COMMERCIAL ARBITRATION FACILITIES AND PROCEDURES *

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At the outset, may I say how pleased I am to be invited to speak in this session of the Third Regional Seminar-Cum-Training Centre of the ECAFE. I wish to state that I also feel greatly honored in meeting this distinguished company of senior officials of participating countries who are actively engaged in promoting international trade. Allow me to compliment the officials and members of the ECAFE and its Secretariat in organizing this Seminar. I need not underscore the extremely valuable assistance rendered to developing economies, like my country, in the development and improvement of their trade promotion machineries and services.

Among the very useful media for the promotion of foreign trade is international commercial arbitration, which for various reasons, has been preferred to judicial litigation by traders as the more business-like means of settling commercial disputes. This morning, I desire to compare and exchange notes with you on two aspects of commercial arbitration.

The subject assigned to me is "Commercial Arbitration Facilities and Procedures". I propose to discuss in broad outlines the arbitral institutions of recognized standing, representative in character, which may be national or international, general or specialized. Since international arbitration, strictly speaking, does not as yet exist because every arbitration is governed by the national laws of a specific country, the diversity of arbitral procedures requires a more or less comparative survey of representative legal systems. After such discussions I believe I am expected to discuss said two aspects of commercial arbitration in a Philippine setting and thus humbly direct your attention to arbitral institutions subsisting in the Philippines, and to the arbitral procedure obtaining in Philippine law.

Before proceeding to the topics assigned, I would like to beg your indulgence on two counts. First, I cannot help but briefly enumerate the advantages of arbitration, for I believe that the preference given by traders to commercial arbitration over other tech-

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niques for settling disputes speaks for its self in terms of advantages. Second, sometime ago, I have written on the various aspects of commercial arbitration with the generous assistance of two researchers. By your leave, I will be quoting from and drawing heavily upon this research work which was published less than a year ago.

PRELIMINARY MATTERS

In its broadest connotation, commercial arbitration is a process for hearing and resolving controversies of economic consequences arising between parties; and it starts with and is dependent upon an agreement of the parties to submit their claims to one or more persons chosen by them to act as their arbitrator—a judge of their own choice. (Sturges, Arbitration—What is it? 35 N.Y.U. L. Rev. 1031 [1960] cited in Domke, The Settlement of Trade Disputes in Regional Markets [1962]).

Commercial arbitration has become popular with merchants who in avoiding court litigations insist on this extrajudicial method of resolving their business controversies. A very brief summary of the advantages and consequently the reasons for the popularity of arbitration follows. First advantage is the expert determination of questions of fact involved in the dispute. Judges may not easily comprehend commercial customs while the arbitrators come from a panel of experienced professionals and businessmen who are conversant with the customs and practices of their trade and calling.

Second advantage is the speedy settlement of disputes. Court dockets and calendars are clogged. Trials are protracted due to postponements and to exclusionary rules of evidence. A plaintiff may find himself before a celestial tribunal before a terrestrial tribunal could dispose of his claim. Third advantage is its economy aspect as courtroom litigation is excessively costly.

Fourth advantage is its amicability, and the corresponding assurance of the continuation of business relations by the good loser. Court battles usually end with the rupture of trade contracts between the litigants. Fifth advantage is its privacy as there is no publicity attendant in courtroom trials. Sixth advantage is the nonlegalistic nature of arbitral proceedings which are not bound by the strict rules of evidence thus assuring the flexibility of the proceedings and the finality of the award.

Seventh advantage is its impartiality. Foreign traders, prefer arbitration to local judicial remedies because of fear of discrimination against foreigners. Eight advantage of arbitration is the

exercise of autonomy by which merchants depend upon other merchants to resolve their controversies. Arbitration therefore, offers an economical method of dispute-settlement through well-organized facilities.

FACILITIES FOR ARBITRATION

Regional arbitration systems are now functioning. As I stated elsewhere in this paper, practical facilities for commercial arbitration are furnished by entities or organizations divided into 3 different classes, namely, (1) national institutions which provide 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.

In Europe and Asia, forty countries maintain general arbitration facilities furnished by local chambers of commerce. Special arbitration associations exist purposely for providing arbitration facilities and for improving commercial arbitration. Examples are the American Arbitration Association, the London Court of Arbitration and the Netherlands Arbitration Institute (Consolidated Report, Secretary General to the Economic and Social Council, E. Conf. 26/4 April 24, 1958). The London Court of Arbitration established within the framework of the London Chamber of Commerce, provided the model or pattern for arbitration system followed by other trade organizations in the British Commonwealth.

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 dispute through arbitration facilities of such exchanges or associations concerned, and more than a hundred association or exchanges maintain these facilities in Western Europe, the British Commonwealth of Nations and the United States. In the cotton trade, for example, arbitrations are held by the New York Cotton Exchange, and also by the Bremen Cotton Exchange, and the Liverpool Cotton Association, and this last one is reputed to have the oldest court of arbitration in the cotton trade.

The American Spice Trade Association and the Association of Food Distributors are American trade organizations maintaining arbitral facilities. A panel of more than 13,000 arbitrators available throughout the United States from all business sectors is maintained by the American Arbitrators Association. This institutional

arbitration is governed by detailed rules of procedure. (Schoonmaker, International Arbitration and the Association of Food Distributors, in Domke, International Arbitration, p. 259).

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 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 is the best example of an international arbitration center. 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-one 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 the rules of arbitral procedure. (Consolidated Report, Secretary General to the Economic and Social Council, E/Conf. 26/4 April 24, 1958).

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 arbitration much is to be desired. In the member-states are non-governmental organizations—chambers of commerce and exporters' associations which help in propagating commercial arbitration. Arbitration bodies are maintained by the Federation of Indian Chamber of Commerce and Industry, and also in Pakistan and similarly by the Japan Commercial Arbitration Association. 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. Such an agreement was entered into between the Amer-

ican Arbitration Association and the Japan Commercial Arbitration Association.

In Communist countries, a different system of foreign trade arbitration exists. Most prominent example is the Foreign Trade Arbitration Commission of the All-Union Chamber of Commerce in Moscow. Such Arbitration Commissions have panels of arbitrators who are all nationals of the Communist country concerned. The arbitrators to be chosen by each party to the dispute must be selected from the panel, and if the parties could not agree on the third arbitrator, the Chairman of the Commission shall choose such from the same panel. Since trade with the Western World is undertaken by Communist states through state-organizations, the practice is to have such arbitration held in the Communist country. It may be mentioned that the Moscow Commission has a rather good record. Of late, some Soviet state organizations consented to hold arbitration outside Moscow such as proceedings held in Sweden and in the United States (Samuel Pisar, Treatment of Communist Foreign Trade Arbitration in Western Courts, pp. 101-113, Domke ed., International Trade Arbitration).

The Philippine Council of the International Chamber of Commerce established an arbitration commission. None of the various trade associations existing in the Philippines today is specially and primarily devoted to arbitration alone. The Philippine Chambers called upon to submit names of at least five of their members who are willing to act as arbitrators 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 Chambers of Commerce, Philippine Chamber of Industries, Philippine Chinese General Chamber of Commerce, Textile Mills Association of the Philippines, and the French Chamber of Commerce in the Philippines. This panel of arbitrators chosen from different trade organizations is truly representative of the cross-section of the business community.

To my knowledge this is the only arbitration facility existing in the Philippines, and this has been organized by the Philippine National Committee of the International Chamber of Commerce. As mentioned, 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 with the least expense. (Joining the International Chamber of Commerce, 51 Commerce, 6 [1955]).

Reciprocal arrangements exist between the Chamber of Commerce of the Philippines and the American Arbitration Association. In turn the American Arbitration Association has entered into reciprocal arrangements with the International Chamber of Commerce and many Chambers of Commerce in the British Empire, and with commercial organizations in the Netherlands, India, Pakistan, and Japan. Similar arrangements have been entered into by the Inter-American Commercial Arbitration Commission and the Japanese Commercial Arbitration Association. (Rosenthal, Techniques of International Trade, 22 [1956]). Consequently members of one organization can conveniently arrange for arbitration under the auspices of any of the associations participating in the arrangement, with panels of expert arbitrators and pre-established rules of procedure.

ARBITRATION PROCEDURES

In provisions of law the substantive and the procedural are so intertwined with each other so that in discussing arbitral procedures one has in effect to discuss the law and practice of arbitration. In the Philippines, arbitration is governed by the new Civil Code, Articles 2042-2046 [Republic Act 386], and the Arbitration Law [Republic Act 876] and to a certain extent referred to in the Revised Rules of Court. The Philippines is a signatory to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards but has not yet ratified the same.

For arbitration to be resorted to, there must be an arbitration agreement. If concluded before the dispute arises it is an arbitration clause, while if concluded after the dispute has arisen it is a submission to arbitration. Both types are recognized in Philippine law. Generally the submission has more requirements than the arbitration clause. In some countries a submission is required after the dispute arises even if there is an arbitration clause. In the Philippines the arbitration clause or submission must be in writing.

Any claim arising out of a determinate legal relationship or contract can be submitted to arbitration. There are matters which may not be submitted to arbitration because of public policy. In France, for example, arbitration is excluded when nullity of a company is pleaded. (Sanders, Arbitration Law in Western Europe, pp. 137-148, Domke ed., International Trade Arbitration [1958]). Under modern arbitration statutes, an arbitration agreement is valid and irrevocable and should not be considered as contrary to public policy on the ground that it ousts the courts of jurisdiction.

On the threshold question for the courts to decide whether there is a valid arbitration agreement, arbitrators can rule on their competence, however, it is the courts which will finally decide the case and render the award in spite of plea of incompetence. The courts will then pass upon the validity of the award and determine whether it is based upon a valid arbitration agreement.

Generally any person legally capacitated can be an arbitrator. There are exceptions to this rule. Thus the Dutch will not allow members of the judiciary to become arbitrators. In some Swiss cantons women cannot act as arbitrators. Spain requires arbitrators to be lawyers if arbitration is to be held under rules of law. Some countries require arbitrators to be nationals. (Sanders, Arbitration Law in Western Europe, pp. 137-148, Domke, *op. cit.*) In Philippine law, disqualifications are based on relationship to the parties and presence of interest in the outcome of the arbitration.

Several countries require odd number of arbitrators. In some countries the number of arbitrators may be even and there is an arrangement of votes are equally divided. There are several systems of composing the arbitral tribunal. There is the single or sole arbitrator. Another is for each party to appoint an arbitrator. The third arbitrator who will join the two already appointed will either be a *tiers arbitre* or third arbitrator proper if he has to concur with the views of one of the two original arbitrators, or an umpire if he has to decide independently instead of the two original arbitrators. The third arbitrator may even be outvoted by the other two. (Sanders, Arbitration Law in Western Europe, pp. 137-148, Domke, *op. cit.*) Philippine law provides for the appointment of one or three arbitrators requiring a majority for an award.

Arbitration recognizes full party autonomy as the parties decide the rule of procedure. Parties may agree on submitting themselves to the rules of a permanent arbitration entity. In some countries, the rules are promulgated by the arbitrators themselves in the absence of an agreement by the parties. At any rate, the rules should observe certain basic principles as giving each party his "day in court" and public policy should be upheld. There are countries where the arbitration can be carried on only under the rules of law. In countries where a second kind of arbitration is known, the amiable compounder or amiable *compositeur* decides the case *ex aequo et bono*. The Philippine Civil Code takes into account customs usages and equity although no specific mention is made of the amiable compounder in the chapter on arbitration, he is recognized for purposes

of compromises and the provisions of the Civil Code on compromise are made applicable to arbitration.

There are countries which require the statement of reasons in the award. Other countries do not require such. Parties may agree to have reasons stated in the award. Generally, an arbitral award can only be enforced after being declared enforceable by the courts. Then this is followed by the *exequatur* or order for enforcement. Philippine law also requires assistance of judicial authority for enforcement of the award.

Philippine law does not require expressly the statement of reasons in the award but such should appear in the award especially if it has been appealed and thus assumes the form of a judgment of an appellate court.

There are countries which do not allow any appeal against the arbitral award. Some recognize the right of appeal to a higher arbitral tribunal or to the appellate judicial tribunal. Philippine law allows appeal or review by certiorari proceedings. An award may be declared null by judicial authority. Many countries have special action to set aside an arbitral award. Principal causes are nonexistence of a valid arbitration agreement, arbitrators have gone beyond authority, and award is contrary to public policy. The usual causes for annulment or revocation of awards are fraud by one of the parties, and misconduct of an arbitrator. Along the same lines are the grounds in Philippine law for vacating an award (Sander, Arbitration Law in Western Europe, in Domke, *op. cit.* and Walther J. Habscheid, Unification in the Enforcement of Foreign Awards, pp. 202-208, Domke, ed., International Arbitration).

CONCLUSION

With utmost simplicity I have discussed the subject assigned to me: Commercial Arbitration Facilities and Procedures. As pointed out, the only arbitration facility in the Philippines today is the one maintained by the Philippine Council of the International Chamber of Commerce. Existing Philippine law on arbitration is primarily aimed at domestic arbitration. It is my fervent hope that more arbitration facilities be established in the Philippines especially the specialized kind maintained by commodities exchanges. I also hope that the Philippines ultimately ratifies the New York Convention on the Recognition and Enforcement of Foreign Arbitral awards, which will fill up many gaps in the law of international commercial arbitration.

Lastly I reiterate my thanks for this opportunity of speaking to you on Commercial Arbitration which I believe is a powerful socio-economic instrument for the promotion of regional trade, international understanding and world-wide cooperation. I thank you.