IS PHILIPPINE LEGISLATIVE ACTION NECESSARY ON TWELVE ECAFE-LISTED PROBLEMS OF COMMERCIAL ARBITRATION? *

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Arbitration, in labor, commercial, or international disputes, has long been recognized as an adjudicative technique.[1] It has been stated that its exact origin was lost in obscurity [2] although historians claimed arbitration is as old as human society, and credited the Greeks and the Romans with the early use of arbitration in settling controversies.[3] Some writers associate the beginning and growth of arbitration with the origin of the law merchant and the development of special mercantile tribunals such as the staple courts, the fair courts or the courts of pie powder.[4]

Philippine statutes provided for arbitration even during the days of the Spanish Civil Code and the *Ley de Enjuiciamiento Civil*.[5] Under the new Civil Code, there are more articles dealing with arbitration, and the code specifically confirms the power of the Supreme Court to promulgate rules of court to govern appointment of arbitrators and the procedure for arbitration.[6] The Supreme Court has not yet deemed it necessary to promulgate such rules on arbitral pro-

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[1] The Use of Tripartite Boards in Labor and Commercial Arbitration, 68 Harvard Law Review 293 (1954).

[2] Wolvaver, The Historical Background of Commercial Arbitration, 83 Univ. Penn. Law Rev 132 (1934).

[3] MAYERS, THE AMERICAN LEGAL SYSTEM, 543 (1955).

[4] Jones, An Inquiry into the History of the Adjudication of Mercantile Disputes in Great Britain and the United States, 25 Univ. of Chicago Law Review, 445-446 (1958).

[5] Cordova v. Conde, 2 Phil. 445, 446 (1903). Arts. 1820, 1921, Spanish Civil Code.

[6] Articles 2042-2046, 1878(3) and 2028-2041 on compromises incorporated and made applicable to arbitrations by article 2043, Republic Act 386 otherwise known as the Civil Code of the Philippines effective on Aug. 30, 1950.

cedure.[7] The Congress of the Philippines enacted an arbitration law, Republic Act 876, effective December 20, 1953, and as explained in the case of *Umbao v. Yap*, this law supplements and does not supplant the provisions of the new Civil Code on arbitration.[8]

A study of Philippine laws on commercial arbitration has to include the treaties or conventions, if any, which the Philippines has signed or acceded to, within the framework of the United Nations. The Philippines has participated in international or regional conferences on commercial arbitration as discussed later.

With reservations the Philippines is a signatory to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards.[9] As the Senate has not yet ratified this Convention there are various quarters advocating for such ratification for this will be in line with the socio-economic program of the administration, since this will provide proper atmosphere and incentives for foreign investments to come to our country.[10]

Together with this Convention, was passed a unanimous resolution which called upon interested organizations to continue disseminating information on arbitration laws, practices, and facilities, and emphasized the value of technical assistance in developing effective legislation and arbitration institutions. The Resolution further suggested that interested organizations, and governments strive to furnish such assistance and that regional study groups, seminars, or working parties be given consideration.[11] In conformity with this Resolution, commercial arbitration was placed on the agenda of the Economic and Social Council (ECOSOC) XXVII Session in Mexico City on April 17, 1959. Among the various measures indorsed by the ECOSOC for promoting and developing commercial arbitration, were establishment of new facilities and improvement of those existing, technical assistance, development of model arbitration statutes and uniform laws, and convening of regional study groups and seminars. It requested the U.N. Secretary-General to assist govern-

[7] Even under the Revised Rules of Courts effective on January 1, 1964, the Supreme Court has not seen it fit to exercise such rule-making power.

[8] G.R. No. L-8933, February 28, 1957; Sec. 31, Rep. Act 876.

[9] Also known as the New York Convention, this was adopted by the U.N. Conference of Plenipotentiaries on International Commercial Arbitration. This Convention was adopted and opened for signature on June 10, 1958. U.N. Economic and Social Council, U.N. Doc. No. E/Conf. 26/8/Rev. I (1958).

A copy of the Convention appears in 13 Arbitration Journal (n.s.) 107 (1958). This Convention is reproduced in the Appendix to this paper. Article 1, paragraph 3 of the Convention states the conditions or reservations a state may declare when signing, ratifying or acceding to the Convention.

[10] This is the stand taken by the Philippine National Committee of the International Chamber of Commerce which is the most vocal and active in urging the ratification of this Convention.

[11] Final Act of the Conference, U.N. Doc. E/Conf. 26/9/Rev. I.

mental organizations in the endeavors towards the ends or purposes aforementioned and therefore aimed towards the more effective use of arbitration in international trade and other private law transactions.

Preparatory to the calling of a regional conference, the Office of Legal Affairs of the U.N. Secretariat submitted reports on "Arbitral Legislation and Facilities in Certain Countries of the ECAFE Region." [12] In a "Nite on Future Activities in the Field of Commercial Arbitration" [13] the Executive Secretary of the ECAFE expressed his desire of establishing contacts and consultations with arbitration experts in the countries of the region, who would be designated by their governments. A questionnaire [14] was sent to the experts designated. The questionnaire inquired into the practical use and effectiveness of arbitration in the region, adequacy and inadequacy of legislation and extent of institutional arbitration facilities. The summary of replies to the questionnaire and a suggestion to convene a working party of experts on commercial arbitration to discuss legal and other problems towards the formulation of realistic solutions best suited to the countries of the Economic Commission for Asia and the Far East (ECAFE) were contained in a report entitled "Commercial Arbitration in the ECAFE Region." [15]

The Committee on Trade of the ECAFE endorsed the suggestions contained in said report and so convened a Conference of Working Party of Experts on Commercial Arbitration at Bangkok, Thailand from January 11 to 17, 1962. Representatives of member states of the region as well as of non-governmental organizations attended. The Philippines was represented in this Conference. Among the matters discussed and acted upon by the Conference are dissemination of information on arbitral procedures and facilities; technical assistance and research activities in countries of the region that have not yet sufficiently utilized arbitration; and the maintenance of arbitration panels and proper selection of arbitrators; establishment of a regional center for the promotion of arbitration which shall be within the framework of the ECAFE Secretariat in Bangkok and with the assistance of the Office of Legal Affairs of the United Nations.

This Bangkok Conference regarded conciliation as a necessary and valuable adjunct of arbitration; considered the formulation of Model Rules of Arbitration under the auspices of the ECAFE for

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[12] U.N. Doc. E/CN.11/Trade/L.19/ of Dec. 31, 1958 and add. 1 of Oct. 18, 1960.

[13] U.N. Doc. E/CN.11/Trade/L.21/of January 22, 1959.

[14] Annex A, U.N. Doc. E/CN.11/Trade/L.38 of Nov. 23, 1960.

[15] U.N. Doc. E/CN.11/Trade/L.21 of Jan. 22, 1959.

use in the region; considered the preparation of standard arbitration clauses; recommended the conclusion of agreements between arbitration institutions in different countries. The Conference finally listed and discussed problems legal or otherwise of commercial arbitration in the region, and included in the list are twelve (12) main problems which merit further consideration as to whether legislative action is needed for the solution thereof, in the countries of the ECAFE.[16] An inquiry along these lines is to be made by the writers in this paper to determine whether further action by Congress of the Philippines is necessary in order to dispose of those twelve ECAFE-listed problems on commercial arbitration. However, before discussing the problems individually, the writers will review very briefly observations on some aspects of commercial arbitration when viewed in general and in a Philippine setting under Themes, Variations, and Trends.

A. THEMES, VARIATIONS, AND TRENDS

1. CONCEPT OF COMMERCIAL ARBITRATION

Arbitration as a means of settling disputes can be applied in the national and international levels. Arbitration has been generally resorted to in this jurisdiction in labor, tenancy, and insurance cases. However, commercial arbitration is the designation ordinarily given to all business arbitrament except arbitration of labor disputes and grievances.[17] In its broadest connotation, it is the means by which the parties to a dispute voluntarily choose arbitrators or judges of their own choice to constitute an arbitral board or tribunal to decide their controversy instead of the ordinary court established by law.[18] By agreement such decision or award is binding upon the parties.[19]

Such modern concept of commercial arbitration is the result of a long evolution. Before, an arbitrator was really a private extraordinary judge chosen by the parties to resolve their controversies. Arbitrators derive their name from the fact that they had an *arbitrary* power because when they kept within the bounds of the sub-

[16] Domke, The Bangkok Conference on Commercial Arbitration, 17 Arbitration Journal 23-33 (1962).

[17] Beatty, Voluntary Arbitration, Its Legal Status and How It Works, 22 University of Kansas City Law Review 191, 199 (1953-54). The same is true under Philippine Law. Sec. 3 of the Arbitration Act, provides that this Act shall not apply 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.

[18] 6 C.J.S. 152; 5 C.J.S. 16 cited in the case of Chan Linte v. Law Union and Rock Insurance Co., 42 Phil. 548 (1921).

[19] Rosenthal, Arbitration in Settlement of International Trade Disputes, 11 Law and Contemporary Problems 808, 810 (1946).

mission their decisions or awards are final and definitive, and there is no appeal.[20]

Such definition however has been altered by the modern development of arbitration for the arbitrator no longer possesses arbitrary power. His award is subject to review in almost every instance when the decision of a judge is subject to appeal. Besides a review of foreign arbitration laws shows that an arbitrator need not have judicial qualifications and will only be legally responsible in cases of fraud.[21]

2. HISTORY OF COMMERCIAL ARBITRATION

Although the exact origin of arbitration has been lost in the mists of antiquity,[22] yet it can be stated that the settlement of controversies by arbitration is a practice of early common law origin.[23] All religions preach peace with one's neighbor and speedy reconciliation with an enemy. Aristotle favored immediate conciliation of adversaries. Heraldus in his book *Animadversiones* described a court for reconciliation among the ancient Greeks. The Romans also utilized arbitration to terminate a litigation.[24] In the patriarchal society, disputes were settled by heads of families, a practice which gave rise to the patriarchal tribunal and which became forerunner of the position of arbitrator.[25]

It is safe to conclude that arbitration of commercial disputes began where a mercantile community together with the law merchant developed.[26] In earlier times, local customs were applied to mercantile disputes decided by the merchants themselves—by merchant referees or arbitrators or by a jury of merchants. When the guilds flourished local customs, like the *coutumes* of France were enforced in the special courts administered by merchants as the fair courts or courts of pie powder. This was true in fairs during the medieval period for the grant of a fair franchise by the King included the power to hold court, to hear and decide controversies in the pie

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[20] Nordon, British Experience with Arbitration, 83 University of Pennsylvania Law Review 314, 317 (1934).

[21] *Idem*. However in the Philippines, Section 10, of the Arbitration Law, Rep. Act 876 prescribes the qualifications of arbitrators.

[22] Wolvaver, The Historical Background of Commercial Arbitration, 83 Univ. of Pennsylvania Law Review 132 (1934).

[23] U.S. Leudinghaus Lumber Co. v. Leudinghaus, 299 Fed. Rep. 111 (1962).

[24] Wolvaver, *op. cit.*

[25] Taeusch, Extrajudicial Settlement of Controversies. The Businessman's Opinion: Trial at Law v. Non-Judicial Settlement, 83 Univ. of Pennsylvania Law Review 147 (1934); Wolvaver, *op. cit.*

[26] MAYERS, THE AMERICAN LEGAL SYSTEM, 543 (1955).

powder courts.[27] There were other courts where the merchants decided or were of considerable influence and importance in deciding their own cases. The courts of staple may be mentioned as an example. They were established in the towns of the staple, which were the only ports of entry and export for prime commodities. Although they were more permanent than the fair courts, yet they were similar as regards their litigants and the law that they applied. When the guilds held sway, traders desired their controversies settled by their peers extrajudicially according to the law of merchants.

In the times which followed, in a vast area of commercial life, mercantile disputes were decided by tribunals constituted by the merchants themselves. With the increase in importance of Admiralty Courts, they began to decide commercial cases. Trading companies were organized and in their charter, the settlement of all intra-company disputes was by a company tribunal consisting of member merchants.[28] Private arbitration began to be popular so that merchants in England, Continental Europe, and the United States in avoiding court litigations, had been insisting on the extrajudicial method of settling their business controversies by commercial arbitration. This method of adjudication has greatly relieved the congested or clogged dockets of the courts.[29]

3. ARBITRATION IN THE PHILIPPINES

In the Philippine scene, arbitration has long been accepted as a valid means for settling disputes. The former *Ley de Enjuiciamiento Civil* of Spain which was applied in the Philippines provided for litigation by friendly adjusters or *juicio de amigables componedores* or *amiables compositeurs*.[30] Adjusters had to be men who could read or write; their number must be odd but could not exceed five. A third person could not be given the power to name them. The agreement of submission must be executed before a notary public otherwise it would be void. Failure to specify five particulars would also result in nullity.

An adjuster could be challenged by a party to a submission if the adjuster had an interest in the subject matter of the suit or was manifestly antagonistic to the parties, if the cause of the challenge arose or became known by the party after the appointment of the adjuster. The Court of First Instance of the place where the ad-

[27] Jones, An Inquiry Into the History of the Adjudication of Mercantile Disputes in Great Britain and the United States, 25 Univ. of Chicago Law Review, 445–446 (1958).

[28] Jones, *op. cit.*

[29] Taeusch, *op. cit.*

[30] Cordova v. Conde, 2 Phil. 445, 446 (1903).

juster resided would try the matter if the adjuster challenged refused to withdraw.

The decision of the dispute or the award by the adjusters was void if not made before a notary public. Within a period of sixty days the party aggrieved could prosecute a writ of error in the Supreme Court of Spain on the grounds that judgment was rendered beyond the time limit set or that questions beyond those submitted had been decided.[31] With the repeal of the *Ley de Enjuiciamiento Civil,* by Act No. 190, the Code of Civil Procedure, which was passed during the early part of the American occupation, all these provisions relating to the suit by friendly adjusters were abrogated. Thus the provisions of the Spanish Civil Code on arbitration were rendered nugatory. This was a necessary consequence of the repeal of the Spanish Law of Civil Procedure for "with regard to the form of procedure in arbitration and to the extent and effects thereof, the provisions of the law of Civil Procedure shall be observed." [32]

The Civil Code of the Philippines contains more provisions on arbitrations. It carries over the provisions of the Spanish Civil Code that the same persons who may enter into a compromise may submit for decision their controversies to one or more arbitrators, so that the provisions of the Code on compromises shall also be applicable,[33] to arbitration. The Code affirms the validity of any stipulation that the arbitrators' award or decision shall be final.[34] In he agreement of submission any stipulation giving one of the parties power to choose more arbitrators than the other is void.[35] Finally the Code specifies that the appointment of arbitrators and the procedure for arbitration shall be governed by the Rules of Court as the Supreme Court shall promulgate.[36] In the light of existing Rules of Court, the Supreme Court has not yet seen fit to promulgate such rules on arbitration,[37] and in the meantime Congress enacted Republic Act 876, popularly known as the Arbitration law.[38] Pertinent provisions of this law will be discussed later in connection with the twelve main problems of commercial arbitration.

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[31] Arts. 810–822, Art. 1670, par. 3; Art. 1673, par. 3; 1765, of the Ley de Enjuiciamiento Civil.

[32] Article 1821, Spanish Civil Code.

[33] Arts. 2042, 2043, Civil Code, which are amended versions of Arts. 1820 and 1821 of the Spanish Civil Code.

[34] Art. 2044. This is without prejudice to Articles 2038, 2039, and 2040 of the Civil Code.

[35] Art. 2045, Civil Code.

[36] Art. 2046, Civil Code.

[37] Paredes, Sponsorship Speech, 3 Congressional Record (Senate) 1188–1189 (1953). However possibility of submission to arbitration is one of the purposes of the mandatory pre-trial provided in Rule 20 of the Revised Rules of Court.

[38] Effective, December, 1953.

The present Arbitration Law is a progressive legislation for undoubtedly it is a distinct step forward. However it contains no provision on the matter of enforcement of foreign awards. Philippine jurisprudence recognizes the validity and enforceability of arbitral awards which are rendered in accordance with law and the *compromis* or arbitral clause or agreement provided the awards have become final and operative if they are not contrary to public policy or public order.[39]

Although arbitration has been in our statute books for a long time, yet it is seldom used in the settlement of controversies. Many therefore aver that lip service is only paid to arbitration. Mention is usually made of the fact that the Philippines, which is a signatory to the U.N. Convention on Recognition and Enforcement of Foreign Arbitral Awards, on condition of reciprocity has up to the present not ratified said Convention. In the same vein, although parties have an arbitral clause in their commercial contracts, said clause is entirely disregarded and no recourse to arbitration is made and the parties just have their dispute judicially settled best exemplified by the case of *Far East International Import and Export Corporation v. Nankai Kogyo Co. Ltd., et al.*,[40] the latest Philippine decision involving commercial arbitration.

Under the special laws however, arbitration is resorted to from time to time in insurance, labor and tenancy cases.[41] The Minimum Wage Law [42] also provides for arbitration of claims between employer and claimants in certain cases. However it is only commercial arbitration which is the subject of inquiry.

4. FACILITIES FOR ARBITRATION

Practical facilities for commercial arbitration are furnished by entities or organizations divided into three different classes: (1) national institutions which provide general arbitration facilities; (2) organizations which provide facilities for the settlement of controversies arising in specific branches of trade or from specific violations or breaches of some forms or types of contracts; and (3) international centers providing facilities for general commercial arbitration.

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[39] Maloles, Summary Record, U.N. Conference on International Commercial Arbitration. E/2704 & Cor. 1, E/2822 & Add. to 1 to 6.

[40] G.R. No. L-13525, November 30, 1962.

[41] Act No. 2427, as amended, effective July 1, 1915. Com. Act No. 103 effective Oct. 29, 1936, as amended by Com. Act No. 559, effective June 7, 1940; Rep. Act No. 1267, effective June 14, 1955 as amended by Rep. Act 1409 effective Sept. 9, 1955.

[42] Rep. Act No. 602 effective April 6, 1951 as amended by Rep. Act No. 812, effective June 22, 1952.

In Europe and Asia, forty countries have general arbitration facilities furnished by local chambers of commerce. Special arbitration associations exist purposely for providing arbitration facilities and for improving commercial arbitration, and examples are the American Arbitration Association, the London Court of Arbitration and the Netherlands Arbitration Institute.[43]

In specific branches of trade there are organizations furnishing arbitration facilities, and these are maintained by most commodity exchanges and trade associations of particular industries. A standard contract contains an arbitration clause which will settle disputes through arbitration facilities of such exchanges or associations concerned, and more than a hundred associations or exchanges maintain these facilities in Western Europe, the British Commonwealth of Nations, and the United States. In the cotton trade, for example, arbitrations held are by the New York Cotton Exchange, and also by the Bremen Citton Exchange and the Liverpool Cotton Association, and the last one is stated to have the oldest court of arbitration in the cotton trade.[44]

Most of the time, organizations furnishing arbitral facilities on the national level or for specific branches of trade are not adequately equipped and developed so that some parties to the commercial disputes prefer to resort to international arbitration centers. Another reason is that a party may not desire to submit to arbitration administered by an organization pertaining to the country of which the other party is a national or domiciliary. The International Chamber of Commerce maintains its Court of Arbitration with headquarters in Paris. The members of the Court are designated by each of the national committees of the International Chamber of Commerce while the officers and technical advisers are appointed by the Council of International Chamber of Commerce. The Inter-American Commercial Arbitration Commission is another international arbitration center which settles commercial disputes arising in the Western Hemisphere. In each of the twenty-nine American republics a national committee affiliated with the Commission is established to cooperate with the ranking commercial associations in these countries. Close cooperation is maintained by the Inter-American Commercial Arbitration Commission, the American Arbitration Association and the Canadian-American Commercial Arbitration Commission so that they recommend the use of a joint standard arbitration clause and they coordinate their rules of arbitral procedure.[45]

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[43] Report, Secretary-General, E.Conf. 26/4, April 24, 1958.

[44] Schottelius, Arbitration Activities of the Bremen Cotton Exchange, in INTERNATIONAL TRADE ARBITRATION (Domke ed. 1958) 271, 272.

[45] Report, Secretary-General, *supra*.

With respect to countries in the ECAFE area, the present facilities for arbitration in most of them are adequate for domestic arbitration, however from the point of view of international trade they are inadequate. In the member states are non-governmental organizations—chambers of commerce and exporters' associations which help in propagating commercial arbitration. Agreements have been signed between arbitration institutions in different countries recommending the insertion of joint arbitration clauses in contracts executed by firms engaged in commercial transactions between the two countries. On September 16, 1952 such an agreement was entered into between the American Arbitration Association and the Japan Commercial Arbitration Association.[46] Mention has already been made earlier of the recommendation by the Working Party of Experts at the Bangkok Conference of 1962 for the establishment of a Regional Center for the Promotion of Arbitration within the ECAFE Secretariat in Bangkok.[47]

5. ARBITRATION FACILITIES IN THE PHILIPPINES

It is sad to note that there are no organized facilities for arbitration in the Philippines except the arbitration commission recently established by the Philippine Council of the International Chamber of Commerce. None of the various trade associations existing today is specially and primarily devoted to arbitration alone. There are no less than ten (10) trade associations existing at present. These chambers are the Chamber of Commerce of the Philippines, the Spanish Chamber of Commerce, The American Chamber of Commerce, the Manila Chamber of Commerce, Chamber of Agriculture and Natural Resources, Indian Chamber of Commerce, Federation of Chinese Chamber of Commerce, Philippine Chamber of Industries, Philippine Chinese General Chamber of Commerce and the Textile Mills Association of the Philippines.[48]

It may be mentioned that in January, 1955, the Philippines became one of the fifty-seven countries affiliated with the International Chamber of Commerce, upon the organization of a Philippine National Committee which represented existing trade organizations. As mentioned already a court of arbitration is maintained by the International Chamber of Commerce so that through conciliation or arbitration commercial disputes are amicably settled with dispatch and

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[46] Report of the Working Party, E/CN 11 Trade/L.51 of Jan. 19, 1962, p. 13, par. 30.

[47] Report of the Working Party, E/CN 11 Trade/L.51 of Jan. 19, 1962 p. 8, par. 23.

[48] Joining the International Chamber of Commerce, 51 Commerce, 6 (1955).

with the least expense.[49] Reciprocal arrangement exist between the Chamber of Commerce of the Philippines and the American Arbitration Association. The American Arbitration Association in turn has also entered into reciprocal arrangements with the International Chamber of Commerce and many chambers of commerce in the British Empire. Consequently members of one organization can conveniently arrange for arbitration under the auspices of any of the associations participating in the arrangement.[50]

In line with the policy of the Administration to attract foreign investments and therefore help Philippine economic development the Philippine National Committee sent letters to various trade associations throughout the Philippines with the end in view of organizing commercial arbitration facilities. If arbitration facilities exist this will greatly enhance the confidence of foreign investors.

The letters requested the various trade associations to submit to the National Committee the names of at least five of their members who are willing to act as arbitrators should they be called upon to do so.[50a] With the formation of commercial panels chosen frim the different trade organizations such panels will be truly representative of the cross-section of the business community. This constituted a great stride towards the organization and maintenance of Philippine arbitration facilities. Six of the various Chambers of Commerce submitted arbitration panels so that the Philippine Council of the International Chamber of Commerce established an International Commercial Arbitration Commission.

6. ADVANTAGES AND DISADVANTAGES OF ARBITRATION

In the settlement of commercial controversies, traders have shown preference for Arbitration. They consider judicial litigation as unbusinesslike.[51] They consider arbitration the better means and the only sensible means of threshing out disputes.[52] A very brief summary of the reasons for the popularity of arbitration is hereby made. At the same time reasons for its unpopularity in some regions will also be given.

The first and most important advantage of arbitration is the expert determination of questions of facts involved in the dispute.[53]

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[49] *Idem.*

[50] Rosenthal, Techniques of International Trade 22 (1956).

[50a] Joining the International Chamber of Commerce, *supra.*

[51] Commercial Arbitration Facilities. U.N. Doc. No. ECN 1 17 T/4/5 of Oct. 18, 1954.

[52] Kopelmanas, The Settlement of Disputes in International Trade, 61 Columbia Law Review 384 (1961).

[53] Nordon, British Experience with Arbitration, 83 Univ. of Pennsylvania Law Review 314 (1934).

The judge may not be acquainted with the technical details of present-day commerce. Experts may be placed on the stand yet the judge may not fully appreciate the complexities involved since business facts are complicated.[54] The tribunal must be thoroughly familiar with the practices of the trade concerned. Arbitrators come from a panel of experienced professionals and business men who are familiar with the customs and practices of their calling.[55]

The second advantage of arbitration is the speedy settlement of disputes. An efficient business concern desires its controversies settled with utmost dispatch. Judicial litigations drag on for years. Dockets and calendars are clogged; there are plenty of postponements and continuances, expert witnesses are presented by both sides to help the judge on technical questions. A protracted trial may bring about a situation where the plaintiff may find himself before a celestial tribunal before the terrestrial tribunal could decide his case.[56]

The third advantage of arbitration is its economy aspect as it is less expensive than a litigation. There are several economies offered by arbitration. Lawyers spend less time in arbitration than in a court action, and so their fees will be smaller. Also the honorarium of expert witnesses will be saved because one or more of the arbitrators in a panel will generally be a specialist in the trade or industry involved.[57]

The fourth advantage of arbitration is its aspect of amicability. The arbitral board is an impartial body chosen by the parties. One is willing to be a good loser and there is no ill-will so that business relations are preserved between the parties.[58] Court battles are usually bitter which usually end in the rupture of trade contracts between the litigants. Adjustment of differences on a friendly basis is the aim of arbitration. The relationship between the parties remain amicable, under an atmosphere of give and take, considering that the arbitrator is the choice of the parties so that his award or decision must be accepted with good grace.[59]

The fifth advantage of arbitration is its aspect of privacy. There is no publicity attendant to a court proceeding. Sessions in

[54] How To Settle Business Disputes Painlessly, 21 Business Week, 60, 62 (November, 1961).

[55] Sturges, Commercial Arbitration or Court Application of Common Law Rules of Marketing, 34 Yale Law Journal, 480 (1952).

[56] Grossman, Arbitration and the Lawyer, 17 New York Univ. L. Q. Rev. 511 (1940). Sec. 19 of the Arbitration Act provides for the period within which the written award should be rendered by the arbitrators.

[57] How To Settle Business Disputes Painlessly, 21 Business Week, 60, 63. (November, 1961).

[58] Bush, Arbitration in Business, 146, The Outlook, 85 (1927).

[59] Beatty, Voluntary Arbitration, Its Legal Status and How It Works, 22 Univ. of Kansas City Law Review, 191, 194 (1953-54)

arbitration are private and informal. No party has to wash his linen in public. An unfavorable award will in no matter injure the party's reputation and business,[60] since privacy is a bedrock principle in commercial arbitration.

The sixth advantage of arbitration is the non-legalistic nature of arbitration proceedings insuring the flexibility of arbitration procedure and finality of awards. Arbitration proceedings are informal and not bound by the strict rules of evidence.[61] Persons who invest in a foreign country have more peace of mind in the assurance that if a dispute arises between them and the host country, they will not be subject to the strict legal system of the country.[62] Several arbitral institutions require that arbitral awards rendered under their auspices are final and not subject to appeal, so that parties wishing to avail of such arbitration facilities have to waive in advance their right to any type of appeal from the arbitral award to the judicial tribunals.[63] This greatly enhances the economy and speed of arbitration.[64]

The seventh advantage of arbitration is its aspect of impartiality. On engaged in international trade prefers arbitration to local judicial remedies because of the fear of discrimination against foreigners. Such discrimination may be shown directly in actual bias or indirectly through preference for local principles of law.[65] Any such prejudice arising from a foreign forum may be avoided by recourse to arbitration.

The eighth advantage of arbitration is its aspect of party autonomy. Arbitration involves exercise of choice by the parties. Instead of resorting to the regularly constituted courts, merchants depend upon other merchants to decide their controversy. In the arbitral clause the parties exercise autonomy, thus they may stipulate the venue they desire, their choice of arbitrators, the place of arbitration, and the arbitral procedure. Commercial arbitration is unique as it is the merchants' own method of settling disputes and remedying differences without going outside the business community.[66]

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[60] Grossman, *op. cit., supra*, note 6.

[61] Sirefman, In Search of a Better Theory of Arbitration, 15 Arbitration Journal 27 (1960).

[62] Rouhani, Arbitration of Oil Agreements, 17 Arbitration Journal 109 (1962).

[63] Consolidated Report, Secretary-General, N.N. Doc. E/Conf. 26/4 April 24, 1958.

[64] You Don't Need To Sue, 38 Fortune 89, 90 (1938).

[65] Hyning and Haight, International Commercial Arbitration, 48 American Bar Assn. Journal 236 (1962).

[66] How To Settle Your Business Disputes Painless, 21 Business Week 60, 63 (November, 1961).

In October, 1963 the advantages of commercial arbitration had been discussed by Philippine Supreme Court Chief Justice Cesar Bengzon before the Philippine Council of the International Chamber of Commerce and Senator Lorenzo Sumulong before the Philippine Business and Civic Assembly. The Chief Justice wholeheartedly endorsed recourse to arbitration in commercial disputes.

However commercial arbitration has not been universally accepted.[67] It still has defects or infirmities which cause its unpopularity in some regions. Compared with the judicial process, the arbitration proceedings are loose and flexible, thus affording a recalcitrant party with means for evasion. It has been feared that where arbitration gains, it is at the sacrifice of due process of law.[68]

The main obstacle to the development of commercial arbitration is the difficulty of bringing the parties together to arbitrate their dispute. It is hard to induce the parties to include an arbitration clause in their contract. This is a great problem with regards to public bodies of government entities who are now engaging in commercial transactions. Differences in laws, arbitral procedures, and conflicts rules of the different legal systems afford a recalcitrant party with opportunities for delay and evasion. Uniformity of arbitration laws will therefore greatly promote arbitration.[69]

Mention should also be made of the deficient knowledge of businessmen as regards existing arbitration facilities and procedure. They also lack confidence in the enforcement of arbitral awards in foreign countries. Lack of compulsion in international commercial arbitration may result in the arbitral proceeding being brought to a standstill by a party refusing to appoint his arbitrator.[70] Lastly the emerging economies would not submit to arbitration their disputes in foreign investments for they consider this as a limitation on their newly-acquired sovereignty.[71]

In 1958, the U.N. Secretary-General made a study of the factors which obstruct the progress of arbitration.[72] Majority of the eleven problems the Philippine law is found to be wanting or inadequate factors he enumerated reappeared in the list of main problems of

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[67] Contini, International Commercial Arbitration, 8 American Journal of Comparative Law 283 (1959).

[68] Nussbaum, Treaties on Commercial Arbitration—A Test of International Private Law Legislation, 56 Harvard Law Review, 219, 240 (1942).

[69] Consolidated Report, Secretary-General, to the Economic and Social Council, E/Conf. 26/4 April 24, 1958.

[70] Nussbaum, *op. cit., supra,* note 18.

[71] Snyder, Foreign Investment Protection—Is International Arbitration An Answer? 40 North Carolina Law Review 665 (1962).

[72] Consolidated Report, Secretary-General, to the Economic and Social Council E/Conf. 26/4 April 24, 1958.

commercial arbitration requiring legislative action as prepared by the Committee on Trade of the ECAFE of the recent Bangkok Conference of the Working Party of Experts on Commercial Arbitration. The twelve (12) following problems are among the main problems listed by the ECAFE to merit further consideration: (1) difficulties in determining the law applicable to the validity of an arbitration agreement; (2) suspension or exclusion of the courts' jurisdiction when there is a valid arbitration agreement; (3) the capacity of governmental agencies and public bodies to submit to arbitration; (4) the capacity of foreigners to become arbitrators; (5) the power of the arbitrators to decide the matters relating to their own competence; (6) statement of the reasons for the award; (7) difficulties in determining the law applicable to arbitration procedure; (8) consequences of default; (9) difficulties in determining the law applicable to the substance of the award, and as to whether decisions on the basis of equity or commercial usages are valid; (10) judicial review of arbitral awards; (11) delays, technical obstacles and costs in enforcement of awards, in particular as regards foreign awards; and (12) power to compel the attendance of witnesses who are within the jurisdiction of the arbitration tribunal.[73] Each of these problems will be dealt with in the light of the pertinent international conventions and treaties and of the existing Philippine law on the matter, to determine whether Philippine law is sufficient and adequate. If in any of the problems the Philippine law is found to be wanting or inadequate then the corresponding legislative action is recommended.

B. MAIN PROBLEMS REQUIRING LEGISLATIVE ACTION

1. DIFFICULTIES IN DETERMINING THE LAW APPLICABLE TO THE VALIDITY OF AN ARBITRATION AGREEMENT

Under Section 2 of the Arbitration Law,[74] an existing controversy which may be the subject of an action can be submitted by the parties to arbitration. The agreement thus to arbitrate is called a submission. Likewise, the parties to any contract may in such contract agree to settle by arbitration a controversy thereafter arising between them. Such arbitration clause and submission are the two types of arbitration agreements recognized by the Arbitration Law. Both are declared valid, enforceable and irrevocable, save upon such grounds as exist at law for the revocation of any contract.[75]

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[73] Domke, The Bangkok Conference on Commercial Arbitration, 17 Arbitration Journal, 23–33 (1962).

[74] Republic Act No. 876, effective December 20, 1953.

[75] Section 2, *Id.*

The validity of a submission or arbitration clause may be attacked either before, during or after the arbitration has taken place. The party upon whom demand for arbitration is made can resist the proceeding for the enforcement of the agreement before the court by a plea of its nullity.[76] A party may defeat a motion to stay a suit brought in violation of an arbitration agreement by contesting the validity of that agreement.[77] The party may likewise submit to the determination of the arbitrators the validity or invalidity of the arbitration agreement.[78] In enforcement proceedings, the court can be confronted with the burden of deciding whether or not the submission or arbitration clause is valid in the first place. In all the foregoing situations, the common problem involved is the choice of legal system to be applied in determining the validity of the arbitration agreement.

When the case at issue has its points of contact localized in the Philippines, Philippine Law will undoubtedly apply. The difficulty in the choice of law arises where foreign elements are attendant in a given case. And these occur frequently in international trade transactions. For instance, a contract of sale between X, a Japanese company and Y, a Philippine firm, entered into in Japan with the Philippines as *locus solutionis*, provides for the arbitration of differences arising under the contract. Y refused acceptance of the goods. X demanded arbitration and sought the aid of Philippine courts to enforce the arbitration clause. In the proceeding, Y contended that the clause is invalid. Which law will the court apply to resolve the question of validity? Should it be Philippine law or Japanese law?

At this juncture, it is pertinent to inquire whether the Philippines views arbitration as substantive or solely procedural. It will be noted that provisions on arbitration are principally found in the new Civil Code.[79] Said Code grants to persons the right to submit their controversies to one or more arbitrators for decision.[80] Arbitration Law which was subsequently enacted to *supplement*[81] the provisions of the new Civil Code, affirms the validity, enforceability and irrevocability of submissions and Arbitration Law, in part provides:

> "Two or more persons or parties may submit to the arbitration of one or more arbitrators any controversy existing between them at the

[76] Section 6, *Id.*
[77] Section 7, *Id.*
[78] See discussion on the power of arbitrators to decide the matters relating to their own competence in other portions of this article.
[79] Republic Act No. 386, effective August 30, 1950.
[80] Article 2042.
[81] Umbao v. Yap, G.R. No. L-8933, February 28, 1957; Section 31, Republic Act No. 876.

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."

The Philippine Supreme Court has not had any occasion to apply or interpret this particular section of the Act. The United States Federal Supreme Court, however, in the case of *Standard Magnesium Corporation v. Fuchs*,[82] made the following observation on a similar provision of the U.S. Arbitration Act, to wit:

"Section 2 of the U.S. Arbitration Act declaring arbitration agreements as valid, irrevocable and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract, abrogates the common law rule that agreements to arbitrate are revocable by either party at any time before an award has been made and places arbitration agreements on the same footing as other contracts. The effect given to arbitration by section 2 of the Act brings into being substantive rights. Such section is not purely remedial." [83]

The contractual character of arbitration agreements is further shown by the provision of the new Civil Code to the effect that an agreement to arbitrate is a contract [84] whose voidability is governed by the provision on contracts in general.[85] In addition, the Arbitra-

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[82] 251 F. 2d 455 (1957). The contrary view of Judge Cardozo in the Matter of Berkovitz v. Arbib & Houlberg (130 N.E. 288 [1921] should not mislead the reader for it is plain *obiter dictum*. It runs:

"The common law limitation upon the enforcement of promises to arbitrate is part of the law of remedies . . . The rule to be applied is the law of the forum. Both in this court and elsewhere, the law has been so declared. Arbitration is a form of procedure whereby differences may be settled. It is not a definition of rights and wrongs out of which differences grow. This statute did not attach a new obligation to sales already made. It vindicated by a new method the obligation then existing."

The questions actually decided by the Berkovitz case were not questions of the conflict of laws in the ordinary sense but the application of the New York Arbitration Act of 1920 from the standpoint of time, that is, whether it was to be applied to existing contracs and pending action. For the purpose in hand it was held that the statute was remedial and was therefore applicable to existing contracts. (Lorenzen, *Commercial Arbitration—International and Interstate Aspects*, 43 Yale L. J. 716 [1934].)

[83] This position is shared by Professor Lorenzen (*op. cit., supra*) who believes that the transformation of a revocable right to one that is irrevocable must certainly be deemed to go to the substance instead of merely to the remedy. He adds that even from a technical point of view, it would seem that a new right has been created instead of merely an additional remedy being added to an existing right. Formerly the contract was said to be "valid" but either party could withdraw from it at will before the award was rendered; suit might be brought for damages, but these were merely nominal; whereas under the modern arbitration acts, the rights of the parties have become irrevocable.

This, too, is the attitude adopted by English courts. (Heilman, *Arbitration Agreements and the Conflict of Laws*, 38 Yale L. J. 617 [1929].)

[84] Article 2043 in relation with Article 2028.

[85] Article 2043 in relation with Articles 2038, and 13330.

tion Law repeatedly refers to the arbitral agreement as the "submission of contract," [86] "Contract to arbitrate" [87] and "contract for arbitration." [88] It thus appears that under both the new Civil Code and the Arbitration Law, arbitration agreements are substantive, giving birth to rights which can specifically be enforced if necessary.[89] This is not to deny that it is purely procedural.[90] In passing it may be mentioned that the contractual character of arbitration has been frequently recognized in matters of international arbitration.[91] The decision of the French Court of Cassation of July 27, 1937, affirmed its contractual character by declaring that "the arbitral awards share part of the contractual character of the agreement of which they are a part and obligates the contracting parties in whatever place it may be, as does any contract which *is not contrary to public policy.*" [92]

Having determined the substantive, contractual character of arbitration agreements, discussion of the Philippine conflicts rule on the question of validity is now in order.

The new Civil Code does not contain any conflicts rule on the validity of arbitration agreements specifically. Since, however, arbitration agreements are a species of contracts, it is submitted that the provisions governing contracts in general have suppletory application to them. It is in this light that the following observations will be made.

The new Civil Code provides that the forms and solemnities of contracts shall be governed by the laws of the country in which they are executed.[93] In this connection, the Code of Commerce provides that contracts executed abroad should observe the formalities prescribed by the law of the place where they were executed even if such forms are not required by Philippine law.[94] The law of the place of contracting then is the test of the formal validity of contracts. Thus, an oral arbitration agreement entered into in the Philippines would be invalid under this conflicts rule. On the other hand, an oral arbitration agreement in certain instances, entered into in Germany

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[86] Sections 2, 4, 8, 12, 22 and 24.
[87] Sections 4, 5, 18, and 28.
[88] Sections 4 and 8.
[89] Section 4, Republic Act No. 876.
[90] Heilman, *Arbitration Agreements and the Conflict of Laws*, 38 Yale L. J. 617 (1929).
[91] Carabiber, *Conditions of Development of International Commercial Arbitration* in INTERNATIONAL TRADE ARBITRATION—A ROAD TO WORLD-WIDE COOPERATION (Domke, ed. 1958) 149.
[92] Cited in Carabiber, *op. cit.*, note 18, *supra.*
[93] Article 17, paragraph 1.
[94] Article 52.

would be upheld by Philippine courts.[95] But when the contract is executed before the diplomatic or consular officials of the Republic of the Philippines in a foreign country, the solemnities established by Philippine laws shall be observed in their execution.[96]

As regards the essential validity of contracts, it seems that the Philippine law is not clear on the point. No definite legal system chosen by the proper points of contact, is indicated as determinative. Instead, the new Civil Code simply states in the negative that "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 determination or conventions agreed upon in a foreign country.[97] This provision gives the impression that an arbitration agreement deemed valid under the proper law must yet be tested by Philippine prohibitive laws, public order, public policy and good customs considerations before said agreement can really be enforced as valid in this jurisdiction. Thus, the important question of which law should initially determine the essential validity of the agreement, is left unanswered.

As can be seen, the new Civil Code is silent on the proper law of the contract. This omission, in the light of the presence of a conflicts rule on formal validity, appears intentional.[98] It is not surprising that the Code Commission chose to leave open the problem. Indeed, as Professor Leflar has observed, "no area in the entire law of conflict of laws is more confused than that concerning the general validity of contracts." [99] Three leading rules have been applied in various jurisdictions, to wit: (1) the *lex contractus* rule, whereby the law of the place of contracting determines its validity; (2) the *lex solutionis* rule, whereby the law of the place of performance is controlling; and the (3) the *lex intentionis* rule which makes the law intended by the parties to govern their contract, controlling so long as such law has some real and substantial connection with the contract.

The Philippine Supreme Court in the early case of *Insular Government v. Frank*,[100] made the statement that "No rule is better

[95] In Germany, a verbal arbitration agreement is sufficient if both parties are so-called "traders of full status". In practice, though most arbitration agreements between such parties are reduced to writing for purposes of evidence. Where, however, one of the parties is a so-called "trader of minor status" the agreement will have to be in writing and contained in a separate document. (Article 1027 of the German Code of Civil Procedure.)

[96] Article 17, paragraph 2, new Civil Code.

[97] Article 17, paragraph 3, new Civil Code.

[98] SALONGA, PRIVATE INTERNATIONAL LAW 303 (1957).

[99] LEFLAR, THE LAW OF CONFLICT OF LAWS 32 (1959).

[100] 13 Phil. 236 (1909).

settled than that matters bearing upon the * * * validity of a contract are determined by the law of the place where the contract is made." This remark, aside from being gratuitous and inaccurate,[101] is clearly an *obiter dictum* merely. No question of essential validity was presented in the Frank case. The only issue involved therein was whether Frank, who was a minor under the then Philippine law, had the capacity to enter into, and be bound by, a contract with the Philippine Government. The case, therefore, has no value as a definitive declaration of the conflicts rule on the essential validity of contracts. The further circumstance that the Code Commission did not incorporate the statement in the new Civil Code militates against its weight, if any. Later decisions of the Supreme Court have been unavailing on the problem. In view of this gap in the Philippine law and jurisprudence it is submitted that some legislative action be taken in order that a definitive conflicts rule on the essential validity of contracts, particularly of arbitration agreements, be had. The importance of having such conflicts rule cannot be overemphasized especially in the field of international commercial arbitration. Traders need to know the state of Philippine law on the question so as to enable them to guard against frustration of commercial expectations.

As earlier noted, there are two theories of arbitration—one substantive and the other procedural.[102] The former treats the arbitration agreement as part of the principal contract and subject to the same law governing the principal contract.[103] The latter theory considers arbitration agreements as purely remedial in character and subjects the same to the law governing procedure. In the 1920's it was felt that the first thesis seemed too vague and its details too much in dispute to become formalized in treaties.[104] The second although found objectionable on the ground that it encouraged forum-

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[101] For an extended criticism of the statement see SALONGA, *op. cit.*, note 25, *supra*.

[102] For a thorough discussion on these theories, see Isaacs, *Two Views of Commercial Arbitration*, 60 Harv. L. Rev. 929 (1927); Heilman, *Arbitration Agreements and the Conflict of Laws*, 38 Yale L. J. 617 (1929); and Lorenzen, *Commercial Arbitration—International and Interstate Aspects*, 43 Yale L. J. 716 (1934).

[103] A contrary view appears in the 1957 Amsterdam Resolution of the Institute of International Law, article 6 of which reads:

> "The conditions for the validity of a submission and of the arbitral clause shall not necessarily be subject to the same law as that applicable to the difference. These conditions shall be regulated by the law in force in the country of the seat of the arbitral tribunal, without it being necessary to distinguish whether the arbitral clause is or is not an integral part of the contract giving rise to a difference. (Cited in Domke, *A Report of the 1961 Paris Arbitration Conference*, 16 Arb. J. 131 [1961].)

[104] Mezger, *The Arbitrator and Private International Law* in INTERNATIONAL TRADE ARBITRATION—A ROAD TO WORLD-WIDE COOPERATION (Domke, ed. 1958) 229.

shopping,[105] sill had many adherents. It was for this reason that the Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention of 1927 intentionally refrained from specifying the law by which the validity of arbitration agreements was determined.[106] The German Government proposed a specific provision in this respect, but no agreement could be reached and the question was referred to the Hague Conference on Private International Law.[107]

The Geneva Convention provided that in order that the arbitral award could be enforced it was necessary, among other things, that said award had been made "in pursuance of a submission to arbitration which is valid under the law applicable thereto." [108] The effect of this was to bring into play the conflict-of-laws rules of the country of enforcement so as to determine the legal system which was to resolve the issue of validity of the arbitration agreement.[109] Thus, the Geneva Convention left to the conflicts rules of each signatory nation the determination of the validity of the arbitration agreement. The inevitable complexities and uncertainties attendant [110] to the application of this solution led to agitation for reforms.

The 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards,[111] which supersedes for the Contracting Parties, both the 1923 Protocol and the 1927 Convention, now defined the applicable law in the text itself. Under Article V, section 1(a) of the New York Convention, recognition and enforcement of the award may be refused if 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 the country where the award was made.[111] The autonomy of the parties is thus primordial.[112] Only in the absence of an express selection of the appli-

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[105] In commercial arbitration, "The Prom policy is to enforce all agreements as written, regardless of changes of forum. The parties to the arbitration agreement expressly contracted for this type of settlement. By applying the substantive label to such agreements the expectations of the parties will be fulfilled. If they are called procedural, however, the parties are denied a right which they would have had in the state where the contract was made. The law should not permit a party to a contract to escape his obligations by bringing suit in a state which does not have an arbitration statute of its own." (Note: *Commercial Arbitration and the Conflict of Laws*, 56 Columi L. Rev. 902 [1956].)

[106] Mezger, *op. cit.*, note 31, *supra*.

[107] Lorenzen, *Commercial Arbitration: Enforcement of Foreign Awards*, 55 Yale L. J. 39 (1935) citing 2 NUSSBAUM 251.1

[108] Article I, paragraph 2(a).

[109] Pisar, *The United Nations Convention on Foreign Arbitral Awards*, 33 So. Cal. L. Rev. 14 (1959).

[110] U.N. Doc. No. E. Conf. 26/8/Rev. 1.

[111] Under the same section, the capacity of the parties is, however, subject to the law applicable to them.

[112] Even before the adoption of the New York Convention, the rule in England has been that the question of validity of the agreement to arbitrate is controlled by the intention of the parties as gathered from the contract as a whole

cable law does the law of the place of arbitration now take over. The far-reaching significance of this is the abolition of the conflict of national legal systems which was previously required to be resolved under the choice of law rules of the forum.

Article II, section 3 of the New York Convention 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 within the meaning of this article, 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." Here the question is not cast in terms of validity. However, the outcome of the motion to stay judicial proceedings allegedly instituted in contravention of an arbitration agreement, may, nevertheless, depend on the court's decision on whether or not the agreement is valid in the sense that it is not "null and void, inoperative or incapable of being performed.[113] Here the law under which the issue of validity is to be resolved is not indicated. It could be presumed that the judge is free to apply the entire law of the forum, including its conflicts rules. In choosing the applicable law for purposes of Article II, the judge might seek inspiration in Article V and refer the issue of validity to the law chosen by the parties, or if there be none, to the law of the place of arbitration. It is only where the parties have failed to select a law, or if it is impossible to anticipate the ultimate place of arbitration, should the normal connecting factors of the forum's conflict-of-laws rules (to the extent that they do not coincide with the connecting factors provided in Article V) become operative.[114]

Even as regards the issues of formality, the New York Convention seems to relegate the *lex loci celebrationis* in favor of the *lex intentionis*. It will be observed that neither Article V, section 1(a) nor Article II, section 3 makes any distinction in respect of formal

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(STUMBERG, CONFLICT OF LAWS 275 [1951].) And in many other jurisdictions, the courts, in keeping with the implied intention of the parties to effectuate their contracts, apply to arbitration agreements the law whatever place its parties have designated as governing their agreement to arbitrate. (LEFLAR, THE LAW OF CONFLICT OF LAW. 246 [1959].) Thus, where a contract is made between parties resident in different countries or is made in one country to be performed in another, the validity and effect of an arbitration clause in the contract are to be determined (unless the contract specifically provides otherwise) by the "proper law" of the contract as a whole: that is to say, whatever system of law it was intended by the parties should govern the contract. This intention, where not expressly set out in the contract itself must be gathered from the language of the whole contract considered in the light of surrounding circumstances. (RUSSELL ON ARBITRATION [White and Walton, ed. 1957] 33 citing DICEY'S CONFLICT OF LAWS/6th ed. 1949/584.)

[113] Pisar, *op. cit.*, note 36, *supra*.

[114] *Idem*.

validity and essential validity. Presumably, therefore, the issues of validity are comprehended in said provisions, to the extent that the same are not fully covered in the partial definition of an "agreement in writing" in Article II, section 2. In this connection, however, it has been pointed out that the court seized of the problem might take refuge in the *renvoi* doctrine.[115] For by construing the law selected, or the law of the place of arbitration governing in default of selection, to mean the whole law, including its conflicts provisions, certain aspects of formal validity could be rendered capable of transmission to the normally applicable law of the place of contracting.[116] Thus, the *lex loci celebrationis* could still be summoned to resolve the issue of formal validity.

Finally, an even more recent multilateral convention, the 1961 European Convention of International Commercial Arbitration,[117] affirms the choice of applicable law provided in the New York Convention, but with greater clarity. It states:

> "In taking a decision concerning the existence or the validity of an arbitration agreement, courts of Contracting States shall examine the validity of such agreement with reference to the capacity of the parties, under the law applicable to them, and with reference to other questions
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> "(a) Under the law to which the parties have subjected their arbitration agreement;
>
> "(b) failing any indication thereon, under the law of the country in which the award is to be made;
>
> "(c) failing any indication as to the law to which the parties have subjected to agreement, and where at the time when the question is raised in court the country in which the award is to be made cannot be determined, under the competent law by virtue of the rules of conflict of the court seized of the dispute.[118]

The idea of including such conflicts rule in international conventions is to insure uniformity of treatment of the problem in as many states as possible and thus to establish certainty in this very confused area of the conflict of laws.

It is rather unfortunate that although the Philippines is a signatory to the New York Convention, yet the latter is still ineffective in this jurisdiction, not having been ratified by the Philippine Senate. The Convention will aptly fill in a long-standing gap in Philippine law and would thus eliminate many difficulties in determining the law applicable to the validity of arbitration agreements. Its ratification is therefore recommended.

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[115] *Idem.*
[116] *Idem.*
[117] U.N. Doc. E/ECE/423, E ECE/Trade, 48.
[118] Article VI, section 2.

2. SUSPENSION OR EXCLUSION OF THE COURT'S JURISDICTION WHERE THERE IS A VALID ARBITRATION AGREEMENT

The existence of a valid arbitration agreement may pose a number of questions as far as the jurisdiction of the court is concerned. To illustrate: (a) Is the existence of an arbitration agreement a ground for staying or dismissing an action allegedly brought in violation of it? (b) Will the plea of a pending arbitration be a bar to the institution of an action? (c) Is the plea of a submission entered into during the pendency of an action a bar to the continuation of the action? (d) Will the plea of an arbitral award be a bar to a re-determination on the merits of the controversy in court? and (e) Does the existence of a valid arbitration agreement actually exclude any possibility of intervention by the courts?

Some of these questions had reached the English courts as early as the fourteenth century. In *Anon v. Anon*,[119] decided in 1930, the Court of the Common Pleas was confronted with the issue of whether or not a pending arbitration was a bar to the institution of a suit. The plaintiff brought a suit of trespass. The defendant pleaded that the parties had "put themselves on the arbitration of certain persons * * * and we say that the arbiters never arbitrated, but the judgment is still pending and much discussed." The Court ruled that a pending arbitration would be a bar (as going to the action) to a cause of action based upon matters encompassed within the arbitration proceedings.

In the 1312 case of *Hardwick v. Wood*,[120] the plaintiff brought a writ of conspiracy alleging that he had brought a writ of entry and while the same was pending the parties agreed on loveday when they would submit themselves to the arbitration of arbitrators. But that during the pendency of the loveday defendant came to court and recovered by default against the plaintiff. The Court ruled:

> "Seeing that you cannot say that he hath recovered the land by false allegation, for he hath recovered it by process of law, because you did not keep the day which you had in Bench, but made default—*for no deed made in the country can extinguish in such case the jurisdiction of the King's Court*—this court ruleth that you take naught by your writ . . ." (Emphasis supplied.)[121]

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[119] 13, Rich. II, VII Ames Foundation 104 (cited in Murray, *Arbitration in the Anglo-Saxon and Early Norman Periods*, 16 Arb. J. 193 (1961).

[120] Bolland, Yearbooks of 5 Edw. II, 33 Selden Society 214 (1916) cited in Murray, *op. cit.*, note 1, *supra*.

[121] This is the germ of the theory of ousting the court of jurisdiction laid down in the case of Kill v. Hollister, *infra*.

In 1388, three cases seemingly recognized the doctrine that a valid arbitration award would bar subsequent attempts to re-litigate controversies embraced by the arbitration proceedings.[122]

The well-known case of *Kill v. Hollister* [123] decided in 1746, enunciated the doctrine that an agreement to arbitrate ousted the courts of jurisdiction and was therefore contrary to public policy.[124] For this reason the common law courts refused to enforce such agreements or even to stay judicial actions brought in violation of them.[125] Neither could the aggrieved party recover more than nominal damages for the breach of the agreement on the theory that there could be no actual injury in forcing people to litigate in the King's own courts of justice.[126]

It was Lord Campbell in the case of *Scott v. Avery*,[127] who first broke away from this revocability rule. Here, Lord Campbell declared that an agreement not to resort to the courts of law or equity until after an arbitral determination of the claims of the parties was sound policy and did not oust the courts of jurisdiction, but merely established a valid condition precedent to jurisdiction.[128] In this case, the Court refused to entertain jurisdiction of a dispute arising from a contract of insurance which the parties had agreed to submit to arbitration. The parties had the right to enter into such agreement and there was no vital rule of public policy which interfered with the enforcement of the agreement to arbitrate. "On the contrary, public policy seems to require that effect should be given to the contract of the parties. For what pretense can there be for saying that there is anything contrary to public policy in allowing the parties to contract, that they shall not be liable to any action until their liability has been detertmined by a domestic and private tribunal, upon which they themselves agreed?" [129]

In the Philippines, the earliest case on arbitration, *Wahl and Wahl v. Donaldson Sims & Co.*,[130] posited the rule that where there is a stipulation that all matters in dispute are to be referred to

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[122] Murray, *op. cit.*, note 1, *supra*.

[123] I Wills. K. B. 129, cited in Murray, *op. cit.*, *supra*.

[124] For an extended discussion why the Court adopted this principle, see Sayre, *Development of Commercial Arbitration Law*, 37 Yale Y. L. 595 (1928).

[125] Introductory note, Commercial Arbitration: Restatement of the Law of Conflict of Laws, 16 Arb. J. 183 (1961).

[126] Sayre, *op. cit.* note 6, *supra*.

[127] 5 H. L. Cas. 811 (1856) cited in Lorenzen, Commercial Arbitration—International and Interstate Aspects, 43 Yale L. J. 716 (1934).

[128] *Id.*

[129] Cited in Buenconsejo, *Can the Philippine Legislature Pass an Arbitration Act Without Ratification by Congress?* 10 Phil. L. J. 69 (1930).

[130] 2 Phil. 301 (1903).

arbitrators and to them alone, such stipulation is contrary to public policy and cannot oust the courts of jurisdiction.

The facts of the case show that the plaintiffs chartered to the defendants a ship called *Petrarch.* In an action to recover rentals due upon the contract, the defendants demurred on the ground of lack of jurisdiction in view of the following arbitration clause in the contracts:

> "If there should arise any difference of opinion between the parties to this contract, whether it may be with reference to the principal matter or in any detail, this difference shall be referred for arbitration to two competent persons in Hongkong, one of whom shall be selected by each of the contracting parties, with the power to call in a third party in the event of a disagreement; the majority of the opinions shall be final and obligatory to the end of compelling any payment. This award may be made a rule of the court."

Upon the issue the Supreme Court held:

> "Agreements to refer matters in dispute to arbitration have been regarded generally as attempts to oust the jurisdiction of the court, and are not enforced. The rule is thus stated in Clark on Contracts, page 432:
>
> "'A condition in a contract that disputes arising out of it shall be referred to arbitration is good where the amount of damages sustained by a breach of the contract is to be ascertained by specified arbitration before any right of action arises, but that it is illegal where all the matters in dispute of whatever sort may be referred to arbitrators and to them alone. In the first case a condition precedent to the accrual of a right of action is imposed, while in the second it is attempted to prevent any right of action accruing at all, and this cannot be permitted.'
>
> "We reach the conclusion that the Court of First Instance should have entertained jurisdiction in this case, notwithstanding the clause providing for arbitration above referred to."

This rule had been liberalized in the subsequent cases of *Chang v. Royal Exchange Assurance Corporation of London,*[131] *Allen v. Province of Tayabas,*[132] and *Chan Linte v. Law Union and Rock Insurance Co.,*[133] where the Supreme Court declared that it would be highly improper for courts out of untoward jealousy to annul laws or agreements which seek to oust the courts of their jurisdiction. Unless the agreement is such as absolutely to close the doors of the courts against the parties, which agreement would be void, courts will look with favor upon such amicable arrangements and will only with great reluctance interfere to anticipate or nullify the action of the arbitrator.

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[131] 8 Phil. 399 (1907).
[132] 38 Phil. 356 (1918).
[133] 42 Phil. 548 (1921).

In two subsequent cases, however, the Supreme Court reverted to the doctrine of the *Wahl and Wahl* case.[134] The arbitration clause involved in both cases provided that the parties should submit any and all differences that may arise between them to arbitration. Said the Court:

> "The contracting parties may covenant to submit to arbitration whatever controversy may arise from the contract, but such a covenant does not deprive the courts of jurisdiction to take cognizance of a cause arising therefrom, even though the difference was not first submitted to arbitration, unless it has been expressly stipulated, or is necessarily inferred from the text of the contract that before any action is instituted, the case must be submitted to arbitration as a condition precedent to bringing the action." [135]

The Court even went further and declared that the arbitration clause being in absolute terms, the same was therefore void.[136] It is fortunate, however, that whatever uncertainty might have been generated by these shifting attitudes of the Court, and however obsolete was the position then taken, have now been cured by the definitive declaration of the Arbitration Law that arbitration agreements *shall be valid, enforceable and irrevocable.*[137]

By express mandate of the Arbitration Law, 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 is referable to arbitration, shall stay the action or proceeding until an arbitration has been had in accordance with the terms of the agreement.[138] The applicant for the stay must not, however, be in default in proceeding with such arbitration.[139] The existence of a valid arbitration agreement or the pendency of an arbitration for that matter, is thus a bar to the institution of an action. At the same time, willingness to submit an existing controversy to arbitration is a ground for suspending an action or proceeding.[140] For this reason, a submission entered into during the pendency of a suit will be a bar to the continuation of the latter. In the foregoing manner

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[134] Vega v. San Carlos Milling Co., 51 Phil. 908 (1924) and Fuentebella v. Negros Coal Co., 50 Phil. 69 (1927).

[135] Vega v. San Carlos Milling Co., note 16, *supra.*

[136] Fuentebella v. Negros Coal Co., note 16, *supra.*

[137] Section 2.

[138] Section 7.

[139] *Id.*

[140] See Article 2043 of the new Civil Code in relation with Article 2030 of the same Code. It shall be remembered that the provisions of the new Civil Code on arbitration are still in force by express reservation in Section 31 of the Arbitration Law. Also, the Arbitration Law was enacted not to supplant but to supplement the new Civil Code provisions on arbitration. (Umbao v. Yap, G.R. No. L-8933, February 28, 1957.)

and to this extent, it can be said that the jurisdiction of the court is suspended. But still as pointed out later, the court's intervention in the arbitration proceedings may frequently be called upon.

Furthermore, an award made pursuant to a valid arbitration agreement has upon the parties the effect and authority of *res judicata*.[141] Hence, it will preclude a re-determination on the merit of the controversy in court. The case of *Chan Linte v. Law Union and Rock Insurance Co.*[142] is very much in point.

In this case the plaintiff was the holder of a fire insurance policy issued by the defendant, in the face value of ₱5,000 covering a bodega of hemp. When the hemp was destroyel by fire he sued the defendant for indemnity. The policy provided for arbitration and expressly stipulated "that it shall be a condition precedent to any right of action or suit upon this policy that the award by such arbitrator, arbitrators or umpire of the amount of the loss or damage if disputed shall first be obtained." The action was brought without making any effort to adjust the loss by arbitration. After the action was brought and upon the request of the defendant, an arbitrator was chosen to whom the evidence of the loss was submitted. The arbitrator found that the value of the hemp destroyed by fire was ₱608.34. Dissatisfied with this return, the plaintiff filed an amended complaint against the company, would his suit prosper?

Citing 5 Corpus Juris 16, the Supreme Court ruled:

> " 'The settlement of controversies by arbitration is an ancient practice at common law. In its broad sense it is a substitution, by consent of parties, of another tribunal for the tribunals provided by the ordinary processes of law; a domestic tribunal, as contra-distinguished from a regularly organized court proceeding according to the course of the common law, depending upon the voluntary act of the parties disputant in the selection of judges of their own choice. Its object is final disposition, in a speedy and inexpensive way, of the matters involved, so that they may not become the subject of future litigation between the parties.'
>
> "The plaintiff, having agreed to arbitration after the action was commenced and submitted his proof to the arbitrator, in the absence of fraud or mistake, *is estopped and bound by the award.* Where a plaintiff has commenced an action to recover upon an insurance policy and then voluntarily submits the amount of his loss to arbitration, he cannot ignore or nullify the award and treat it as void upon the ground that he is dissatisfied with the decision." [143]

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[141] Article 2043 of the new Civil Code in relation with article 2037 of the same Code.

[142] 42 Phil. 548 (1921).

[143] The strength of this ruling is even greater now in the fact of strong policy considerations favoring arbitration.

Finally, the scope of judicial intervention in arbitration proceedings will now be discussed. There are many occasions where court action becomes necessary either to enforce the arbitration agreement or to protect the rights of the parties. For instance, under Section 6 of the Arbitration Law, a party aggrieved by the failure, neglect or refusal of another to perform under an agreement to arbitrate may petition the court for an order directing that such arbitration proceed in the manner provided for in such agreement.[144] Again, if the arbitration agreement does not provide for the method of naming the arbitrator or arbitrators the court shall designate an arbitrator or arbitrators.[145] The court shall also 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 fifteen 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." [146]

Under Section 11, if the arbitrators do not yield to the challenge of disqualification made before them, the challenging party may renew the challenge before the court. Moreover, at any time before the award is rendered a party may petition the court to take measures to safeguard and/or conserve any matter which is the subject of the dispute in arbitration.[147] After rendition of the award, a party to the arbitration may apply to the court for an order confirming,[148] vacation, modifying or correcting the award,[149] as the case may be.

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[144] 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 direct 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 default in proceeding thereunder, an order shall be made summarily directing the parties to proceed with the arbitration in accordance with the terms thereof. (Section 6 paragraph 1.)

[145] Section 8, paragraph 1.

[146] Section 8, paragraph 2.

[147] Section 23.

[148] Section 23.

[149] The grounds for vacating the award are:

"(a) The award was procured by corruption, fraud, or other undue means; or

An appeal may likewise be taken from any such order or from a judgment entered upon an award through certiorari proceedings, but such appeals shall be limited to questions of law.[150] It thus appears that the existence of a valid arbitration agreement does not really exclude every possibility of intervention by the courts.[151]

The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards[152] provides for the suspension of the court's jurisdiction in this wise:

> "The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article 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."[153]

This is substantially the same rule embodied in the Arbitration Law.[154]

In conclusion, it is submitted that no further legislative action is needed on the "suspension or exclusion of the court's jurisdiction when there is a valid arbitration agreement" aspect of commercial arbitration in the Philippines.

"(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 nine hereof, and wilfully 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 power or so imperfectly executed them, that a mutual, final and definite award upon the subject matter submitted to them was not made.

"Where the award is vacated, the court in its discretion, may direct a new hearing either before the same or new arbitrator or arbitrators." (Section 24.)

"The grounds for modifying or correcting the award are:

"(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." (Section 25).

[150] Section 29.

[151] In England, the power of the courts over arbitration is even more ample. Thus, no arbitration agreement is effective as such by which the parties agree that the courts of law shall have no jurisdiction over any dispute which has arisen or may arise and that arbitrators appointed under the agreement shall have exclusive jurisdiction. The courts, too, have complete discretion to stay or not to stay an action brought in violation of an agreement to arbitrate. (INTERNATIONAL COMMERCIAL ARBITRATION/[Sanders, ed. 1956] 61.)

[152] U.N. Doc. E/Conf. 26/8/Rev. 1 of June 1958.

[153] Article II, Section 3.

[154] Section 7, Republic Act No. 876.

3. THE CAPACITY OF GOVERNMENTAL AGENCIES AND PUBLIC BODIES TO SUBMIT TO ARBITRATION

The ever-growing participation of governments and public bodies in the economic life of the nation has now become a famliiar phenomenon everywhere. Especially in developing countries, state activities have extended to contracts for the sale of commodities and the purchase of manufactured goods, in agreements for the construction of public utilities and for engineering services, as well as in various arrangements for loans, concessions and investments.[155] The state has nationalized a great sector of the economy formerly reserved to private entities. Indeed, its wide interests in business and industrial enterprises have been aptly described as "conquering invasions in the field of private law." [156] These developments have raised problems as to the settlement of controversies arising out of government transactions with private firms and individuals, particularly in the international level.

In the investment field, the very real problem lies in the insecurity of foreign investments, whether as an actual danger or as a subjective deterrent in the estimation of the investor. Here, the consensus is that what is lacking is not so much a definition of his right, as an effective forum in which to enforce them.[157] This lack is chiefly due to reservations which the investor might feel toward reliance either on foreign courts and agencies with which he is unfamiliar, or on the support of his own government which in practice he may have difficulty in securing and which, in many countries adhering to the Calvo clause,[158] he is under an express prohibition to enlist. For this reason, arbitration has been adopted as the alternative recourse by a number of countries either in individual concession agreements or in general investment laws.[159]

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[155] Domke, *Arbitration Between Governmental Bodies and Foreign Private Farms*, 17 Arb. J. 129 (1962).

[156] Carabiber, *Condition of Development of International Commercial Arbitration in* INTERNATIONAL TRADE ARBITRATION—A ROAD TO WORLD-WIDE COOPERATION (Domke, ed. 1958) 149.

[157] The Promotion of the International Flow of Private Capital, U.N. Doc. No. E/3325 of 26 February 1960.

[158] Special mention may be made of Latin-American countries.

[159] In Greece for example, the Law on Investment and Protection of Foreign Capital provides for the settlement of disputes, arising under the terms of the instrument of approval (issued for each investment), by arbitration and expressly permits the appointment of a foreign umpire. In Afghanistan, arbitration, at least for disputes over compensation in case of nationalization, is also provided in the Law Encouraging the Investment of Private Foreign Capital. (The Promotion of the International Flow of Private Capital, U.N. Doc. No. E/3325 of 26 February 1960.)

Dr. Glossner of Germany is of the opinion that there is at least impliedly common opinion that what people want in disputes on investments between states and individuals are appropriate means to deal with the elimination or

Likewise, private arbitration has become a popular means for resolving disputes arising from business relations.[160] Such recourse has been extended to the relations between private enterprises and public bodies.[161] In many countries, however, public bodies are prevented from agreeing to private arbitration.[162] Invariably, the chief impediment is the lack of capacity of, and hence the legal impossibility for, governmental agencies and public bodies to submit to arbitration.[163]

In countries where no constitutional or statutory prohibition exists,[164] the traditional reluctance of the government to accept state-individual arbitration is grounded on the doctrine of state immunity.

The old theory of state immunity would grant to the State integral or absolute immunity, i.e., immunity for its *acta jure imperii* as

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a fair and just appreciation of the cases of nationalization and expropriation. He advocates, therefore, resort to arbitration, saying:

> "If one follows the principle, which is true to my mind, that a good arbitration clause avoids arbitration because the parties will aim to reach friendly settlement, it should also be true that good arbitration for the settlement of nationalization and expropriation problems should exclude attempts of such measures." (Arbitration Between State and Individuals, Memorandum Submitted by Dr. Glossner of Germany, ICC Doc. No. 420/124, 5X 1961.)

Mr. Lowell Wadmond has stressed the importance of an arbitration clause in concession agreements with a foreign government. Failure to obtain an arbitration clause, he points out, might give rise to the following difficulties: First, there is the problem of exhaustion of local remedies, which must take place before the foreign office or state department of the foreign national may espouse any claim on behalf of the concessionaire. This problem is to a great degree avoided if an arbitration clause is included in the agreement, which clause may define the applicable law, the situs of the arbitration and other procedures. The mere fact that the sovereign has agreed to arbitration in itself implies that the sovereign has waived the exhaustion of local remedies. Secondly, the acceptance of an arbitration clause in the concession agreement minimizes the likelihood of serious disputes. (PROCEEDINGS OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW 69 [1961].)

[160] For the reasons for this popularity, see discussions on the advantages of arbitration in other portions of this paper.

[161] e.g., the following governmental agencies have submitted controversies to private arbitration: the National Resources Commission of China, the Argentine Institute of Trade Development, the Turkish Railway Administration, the National Iranian Oil Company, and the nationalized Czechoslovakian enterprise, formerly Dynamite Nobel, now George Dimitrov, cited in Domke, *Arbitration of State-Trading Relations*, 24 Law and Contemporary Problems 317 (1959). Also, Pacific Molasses Co. v. Comite de Ventas de la Republica Dominicano, N.Y.L.J. September 15, 1961, p. 11; ass. des Porteurs Français de Scripts Lombards v. Etat Italian et Comite des Obligataires de la Compagnie Chemine-de-fer Danube-Save-Adriatique, Juris Classeur Periodique, May 14, 1961, p. 96, cited in Domke, *A Report of the 1961 Paris Arbitration Conference*, 16 Arb. J. 131 (1961).

[162] Arbitration Law and Practice, ICC Doc. No. 420/63, 13, XII, 1956; Domke, *A Report of the 1961 Paris Arbitration Conference*, 16 Arb. J. 131 (1961).

[163] International Commercial Arbitration between States and Individuals, Memorandum by the Secretariat, ICC Doc. No. 420/93 p.x. 1958.

[164] Express constitutional and statutory prohibitions are principally found in Latin-American countries.

well as for its *acta jure gestionis*.[165] The United Kingdom and the Communist States still adhere to this.[166] On the other hand, the functionally limited or restrictive theory would grant immunity only for the *acta jure imperii* of the State but not for its *acta jure gestionis*.[167] The Philippines,[168] the United States,[169] France,[170] and the Netherlands,[171] among others, subscribe to this more realistic and progressive school of thought.

Difficulties may arise in characterizing whether an act falls under one category or the other.[172] Happily for the Philippines, a reasoned case-by-case development by the Supreme Court has evolved a formula for distinguishing the two classes of governmental activities. If the acts partake more of the nature of ordinary business (private or proprietary) rather than functions of a purely governmental character then they are classified as *acta jure gestionis* and no immunity attaches.[173] Thus, when a sovereign State[174] or its governmental agency[175] enters into a contract with a private person the former can be sued upon the theory that it has descended to the level of the individual and its consent to be sued is implied from the very act of entering into such contract.

On the other hand, if the acts partake of a governmental or public function generally without any special corporate benefit or pecuniary profit intended for the Government then they are classified as *acta jure imperii* and immunity is conferred.[176] Borderline ques-

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[165] Ignez Seidi-Hohenveldern, *Commercial Arbitration and State Immunity in* INTERNATIONAL TRADE ARBITRATION—A ROAD TO WORLD-WIDE COOPERATION (Domke, ed. 1958) 87.

[166] *Idem.*

[167] *Id.*

[168] SINCO, PHILIPPINE POLITICAL LAW, 33 (1962).

[169] Niehuss, The First Decade of the Tate Letter Policy, 60 Mich. L. Rev. 1142 (1962).

[170] Carabiber, *Conditions of Development of International Commercial Arbitration* in DOMKE, *op. cit.*, note 11, at 149.

[171] Arbitration Law and Practice, ICC Doc. No. 420/63, 13, XII, 1956.

[172] The Institute de Droit International, in its session at Aix-en-Provence on April 30, 1954, initially laid down the rule that the *lex fori* shal determine the characterization of a given activity. But then the question remains, namely, what criteria shall be used to determine whether a certain activity is truly commercial or otherwise of a private law nature in the eyes of the forum. Should it be enough that a private individual could pursue the same activities or should account be taken of the aim which the State intends to attain by the transaction? (Seidl-Hohenveldren, *op. cit.*, note 11, *supra.*)

The Jubilee Conference of the International Law Association in Brussels in August 1962, came up with the suggestion that governments should agree "to give the expression 'commercial transactions' the ordinary meaning attached to it by businessmen." (Domke, *Arbitration Between Governmental Bodies and Foreign Private Firms*, 17 Arb. J. 129 [1962].)

[173] National Airports Corporation v. Teodoro, G.R. No. L-5122, April 30, 1952.

[174] Harry Iyons Inc. v. The United States of America, G.R. No. L-11789, September 26, 1958.

[175] Santos v. Santos, G.R. No. L-4699, November 26, 1952.

[176] Metropolitan Transportation Service v. Paredes, 79 Phil. 819 (1948); Syquia, *et al.* v. Lopez, *et al.*, G.R. No. L-1648, August 17, 1949, 47 O.G. 665

tions of fact and law may arise and if the test evolved could not resolve them, there is yet room for the refinement of the formula which in appropriate case the Supreme Court may fill in.

There is no doubt, however, that as in the case of commercial or industrial corporations of which the government is the sole or controlling stockholder, a public or municipal corporation does not enjoy state immunity.[177] The charter creating a public or municipal corporation usually contains a provision that it "may sue and be sued."

If a governmental agency or public body can legally sue and be sued, does it necessarily follow that it can likewise submit to arbitration, in the absence of a constitutional or statutory prohibition? It will be noted that no such prohibition exists in the Philippines. To the contrary, it can be inferred from the provisions of the new Civil Code that governmental agencies and public bodies have authority to submit to arbitration. Under Article 2042, the same persons who may enter into a compromise may submit their controvercies to one or more arbitrators for decision. Among those authorized to enter into a compromise are juridical persons, such as the State and its political subdivisions; other corporations, institutions and entities for public interest or purpose, created by law; and corporations for private interest or purpose.[178] Indeed, Article 2033 provides that juridical persons may compromise only in the form and with the requisites which may be necessary to alienate their property. If the provisions on compromise are equally applicable to arbitrations, as in fact they are,[179] the conclusion can easily be drawn that juridical persons have authority to submit to arbitration subject only to the form and requisites necessary to alienate their property. Moreover, juridical persons have the power to incur obligations [180] and thus to conclude contracts.

In the United States, the agencies of the federal government are not specifically authorized by statute to resort to arbitration.[181] On the state level, however, the authority of public bodies to submit to arbitration disputes arising out of their private transactions has been well-established, the same being implied from their power to enter into contracts.[182]

(1951); and The Angat River Irrigation System v. Angat River Worker's Union, G.R. Nos. L-10943 and L-10944, December 28, 1957.

[177] SINCO, *op. cit.*, note 14, *supra*, at 37.

[178] Article 44, new Civil Code.

[179] Article 2043, new Civil Code.

[180] Article 46, new Civil Code.

[181] Domke, *A Report of the 1961 Paris Arbitration Conference*, 16 Arb. J. 131 (1961).

[182] *Id.*

The International Chamber of Commerce, in advocating the conclusion, with countries whose laws prohibit public bodies from resorting to arbitration, agreements removing that prohibition in international commercial relations, has pointed out that there would obviously be no need for such agreements if prohibitions of this nature were removed from national laws.[183]

At the same time, although French law prohibits the state and public bodies to resort to arbitration, as cases involving them are subject to communication to the *Ministere Public* whose function is to protect them, yet this interdiction is merely confined to contracts of an internal character and does not apply to arbitration clauses in international transactions.[184] This is the ruling of the Court of Appeals of Paris in its decision of April 10, 1957, its First President presiding.[185]

The foregoing discussions only attempt to show that the trend of modern policy is towards the recognition of the capacity of public bodies to submit to arbitration when no legal provision exists prohibiting them from so doing.[186]

In the Philippines, no question has yet reached the Supreme Court as to whether governmental agencies and public bodies can agree to arbitrate in a commercial dispute in the strict sense thereof. The state of the law is that there is no prohibition. In fact, it appears that the new Civil Code authorizes such submission. To make that legal capacity definitive, however, it may be well to adopt legislation somewhat according to the model draft as follows:

> "Any department or agency may agree to settle by arbitration any claim or controversy arising out of or with respect to such contract. Every such written agreement for arbitation shall be valid and enforceable." [187]

Ratification of the New York Convention will similarly provide the necessary authorization to governmental agencies and public bodies

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[183] Arbitration Law and Practice, ICC Doc. No. 420/63 13, XII, 1956.

[184] Carabiber, *Conditions of Development of International Commercial Arbitration* in INTERNATIONAL TRADE ARBITRATION—A ROAD TO WORLD-WIDE COOPERATION (Domke, ed. 1958) 149.

[185] The case involved a charter party between the Ministry of the Merchant Marine and a foreign shipowner.

[186] In fact, it is felt that, in this respect, arbitration between states and individuals raises no particular problem as far as commercial disputes in the proper sense of the term are concerned, since the public authorities then assume the role of traders identical to that of private firms who were joint contracting parties. (Summary Record of the Meeting of 31 October 1958 of the Commission on International Commercial Arbitration, ICC Doc. No. 420/95, 3, XII. 1958.

[187] This draft authorization was recommended by the Jubilee Conference of the International Law Association in Brussels in August 1922. (Domke, *Arbitration Between Governmental Bodies and Foreign Private Firms*, 17 Arb. J. 129 [1962].)

to submit to arbitration. It will be noted that said Convention expressly provides that the Convention shall apply to the recognition and enforcement of arbitral awards "arising out of differences between persons, whether physical or legal." [188]

Likewise, the 1961 European Convention on International Commercial Arbitration applies to "arbitration agreements concluded for the purpose of settling disputes arising from international trade between physical or legal persons." [189]

More importantly, said Convention expressly authorizes legal persons of public law to submit to arbitration, in this wise:

> "* * * legal persons considered by the law applicable to them as 'legal persons of public law' have the right to conclude valid arbitration agreements." [190]

Also, the recent treaties of friendship, commerce and navigation concluded by the United States with fourteen countries expressly disavow immunity in state-trading relations with respect not only to "suits", but also to "arbitration".[191] Significant, too, is the Soviet Union's proposal for an All-European Agreement in Economic Cooperation.[192] It would provide that:

> "The participating States undertake to give effect to arbitral decisions in disputes arising out of commercial contracts concluded by their citizens, organizations, or institutions when provision is made in the con-

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[188] Article I, section 1. Note, further, that the New York United Nations Conference on International Commercial Arbitration which had to define the scope of this Convention in Article 1, section 1, agreed to regard as superfluous an express provision stipulating that the Convention was also applicable to cases where corporate bodies under public law, "in their capacity as entities having rights and duties under private law," entered into arbitration agreements. The *intention* of the Conference clearly seems to have been *that the validity of any agreement providing for arbitration between states and individuals in the sphere of international trade should be regarded as a recognized principle*, except in the case of political transactions. (See Report of Mr. Haight on the New York Convention, ICC Doc. No. 420/90.)

[189] Article I, section, paragraph (a).

[190] Article II, paragraph 1.

[191] See *e.g.* Treaty of Friendship, Commerce and Navigation with the Republic of Korea, effective 7 November 1957. (UNITED NATIONS TREATY SERIES, v. 302; 281): "No enterprise of either Party, including corporations, associations, and government agencies and instrumentalities, which is publicly owned or controlled shall if it engages in commercial, industrial, shipping, or other business activities within the territories of the other Party, claim or enjoy, whether for itself or for its property, immunity therein from taxation, *suit, execution of judgment* or other liability to which privately owned or controlled enterprises are subject therein." (Emphasis supplied.) Similar waiver is found in similar treaties concluded with the Republic of China, the Federal Republic of Germany, Italy, Greece, Ireland, Japan, Iran, Haiti, Colombia, Nicaragua, Denmark, and the Netherlands. (Walker, *United States Treaty Policy on Commercial Arbitration:* 1946-1957 in INTERNATIONAL TRADE ARBITRATION—A ROAD TO WORLD-WIDE COOPERATION (Domke, ed. 1958) 149.

[192] U.N. Doc. No. E/ECE/270 (1957).

tract itself, or in a separate agreement expressed in the form required by the contract that disputes shall be settled by a specially or permanently constituted arbitration tribunal." [193]

Indeed, practice over the recent years and the experience of several governments as regards arbitration agreements clearly show that there are no legal objections of principle to the participation of governments as parties in arbitration proceedings between these governments and private firms.[194] The practice is not incompatible with the sovereign rights of States for international law does not deny governments the right to submit to foreign jurisdiction. If it is possible therefore for a state to voluntarily submit to a foreign court of justice, with more reason that it should be legally in order for a government to submit to arbitral decision disputes arising out of contracts to which the government in question is a party.[195] The reason is that submission to commercial arbitration is easier to reconcile with national prestige than submission to the courts of a foreign state.[196]

4. THE CAPACITY OF FOREIGNERS TO BECOME ARBITRATORS

The Arbitration Law, in enumerating the qualifications of arbitrators, is silent as to the nationality that the arbitrator should possess.[197] What is more, after specifically naming such qualifications in Section 10, the Arbitration Law, in Section 11 expressly provides that "the arbitrators may be challenged only for the reasons mentioned in the preceding section which may have arisen after the arbitration agreements or where unknown at the time of arbitration." It may be stated therefore that foreigners have the capacity to become arbitrators as long as they possess the qualifications specified by the Arbitration Law.[198] In view of this, no further legisla-

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[193] Article 9.

[194] International Commercial Arbitration Between States and Individuals, Memorandum by the Secretariat, ICD Doc. No. 420/93, 6X 1958.

[195] *Id.*

[196] Seidl-Hohenveldern, *Commercial Arbitrations and State Immunity* in INTERNATIONAL TRADE ARBITRATION—A ROAD TO WORLD-WIDE COOPERATION (Domke, ed. 1958) 87.

[197] "Section 10. Qualifications of arbitrators.—Any person appointed to serve as an arbitrator must be of age, in full enjoyment of his civil rights and know 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..."

[198] The same rule obtains in the Federal Republic of Germany (Article 1032, paragraph 3 of the German Code of Civil Procedure); Greece (Economopoulos,

tion is necessary on this aspect of commercial arbitration. In fact Article 7, Section 4 of the Rules on Conciliation and Arbitration of the Arbitration Commission of the Philippine Council of the International Chamber of Commerce provides that sole arbitrators and third arbitrators must be nationals of countries other than those of the parties. Professor Pieter Sanders, U.N. Consultant on commercial arbitration, when interviewed in Manila, stated that such requirement is advisable for international disputes but not for purely domestic cases.

In a recent decision the parties agreed to refer the matter in dispute to three persons at New York for arbitration, one to be appointed by each of the parties and the third by the two so chosen, and if the two be not able to agree who the third arbitrator should be then the New York Produce Exchange is to appoint such third arbitrator. The only qualification agreed upon is that the arbitrators should be commercial men. Pursuant to the contract three American nationals served as arbitrators is New York. From the point of view of the Philippine court, this involves the enforcement of a foreign arbitral award rendered by foreign arbitrators.[199]

5. THE POWER OF ARBITRATORS TO DECIDE THE MATTERS RELATING TO THEIR OWN COMPETENCE

Do arbitrators have the power to decide the matters relating to their own competence? In the affirmative, what degree of finality does their decision on such question carry?

The matters relating to the competence of arbitrators cover such questions as (a) the existence or validity of the arbitration clause

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Greece in INTERNATIONAL COMMERCIAL ARBITRATION [Sanders, ed. 1956] 289); Denmark (Hjyle, *Denmark* in Sanders, *op. cit.*, 155); Belgium (Bernard, Belgium in Sanders, *op. cit.*, 121); Finland (Ellila, *Finland* in Sanders, *op. cit.*, 317); Sweden (Graaf, *Sweden* in Sanders, *op. cit.*, 423) France (Robert, *France* in Sanders, *op. cit.*, 251); and the United States (Domke, United States in Sanders, *op. cit.*, 197).

On th other hand, arbitrators are required to be nationals in Italy (Braschi, *Italy* in Sanders, *op. cit.*, 137); Portugal (Sanders, *Arbitration Law in Western Europe: A Comparative Survey* in INTERNATIONAL TRADE ARBITRATION—A ROAD TO WORLD-WIDE COOPERATION [Domke, ed., 1958] 325); and the Soviet Union (Hazard), *State-Trading and Arbitration* in Domke, op. cit. 93).

Express provision empowering foreigners to become arbitrators is found in the 1961 European Convention on International Commercial Arbitration, thus:

> "In arbitration covered by this convention, foreign nationals may be designated as arbitrators." (Article III).

The New York Convention of 1958, is, however, silent on the question of the nationality of arbitrators.

[199] Eastboard Navigation Co. v. Ysmael and Co. Ltd., G.R. No. L-9090, September 10, 1957.

or submission; (b) the existence or validity of the main contract if the validity of the arbitration clause depends on the validity of the main contract; (c) whether or not the dispute to be arbitrated falls within the terms of the arbitration agreement; (d) the limits of the authority conferred upon the arbitrators by the terms of the reference; and to a certain extent (e) the qualification or disqualification of the arbitrators.

Under the Arbitration Law, the power to determine the existence or validity of the arbitration agreement is vested, even initially, in the courts. Thus, Section 6 provides:

> "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. x x x The court shall hear the parties, and upon being satisfied that the making of the agreement x x x 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 x x x 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, x x x 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 . . ."

It thus appears that a party to an arbitration proceeding who desires to contest the existence or validity of the arbitration agreement, and for that matter the jurisdiction of the arbitrators, need not and logically cannot, raise that plea before the arbitrators. Said party need only do nothing but wait for the other party to bring the matter in court. It will be the court who will decide the issue.

Whether or not the dispute to be arbitrated falls within the terms of the arbitration agreement, is a matter that is delicately linked with the question of the existence of an arbitration agreement as far as the dispute before the arbitrators is concerned. For, it may be agreed that, if the dispute is completely outside the scope of the reference, it can be asserted that no submission exists really as regards that particular controversy. The position, then, here taken is that the issue in question has to be ventilated before, and resolved by, the court.

On the other hand, it will be the arbitrators rather than the court who will initially determine the extent of their authority as conferred by the arbitration agreement. However, their opinion or

action in this respect is subject to the review of the court in proceedings to vacate,[200] modify or correct[201] the award.[202]

Likewise, with respect to the disqualification of arbitrators, "the challenge shall be made before them."[203] Only if they do not yield to the challenge may the challenging party bring the issue before the court.[204] In this case, the arbitration hearing shall be suspended while the challenging incident is discussed before the court and it shall be continued immediately after the court has delivered an order on the challenging incident.[205] Thus if an arbitrator is challenged by one of the parties the matter shall be decided by the Arbitration Commission without prejudice to the right of the challenging party under the law, as provided by Article 7, Section 5 of the Rules set by the Arbitration Commission of the Philippine Council of the International Chamber of Commerce.

In progressive jurisdiction, the trend favors the power of arbitrators to decide upon their own competence.[206] In France, for example, a decision of the Court of Cassation of February 22, 1949, holds that "since every jurisdiction, even when not that of regular courts, is judge of its own competence, the arbitrators have the power and the duty to make sure that, under the agreement to arbitrate signed by the interested parties, they are competent to determine the dispute brought before them.[207] Again, a decision of the same court of January 22, 1957 holds that "arbitrators must make sure of the validity and of the limits of the agreement defining their power," adding that to distinguish between the competence proper on the one hand, and the taking of the office (investure) on the other, is not justifiable from a rational point of view.[208]

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[200] Section 24 of the Arbitration Law provides: "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:

(d) 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..."

[201] Section 25 of the Arbitration Law provides: "In any 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:

"(b) Where the arbitrators have awarded upon a matter not submitted to them, not affecting the merits of the decision upon the matter submitted..."

[202] Section 26, paragraph 3 of the Arbitration Law states: "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."

[203] Section 11, paragraph 2, Arbitration Law.

[204] Section 11, paragraph 3, Arbitration Law.

[205] *Id.*

[206] Carabiber, *Conditions of Development of International Trade Arbitration* in INTERNATIONAL TRADE ARBITRATION—A ROAD TO WORLD-WIDE COOPERATION (Domke, ed. 1959) 149 at 152.

[207] Cited in Carabiber, *op. cit.*, note 7, *supra*.

[208] *Id.*

In West Germany, a recent decision of the Federal Court of March 3, 1955, likewise holds openly in favor of the competence of the arbitrator.[209] This decision affirms a former ruling that the arbitrator has power to determine the validity or nullity of the arbitration clause, and whereunder the nullity of one part of the contract which leads to the nullity of the contract as a whole, does not apply to such clause, which is independent of the rest of the contract.[210]

To top all those, international movements for the unification of the law on commercial arbitration has recognized the soundness of the principle. Arbitrators, it has been advocated, should be given the power to go with the arbitration case and to decide the dispute rendering their award thereon, notwithstanding the plea of incompetence.[211] Then only after the award has been rendered will the court have a possibility to pass upon its validity, that is to say, to investigate whether the award is based on a valid arbitration agreement.[212]

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[209] *Id.*

[210] *Id.* In commercial arbitration, a frequent question is whether the invalidity of the contract, especially for alleged fraud in the inducement of the contract, also nullifies the arbitration clause, and whether this issue is referable to a court or to the arbitrators themselves. Professor F. E. Klein of the University of Basle, Switzerland (the reporter of the First Commission of the 1961 Paris Conference on International Commercial Arbitration) is of the opinion that the arbitration clause is independent of, and not affected by any deficiencies of the main contract particularly because the function of said clause is different from that of other provisions of the contract.

There are cases decided by the Federal Supreme Court of the United States that have also adopted this separability approach appealing with the question of fraudulent inducement of a contract containing an arbitration clause. Under this doctrine, an allegation of fraud in the inducement of the principal contract would clearly be a matter to be determined by the arbitrator. In some state jurisdictions, such as New York, the principal agreement and the arbitration clause are considered indivisible parts of a single contract; any allegation of fraud, if proven, would defeat the entire contract. That is why the New York courts inquire into the scope of the arbitration agreement before determining whether the issue of fraud would be a bar to arbitration. A most recent decision of the New York Supreme Court (Fabrex Corporation v. Winard Sales Company, 200 N.Y.S. 2d 278 [1960], however, holds that where a contract contains a broad arbitration clause, even a request for rescission of the contract based upon fraud in the inducement will be left for the determination of the arbitrators. Otherwise, said the court, a bare allegation of fraud in the inducement in any contract would be sufficient to defeat every arbitration." In a recent federal decision the court, in dealing with New York law, stated: "We believe it fair to say that on the basis of these cases there is a trend in the New York decisions, if not towards an acceptance of separability, at least in the direction of a more careful consideration of what is sought when the party opposing arbitration cries fraud." (Commonwealth Oil Refining Company, Inc. v. The Lummus Co., 280 F. 2d 915, cert. denied 364 U.S. 911 [1960].) See Domke *A Report of the 1961 Paris Arbitration Conference.* 16 Arb. J. 131 (1961).

[211] Sanders, *Arbitration Law in Western Europe: A Comparative Survey* in INTERNATIONAL TRADE ARBITRATION—A ROAD TO WORLD-WIDE COOPERATION (Domke, ed. 1958) 137, at 140.

[212] *Id.* In this connection, it has been suggested that a party, who defended his case before arbitrators without bringing a plea of incompetent, cannot

In the same vein, the First Commission of the 1961 Paris Conference on Arbitration recommended that "arbitrators should be authorized, subject to ultimate judicial control and without depriving themselves of the right to decide on the merits, to inquire into and determine their own jurisdiction and to rule upon the existence and the validity of the arbitration agreement." [213]

The Paris Conference which adopted that recommendation of the First Commission followed the trend which prevails in the practice of some European countries and under the arbitration rules of the International Chamber of Commerce, which latter provide in Article 13 (4), that "unless otherwise stipulated, the arbitrators shall not cease to have jurisdiction by reason of an allegation that the contract is null and void or non-existent." [214] The Conference therefore recommended the insertion of the following arbitration clause:

> "All disputes which may arise out of the present contract in regard to its interpretation, execution or frustration, shall be resolved by arbitration (here set out the terms of the agreement to refer). Subject to judicial control of the validity of the award, the arbitrators are entitled to rule on the existence and validity of the arbitration agreement as well as on the existence and validity of the main contract, and in the event of nullity, discharge or frustration of the main contract to make an award on the consequences arising therefrom." [215]

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later on, after the rendition of the award, invoke the incompetence of arbitrators before the court. (*Id.*) This suggestion is now incorporated in the European Convention on International Commercial Arbitration, in this wise:

> "The Party which intends to raise a plea as to the arbitrator's jurisdiction based on the fact that the arbitration agreement was either non-existent or null and void or had lapsed shall do so during the arbitration proceedings, not later than the delivery of its statement of claim or defense relating to the substance of the dispute; those based on the fact that an arbitrator has exceeded his terms of reference shall be raised during the arbitration proceedings as soon as the question on which the arbitrator is alleged to have no jurisdiction is raised during the arbitral procedure. Where the delay in raising the plea is due to a cause which the arbitrator deems justified, the arbitrator shall declare the plea admissible.
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> "Pleas to the jurisdiction referred to in paragraph 1 above that have not been raised during the time limits there referred to, may not be entered either during a subsequent stage of the arbitral proceedings where they are pleas left to the sole discretion of the parties under the rule of conflict of the court seized of the substance of the dispute or the enforcement of the award. The arbitrator's decision on the delay in raising the plea, will however, be subject to judicial control." (Article V, paragraphs 1 and 2.)

[213] In the Philippines and the United States, on the other hand, the validity of the arbitration agreement has to be determined by the courts, as the authority of the arbitrators may not be self-determined.

[214] See Domke, *A Report of the 1961 Paris Arbitration Conference.* 16 Arb. J. 131 (1961).

[215] In the opinion of Mr. Martin Domke, such a clause "may indeed be helpful in cases where the parties have expressly agreed to submit the validity of the contract to the determination of the arbitrator."

Most significant is the European Convention on International Commercial Arbitration,[216] concluded by sixteen countries of Western and Eastern Europe within the framework of the United Nations Economic Commission for Europe. On the competence of arbitrators to determine their own competence, it provides:

> "Subject to any subsequent judicial control provided for under *lex fori*, the arbitrator whose jurisdiction is called in question shall be entitled to proceed with the arbitration, to rule on his own jurisdiction and to decide upon the existence or the validity of the arbitration agreement or of the contract of which the agreement forms part."[217]

These developments answer a long-felt need for the unification of commercial arbitration law particularly on the question of the power of arbitrators to decide on matters relating to their own competence.[218] The wisdom of conferring such power upon arbitrators seems disputable, however. In commercial practice, the arbitrators appointed are usually experts in commerce and trade, but not lawyers who could be expected to be at home in deciding questions of law, such as the validity of a contract, existence or validity of an arbitration agreement and the like. The Philippine law, namely that a court initially determines the challenge to the existence of a valid arbitration agreement (and thus the authority of the arbitrator) eliminates the risk of lengthy arbitration which may later be voided, either because the principal contract was considered invalid or because the dispute submitted for arbitration was not included within the terms of the reference.[219] Furthermore, delaying tactics by a party reluctant to abide by an arbitration clause or submission should be met by other means, especially court directives to proceed to arbitration.[220] Thus Philippine law is more practical and convenient and so no further legislative action is necessary on the matter.

6. STATEMENT OF THE REASONS FOR THE AWARD

Adherents of commercial arbitration point out that the main difference between the various countries as far as the arbitral award is concerned is whether the award itself must state the reasons or not. There are countries where the law itself provides compulsorily for a statement of the reasons. There are some where such reasons are provided for but the statement is not obligatory, hence, omitted. In some jurisdictions, the law itself is silent. However, it is to be noted

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[216] U.N. Doc. No. E/ECE/423 of 21 April 1961.

[217] Article V, paragraph 3.

[218] For a survey of the divergent laws on the question: see Arbitration Law and Practice, ICC Doc. No. 42058, 20, IV, 1956.

[219] The same observations were made by Domke on the U.S. Arbitration Act. (Domke, *op. cit.*, note 15).

[220] *Idem.*

that it is the usual practice in most countries to give the reasons for the award.[221]

The Philippine Arbitration Law in this regard does not compulsorily require the statement of the reasons for the arbitral award. Beyond the formalities and the acknowledgment of the arbitrators, the law is silent. The arbitrators in their award, the law says, may grant any remedy or relief which they may deem just and equitable provided that it is within the scope of the arbitration agreement of the parties. Obviously, the arbitrators have limited power for they can decide only those matters which have been submitted to them, the terms of the awards being confined to such disputes.[222]

Yet the law itself chooses to give the arbitrators a free hand to embody or not to embody the reasons in their award. However, it must be observed that any decision rendered by any court of record must express therein clearly and distinctly the facts and the law on which it is based.[223] The Rules of Court provide in the same manner for the statement of both facts and the law which is the basis of the judgment.[224] Furthermore, it must be noted that an arbitral award may reach the appellate courts through certiorari proceedings when a party moves for the correction, modification, and setting aside of the arbitral awards [225] in which case the statement of the reasons must be stated in the appellate court's decision.

The present state of our law in this regard is similar to American law. The uniform Arbitration Law of the United States provides that the award has to be in writing and signed by at least a majority of the arbitrators. No statutory provision exists whereby the arbitrators have to give a statement of the reasons for the award. It is not the practice to state the reasons even in a separate opinion.[226] Arbitration laws in Austria [227] and Denmark [228] also made no mention of whether reasons must be given in the award, hence they are usually omitted.

In Norway, the statement of the reasons is not necessary. However should either of the parties so demand, it must be embodied in the award.[229] Normally, these reasons are given even though they

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[221] Sanders, *Introduction* in INTERNATIONAL TRADE ARBITRATION (Sanders, ed. 1956), 23.
[222] Section 20, Republic Act 876.
[223] Article VIII, Section 12, CONSTITUTION OF THE PHILIPPINES.
[224] Rule 35.
[225] Sections 24 and 25, Republic Act 876.
[226] Domke, *United States* in INTERNATIONAL COMMERCIAL ARBITRATION (Sanders, ed. 1956), 197, 207.
[227] Ender, *Austria, op. cit.*, 101, 111-113.
[228] Hiefle, Denmark, *op. cit.*, 155, 165.
[229] Article 464, Norweigian Civil Procedure Act.

are not specifically demanded by the parties.[230] A similar practice exists in Sweden.[231]

Finnish law is also silent in this point; however in practice, the arbitral award usually states the reasons.[232] English Arbitration Law also follows this trend; it does not compel arbitrators to give any reason for their decisions. The arbitrators in England consider it a prudent practice not to give reasons for they might thereby afford the party against whom the award is entered an opportunity to take the dispute to the courts to have the reasons reviewed. However, if the English award is to be enforced in a country whose laws require the statement of the reasons, it will be necessary for the reasons to be stated. Usually, it is desirable, though not obligatory that an arbitrator should state briefly in his award the facts and circumstances of the dispute which he is deciding. Or else the award will in the later years be unintelligible as a record.[233]

Other foreign arbitration laws provide that the award should be drawn up like a judgment of the court, hence, the statement of the reasons of the decision must be given. However, in Belgium, the agreement of the parties concerning the matter is supreme, for they may provide that the arbitration award may or may not conform with the requisites of a judgment.[234]

The Spanish law on arbitration provided that the form of the award is that of an ordinary judgment. Hence it begins with the statement of the place of abritration and the names of the parties and the matter in issue, the concise summary of the facts, the reasons of the decisions, and enumeration of the statutes and precedents referred to if the arbitration takes place under the rules of law, and finally, the decision. It will be observed that the reasons for the decision are among the essential elements of the award.[235]

Likewise, the Greek law on arbitration provides that the form of the arbitral award is subject to the same formalities as judgments of courts of law, unless otherwise stipulated by the parties in their arbitration agreement.[236] In some jurisdictions the law is clear; the award must state the reasons which form its bases. Arbitration laws

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[230] Arntzen, *Norway*, in INTERNATIONAL COMMERCIAL ARBITRATION, *op. cit.*, 361, 377.
[231] Graaf, Sweden, *op. cit.*, 423, 433.
[232] Article 20, Code of Civil Procedure.
[233] Ellila, Finland, *op. cit.*, 171.
[234] Appeal Brussels, Jan. 3, 1929, Pas 5, quoted in Alfred, *Belgium, op. cit.*, 121, 141.
[235] De Leyva, *Spain*, in INTERNATIONAL COMMERCIAL ARBITRATION, *op. cit.*, 169, 183.
[236] Economopoules, *Greece, op. cit.*, 271, 301.

in Italy,[237] France,[238] Turkey,[239] and Netherlands [240] require such statement.

Similarly, the French law required that the award must contain three elements; the reasons on which the award is based being one of them. There had been decisions to the effect that "amiables compositeurs" need not state the reasons for their opinions but this view is still doubtful.[241] The Italian law on the matter makes it compulsory and if the award fails to comply with the requirement, it is liable to be set aside. This is irrespective of whether they are made pursuant to the rules of law or in amiable composition.[242]

In countries where statement of the reasons for the award is obligatory, the question arises whether a foreign arbitral award in the country where reasons need not be given can be enforced. Dutch courts have ruled several times that an English arbitral award in which no reasons have been given may be enforced in Netherlands although such an award if made in the Netherlands would be contrary to public policy. It is to be noted that a distinction arises between a national or domestic award and an international or foreign award. As a result there is also a distinction between national and international public policy which may be useful in some cases.[243]

It is interesting to note that in Russia, the adjudication of the questions submitted to the courts of arbitration does not require the statement of the grounds of the award.[244] However in Germany it is still questionable whether the provisions of German law [245] whereby awards are to be vacated if reasons are not stated are also applicable to foreign awards. The law itself makes no reference to that provisions nor does it expressly exempt its appluable.[246] It has been pointed out the provision does not offer sufficient grounds to deny the recognition of an arbitral award rendered without the statement of reasons under a foreign law which does not require such reasons. In other words, parties in accepting the foreign law may be presumed to have waived their right to demand the reasons for the award.[247]

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[237] Braschi, *Italy, op. cit.*, 325 341.
[238] Robert, *France, op. cit.*, 241.
[239] Necdel, *Turkey, op. cit.*, 469, 473.
[240] Sanders, *The Netherlands, op. cit.*, 387, 387.
[241] Robert, *op., cit.*, note 18, *supra.*
[242] *Braschi, op. cit.*, note 17, *supra.*
[243] *Sanders, Arbitration Law in Western Europe:* A Comparative Survey in INTERNATIONAL TRADE ARBITRATION (Domke ed., 1958), 137 at 152.
[244] Evsey, *Settlement of Disputes in Commercial Dealings with the Soviet Union*, 45 Columbia Law Review 530, 543 (1945).
[245] Article 1041, paragraph 5, German Code of Civil Procedure.
[246] Article 1044, *ibid.*
[247] Nusshaum, PROBLEMS OF INTERNATIONAL ARBITRATION 22 (1928).

The Philippine Law, it seems, is wanting in this regard. It sidesteps the issue itself by its silence giving the impression that no statement of the reasons for the award is necessary at all. But the provisions of the Constitution and the Rules of Court must be taken into consideration.

Observers postulate the view that the fact that in some countries no reasons have to be given for the award hinders the effectiveness of arbitration awards in Europe and in the Anglo-American law area. It is believed that an award for which no reasons are given lacks the power of persuasion if it is to be effected in a foreign country. It is suggested therefore, that at least for international awards all arbitral tribunal must give reasons for their awards.[248]

It is always advisable for arbitrators in every case, whether requested ir not, to publish their awards in a reasoned form. Hence, it is suggested that the Philippine law must be explicit in the matter. One writer on the subject notes:

> "If the practice were made uniform, the arbitrators would have to listen to the evidence and study the legal arguments with greater care than they sometimes do at present. It would also be desirable that, in addition to giving reasons for his award and dealing with the points of law raised by the party, the arbitrator should append a reference to the documents given him by the witnesses so that the court of review (should review be inevitable) would then have before it all the necessary materials. In cases where the sworn shorthand writer does not record the evidence, I suggest that it should be part of the duty of the arbitrator to take a sufficient note and to read it over to the witness in the presence of the parties before dismissing him.[249]

Under the Philippine law where it is possible that arbitral awards may be litigated in courts, the importance and necessity of the statement of the reasons for the awards can not be over-emphasized. And the fact that the Arbitration Law itself is silent in this matter leaves a gap which the Philippine law-making body must fill.

7. DIFFICULTIES IN DETERMINING THE LAW APPLICABLE TO ARBITRATION PROCEDURE

The doctrine of party autonomy is discernible in the field of international arbitration.[250] Even with respect to procedure the par-

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[248] Siegert, *Universal, Regional and National Measures to Further International Commercial Arbitration* in INTERNATIONAL ARBITRATION (Domke ed., 1958) 213, 222.

[249] Nordon, *British Experience with Arbitration*, 83 University of Pa. Law Review 314 at 320-321 (1934).

[250] Mezger, *The Arbitrator and Private International Law* in INTERNATIONAL TRADE ARBITRATION (Domke ed. 1958) 229.

ties to an arbitration agreement are given the freedom to embody it in their agreement.[251]

The Philippine Arbitration Law respects the agreement of the parties hence a party to an arbitration agreement 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 matter provided for in their agreement. Upon hearing the parties the court may direct the parties in a proper case to proceed with the arbitration in accordance with the terms of the arbitration agreement.[252]

The contract of arbitration governs the method of appointing the arbitrators. But if no procedure is provided by the parties in the agreement, the Court of First Instance wherein the dispute is brought to enforce the arbitration agreement has the power to designate or appoint the arbitrator or arbitrators as the case may be in proper cases.[253]

The hearings to be conducted by the arbitrators are always subject to the terms of the arbitration agreement, if any is specified therein concerning the proceedings.[254] It is the practice in the Philippines that both parties are heard; they give brief statement of the issues of the controversy or an agreed statement of the facts of the dispute. The parties during the hearing may offer such evidence as the arbitrators may require or deem necessary to the understanding and determination of the dispute. The arbitrators also determine the relevancy and materiality of the evidence offered or produced and are not bound by the Rules of Court pertaining to evidence. The arbitrators in this regard may choose to make an ocular inspection of the premises which are subject of the dispute if necessary but such inspection shall be made only in the presence of all the parties to the arbitration unless a party duly notified failed to appear in which case such an inspection shall proceed in spite of his absence.[255]

Or the parties may choose to proceed with the arbitration proceeding other than by oral submission in which case they will just submit to the arbitrators chosen by them or designated by the court the statement of facts and all documentary proofs.[256]

The Philippine rules on arbitration authorize the arbitrators to determine for themselves the procedure to be followed in the pro-

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[251] Rosenthal, *Arbitration in the Settlement of International Dispute*, 11 Law and Contemporary Problems, 808 (1946).
[252] Section 6, Rep. Act 876.
[253] Sections 8 and 9, *ibid.*
[254] Section 12, *Ibid.*
[255] Section 15, *Ibid.*
[256] Section 18, *Ibid.*

ceeding subject however to any rules of procedure that may have been adopted by the parties by previous agreement. On the other hand, arbitration clauses in standard form of contract employed in particular trades usually provide that arbitration proceedings shall be conducted according to the rules of commercial organization [257] but it seems that the Philippines has not yet reached that stage.

However, some difficulties may result when the dispute touches on some aspects of the conflicts of law. The disparity of national arbitration laws frequently interferes with the intention of the parties concerning the procedure to be followed once arbitration is resorted to. Stipulations are always possible but they may prove risky since they may be contrary with the laws of the eventual place of arbitration.[258]

In one American case [259] it was held that "arbitration relates to the law of remedies and the law of remedies is governed by the law of the forum." However, the state of the different laws of many countries is not clear. But it seems that cases applying the *lex fori* are in the majority. And moreover it is pointed out that a decision that arbitration is procedural for any particular local purpose should not control the characterization in the conflict of laws area unless a similar policy consideration exists. For the area of private international law is concerned with the prime policy of enforcing all agreements as written in whatever forum the disputes concerning the agreement are brought. This is also the presumed intention of every party to the agreement. By applying the substantive label to such agreements, the expectations of the parties will be realized. If they are to be considered procedural however, the parties are denied a right which they would have possessed if the matter were brought to the courts of the state where the contract was made.[260]

Writers on the subject suggest that arbitration agreement for private international purposes must be considered similar to the provisions of the contract itself. For it is not the intention of the law to allow the party to a contract to escape liability thereon by bringing the action on the contract in the state which possesses no arbitration statute of its own. It is often suggested that although arbitration undeniably has some peculiar remedial aspects, it would be favorable to discard the present procedural label if only for convenience and uniformity.[261]

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[257] MAYERS, THE AMERICAN LEGAL SYSTEM, 547-549 (1955).

[258] Pisar, *The U.N. Convention on Foreign Arbitral Awards*, 33 South California Law Review 14, 23-26 (1959).

[259] Mecham v. Jamestown and CRR, 211 NY 346, 105 NE 653 (1941).

[260] Editorial; *Commercial Arbitration and the Conflicts of Laws*, 56 Columbia Law Review 902, at 905-909 (1956).

[261] *Ibid.*, 909.

Under the statutes and rules of procedure of most arbitral institutions, the arbitrators are given the authority to determine the procedure to be followed on questions which are not covered by the statutes of arbitration or the rules adopted by the institutions. However some institutions expressly provide that the law of the country to which the arbitral institution itself belongs shall apply to the questions of procedure which are not governed by its rules.[262]

The conflicts rule obtaining in the United States in effect states that the method of enforcement of an arbitration agreement is determined by the local law of the forum.[263] The forum will look into its own law to determine what method or methods, it is advisable to adopt to enforce the agreement. Therefore as a consequence, the local law of the forum is applied to determine whether the proceedings must be stayed or the action brought in violation of an arbitration agreement that is irrevocable under the governing law must be dismissed. Such an order as a rule can not be made if arbitration is to take place in another state.[264]

Furthermore, the forum will apply its own local law in determining whether it should enjoin the maintenance of a suit that is being litigated in the second state in violation of the arbitration agreement. Similarly, the forum will apply the same law to decide whether to appoint arbitrators; this usually arises when one of the parties refuses to appoint an arbitrator in violation of the arbitration agreement.[265]

In theory, there is no difference in substantive law as to whether the action on the agreement is brought in one state or another. However, it is to be observed that the procedural law carries with it some substantive right and it may by a rule excluding evidence and some similar rule determine the final outcome of the case. Thus, the law in this matter has gradually recognized a deliberate choice of law on the part of the parties, so far as such choice is not contrary to the public policy obtaining in the jurisdiction whose law would eventually apply in the forum.[266]

It is now a settled rule that the laws of procedure of the forum is the law that governs procedure. This rule is actually an extension of the concept of national jurisdiction. The difference of opinions in this area of conflicts of laws is actually the outcome of the

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[262] Consolidated Report, UN Secretary-General (April 24, 1958) E/Conf. 26/4.

[263] Section 354, paragraph 1, UN Uniform Arbitration Law.

[264] Topic 5, Commercial Arbitration Restatement of the Law on Conflicts of Laws, April 22, 1950 (Draft) Published in 16 Arbitration Journal 183 (1961).

[265] *Ibid.*

[266] Pisar. *op. cit.*, note 9, *supra*.

distinction between the law of procedure and substantive law in almost all jurisdictions.[267]

But it is observed that it is not advisable to make it a strict rule to identify the country of the arbitral procedure or the country where the award is rendered. For there may arise a situation where by the doctrine of autonomy of the parties, a contract may be voided if the parties subjected it to a law which does not recognize its validity.[268]

The Arbitration Law in this regard lacks preciseness and clarity thus sacrificing certainty of results which arbitration as an instrument of settlement of commercial dispute needs. It does not cover any arbitration award made in another country which has a different set of rules of procedure. It is submitted therefore, that the Congress of the Philippines ratify the New York Convention on the Enforcement of Foreign Awards. Thus there would be a positive procedure: that in the absence of party agreement on the validity of the method of composition and procedure of the tribunal which pronounced the contested awards, the procedural questions are required to be referred to the law of the territory where the arbitration proceedings were held.[269]

8. CONSEQUENCES OF DEFAULT

Default in commercial arbitration consists of the following acts: (1) the failure of one party to an arbitration agreement to appoint an arbitrator, (2) the refusal of an arbitrator to carry out his duties, (3) the refusal of the parties to sign the submission to appear or to plead.[270]

Arbitration laws of different countries contain varied provisions as to the consequences of default. The courts, as provided in most laws, are the direct recourse for the appointment of arbitrators in cases where the parties fail to agree on the matter or where one of them defaulted. Other foreign laws provide that the failure by the party to carry out the obligations incurred under the arbitration agreement necessitates the payment of damages by the defaulting party.[271]

The Philippine Arbitration Law governing the matter provides:

> "If in the contract for arbitration or in the submission . . . provision is made for a method of naming or appointing an arbitrator or arbitrators

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[267] *Ibid.*
[268] *Ibid.*
[269] See the discussion in Pisar, U.N. Convention on the Enforcement of Foreign Awards, *op. cit.*, note 9, *supra.*
[270] Arbitration Law and Practice. International Chamber of Commerce Document No. 420/58, 20 IV (1956).
[271] *Ibid.*

such method shall be followed, but if no method be provided therein, the Court of the 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 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 the receipt of the demand for arbitration; or

(d) If the arbitrators appointed by each party to the contract and by the proper court shall fail to agree upon or to select the third arbitrator; or

(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.

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 appointment.[272]

The Court of First Instance has jurisdiction over the appointment of arbitrators upon default of a party to the arbitration agreement. Default on the part of one party does not stay the arbitration proceedings.

The Philippine Arbitration Law further provides:

"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 the appointment if the parties to controversy reside within the same city or province or within 15 days after appointment if the parties to the controversy 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 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 * * *[273]

It is interesting to note that in some countries arbitration agreements provide for the reference of the dispute to an arbitration body: these bodies are authorized by statutes to act when the parties fail to do so. The opinion, however was expressed that the arbitration

[272] Section 8, Republic Act 876.
[273] Section 12, *ibid.*

body concerned is obliged to intervene in the cases covered by its statutes but similar obligation does not devolve from a legal standpoint on the person or body appointed for this purpose without their having been consulted beforehand, unless the statutes of the body concerned provided that it must carry out the functions of this kind.[274]

In some legal systems, among them the Philippines, the failure of one of the parties to appoint an arbitrator or to appear or to plead may be penalized by the proceedings being continued without the participation of the defaulting party, either by the arbitrator appointed by the party not in default going to decide the dispute alone or by the arbitration proceedings being continued principally on the basis of the evidence produced by the party not in default. However, doubt is still expressed as to whether an award made as a result of procedure by default could be enforced abroad since it might not be recognized as valid especially in countries where this type of procedure is unknown.[275]

The neglect or refusal of a party to fulfill his contractual obligations in the appointment of an arbitrator is indeed, a hindrance to satisfactory arbitration. In England, as in the Philippines, this difficulty has been overcome by legislation; the practice is when a party fails to designate an arbitrator within seven days after notification by the other party of its intention to arbitrate, the arbitrator appointed by the demanding party may act as the sole arbitrator and his award will be binding on both parties. Similar practice exists in most states of the United States but usually this is expressed in most arbitration agreements. The lone arbitrator may act as the sole arbitrator, and the award made in *ex parte* arbitration after such failure to appoint an arbitrator is valid even though an order directing arbitration to proceed in accordance with contract is not obtained.[276]

Under traditional doctrines, when one of the parties refuses to proceed with the agreed arbitration, as when he refuses to nominate an arbitrator as required by the agreement or the arbitration can not proceed because of the refusal of the arbitrator appointed, he is liable in damages to the other party for any breach of contract.[277]

In France, this system of imposing damages upon the erring party or the enforcement under sanction of contempt was practiced for a time but it has been abandoned. Furthermore, this remedy is available only where the dispute agreed to be submitted to arbitra-

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[274] Arbitration Law and Practice, *op. cit.*, note 1, *supra*.
[275] *Ibid.*
[276] Kentucky River Mills v. Jackson, 206 F2d 111 (1948).
[277] MAYERS, THE AMERICAN LEGAL SYSTEM, 544-545 (1955).

tion is existing when the arbitration agreement was made. The effect of this doctrine is that the agreement in advance to submit any dispute to arbitration attempts to bind the parties not to resort to courts, and is in consequence contrary to public policy of some countries.[278]

The demanding party in France may obtain the designation of an arbitrator by the competent court on behalf of the party who refuses to name one. If the agreement of the parties confers the power to nominate an arbitrator for a defaulting party or if the arbitration agreement refers to the rules of an arbitration agency which provides similar facilities, proceedings will be initiated in conformity with such stipulations. German jurisprudence recognizes the possibility of having the court appoint an arbitrator if the party fails to make such appointment.[279]

The Philippine law on the consequence of default in arbitration, it is heartening to note, has embodied the practice of some countries wherein the courts intervene for the continuity of the arbitration process itself. This is indeed a step forward. This way, party autonomy is respected; so is the freedom to contract. However, doubts have been expressed as to whether an award made as a result of default could be enforced abroad since it might not be recognized as valid in some jurisdictions which do not have procedure in case of default.[280]

9. DIFFICULTIES IN DETERMINING THE LAW APPLICABLE TO THE SUBSTANCE OF THE AWARD; VALIDITY OF DECISIONS BASED ON EQUITY OR USAGES

What law applies to the substance of the arbitral award has always been a problem in the field of international commercial arbitration. Writers on the subject are divided on the question of whether arbitral bodies are independent of municipal law or not. This issue actually boils down to this question: Does the substantive law of the place apply in the absence of party stipulation to the contrary.[281]

In most countries the Civil Code and the rules of arbitration do not contain any provision whatever regarding the binding force of substantive law or the freedom to decide as arbitrators, popularly

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[278] *Ibid.*

[279] Carabiber, Conditions of Development of International Commercial Arbitration in INTERNATIONAL TRADE ARBITRATION—A ROAD TO WORLD-WIDE COOPETION (Domke, ed. 1958), 149

[280] Arbitration Law and Practice, *op. cit.*, note 1, *supra.*

[281] Crane, *Arbitral Freedom from Substantive Law*, 14, Arb. J. 163 (1957).

termed as "arbitral equity."[282] However, there is a distinctive feature existing note: the power of arbitration bodies in many jurisdictions to have decision based on equity and commercial usages rather than on rules of pure law.[283]

The Philippine Arbitration Law provides that "the arbitrators in their award may grant any remedy or relief which they may deem just and equitable and within the scope of the agreement of the parties which shall include but not limited to the specific performance of a contract.[284] In the Philippine arbitration system, therefore, the arbitrators can decide matters partially based on equity and justice as expressly authorized by law provided that it is within the sphere given them by the parties,[285] substantive laws can be said to guide them but arbitrators can discard them if injustice would result by applying them. In some countries, references to statutes and court decisions are made but they are not determinative of the dispute.[286]

Even our Civil Code authorizes the courts to resort to usages and customs of the place in the interpretation of contracts; this way the omissions of the stipulations of the parties are filed.[287] The judge shall render judgment even if the law is silent, obscure or insufficient[288] in which case the general or local custom shall govern and, in its absence, the general principles of law. He must decide the question with justice, reason, and equity, in view of the circumstances of the case.[289]

On the other hand, the same practice is not true in the United Kingdom, in some Commonwealth countries, and in some other areas wherein the arbitrators are to apply to the dispute the national laws of the country of arbitration including those provisions relating to the conflict of laws. Some other systems dispense arbitrators either entirely or partially from applying the national law and authorize them to base their awards on trade practices as reflected in standard contracts or on commercial usage, equity and good faith. In several countries, arbitral institutions expressly provide in their rules of

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[282] *Ibid.*

[283] *Ibid.*

[284] Section 20, Republic Act 876.

[285] In Turkey, arbitrators are completely free to decide according to equity or common sense. Parties, however, may bind the arbitrators, by means of the arbitration agreement, to observe the rules of law. (Ansay, *Commercial Arbitration in Turkey*, 12 Arb. J. 31 [1957].)

[286] *Frankel, Procedural Aspects of Arbitration*, 83 University of Pa. L. R. 226 at 239 (1939.

[287] Article 1376, Rep. Act No. 386.

[288] Article 9, *ibid.*

[289] Araneta, Inc. v. Rodas, 81 Phil. 506 (1948).

procedure that the arbitrators shall act as "amiables compositeurs" and settle disputes on the basis of simple equity.[290]

It is to be noted that in some countries, arbitrators are clothed with maximum powers and treated as if he were a judge in a court of equity.[291] But in countries where the codes regulate two types of arbitration, the legal arbitration and arbitration by amicable compositeurs, it is clear that only the legal arbitrators in the strict sense must apply legal rules. In other countries where the codes regulate only one system, there is still an express provision that arbitrators must comply with the rules of law unless the parties have agreed that they shall not act merely as "amiables compositeurs." In the United States, it seems that a rule similar to that of the Philippines exists; arbitrators are not bound by the strict rules of law or equity unless there is an express stipulation to this effect in the agreement for arbitration. However, if the arbitrators undertake to decide the dispute according to strict law and it appears, judging from the face of the arbitral award, that they have misconceived any principle of law applicable to the case, the award will be set aside.[292]

However, in recent years, it has become recognized that within particular trades and for particular types of commercial disputes, there may be an established system of arbitration not making use of ordinary legal procedure and the court will uphold the award of an arbitrator shown to have followed such system if it is satisfied that it is what the parties actually intended.[293]

But it must be remembered that in reality, arbitration is based on contract and that businessmen are aware of commercial usages and intend to follow them. If the custom is to submit dispute to arbitration, the jurisdiction of ordinary courts is excluded if all the parties to the arbitration contract are in fact not aware of such a custom.[294]

Those who believe in the binding effect of the substantive law on arbitration have advanced several arguments in their favor. They view the award in the nature of a regular court judgment which should have a corresponding basis for decision. Some point out that there is a pressing need for legal security even in the field of arbitration. To release the arbitrator in principles from the law would make him "a legislator with a retroactive power." Suggestion is even

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290 Report, Sec.-Gen., UN Document E/Conf. 26/4 (1958).

291 Stein, *Remedies in Labor Arbitration in* NATIONAL ACADEMY OF ARBITRATION, CHALLENGES TO ARBITRATION (McKelvey ed. 1960), 39, 44.

292 Lorenzen, *Commercial Arbitration International Interstate Aspects*, 43 Yale L. R. 716 (1934).

293 WHITE AND WALTON, RUSSELL ON ARBITRATION 118-119 (1951).

294 Crane, *op. cit.*, note 1, *supra*.

made to the effect that if the award is based on equity, the man who is obedient to the law is the one penalized.[295]

This argument is also advanced: if a man is himself bound by the substantive law of the land and is himself held responsible for knowing this, law, he should follow this same law in his capacity as an arbitrator in his dealings with others. It is also contended that people submit their disputes to arbitration primarily for the determination of facts and have no intention to give up the protection of the law or that the parties submit to arbitration "to get procedural freedom but not substantive freedom." There are also arguments in favor of substantive law which are more on the theoretical side, i.e., (1) enforceability of an award based on substantive law will be greatly facilitated in those foreign countries which refuse to enforce even their own awards not based on substantive law; (2) by reason of explicit freedom from substantive law, the arbitrators may misconstrue their function and erroneously conclude that they have the power to decide not even by arbitral equity but by their subjective notions of what equity should be.[296]

There are jurists who consider arbitration either as an agency or as a branch of the judiciary. Those who view the arbitrators as agents believe that they could find the law about as they please. While arbitrators acting as judges would be bound to follow the law as laid down by the courts. Some commentators also share the view that as of now, businessmen use arbitration to escape the law's delay. But arbitration with no court control over the rulings of arbitrators and with no definite rules of law laid down, takes away certainty in the result. Arbitration clauses are placed in standardized contracts but unless arbitrators follow series of rules, no standardization or certainty can follow, and the very purpose of the contract is defeated.[297]

What is arbitral equity? Actually arbitral equity is the explicit application either of the principles which underlie the provisions of the commercial codes or the principles with which the judge usually favors his application of the code, the ordinary substantive law is disregarded only to the extent that the arbitrators give weight to non-legal factors like business ethics and commercial usage.[298]

There is no serious problem when the domestic award is concerned but when an award partakes of a foreign one, difficulties arise. Since grounds for refusing enforcement of confirmation of an

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[295] *Ibid.*
[296] *Ibid.*
[297] Phillips, *Rules of Law on Laizzez-Faire in Commercial Arbitration*, 47 Harvard Law Review 590 (1934).
[298] Crane, *op. cit.*, note 1, *supra*.

arbitral award vary from country to country, problems are expected to arise. But no arbitral award based on willful violation of the law will be tolerated anywhere. Moreover, courts of law will also refuse enforcement of the award where mandatory rules of law were violated although not voluntarily.[299]

Not all violations of mandatory rules of law may have this result in all countries. But violations of public policy, particularly conspicuous violations of mandatory rules, will at all cases prevent the enforcement or confirmation of an arbitral award.[300] For it is the doctrine of arbitration that the arbitrator has a limited discretion in applying rules of law arbitral equity but this discretion does not include the discretion to err in the interpretation and application of mandatory laws. However, it must be pointed out that where the arbitrator is relieved from the observance of the rules of law or may so be relieved by the parties, he becomes an amiable compositeur and as such may disregard those rules which the parties were allowed to waive at the time of the appointment of the arbitrators. It is possible that the arbitrator may have dispensed with the observance of certain provisions of the contract.[301]

The question, then, whether decisions based on equity and commercial usages are valid hinges on the rules of private international law, since the rules of conflicts of laws are mandatory rather than discretionary.[302] It can be inferred that arbitral awards made abroad whether based on law or equity, can be recognized in the Philippines just like any foreign judgment and like any foreign judgment they are subject to the conflict of laws rule of the forum.[303]

Indeed, the Philippine law on the matter has its merits. For then, problems of conflict of law could be avoided by the more general acceptance of the principles, admitted under the laws of many countries, that arbitrators may base their awards on commercial usages or on arbitral equity, without need to refer to the applicable provisions of municipal law. This is also in conformity to the provisions of the new Civil Code in cases of absence, obscurity or inadequacy of the law. It is worthwhile to explore the possibilities of permitting arbitrators sufficient flexibility in seeking practical means of disposing controversies submitted to them for their final determination.[304]

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299 Mezger, *op. cit.*, note *supra.*
300 *Ibid.*
301 *Ibid.*
302 *Ibid.*
303 SALONGA, PRIVATE INTERNATIONAL LAW 391 (1952).
304 For further discussion, see Domke, *The Settlement of Disputes in International Trade and Legal problems of International Trade.* (Proehl ed., 1959, 402.

10. JUDICIAL REVIEW OF ARBITRAL AWARDS

It is said that an arbitration award is unlike a lower court decision or a decision of an administrative agency for there exists a general doctrine that arbitral awards are neither reviewable on questions of law nor facts nor mixed law and facts.[305] For "where the merits of the controversies are referred to an arbitrator selected by the parties, his determination either as to the law or the facts is final and conclusive.[306]

In some jurisdictions, the agreement of the parties is still guarded with a certain amount of jealousy. It is the general belief that there is no appeal for arbitration, and fortunately so, since arbitration ends speedily commercial disputes. But if arbitration ends in court litigation its advantages of speed, economy, simplicity and goodwill will be lost.[307] Arbitration agreements usually provides thus and if such is not provided in the agreement the law steps in. Usually after the hearing and the rendition of the award, there is no appeal in the sense that the judgment of the lower court may be reviewed for errors or retried *de novo* in superior courts. A simple mistake of law or fact or an error of judgment on the part of the arbitrator are not grounds for reversal of the award.[308]

The court has no general supervisory power over arbitral award and if arbitrators keep within their jurisdiction, their award will not be set aside because they have erred in judgment either upon the facts or law. If the courts would be given this power, the advantage of arbitration as a means of settling disputes would be destroyed and an award instead of being a final determination of a controversy would be but one of the steps taken towards its solution.[309]

Yet, it is noted that there is probably no modern legal system that provides for an unlimited arbitration which bypasses the courts of law and which admits arbitral awards to execution and approves all arbitration without question.[310] It is the practice in most legal systems that the courts have the power to pass upon the actions and decisions of other governing bodies, whether they be part of the legislative or executive departments, or an administrative agency or some

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[305] Warns, *Arbitration and the Law*, 15 Arb. J. 3 (1960).

[306] *In re* Wilkins, 169 NY 494, 62 NE 575 (1902).

[307] Kroenstein, Business Arbitration: Instrument of Private Government, 54 Yale L. R. 36 (1944).

[308] Beatty, *Voluntary Arbitration, Its Legal Status and How It Works*, 22 University of Kansas City L. R. 191, 195-198 (1953-54)

[309] Fudickar v. Guardian Insurance Co., 62 NY 392 (1875).

[310] Habscheid, *Unification in the Enforcement of Awards*, in INTERNATIONAL TRADE ARBITRATION, *op. cit.*, 199, at 200-201.

lower court: this authority of the court also applies to the panel of arbitrators.[311]

The set-up of judicial review of arbitration has resulted to charges of judicial interference and hostility, on the one hand, and to the counter-charges of ways to side-step judicial structures on the other. The very nature of arbitration tends to limit the extent to which its proceedings and its award are subject to review by the courts. Although it is conducted by persons not usually trained in law, arbitrators are usually experts in their field and courts are reluctant to disturb their determinations.[312]

The legal system of the State intervenes with limitations and regulations. While the court can only place a small part of the civil dispute at the disposal of an arbitration body yet it can not for reasons of public policy appear to be disinterested in arbitration. In the final analysis, arbitration is subject to the review of the courts of law for the courts define the limits by which an arbitration can be had.[313]

The courts play an important role in the Philippine system of arbitration. Under the Arbitration Law, awards of arbitration tribunals can be vacated, modified or corrected by the court.[314]

The court may order the vacating of the award upon petition of any party to the dispute after it is proved that the award was procured by corruption, fraud, or other undue means, or that there was evident partiality on the part of the arbitrators or any of them; or when the arbitrators exceeded their power or imperfectly executed them, that a mutual, final and definite award upon the subject matter submitted to them was not made or 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 [315] and willfully refrained from disclosing such disqualifications or of any other misbehavior by which the rights of any party have been materially prejudiced.[316]

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[311] Jalet, *Judicial Review of Arbitration, The Judicial Attitude*, 45 Cornell L. Q. 519 (1960).

[312] Arlington Tower Land Corporation v. McShain, Inc., 150 F. Suppl. 904 (1957).

[313] Stressed recently by the German Federal Court in the decision of October 30, 1955 (U Z R 32/55) digested in *Juristis Zeitz* 26 (1951), quoted in Habscheid, *op. cit.*, note 6, *supra*.

[314] Section 9, Rep. Act No. 876.

[315] Section 24, *ibid.*

[316] Section 24, *ibid.*

The court after vacating the award is faced with two alternatives; it may direct a new hearing either before the same arbitrators or before a new set of arbitrators to be chosen in the manner provided in the submission or arbitration agreement for the selection of the original arbitrators and to commence from the date of the order of the court.[317]

Furthermore, the court may order the correction or modification of the arbitral award to the effect that the intention of the parties and interests of justice must be realized in any of the following cases:

> "(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 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." [318]

It is to be observed that an arbitration award improperly arrived at may be set aside; it may be reviewed and modified on the grounds of legal defect, fraud, corruption, undue means and misbehavior of the arbitrators. It may be stated then as a general proposition that an award arrived at in accordance with the agreement of the parties is final and is a binding determination of the controversy.[319] Only a few courts have been inclined to inquire into the merits of the case once arbitrated.[320]

It is interesting to note that the English Arbitration Act of 1950 provides that "the award to be made by the arbitrator or umpire shall be final and binding on the parties and the persons claiming under them respectively.[321] This only means that the award shall be final and binding insofar as under the Arbitration Act and the general law does not provide for any appeal to a court of law for retrial by the court of the dispute decided. But an award may be brought to the court for review in two cases: (1) one of the parties may apply to the court or judge to "remit" the award in whole or in part back to the arbitrator for reconsideration which may involve the making of a new award,[322] (2) where the arbitrator or umpire has misconducted himself in the proceedings by an application to the

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[317] *Ibid.*
[318] Section 25, *ibid.*
[319] Beatty, *op. cit., supra,* note 4.
[320] *Ibid.*
[321] Sanders, *England,* in INTERNATIONAL COMMRCIAL ARBITRATION (Sanders, ed., 1956), 61.
[322] Section 22, Arbitration Law of 1950.

court to set aside the award in toto.[323] In practice the court remits an award on grounds similar to the Philippine law.[324]

Aside from the grounds provided for in the Arbitration Act, the English Court has asserted its inherent power to set aside an award under other circumstances. Instances illustrative of this power to set aside are: (1) where it was discovered that the arbitrator has personally an undisclosed interest in the dispute; (2) where the arbitrator did not possess the qualifications prescribed by the arbitration agreement; (3) where he intentionally disregarded the law applicable to the dispute; (4) where he delegated his duty of decision to some other person; or (5) he proceeded with the hearing in the absence of one of the parties without proper justification.[325]

Under Philippine law of arbitration, appeal through certiorari proceedings may also be taken for an order made in an arbitration proceedings under the Arbitration Law or from a judgment entered upon an award but such appeal may be limited to questions of law.

In this matter the Rules of Court, insofar as they are applicable govern the proceedings including the judgment thereof.

In other countries, appeal against arbitral awards to a higher arbitral tribunal exists; this tribunal may be either a second arbitral tribunal or a court of appeal.[326] However in some countries, there is no appeal against arbitral awards.[327] In almost all countries, it is possible to have the award declared null and void by judicial proceedings.[328] However, the remedies available to the parties and the cases wherein the award can be voided differ from one country to

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[323] Section 23, *ibid.*

[324] Section 22, Rep. Act No. 876. The instances provided for in the law are: (1) when the award has not decided all the differences included in the arbitration agreement, or when the arbitral award is ambiguous, uncertain or does not comply with the arbitration agreement; (2) when the arbitrator has unwittingly or mistakenly exceeded his authority under the arbitration agreement or the general law; (3) where he has in good faith, but in error, failed to follow proper judicial procedure in such a way as might have had a material influence on his decision appears on the face of the award. If the mistake does not so appear the court will not listen to the contention by one of the parties that there has been a mistake; (5) where the arbitrator himself admits that he has made a mistake in expressing his decision and asks for the award to be remitted to him for rectification; (6) where since the making of the award additional and material evidence relevant to the dispute has been discovered which he could not without unreasonable diligence have ascertained before the hearing by the party.

[325] Section 30, Rep. Act No. 876.

[326] Appeal is made to a second arbitral tribunal in the following countries: Germany, Norway, Austria, Netherlands (in practice). Appeal is made to courts of appeal in Belgium, France, Portugal, and Netherlands (in principle).

[327] There is no appeal in England, Denmark, Finland, Italy, Sweden, Spain, Switzerland, Turkey.

[328] Sanders, *Arbitration Laws in Western Europe. A Comparative Survey,* in INTERNATIONAL TRADE ARBITRATION, *op. cit.* 137.

another although most legislations have a special action for setting aside an arbitral award. But there are instances which may warrant the annulment or revocation of the award by judicial authority or the arbitrators themselves.[329]

The importance of judicial review of arbitration is not to be minimized but in arbitration there is a limitation upon judicial control that exists independent of any judicial attitude that prevails. It is observed that only a small portion of arbitral awards ever reach the courts. This is a healthy condition for arbitration for this fact implies that the parties are abiding by their agreements and are satisfied with the arbitral process.

The Philippine law on the matter is adequate. But it is submitted that the courts should refrain as far as possible in the interest of justice and equity to review arbitral awards. After all the businessman wants a definite decision of the dispute and he wants it quick and final.[330] Moreover, in reviewing the arbitration process, the courts are in a dilemma. Two antithetical attributes of the arbitrator may confuse the judges. Simultaneously, he is recognized as an expert and as a mere neophyte. He is an expert because of his special knowledge in his chosen field; here the courts will likely give him his due. On the other hand, in the area of his ignorance, the law, the judges unrealistically will seek to hold him to a proper application, of the legal principles, with which he may not be familiar. The arbitral award, as long as the arbitrators act within their sphere must be final and binding. Law actually rests on the basic tenets of right and wrong.[331] But the arbitrators going beyond their power, whether derived from law or from the agreement of the parties, are subject to judicial review. The Philippine law is meritorious in this regard.

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[329] For setting aside an arbitral award, the following causes are most common in the arbitration laws of the different countries: (1) The award has been made without a valid arbitration agreement underlying it; (2) the award exceeds (in part) the limits of the submission, i.e., the arbitrators have gone beyond their authority; (3) the arbitrators have omitted to adjudicate upon one of the issues submitted to them; (4) the arbitral tribunal has not been properly constituted; (5) the arbitral award is contrary to recognized moral rules and public policy; (6) from the viewpoint of arbitral procedure: (a) one of the parties has not been given the opportunity to present his case adequately, viz., the violation of the rights of the defense; (b) the arbitral award does not state the grounds on which it is based (if the law or parties require that reasons be given). *Ibid.* 146-148.

[330] Taeusch, *Extraterritorial Settlement of Controversies—The Business Man's Opinion; Trial at Law v. Non-Judicial Settlement*, University of Pennsylvania Law Review, 147 (1934).

[331] Jalet, Judicial Review of Arbitration, the Judicial Attitude, *op. cit.*, note 7, *supra*.

II. DELAYS, TECHNICAL OBSTACLES AND COSTS IN ENFORCEMENT OF AWARDS, IN PARTICULAR AS REGARDS FOREIGN AWARDS.

Unlike the judicial judgment, the arbitrator's award cannot *per se* be carried into execution against an unwilling party. In dealing with a recalcitrant loser the order of the court is essential. Although usually this order of the court is a mere formality, it involves expense and delay. However, as a rule, the court by its own mandate and without rehearing, authorizes issuance of execution, attachment or a similar remedy to enforce the award.[332]

Yet, there is still absence or uncertainty of efficient judicial compulsion in the international field of commercial arbitration. For instance, in the international sphere, the party who does not wish to comply often resorts to such devices as the non-appointment of his arbitrator, thereby paralyzing the arbitral procedure.[333] But this fact must be borne in mind: that an arbitration award made in one country, pursuant to contractual agreement of the parties and pursuant to arbitration conducted as agreed by the parties, needs to be enforceable in the country different from the one in which the arbitration was held.[334]

The enforcement of an arbitration award in a country other than the one in which it was rendered has always been an important issue in international law.[335]

The main purpose of private international arbitration is the recognition of arbitral agreements and inherent in this recognition is the enforcement of foreign arbitration awards. An area of doubt in the field of arbitration lies in the uncertainty of enforcement of awards. It is felt that the number of arbitration clauses in commercial contracts between corporations of different countries would be much greater if there were less uncertainty of enforcement.[336] For if an agreement to arbitrate is to have substantial value it should be enforceable.[337]

Business firms engaged in foreign trade usually carry out awards in good faith since they have undertaken in their contracts to abide by an award and are eager to maintain trade relations. It is one

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[332] Nordon, *British Experience with Arbitration*, 83 University of Pennsylvania L. Rev. 314, 321 (1934).

[333] Nussbaum, *Treaties on Commercial Arbitration, A Test of International Private Law Legislation*, 56 Harvard Law Review, 219, 240 (1942).

[334] Sosenthal, *A Businessman Looks at Arbitration*, in INTERNATIONAL TRADE ARBITRATION (Domke, ed., 1958), 27.

[335] Domke, On the Enforcement Abroad of American Arbitration Awards, 17 Law and Contemporary Problems 545 (1934).

[336] *Ibid.*

[337] Nordon, *op. cit., supra* note 1.

of the advantages of commercial arbitration that an award rendered by persons experienced in special fields will not be reviewed by courts on its merits, and, therefore, parties voluntarily accept the decisions of arbitrators. Sometimes, trade organizations to which a recalcitrant party belongs are called upon to secure compliance with an award. Thus, the situation does not arise too often of instituting court procedures in a foreign country where the application of different principles of law and practice as to the enforcement of foreign awards cannot be easily ascertained since the statutes of various countries do not usually provide for the execution abroad of awards rendered.[338]

The legal requirement to enforce arbitral awards vary greatly from one country to another and there is much ambiguity as to what is actually demanded.[339]

Several arbitral institutions stipulate that arbitral awards rendered under their auspices are final and are not subject to appeal. The rules of other arbitral institutions state explicitly that arbitral awards may be appealed either to the regular courts having jurisdiction over the dispute, or through an arbitration machinery for appeals provided for by the institution itself. Many arbitral institutions make provisions in their rules for steps which would facilitate enforcement should the party who lost fail to execute the award voluntarily. In some countries, where a court *exequatur* is a condition for validity of the award, provision is made for depositing a copy of the award with the Registrar of the competent court, either automatically or at the request of one of the parties. Other organizations only rely on moral pressure to assure compliance with awards and provide for giving publicly to non-execution of the award, for debarment of the party who has failed to comply with an award from using the facilities of the institution in the future or in some cases, for the expulsion of the party in default from the organization. A few organizations, for instance, the Federation of Indian Chambers of Commerce and Industry, provide in their rules that if a party fails to comply with an award directing it to do a certain act, the other party may ask the arbitration tribunal to assess the amount of damages or compensation payable to it by reason of non-compliance.[340]

The traditional method of securing enforcement of a foreign award, in almost all countries, has been by a suit on the award.[341]

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[338] Mihm, Arbitration in Latin American, 15 Arbitration Journal 17 (1960).
[339] Swacker, Selection of Arbitrator by Government and Foreign Investor, 17 *Business Lawyer* 340 (1960).
[340] Consolidated Report of the Secretary General, April, 1958 E/Conf. 26/4.
[341] Walker, Commercial Arbitration in United States, Treaties.

If an award is not complied with, application is made to the court to compel compliance. An award of a sum of money is readily converted by the court into money judgment. Other types of award require other forms of judgment. Thus, a court may find itself in the position of granting, in enforcement of an arbitration award a form of redress which it would have declared itself capable of granting in a judicial proceeding out of the same facts. And if the appropriate redress be a judgment in *personam*, it will be enforceable by contempt proceedings.[342]

In connection with an application to the court for enforcement of an award, there may arise different questions of the jurisdiction of the court to grant judicial redress against the non-complier, questions which may be renewed if the attempt be made to enforce the judgment in another jurisdiction.[343]

The procedure under which arbitral awards will be enforced in other countries is derived mainly from concepts which prevail for the enforcement of foreign decisions. First, it may be based on treaties, either multilateral or bilateral, concluded between the country where the award was rendered and the country where the award has to be enforced. In the absence of treaty provisions, conditions of comity of nations may prevail, especially the concept of reciprocity whereby foreign awards have the same force as is granted to awards of the country where enforcement is sought. Enforcement of a foreign award is possible only by an order of a competent judicial authority in observance of the requirement of the law of the foreign country.[344]

International agreements, both multilateral and bilateral, have at various times dealt with efforts to facilitate the enforcement of foreign awards and to improve what Professor Lorenzen termed a "chaotic condition." [345]

The Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927 had been entered into to remedy the obstacles of enforcement. The application of both treaties is limited to persons who are subject to the jurisdiction of different countries signatories to these agreements. Each contracting country is required to recognize as binding and to enforce in accordance with the procedure of the forum awards rendered in the territory of another contracting state under the follow-

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342 MAYERS, THE AMERICAN LEGAL CONCEPT (1950), 550.
343 *Ibid.*
344 Domke, *op. cit., supra* note 4.
345 Contini, *"International Commercial Arbitration"*, 8 American Journal of Comparative Law 283 (1957).

ing conditions: (1) the award was rendered pursuant to an arbitration agreement valid under the law applicable to the agreement; (2) the object of the award is capable of settlement by arbitration under the laws of the country of the forum; (3) the award was rendered by the arbitral tribunal provided in the arbitration agreement or constituted as regarded by the parties and in conformity with the law governing the arbitration procedure; (4) the award has become final and no proceedings are pending for the purpose of contesting the validity of the award;[346] (5) the recognition and enforcement of the award would not be contrary to public policy, or the principle of law of the forum.[347]

Even where these above-mentioned conditions are met, recognition and enforcement of the award must still be refused if the court finds that: (1) the award has been annulled in the country where it was rendered; or (2) the party against whom the award has been invoked did not have sufficient notice or being under a legal incapacity, was not properly represented; or (3) the award goes beyond the scope of the agreement or deals with a dispute not included under the terms of the agreement. Furthermore, a court may refuse enforcement or give the losing party reasonable time to seek annulment if that party proves that under the law of the country where the arbitration took place, there is a ground, other than those specified in the Convention to contest the validity of the award in a court of law.[348]

Bilateral agreements, on the other hand, are in existence between several countries for the enforcement of foreign awards.[349] In these agreements, it is usually provided that "arbitration award would be given full faith and credit by the courts of the contracting countries where they were rendered." [350]

The question of when, to what extent and under what conditions a commercial arbitration award will be enforced in a state other than the one in which it was granted is a problem of considerable importance to businessmen engaged in international trade. Enforcement of foreign awards between many countries is governed by the Geneva Convention of 1927, the Arbitration Protocol of 1923 or by bilateral treaties. To signatories of the United Nations Convention on the Enforcement of Foreign Arbitral Awards in 1958, the

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[346] An award still subject to opposition or appeal or *pourvoi en cassation* or the equivalent is not regarded as final.

[347] Contini, *op. cit., supra* note 14.

[348] *Ibid.*

[349] Domke, *op. cit., supra* note 13.

[350] Quoted from the treaty between United States and China, November 4, 1946.

provisions of the agreement control. However, when the UN Convention is not enforced between the countries concerned, the municipal law of the country where the award is being enforced must be inquired into, together with the principles of private international law which the local court may apply.[351] This is so, since once an enforcement of an arbitration award is sought, the divorce of arbitral procedure from the authority of a particular legal system must end. The procedure of enforcement is, of necessity, a governmental action and must therefore be controlled by the laws of the country in which enforcement is sought. International action on this point is consequently aimed not at freeing the arbitral procedure from the authority of competent domestic legal system but only at facilitating the enforcement of foreign arbitral awards.[352]

An award upon an arbitration conducted abroad or founded upon a submission governed by a foreign law is usually enforceable in another country in the manner as a judgment having a foreign element.[353] In some countries, there is a necessity of obtaining an *exequatur* before the national court will recognize and give effect to the international judgment. This requirement will mean in effect that the international decision would have to conform to certain standards imposed by the State of enforcement on all decisions emanating from a non-domestic jurisdiction. As a Belgian court held: "An *exequatur* is required since the international court judgment emanated from a non-national jurisdiction and it could not be considered as a self-executory because of its international character. However, the arbitral award constituted sufficient "title" to support an attachment of assets belonging to a debtor as a type of conservatory action." [354]

In some jurisdictions, foreign awards are treated even more favorably than domestic awards, since domestic ones are open to an appeal which automatically suspends enforcement. For instance, in France, judicial confirmation of an award in its state of origin is not a pre-requisite of its recognition and enforcement in France.[355]

On the other hand, most of the Latin American courts look for some sign of authenticity of foreign arbitral awards. In this regard the Chilean Code states that the authenticity of foreign arbitral de-

[351] Erickson "Enforcement of American Awards in Thailand," 16 Arbitration Journal, 134 (1961).

[352] Kopelmanas, The Settlement of Disputes of International Trade, 61 Columbia Law Review 384 (1961).

[353] WHITE AND WALTON, RUSSELL ON ARBITRATION, 280 (1957).

[354] Socabelge v. Greece, 1953 *Recueil Suez Jurisprudence* 1, 16, 1; summarized in 47 Am. Journal of International Law, 508 (1953).

[355] Mezger Enforcement of American Awards in France, 17 Arb. Journal 74 (1962).

cisions shall be established by some sign of approbation from the courts of the country in which the decision was rendered. It is believed that this requirement is most logical, since even awards rendered in Chile by domestic arbitrators before they may be executed have to be approved by the judge, due to the fact that the difference between arbitrators and judges is that the former lacks the power to execute their own decision.[356]

It is almost obligatory, therefore, to first obtain a judgment on the award in the country of origin before seeking its execution in Latin America and this despite the fact that no real distinction is made between an award and a judgment. To the Latin American mind, however, the judgment is more official in character and demonstrates satisfactory compliance with domestic legal requirements.[357]

A closer perusal of the United Nations Convention of 1958 will indicate five grounds upon which the award may be refused recognition and enforcement upon the request of the defendant, and two additional grounds upon which the competent authority of the forum State may upon its own motion refuse recognition and enforcement. Two common features are prominent in these seven grounds of invalidity. The first is that of ultimate judicial control over enforcement of the award, the problem of "double exequatur," the ultimate authority was placed in the enforcing State, but Article V, paragraph 1(e) allows the defendant to attack the award on the ground that it has not yet become binding or has been set aside or suspended by a competent authority "of the country in which, or under the law of which, that award was made." Another important feature is, of course, contractual autonomy.[358]

The Convention provides that there should be no enforcement of an award against the party who never agreed to arbitrate; the enforcing State must examine the validity of the agreement but only under the law which the parties have chosen, or in absence thereof, under the law of the country where the award was made.[359] However, the capacity of the parties to contract is to be judged by the "law applicable to them."

Enforcement cannot also be made if there is a lack of a fair opportunity to be heard on the part of the party against whom the

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[356] Mihm, *op. cit., supra* note 5.

[357] *Ibid.*

[358] Quigley, "Accession by the United States to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards," 70 Yale Law Journal 1049 (1961).

[359] Art. V, Sec. 1(a) Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Adopted June 10, 1958, UN Doc. E/Conf. 26/8 Rev. 1.

award is invoked. For instance, he was "not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case." [360] There is no specification of the standards for judging the propriety of the notice or the adequacy of the opportunity to be heard. It can be argued that the law chosen by the parties or the law of the rendering State should govern. Yet, we cannot deny that the concept of due process is closely linked with the public policy of the forum and it can be expected that the enforcing State will apply its own standards of due process.[361]

The award cannot also be enforced it if has not yet become binding or has been set aside or suspended by a competent authority of the country in which or under the law of which that award was made.[362] Improper composition of the arbitral tribunal or the arbitral procedure also is detrimental to the enforceability of a foreign award.[363]

Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement are sought finds that the subject matter is not capable of settlement by arbitration under the law of *that* country or such recognition and enforcement would be contrary to the public policy of *that* country.[364]

Comparing the 1958 United Nations Convention with the 1927 Geneva Convention, it can be said that significant progress had been made in facilitating enforcement of foreign arbitral awards. There is for instance, an improvement in the burden of proof. The 1927 Convention was based on the positive proof that the conditions laid down for enforcement of the Convention had been fulfilled. While the new system gives the party against whom the award is invoked the right to prove the existence of one of the facts which the 1958 Convention considers as reasons for refusal to enforce. The new system also facilitates enforcement by reducing the number of valid reasons for a refusal to enforce.[365]

In the final analysis, most jurisdictions enforce an arbitral award if it is reduced to a judgment. It is the general rule that "a valid foreign judgment should be recognized and given effect in another state as a conclusive determination of the rights and obligations of

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[360] Article V, Section 1(b), UN Convention of 1958.
[361] Quigley, *op. cit., supra* note 27.
[362] Article IV, Sec. 1(d), UN Convention.
[363] *Ibid., paragraph* (e).
[364] Article IV, Section 2 (a) and (b).
[365] Kopelmanas, *op. cit., supra* note 21.

the parties.[366] This is, indeed, true especially where the foreign state gives conclusive enforcement and effect to the judgments of the state where enforcement is sought.[367]

The Philippine courts seem to follow this procedure. The judgment of a tribunal of a foreign country having jurisdiction to pronounce judgment, in case of a judgment against a person is "presumptive evidence of the right as against one party and successors in interest by a subsequent title; but the judgment may be repelled by evidence of want of jurisdiction, want of notice to the party, collusion, fraud or clear mistake of law or fact. Thus, foreign personal judgment may be impeached by evidence of want of jurisdiction, fraud, or clear mistake of law or fact.[368]

The Supreme Court had occasion to apply this provision in an enforcement case between a New York company and a Philippine corporation.[369] The parties entered into a charter party agreement whereby the plaintiff, the New York Company chartered unto the defendant its vessel to load a cargo of scrap iron from/in the Philippines for Buenos Aires, Clause No. 29 of the agreement reads: "It is mutually agreed that should any dispute arise between the owner and charterer, the matter in dispute shall be referred to three persons at New York for arbitration, one to be appointed by each of the parties hereto, and the third by the two thus chosen; their decision of that of any two of them shall be final and for the purpose of enforcing the award, this agreement may be made a rule of the court * * *"

A dispute as to the payment of demurrage arose between the parties and so arbitration was had in New York. In due time the arbitration decision was presented by the plaintiff to the United States District Court, Southern District of New York for confirmation and said court confirmed the decision in all respects. Pursuant to the Rules of Court, the plaintiff brought an action in the Philippine courts to enforce the order and final decree.

The Supreme Court is of the opinion that arbitration should receive every encouragement from the courts. The Philippine Legislature, for that matter, has officially adopted this view when it reproduced in the new Civil Code the provisions of the old Code on arbitration and recently when it approved Republic Act No. 876, the Arbitration Law. It was contended that the decisions rendered by the United States District Court of New York which ratifies the

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[366] GOODRICH, HANDBOOK OF CONFLICT OF LAWS, 603 (1949).
[367] Hilton v. Guyot, 159 U.S. 113 (1895).
[368] Rule 39, Sec. 48 (b), Rules of Court.
[369] Eastboard Navigation Ltd. v. Jan Ysmael and Co., Inc., G.R. No. L-9090, September 10, 1957.

arbitral award, has no binding effect on the defendant corporation, nor can it be enforced in this jurisdiction since said court did not acquire jurisdiction over said defendant. This claim is based on the alleged fact that the defendant was never served with notice, summons or process relative to the submission of the award of the arbitrators, invoking in support of this contention the United States Arbitration Act of 1925. But the Supreme Court finds that the law thus invoked does not sustain the defendant's contention, for the same, in case of a non-resident, does not necessarily require that service of notice of the application for confirmation be made on the adverse party himself, it being sufficient that it be made upon his attorney. This is precisely what was done in this case. It is significant, the Supreme Court said, that the respondent's counsel never impugned the jurisdiction of the court over the defendant nor did they ever plead before it that they were bereft of authority from the defendant. Moreover, even though the plaintiff is a foreign corporation without license to transact business in the Philippines, it does not follow that it has no capacity to bring the present action. Such license is not necessary because it is not engaged in business in the Philippines.[370]

In another case,[371] the Supreme Court held that the fact that a contract sued upon was executed in another country and that the plaintiff is a non-resident of the Philippines is not a ground for denying him the right to maintain an action to enforce it in a Philippine court, if the defendant is amenable to its process and the contract is not contrary to public policy.[372]

Stated broadly, a foreign judgment may be recognized and enforced if it constitutes a final adjudication on a civil or commercial subject matter, issued by a court of competent jurisdiction and is neither inconsistent with the fundamenal principles of public policy and morality obtaining in the forum [373] or was not tainted with a clear mistake of law or fact.[374] Early writers traced its juridical basis for recognition, a foreign judgment constituting a vested right which may be enforced in the forum. Other authorities, however, adheres to the view that where a foreign court of competent jurisdiction has adjudicated a certain sum to be due from one person to another, the liability to pay that sum becomes a legal obligation which may be enforced in the forum by an action.[375] It can be said that

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[370] Pacific Vegetable Oil Corporation v. Singzon, G.R. No. L-7919, April 29, 1955.

[371] King Mau Wu v. Sycip, 50 O.G. (1954).

[372] *Ibid.*, 66.

[373] WOLFF, PRIVATE INTERNATIONAL LAW, 259 (1950).

[374] Rule 39, Section 48 (b), Rules of Court.

[375] Wolff, *op. cit., supra* note 42.

this case controls when an arbitral award reduced to judgment in the country where it was rendered is sought to be enforced in local courts.

In international circles, however, there is an advocacy for the establishment of an International Registry For Arbitration Awards. This agency, its adherents point out, would have the authority to approve or recognize arbitration awards that have been qualified by meeting certain conditions. An award upon being so approved or recognized would be entitled to automatic enforcement in any country subscribing to the agency.[376] This is, indeed, a reform to improve commercial arbitration. It must be noted that the New York Convention of 1958 retains the orthodox method of "reducing an award to judgment." The use of court facilities is ordinarily slow, expensive and time-consuming.[377]

Other sectors believe that a super-national award would solve the chaotic condition. Yet they seem to overlook the fact that arbitration is subject to the review of the courts of law for the courts define the limits within which an arbitration can be had. There is probably no modern legal system that provides for an unlimited arbitration which by-passes the courts of law, moreover, which admits all arbitral awards to execution. It can be said that "a super-national award would be possible if there is a super-national legal system. But so long as there is no super-national legal system, hence no legal authority in existence which would encompass the sphere of civil procedure, the legal concept of a super-national award remains an illusion." [378]

Arbitration, in the Philippines, has not been modernized when it comes to the enforcement and recognition of the foreign arbitral awards. No step so far has been taken by our legislators in remedying the chasm that exists. Our courts if confronted with the conflict in the enforcement problem, would only resort to the general principles of conflict of laws or the Rules of Court. Special laws on the matter are a necessity. The Philippines is a signatory to the 1958 New York Convention yet the signing was with the reservation that it did so on the basis of reciprocity. So far, the Philippine Senate has not ratified the Convention, hence it does not apply in this country. It cannot be denied that said ratification would bring up-to-date our arbitration laws on the matter and fill in he gap that

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[376] Kagel, An International Registry for Arbitration Awards, in INTERNATIONAL TRADE ARBITRATION (Domke, ed., 1958), 209.

[377] *Ibid.*, 210.

[378] Habscheid, "Unification in the Enforcement of Foreign Awards," in INTERNATIONAL TRADE ARBITRATION (Domke, ed., 1958), 199-202.

seems to drive our merchants and foreign merchants dealing with local businessmen from availing of arbitration as a modern means of settling commercial differences.

12. POWER TO COMPEL THE ATTENDANCE OF WITNESSES WHO ARE WITHIN THE JURISDICTION OF THE ARBITRATION TRIBUNAL

To a certain extent, arbitrators function as a court of justice. It is natural, therefore that the arbitration tribunal has some powers and functions of an ordinary court.

The Philippine Arbitration Law has given the arbitrators duly chosen by the parties the power to require any person to attend a hearing as witness.[379] For this matter, the arbitrators have the power to subpoena witnesses or require the production of documents when the relevancy and the materiality thereof has been demonstrated.[380] The latter is known as subpoena *duces tecum*.[381] In the Philippine jurisprudence, in order that a subpoena *duces tecum* may be enforced, it must comply with the following requisites: (1) it shall designate or describe reasonably the papers or articles demanded; and (2) that such papers or articles must *prima facie* appears to be relevant to the issue.[382]

Arbitrators have also the power to require the retirement of witness during the testimony of any other witness. All of the arbitrators appointed in any controversy must attend all hearings in that matter and hear all the allegations and proofs of the parties; but an award by the majority 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 conserve any matter which is the subject of the dispute in arbitration.[383]

The Arbitration Law in this regard is silent on the form and contents and service of the subpoena. To supply the gap of the law, it is advisable to apply the pertinent provisions of the Rules of Court. Adopting the relevant provisions to the arbitration procedure, it can be said that the service of a subpoena shall be made by the arbitrators or by any other person specially authorized who is not party and is not less than 18 years old. The service must be made so as to

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379 Section 14, Republic Act No. 876.
380 *Ibid.*
381 Rule 29, Section 1, Rules of Court.
382 Liebnow v. Philippine Vegetable Oil Co., 39 Phil. 60, 68 (1918); Sarabya v. Locsin, 69 Phil. 113 (1939).
383 Sec. 14, Republic Act No. 876.

allow the witness a reasonable time for preparation and travel to the place of attendance.[384]

Following the same procedure, the witness concerned in an arbitration procedure is not bound to attend as such before the arbitrators if the hearing is to be held out of the province in which he resides. unless the distance be less than fifty kilometers from his place of residence to the place of arbitration by the usual course of travel.[385] It can also be said that "a person present before the arbitrators may be required to testify in the same manner as if he were in attendance upon a subpoena issued by the board.[386]

However, the law is silent on the matter of contempt. Under Sec. 3(f), Rule 71 (formerly Rule 64) failure to obey a subpoena duly served constitutes indirect contempt which shall be punished after charge and hearing. If the subpoena has been issued by a court, there is no question concerning the power to punish contempts because such power is inherent in all courts as it is essential to their right of self-preservation. This is true not only in contentious litigations but also in administrative proceedings.[387]

Since the arbitrator is not a judge, but his authority to issue subpoena is expressly recognized under the Arbitration Act, then he is covered by Section 580 of the Revised Administrative Code. The first paragraph of this section states that the authority to take testimony or evidence conferred upon an administrative officer or upon any non-judicial person shall comprehend the right to administer oaths and summon witnesses, and shall include authority to require the production of documents under a *subpoena duces tecum,* or otherwise, subject in all respects to the same restrictions and qualifications as apply in judicial proceedings of a similar character."

If without any lawful excuse, any one fails to appear upon the summons issued, or having appeared before such individual or body, refuses to take oath, testify, or produce documents for inspection, when lawfully required to do so he "shall be subject to discipline as in case of contempt, of courts, and upon application of the individual or body exercising the power in question, shall be dealt with by the judge of first instance having jurisdiction of the case in the manner provided by law." [388]

Under the Rules of Court, where the contempt has been committed against an administrative officer, or any non-judicial person,

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[384] Rule 29, Sec. 6, Rules of Court.
[385] Sec. 9, *ibid.*
[386] Sec. 10, *ibid.*
[387] III MORAN, COMMENTS ON THE RULES OF COURT, 342 (1963 ed.).
[388] Sec. 580, Revised Administrative Code.

committee or other body, the charge may be filed with the Court of First Instance of the province or city in which the contempt has been committed.[389] Example of a contempt proceedings instituted by an administrative officer or non-judicial person or body is the case filed by the Securities and Exchange Commission against Pimentel in the Court of First Instance of Manila.[390] In the final analysis, therefore the contempt committed against an arbitrator will be punished through a charge filed with the Court of First Instance of the province or city where the contempt transpired. Philippine law therefore is not wanting in this matter, so no further legislative action is necessary on this last problem.

CONCLUSION AND RECOMMENDATIONS

It cannot be denied that the Arbitration Law has greatly enhanced the popularity of commercial arbitration in the Philippines.

Before the passage of the law, arbitration was considered side by side with compromises. The new Civil Code of 1950 contains provisions on arbitration, it is true, but actually, the provisions of the Code on compromises [391] are made applicable to commercial arbitration.[392] Therefore, when the Congress of the Philippines approved the Arbitration Law, it in effect gave proper identity to commercial arbitration in the country. Likewise, it supplied the deficiency in the law governing arbitral procedure, which under the new Civil Code, the Supreme Court may issue but fails to do so far.[393]

The Arbitration Law has its merits. For instance, it vests the power to determine the existence of validity of the arbitration and the power to determine matters relating to the arbitrator's competence in the court.[394] Indeed, the advocates of commercial arbitration usually believe that it is better that it will be the arbitrators themselves rather than the court who initially determine the extent of their authority as conferred by the arbitration agreement. This principle was adopted by the European Convention on International Commercial Arbitration.[395] However, the wishes of vesting such power upon arbitrators themselves is questionable, for any decision of the arbitrators on the matter is subject to review by the courts, as provided for in the Philippine Arbitration Law. Moreover, arbitrators

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389 Sec. 3 Rule (formerly Rule 64), Rules of Court.

390 Securities and Exchange Commission v. Pimentel, G.R. No. L-4228, January 23, 1952, cited in III MORAN, COMMENTS ON THE RULES OF COURT, 325 [1963] ed.)

391 Articles 2028-2041, Republic Act No. 386. Effective August 30, 1950.

392 Article 2043, *ibid.*

393 Article 2046, *ibid.*

394 Section 6, Arbitration Law.

395 U.N. Documents No. E/ECE/423 of April 21, 1961, Art. V, paragraph 3.

appointed although experts in commerce and industry, are not lawyers who could be expected to be at home in deciding matters concerning questions of law such as the validity of a contract, the existence or validity of an arbitration agreement and the like. The Philippine law which gives to the court the power to determine initially the challenge to the existence of a valid arbitration agreement (and thus the authority of the arbitrator) eliminates the risk of lengthy arbitration which may later be voided, either because the principal contract was considered invalid or because the dispute submitted for arbitration was not included within the terms of the references.[396] Indeed, the Philippine law is practical and convenient.

Furthermore, the Philippine law on compromise as provided in the Code to apply in some cases still stands and this fact enriches the arbitration jurisprudence in this country. The law on consequences of default in arbitration is also up-to-date; it has embodied the practice of some countries wherein the courts intervene for the continuity of the arbitration process itself. This way party autonomy is respected. The failure of one of the parties to appoint an arbitrator or to appear or to plead may be penalized by the proceedings being continued without the participation of the defaulting party.

Arbitrators, moreover, can decide matters partially based on equity and justice as expressly authorized by the Arbitration Law, provided that it is within the sphere given them by the parties.[397]

It is significant to note a similar provision in the new Civil Code which authorizes the courts to resort to usages and customs of the place in the interpretation of contracts to fill in omissions in the stipulations of the parties.[398] Hence, the Arbitration Law permits the arbitrators some flexibility in seeking practical means of disposing commercial controversies submitted to them for final determination. Moreover, the law avoids problems of conflict of laws through the more general acceptance of the principles, admitted under laws of many countries, that arbitrators may have their awards on commercial usages or on arbitral equity without need to refer to the applicable provisions of municipal law.[399]

The Philippine law is adequate with regard to the questions of judicial review of arbitration procedure and awards. The courts

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[396] Similar observations were made by Domke on the U.S. Arbitration Act, Report of the 1961 Arbitration Conference, 16 Arb. J. 131 (1961).

[397] Sec. 8, Rep. Act 876.

[398] Sec. 20, *ibid.*

[399] Art. 1376, Rep. Act No. 386.

[400] For further discussion, see Domke, The Settlement of Disputes, in INTERNATIONAL TRADE AND LEGAL PROBLEMS OF INTERNATIONAL TRADE (Proehl ed., 1959), 402.

play an important role in the local system of commercial arbitration. Awards of arbitration tribunals can be vacated, modified or corrected by courts of law.[400] It should be remembered that the court has no general supervisory power over arbitral awards if arbitrators keep within their jurisdiction.[401] Yet it is noted that there is no modern legal system that provides for unlimited arbitration which in effect bypasses the courts of law and which admits arbitral awards to executions and approves all arbitration without questions.[402] This way the legal system of the State intervenes with limitations and regulations for in the final analysis, arbitration must be subject to the review of the courts of law for the courts define the limits in which an arbitration can be had.[403]

Furthermore, the Arbitration Law provides for the suspension or exclusion of the court's jurisdiction when there is valid arbitration agreement.[404] The same rule is provided in the New York Convention on the Enforcement and Recognition of Foreign Arbitral Awards.[405]

However, the present Arbitration Law leaves gaps in the system of commercial arbitration which necessitate legislation on the matter.

It is quite unfortunate that although the Philippines is one of the signatories to the New York Convention of 1958, the same does not apply in this jurisdiction due to the failure of the Philippine Senate to ratify it.

Under the Arbitration Law, there are still difficulties in determining the law applicable to the validity of an arbitration agreement. Even our new Civil Code is silent on the proper law of the contract. However, the 1958 New York Convention now defines the law applicable in the text itself.[406] Recognition and enforcement of the awards, the Convention provides, may be refused if 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 the country where the award was made." Only in the absence of an express selection of the applicable law does the law of the place of arbitration now take over. This settles the conflict that would result if various national laws be applied the arbitration agreement.

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401 Sec. 9, Act No. 876.

402 Fudickar v. Guardian Insurance Co., 62 NY 392 (1875).

403 Habscheid, Unification in the Enforcement of Awards, in INTERNATIONAL TRADE ARBITRATION (Domke, ed., 1958), 99.

404 Decision of the German Federal Court, 1955 (UZR) 32/55 digested in *Jurista Zetts*, 26 Habscheid, *ibid.*

405 Section 7, Republic Act No. 876.

406 Article 11, Section 3, U.N. Doc. E/Conf. 26/8 Rev. 1, of June 10, 1958.

The arbitration rules and legal provisions in the Philippines do not cover a case wherein governmental agencies and public bodies are involved. No question has yet reached the courts in this aspect. Thus the ratification of the New York Convention will similarly provide the necessary authorization to governmental bodies to submit to arbitration.[407] The convention also will settle the difficulties in determining the law applicable to arbitration procedure. It must be remembered that with the exception of the Arbitration Commission with its Rules on conciliation and arbitration, set up by the Philippine Council of the International Chamber of Commerce, there is still no organized arbitration in the Philippines, hence, no arbitral rules of any other organization will fill in the gaps.

The Philippine law on arbitration does not cover any case of an award made in another country which has a different set of rules of procedure. It is respectfully submitted, therefore, that the Senate of the Philippines should ratify the Convention. Thus, there would be a positive procedure if our courts will be confronted with a conflict of laws problem on the matter.

Provisions on the enforcement of awards in particular as regards foreign awards will also be brought up-to-date. Uncertainty of enforcement will be done away with in this jurisdiction upon the ratification of the Convention.

In the light of the existing Philippine legislation on arbitration consisting principally of the Arbitratton Law and the pertinent provisions of the new Civil Code, the writers have discussed each one of twelve ECAFE listed main problems on commercial arbitration. Where the Philippine law is meritorious, practical and adequate, the writers point out such, whereas where the Philippine law is wanting or inadequate for reasons of ambiguity, paucity or total absence of provisions, the writers have so indicated and have made the corresponding recommendations for legislative action to fill up such *lacunae juris*. After discussing the resulting benefits and advantages, recommendation has also been made for the ratification of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards to which the Philippines is a signatory on basis of reciprocity.

As a socio-economic instrument, commercial arbitration, will help in a very great way towards understanding between peoples according to Proehl, and the peaceful conduct of international relations according to Fowler, and ultimately to world-wide cooperation according to

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[407] Discussion on the subject was made earlier in this work.

Domke. The state, the lawmaking body, and the businessmen themselves through trade association provide the healthy atmosphere for the growth of commercial arbitration.[408] Commercial arbitration to be an effective remedy for businessman needs more support from legislators. What the law *is* on the matter today hardly approximates the concept of what the law *ought to be.* Along the lines indicated in this paper, it can be said that legislative action is very much wanting and is obviously desirable, in order that the ideal relation between *de lege ferenda* and the *lex lata* can be attained!

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[408] Article 1, Section 1, New York Convention of 1958.

[409] Tauesch, Extrajudicial Settlement of Controversies, The Businessman's Opinion: Trial at Law v. Non-Judicial Settlement, 83 Univ. of Pennsylvania Law Review 47 (1934).

Appendix A

UNITED NATIONS CONFERENCE ON INTERNATIONAL COMMERCIAL ARBITRATION

CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS *

June 10, 1958

Article I

1. This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.

2. The term "arbitral awards" shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted.

3. When signing, ratifying or acceding to this Convention, or notifying extension under Article X hereof, any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another contracting State. It may also declare that it will apply 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.

Article II

1. 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, concerning a subject matter capable of settlement by arbitration.

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* This Convention and the accompanying Resolution appeared in the Supplement to INTERNATIONAL COMMERCIAL ARBITRATION—A ROAD TO WORLD-WIDE CO-OPERATION (Domke, ed. 1958). 13 Arbitration Journal (n.s.) 107 (1958) also reproduced this Convention. See U.N. Doc. No. E/Conf. 26/8 Rev. I (1958) and U.N. Dec. No. E/Conf 29/9 (1958).

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.

3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, 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.

Article III

Each contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the awards is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which the Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.

Article IV

1. 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.

2. If the said award or agreement is not made in an official language of the country in which the award is relied upon, the party applying for recognition and enforcement of the award shall produce a translation of these documents into such language. The translation shall be certified by an official or sworn translator or by a diplomatic or consular agent.

Article V

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

(a) 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, failing any indication thereon, under the law of the country where the award was made; or

(b) the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

(c) the award deals with a difference not contemplated by or not failing 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

(d) the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(e) the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

2. 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:

(a) the subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

(b) the recognition or enforcement of the award would be contrary to the public policy of that country.

Article VI

If an application for the setting aside of suspension of the award has been made to a competent authority referred to in Article V paragraph (1) (e), the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of

the party claiming enforrement of the award, order the other party to give suitable security.

Article VII

1. The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting State nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.

2. The Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927 shall cease to have effect between Contracting States on their becoming bound and to the extent that they became bound, by this convention.

Article VIII

1. This Convention shall be open until 31 December 1958 for signature on behalf of any Member of the United Nations and also on behalf of any other States which is or hereafter becomes a member of any specialized agency of the United Nations, or which is or hereafter becomes a party to the Statute of the International Court of Justice, or any other State to which an invitation has been addressed by the General Assembly of the United Nations.

2. This Convention shall be ratified and the instrument of ratification shall be deposited with the Secretary-General of the United Nations.

Article IX

1. This Convention shall be open for accession to all States referred to in article VIII.

Article X

1. Any State may, at the time of signature, ratification or accession, declare that this Convention shall extend to all or any of the territories for the international relations of which it is responsible. Such a declaration shall take effect when the Convention enters into force for the State concerned.

2. At any time thereafter any such extension shall be made by notification addressed to the Secretary-General of the United Nations and shall take effect as from the ninetieth day after the day of receipt

by the Secretary-General of the United Nations of this notification, or as from the date of entry into force of the Convention for the State concerned, whichever is the later.

3. With respect to those territories to which this Convention is not extended at the time of signature, ratification or accession, each State concerned shall consider the possibility of taking the necessary steps in order to extend the application of this Convention to such territories, subject, where necessary for constitutional reasons, to the consent of the Government of such territories.

Article XI

1. In the case of a federal or non-unitary State, the following provisions shall apply:

(a) With respect to those articles of this Convention that come within the legislative jurisdiction of the federal authority, the obligatiins of the federal Government shall to this extent be the same as those of Contracting States which are not federal States;

(b) With respect to those articles of this Convention that come within the legislative jurisdiction of constituent states or provinces which are not, under the constitutional system of the federation, bound to take legislative action, the federal Government shall bring such articles with a favorable recommendation to the notice of the appropriate authorities of constituent states or provinces at the earliest possible moment;

(c) A federal State party to this Convention shall, at the request of any other Contracting State transmitted through the Secretary-General of the United Nations, supply a statement of the law and practice of the federation and its constituent units in regard to any particular provision of this convention, showing the extent to which effect has been given to that provision by legislative or other action.

Article XII

1. This Convention shall come into force on the ninetieth day following the date of deposit of the third instrument of ratification or accession.

2. For each State ratifying or acceding to this Convention after the deposit of the third instrument of ratification or accession, this Convention shall enter into force on the ninetieth day after deposit by such State of its instrument of ratification or accession.

Article XIII

1. Any contracting State may denounce this Convention by a written notification to the Secretary-General of the United Nations. Denunciation shall take effect one year after the date of receipt of the notification by the Secretary-General.

2. Any state which has made a declaration or notification under article X may, at any time thereafter by notification to the Secretary-General of the United Nations, declare that this Convention shall cease to extend to the territory concerned one year after the date of the receipt of the notification by the Secreary-General.

3. This Convention shall continue to be applicable to arbitral awards in respect to which recognition or enforcement proceedings have been instituted before the denunciation takes effect.

Article XIV

A Contracting State shall not be entitled to avail itself of the present Convention against other Contracting States except to the extent that it is itself bound to apply the Convention.

Article XV

The Secretary-General of the United Nations shall notify the States contemplated in article VIII of the following:

(a) Signature and ratifications in accordance with article VIII;

(b) Accessions in accordance with article IX;

(c) Declarations and notifications under articles I, X and XI;

(d) The date upon which this Convention enters into force in accordance with article XII;

(e) Denunciations and notifications in accordance with article XIII.

Article XVI

1. This Convention, of which the Chinese, English, French, Russian and Spanish texts shall be equally authentic, shall be deposited in the archives of the United Nations.

2. The Secretary-General of the United Nations shall transmit a certified copy of this Convention to the States contemplated in article VIII.

Appendix B

RESOLUTION OF THE UNITED NATIONS CONFERENCE ON INTERNATIONAL COMMERCIAL ARBITRATION

June 10, 1958

The Conference, believing that, in addition to the convention on the recognition and enforcement of foreign arbitral awards just concluded, which would contribute to increasing the effectiveness of arbitration in the settlement of private law disputes, additional measure should be taken in this field.

Having considered the able survey and analysis of possible measures for increasing the effectiveness of arbitration in the settlement of private law disputes prepared by the Secretary-General, document E/CONF. 26/6.

Having given particular attention to the suggestions made therein for possible ways in which interested governmental and other organizations may make practical contributions to the more effective use of arbitration.

Expresses the following views with respect to the principal matters dealt within the note of the Secretary-General:

1. It considers that wider diffusion of information on arbitration laws, practices and facilities contributes materially to progress in commercial arbitration; recognizes that work has already been done in this field by interested organizations,[1] and expresses the wish that such organizations, so far as they have not concluded them, continue their activities in this regard, with particular attention to coordinating their respective efforts;
2. It recognizes the desirability of encouraging where necessary the establishment of new arbitration facilities and the improvement of existing facilities, particularly in some geographic regions and branches of trade; and believes that useful work may be done in this field by appropriate governmental and other organizations, which may be active in arbitration matter, due regard being given to the need to avoid duplication of effort and to concentrate upon those measures of greatest practical benefit to the regions and branches of trade concerned;

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[1] For example, the Economic Commission for Europe and the Inter-American Council of Jurists. See Supplement to INTERNATIONAL COMMERCIAL ARBITRATION—A ROAD TO WORLD-WIDE COOPERATION (Domke, ed. 1958).

3. It recognizes the value of technical assistance in the development of effective arbitral legislation and institutions; and suggests that interested governments and other organizations endeavour to furnish such assistance, within the means available, to those seeking it;

4. It recognizes that regional study groups, seminars or working parties may in appropriate circumstances have productive results; believes that consideration should be given to the advisability of the convening of such meetings by appropriate regional commissions of the United Nations and other bodies, but regards it as important that any such action be taken with careful regard to avoiding duplication and assuring economy of effort and of resources;

5. It considers that greater uniformity of national laws on arbitration would further the effectiveness of arbitration in the settlement of private law disputes, notes the work already done in this field by various existing organizations,[2] and suggests that by way of supplementing the efforts of these bodies appropriate attention be given to defining suitable subject matter for model arbitration statutes and other appropriate measures for encouraging the development of such legislation.

Expresses the wish that the United Nations, through its appropriate organs, take such steps as it deems feasible to encourage further study of measures for increasing the effectiveness of arbitration in the settlement of private law disputes through the facilities of existing regional bodies and non-governmental organizations and through such other institutions as may be established in the future.

Suggests that any such steps be taken in a manner that will assure proper co-ordination of effort, avoidance of duplication and due observance of budgetary considerations.

Requests that the Secretary-General submit this resolution to the appropriate organs of the United Nations.

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[2] For example, the International Institute for the Unification of Private Law and the Inter-American Council of Jurists. See Supplement to INTERNATIONAL COMMERCIAL ARBITRATION—A ROAD TO WORLD-WIDE COOPERATION (Domke, ed. 1958).