLES, *The Culture of Dispute Resolution in Asia*, in M. PRYLES, DISPUTE RESOLUTION IN ASIA 15-16 (KLUWER LAW INTERNATIONAL: 3RD ED. 2006).

[31] *Supra* note 5 at 418. "Among the cited examples is the decision of the Philippine Court of Appeals in *Luzon Hydro Corporation v. Baybay and Transfield Philippines*, though this ruling was handed down prior to the adoption of the Special Rules of Court on Alternative Dispute Resolution, which states in Rule 13, § 4, that "A Philippine court shall not set aside a foreign arbitral award."

New York Convention are applied in line with international principles on which they are based.[32]

Another area where the Asian context proves especially enlightening is in understanding how arbitral procedures as practiced in specific countries are developing. One crucial and controversial question is the extent foreign counsel may participate in arbitration proceedings in the seat of arbitration, especially in countries like the Philippines where the practice of law within its borders remains confined to Philippine nationals.[33] In some nations, the suspicion over the participation of foreign actors in arbitral proceedings is evident. For instance, the authors point out that in rules of the Indonesia National Arbitration Board (BANI), if a party is represented by a foreign legal advisor in an arbitration involving Indonesian law, the foreign legal advisor may only attend if accompanied by an Indonesian legal advisor.[34] In China, the authors observe that while the Ministry of Justice has said that foreign law firms are not prohibited from representing clients in arbitrations in China; however if Chinese law is the applicable law or if China law issues are involved, then they should refrain from providing legal advice and should engage local lawyers. Since most if not all of the arbitrations in China applies Chinese law as the substantive law, the effect is to restrict the participation of foreign law firms.[35]

These restrictions have the effect of reducing a country's viability as an international hub for arbitration, and it does not come as a surprise that Singapore had amended its arbitration law to eliminate restrictions on the ability of foreign lawyers to act for clients in arbitrations seated in Singapore.[36] With the passage of the Philippine Alternative Dispute Resolution Act of 2004,[37] foreign lawyers are allowed to represent parties in international arbitrations seated in the Philippines

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[32] *Supra* note 5 at 435. "[I]t may not be sufficient to check simply whether a country has ratified the New York Convention when planning enforcement strategies. Other factors such as a country's implementation of the New York Convention or its administrative procedures may prove extremely important in assessing the prospects of enforcement."

[33] Rules of Court, Rule 138, § 2, which states: "Every applicant for admission as a member of the bar must be a citizen of the Philippines.".

[34] *Supra* note 5 at 325.

[35] *Supra* note 5 at 325.

[36] *Supra* note 5 at 324, *citing* M. Polkinghorne, *More Changes in Singapore: Appearance Rights of Foreign Counsel*, J. INT'L. ARB. 75, 22 (2005).

[37] Rep. Act No. 9285 (2004). This is the ADR Act of 2004.

even when the governing law is Philippine law.[38] Similarly with the adoption of the Special Rules of Court for Alternative Dispute Resolution (SRC-ADR),[39] the parties may freely choose an arbitrator without regard to nationality even when the substantive law of the dispute is Philippine law.[40]

Notwithstanding changes such as these , the Philippines is cited as among the jurisdictions where arbitration is not conducive. The laggard pace in the enactment of arbitration-friendly legislation is one factor – even as the Philippine Senate ratified the integral New York Convention in 1965, it was only in 2004 that the corresponding implementing legislation (the Alternative Dispute Resolution Act of 2004) was finally promulgated. Still, the enactment of the ADR Act of 2004 and the adoption in 2009 of the SRC-ADR must be counted as significant steps for enhancing the viability of the Philippines as a center for international arbitration. For instance, under the SRC-ADR, Philippine courts are prohibited from setting aside foreign arbitral awards, even though they may still of course refuse to enforce foreign awards.[41]

These positive steps are timely. More and more Philippine parties are involved in disputes being resolved through arbitration, a sign not only of the increasing complexity of international agreements involving Filipino actors, but also of increased Philippine participation in the international commercial sphere. Moreover, states are being held accountable for their actions and implored to comply with their international obligations. Countries which have ratified the New York Convention have a duty to comply with its obligations under the Convention. As the authors points out "a state party to the New York Convention may still be responsible under international law if an arbitral

[38] Rep. Act No. 9285, § 22, which states: "In international arbitration conducted in the Philippines, a party may be represented 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." Clearly then, the extent within which foreign counsel may represent their client's interests in Philippine-seated arbitrations cannot extend to Philippine courts or quasi-judicial bodies.

[39] A.M. No. 07-11-08-SC (2009). This is the Special Rules of Court on Alternative Dispute Resolution.

[40] A.M. No. 07-11-08-SC, Rule 7, § 4, which states: "The nationality or professional qualification of an arbitrator is not a ground to challenge an arbitrator unless the parties have specified in their arbitration agreement a nationality and/or professional qualification for appointment as arbitrator

[41] *Supra* note 5 at 447.

agreement or award is not recognized or enforced as required by the Convention."[42]

In the ground-breaking case of *Saipem v. Bangladesh*,[43] an ICSID tribunal held that Bangladesh had violated its international law obligations because its national courts breached Article II of the New York Convention by unlawfully revoking the authority of arbitrators in an ICC arbitration. The prospect of the Philippine judiciary being identified before international tribunals as responsible for violating in behalf of the Philippines a treaty obligation such as the New York Convention is obviously embarrassing. There is an urgent need for the Philippine legal community, especially judges, to be better versed in the international arbitration paradigm. I believe that *International Commercial Arbitration: An Asia-Pacific Perspective*, an intelligent and comprehensible discourse, more than sufficiently serves the purpose of a sorely-needed reference in a somewhat daunting field of law.

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[42] *Supra* note 5 at 432.

[43] ICSID Case No. ARB/05/7, Award of 30 June 2009. *See* S. Greenberg, C. Kee & J.R. Weeramantry, *supra* note 5 at 472. *See also GEA Group Aktiengesellschaft v. Ukraine*, ICSID Case No. ARB/08/16, Award of 31 March 2011, where the tribunal held that the ICC award - in and of itself - cannot constitute an "investment" and noted that *Saipem v. Bangladesh* is difficult to reconcile.

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