Overturning the Supreme Court: Treating Foreign International Arbitral Awards as Exceptions to the Rule on Finality of Judgments

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I. INTRODUCTION

Pacta sunt servanda[1] requires parties to a treaty to comply[2] with its provisions in good faith.[3] This well-settled principle of international law is central to international commercial arbitration[4] because issues of enforcement and recognition — one of the most troublesome aspects of international commercial arbitration[5] — are governed by international instruments, such as the New York Convention on Recognition and the Enforcement of Foreign Arbitral Awards (New York Convention).[6]

It is this tension between enforcement and non-enforcement of foreign international arbitration awards which serves as a backdrop for the subject matter of this Note.

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1. *See* Vienna Convention on the Law of Treaties, May 23, 1969, art. 26, 1155 U.N.T.S. 331.
2. *See* Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, 1950 I.C.J. 221, 228 (July 18, 1950) & Gabčíkovo-Nagymaros Project (Hung. v. Slovk.), 1997 I.C.J. 7, 46 (Sep. 25, 1997).
3. *See* Nuclear Tests (N.Z. v. Fr.), 1974 I.C.J. 457, 473 (Dec. 20, 1974) & IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 592 (2003 ed.).
4. ALAN REDFERN & MARTIN HUNTER, LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 62 (1999 ed.).
5. Joseph E. Neuhaus, *Current Issues in the Enforcement of International Arbitration Awards,* 36 U. MIAMI INTER-AM. L. REV. 23 (2004).
6. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 330 U.N.T.S. 38 [hereinafter New York Convention].

A. Statement of the Problem

The problem to be resolved in this Note pertains to the enforcement stage of foreign international arbitration proceedings. Specifically, the questions sought to be addressed are: (1) whether a foreign arbitral award could be refused enforcement on the ground of *res judicata*;[7] (2) whether principles of *res judicata* can be considered subsumed under the public policy exception under the New York Convention;[8] and (3) whether foreign arbitral awards could be considered as among the exceptions to the rule on finality of judgments, with a view to making it enforceable, despite *res judicata* objections.[9]

Despite the pro-enforcement objectives of the New York Convention,[10] arbitration experience shows that there is an increasing tendency for parties to prevent enforcement of arbitration awards.[11] Of course, it is to be expected that litigants would resort to such measures since the New York Convention itself provides grounds for non-enforcement of awards.[12] As a

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7. As where a court in the place of enforcement has already rendered a decision regarding a particular case and is now confronted with a subsequent foreign arbitral award dealing with the same case between the same parties.

8. New York Convention, *supra* note 6, art. 5, ¶ 2 (b). The Article provides that the "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 the "recognition or enforcement of the award would be contrary to the public policy of that country." *Id.*

9. For purposes of this Note, *res judicata* and rule on finality of judgments will be used interchangeably, as they are interrelated concepts.

10. New York Convention, *supra* note 6, art. 1, ¶ 1. The Article provides:

> (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.

Id.

11. CUSTODIO O. PARLADE, ALTERNATIVE DISPUTE RESOLUTION ACT OF 2004 (REPUBLIC ACT NO. 9285) ANNOTATED 240 (2004).

12. New York Convention, *supra* note 6, art. 5. The Article provides:

> (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 [A]rticle II were, under the law applicable to them, under some incapacity, or

result, much of the provisions on non-enforcement are, in a sense, exploited by litigants. In fact, even from the very start, the public policy exception "caused the most consternation" among the drafters of the New York Convention, as it was feared to be a "major potential loophole" in the future.[13]

These questions arise from the dispute between the Philippine International Air Terminals Co., Inc. (PIATCO) and the Philippine Government in *Agan, Jr. v. Philippine International Air Terminals Co., Inc.*

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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 falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(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.

Id.

13. David Stewart, *National Enforcement of Arbitral Awards Under Treaties and Conventions*, *in* INTERNATIONAL ARBITRATION IN THE 21ST CENTURY: TOWARDS JUDICIALIZATION AND UNIFORMITY? 189 (1994).

[*PIATCO*].[14] In this Case, a build-operate-transfer agreement was entered into by the Government wherein it granted PIATCO the right to operate the Ninoy Aquino International Airport (NAIA) Terminal III. Problems arose when then President Gloria Macapagal-Arroyo made pronouncements that she will not honor PIATCO's contracts as they were considered null and void.[15] When the Case reached the Supreme Court, the contracts were voided for being contrary to law and public policy.[16]

Among the issues resolved by the Court in *Agan* was the legal effect of PIATCO's arbitration proceedings.[17] This issue came about because PIATCO commenced arbitration proceedings before the International Chamber of Commerce (ICC) in Singapore, while the Case was pending in the Supreme Court.[18] Thus the Court had to resolve whether the arbitration proceedings should take primacy and to suspend the proceedings in the Supreme Court.

The Supreme Court decided that it had jurisdiction despite the existence of an arbitration clause in the concession agreement between PIATCO and the Philippine Government.[19] It anchored its position on the existence of parties not privy to the arbitration agreement,[20] on the speedy resolution of cases,[21] and the alleged corruption attending the contract.[22]

However, notwithstanding the ruling of the Supreme Court in *Agan*, the proceedings continued before the ICC in Singapore. The Philippine Government raised the issue of whether the arbitration tribunal still had jurisdiction over the matter considering that the contract was already

14. Agan, Jr. v. Philippine International Air Terminals Co. Inc. [PIATCO], 402 SCRA 612 (2003).

15. *Id.* at 640.

16. *See* Mario E. Valderrama, *Should Local Courts Interfere in the NAIA 3 Mess?*, *available at* http://webcache.googleusercontent.com/search?q=cache:CLMpbyUo_70J:www.pdrci.org/web1/art004.html+should+local+courts+interfere+in+the+NAIA+3+mess&cd=4&hl=en&ct=clnk&gl=ph&source=www.google.com.ph (last accessed Feb. 25, 2011).

17. *Agan, Jr.*, 402 SCRA at 647.

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.* at 648.

22. *Id.* at 644-45. The Petitioners cited provisions of the PIATCO contracts which "require disbursement of unappropriated amounts in compliance with the contractual obligations of the Government," which were "contrary to the mandate of the Constitution that 'no money shall be paid out of the treasury except in pursuance of an appropriation made by law.'" *Agan, Jr.*, 402 SCRA at 644-45.

declared void by the Philippine Supreme Court.[23] The ICC rejected the Government's arguments and adhered to the doctrine of separability of arbitration clauses.[24] Thus, it took cognizance of PIATCO's claims notwithstanding the decision by the Philippine Supreme Court.[25]

Philippine Dispute Resolution Center's Deputy Secretary-General, Atty. Mario E. Valderrama, observes that the Supreme Court did not act in accordance with international arbitration procedures.[26] Being a contract involving an arbitration clause, the dispute should have been brought to the arbitral body *first* — resolving any issue as to the validity of the contract. Thereafter, the decision in the arbitration proceedings could be brought to the local courts in order to determine whether it could be enforced locally.[27]

It is the opinion of arbitration author Atty. Eduardo P. Lizares that even if the subject matter of the controversy was public in nature or involved a paramount public interest, arbitration should have been required prior to any intervention by the courts.[28] After all, any award of the arbitral tribunal chosen by the parties could still be subject in a proper case to the certiorari jurisdiction of the Supreme Court.[29] It was as important, however, for the Court not to have preempted the international arbitration route by ruling upon the legal issues of the case on the merits.[30]

More important are the issues which arise out of *Agan, Jr.*. Necessarily, the ongoing arbitration in the ICC would deal with the PIATCO contract — the very same document which the Supreme Court nullified. Being a trier of facts, the ICC is not precluded from entertaining the very same issues resolved by the Supreme Court.

Thus, a problem exists. If the ICC upholds the contract's validity or at least bases its award on one of the provisions considered void by the Supreme Court, what remedies can PIATCO avail of in order to persuade the Supreme Court to recognize such award? Would the Supreme Court reverse or modify its decision in *Agan, Jr.* on account of a foreign arbitral

23. Government of the Republic of Philippines v. Philippine International Air Terminals Co, Inc., 1 SLR 278 (Nov. 17, 2007), *available at* http://www.ipsofactoj.com/highcourt/2006/Part3/hct2006(3)-008.htm (last accessed Feb. 25, 2011) [hereinafter *GRP v. PIATCO*].

24. *Id.*

25. *Id.*

26. Valderrama, *supra* note 16.

27. *Id.*

28. EDUARDO P. LIZARES, ARBITRATION IN THE PHILIPPINES AND THE ALTERNATIVE DISPUTE RESOLUTION ACT OF 2004 81 (2004).

29. *Id.*

30. *Id.*

award? If so, how would PIATCO ask for such a revisiting of a final judgment? More importantly, how would local courts interpret issues of *res judicata* when it comes to enforcement proceedings? Will it resort to the public policy exception under the New York Convention?

These are some of the problems this Note wishes to address.

B. Significance of the Study

The present trend is for commercial transactions to stipulate and choose arbitration as a form of dispute resolution. In fact the Supreme Court itself said that "[i]n our jurisdiction, the policy is to favor alternative methods of resolving disputes, particularly in civil and commercial disputes. Arbitration along with mediation, conciliation, and negotiation, being inexpensive, speedy[,] and less hostile methods have long been favored by this Court."[31] However, the recent decisions of the Supreme Court show that it could exercise jurisdiction notwithstanding the existence of an arbitration clause.

At present, the Supreme Court has not dealt with the issue of what to do in case a foreign arbitral award goes against its own final decisions. It is therefore crucial to determine how the Supreme Court would act in such a scenario. It is much more necessary to examine what possible relief, avenues, or options a party has in such a scenario.

The Note gains more significance because it looks for an alternative way of interpreting the public policy exception under the New York Convention. It looks into the possibility of treating foreign arbitration awards as exceptions to the rule on finality of judgment, such that there would be room for enforcement despite overly broad definitions of the public policy exception to enforcement.

When the stakes are high and the resulting outcome could cost millions of pesos, subsequent foreign arbitral awards should be given special attention. This Note's attempt to highlight the Supreme Court's consideration of justice and fairness in "supervening events cases" serves a fresh perspective at the Supreme Court's decision-making process. More importantly, it would provide remedies for future commercial disputes running the same course as *Agan, Jr.*.

C. Scope and Limitations

This Note is confined to the enforcement stage of foreign international commercial arbitration cases. Thus, it will deal with questions of enforceability of *arbitral awards* as opposed to validity and enforceability of *arbitration agreements*. As a consequence, discussions on "public policy" will pertain to public policy as an exception to the enforcement of arbitral

31. Korea Technologies Co., Ltd. v. Lerma, 542 SCRA 1, 7 (2008).

awards, as opposed to public policy as a ground for annulment of arbitral awards in the court of the place of the seat of arbitration.

Likewise, this Note is limited to the scenario where a court in the place of enforcement *first* takes cognizance and decides a case which is *subsequently* taken cognizance of by a foreign international arbitration tribunal. In this way, the discussion will be focused on the enforcement stage of such a situation giving rise to two decisions — one decision belonging to a court in the place of enforcement, another belonging to the foreign international commercial arbitration tribunal.

The confidential nature of arbitral proceedings also puts certain limitations on the production of resources such as orders and awards of arbitral tribunals. Therefore, discussions on the merits of ongoing arbitration proceedings will only be made when possible.

Lastly, this Note would not depend on the success or demise of the negotiations between the Philippine Government and PIATCO. As of date, the arbitration is still ongoing. And, currently, the Government has extended its willingness to negotiate with PIATCO in order to prevent further litigation.[32] This Note would be based on an assumption that the case would continue to be resolved by the ICC. Emphasis would be placed on the reality of the problems posed by the mere fact that there is a continuing tendency for local tribunals to preempt resolution of disputes by foreign arbitral bodies.

II. PRELIMINARY CONCEPTS

More than giving an overview of the basic concepts involved in this Note, the discussions involved in this Chapter will show that (1) international law gives paramount importance to international arbitration whenever it is involved in contractual disputes and (2) Philippine laws and jurisprudence establish that giving preference to arbitration is indeed already part of public policy. All these point to the proposition that when faced with an international arbitral award dealing with the same issues, the Supreme Court must be willing to reverse its own final decision.

A. Arbitration in the Philippines

Arbitration is the submission of a dispute to one or more impartial persons for a final and binding decision.[33] Arbitration in the Philippines, according to

32. Lala Rimando, Task Force NAIA 3 to compromise with PIATCO, *available at* http://www.abs-cbnnews.com/special-report/07/01/08/task-force-naia-3-compromise-PIATCO (last accessed Feb. 25, 2011).

33. JIM LOPEZ, THE LAW ON ALTERNATIVE DISPUTE RESOLUTION: PRIVATE JUSTICE IN THE PHILIPPINES — HOW TO RESOLVE LEGAL DISPUTES WITHOUT

Chung Fu Industries (Phils.), Inc. v. Court of Appeals,[34] dates back to tribal practice by native rulers, which was then later codified in the Spanish Civil Code.[35]

In 1950, the New Civil Code of the Philippines (Civil Code)[36] was enacted. It expressly contained a chapter on arbitration.[37] Prior to its enactment, the prevailing thought was that of judicial hostility towards arbitration agreements as seen in *Wahl, Jr. v. Donaldson, Sims & Co.*[38] It showed this hostility by laying down the principle that "any clause which ousts the courts of jurisdiction is contrary to public policy" and is therefore null and void.[39]

1. Important Distinctions in Philippine Arbitration Laws

Arbitration may be international or domestic.[40] In the Philippines, international arbitration is governed by the UNCITRAL[41] Model Law on

A COURTROOM TRIAL 164-65 (2004) (citing Wesley A. Sturges, *Arbitration — What is it?*, 35 N.Y.U. L. REV. 1031 (1960)).

34. Chung Fu Industries (Phils.), Inc. v. Court of Appeals, 206 SCRA 545 (1992).

35. *Id.* at 548.

36. An Act to Ordain and Institute the Civil Code of the Philippines [CIVIL CODE], Republic Act No. 386 (1950).

37. *Id.* arts. 2042-2046. The Articles provide:

> Art. 2042. The same persons who may enter into a compromise may submit their controversies to one or more arbitrators for decision.
>
> Art. 2043. The provisions of the preceding Chapter upon compromises shall also be applicable to arbitrations.
>
> Art. 2044. Any stipulation that the arbitrators' award or decision shall be final, is valid, without prejudice to [A]rticles 2038, 2039, and 2040.
>
> Art. 2045. Any clause giving one of the parties power to choose more arbitrators than the other is void and of no effect.
>
> Art. 2046. The appointment of arbitrators and the procedure for arbitration shall be governed by the provisions of such rules of court as the Supreme Court shall promulgate.

Id.

38. Wahl, Jr. v. Donaldson, Sims & Co., 2 Phil. 301 (1905).

39. *Id.* at 302-03.

40. PARLADE, *supra* note 11, at 48.

41. UNCITRAL stands for the United Nations Commission on International Trade Law. It was established in 1996 by the UN General Assembly to formulate and harmonize international trade law. Origin, Mandate, and Composition of UNCITRAL, *available at* http://www.uncitral.org/uncitral/en/about/origin.html (last accessed Feb. 25, 2011).

International Commercial Arbitration (UNCITRAL Model Law)[42] and the New York Convention,[43] pursuant to Republic Act (R.A.) No. 9285, the Alternative Dispute Resolution Act of 2004 (ADR Act).[44] Meanwhile, domestic arbitration is governed by R.A. No. 876 (Arbitration Law).[45] Domestic arbitral awards in the contemplation of the ADR Act are arbitral awards rendered in arbitration proceedings that are held in the Philippines.[46] Foreign arbitral awards are awards rendered abroad in arbitration proceedings that take place outside of the Philippines.[47]

2. The Arbitration Law (1953)

R.A. No. 876 or the Arbitration Law was enacted in 1953.[48] It was in large part due to the failure of the Supreme Court to "promulgate the rules for the appointment of arbitrators and procedure for arbitration"[49] as required by Article 2046 of the New Civil Code, that the legislature deemed it proper to enact the Arbitration Law.[50]

With the enactment of this Law, Congress formally adopted the modern view of arbitration as a speedy, inexpensive, and amicable method of settling disputes and as a means of avoiding litigation should receive every encouragement from the courts.[51] It was during the effectivity of this Law that jurisprudence affirmed the constitutionality and validity of arbitration.[52]

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42. UNCITRAL Model Law on International Commercial Arbitration, June 21, 1985, 24 I.L.M. 1302 [hereinafter UNCITRAL Model Law].
43. New York Convention, *supra* note 6.
44. An Act to Institutionalize the Use of an Alternative Dispute Resolution System in the Philippines and to Establish the Office for Alternative Dispute Resolution, and for Other Purposes [Alternative Dispute Resolution Act of 2004], Republic Act No. 9285 (2004).
45. An Act to Authorize the Making of Arbitration and Submission Agreements, to Provide for the Appointment of Arbitrators and the Procedure for Arbitration in Civil Controversies and for Other Purposes [Arbitration Law], Republic Act No. 876 (1953).
46. LIZARES, *supra* note 28, at 5.
47. *Id.*
48. *See generally* Arbitration Law.
49. CIVIL CODE, art. 2046.
50. Laurence Hector B. Arroyo, Arbitration in the Philippines: Wave of the Future? 5, *available at* http://www.Philippinesforum.Com/ program/ pdf/Briefing %20 Paper_Arbitration.pdf (last accessed Feb. 25, 2011).
51. Eastboard Navigation, Ltd. v. Juan Ysmael and Co., Inc., 102 Phil. 1, 16 (1957).
52. *See* Puromines, Inc. v. Court of Appeals, 220 SCRA 281, 291 (1993).

Under this Law, the arbitration agreement must be in writing and signed by the party sought to be charged or by his legal representative.[53] In keeping with the intent of the parties to refer their dispute to arbitration, an aggrieved party is empowered to file a petition with the court for an order directing that arbitration proceed as agreed upon.[54] More importantly, it directs the court to stay the action and let the parties proceed to arbitration if it finds that the issues arise out of an agreement providing for arbitration.[55]

3. Adoption of the New York Convention

Senate Resolution No. 71 signified the Philippines' ratification of the New York Convention.[56] Being a signatory, it is bound to recognize arbitration agreements and to enforce arbitral awards made in any Contracting State.[57] Nevertheless, it was only in 2004 when the Convention was explicitly mentioned in a Philippine Law. The New York Convention is referred to by the ADR Act as a convention "approved in 1958" and "ratified by the Philippine Senate under Senate Resolution No. 71."[58]

4. The Alternative Dispute Resolution Act of 2004

R.A. No. 9285 or the Alternative Dispute Resolution Act of 2004 was signed into law on 2 April 2004.[59] The Law primarily institutionalizes alternative dispute resolution as an important means to achieve speedy and impartial justice and de-clog court dockets.[60] More importantly, this Law

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53. Arbitration Law, § 2.

54. *Id.* § 6.

55. *Id.* § 7.

56. *See* Alternative Dispute Resolution Act of 2004, § 3 (w). This Section provides:

> Sec. 3. *Definition of Terms.* — For purposes of this Act, the term:
>
> ...
>
> (w) 'New York Convention' means the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards approved in 1958 and ratified by the Philippine Senate under Senate Resolution No. 71.

Alternative Dispute Resolution Act of 2004, § 3 (w).

57. New York Convention, *supra* note 6, arts. 2-3 & Arthur P. Autea, *International Commercial Arbitration: The Philippine Experience*, 77 PHIL. L.J. 143, 143 (2002).

58. Alternative Dispute Resolution Act of 2004, § 3 (w).

59. *See* Alternative Dispute Resolution Act of 2004.

60. Alternative Dispute Resolution Act of 2004. § 2. This Section provides:

> Sec. 2. *Declaration of Policy.* — It is hereby declared the policy of the State to actively promote party autonomy in the resolution of disputes or the freedom of the party to make their own arrangements to resolve their disputes. Towards this end, the State shall encourage and actively

updates the previous arbitration law in order to harmonize it with the UNCITRAL Model Law.[61]

A notable development introduced by this Law is its reference to two international instruments — the UNCITRAL Model Law[62] and the New York Convention.[63] The ADR Act expressly adopted the UNCITRAL Model Law with respect to International Commercial Arbitration, to wit:

> Adoption of the Model Law on International Commercial Arbitration. — International commercial arbitration shall be governed by the Model Law on International Commercial Arbitration (the 'Model Law') adopted by the United Nations Commission on International Trade Law on June 21, 1985 (United Nations Document A/40/17) and recommended approved on December 11, 1985, copy of which is hereto attached as Appendix 'A.'[64]

In providing for the applicability of the UNCITRAL Model Law, Congress sought "to achieve the objective of the United Nations General

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> promote the use of Alternative Dispute Resolution (ADR) as an important means to achieve speedy and impartial justice and declog court dockets. As such, the State shall provide means for the use of ADR as an efficient tool and an alternative procedure for the resolution of appropriate cases. Likewise, the State shall enlist active private sector participation in the settlement of disputes through ADR. This Act shall be without prejudice to the adoption by the Supreme Court of any ADR system, such as mediation, conciliation, arbitration, or any combination thereof as a means of achieving speedy and efficient means of resolving cases pending before all courts in the Philippines which shall be governed by such rules as the Supreme Court may approve from time to time.

Id.

61. *See* Alternative Dispute Resolution Act of 2004, § 32. This Section provides:

> Sec. 32. *Law Governing Domestic Arbitration.* — Domestic arbitration shall continue to be governed by Republic Act No. 876, otherwise known as 'The Arbitration Law' as amended by this Chapter. The term 'domestic arbitration' as used herein shall mean an arbitration that is not international as defined in Article (3) of the Model Law.

Alternative Dispute Resolution Act of 2004, § 32.

62. *See* Alternative Dispute Resolution Act of 2004, § 3 (v). This Section provides:

> Sec. 3. *Definition of Terms.* — For purposes of this Act, the term:
>
> ...
>
> (v) 'Model Law' means the Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law on 21 June 1985.

Alternative Dispute Resolution Act of 2004, § 3 (v).

63. *Id.* § 3 (w).

64. *Id.* § 19.

Assembly, expressed in its resolution No. 40/72 of 11 December 1985, for member States to give due consideration to the Model Law on International Commercial Arbitration, in view of the desirability of uniformity of the law of arbitral procedures and the specific needs of international arbitration practice."[65]

With respect to the recognition and enforcement of foreign arbitral awards, Section 42 of the ADR Act provides that "the New York Convention shall govern" insofar as it concerns arbitral awards covered by the said Convention.[66] It likewise adopts the grounds for non-enforcement under the New York Convention.[67]

The ADR Act is the first Philippine legislation which provides for a separate system for international commercial arbitration.[68] Thus, it defines "international" in accordance with the definition of international arbitration under Article 1, Paragraph 3 of the UNCITRAL Model Law on International Commercial Arbitration.[69] Likewise, it defines an "international party" as an "entity whose place of business is outside the Philippines."[70] Furthermore, it also provides for a definition of what makes arbitration a "commercial" one, to wit:

> *Commercial Arbitration* — An arbitration is 'commercial' if it covers matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of transactions: any trade transactions for the supply or exchange of goods or services; distribution agreements; construction of works; commercial representation or agency; factoring; leasing, consulting; engineering; licensing; investment; financing; banking; insurance; joint venture and other forms of industrial or business cooperation; carriage of goods or passengers by air, sea, rail or road.[71]

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65. PARLADE, *supra* note 11, at 50.

66. Alternative Dispute Resolution Act of 2004, § 42.

67. *Id.* § 45. This Section provides:

> Sec. 45. *Rejection of a Foreign Arbitral Award.* — A party to a foreign arbitration proceeding may oppose an application for recognition and enforcement of the arbitral award in accordance with the procedural rules to be promulgated by the Supreme Court only on those grounds enumerated under Article V of the New York Convention. Any other ground raised shall be disregarded by the regional trial court.

Id.

68. Arroyo, *supra* note 50.

69. *Id.*

70. Alternative Dispute Resolution Act of 2004, § 3 (p).

71. *Id.* § 21.

B. International Commercial Arbitration

International commercial arbitration is the process of resolving business disputes between or among transnational parties through the use of one or more arbitrators rather than through the courts.[72] It is a way of resolving disputes which the parties choose for themselves.[73]

The practice of resolving disputes by international commercial arbitration only works because it is held in place by a complex system of national laws and international treaties.[74] First, there is the law that governs recognition and enforcement of the agreement to arbitrate.[75] Then, there is the law which governs the actual arbitration proceedings themselves. Next, there is the law or the set of rules which the arbitral tribunal has to apply to the substantive matters in dispute before it. Finally, there is the law that governs the recognition and enforcement of the award of the arbitral tribunal.[76]

1. The Arbitration Agreement

An agreement by the parties to submit to arbitration any disputes or differences between them is the foundation stone of modern international commercial arbitration; if there is to be a valid arbitration, there must first be a valid agreement to arbitrate.[77] This is recognized both by national laws and by international treaties[78] — i.e., the New York Convention and the Model Law on International Commercial Arbitration.

In an international commercial arbitration, the arbitration agreement fulfills several important functions. The most important of these in the present context is that it shows that the parties have consented to resolve their disputes by arbitration. This element of consent is essential. Without it, there can be no valid arbitration.[79] Once the parties have validly given their consent to arbitration, this consent cannot be unilaterally withdrawn. Even if the arbitration agreement forms part of the original contract between the parties and that contract comes to an end, the obligation to arbitrate survives; it is an independent obligation separable from the rest of the contract.[80]

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72. REDFERN & HUNTER, *supra* note 4, at 1.

73. *Id.*

74. *Id.*

75. *Id.* at 2.

76. *Id.*

77. *Id.* at 7.

78. REDFERN & HUNTER, *supra* note 4, at 4.

79. *Id.* at 6-7.

80. *Id.* at 7.

An arbitration agreement may be spelled out in the main contract, as an "arbitration clause," or it may be set down in a separate "submission to arbitration."[81] Whichever way it is done, there must be an agreement. If there is no agreement, there can be no valid arbitration.[82] An arbitration clause relates to disputes that might arise between the parties at some time in the future. However, an arbitration agreement which is drawn up to deal with disputes that have already arisen between the parties is generally known as a submission agreement or *compromis*.[83]

An agreement to arbitrate, like any other agreement, must be capable of being enforced at law. Otherwise, it will be a mere statement of intention which, whilst perhaps morally binding, is without legal effect.[84] It would be of little use to enforce an obligation to arbitrate in one country if it could be evaded by commencing legal proceedings in another.[85]

2. The Arbitral Award

In the modern arbitral process, the decision is made by an arbitral tribunal composed of one or more arbitrators chosen by or on behalf of the parties. The tribunal's decision is made in writing in the form of an award and usually sets out the reasons on which it is based.[86] The award binds the parties and represents the final word on the dispute. If it is not carried out voluntarily, the award may be enforced by legal process against the assets of the losing party.[87]

If no settlement between the parties is reached during the course of the arbitration, the arbitral tribunal will come to a decision on the dispute in the form of an award.[88] Thus, the end result of the arbitral process, if carried through to its conclusion, will be a decision and not merely a recommendation which the parties are free to accept or reject as they please. Once the award has been made, it will be directly enforceable by court action, both nationally and internationally.[89]

Internationally, an award differs from the judgment of a court of law, since the international treaties that govern the enforcement of an arbitral

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81. *Id.* at 4-5.

82. *Id.*

83. *Id.* at 6.

84. REDFERN & HUNTER, *supra* note 4, at 7.

85. *Id.*

86. *Id.* at 4.

87. *Id.*

88. *Id.* at 23-24.

89. *Id.*

award have much greater acceptance internationally than treaties for the reciprocal enforcement of judgments.[90]

Although it is the result of a private arrangement and is made by a private arbitral tribunal, the award constitutes a binding decision on the dispute between the parties. If it is not carried out voluntarily, the award may be enforced by legal proceedings — both locally and internationally.[91]

3. International Laws and Institutions on Arbitration

There is in place an effective international network of treaties and conventions which governs the recognition and enforcement of foreign arbitral awards. These conventions are instruments of international law, but their application with respect to any particular award will be a matter for the national law and the national courts of the place of enforcement.[92]

a. International Chamber of Commerce (1923)

The International Court of Arbitration was established in 1923 as the "arbitration body of the International Chamber of Commerce" and was constituted "to provide for the settlement by arbitration of business disputes of an international character in accordance with the Rules of the ICC, or even of disputes not of international character, if empowered by the arbitration agreement."[93]

Each year, ICC arbitrations are held in some 40 countries, in most major languages and with arbitrators of some 60 different nationalities. The work of the arbitral tribunals is monitored, organized, and supervised by the International Court of Arbitration.[94]

b. The New York Convention

The Convention on the Recognition and Enforcement of Foreign Awards or the New York Convention was conceived and adopted during the United Nations Conference on International Arbitration in 1958.[95] It is the world's basic law on recognition and enforcement of foreign arbitral

90. REDFERN & HUNTER, *supra* note 4, at 24.

91. *Id.* at 10.

92. *Id.* at 11.

93. International Chamber of Commerce, ICC Rules of Arbitration, *available at* http://www.iccwbo.org/court/arbitration/id4093/index.html#article_1 (last accessed Feb. 25, 2011).

94. *Id.*

95. New York Convention, *supra* note 6.

awards.[96] In fact, it is "the most important and widely used" convention with respect to enforcement of arbitral awards.[97]

It sets out the procedure to be followed for recognition and enforcement of foreign arbitral awards, whilst specifying limited grounds on which recognition and enforcement of such awards may be refused by a contracting state.[98] Most of the major trading nations of the world have become parties to the New York Convention.[99]

c. UNCITRAL Model Law

The UNCITRAL Model Law is said to reflect "a world-wide consensus on the principles and important issues of international arbitration practice."[100]

It is the product of the work of a Working Group of experts who met in Vienna from 1982 to 1985 which was submitted to and approved by a meeting of the UNCITRAL by delegates representing 32 states before it was submitted to the General Assembly of the United Nations.[101]

III. CONFLICTING ADJUDICATIONS: PROBLEMS BROUGHT ABOUT BY CONCURRENT JURISDICTIONS BETWEEN COURTS AND TRIBUNALS

This Chapter will establish that the problem of conflicting adjudications between foreign arbitral tribunals and courts in the place of enforcement exists because of the current state of international commercial arbitration laws and jurisprudence. A discussion will be made regarding (1) concurrent jurisdiction and parallel proceedings in international commercial arbitration; (2) the case of *Agan, Jr. v. PIATCO*[102] and how it gives rise to conflicting adjudications; and (3) why the problem of conflicting adjudication continues to be relevant and existent.

The problems posed in this Chapter will be answered by the proposition that a foreign arbitral award should be recognized despite the existence of a prior decision in the place of enforcement.

96. REDFERN & HUNTER, *supra* note 4, at 46.

97. *Id.* at 10.

98. *Id.*

99. *Id.*

100. PARLADE, *supra* note 11, at 51 (citing Explanatory Note by the UNCITRAL secretariat on the Model Law on International Commercial Arbitration).

101. *Id.*

102. Agan, Jr. v. PIATCO, 402 SCRA 612 (2004).

A. The Problem of Concurrent Jurisdictions and Parallel Proceedings in International Commercial Arbitration

International commercial arbitration has inherent problems to it. The problem ranges from basic jurisdictional issues (i.e. the validity of the arbitration agreement, jurisdiction of the arbitral tribunal, arbitrability of the subject matter) to matters of enforcement.

Basically, problems arise from the fact that one party almost always inevitably attempts to escape from liability.[103] The attempts are made in the form of raising jurisdictional issues and, in case an arbitral tribunal does take cognizance of the issue, the attempt to escape is made in the form of instituting proceedings to set aside or nullify the arbitral award during the enforcement stage in a domestic court. Highly qualified commentator Alan Redfern attempts to explain this phenomenon. He says:

> There is an unfortunate but increasing tendency for a party to an arbitration to attempt to resile from that agreement when a dispute actually arises. What tends to happen is that an arrangement that seemed sensible at the time looks much less attractive when a request for arbitration is actually made. It may then become a matter of trying to avoid the bargain, so that at best the claimant will not be able to proceed and at worst the claimant will have to proceed in the defendant's national courts, with all the trouble, expense and uncertainty that such a course of action is likely to entail.[104]

Questions of jurisdiction are indeed preliminary issues which frequently become the battlefield in litigation. However, more than that, questions of jurisdiction are crucial in international commercial arbitration not only because it determines whether a case should be dismissed, but also because it opens the door to the unique circumstance of parallel proceedings. Parallel proceedings exist because of concurrent jurisdiction.[105]

Nevertheless, regardless of the reasons for the multiple proceedings, there are three possible responses: (1) stay or dismiss the domestic action; (2) enjoin the parties from proceeding in the foreign forum; or (3) allow both suits to proceed simultaneously.[106] However, it is precisely due to the *alternative* nature of these responses that the existence of two or more conflicting decisions between different tribunals exists.

Given the increasingly transnational character of daily transactions, litigants are considerably more likely to find themselves embroiled in

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103. REDFERN & HUNTER, *supra* note 4, at 22.

104. *Id.*

105. Louise Ellen Teitz, *Both Sides of the Coin: A Decade of Parallel Proceedings and Enforcement of Foreign Judgments in Transnational Litigation* 10 ROGER WILLIAMS U. L. REV. 1, 8 (2004).

106. *Id.*

simultaneous proceedings in two or more locations.[107] Necessarily however, the existence of parallel proceedings gives rise to concurrent decisions. These decisions may or may not be reconcilable. This is where the problem lies.

B. Agan, Jr. v. PIATCO: The Problem of Conflicting Adjudications Illustrated

The following discussion will illustrate how the problem of conflicting adjudications between foreign arbitral tribunals and courts in the place of enforcement comes up in an international arbitration case. This is an illustration of how courts and foreign arbitral tribunals could exercise concurrent jurisdiction over cases involving arbitration agreements. From this, one will easily see that the rendition of an award poses potential conflict with the court judgment.

1. *Agan, Jr. v. PIATCO*: A Decision Rendered by a Court in the Place of Enforcement

Agan is a 2003 case decided by the Philippine Supreme Court.[108] This Case is a dispute about the project involving the construction of a terminal building at the Ninoy Aquino International Airport. The Complaint was filed by workers, service providers, and congressmen during the latter part of 2002.[109] During the pendency of the Case before the Court, President Arroyo, on 29 November 2002, in her speech at the 2002 Golden Shell Export Awards at Malacañang Palace, stated that she will not "honor (PIATCO) contracts which the Executive Branch's legal offices have concluded (as) null and void."[110]

On 26 February 2003, PIATCO filed a Request for Arbitration against the Republic of the Philippines with the International Court of Arbitration of the International Chamber of Commerce, Paris, France.[111] On 30 January 2004, the Republic of the Philippines filed its Answer to the Request for Arbitration of PIATCO.[112]

Thus, among the issues raised in the Case was the "legal effect of the commencement of arbitration proceedings by PIATCO."[113] The Court expressed that it was aware that arbitration proceedings have been filed pursuant to Section 10.02 of the [Arbitration] Agreement.[114] Nevertheless, it

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107. *Id.*

108. *Agan, Jr.*, 402 SCRA at 612.

109. *Id.* at 639.

110. *Id.* at 639-40.

111. *GRP v. PIATCO*, *supra* note 23.

112. *Id.*

113. *Agan, Jr.*, 402 SCRA at 647.

114. *Id.*

chose to take cognizance of the Case. The *whole* ratiocination of the Court is as follows:

> There is one more procedural obstacle which must be overcome. The Court is aware that arbitration proceedings pursuant to Section 10.02 of the ARCA have been filed at the instance of respondent PIATCO. *Again, we hold that the arbitration step taken by PIATCO will not oust this Court of its jurisdiction over the cases at bar.*[115]

Then, the Court cited *Del Monte Corporation-USA v. Court of Appeals*[116] in explaining why it is justified to take cognizance of the Case on the ground that there are parties involved in the present Case which could not be bound by the arbitration agreement.[117] The Court ruled that "arbitration proceedings could be called for but only with respect to the parties to the contract in question."[118] In applying said ruling to the Case, the Court said, to wit:

> It is established that petitioners in the present cases who have presented legitimate interests in the resolution of the controversy are not parties to the PIATCO Contracts. Accordingly, they cannot be bound by the arbitration clause provided for in the ARCA and hence, cannot be compelled to submit to arbitration proceedings.[119]

In further justifying its stance, the Court also cited *Heirs of Augusto L. Salas, Jr. v. Laperal Realty Corporation*,[120] where the Supreme Court proceeded to resolve the Case despite the existence of a valid arbitration agreement, on the ground that "the splitting of proceedings by allowing arbitration as to some of the parties on the one hand and trial for the others on the other hand would, in effect, result in multiplicity of suits, duplicitous procedure, and unnecessary delay."[121] Thus, according to the Court, it had jurisdiction to resolve the Case without waiting for the arbitration tribunal's resolution because "the interest of justice would best be served if the trial court hears and adjudicates the case in a single and complete proceeding."[122]

The Court ended the jurisdictional aspects of its ruling by reiterating how it valued a speedy resolution of the Case, with due regard for all parties before it in the Case at bar, to wit:

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115. *Id.* (emphasis supplied).

116. Del Monte Corporation-USA v. Court of Appeals, 351 SCRA 373 (2001).

117. *Agan, Jr.*, 402 SCRA at 647.

118. *Id.*

119. *Id.*

120. Heirs of Augusto L. Salas, Jr. v. Laperal Realty Corporation, 320 SCRA 610 (1999).

121. *Del Monte*, 351 SCRA at 382.

122. *Id.*

> *A speedy and decisive resolution of all the critical issues in the present controversy, including those raised by petitioners, cannot be made before an arbitral tribunal.* The object of arbitration is precisely to allow an expeditious determination of a dispute. This objective would not be met if this Court were to allow the parties to settle the cases by arbitration as there are certain issues involving non-parties to the PIATCO Contracts which the arbitral tribunal will not be equipped to resolve.[123]

The Court then continued to proceed with the merits of the Case. It concluded that the award by the Prequalification, Bids, and Awards Committee (PBAC) of the contract for the construction, operation, and maintenance of the Ninoy Aquino International Airport (NAIA) International Passenger Terminal III, the 1997 Concession Agreement, and its supplements, were all null and void.[124]

2. *Government of the Republic of the Philippines v. Philippine International Air Terminals Co., Inc.* [*GRP v. PIATCO*]: A Subsequent ICC Arbitration Case in Singapore

Notwithstanding the Supreme Court's decision in *Agan*, a request for arbitration was filed by PIATCO with the International Chamber of Commerce (ICC) in Singapore[125] in *GRP v. PIATCO.*[126] This was pursuant to the arbitration clause in the Concession Agreement between PIATCO and the Philippine Government which provided that:

> All disputes, controversies or claims arising from or relating to the construction of the Terminal and/or Terminal Complex or in general relating to the prosecution of the Works shall be finally settled by arbitration in the Republic of the Philippines following the Philippine Arbitration Law or other relevant procedures. All disputes, controversies or claims arising in connection with this Agreement except as indicated above shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by three (3) arbitrators appointed in accordance with the said Rules. The place of arbitration shall be Singapore and the language of the arbitration shall be English.[127]

As early as April of 2003, the Government of the Philippines wrote to inform the ICC that petitions had been filed with the Philippine Supreme

123. *Id.* at 647-48 (emphasis supplied).

124. *Id.* at 678.

125. *GRP v. PIATCO, supra* note 23.

126. Government of the Republic of Philippines v. Philippine International Air Terminals Co, Inc., 1 SLR 278 (Nov. 17, 2007), *available at* http://www.ipsofactoj.com/highcourt/2006/Part3/hct2006(3)-008.htm (last accessed Feb. 25, 2011).

127. *Id.*

Court.[128] However, on 28 July 2003, the ICC informed the Parties that it had decided that the arbitration should proceed in accordance with Article 6 (2) of the ICC Rules of Arbitration (the ICC Rules) as it was *prima facie* satisfied that an ICC arbitration agreement might exist between the parties.[129] It also indicated that the arbitral tribunal, when constituted, would have to decide on its own jurisdiction.[130]

On 20 October 2004, the Tribunal published its partial award deciding that Singapore Law governed the arbitration agreement and the arbitration proceedings.[131] It applied the principle of severability of arbitration agreement from the underlying agreement in response to the objections raised by the Philippine Government that the concession agreements have already been declared null and void by the Philippine Supreme Court.[132] Thus, the ICC tribunal in Singapore decided that it had jurisdiction over the case, and as of date, the arbitration is currently ongoing.[133]

C. How the Problem of Conflicting Adjudications Continues to Persist

The problem of conflicting adjudications will not end with *Agan, Jr.*. This is due to subsequent jurisprudence indicating a similar path. It is also of note that the ADR Act incorporated the UNCITRAL Model Law — to govern foreign international arbitration proceedings; and the New York Convention — to govern the enforcement of foreign arbitration awards.[134] However, it will be seen that both the UNCITRAL Model Law and the New York Convention contain certain characteristics which do not prevent the existence of two or more decisions. Lastly, it will also be seen that such problem also exists in other countries.

1. Subsequent Jurisprudence Indicates a Continuing Trend of Judicial Preemption of Arbitration

Some are of the opinion that the problems experienced in *Agan, Jr.* would no longer recur with the advent of the ADR Act.[135] For example, it now

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128. *Id.*

129. *Id.*

130. *Id.*

131. International Law Office, No Breach of Natural Justice in Arbitration, *available at* http://www.internationallawoffice.com/newsletters/Detail.aspx?g= 085d2c1c -15cb-db11-adf6-001143e35d55 (last accessed Feb. 25, 2011).

132. *Id.*

133. *Id.*

134. Alternative Dispute Resolution Act of 2004, § 42.

135. Philippine Chamber of Commerce and Industry, DOJ promulgates ADR Act's Implementing Rules and Regulations, *available at* http://www.philippine chamber.com/index.php?view=article&id=741:doj-promulgates-adr-acts-imple

provides that the court is duty-bound to refer to arbitration those parties who are bound by the arbitration agreement and as to those parties who are not bound by the arbitration agreement, the civil action may proceed separately against them.[136] Therefore, the argument in *Agan* with respect to parties not privy to the contract would no longer hold. More importantly, the ADR Act now expressly provides that the correct procedure is for the Court to suspend the proceedings before it and refer the parties to arbitration.[137]

However, even after the ADR Act's enactment, jurisprudence seems to follow the Supreme Court's direction in *Agan*. In *European Resources and Technologies, Inc. v. Nolte, et al.*,[138] the Supreme Court again disregarded the arbitration clause and proceeded to resolve the Case on its merits. In fact, it even cited *Agan* to justify its action.[139] In other words, the Supreme Court tends to pre-empt arbitration proceedings despite the current law — and this signals a trend to be seen in the coming years.

2. The UNCITRAL Model Law Does Not Make it Mandatory for Courts to Defer to Arbitration

The ADR Act "adopts" the UNCITRAL Model Law for the resolution of international commercial arbitration cases.[140] Because, initially, the objective of adopting the Model Law to govern international arbitration cases was to harmonize Philippine laws and procedure with the prevailing international procedures on arbitration,[141] it would be fair to expect that this incorporation serves to resolve the problems raised by jurisprudence previous to the enactment of the Alternative Dispute Resolution Act — specifically, the issue of having parallel proceedings between an arbitral tribunal and a domestic court, and corollary to that, the issue of having conflicting decisions between foreign arbitral tribunals and domestic courts.

The problem lies in the fact that the UNCITRAL Model Law itself has given rise to a cacophony of domestic decisions interpreting its own

menting-rules-and-regulations&option=com_content&Itemid=62 (last accessed Feb. 25, 2011).

136. *Id.* § 25.

137. *Id.* § 24.

138. European Resources and Technologies, Inc. v. Ingenieuburo Birkhahn + Nolte, Ingeniurgesellschaft mbh, 435 SCRA 246 (2004).

139. *Id.* at 258.

140. Alternative Dispute Resolution Act of 2004, § 19.

141. *See* Ranier R. Mamangun, The Philippine Arbitration Law and the UNCITRAL Model Law, *available at* http://www.hg.org/article.asp?id=5124 (last accessed Feb. 25, 2011).

provisions.[142] Different interpretations from different countries adopting the Model Law have been made regarding its Articles 8 and 16 — articles dealing with the issue of whether it is the domestic court or the arbitral tribunal which determines whether a dispute is arbitrable and thus should be referred to arbitration.[143]

On the one hand, Article 8 of the UNCITRAL Model Law provides, to wit:

> Arbitration and substantive claim before court.
>
> (1) A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.
>
> (2) Where an action referred to in [P]aragraph (1) of this [A]rticle has been brought, arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the court.[144]

On the other hand, Article 16 of the Model Law provides, to wit:

> Competence of arbitral tribunal to rule on its jurisdiction.
>
> (1) The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.
>
> (2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence. A party is not precluded from raising such a plea by the fact that he has appointed, or participated in the appointment of, an arbitrator. A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings. The arbitral tribunal may, in either case, admit a later plea if it considers the delay justified.

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142. International Commercial Arbitration, UNCITRAL Secretariat Explanation of Model Law, *available at* http://faculty.smu.edu/pwinship/arb-24.htm (last accessed Feb. 25, 2011).

143. *See* Alan Uzelac, Jurisdiction of the Arbitral Tribunal: Current Jurisprudence and Problem Areas under the UNCITRAL Model Law, *available at* http://alanuzelac.from.hr/pubs/B23ALR_jurisdiction_fin.pdf (last accessed Feb. 25, 2011).

144. UNCITRAL Model Law, *supra* note 42, art. 8.

> (3) The arbitral tribunal may rule on a plea referred to in [P]aragraph (2) of this [A]rticle either as a preliminary question or in an award on the merits. If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within thirty days after having received notice of that ruling, the court specified in [A]rticle 6 to decide the matter, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award.[145]

When one party submits a claim to the court, and the other party opposes on the ground that an arbitration agreement was concluded (and, eventually, commences arbitral proceedings regarding the same claim), there are two possible scenarios: under Article 8, the court is bound to refer the case to arbitration, "unless the agreement is null and void, inoperative or incapable of being performed".[146] Under Article 16, the tribunal may rule on its own jurisdiction, including any objections regarding the existence or validity of the agreement. Thereby, the same objection can be resolved either as a preliminary issue in court proceedings, upon motion to refer the dispute to arbitration, or in the arbitral proceedings in a separate decision or in the award on the merits.[147]

So, the question is: Who should be the one to resolve the issue on jurisdiction? Currently, there are two prevailing answers to the issue. The first is to leave the issue of jurisdiction to be resolved by arbitrators.[148] The second answer, adopted by other countries, is to grant the domestic court an independent preliminary decision on the issue of the existence, validity, and/or practicability of the agreement.[149]

However, due to the existence of this dual approach to interpreting the Model Law, the issue remains unresolved. As one commentator observes, different jurisdictions have resorted to different approaches, and thus, two possible scenarios become possible with both situations being legitimate, subject to prudent exercise of the courts' discretion.[150]

The problems created by this dual jurisdiction regarding evaluation of validity of the arbitration agreement are likewise confirmed by commentators as a major problem area in the field of international commercial arbitration. One commentator says, to wit:

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145. *Id.* art. 16.

146. *Uzelac*, *supra* note 143.

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

> The first problem area arises from the dual jurisdiction with respect to determining whether [the] arbitration agreement is valid and binding. Although there is no doubt that arbitrators are empowered to rule in their own jurisdiction upon timely objections raised in the arbitral proceedings, virtually the same authority is also given to the court if the claim is raised in a court action, and the other party objects on the ground that this claim was covered by an arbitration agreement. This parallel regime raises a number of questions regarding the division of labour between arbitrators and the courts; regarding potential duplication of work; regarding the possibility of incompatible decisions; regarding the effects of the arbitral and/or court's final determination, etc.[151]

The problem is highlighted when compared to other conventions dealing with parallel proceedings. Case in point is the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (Brussels Convention).[152] The Brussels Convention provides uniform rules on the Euronational jurisdiction of the courts of the contracting states — members of the European Union and the European Free Trade Association (EFTA). It is a set of rules which covers jurisdiction on the one hand, and enforcement of judgments on the other hand, to simplify formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals.[153] The Convention also makes sure that judgments of a member state can circulate freely in another member state.[154]

Unlike the UNCITRAL Model Law, the Brussels Convention adequately provides for parallel proceedings. In fact, it could be observed that parallel proceedings are unavoidable under the Model Law. Article 8 of the Model Law provides:

> (1) A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.

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151. *Id.*

152. Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, Sep. 27, 1968, 1990 O.J. (C 189) 2 [hereinafter Brussels Convention].

153. Nadine Balkanyi-Nordmann, *The Perils of Parallel Proceedings, Is An Arbitration Award Enforceable if the Same Case is Pending Elsewhere?*, 56 DISP. RESOL. J. 20, 21 (2002).

154. *Id. See also* Dominique T. Hascher, *Recognition and Enforcement of Judgments on the Existence and Validity of an Arbitration Clause under the Brussels Convention*, 7 ARBITRATION INTERNATIONAL 33 (1997).

(2) *Where an action referred in [P]aragraph (1) of this [A]rticle has been brought, arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the court.*[155]

As a result, even the issue of whether it is the arbitral tribunal or the domestic court takes primary jurisdiction is not clear under the UNCITRAL Model Law — again, a fertile ground for disputes arising from parallel proceedings.

In contrast, the Brussels Convention makes *lis pendens* a key feature in order to prevent parallel litigation and conflicting results in different contracting States.[156] Article 21 of this Convention provides:

(1) Where proceedings involving the same cause of action and between the same parties are brought in the courts of different Member States, *any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established.*

(2) *Where the jurisdiction of the court first seised is established, any court other than the court first seised shall decline jurisdiction in favour of that court.*[157]

Thus, it could be observed that parallel proceedings are prevented under the Brussels Convention due to its clear mandatory rule on *lis pendens.*[158] However, the same cannot be said of the UNCITRAL Model Law. Parallel proceedings are unavoidable under the current state of the Model Law. Thus, necessarily, conflicting decisions are likewise unavoidable.

3. The New York Convention Does Not Provide for Conflicting Decisions Scenarios

A particular problem exists with regard to enforcement of international arbitration awards when it conflicts with a final decision in the place of enforcement. This is so because nowhere does it say in the New York Convention that enforcement of an arbitration award can be refused on the ground of irreconcilable difference with a domestic judgment in a convention State.[159]

155. UNCITRAL Model Law, *supra* note 42, art. 8 (emphasis supplied).

156. Balkanyi-Nordmann, *supra* note 153, at 23 (citing ECJ in Case C-351/96, Drouot v. CMI, 1998 E.C.R. I-03075 & Marc Bernheim, *Rechtshaengigkeit und im Zusammenhang stehende Verfahren nach dem Lugano-Uebereinkommen*, 90 SJZ 143 (1994)).

157. Brussels Convention, *supra* note 152, art. 21 (emphasis supplied).

158. Balkanyi-Nordmann, *supra* note 153, at 27.

159. New York Convention, *supra* note 6, art. 5.

In fact, the New York Convention does not address the issue of parallel proceedings in international commercial arbitration.[160] Again, it would be helpful to contrast this with the Brussels Convention. Because of its due regard for parallel proceedings,[161] the Brussels Convention creates a distinct ground for refusal of enforcement of judgment when it comes to conflicting decisions. Article 27 of this Convention provides:

> A judgment shall not be recognized:
>
> ...
>
> (3) *if it is irreconcilable with a judgment given in a dispute between the same parties in the State in which recognition is sought.*
>
> (4) *if it is irreconcilable with an earlier judgment given in another Member State or in a third State involving the same cause of action and between the same parties,* provided that the earlier judgment fulfils the conditions necessary for its recognition in the Member State addressed.[162]

Currently, the New York Convention only recognizes seven exceptions to enforcement of international arbitration awards.[163] However, a provision similar to the Brussels Convention is absent from the New York Convention, leaving the issue of conflicting decisions largely unregulated.

However, it is true that while the Convention does not specifically list *res judicata* policies as a basis for refusal, Article 5, Paragraph 2 (b) creates an exception if "[t]he recognition or enforcement of the award would be contrary to the public policy of [the reviewing] country."[164] Nevertheless, as will be discussed in Chapters IV and V, not all issues of *res judicata* would find its way under the general rubric of "public policy" under the New York Convention.

4. International Arbitration Tribunals Determine Its Own Jurisdiction and Take Cognizance of Cases Despite the Existence of Prior Domestic Court Adjudication

The ICC's action in *GRP v. PIATCO* shows how an international arbitration tribunal resolves issues of jurisdiction where the point of contention is whether to proceed with the arbitration case despite the existence of a decision in a party's domestic court.

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160. Balkanyi-Nordmann, *supra* note 153, at 28.

161. *Id.*

162. Brussels Convention, *supra* note 152, art. 27, ¶¶ 3-4 (emphasis supplied).

163. New York Convention, *supra* note 6, art. 5.

164. Martin L. Roth, *Recognition by Circumvention: Enforcing Arbitral Awards as Judgments under the Parallel Entitlements Approach*, 92 CORNELL L. REV. 573, 582 (2007).

As was previously mentioned, PIATCO filed a request for arbitration before the International Chamber of Commerce in Singapore *despite* the pendency of *Agan, Jr.* with the Philippine Supreme Court.[165] PIATCO raised this as a jurisdictional issue in *Agan, Jr.*.[166] Nevertheless, the Supreme Court decided that the filing of such request for arbitration "will not oust the Court of jurisdiction."[167] It thus took cognizance of the case despite the arbitration agreement between the parties.

Meanwhile, PIATCO had commenced arbitration proceedings against the government, and on 20 October 2004, the Tribunal applied the principle of severability to address the objections raised by the Philippine Government that the concession agreements have already been declared null and void by the Philippine Supreme Court.[168]

Not satisfied by the tribunal's partial award, the Philippine Government applied to the Singapore High Court for the setting aside of the award. However, the Singapore High Court sided with the tribunal and upheld its application of the principle on severability.[169]

This approach by the ICC and the Singapore High Court is supported by the International Law Association. In its 72d Conference in 2006, it adopted the "Final Report on *Lis Pendens* and Arbitration," of its Committee on International Commercial Arbitration. In this Report, it recommended that a tribunal should determine its own jurisdiction, to wit:

> *Where the Parallel Proceedings are pending before a court of a jurisdiction other than the jurisdiction of the place of the arbitration, consistent with the principles of competence-competence, the tribunal should proceed with the Current Arbitration and determine its own jurisdiction,* unless the party initiating the arbitration has effectively waived its rights under the arbitration agreement or save in other exceptional circumstances.[170]

Thus, it is to be expected that in situations where a domestic court pre-empts an arbitration case, the arbitral tribunal will proceed with arbitration based on the principles of *competence-competence,* and separability of arbitral clause, whenever necessary.

5. The Problem is Likewise Felt in Other Jurisdictions

165. *Agan Jr.*, 402 SCRA at 647.

166. *Id.* at 646.

167. *Id.* at 647.

168. *GRP v. PIATCO, supra* note 23.

169. International Law Office, *supra* note 131.

170. *See* The 72d Conference of the International Law Association, Toronto, Can., June 4-8, 2006, *ILA Final Report on Lis Pendens and Arbitration*, ¶ 5.13. (emphasis supplied).

What happened in *GRP* also happened to a case between the Pakistani Government and the Hub Power Company Limited (HUBCO).[171] In this Case, the Water and Power Development Authority of Pakistan (WAPDA) entered into project contracts with HUBCO for the construction of power plants under a build operate transfer scheme.[172] Subsequently, the Pakistan Government, through WAPDA, wrote a letter to HUBCO indicating that it considers the project contracts to be "illegal, fraudulent, collusive, without consideration, *mala fide*[,] and designed to cause wrongful loss to WAPDA and the government of Pakistan with consequential wrongful gain to H[UBCO]."[173] WAPDA filed an action to recover money allegedly paid pursuant to the void contracts and to restrain HUBCO from resorting to ICC arbitration pursuant to the contract's arbitration clause.[174] Upon reaching Pakistan's Supreme Court, WAPDA's claim was upheld, there being "salient features" of the contract raising a "prima facie case of misuse of power by a public functionary."[175] Therefore, similar to what happened in *Agan, Jr.,* the Pakistan Court did not refer the parties to arbitration despite absence of challenge on the arbitration clause's validity.

With all these, it could be seen that international arbitration tribunals will insist on determining its own jurisdiction despite any previous or ongoing domestic court proceedings. Given that tribunals will insist on their own jurisdiction, and, currently, local courts also have a tendency to insist in determining its own jurisdiction, problems of parallel proceedings and conflicting adjudications are inevitable.

IV. THE STATUS OF RES JUDICATA VIS-À-VIS THE PUBLIC POLICY EXCEPTION UNDER THE NEW YORK CONVENTION

This Chapter will now focus on the question of whether the principle of *res judicata* can be subsumed under the public policy exception to enforcement of judgment and may thus be a ground for non-recognition of foreign arbitral awards. It should be recalled that the New York Convention does not mention *res judicata* as a ground for non-enforcement. Neither could the public policy exception be carelessly invoked. It will be learned later on that the public policy exception is *not* as all encompassing as it is thought to be.

Thus, this Chapter will show (1) the intricacies of the principles of *res judicata* and finality of judgments; (2) how foreign arbitral awards are

171. Louise Barrington, *HUBCO v. WAPDA: Pakistan Top Court Rejects Modern Arbitration,* 11 AM. REV. INT'L ARB. 385, 385 (2000) (citing Hub Power Company Ltd. v. WAPDA, (2000) PLD (SC) 841 (Pak.)).

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.*

enforced under the New York Convention; (3) the grounds for refusal of recognition; and (4) the intended scope and definition of "public policy" as envisioned by the convention.

The Section will end by concluding that *res judicata* could indeed fall under the rubric of the public policy exception to enforcement of foreign arbitral awards under the New York Convention.

A. Res Judicata and Finality of Judgment Defined

Courts have long held that *res judicata* applies to arbitration awards.[176] *Res judicata* literally means a matter adjudged; a thing judicially acted upon or decided; a thing or matter settled by judgment.[177] It refers to the rule that a final judgment or decree on the merits by a court of competent jurisdiction is conclusive of the rights of the parties or their privies in all later suits on points and matters determined in the former suit.[178] Another statement of the rule is that any right, fact, or matter in issue and directly adjudicated on or necessarily involved in the determination of an action before a competent court in which a judgment or decree is rendered on the merits, is conclusively settled by the judgment therein and cannot again be litigated between the same parties and privies whether or not the claim or demand, purpose, or subject matter of the two suits is the same.[179]

Res judicata rests on two grounds, namely: (1) public policy and necessity, which makes it the interest of the state that there should be an end to litigation — *republicae ut sit litum*; and (2) hardship on the individual that he should be vexed twice for the same cause — *nemo bis vexari et eadem causa*.[180] The public necessity was highlighted in a case wherein the Supreme Court said that "[a] contrary doctrine could subject the public peace and quiet to the will and neglect of individuals and prefer gratification of the litigious disposition on the part of suitors to the preservation of the public tranquility and happiness."[181]

As for its rationale, it was said in a case that "[t]he *raison d'etre* rests on the well-entrenched rule that even at the risk of occasional errors, judgments

176. Richard G. Shell, *Res Judicata and Collateral Estoppel Effects of Commercial Arbitration,* 35 UCLA L. REV. 623, 641 (1988) (citing New York Lumber & Wood-Working v. Schnieder, 119 N.Y. 475 (1890) (U.S) & Brazill v. Isham, 12 N.Y. 9 (1854) (U.S.)).

177. Mirpuri v. Court of Appeals, 376 SCRA 628, 649 (1999).

178. Taganas v. Emuslan, 410 SCRA 237, 241 (2003).

179. Agustin v. Delos Santos, 576 SCRA 576, 585-86 (2009).

180. De Ramos v. Court of Appeals, 213 SCRA 207, 214 (1992).

181. Linzag v. Court of Appeals, 291 SCRA 304, 319 (1998).

of courts should become final at some definite time fixed by law and that parties should not be permitted to litigate the same issues over again."[182]

1. Elements of *Res Judicata*

In order that *res judicata* can be invoked, the following elements must concur: (1) the presence of a final former judgment; (2) the former judgment is by a court of competent jurisdiction over the subject matter and the parties; (3) the former judgment is a judgment on the merits; and (4) there is, between the first and the second actions, identity of parties, of subject matter, and of cause of action. Absolute identity is not required, substantial identity being sufficient.[183] The fact that the relief sought in the second case is different from that of the first case does not render the doctrine of *res judicata* inapplicable if the question at issue upon which the relief depends is identical or the same as that of the first case.[184]

The fact that new issues are raised in the second case does not take the case out of the rule of bar by prior judgment, because under this rule not only are the issues actually passed upon barred, but any other issue that could have been raised in the previous case.[185] There is identity of causes of action when the judgment sought will be inconsistent with the prior judgment[186] or if the same evidence will sustain the second action.[187]

When a right or fact has been judicially tried and determined by a court of competent jurisdiction, so long as it remains unreversed, it should be conclusive upon the parties and those in privity with them in law or estate, in accordance with the rule on conclusiveness of judgment. The less familiar concept or less terminological usage of *res judicata* as a rule on conclusiveness of judgment in the prior action is that it operates as an estoppel only as to the matters actually determined therein or which were necessarily included therein.[188]

Likewise, the doctrine of *res judicata* does not apply where the second action is precisely to annul the judgment in the first action, as one of the requisites of *res judicata* is that there must be a former valid judgment.[189]

2. Extent of Coverage

182. Allied Banking Corporation v. Court of Appeals, 229 SCRA 252, 257 (1994).

183. Santos v. Court of Appeals, 226 SCRA 630, 637 (1993).

184. Vda. de Valenzuela, et al. v. CA and Jara, 109 Phil. 396, 402 (1960).

185. Penalosa v. Tuason, 22 Phil. 303, 312 (1912).

186. Tan v. Valdehueza, 66 SCRA 61, 64 (1975).

187. Stilanopolus v. City of Legaspi, 316 SCRA 523, 541 (1999).

188. *See* Calalang v. Register of Deeds of Quezon City, 208 SCRA 215 (1992).

189. FLORENZ D. REGALADO, REMEDIAL LAW COMPENDIUM 483 (8th ed. 2002).

With regard to its effects, the doctrine of *res judicata* has two aspects. The first is the effect of a judgment as a bar to the prosecution of a second action upon the same claim, demand, or cause of action (bar by prior judgment).[190] The second aspect is that it precludes re-litigation of a particular fact or issue in another action between the same parties on a different claim or cause of action (conclusiveness of judgment).[191] Thus, a party, by changing the form of action or method of case presentation, cannot run away from the effect of the principle of *res judicata* nor can a party avoid an estoppel of a former judgment by alleging in a second action new arguments to sustain it, the facts remaining the same, at least where such new matters could have been pleaded in the prior action.[192]

The doctrine is that a final judgment is conclusive not only as to every matter which was offered to sustain or defeat the claim or demand raised in the case, but also as to any other admissible matter which might have been offered for that purpose.[193] The party is bound by the previous decision, even if his cause had not been properly ventilated by his counsel who failed to see and develop a pertinent issue.[194]

Likewise, the principle of *res judicata* applies not only to issues discussed in the decision but also as to any other matter that could have been raised but was, for one reason or another, was not so raised.[195]

3. Contrasted with *Stare Decisis*

Common usage of the concept of *stare decisis* tells us that the rule holds that when the Supreme Court has laid down a principle of law applicable to a certain state of facts, it will adhere to that principle and apply it to all future cases where the facts are substantially the same.[196]

In other words, the principle enjoins adherence to judicial precedents and requires courts to follow the rule established in a decision of the Supreme Court. That decision becomes a judicial precedent to be followed in subsequent cases by all courts in the land. It is based on the principle that

190. Heirs of Clemencia Parasac v. Republic of the Philippines, 489 SCRA 498, 517 (2006).

191. *Id.*

192. Filinvest Credit Corp. v. Intermediate Appellate Court, 207 SCRA 59, 64-65 (1992).

193. Velasquez v. Gil, etc., et al., 99 Phil. 457, 459 (1956) (citing Peñalosa v. Tuason, 22 Phil. 303, 312 & Philippine National Bank v. Barreto, 52 Phil. 818, 824).

194. *Velasquez*, 99 Phil. at 460.

195. Mercantile Insurance Co., Inc. v. Court of Appeals, 196 SCRA 197, 205 (1991).

196. Department of Transportation and Communications v. Cruz, 559 SCRA 638, 646 (2008).

once a question of law has been examined and decided, it should be deemed settled and closed to further argument.[197]

In *Pepsi Cola Products Philippines, Incorporated v. Pagdanganan*,[198] the Supreme Court explained *stare decisis*:

> The doctrine of *stare decisis* embodies the legal maxim that a principle or rule of law which has been established by the decision of a court of controlling jurisdiction will be followed in other cases involving a similar situation. It is founded on the necessity for securing certainty and stability in the law and does not require identity of or privity of parties. This is unmistakable from the wordings of Article 8 of the Civil Code.
>
> It is even said that such decisions assume the same authority as the statute itself and, until authoritatively abandoned, necessarily become, to the extent that they are applicable, the criteria which must control the actuations not only of those called upon to decide thereby but also of those in duty bound to enforce obedience thereto. Abandonment thereof must be based only on strong and compelling reasons, otherwise, the becoming virtue of predictability which is expected from this Court would be immeasurably affected and the public's confidence in the stability of the solemn pronouncements diminished.[199]

From the foregoing, it could be deduced that *stare decisis* affects subsequent cases dealing with the same doctrinal ruling, while *res judicata* affects subsequent cases dealing with the a case previously dealt with by a court between the same parties and having the same issues.

4. Finality of Judgment

The rule on finality of judgment is a concept closely related to *res judicata*. It is important to discuss this because it highlights the fact that not only does a judgment have certain procedural effects; it also shows that judgments have an inherent nature of finality.

Under the doctrine of conclusiveness or immutability of judgments, a judgment that has attained finality can no longer be disturbed. The doctrine which is sometimes referred to as "preclusion of issues" or "collateral estoppel" holds that issues actually and directly resolved in a former suit cannot again be raised in any future case between the same parties.[200] As stated in a case, the doctrine is usually stated as follows: "[o]nce a judgment

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197. *Id.*

198. Pepsi Cola Products Philippines, Incorporated v. Pagdanganan, 504 SCRA 549 (2006).

199. *Id.* (citing CIVIL CODE, art. 8, which provides that, "judicial decisions applying or interpreting the laws or the Constitution shall form a part of the legal system of the Philippines.").

200. Celendro v. Court of Appeals, 310 SCRA 835, 843-44 (1999).

has become final and executory, it can no longer be disturbed, altered, or modified."[201]

In *Filipro, Inc. v. Permanent Savings & Loans Bank*,[202] the seemingly all encompassing nature of this rule as well as its rationale was stated by the Supreme Court, to wit:

> Nothing is more settled in law than that once a judgment attains finality it thereby becomes immutable and unalterable. It may no longer be modified in any respect, even if the modification is meant to correct what is perceived to be an erroneous conclusion of fact or law, and regardless of whether the modification is attempted to be made by the court rendering it or by the highest court of the land. Just as the losing party has the right to file an appeal within the prescribed period, the winning party also has the correlative right to enjoy the finality of the resolution of his case. Litigation must end and terminate sometime and somewhere, and it is essential to an effective administration of justice that once a judgment has become final, the issue or cause involved therein should be laid to rest. The basic rule of finality of judgment is grounded on the fundamental principle of public policy and sound practice that at the risk of occasional error, the judgment of courts and the award of quasi-judicial agencies must become final at some definite date fixed by law.[203]

B. Res Judicata as a Ground for Non-recognition of Arbitral Awards Under the New York Convention — Inclusion Under the Public Policy Exception

This Section will discuss how enforcement is carried out under the New York Convention, and how it is possible for the principle of *res judicata* to be subsumed under the public policy exception. This Section will likewise explore the two approaches to public policy under the New York Convention.

1. The New York Convention Imposes a General Obligation to Enforce and Recognize Foreign International Arbitration Awards

The finality of awards is of paramount importance in international commercial arbitration as it ensures a certain degree of certainty and predictability in the international arbitration process essential to international trade.[204] The successful party in an international commercial arbitration

201. Industrial Timber Corporation v. Ababon, 480 SCRA 171, 180 (2006) (citing Industrial Timber Corporation v. National Labor Relations Commission, 233 SCRA 597, 601 (1994)).

202. Filipro, Inc. v. Permanent Savings & Loans Bank, 503 SCRA 430 (2006).

203. *Id.* at 438.

204. STEFAN M. KROLL, ET AL., COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION 731 (2001).

expects the award to be performed without delay.[205] There is thus a recognized international policy in favor of enforcing awards.[206]

The foundation for enforcement of international arbitral awards is the New York Convention.[207] It is the most successful multi-lateral international legal instrument that man has devised.[208] As of 2009, the New York Convention has already been signed, ratified, and entered into force in 144 countries.[209]

The New York Convention applies to "foreign arbitral awards"[210] — that is, an award made outside the territory of the state in which recognition or enforcement is sought.[211] Thus, it requires a ratifying state to enforce awards issued in another ratifying state.[212]

2. The Convention Allows for Limited Exceptions to the Rule on Enforcement

The obligation on a national court to recognize and enforce arbitration awards as provided in Article 3 of the New York Convention[213] is subject to limited exceptions.[214] Recognition and enforcement may be refused *only* if the party against whom enforcement is sought can show that one of the exclusive grounds for refusal enumerated in Article 5, Paragraph 1 has occurred.[215] All grounds for refusal of enforcement must be construed narrowly as they are exceptions to the general rule that foreign awards must be recognized and enforced.[216]

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205. REDFERN AND HUNTER, *supra* note 4, at 433.

206. Carolyn B. Lamm and Eckhard R. Hellbeck, *The Enforcement of Foreign Arbitral Awards Under the New York Convention: Recent Developments*, 5 INT. A.L.R. 137 (2002).

207. Neuhaus, *supra* note 5, at 24.

208. *Id.*

209. Status of the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *available at* http://www.uncitral.org/ uncitral/ en/ uncitral_ texts/arbitration/NYConvention_status.html (last accessed Feb. 25, 2011).

210. REDFERN AND HUNTER, *supra* note 4, at 455.

211. *Id.* at 456 (citing New York Convention, *supra* note 6, art. 1, ¶ 1).

212. New York Convention, *supra* note 6, art. 5.

213. *Id.* art. 3.

214. KROLL, ET AL., *supra* note 204, at 706.

215. Parsons and Whittemore Overseas Co., Inc. v. Societe Generale de l'Industrie du Papier (RAKTA), 508 F.2d 969 (2d Cir. 1974) (U.S.).

216. KROLL, ET AL., *supra* note 204, at 706.

Specifically, the grounds for refusing enforcement under the New York Convention are found in Article 5, Paragraph 1:

> (a) The parties to the [arbitration] agreement ... 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 falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or
>
> (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.[217]

In addition, Article 5, Paragraph 2 states that recognition and enforcement may also be refused where:

> (a) The subject matter of the difference is not capable of settlement by arbitration under the law of [the] country [in which enforcement is sought]; or
>
> (b) The recognition or enforcement of the award would be contrary to the public policy of that country.[218]

It could be seen that these grounds are essentially, but not entirely, procedural. For the most part, they provide for review to ensure that the arbitral procedures used were fair, rather than providing for review of the merits of the decision.[219] Except for the public policy defense, the second look at the award during the enforcement stage is confined to the procedural issues listed in Article 5, Paragraph 1. A re-examination of the merits of the award is not allowed by the Convention.[220] Moreover, these grounds are

217. New York Convention, *supra* note 6, art. 5, ¶ 1 (a)-(e).

218. *Id.* art. 5, ¶ 2 (a)-(b).

219. Neuhaus, *supra* note 5, at 25.

220. KROLL, ET AL., *supra* note 204, at 706.

exhaustive and are the only grounds on which recognition and enforcement may be refused.[221] It is also important to stress the permissive language in Articles 5, Paragraphs 1 and 2 — a court *may* but is not obliged to refuse enforcement if one of the exceptions is satisfied.[222]

3. Public Policy Under Article 5, Paragraph 2 as One of the Grounds for Non-enforcement of Foreign Arbitral Awards — Lack of Uniform Interpretation Yet Still Strictly Construed

The New York Convention provides that "recognition of an arbitral award may be refused if its enforcement would be contrary to the public policy of the country in which enforcement is sought."[223] Considering that public policy plays a great part in international arbitration, particularly during the enforcement stage, the question arises what the substantive content of the term is.[224]

It has been said that public policy can be a "double-edged sword" in international commercial arbitration — "helpful as a tool, dangerous as a weapon."[225] This is not surprising considering that different jurisdictions interpret public policy differently.

For example, many national courts acknowledge that the "pro-enforcement policy" of the New York Convention requires a narrow approach to the public policy exception — some national courts would refuse enforcement only where such enforcement would violate "the most basic notions of morality and justice,"[226] or "be clearly injurious to the public."[227] On the other hand, several jurisdictions seemingly resort to the public policy exception rather frequently. Thus, according to a rather pessimistic English view of public policy, "public policy is a very unruly horse ... [i]t is never argued at all, but when other points fail."[228]

221. REDFERN & HUNTER, *supra* note 4, at 59.

222. KROLL, ET AL., *supra* note 204, at 707 (citing New York Convention, *supra* note 6, art. 5, ¶ 1).

223. *Id.* art. 5, ¶ 2 (b).

224. Hans Smit, *Comments on Public Policy in International Arbitration*, 13 AM. REV. INT'L ARB. 65, 65 (2002).

225. Loukas Mistelis, *Keeping the Unruly Horse in Control or Public Policy as a Bar to Enforcement of (Foreign) Arbitral Awards*, *in* 2 INTERNATIONAL LAW FORUM DU DROIT INTERNATIONAL 248 (2000).

226. *Parsons*, 508 F.2d at 973-74.

227. Deutsche Schachtbau und Tiefbonhrgesellschaft mbH v. R'as Al Khaimah National Oil Co. & Shell International Petroleum Co. Ltd., 3 W.L.R. 1023 (1987) (Eng.).

228. REDFERN AND HUNTER, *supra* note 4, at 471 (citing Richardson v. Mellish, 2 Bing. 229, 252 (1824) (Eng.)).

It is for these reasons that public policy has been regarded as one of the most significant and controversial bases for refusing the enforcement of arbitral awards.[229]

a. Public Policy Refers to "International Public Policy" and Must Be Strictly Construed

As was mentioned above, there are those that maintain that the Convention's public policy defense should be construed narrowly.[230] Thus, the International Law Association (ILA) endorses "international public policy" as the test for determining the enforceability of foreign awards.[231] International public policy is public policy which applies to transactions or relationships which involve foreign elements.[232]

Thus, under this interpretation, public policy is to be seen as "a body of universal principles shared by nations of similar civilization, aiming at the protection of fundamental human rights, often embodied in international declarations or conventions,"[233] which includes "fundamental principles, pertaining to justice or morality, that the State wishes to protect even when it is not directly concerned."[234] This is to ensure that public policy is rarely a ground for refusing enforcement of international arbitral awards.[235] Along this line of reasoning is the recognition that "[t]he potential for judicial abuse of the public policy exception significantly undermines the foundations of international arbitration."[236]

229. GARY BORN, INTERNATIONAL COMMERCIAL ARBITRATION 815 (2001).

230. *Parsons*, 508 F.2d at 974.

231. *See* Winnie (Jo-Mei) Ma, Public Policy in the Judicial Enforcement of Arbitral Awards: Lessons for and from Australia, A thesis submitted to Bond University in fulfillment of the requirements for the Degree of Doctor of Legal Science 25, *available at* http://epublications.bond.edu.au/context/theses/article/1023/index/0/type/native/viewcontent (last accessed Feb. 25, 2011) (citing The 70th Conference of the International Law Association, New Delhi, India, Apr. 2-6, 2002, *Resolution of the ILA on Public Policy as a Bar to Enforcement of International Arbitral Awards*, Rec. 1 (b) [hereinafter ILA Resolution]).

232. Hebei Import & Export Corp v. Polytek Engineering Co. Ltd, 1 H.K.L.R.D. 552 (1999) (H.K.).

233. *See* Audley Sheppard, *Interim ILA Report on Public Policy as a Bar to Enforcement of International Arbitral Awards,* 19 ARB. INT'L 217, 217 (2003).

234. ILA Resolution, *supra* note 231, Rec. 1 (d).

235. *See* Pierre Mayer and Audley Sheppard, *Final ILA Report on Public Policy as a Bar to Enforcement of International Awards*, 19 ARB. INT'L 249, 255 (2003).

236. Smit, *supra* note 224.

Parsons & Whittemore Overseas Co., Inc. v. Societe Generale de l'Industrie du Papier[237] is a landmark case enunciating the narrower interpretation of Article 5, Paragraph 2 (b) of the New York Convention. It was held that "[t]he general pro-enforcement bias in forming the [New York] Convention ... points toward a narrow reading of the public policy defense. An expansive construction of this defense would vitiate the Convention's basic effort to remove pre-existing obstacles to enforcement."[238] The case interpreted Article 5, Paragraph 2 (b) of the New York Convention in the following manner, to wit:

> Article V (2) (b) of the Convention allows the court in which enforcement of a foreign arbitral award is sought to refuse enforcment, on the defendant's motion or *sua ponte,* if 'enforcement of the award would be contrary to the public policy of [the forum] country.' The legislative history of the provision offers no certain guidelines to its construction. Its precusors in the Geneva Convention and 1958 Convention's ad hoc committee draft extended the public policy exception to, respectively, awards contrary to 'principles of the law' and awards violative of 'fundamental principles of the law.'
>
> ...
>
> We conclude, therefore, that the Convention's public policy defense should be construed narrowly. Enforcement of foreign arbitral awards may be denied on this basis only where enforcement would violate the forum state's most basic notions of morality and justice.[239]

4. *Res Judicata* Falls Under Current Interpretations of Public Policy

Does enforcement of a foreign arbitral violate the "state's most basic notions of morality and justice" on the ground that it might go against an existing decision by a court in the place of enforcement? Despite current inconsistencies in the acceptance of a uniform public policy definition under the New York Convention, it is reasonable to say that *res judicata* considerations fall under the public policy exception to enforcement of foreign arbitral awards.

a. Philippine Jurisprudence Considers Res Judicata as Part of its Public Policy

The doctrine of *res judicata* is a rule which pervades every well-regulated system of jurisprudence.[240] In the Philippines, the doctrine of finality of

237. *Parsons,* 508 F.2d 969.

238. *Id.*

239. *Id.* at 974 (emphasis supplied).

240. Heirs of the Late Faustina Adalid v. Court of Appeals, 459 SCRA 27, 41 (2005).

judgment has been treated as part of public policy. *Filipro, Inc.*[241] is instructive on this point:

> The basic rule of finality of judgment is grounded on the fundamental principle of public policy and sound practice that at the risk of occasional error, the judgment of courts and the award of quasi-judicial agencies must become final at some definite date fixed by law.[242]

This pronouncement of the Supreme Court is further substantiated by its treatment of the concept of *res judicata* in *De Ramos v. Court of Appeals*.[243] It ruled that:

> *Res judicata* rests on two grounds, namely: (1) public policy and necessity, which makes it the interest of the state that there should be an end to litigation — *republicae ut sit litum*; and (2) hardship on the individual that he should be vexed twice for the same cause — *nemo bis vexari et eadem causa*.[244]

The public necessity of *res judicata* is shown in *Linzag v. Court of Appeals*[245] where the Supreme Court said that "[a] contrary doctrine could subject the public peace and quiet to the will and neglect of individuals and prefer gratification of the litigious disposition on the part of suitors to the preservation of the public tranquility and happiness."[246] Thus, *res judicata* is considered part of public policy in the Philippines.

b. Res Judicata is an Internationally-Accepted Principle

Even if the stricter definition of "international public policy" is to be applied in interpreting the public policy exception under the New York Convention, it stands to reason that the principle of *res judicata* will still be considered as falling under the rubric of what may be considered as public policy exception to enforcement of foreign arbitral awards. This is so because *res judicata* is an internationally accepted principle of law.[247] It is applied by international criminal tribunals,[248] international arbitration tribunals,[249] and recognized by various commentators in international law.[250]

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241. *Filipro*, 503 SCRA 430.

242. *Id.* at 438.

243. *De Ramos,* 213 SCRA 207.

244. *Id.* at 214.

245. *Linzag*, 291 SCRA 304.

246. *Id.* at 319.

247. Joost Pauwelyn, *Forum Shopping Before International Tribunals: (Real) Concerns, (Im)possible Solutions* 42 CORNELL INT'L L.J. 77, 102 (2009).

248. Application of the Convention on Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Mont.), Feb. 26, 2007, *available at* http://www.icj-cij.org/docket/files/91/13685.pdf (last accessed Feb. 25, 2011).

Thus, the principle of *res judicata* and the doctrine of finality of judgment are subsumed under the public policy exception of the New York Convention.

Indeed, a basic approach to the New York Convention should be one where the general rule is enforcement and the bars to enforcement being mere exceptions. It is in this light that the "public policy" ground found in Article 5, Paragraph 2 (b) should be interpreted. Arguably, although the award ruled by the arbitral body is binding, the fact that another arbitral or judicial institution is dealing with the same cause of action between the same parties might contravene the public policy of a country in so far as *res judicata* is part of the public policy.[251]

V. EXAMINING THE EXCEPTIONS TO THE RULE ON FINALITY OF JUDGMENTS: SUPERVENING CIRCUMSTANCE EXCEPTION

The previous Chapter established the proposition that issues of *res judicata* could fall under the rubric of the public policy exception to enforcement of foreign arbitral awards under the New York Convention. Going by that proposition alone, enforcement of a foreign arbitral award could be denied simply by invoking that a previous final decision has already been rendered by a court in the place of enforcement.

Thus, by way of example, in the ICC case of *GRP,* should an award be subsequently rendered by in favor of PIATCO, Philippine courts could deny enforcement on the ground that a decision already exists in the form of *Agan*. The enforcement of the award will be contrary to the state's public policy.[252]

This Chapter will now establish a way of enforcing foreign arbitral awards despite issues of *res judicata* being raised before a court in the place of enforcement. It will bank upon the similarly accepted exceptions to the rule on finality and immutability of judgments. The discussion will focus on the supervening circumstance exception, culling from jurisprudence specific parameters present when such exception is successfully invoked.

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249. Petrobart Ltd. v. Kyrgyz Republic, Arb. No. 126/2003 55 (Arb. Inst. of the Stockholm Chamber of Commerce 2005) & Waste Management, Inc. v. United Mexican States, 43 I.L.M. 967, 972 (2004).

250. Frank Meyer, *Judicial Decisions Involving Questions of International Law: Protocol of an Agreement Between the United States and the Republic of Mexico for the Adjustment of Certain Contentions Arising Under What is Known as "The Pious Fund of the Californias,"* 2 AM. J. INT'L L. 893, 900 (1908). *See also* Vaughan Lowe, *Res judicata and the Rule of Law in International Arbitration*, 8 AFR. J. INT'L & COMP. L. 38 (1996).

251. Balkanyi-Nordmann, *supra* note 153, at 27.

252. *Agan, Jr.*, 402 SCRA at 678.

The discussions are premised upon this rationale: If an award could be denied enforcement because it runs contrary to the public policy of *res judicata*, then, such award should be enforced if it is considered an exception to the rule.

A. Exceptions to the Rule on Finality of Judgments

Nothing is more settled in law than that once a judgment attains finality it thereby becomes immutable and unalterable.[253] After judgment has become final, it can no longer be touched and amended, except for its execution; otherwise, litigations will never end, and the role of courts — to enforce the rule of law by settling controversies with conclusiveness — will never be attained.[254]

However, notwithstanding the seeming absoluteness of the Supreme Court's adherence to the rule of *res judicata* and finality and immutability of judgments, there exists a string of jurisprudence outlining certain exceptions to such rules.[255] They are, to wit:

(a) the correction of clerical errors;[256]

(b) the so-called *nunc pro tunc* entries which cause no prejudice to any party and void judgments;[257]

(c) whenever circumstances transpire after the finality of the decision rendering its execution unjust and equitable; [258] and

(d) in cases of special and exceptional nature as when facts and circumstances transpire which render the judgment's execution impossible or unjust, when necessary in the interest of justice to direct its modification to harmonize the disposition with prevailing circumstances.[259]

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253. Fariscal Vda. de Emnas v. Emnas, 95 SCRA 471, 474 (1980) (citing Kimpo v. Tabañar, 3 SCRA 423 (1961)).

254. *Id.* (citing *Kimpo*, 3 SCRA 423).

255. *See* People v. Gallo, 315 SCRA 461 (1999); Serapion v. Court of Appeals, 295 SCRA 689 (1998); Jose Clavano, Inc. v. Housing and Land Use Regulatory Board, 378 SCRA 172 (2002); Natalia Realty, Inc. v. Court of Appeals, 391 SCRA 379, 387 (2002); Lee v. Regional Trial Court of Quezon City, Br. 85, 456 SCRA 538 (2005); Silverio, Jr. v. Filipino Business Consultants, Inc., 466 SCRA 584 (2005); & Republic v. Florendo, 549 SCRA 526 (2008).

256. *See* Marasigan v. Ronquillo, 94 Phil. 237, 242 (1954).

257. *See* Briones-Vasquez v. Court of Appeals, 450 SCRA 482, 492-93 (2005).

258. *See* Siy v. National Labor Relations Commission, 468 SCRA 154, 163-64 (2005).

259. *See Industrial*, 480 SCRA at 180 (citing Industrial Timber Corporation v. National Labor Relations Commission, 233 SCRA 597, 601 (1994)).

B. Supervening Circumstances as an Exception to the Rule on Finality of Judgments

The supervening circumstance exception was incorporated by the Supreme Court as early as 1938 in *Chua A.H. Lee v. Mapa.*[260] In that case, the Court pointed out that a stay of enforcement proceedings is possible when the ground relied upon for the stay of execution, and which is the foundation of the new action "is such that it could not have been foreseen at the time of the trial of the case," having indeed "arisen subsequent to the remanding of the record from the Supreme Court to the trial court," and could not therefore be regarded as an attempt "to interpret or to reverse the judgment of the higher court."[261]

The application of the rule encompasses a variety of actions, whether, criminal, civil, or administrative. In *So v. Court of Appeals,*[262] the Court allowed the suspension of execution of a criminal sentence, to wit:

> Admittedly, the decision in Criminal Case Nos. 8345 and 8346 has become final. Nevertheless, the rule that it is the ministerial duty of the court to order the execution of a final judgment admits of certain exceptions. Thus, in the case of *People vs. Gallo,*[263] we held that *the court has the authority to suspend the execution of a final judgment or to cause a modification thereof as and when it becomes imperative in the higher interest of justice or when supervening events warrant it.*[264]

In *Echegaray v. The Secretary of Justice,*[265] where the sentence of death had become final and executory, the Supreme Court issued a temporary restraining order delaying the execution of the sentence.[266] Against the contention that the Court had violated the rule on finality of judgment and even encroached on the President's power of executive clemency, the Court replied that the power to control the execution of its decision is an essential aspect of jurisdiction.[267] It cannot be the subject of substantial subtraction because the Constitution vests the entirety of judicial power in one Supreme Court and in such lower courts as may be established by law.[268] The Court added that the most important part of litigation, whether civil or criminal, is the process of evaluation of decisions where supervening events may change

260. Chua A.H. Lee v. Mapa, 51 Phil. 624 (1928).

261. *Id.* at 628.

262. So v. Court of Appeals, 388 SCRA 107 (2002).

263. People v. Gallo, 315 SCRA 461 (1999).

264. *So*, 388 SCRA at 111 (emphasis supplied).

265. Echegaray v. The Secretary of Justice, 301 SCRA 96 (1999).

266. *Id.* at 102.

267. *Id.* at 108.

268. *Id.*

the circumstance of the parties and compel courts to intervene and adjust the rights of the litigants to prevent unfairness.[269]

C. Elements of Supervening Circumstances as an Exception to the Rule on Finality of Judgments

Jurisprudence shows that there are three essential requisites for supervening circumstance to be successfully invoked as an exception to the rule on finality of judgments.[270] Included in the discussion are factual circumstances directly affecting each element.

1. The Circumstance Must Refer to a Fact Which Transpires After the Judgment has Become Final and Executory

An essential ingredient for supervening circumstances to be considered as an exception to the rule on finality of judgment is that it must refer to facts which occur after the finality of judgment. Thus, in *Lim v. Jabalde*,[271] it was ruled that new facts and circumstances that would justify a modification or non-enforcement of a final and executory judgment refer to those matters which developed after the judgment acquired finality and which were not in existence prior to or during the trial.[272] Such facts must either bear a direct effect upon the matters already litigated and settled or create a substantial change in the rights or relations of the parties therein which would render execution of the final judgment unjust or impossible.[273] Likewise, these matters are those which developed after the judgment has acquired finality; matters which the parties were not aware of, and could not have been aware of, prior to or during trial as they were not yet in existence at that time.[274]

2. The Event Which Transpired Must Render the Execution Unjust and Inequitable or Impossible

269. *Id.*

270. *See* jurisprudence where supervening event was successfully invoked, i.e., Republic v. Unimex Micro-Electronics GmBH, 518 SCRA 19 (2007); Flores v. Court of Appeals, 259 SCRA 618 (1996); City of Butuan v. Ortiz, 3 SCRA 659 (1961); David v. Court of Appeals, 316 SCRA 710 (1999); Abalos v. Philex Mining Corporation, 393 SCRA 134 (2002); Natalia Realty, Inc. v. Court of Appeals, 391 SCRA 379, 387; & Balanoba v. Madriaga, 475 SCRA 688 (2005).

271. Lim v. Jabalde, 172 SCRA 211 (1989).

272. *Id.* at 220.

273. *Id.*

274. *See* Cabrias v. Adil, 135 SCRA 354 (1985); De Luna v. Kayanan, 61 SCRA 49 (1974); Abellana v. Dosdos, 13 SCRA 244 (1965); & Candelario v. Cañizares, 4 SCRA 738 (1962).

These are factual determinations which have a direct bearing on whether the situation would be "unjust and inequitable" if the prior judgment be allowed to continue, or if the court fails to take into account such circumstances.

a. Existence of Bad Faith

When both parties are at fault or *in pari delicto*, the law refuses them every remedy and leaves them where they are.[275] "Neither a court of law nor equity will aid [the parties], but will, as it is often said, leave them where it finds them."[276] In *Jandusay v. Court of Appeals*,[277] it was stated that "[o]ne who seeks equity must himself be deserving of equity. When parties are in culpability similarly situated, it is a general principle of law that one may claim no advantage over the other."[278]

Thus, where the event which transpired shows bad faith on either of the parties, failure to take cognizance of such event or discovery would create an unjust and inequitable scenario.

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275. CIVIL CODE, arts. 1411-1412. The Articles provides:

> Art. 1411. When the nullity proceeds from the illegality of the cause or object of the contract, and the act constitutes a criminal offense, both parties being *in pari delicto*, they shall have no action against each other, and both shall be prosecuted. Moreover, the provisions of the Penal Code relative to the disposal of effects or instruments of a crime shall be applicable to the things or the price of the contract.
>
> This rule shall be applicable when only one of the parties is guilty; but the innocent one may claim what he has given, and shall not be bound to comply with his promise.
>
> Art. 1412. If the act in which the unlawful or forbidden cause consists does not constitute a criminal offense, the following rules shall be observed:
>
> (1) When the fault is on the part of both contracting parties, neither may recover what he has given by virtue of the contract, or demand the performance of the other's undertaking;
>
> (2) When only one of the contracting parties is at fault, he cannot recover what he has given by reason of the contract, or ask for the fulfillment of what has been promised him. The other, who is not at fault, may demand the return of what he has given without any obligation to comply his promise.

Id.

276. JOHN D. LAWSON, LAWSON ON CONTRACTS 378 (1905).

277. Jandusay v. Court of Appeals, 172 SCRA 376 (1989).

278. *Id.* at 387.

b. Estoppel by Participation

The Supreme Court has had an opportunity to discuss estoppel by participation in *Philsec Investment Corporation v. Court of Appeals*.[279] It was held, to wit:

> Thus, in the case of *General Corporation of the Philippines v. Union Insurance Society of Canton, Ltd.*, which private respondents invoke for claiming conclusive effect for the foreign judgment in their favor, the foreign judgment was considered *res judicata* because this Court found 'from the evidence as well as from appellant's own pleadings' that the foreign court did not make a 'clear mistake of law or fact' or that its judgment was void for want of jurisdiction or because of fraud or collusion by the defendants. Trial had been previously held in the lower court and only afterward was a decision rendered, declaring the judgment of the Supreme Court of the State of Washington to have the effect of *res judicata* in the case before the lower court. In the same vein, in *Philippine International Shipping Corp. v. Court of Appeals*, this Court held that the foreign judgment was valid and enforceable in the Philippines there being no showing that it was vitiated by want of notice to the party, collusion, fraud or clear mistake of law or fact.[280]

Thus, for example, if the supervening event being invoked pertains to a subsequent judgment or decision, a party cannot invoke finality of a previous decision if he participated in it. Therefore, it is a reason for enforcing and recognizing the subsequent decision.

3. The Event Must Be of Special and Exceptional Nature

This element pertains to the nature of the supervening event. Accordingly, facts which pertain to the nature of the event itself, and to the parties affected must be taken into consideration.

a. Gravity of Circumstances Considered

In *Abalos v. Philex Mining Corporation*,[281] the Supreme Court took into consideration the gravity of the supervening event. After considering all the circumstances in the Case, the Supreme Court went further and said that an issue to be resolved is whether the supervening events were "grave enough to warrant a modification in the execution of the judgment."[282]

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279. Philsec Investment Corporation v. Court of Appeals, 274 SCRA 103 (1950).

280. *Philsec Investment Corporation*, 274 SCRA at 111 (citing General Corporation of the Philippines v. Union Insurance Society of Canton, Ltd., 87 Phil. 313 (1950) & *Philippine International Shipping Corp.*, 172 SCRA 810).

281. *Abalos*, 393 SCRA 134.

282. *Id.* at 141.

Thus, the gravity of the supervening event may determine its special and exceptional nature.

b. Absence of Affected Private Individuals Considered

In *Teodoro v. Carague*,[283] the existence of "private individuals" was considered. The Court was willing to overturn a final judgment especially when no private individual would be financially prejudiced by such overturning.[284] It ratiocinated in these terms, to wit:

> The rule that once a litigant's rights have been adjudicated in a valid judgment by a competent court he should not be granted an unbridled license to come back for another try is subject to certain exceptions, as *when there are supervening events which make it imperative, in the higher interest of justice, to modify said judgment to harmonize the disposition with the prevailing circumstances, especially where no private individual will be financially prejudiced by overturning the final judgment*. The rule on *res judicata* may also be overlooked where the same has been waived or has not been timely raised as a defense, where the application of the principle, under the particular facts obtaining, would amount to a denial of justice or a bar to a vindication of a legitimate grievance.[285]

Thus, absence of affected private individuals gives the circumstance a special and exceptional nature, warranting an exception to the rule on finality of judgment.

D. Scope of Application of the Supervening Circumstance Exception

A question could be asked whether "court decisions" and "orders" could be considered supervening circumstances and thus provide exceptions to the rule on finality of judgments. It should be noted that the mantra typically invoked regarding this exception pertains to "facts" and "circumstances" without necessarily indicating whether such are to be considered as individual events or occurrences.

This Part is in preparation for the next proposition in this Note — namely, that a foreign international arbitration award could be given the characterization of a supervening circumstance. This Portion of the Note shows that judgments, decisions, and orders of tribunals *can be given* the status of supervening circumstances. Thus, even foreign arbitral awards could be given such status.

Jurisprudence exists showing how subsequent decisions and orders are capable of being considered supervening circumstances warranting reversal of

283. Teodoro v. Carague, 206 SCRA 429 (1992).

284. *Id.* at 434.

285. *Id.* at 433-34 (emphasis supplied).

even a final judgment. Thus, in *City of Butuan v. Ortiz*,[286] a decision of the Civil Service Commissioner was considered a supervening cause which rendered a court decision ordering reinstatement unenforceable.[287]

Likewise, *Dela Costa v. Cleofas*[288] shows that even subsequent "agreements" by the parties fall within the ambit of supervening circumstances.[289] In that case, respondent Cleofas alleged that subsequent to the judgment obtained by Sto. Domingo, they entered into an agreement which showed that he was no longer indebted to the latter.[290] The Supreme Court allowed the previous judgment to be modified by the agreement.[291]

These Cases show the wide application of the doctrine of supervening circumstances. Thus, from the above discussions, the Note will now proceed to analyze how foreign international arbitration awards could be treated as supervening circumstances.

VI. ANALYSIS AND RECOMMENDATIONS: TREATING FOREIGN INTERNATIONAL ARBITRAL AWARDS AS SUPERVENING CIRCUMSTANCES AND RECOMMENDING GUIDELINES IN ENFORCEMENT PROCEEDINGS

This Chapter will analyze how the Supreme Court could resolve issues of conflicting decisions in light of all that was discussed regarding problems of conflicting adjudications between courts and tribunals.[292] Considering that issues of *res judicata* could be subsumed under the public policy exception to enforcement under the New York Convention,[293] it is now the province of this Chapter to make the parameters and commonalities found in Philippine jurisprudence with respect to exceptions to the rule on finality of judgment[294] applicable to foreign arbitration awards — the objective being that certain foreign arbitration awards be enforced when it doesn't run afoul of the domestic policy on *res judicata* and finality of judgments.

By way of restatement, enforcement of foreign arbitral awards in the Philippines is now governed by the New York Convention, due to the express reference to it by the Alternative Dispute Resolution Act of 2004. Thus, once an award has been rendered, it has legal effect subject only to rare cases where the international public policy of the court of enforcement

286. *City of Butuan*, 3 SCRA at 659.

287. *Id.* at 661.

288. Dela Costa v. Cleofas, 67 Phil. 686 (1939).

289. *Id.* at 692.

290. *Id.*

291. *Id.*

292. *See* discussion in Chapter III.

293. *See* discussion in Chapter IV.

294. *See* discussion in Chapter V.

is affected.[295] As it was previously discussed, the unsettled definition of public policy as a ground for non-recognition under the New York Convention results to the inclusion of various domestic policies — one of them being the principle of *res judicata*.

Thus, if an arbitral award could fall as an exception to the rule on *res judicata* and finality of judgments, its enforcement would *not* be contrary to public policy. If it does not fall under the exception, then its enforcement would be contrary to public policy. The former warrants enforcement. The latter would not.

A. A Foreign International Arbitral Award is Deemed an Exception to the Rule on Finality of Judgment if it Possesses the Elements of Supervening Circumstances

It was previously mentioned how even decisions and orders become supervening circumstances warranting reversal or modification of final judgments.[296] Having determined the elements of the supervening circumstance exception and the possible factual circumstances which could affect those elements, it will now be seen how those operate in the context of foreign international arbitral awards.

The discussion of the elements as applied to arbitral awards would be fused with discussions pertaining to *Agan*.

1. *First Element*: The Foreign Arbitral Award Must be an Adjudication on the Merits Rendered After the Judgment in the Place of Enforcement has Become Final and Executory

Supervening circumstances more or less deal with factual circumstances.[297] Therefore, the foreign arbitral award must be an adjudication on the merits. Of particular interest relative to this point is the difference between the Supreme Court and an arbitral tribunal.

It must be noted that an arbitral tribunal is empowered, and in fact, obligated, to render an award solely on the basis of facts.[298] An arbitral tribunal is, by necessity, a trier of facts. On the other hand, it is well settled that "the Supreme Court is not a trier of facts."[299]

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295. KROLL, ET AL., *supra* note 204, at 680.

296. *See* discussion in Chapter V (D).

297. *See* discussion in Chapter V.

298. REDFERN & HUNTER, *supra* note 4, at 313-14.

299. *See* Republic v. Sandiganbayan, 375 SCRA 425 (2002); Trade Unions of the Philippines v. Laguesma, 236 SCRA 586, 591 (1994); & Navarro v. Court of Appeals, 209 SCRA 612, 623 (1992).

Thus, in *Agan, Jr.*, the foreign arbitral award could be considered a supervening circumstance, capable of bringing out facts which the Supreme Court was not able to adjudicate upon in its 2004 decision.[300]

2. *Second Element*: The Non-enforcement of the Award Should Result to an Unjust and Inequitable Situation

a. A Subsequent Finding of Bad Faith by the Foreign Arbitral Tribunal Should be a Weighty Consideration in Enforcing the Subsequent Arbitral Award

By way of reiteration, the law affords no remedies in case there is bad faith on the part of one or both parties.[301] In fact, if both parties are found to be in bad faith, the law leaves them with no remedies at all. Therefore, any relief obtained by a party in a previous proceeding, should be returned if that party is found to be in bad faith. Otherwise, an unjust and inequitable situation would occur.

It was previously mentioned that the arbitral tribunal is, by nature, a fact-finding body while the Supreme Court is not. Thus, by way of application to *Agan*, any subsequent determination of bad faith on the part of the parties would have inequitable effects should enforcement of the arbitral award be denied.

b. A Party's Participation in the Proceedings Should be Taken into Consideration

The conduct of a party in participating in the arbitration proceedings may provide a sufficient independent basis for concluding that there was acquiescence by the objecting party in the jurisdiction of the arbitral tribunal.[302]

By agreeing to arbitrate, parties give up one of the basic rights of the citizens of any civilized community — that is to say, the right to go to their own courts of law.[303] They cut themselves off from recourse to the courts of law. They have agreed to a *private* method of dispute resolution and they will be held to this agreement by the courts of law, both nationally and internationally, in accordance with the national legislation and such international treaties as the New York Convention.[304]

300. As in possible issues on breach of contract and bad faith.

301. CIVIL CODE, arts. 1411-1412.

302. PARLADE, *supra* note 11, at 172.

303. REDFERN & HUNTER, *supra* note 4, at 5.

304. *Id.* at 22.

In a case[305] decided by the high court of Hong Kong, it appeared that the parties entered into a contract for the purchase and sale of cement.[306] When one party sued the other before a court in China, the defendant demurred and informed the court that the parties had an arbitration agreement.[307] When the arbitral tribunal took cognizance of the dispute, the defendant challenged the jurisdiction of the tribunal on the ground that the parties had not entered into an arbitration agreement.[308] The tribunal rejected the challenge.[309] The defendant filed an answer and made submissions to the tribunal in the proceedings.[310] Award was made in favor of the claimant.[311] At the stage of the enforcement of the award in Hong Kong, the defendant raised the defense that there was no arbitration agreement between them as it had been signed only by one party.[312] The court held that the production of the written contract, although unsigned by the parties, coupled with the letter of the defendant to the arbitral court were sufficient to establish the requirement of a written arbitration agreement.[313] Moreover, in light of the facts, the defendant was in estoppel and may not be allowed to assert a fact contrary to its representations before the court in China.[314]

Thus, applying it to *Agan, Jr.*, the Government's participation in the ICC proceeding in Singapore should be a strong ground for enforcement of the foreign arbitration award in case it is rendered in favor of PIATCO.

3. *Third Element*: The Circumstances Surrounding the Award Should be Special and Exceptional in Nature

To be taken into account are (a) the existence of private parties and (b) participation of the government. These parameters go into the nature of the case.

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305. PARLADE, *supra* note 11, at 101 (citing Jiangxi Provincial Metal & Mineral Import & Export Corp. v. Sulanser Co., Ltd., 2 H.K.C. 373 (1995) (H.K.)).

306. *Id.*

307. *Id.*

308. *Id.*

309. *Id.*

310. *Id.*

311. PARLADE, *supra* note 11, at 101.

312. *Id.*

313. *Id.*

314. *Id.*

a. The Amounts and Costs Involved Should be Taken into Consideration in Determining Whether the Arbitration Award can be Deemed a Supervening Circumstance

Of course, adding to the special and exceptional nature of an award would be the amount and cost involved in the dispute. By way of application to the *Agan, Jr.,* there is no question that the amounts involved are considerably high. It should be a consideration when enforcing a subsequent award by the tribunal.

b. The Fact that the Government is a Party to the Case Must be Considered in Determining Whether the Arbitration Award Can be Deemed a Supervening Circumstance

There is an inherent disparity between private parties and the Government. In fact, it is one reason cited for resorting to foreign arbitration. If one of the parties to the contract is a state or state entity, the prospect of bringing a claim before a local court is not attractive. The private party will usually have little or no knowledge of the law and practice of that court and will be afraid of encountering judges predisposed to find in favor of the government to which they owe their appointment. For its part, the state concerned will not wish to submit to the national courts of the private party. Indeed, it will probably object to submitting to the jurisdiction of any foreign court.[315] Thus, it is important to take this into account when enforcing an arbitral award against an existing final decision in the place of enforcement. Neutrality and impartiality is better assured by the foreign arbitral award.

Again, by way of application to *Agan, Jr.*, a subsequent award by the tribunal would unquestionably be more credible and free from bias than that rendered by the Supreme Court. It is to be stressed that the appearance of impartiality is as much as important as the actual existence thereof. Therefore, it should be considered in favor of enforcement of the foreign arbitral award.

B. Recommendations on How Courts in the Place of Enforcement Should Approach Issues of Res Judicata in Enforcement Proceedings in International Commercial Arbitration Cases

Based on the previous analyses and discussion, it is recommended that the Supreme Court make (1) Public Policy Determinations; (2) *Res Judicata* Determination; and (3) Supervening Circumstance Determination.

315. REDFERN & HUNTER, *supra* note 4, at 27.

1. Public Policy Determination[316]

Courts should first determine whether or not an award is enforceable vis-à-vis the public policy exception of the New York Convention. This is in light of the fact that not all policies are public policies, and not all public policies are considered grounds for non-enforcement under the New York Convention.[317]

First Step — Is There an Applicable Public Policy Falling Within the Public Policy Exception Under the New York Convention?

Second Step — Would the Enforcement of the Award be Contrary to this Public Policy?

Third Step — Should the Enforcement Court Nevertheless Allow Enforcement Despite the Establishment or Applicability of the Public Policy Exception? This last step is actually a determination whether numbers two and three are present.

2. Res Judicata Determinations

In determining the "third step," courts should determine whether *res judicata* is at issue. This is based on the accepted elements of *res judicata*.[318] Failure in this step would mean that some other public policy is involved. Hence, it would be beyond (the scope of) this Note. These determinations are to be deemed as elements which must all concur.

a. Two Valid Decisions in Existence?

This involves looking into whether the arbitration agreement was adjudicated as valid by the arbitration tribunal.

b. Is There a Conflict-oj-decisions Scenario?

This is a job for the court in the place of enforcement. There should be a prior decision in the place of enforcement and a subsequent award by a foreign arbitral tribunal.[319]

3. Supervening Circumstance Determination

The question to be resolved here is whether the foreign arbitral award can be considered a supervening circumstance. The parameters and elements previously discussed with respect to the subject matter shall be used.[320]

316. ILA Resolution, *supra* note 232.

317. *See* discussion in Chapter IV.

318. *See* discussion in Chapter IV.

319. *See* discussion in Chapter III.

a. The Foreign Arbitral Award Must be Adjudicated on the Merits Rendered After the Judgment in the Place of Enforcement has Become Final and Executory

b. The Non-enforcement of the Award Should Result to an Unjust and Inequitable Situation

To be taken into account are (a) the existence of bad faith and (b) the extent of participation of the parties in the arbitral proceeding.

c. The Circumstances Surrounding the Award Should be Special and Exceptional in Nature

To be taken into account are (a) the existence of private parties and (b) the participation of the government.

d. Interpretation of the Abovementioned Parameters

If number 2 is present, it means that the public policy involved is *res judicata.* Then an application of number 3 is to be considered.

If number 3 is present, it means that the foreign arbitral award is a supervening circumstance, necessitating enforcement despite *res judicata* policy being involved.

If number 3 is absent, it means that enforcement may be denied.

If number 2 is absent, it means that some other public policy is involved, and it is beyond the scope of this Note.

VII. CONCLUSION

It is to be conceded that the Supreme Court has made some judicial missteps in its resolution of *Agan, Jr.*. Its consequences have far reaching effects such as in terms of whether the domestic courts or the arbitration tribunal should rule on the matter of jurisdiction or even in terms of whether one of the proceedings should stop or both should continue.

However, those issues are beyond the scope of this Note. To reiterate, this Note deals with the aftermath of parallel proceedings — that is when both the domestic court and the international arbitration tribunal have already rendered their decisions. The problem sought to be addressed is one where the international arbitration award goes against a final decision of the Supreme Court.

First, it was shown that the current state of laws and jurisprudence fail to address the issue of *res judicata* properly. In fact it does not prevent the existence of parallel and subsequent proceedings.

320. *See* discussion in Chapter V.

Second, it was shown that *res judicata* may very well be within the scope of "public policy" as a ground for non-recognition of foreign arbitral awards under the New York Convention.

Third, despite the possibility of raising *res judicata* as a public policy exception to enforcement under the New York Convention, cases show that the Supreme Court has amended, and even overturned its own decisions due to the existence of recognized exceptions to the rule on finality of judgments. Thus, the mere fact that a final judgment regarding the same issues already exists in a court where the enforcement is sought is not enough to warrant a finding that such enforcement goes against "public policy." Should there be room to believe that the foreign arbitration award could be treated as a supervening circumstance which is an exception to the rule on *res judicata*, then enforcement must proceed.

Lastly, it was shown that despite the inadequacies of current laws with regard to the situation posed by conflicting decisions and parallel proceedings, the Supreme Court could still resolve such issues and go about revisiting its final judgment by looking at how it has done so in existing jurisprudence. From these decisions, it was shown that the Supreme Court takes consistent elements and parameters into consideration whenever it decides to overturn its own decisions. Thus, a legal vacuum cannot be said to exist with respect to conflicting decisions scenarios and there is no need for an expanded construction of "public policy" under the New York Convention.