Arbitral Autonomy Principle in Philippine Jurisprudence

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I. PREMISES OF THE INQUIRY

> *...to protect investments is to protect the general interest of development and of developing countries.*[1]

At the root of Law is the interaction between individuals that necessitates the regulation of legal relationships in order to realize a normative milieu where the Rule of Law governs and is similarly applied to all individuals of the same class. Commercial practice is one such legal relationship that has flourished within this framework of legal order from the earliest of known human history to contemporary society. Throughout the ages, however, what remains constant is the security of expectations[2] that parties to a legal contractual transaction will fulfill their respective obligations within the confines of their contractual agreement.

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1. Amco Asia Corp. v. Republic of Indonesia, ICSID Award on Jurisdiction of Sept. 25, 1983, *reprinted in* 10 Y.B.C.A. 61, 66 (1985).
2. *See* Harry Jones, *An Invitation to Jurisprudence*, 74 COLUM. L. REV. 1023, 1026-28 (1974).

The Civil Code of the Philippines plainly and straightforwardly defines a contract as "a meeting of minds between two persons whereby one binds himself, with respect to the other, to give something or to render some service."[3]

In any licit transaction, good faith and good will on the part of both contracting parties to perform the agreed terms of the contract must preside over its consummation lest life in society become "limited and unimaginable if men and women cannot plan their future conduct with reasonable assurance that the rule will not be changed after a commitment or investment, of effort or money, is made."[4]

As a juridical person, the State "may acquire and possess property of all kinds, as well as incur obligations and bring civil or criminal actions, in conformity with the laws and regulations of their organization."[5] It may thus enter into valid and binding contractual agreements:

> It is axiomatic that the Philippine Government is endowed with a juridical personality that invests it with the authority to enter into contracts. Being a sovereign political entity, the Republic of the Philippines is clothed with all of the privileges and prerogatives attendant and appropriate to the just exercise of its powers. As a government, it is capable of realizing the ends for which it was created, by all the means necessary for their attainment. Being a body politic and corporate and as an incident of and necessarily implied from its constitutional capacity to contract and to be contracted with and, having thus entered into a contract, to be bound thereby.[6]

A State, through its Government, may contract out to private entities the erection of vital infrastructure projects that are essential for the maintenance of public order. It is to this class of contracts that the term *state contract* will apply.

The Congress of the Philippines enacted two vital pieces of legislation that sanctions the financing, operation, and maintenance of infrastructure projects by private investors. These are Republic Act No. 6957[7] and

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3. An Act to Ordain and Institute the Civil Code of the Philippines [CIVIL CODE] art. 1305.

4. Jones, *supra* note 2, at 1026.

5. CIVIL CODE, art. 46.

6. BARTOLOME C. FERNANDEZ, A TREATISE ON GOVERNMENT CONTRACTS UNDER PHILIPPINE LAW 3 (2003).

7. An Act Authorizing the Financing, Construction, Operation and Maintenance of Infrastructure Projects by the Private Sector, and for Other Purposes, Republic Act No. 6957 (1990).

Republic Act No. 7718.[8] These statutes bestow upon the Government the power to contract out to private individuals the construction of vital infrastructure projects and procurement of goods and services.

Under the Build-Operate-Transfer (BOT) Law, the State to recognizes "the indispensable role of the private sector as the main engine for national growth and development and provide the most appropriate favorable incentives to mobilize private resources for the purpose of financing the construction, operation and maintenance of infrastructure and development projects normally financed and undertaken by the Government. Such incentives, aside from financial incentives as provided by law, shall include providing a climate of minimum government regulations and procedures and specific government undertakings in support of the private sector."[9]

To give life to this policy, the law authorizes all government infrastructure agencies, including government-owned and controlled corporations and local government units "to enter into contract with any duly pre-qualified private contractor for the financing, construction, operation and maintenance of any financially viable infrastructure facilities through any of the projects authorized in this Act."[10]

The BOT scheme is recognized as a "contractual arrangement whereby the project proponent undertakes the construction, including financing, of a given infrastructure facility, and the operation and maintenance thereof."[11]

State contracts partake of the nature of any other contract, which, in the eyes of the law, is perfected upon the concurrence of consent, object, and cause, save in those situations wherein a contract cannot be legally enforced due to the absence of certain formalities that bear upon its enforceability. With respect to the freedom to contract, however, unlike ordinary contracts between private individuals or juridical entities, state contracts are situated on a different plane, as elucidated by the Supreme Court:

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8. An Act Amending Certain Sections of Republic Act No. 6957, Entitled "An Act Authorizing the Financing, Construction, Operation and Maintenance of Infrastructure Projects by the Private Sector, and for Other Purposes," Republic Act No. 7718 (1994) [hereinafter BOT Law, as amended].

9. BOT Law, as amended, § 1.

10. *Id.* § 3.

11. *Id.* § 2(b).

> The authority of public officers to enter into government contracts is circumscribed with a heavy burden of responsibility. In the exercise of their contracting prerogative, they should be the first judges of the legality, propriety and wisdom of the contract they entered into. They must exercise a high degree of caution so that the Government may not be the victim of ill-advised or improvident action.[12]

Thus, with respect to government contracts, statutes take precedence over the freedom of public officers to contract, to wit:

> The actual contract for public work or public supplies must, of course, be executed in behalf of the public body by some officer or officers possessed of power to contract in behalf of the governmental body which they represent. The fundamental rule that a public officer who has only such authority as is conferred on him by law, may make for the government which he represents only such contracts as he is authorized by law to make, and must comply with the requirements of the law in respect to the manner in which and the conditions upon which the contracts may be entered into is fully applicable to the execution of contracts for public works, and when executed by a public officer or board who does not possess power or authority to execute the same, even though the contract itself is within the powers of the public body, it is not binding upon the latter, unless by its subsequent conduct, as by acceptance of benefits of the contract, the public body becomes estopped to assert the authority of such officer or to set up the invalidity of the contract on the ground of want of his authority, or unless the public body is deemed to have ratified the unauthorized act of its officer.[13]

The State, like all contracting parties, is therefore expected to perform its obligations under such binding agreement in good faith and good will. Further, by the doctrine of incorporation,[14] the Philippines is bound by generally accepted principles of international law, which are considered to be part of Philippine law.[15] Moreover, through the treaty clause,[16] treaties are

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12. Commission on Elections, et al. v. Judge Ma. Luisa Quijano-Padilla and Photokina Marketing Corp., 389 SCRA 353 (2002) (citing Rivera v. Maclang, 7 SCRA 57 (1963)).

13. 43 AM. JUR. *Public Works and Contracts* §12 (1937).

14. PHIL. CONST. art. II, § 2 ("The Philippines renounces war as an instrument of national policy, adopts the generally accepted principles of international law as part of the law of the land and adheres to the policy of peace, equality, justice, freedom, cooperation, and amity with all nations.").

15. Tanada v. Angara, 272 SCRA 28, 66 (1997). A superior study on the doctrine of incorporation relative to the adoption of the generally accepted principles of

transformed into municipal laws. Generally accepted is the paramount legal principle that the rights and obligations of a State as regards its international relations are determined by international law. It is the law between nations, and not the municipal State law that governs the determination as to whether or not a State's conduct before the bar of international law is legal or proscribed.[17]

Thus, treaty obligations preclude a State from invoking its municipal laws to excuse itself from performing its obligations under international law. However, the constitution of a State prevails over a treaty and is the supreme law from which no contravention may prosper. This legal tension creates a predicament that may undermine the stability of commercial practice and the resolution of investment disputes in this jurisdiction. Consequently, investors invariably insist on the inclusion of stipulations with respect to international commercial arbitration into their contractual agreements in order to provide a more reliable and acceptable means of dispute resolution outside the exclusive jurisdictional domains of the contracting State for conflicts that may arise from state contracts.

Accordingly, the question of dispute resolution in state contracts between a sovereign entity and a private investor presents an issue that goes beyond Philippine municipal law and jurisprudence and necessitates a serious consideration of international legal principles.

Prescinding therefrom, the dispute relative to the legality of a state contract for the erection of the Ninoy Aquino International Airport International Passenger Terminal III (NAIA IPT III) Project under a BOT

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international law as municipal law is found in: Aloysius P. Llamzon, *'The Generally Accepted Principles of International Law' as Philippine Law: Towards a Structurally Consistent Use of Customary International Law in Philippine Courts*, 47 ATENEO L. J. 243 (2002). Another well-reasoned study on the doctrine of incorporation is found in: José M. Roy III, *A Note on Incorporation: Creating Municipal Jurisprudence from International Law*, 46 ATENEO L. J. 635 (2001).

16. PHIL. CONST. art. VII, § 21 ("No treaty of international agreement shall be valid and effective unless concurred in by at least two-thirds of all the Members of the Senate.").

17. HERBERT W. BRIGGS, THE LAW OF NATIONS 60 (1982).

agreement had been the source of much legal debate in *Agan v. Philippine International Air Terminals Co., Inc.*[18]

In *PIATCO*, the Court was called upon to resolve "complicated issues made difficult by their intersecting legal and economic implications."[19] According to the Court, it took cognizance of the case because if its solemn duty to dispense justice and resolve "actual controversies involving rights which are legally demandable and enforceable, and to determine whether or not there has been grave abuse of discretion amounting to lack or excess of jurisdiction."[20]

Five issues were presented before the Court: (1) whether or not PIATCO is a qualified bidder; (2) whether or not the 1997 Concession Agreement, the Amended and Restated Concession Agreement (ARCA), and the Supplemental Agreements (PIATCO Contracts) are valid; (3) whether or not there was a direct government guarantee in this case; (4) whether or not a temporary takeover of a business affected with public interest is proper in this case; and (5) whether or not there was the presence of a monopoly in this case.

In particular, the Court discussed the legal effect of the commencement of arbitral proceedings by PIATCO with the International Chamber of Commerce (ICC), pursuant to Section 10.02 of the ARCA. The Court held that submission to arbitration will not oust the Court of its jurisdiction over the petitions.[21] The Court emphasized that since petitioners were not parties

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18. Agan v. Philippine International Air Terminals Co., Inc., 402 SCRA 612 (2003).

19. *Id.* at 641.

20. *Id* (citing PHIL. CONST. art. VIII, § 1).

21. *Id.* at 647; *see* Del Monte Corporation-USA v. Court of Appeals, 351 SCRA 373, 381 (2001) ("even after finding that the arbitration clause in the Distributorship Agreement in question is valid and the dispute between the parties is arbitrable, this Court affirmed the trial court's decision denying petitioner's Motion to Suspend Proceedings pursuant to the arbitration clause under the contract. In so ruling, this Court held that as contracts produce legal effect between the parties, their assigns and heirs, only the parties to the Distributorship Agreement are bound by its terms, including the arbitration clause stipulated therein. This Court ruled that arbitration proceedings could be called for but only with respect to the parties to the contract in question. Considering that there are parties to the case who are neither parties to the Distributorship Agreement nor heirs or assigns of the parties thereto, this Court, citing its previous ruling in *Salas, Jr. v. Laperal Realty Corporation* (320 SCRA 610 (1999)), held that to tolerate the splitting of proceedings by allowing

to the PIATCO Contracts, they cannot therefore be bound by the arbitration clause provided for in the ARCA and, hence, cannot be compelled to submit to arbitration proceedings.[22]

The Court further underscored that "[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."[23] The Court moreover stated that objective of arbitration, which is to allow and expeditious determination of a dispute, "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."[24]

On 5 May 2003, the Court[25] nullified PIATCO Contracts. The Court was subsequently tasked to resolve the separate Motions for Reconsideration of the Decision, which it denied with finality on 21 January 2004.[26]

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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. Thus, we ruled that the interest of justice would best be served if the trial court hears and adjudicates the case in a single and complete proceeding.").

22. *Id.*

23. *Id.* at 647-48.

24. *Id.* at 648.

25. The ten-member majority is composed of Chief Justice Davide, and Associate Justices Bellosillo, Ynares-Santiago, Sandoval-Gutierrez, Austria-Martinez, Corona, and Carpio-Morales, together with Associate Justice Puno, as *ponente*, Associate Justice Panganiban, who filed a Separate Concurring Opinion, and Associate Justice Callejo, who joined in the Separate Concurring Opinion. The three-member minority is composed of Associate Justice Vitug, who filed a Separate Dissenting Opinion, in which Associate Justices Quisumbing and Azcuna joined. Associate Justice Carpio took no part in the proceedings.

26. Agan v. Philippine International Air Terminals Co., Inc., G.R. No. 155001, Jan. 21, 2004 (Resolution).

    On Reconsideration, the voting of the members of the Supreme Court varied from that in the main case. Now, the majority is only composed of seven members: Chief Justice Davide, and Associate Justices Austria-Martinez, Corona, and Carpio-Morales, together with Associate Justice Puno, as *ponente*,

It should be underscored that even prior to the action before the Supreme Court, PIATCO filed, on 26 February 2003, a Request for Arbitration against the Republic of the Philippines with the International Court of Arbitration of the ICC, as provided for in the PIATCO Contracts. Thereafter, on 17 September 2003, PIATCO investor Fraport AG Frankfurt Airport Services Worldwide filed a Request for Arbitration against the Republic of the Philippines with the International Centre for Settlement of Investment Disputes (ICSID), alleging that the Philippine Government has expropriated the investments of Fraport AG in NAIA IPT III in alleged violation of the Bilateral Investment Treaty entered into by the Philippines and Germany on 17 April 1997.[27]

Legal tension exists as between the declaration by the President of the Philippines that the PIATCO Contracts were null and void *ab initio*, on the one hand, and the doctrine of arbitral autonomy that requires contractual disputes to be resolved by means arbitration, even those disputes involving the invalidity of the contract itself, on the other hand. Thus, arbitration laws and principles, specifically the principle on arbitral autonomy or the separability doctrine, shall be pervasive in this study for the reason that such procedural principle was pivotal in deciding the outcome of *PIATCO*.

The study intends to explore the legal issues involved in resolving disputes in state contracts entered into by the State with non-state entities and look into the implications of the interplay of state sovereignty on commercial practice in the Philippines.

Any discussion on the development of contract law and dispute resolution should contain a reminder that although the rudiments of contemporary commercial contract law are more often than not embodied in

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and Associate Justice Panganiban, who reiterated his Separate Concurring Opinion in the main case, and Associate Justice Callejo, who joined in the Separate Concurring Opinion. The previous three-member minority now increased to five: Associate Justice Vitug, who maintains his Separate Dissenting Opinion in the main *ponencia*, in which Associate Justices Quisumbing, Ynares-Santiago, Sandoval-Gutierrez, and Azcuna joined. Associate Justice Carpio still had no part in the proceedings. Associate Justice Tinga, who was appointed after the promulgation of the main Decision, did not participate in the deliberations.

Associate Justice Bellosillo, who participated in the previous deliberations, retired from the Court before the promulgation of the Resolution resolving the Motions for Reconsideration.

27. Due to the confidential nature of arbitral proceedings, copies of pleadings and other pertinent documents relative to the arbitration proceedings before the ICC and the ICSID are not available to the public.

statute books and codes of exacting nature, a great number of foundational doctrines on contract law and dispute resolution find their origins from common law contracts and the decisions occasioned by contractual disputes of old. Any reading of present day commercial relationships should not fail to take heed of the fact that such is rooted in common law.

Thus, prior to the development of multifarious rules of codes and statute books that govern contemporary commercial milieu, there already existed well-recognized systems of commercial practice and dispute resolution. Failing to recognize this historical perspective will deny contract law its genesis and, unfortunately, treat the subject matter as a purely legal abstraction borne merely in the eyes of the law and cradled by it to seeming complication.

Commercial practice cannot develop without relying on the efficacy of transactional commitments grounded on statutory law and judicial pronouncements that interpret the same. It is, thus, only logical that this study begin with a discussion of the tenets of contract law.

The Restatement (Second) of Contracts defines a contract as a promise for breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty.[28] A contract, therefore, is an agreement between two or more parties recognized by the courts as creating legally binding and enforceable duties and obligations between the parties.

Prescinding from the principles of contract law, a state contract is considered to be a public contract "entered into by a public officer acting for an on behalf of the Government within the scope of his authority and in his official capacity, in which the people are interested, the subject matter of which is of public concern and affects private rights only insofar as the law confers such rights when its provisions are carried out by the officer to who, it is confided to perform."[29]

The State may enter into contracts for its own welfare and that of its citizens. Having a juridical personality, the Government is endowed with the authority to enter into contracts and "clothed with all of the privileges and prerogatives attendant and appropriate to the just exercise of its powers by virtue of being a sovereign political entity." As a Government, "it is capable

28. Restatement (Second) of Contract, § 1 (1981).

29. People v. Palmer, 35 N.Y.S. 222, 14 Misc. 41.

of realizing the ends for which it was created, by all the means necessary for their attainment." As an incident of and necessarily implied from its constitutional powers, the Government "possesses the legal capacity to contract and to be contracted with and, having thus entered into a contract, to be bound thereby."[30]

It is well established that "contracts or conveyances may be executed for and in behalf of the Government or of any of its branches, subdivisions, agencies, or instrumentalities, including government-owned or controlled corporation, whenever demanded by the exigency or exigencies of the service and as long as the same are not prohibited by law."[31]

The government officer who contracts on behalf the State "functions as agent of the Philippine Government for the purpose of making the contract." There arises then "a principal-agent relationship between the Government, on the one hand, and the contracting official, on the other." The contracting power of the agent exists "only because and by virtue of a law, or by authority of a law," creating principal-agent relationship and conferring upon the agent the actual authority to enter into contracts on behalf of the Government. The agent "may make only such contracts as he is so authorized to make." Flowing from this premise is the principle that "the Government is bound only to the extent of the power it has actually given its officer-agents." Pursuant to a well established principle in agency, "the acts of such agents in entering into agreements or contract beyond the scope of their actual authority do not bind or obligate the Government" since the instance when the agent contracts beyond the scope of his authority, "the principal-agent relationship between the Government and the contracting officer ceases to exist."[32]

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30. FERNANDEZ, *supra* note 6, at 3.

31. Administrative Code of 1987, Executive Order No. 292, Book I, Chapter 12, § 47 (1987) ("in more specific terms, the respective charters of government-owned or controlled corporations invariably include in the enumeration of the powers of such entities the authority to contract and to be contracted with. So, too, every local government unit (LGU) as a corporate body is empowered to enter into contracts. (citing Local Government Code of 1991, Republic Act No. 7160, Sec. 22) In this connection, all local government units are expected to observe and comply with the requirements of existing laws, rules and regulations pertaining to government contracts." FERNANDEZ, *supra* note 6, at 3-4.).

32. FERNANDEZ, *supra* note 6, at 8-9.

It is recognized that contracts entered into by the Government are subject to the same rules of contract law, which govern the validity and sufficiency of contracts between individuals. Such is the situation because "when the Government enters into a contract, it sheds its cloak of sovereignty, descends to the level of the citizens, and is treated by the law as a private person with the same rights and obligations of such individual as are generally governed by the law applicable to contracts between private persons." As in the case of ordinary contracts between private individuals or entities, "all the essential elements and characteristics of a contract in general must be present in order to create a binding and enforceable Government contract."[33]

As such, "a Government contract also memorializes a meeting of the minds between the parties thereto whereby one binds himself, with respect to the other, to give something or to render some service." The essential contractual requisites of consent of the contracting parties, an object certain which is the subject matter, and cause or consideration of the obligation which is established must concur in state contracts; otherwise, it shall not exist in the eyes of the law. Peculiar to state contracts, however, is that "the approval of the contract by a higher authority is usually required by law or administrative regulation as a requisite for its perfection."[34]

By reason that state contracts are strictly attended by statutory requirements, particular acts of public officials that relate to state contracts have been measured by the Supreme Court as to whether or not said acts conform to the duties and obligations reposed upon officials of the Government by statutory law and jurisprudence.

II. LAW ON ARBITRATION

It is of great importance to be acquainted with the law on arbitration for the reason that arbitration — more particularly, international commercial arbitration — is one of the means relied upon by contracting parties to

33. *Id.* at 9.

34. *Id.* at 10.

resolve contractual disputes that may arise between them with respect to the provisions of their contractual agreement.

A. Philippine Laws on Arbitration

In this jurisdiction, there are two prevailing statutory enactments with regard to arbitration: (1) Republic Act No. 9285,[35] governing international commercial arbitration; and (2) Republic Act No. 876,[36] governing domestic arbitration.[37] Since this study is primarily focused on the issue of international commercial arbitration, the Alternative Dispute Resolution (ADR) Law shall play a more prominent role as opposed to the old Arbitration Law.

It is a 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."[38] The State, therefore, encourages the use of alternative dispute resolution "as an important means to achieve speedy and impartial justice and declog court dockets." In view of such policy, "the State shall provide means for the use of ADR as an efficient tool and an alternative procedure for the resolution of appropriate cases."[39]

The ADR Law defines "arbitration" to be "a voluntary dispute resolution process in which one or more arbitrators, appointed in accordance

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35. 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, Republic Act No. 9285 (2004) [hereinafter ADR Law]. The ADR Law is a consolidation of Senate Bill No. 2671 and House Bill No. 5654.

36. 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, Republic Act No. 876 (1953) [hereinafter old Arbitration Law].

37. ADR Law, § 32 and 33. The Chapter on domestic arbitration provides that domestic arbitration shall continue to be governed by the old Arbitration Law provided that the term "domestic arbitration" as used in the ADR Law shall mean "an arbitration that is not international as defined in Article (3) of the Model Law." Furthermore, articles 8, 10, 11, 12, 13, 14, 18, 19, and 29 to 32 of the Model Law and sections 22 to 31 of the Chapter on international commercial arbitration in the ADR Law shall likewise apply to domestic arbitration.

38. *Id.* § 2.

39. *Id.*

with the agreement of the parties, or rules promulgated pursuant to this Act, resolve a dispute by rendering an award."[40] In the same vein, "commercial arbitration" is understood to apply to matters "arising from all relationships of a commercial nature, whether contractual or not."[41]

Exempted from the coverage of the law are (a) labor disputes covered by the Labor Code of the Philippines, as amended and its Implementing Rules and Regulations; (b) the civil status of persons; (c) the validity of a marriage; (d) any ground for legal separation; (e) the jurisdiction of courts; (f) future legitime; (g) criminal liability; and (h) those which by law cannot be compromised.[42]

With respect to international commercial arbitration, the law provides that it shall be governed by the Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law on 21 June 1985.[43]

A party to an international arbitration conducted in the Philippines may be represented by any person of his choice. However, unless admitted to the practice of law in the Philippines, such representative is not authorized to appear as counsel in any Philippine court, or any other quasi-judicial body

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40. *Id.* § 3(d).

41. *Id.* § 3(g). According to the law, this includes any trade transaction 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. *Id.* § 21.

42. *Id.* § 6.

43. *Id.* § 19 (referring to United Nations Commission on International Trade Law Model Law on International Commercial Arbitration, June 21, 1985, U.N. Doc. A/40/17 [hereinafter UNCITRAL Model Law]). The succeeding section provides that in interpreting the UNCITRAL Model Law, "regard shall be had to its international origin and to the need for uniformity in its interpretation and resort may be made to the *travaux preparatories* and the report of the Secretary General of the UNCITRAL dated 25 March 1985 (referring to International Commercial Arbitration: Analytical Commentary on Draft Trade, A/CN/9/264)).

regardless of whether or not such appearance is in relation to the arbitration in which he appears.[44]

The law emphasizes the need for confidentiality in arbitral proceedings. As such, the arbitration proceedings, including the records, evidence, and the arbitral award, shall be considered confidential and shall not be published except (1) with the consent of the parties, or (2) for the limited purpose of disclosing to the court of relevant documents in cases where resort to the court is allowed herein.[45]

In relation with this policy, the court in which the action or the appeal is pending may issue a protective order to prevent or prohibit disclosure of documents or information containing secret processes, developments, research and other information where it is shown that the applicant shall be materially prejudiced by an authorized disclosure thereof.[46]

The law provides that "a court before which an action is brought in a matter which is the subject matter of an arbitration agreement shall, if at least one party so requests not later that the pre-trial conference, or upon the request of both parties thereafter, refer the parties to arbitration unless it finds that the arbitration agreement is null and void, inoperative or incapable of being performed."[47]

The ADR Law likewise requires that courts "shall have due regard to the policy of the law in favor of arbitration." Thus, "where an action is commenced by or against multiple parties, one or more of whom are parties who are bound by the arbitration agreement although the civil action may continue as to those who are not bound by such arbitration agreement."[48] The law further provides for interim measures for the protection of the parties subject to a pending arbitral proceeding.[49]

With respect to judicial review of domestic arbitral awards, the law provides that confirmation of a domestic arbitral award shall be governed by Section 23 of the old Arbitration Law and in accordance with the Rules of Procedure to be promulgated by the Supreme Court, after which it shall be enforced in the same manner as final and executory decisions of the

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44. *Id.* § 22.
45. *Id.* § 23.
46. *Id.*
47. *Id.* § 24.
48. *Id.* § 25.
49. *Id.* § 28 and 29.

Regional Trial Court.[50] With respect to vacating the award, the law provides that a party to a domestic arbitration may question the arbitral award with the Regional Trial Court in accordance with the Rules of Procedure to be promulgated by the Supreme Court exclusively on those grounds enumerated in Section 25 of the old Arbitration Law.[51]

Shifting to foreign arbitral awards, the law provides that the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards shall govern the recognition and enforcement of arbitral awards covered by the said Convention.[52] The recognition and enforcement of such arbitral awards shall be filed with the Regional Trial Court in accordance with the Rules of Procedure to be promulgated by the Supreme Court, which shall provide that the party relying on the award or applying

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50. *Id.* § 40. Section 23 of the old Arbitration Law provides:

Sec. 23 Confirmation of Award - At any time within one month after the award is made, any party to the controversy which was arbitrated may apply to the court having jurisdiction, as provided in section twenty-eight, for an order confirming the award; and thereupon the court must grant such order unless the award is vacated, modified or corrected, as prescribed herein. Notice of such motion must be served upon the adverse party or his attorney as prescribed by law for the service of such notice upon an attorney in action in the same court.

51. *Id.* § 41. Section 25 of the old Arbitration Law provides:

Sec. 25. Grounds for modifying or correcting award. - In any one of the following cases, the court must make an order modifying or correcting the award, upon the application of any party to the controversy which was arbitrated:

(a) Where there was an evident miscalculation of figures, or an evident mistake in the description of any person, thing or property referred to in the award; or

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

(c) Where the award is imperfect in a matter of form not affecting the merits of the controversy, and if it had been a commissioner's report, the defect could have been amended or disregarded by the court.

The order may modify and correct the award so as to effect the intent thereof and promote justice between the parties.

52. *Id.* § 42.

for its enforcement shall file with the court the original or authenticated copy of the award and the arbitration agreement. Furthermore, the applicant shall establish that the country in which foreign arbitration award was made is a party to the New York Convention.[53] Moreover, if the application for rejection or suspension of enforcement of an award has been made, the Regional Trial Court may, if it considers it proper, vacate its decision and may also, on the application of the party claiming recognition or enforcement of the award, order the party to provide appropriate security.[54]

The law provides that the Supreme Court may, in view of comity and reciprocity and in accordance with procedural rules it may promulgate, recognize and enforce foreign arbitral awards not covered by the New York Convention and consider the same convention awards.[55]

The law is careful to distinguish between foreign arbitral awards and foreign judgments, such that a foreign arbitral award when confirmed by a court of a foreign country, shall be recognized and enforced as a foreign arbitral award and not a judgment of a foreign court. Likewise, a foreign arbitral award, when confirmed by the Regional Trial Court, shall be enforced as a foreign arbitral award in the same manner as final and executory decisions of courts of law of the Philippines and not as a judgment of a foreign court.[56]

It is provided for by the law that a party to a foreign arbitration proceeding may oppose an application for recognition and enforcement of the arbitral award exclusively on those grounds enumerated under Article V of the New York Convention.[57]

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53. *Id.*

54. *Id.*

55. *Id.* § 43.

56. *Id.* § 44.

57. *Id.* § 45. Article V of the New York Convention provides that recognition and enforcement of the foreign arbitral award may be refused, at the request of the party against whom it is invoked, if that party furnishes to the competent authority where the recognition and enforcement are sought, proof that (a) either of the parties were incapacitated to enter into the arbitration agreement, the arbitration agreement is not valid under the law to which the parties have subjected it, or the law of the country where the award was made; (b) the party against whom the award was made was not given any proper notice of the arbitration proceedings, or was unable to present his case; (c) the award deals with a difference not contemplated by or not falling within the terms of the arbitration agreement, or it contains decisions on matters beyond the scope of

Decisions of the Regional Trial Court confirming, vacating, setting aside, modifying or correcting an arbitral award may be appealed to the Court of Appeals. In connection with this, the losing party appealing from the judgment of the court confirming an arbitral award shall required by the appellant court to post a counter bond executed in favor of the prevailing party equal to the amount of the award.[58]

As to venue and jurisdiction, judicial proceedings for the recognition and enforcement of an arbitration agreement or for vacation, setting aside, correction or modification of an arbitral award shall be deemed as special proceedings and filed with the Regional Trial Court (i) where arbitration proceedings are conducted; (ii) where the asset to be attached or levied upon, or the act to be enjoined is located; (iii) where any of the parties to the dispute resides or has his place of business; or (iv) in the National Judicial Capital Region, at the option of the applicant.[59] In such cases, the court shall send notice to the parties at their address of record in the arbitration, or if any party cannot be served notice at such address, at such party's last known address at least fifteen (15) days before the date set for the initial hearing of the application.[60]

B. International Bodies for Dispute Settlement

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the submission to arbitration; (d) the composition of the arbitral authority or the arbitral procedure was not in accordance with the arbitration agreement, or in the absence thereof, the law of the State where arbitration took place; and (e) the arbitral award is not yet final and executory or has been suspended or set aside by a competent authority of the State where the award was rendered. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement are sought finds that (a) the subject matter of the difference is not arbitrable under the law of that country; and (b) the recognition or enforcement of the award would be contrary to the public policy of that country. Furthermore, the burden of proof rests on the party opposing the recognition and enforcement of the foreign arbitral award.

58. *Id.* § 46.

59. *Id.* § 47.

60. *Id.* § 48.

Since the mid-20th century, the international business community has manifested an increasing interest in arbitration as a dispute resolution mechanism.[61] It is well recognized that the desire for certainty and predictability is a powerful motivating factor in international commercial relations.[62] This is for the reason that business people are "renowned for their self-professed attachment to stability."[63] In this regard, "the existence of arbitral institutions is a source of great comfort to foreign investors who would wish to resort to such institutions with their pre-established rules in the event of any dispute."[64]

Arbitration has evolved as the preferred method for resolving contractual disputes in international commercial agreements. International commercial arbitration is a highly competitive business.[65] It has become "a field of intense competition: competition between the arbitration sites, between the arbitral institutions, between counsel, between arbitrators, and even between the periodicals on international arbitration."[66]

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61. STEPHEN J. TOOPE, MIXED INTERNATIONAL ARBITRATION: STUDIES IN ARBITRATION BETWEEN STATES AND PRIVATE PERSONS 199 (1990).

62. *Id.* at 201.

63. *Id.*

64. *Id.*

65. Christopher R. Drahozal, *Commercial Norms, Commercial Codes, and International Commercial Arbitration*, 33 VAND. J. TRANSNAT'L L. 79, 98 (2000).

66. Jacques Werner, *Competition Within the Arbitration Industry*, J. INT'L. ARB. 5 (1985). Drahozal, *supra* note 65, at 98 ("Administering institutions compete fiercely as to the fees they charge for their services as well as to the procedures followed in the arbitrations they administer. Countries (like American states in corporate law) compete to be selected the situs for international commercial arbitrations and to obtain the financial benefits that follow. Arbitrators compete with other arbitrators to be selected to serve in a particular case; unlike public judges, who ordinarily get paid a fixed salary regardless of how many cases they decide or how they decide those cases, arbitrators get paid only when they are chosen. International lawyers facilitate this competition by reducing the costs of finding and adopting alternative arbitral schemes. Accordingly, if institutional rules or international arbitration laws require arbitrators to follow commercial norms in deciding disputes or if many arbitrators in fact decide disputes using such norms, that provides strong evidence that such rules ex ante benefit the parties involved.").

Arbitral institutions provide a variety of services to the arbitrating parties by providing a standard set of procedural rules to govern the arbitration;[67] serving as an appointing authority that provides backup arbitrator selection services for the parties if they cannot agree;[68] and, the arbitral institution may provide various administrative services to the parties.[69] As a service industry, arbitral institutions see to it that the needs of contracting parties in pursuance of the remedy of international commercial arbitration are met and satisfied.

Submission to arbitration before international arbitral bodies requires a valid and binding arbitral agreement between the parties. Before pursuing the intricacies of arbitral proceedings before international arbitral bodies, the legal bases for arbitration in the Philippines must first be considered.

The ICC is considered to be the dominant arbitral institution the world over.[70] Other leading international arbitration institutions include the American Arbitration Association, the London Court of International Arbitration, the Stockholm Chamber of Commerce, the Federal Economic Chamber in Vienna, and the China International Economic and Trade Arbitration Commission.[71] These institutions, however, cater primarily to the resolution of commercial disputes between private parties. Conversely,

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67. Drahozal, *supra* note 65, at 99 (citing YVES DEZALAY & BRYANT G. GARTH, DEALING IN VIRTUE: INTERNATIONAL COMMERCIAL ARBITRATION AND THE CONSTRUCTION OF A TRANSNATIONAL LEGAL ORDER 6 & n.2 (1996)) (stating that contracting parties who specify in an arbitration clause a particular institution as the arbitral institution that has jurisdiction to revolve disputes pursuant to their contracts thereby adopt rules as such arbitral institution as a standard form subject to any changes agreed upon by the parties).

68. *Id.* at 99-100.

69. *Id.* at 100.

70. *Id.* ("The ICC once had a 'quasi-monopoly position'; although it remains the most prominent institution, the ICC's market share has declined in the face of increased competition from new and existing arbitral institutions. In response to this competition, the ICC has reduced the fees it charges for its services and amended its rules to make them more attractive to potential contracting parties.").

71. *Id.* (citing Robert Clow & Patrick Stewart, *International Arbitration: Storming the Citadels*, INT'L FIN. L. REV. 11-12 (Mar. 1990); James H. Carter, *International Commercial Dispute Resolution*, DISP. RESOL. J. 95, 95 & 99 n.2 (Apr.- Sept. 1996)).

the ICSID is the arbitral body that is equipped to handle the conduct of arbitration between a sovereign entity and a private investor.[72]

The ICC was created in Paris immediately after the First World War "to encourage the re-establishment and the expansion of trading links between the recently pacified European states."[73] Structured as an association of national committees, the ICC created a Court of Arbitration in 1923, which "has become the most important and significant tribunal for disputes arising out of international commerce."[74] The ICC serves as a "convenient paradigm" for the conduct of international commercial arbitration.[75]

The ICSID, which is under the auspices of the World Bank, came into being by virtue of the Convention for the Settlement of Investment Disputes Between States and Nationals of Other States. The primary goal of the ICSID system of arbitration is to "maintain a careful balance between the interests of investors and those of host States."[76]

In *Amco Asia Corp. v. Republic of Indonesia*,[77] an ICSID award of recent vintage, the arbitral tribunal stated: "[t]he Convention is aimed to protect, to the same extent and with the same vigour the investor and the host-state, not forgetting that to protect investments is to protect the general interest of development and of developing countries."[78]

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72. TOOPE, *supra* note 61, at 201-02 (underscores the fact that within the context of arbitration between states and foreign private entities, a number of troubling issues arise, such as the issue of whether or not institutional arbitration is "sufficiently attuned to the legitimate political and policy goals of states" or the issue of whether or not the codified procedures of such international arbitral bodies together with an increased emphasis on precedent "lend a certain inflexibility to the process of dispute resolution" as far states are concerned.).

73. TOOPE, *supra* note 61, at 205.

74. *Id.* (citing J. LEW, APPLICABLE LAW IN INTERNATIONAL COMMERCIAL ARBITRATION: A STUDY IN COMMERCIAL ARBITRATION AWARDS 22 (1978)).

75. *Id.*

76. *Id.* at 219 (citing International Bank for Reconstruction and Development, *Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and nationals of Other States, reprinted in* 4 I.L.M. 524, 526 (1965)).

77. Amco Asia Corp. v. Republic of Indonesia, ICSID Award on Jurisdiction of Sept. 25, 1983, *reprinted in* 10 Y.B.C.A. 61 (1985).

78. *Id.* at 66.

In the international legal order, definitive sets of rules to govern arbitral proceedings are imperative towards the proper settlement of contractual disputes between parties who or which are, more often than not, situated in different jurisdictions. For purposes of this study, it is important to note that relevant trade usages may be considered in arbitral proceedings under the auspices of the ICC.[79] In the same vein, applicable rules of international law may be taken into consideration in arbitral proceedings under the ICSID regime.[80]

The well-defined rules of procedure in insofar as ICC and ICSID arbitrations are concerned provide for the predictability that men of commerce depend upon in going about their commercial transactions. However, provisions paving the way for the use of relevant trade usages and applicable rules of international law likewise benefit them for these permit the rules to adapt to prevailing commercial conditions in different jurisdictions, which may not necessarily be reflected at once in definitive codes and rules. In fact, the ability to recognize and be adaptable to different nuances that exist in commercial transactions and relationships in various jurisdictions is precisely the key towards commercial development and prosperity.

It is said that "the principal reason parties choose to arbitrate international commercial disputes because neither party is comfortable litigating in the public courts of the other's home country."[81] Furthermore, parties choose to arbitrate international disputes because "arbitration awards are easier to enforce than court judgments."[82] International treaties such as the New York Convention provide for a well-recognized "legal framework through which international arbitration awards can readily be enforced through much of the legal world."[83]

Commentators likewise argue that "international commercial arbitration can provide valuable evidence about the costs and benefits of using

79. ICA-ICC Rules of Arbitration, art. 17.

80. Washington Convention, art. 42.

81. Drahozal, *supra* note 65, at 94-95.

82. *Id.* at 95.

83. *Id.*

commercial norms to resolve contract disputes."[84] Examining the crucial role played by commercial norms in international arbitrations will help in evaluating the role those norms should play in resolving contract disputes in public courts.

Customarily, international arbitrators rely on commercial norms in resolving the contractual dispute presented before them and in subsequently making their arbitral awards. The following observation is instructive:

> Arbitrators in ICC arbitrations regularly cite to the ICC rule on trade usages, which requires that "[i]n all cases, the Arbitral Tribunal shall take account of the provisions of the contract and the relevant trade usages." As the arbitrator in ICC Award No. 4237 stated after citing the French arbitration statute and the ICC Rules, "[i]t goes without saying that the Arbitrator shall have regard to [the terms of the contract and the trade usages] to the extent that they do not deviate from the mandatory rules of the applicable law."
>
> Nonetheless, when contract terms are clear, it may be that international arbitrators give precedence to contract terms over trade usages despite the wording of the institutional rule. Pieter Sanders has explained that in his experience in international arbitrations, "[a]rbitrators will let the contract, if it is clear, prevail." As a result, Sanders concludes, the difference in wording between the ICC rule on trade usages and UNCITRAL Rule 33(3), which gives greater weight to the contract terms, "[i]n arbitral practice" may "hardly exist." Arbitrators certainly indicate that the parties' contract is controlling, although only rarely does it seem to matter for the outcome of the proceeding.
>
> On the other hand, there is some indication in reported awards that international arbitrators will disregard express contract terms in light of trade usages. In ICC Award No. 3820, the sole arbitrator looked behind the plain language of the contract on the basis of the underlying purpose of the provision and international trade practices. A contract for the sale of food products provided that the buyer would open an irrevocable letter of credit in favor of the seller. The issuer of the credit, buyer's bank, agreed that it would authorize payment "provided goods have been received by opener." The buyer ultimately refused to take receipt of the goods, and its bank refused payment. In an action against the bank, the arbitrator "acknowledged that, if read literally, the will of the credit opener would determine whether the beneficiary would be paid: by refusing the goods he could ensure that the condition 'goods received by opener' was not fulfilled." But instead the arbitrator interpreted the credit "in accordance

84. *Id.* at 93.

> with the practices that apply on this subject in international trade" and rejected the plain language reading of the credit as "in conflict with the nature and the purpose of the documentary credit." The arbitrator concluded that the phrase "'goods received by opener' also covers the situation that the opener could have received the goods if he had wanted to," which gave the language "a significance that is understandable and acceptable in commerce and trade."[85]

Reliance on trade usages is particularly pronounced in arbitrations between private parties and foreign governments.[86] In the *Aramco* ad hoc arbitration[87] between Saudi Arabia and Aramco, the arbitrators interpreted the terms of the oil concession "in their plain, ordinary and usual sense, which is the sense accepted in the oil industry." Furthermore, the award stated that the tribunal "cannot overlook the practices and usage of commerce, known by both Parties at the time the Agreement was signed, unless it be prepared to content itself with abstract reasoning and to lose sight of reality and of the requirements of the oil industry."[88]

In similar fashion, international arbitrators frequently rely upon considerations of good faith in resolving contract disputes. In several

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85. *Id.* at 122-24.

86. *Id.* at 126.

87. Saudi Arabia v. Arabian American Oil Co. (Aramco), 27 Int'l L. Rep. 117, 179 (ad hoc arbitration Aug. 23, 1958) (cited in Christopher R. Drahozal, *Commercial Norms, Commercial Codes, and International Commercial Arbitration*, 33 VAND. J. TRANSNAT'L L. 79, 126 (2000)).

88. *Id.* at 188. Drahozal, *supra* note 65 at 222 (points the reader to several other arbitral awards: ICC Final Award in Case No. 3572 of 1982, 14 Y.B.C.A. 111, 116-17 (1989) (declining to apply national law, instead applying "internationally accepted principles of law governing contractual relations;" tribunal explained that this "has become common practice in international arbitrations particularly in the field of oil drilling concessions and especially to arbitrations located in Switzerland. Indeed, this practice, which must have been known to the parties, should be regarded as representing their implicit will."); Mobil Oil Iran Inc. v. Iran, 16 Iran-U.S. Cl. Trib. Rep. 3, 27-28 (1987) (finding oil sale and purchase agreement not governed by national law of one party and instead applying general principles of international and commercial law; "[t]his conclusion is in accord with the spirit of Article 29 and with the usages of trade, as expressed in agreements between States and foreign companies, notably in the oil industry, and confirmed in several recent arbitral awards.")).

instances, international arbitration tribunals have shown willingness "to apply the good faith requirements of national laws and to find that a contract party has not acted in good faith."[89] Without question, "parties to international contracts must act in good faith regardless of whether national law imposes such a requirement,"[90] going so far as to identify the duty of good faith "as

89. *Id.* at 127. (citing Cairo Regional Centre for International Commercial Arbitration Final Award of 21 Dec. 1995, 22 Y.B.C.A.13, 17-18 (1997) (Egyptian law); Hamburg Chamber of Commerce Partial Award of 21 March 1996, 22 Y.B.C.A.35, 42 (1997) (German law) ("The general principle of good faith also applies to international contracts for the delivery of goods by installments."); ICC Final Award in Case No. 8362 of 1995, 22 Y.B.C.A.164, 168-69 (1997) (New York law); Ad Hoc UNCITRAL Award of 17 November 1994, 21 Y.B.C.A.(1996) 13, 34 ("good faith is among the basic legal principles common to all Arab countries"); ICC Final Award in Case No. 6283 of 1990, 17 Y.B.C.A.178, 181 (1992) ("the Arbitral Tribunal considers that defendant did not execute its contractual obligations in good faith and has therefore breached the Agreement"); ICC Partial Award in Case No. 5073 of 1986, 13 Y.B.C.A.53, 65 (1988) ("the good faith that claimant owed to defendant in the performance of the contract as extended 9 March 1983, obligated it to provide more ample notice of termination than it in fact did"); ICC Award on the Merits (of December 29, 1972) Made in Case No. 2114, 5 Y.B.C.A.189, 190 (1980) ("present dispute is exactly the type of case where good faith is of utmost importance")).

90. *Id.* (citing See Ad Hoc Award of April 1982, 8 Y.B.C.A.94, 116 (1983) (argument "contradicts both the general principle of good faith and the fundamental principle pacta sunt servanda, both principles forming the basis of all contractual relations, particularly in international affairs, and which are specifically enshrined in international commercial usages and international law"); ICC Partial Award Made (June 14, 1979) in Case No. 3267, 7 Y.B.C.A.96, 100 (1982) ("the abruptness of this deduction without advance warning other than a notice sent simultaneously with the making of such deduction does not appear in keeping with the good faith spirit which should have prevailed in the performance of the Contract") (arbitrators authorized to act as "*amiable compositeurs*"); Arbitral Tribunal of Hamburg Friendly Arbitration Award of January 15, 1976, 3 Y.B.C.A.212, 213 (1978) ("the forementioned principles are not based on German rules of law, but are rather a consequence of the principle of good faith in trade. These principles have because of their character a supra-national validity"); ICC Award Made in Case No. 1784 in 1975, 2 Y.B.C.A.150, 150 (1977) ("requirement of good faith which should govern the determination of the parties' obligations and their fulfillment, particularly when the agreement involved is an international contract")).

one of the general principles of international trade law developed in international arbitration proceedings."[91]

III. ARBITRAL AUTONOMY

Section 10.02 of the ARCA provides that any dispute, controversy, or claim arising in connection with the PIATCO Contracts shall be settled by means of ICC arbitration. However, in spite of the fact that arbitral proceedings were already pending before the ICC, the Supreme Court still took cognizance of *PIATCO*, invoking the transcendental importance of the case. In effect, the Court brushed aside the validity of the arbitral clause in the ARCA. Citing *Del Monte*, the Court held that although arbitral proceedings may indeed be instituted, the same applies only to the contracting parties. Further, citing *Salas*, since *PIATCO* involved non-parties to the contracts, splitting the proceedings in order to give way to arbitration for the contracting parties and trial for the non-contracting parties would result in multiplicity of suits, duplicitous proceedings, and unnecessary delay. Thus, following the *Del Monte* and *Salas* doctrines, the Court ruled that the interest of justice would best be served if it heard and adjudicated the case in a single, complete proceeding.

Moreover, the Court, it appears, adopted the reasoning that since the PIATCO Contracts are null and void *ab initio*, then the arbitral agreement is also without any legal existence.

This *ratio*, however, betrays the well-recognized principle of arbitral autonomy, which provides that an arbitral clause is considered separate or independent from the main contract. This entails that the validity of the arbitral agreement does not rest upon the validity of the principal agreement within which an arbitration clause is embodied.[92] As such, the invalidity of

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91. *Id.* at 128 (citing Thomas E. Carbonneau, *Rendering Arbitral Awards with Reasons: The Elaboration of a Common Law of International Transactions*, 23 COLUM. J. TRANSNAT'L L. 579, 590 (1985) ("ICC arbitrators consider the good faith obligation as part of international commercial usages"); Bernardo M. Cremades, *Practitioners' Notebook: The Impact of International Arbitration on the Development of Business Law*, 31 AM. J. COMP. L. 526, 527 (1983) ("Arbitral decision making has developed good faith as an overriding rule of international contracting")).

92. Francisco Ed. Lim, *Commercial Arbitration in the Philippines*, 46 ATENEO L.J. 394, 404 (2001). Professor Lim argues that this is consistent with the presumption of

the principal agreement does not necessarily result in the invalidity of the arbitral separate agreement. The principle of arbitral autonomy is embodied in Sections 24 and 25 of the ADR Law.[93]

However, since the ADR Law does not apply to *PIATCO* by reason that it was enacted only in April of 2004, long after the Court promulgated both its Decision and Resolution in said case, it is significant to point out that the old Arbitration Law, which was the applicable law when *PIATCO* was promulgated and which governs both international commercial arbitration and domestic arbitration, likewise recognizes the arbitral autonomy principle in Section 6 thereof.[94]

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divisibility or separability of contractual stipulations in this jurisdiction. He cites Article 1420 of the Civil Code as authority, which states that in case of divisible contracts, if the illegal terms can be separated from the legal ones, the latter may be enforced.

93. Sections 24 and 25 of the ADR Law provides:

SEC. 24. *Referral to Arbitration.* - A court before which an action is brought in a matter which is the subject matter of an arbitration agreement shall, if at least one party so requests not later that the pre-trial conference, or upon the request of both parties thereafter, refer the parties to arbitration unless it finds that the arbitration agreement is null and void, inoperative or incapable of being performed.

SEC. 25. *Interpretation of the Act.* - In interpreting the Act, the court shall have due regard to the policy of the law in favor of arbitration. Where action is commenced by or against multiple parties, one or more of whom are parties who are bound by the arbitration agreement although the civil action may continue as to those who are not bound by such arbitration agreement.

94. Section 6 of the old Arbitration Law provides:

SEC. 6. *Hearing by court.* - A party aggrieved by the failure, neglect or refusal of another to perform under an agreement in writing providing for arbitration may petition the court for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days notice in writing of the hearing of such application shall be served either personally or by registered mail upon the party in default. The court shall hear the parties, and upon being satisfied that the making of the agreement or such failure to comply therewith is not in issue, shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. If the making of the agreement or default be in issue the court shall proceed to summarily hear such issue. If the finding be that no agreement in writing providing for arbitration was made, or that there is no default in the proceeding thereunder, the proceeding shall be dismissed. If the finding be that a written provision for arbitration was made and there is a default in proceeding thereunder, an order shall be made summarily

The old Arbitration Law cannot be clearer on the matter. After being satisfied that the making of the agreement or such failure to comply therewith is not raised as an issue in the proceedings, the court before which the action is pending "shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement."[95]

Furthermore, even the Supreme Court recognizes the principle of arbitral autonomy. In *General Insurance and Surety Corporation v. Union Insurance Society of Canton, Ltd.*,[96] the Court compelled the parties to arbitrate pursuant to their arbitral agreement despite the alleged nullity of the contract containing the arbitral clause:

> The crux of the controversy boils down to whether or not a controversy or dispute exists under the circumstances to warrant an order compelling the parties to submit to arbitration.
>
> A cursory reading of the petitions (complaints) in the trial court and the answers thereto will readily reveal that indeed, a valid controversy existed between the parties, which is a proper subject for arbitration. The two (2) civil cases brought by herein respondents alleged that there was still some amount payable in pounds sterling due to it from the herein petitioner. This allegation was denied by petitioner in its answer. Petitioner's defenses in the trial court were anchored on three (3) grounds, namely: 1) that there was a previous agreement between the parties that beginning January 1, 1959, the balance under the agreement will be made payable in US dollars; 2) that the provision to refer to arbitration any dispute arising from the reinsurance and the retrocession agreements can no longer be enforced five (5) years after the termination of both agreements; and 3) as a special alternative defense, that it was in fact the private respondents who owe the petitioner some amount. Since it was not disputed that in both the First Surplus Reinsurance Agreement and the Retrocession Quota Share Fire Pool Agreement the parties had agreed that any dispute arising from these

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directing the parties to proceed with the arbitration in accordance with the terms thereof.

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

95. *Id.*

96. General Insurance and Surety Corporation v. Union Insurance Society of Canton, Ltd., 179 SCRA 130 (1989).

> agreements shall be referred to a set of arbitrators, the trial court correctly ordered the parties to submit to arbitration. As found by the trial court:
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> "It will be seen from the pleadings of the parties that the only and principal issue to be decided by the court is whether or not there is a controversy or dispute between the petitioners and the respondent under their reinsurance agreement in Civil Case No. 68558 and in their retrocession agreement in Civil Case No. 68559 which controversy or dispute was subject to arbitration under their agreements. One of the special defenses of the respondent is that the respondent does not owe any amount to the petitioners. Inasmuch as the court is not called upon to determine the merits of the claim of the petitioners, this special defense of the respondent is immaterial for the purpose of this decision." (p. 56, Rollo; italics supplied)
>
> We hold therefore, that as regards the dispute on the amount the parties owe each other, the same is a proper subject of arbitration.[97]

In *General Insurance*, the Court cited *Mindanao Portland Cement Corp. v. McDonough Construction Co. of Florida*,[98] in which it held that when there is an arbitral agreement and one party puts up a claim which the other disputes, the need to arbitrate is imperative, to wit:

> Since there obtains herein a written provision for arbitration as well as failure on respondent's part to comply therewith, the court a quo rightly ordered the parties to proceed to arbitration in accordance with the terms of their agreement (Sec. 6, Rep. Act 876). Respondents' arguments touching upon the merits of the dispute are improperly raised herein. They should be addressed to the arbitrators. This proceedings ii merely a summary remedy to enforce the agreement to arbitrate. The duty of the court in this case is not to resolve the merits of the parties' claims but only to determine if they should proceed to arbitration or not. And although it has been ruled that a frivolous or patently baseless claim should not be ordered to arbitration, it is also recognized that the mere fact that a defense exists against a claim does not make it frivolous or baseless (Butte Minors' Union No. 1, et al. v. Anaconda Co., 159 I Supp. 431, affirmed in 267 F. 2d. 941).[99]

Further, although the conduct of judicial proceedings was eventually affirmed in *Del Monte Corporation-USA v. Court of Appeals*,[100] the very case

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97. *Id.*

98. Mindanao Portland Cement Corp. v. McDonough Construction Co. of Florida, 19 SCRA 808 (1967).

99. *Id.* at 814-15.

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

relied upon by the Court in *PIATCO*, it nonetheless stated that a "provision to submit to arbitration any dispute arising [from the contract] and the relationship of the parties is part of the contract and is itself a contract."[101]

To buttress the principle of arbitral autonomy, three cases decided in the United States are illustrative of the separability effect of the arbitral autonomy principle: *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*,[102] *Par-knit Mills, Inc. v. Stockbridge Fabric Co.*,[103] and *Three Valleys Municipal Water District v. E.F. Hutton*.[104]

In *Prima Paint*, the United States Supreme Court held that under the Federal Arbitration Act,

> [w]ith respect to a matter within the jurisdiction of the federal courts save for the existence of an arbitration clause, the federal court is instructed to order arbitration to proceed once it is satisfied that 'the making of the agreement for arbitration or the failure to comply [with the arbitration agreement] is not in issue.' Accordingly, if the claim is fraud in the inducement of the arbitration clause itself — an issue, which goes to the 'making' of the agreement to arbitrate — the federal court may proceed to arbitrate.[105]

The *Prima Paint* Court held that a claim of fraud in the inducement of the arbitration agreement itself is cognizable by the courts but not as to claims of fraud in the inducement of the principal contract. Thus, a claim of fraud in the inducement of the contract is to be resolved by means of arbitration.[106]

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101. *Id.* at 381.

102. Prima Paint Corporation v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967).

103. Par-knit Mills, Inc. v. Stockbridge Fabric Co., 636 F.2d 51 (1980).

104. Three Valleys Municipal Water District v. E.F. Hutton, 925 F.2d. 1136 (1991).

105. *Prima Paint*, 388 U.S. at 403-04.

106. *See id.* at 402-07. For a comprehensive discussion of *Prima Paint* in relation with the concept of fraud in inducement of contracts as opposed to the concept of fraud in fact, *see* Republic of the Philippines v. Westinghouse Electric Corporation, 714 F.Supp. 1362 (1989), decided by the United States District Court for the District of New Jersey. The discussion of fraud in the inducement or fraud in fact, however, do not bear much on the subject of this study by reason that there is no allegation in the pleadings relative to *PLATCO* as to the

In *Par-knit*, the United States Court of Appeals for the Third Circuit ruled that

> Before a party to a lawsuit can be ordered to arbitrate and thus be deprived of a day in court, there should be an express, unequivocal agreement to that effect. If there is doubt as to whether such an agreement exists, the matter, upon a proper and timely demand, should be submitted to a jury. Only when there is no genuine issue of fact concerning the formation of the agreement should the court decide as a matter of law that the parties did or did not enter into such agreement. The district court, when considering a motion to compel arbitration which is opposed on the ground that no agreement to arbitrate had been made between the parties, should give to the opposing party the benefit of all reasonable doubts and inferences that may arise.[107]

In this case, it was held that the determination of whether or not an arbitral agreement had in fact been executed by the contracting parties was an issue cognizable by judicial proceedings.[108]

In *Three Valleys*, the United Stated Court of Appeals for the Ninth Circuit, the court discussed the extent of the authority of an arbitrator in relation to the principle of arbitral autonomy, to wit:

> If the dispute is within the scope of an arbitration agreement, an arbitrator may properly decide whether a contract is "voidable" because the parties have agreed to arbitrate the dispute. But, because an "arbitrator's jurisdiction is rooted in the agreement of the parties," a party who contests the making of a contract containing an arbitration provision cannot be compelled to arbitrate the threshold issue of the *existence* of an agreement to arbitrate. Only a court can make that decision.[109]

By virtue of the arbitral autonomy principle, therefore, questions as to the validity or invalidity of the principal contract is cognizable by an arbitrator or arbitral tribunal for as long as there is a valid and binding arbitral agreement. However, where the legal existence of the arbitral agreement is

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> presence of fraud at any stage of the contracting process, from the prequalification and bidding proceedings to the actual execution of the PIATCO Contracts. The absence of fraud in the subject of this study notwithstanding, it is important to take into account the distinction concept of fraud in inducement on the one hand and the concept of fraud in fact on the other hand because of the differing consequences of such concepts as regards jurisdiction of arbitral tribunals.

107. *Par-knit*, 636 F.2d. at 54.

108. *Id.* at 55.

109. *Three Valleys*, 925 F.2d. at 1140-41.

itself disputed, such question is properly cognizable by regular courts in judicial proceedings.

Since the legal existence of Section 10.02 of the ARCA was not put into question, the dispute relative to the PIATCO Contracts should have been submitted to arbitration because the PIATCO Contracts precisely provide for arbitration with the ICC to settle any dispute, controversy, or claim arising in connection with the PIATCO Contracts.

Absent any allegation whatsoever that the arbitral agreement in the ARCA was procured through fraud such that no meeting of the minds occurred with respect to such arbitral agreement, arbitration proceedings should be allowed to take its due course by reason that the contracting parties precisely intended any dispute, controversy, or claim arising from the PIATCO Contracts to be so submitted and resolved.

The Supreme Court has had several occasions to construe the meaning of the phrase "any dispute, controversy, or claim" arising from contracts in relation to the question of applicability of arbitration.

In *Bay View Hotel, Inc., v. Ker & Co., Ltd.*,[110] the Court construed the clause "if dispute should arise as to the amount of [the insurance] company's liability" to exclude the total and complete negation of liability. Thus, the Court held that the clause "requires arbitration only as to disputes regarding the *amount* of the insurer's liability but not as to any dispute as to the *existence or non-existence* of liability."[111] In the mind of the Court, arbitration cannot be invoked when a party completely denies any liability pursuant to the contract.

In *Western Minolco Corporation v. Court of Appeals*,[112] the Court construed the clause "should any dispute, difference, or disagreement arise between the CLAIM-OWNER and the COMPANY regarding the meaning, application or effect of this Agreement or of any clause thereof, or in regard to the amount and computation of the royalties, deductions, or other item of expense" to exclude actions for breach of contract, rescission, and damages. As such, an aggrieved party may not be barred from instituting judicial

110. Bay View Hotel, Inc., v. Ker & Co., Ltd., 116 SCRA 327 (1982).

111. *Id.* at 334.

112. Western Minolco Corporation v. Court of Appeals, 167 SCRA 592 (1988).

proceedings to rescind the contract in spite of a stipulation on prior arbitration.[113]

In *Puromines, Inc. v. Court of Appeals*,[114] the Court construed "any dispute arising under this contract" to include cargo claims against the vessel owners and/or charterers for breach of contract of carriage. The Court held that the sales contract is comprehensive enough to include claims for damages arising from carriage and delivery of goods because the right to the cargo is derived from the bill of lading and the sales contract, which incorporates the arbitration clause.[115]

Moreover, in *Toyota Motor Philippines Corporation v. Court of Appeals*,[116] the Court held that the presence of third parties does not render the arbitration clause disfunctional, to wit:

> The contention that the arbitration clause has become disfunctional because of the presence of third parties is untenable.
>
> Contracts are respected as the law between the contracting parties (Mercantile Ins. Co, Inc. v. Felipe Ysmael, Jr. & Co., Inc., 169 SCRA 66 [1989]). As such, the parties are thereby expected to abide with good faith in their contractual commitments (Quillan v. CA, 169 SCRA 279 [1989]). Toyota is therefore bound to respect the provisions of the contract it entered into with APT.
>
> Toyota filed an action for reformation of its contract with APT, the purpose of which is to look into the real intentions/agreement of the parties to the contract and to determine if there was really a mistake in the designation of the boundaries of the property as alleged by Toyota. Such questions can only be answered by the parties to the contract themselves. This is a controversy which clearly arose from the contract entered into by APT and Toyota. Inasmuch as this concerns more importantly the parties APT and Toyota themselves, the arbitration committee is therefore the proper and convenient forum to settle the matter as clearly provided in the deed of sale.
>
> Having been apprised of the presence of the arbitration clause in the motion to dismiss filed by APT, Judge Tensuan should have at least suspended the proceedings and directed the parties to settle their dispute by

113. *Id.* at 596-97.

114. Puromines, Inc. v. Court of Appeals, 220 SCRA 281 (1993).

115. *Id.* at 286-87.

116. Toyota Motor Philippines Corporation v. Court of Appeals, 216 SCRA 236 (1992).

> arbitration (Bengson v. Chan, 78 SCRA 113 [1977], Sec. 7, RA 876). Judge Tensuan should not have taken cognizance of the case.[117]

One must not lose sight of the fact that the State encourages arbitration as a means of resolving disputes between parties. Given the fact that the PIATCO Contracts contain an express arbitration agreement and that such agreement was not challenged as non-binding or invalid, the Supreme Court should have respected the express intentions of the contracting parties to submit their dispute as to the validity or invalidity of the BOT agreements before the ICC.

This is not without precedence in case law. In *Bengson v. Chan*,[118] as reiterated in *Toyota Motor*, the Court ruled that a civil action should be stayed in order that the parties may be able to resort to arbitral proceedings as they themselves agreed upon in their contract.[119]

Since the making of the arbitral agreement by the Philippine Government and PIATCO was not put in issue in *PIATCO*, the Court should not have taken cognizance of the case by reason that arbitral proceedings have already been commenced by PIATCO before the ICC. By taking cognizance of *PIATCO*, the Court disregarded the express intention of the parties to arbitrate any dispute, controversy, or claim that may arise in the course of the PIATCO Contracts. Worse, by saying that said contracts are void from the very beginning, the Court betrayed the principle of arbitral autonomy that the Court itself recognized in *General Insurance*, *Mindanao Portland Cement*, and *Del Monte*.

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117. *Id.* at 246-47.

118. Bengson v. Chan, 78 SCRA 113 (1977).

119. *Id.* at 118-19 (the Court cited sections 6 and 7 of the old Arbitration Law, which provides that after a determination that the making of the arbitration agreement is not in issue, a court shall order the parties to proceed to arbitration and that the civil proceedings shall be stayed until the arbitration has terminated. The issue of stay of judicial proceedings was also discussed in *Almacenes Fernandez, S.A. v. Golodetz*, 148 F.2d. 625 (1945), decided by the United States Court of Appeals for the Second Circuit, and *Lawson Fabrics, Inc. v. Akzona, Inc.*, 355 F.Supp. 1146 (1973), decided by the United States District Court for the Southern District of New York.).

The Court should not have gone beyond Section 6 of the old Arbitration Law. After being satisfied that the making of the agreement or such failure to comply therewith is not raised as an issue in the proceedings, the court before which the action is pending "shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement."[120]

In *PIATCO,* the Court held that it would be improper to relegate to an arbitral body the resolution of the issues presented therein, to wit:

> *[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.[121]

This is legally disturbing in two ways. Firstly, the Court is essentially saying that an arbitral tribunal is incapable of reaching a credible conclusion of the dispute presented before the Court. The Court is totally mistaken in this regard. It should be borne in mind that arbitral tribunals are triers of facts. When an arbitrable dispute is submitted before arbitral tribunals, such tribunals are precisely tasked to determine and investigate the factual and circumstantial antecedents of such dispute and, based on such investigation, reach a conclusion as to the legal liability of any or both parties. By saying that arbitral tribunals are not equipped to resolve the attendant issues in *PIATCO,* the Court is therefore saying that arbitral tribunals are not effective triers of facts. It is thus paradoxical that in one stroke, the Court brushed aside the competence of arbitral tribunals to resolve fact-based contractual disputes while declaring that it is the proper venue for resolving such fact-based disputes. This *ratio* is difficult to accept by reason that it is emanating from the very court that has time and again held that it is not even a trier of fact to begin with.

By brushing aside arbitration as a means of resolving contractual disputes in the manner it did in *PIATCO,* the Court manifestly expressed its distrust towards arbitral proceedings. For a Court that consistently relies upon American jurisprudence for enlightenment on developments on various

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120. R.A. No. 876, § 6.

121. Agan v. Philippine International Air Terminals Co., Inc., 402 SCRA 62, 647-48 (2003) (emphasis supplied).

aspects of the Law, it is therefore astounding that it espoused a regressive stance as regards arbitration as an effective means of dispute resolution.

Arbitration holds an esteemed place in American law and jurisprudence. In *Shearson/American Express, Inc., et al., v. McMahon, et al.*,[122] the United States Supreme Court declared that:

> The Federal Arbitration Act, 9 U.S.C. 1 et seq., provides the starting point for answering the questions raised in this case. The Act was intended to "revers[e] centuries of judicial hostility to arbitration agreements," Scherk v. Alberto-Culver Co., supra, at 510, by "plac[ing] arbitration agreements 'upon the same footing as other contracts.'" 417 U.S., at 511 , quoting H. R. Rep. No. 96, 68th Cong., 1st Sess., 1, 2 (1924). The Arbitration Act accomplishes this purpose by providing that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. 2. The Act also provides that a court must stay its proceedings if it is satisfied that an issue before it is arbitrable under the agreement, 3; and it authorizes a federal district court to issue an order compelling arbitration if there has been a "failure, neglect, or refusal" to comply with the arbitration agreement, 4.
>
> The Arbitration Act thus establishes a "federal policy favoring arbitration," Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1, 24 (1983), requiring that "we rigorously enforce agreements to arbitrate." Dean Witter Reynolds Inc. v. Byrd, supra, at 221. This duty to enforce arbitration agreements is not diminished when a party bound by an agreement raises a claim founded on statutory rights. As we observed in Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., "we are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals" should inhibit enforcement of the Act "in controversies based on statutes." 473 U.S., at 626 -627, quoting Wilko v. Swan, supra, at 432. Absent a well-founded claim that an arbitration agreement resulted from the sort of fraud or excessive economic power that "would provide grounds for the revocation of any contract," 473 U.S., at 627, the Arbitration Act "provides no basis for disfavoring agreements to arbitrate statutory claims by skewing the otherwise hospitable inquiry into arbitrability." Ibid.
>
> The Arbitration Act, standing alone, therefore mandates enforcement of agreements to arbitrate statutory claims. Like any statutory directive, the

122. Shearson/American Express, Inc., et al., v. McMahon, et al., 482 U.S. 220 (1987).

> Arbitration Act's mandate may be overridden by a contrary congressional command. The burden is on the party opposing arbitration, however, to show that Congress intended to preclude a waiver of judicial remedies for the statutory rights at issue. See id., at 628. If Congress did intend to limit or prohibit waiver of a judicial forum for a particular claim, such an intent "will be deducible from [the statute's] text or legislative history," ibid., or from an inherent conflict between arbitration and the statute's underlying purposes. See id., at 632-637; Dean Witter Reynolds Inc. v. Byrd, 470 U.S., at 217 .[123]

Shearson recognized arbitration as an effective means of resolving disputes arising from contractual agreements. *Shearson* likewise reversed the long engrained judicial hostility or distrust towards arbitration, as expressed in *Wilco v. Swan.*[124]

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123. *Id.* at 226-27.

124. Wilco v. Swan, 346 U.S. 427, 428, 435-437 (1953) (the United States Supreme Court stated that the right to select the forum even after the creation of a liability is a substantial right. It found that the arbitral agreement in the contract of sale of securities restricted the choice of forum, in contravention of the Securities Act. As between arbitration and the choice of venue guaranteed by the Securities Act, the Court chose the latter, to wit: "Congress has afforded participants in transactions subject to its legislative power an opportunity generally to secure prompt, economical and adequate solution of controversies through arbitration if the parties are willing to accept less certainty of legally correct adjustment. On the other hand, it has enacted the Securities Act to protect the rights of investors and has forbidden a waiver of any of those rights. Recognizing the advantages that prior agreements for arbitration may provide for the solution of commercial controversies, we decide that the intention of Congress concerning the sale of securities is better carried out by holding invalid such an agreement for arbitration of issues arising under the Act." The Court likewise stated: [e]ven though the provisions of the Securities Act, advantageous to the buyer, apply, their effectiveness in application is lessened in arbitration as compared to judicial proceedings. Determination of the quality of a commodity or the amount of money due under a contract is not the type of issue here involved. This case requires subjective findings on the purpose and knowledge of an alleged violator of the Act. They must be not only determined but applied by the arbitrators without judicial instruction on the law. As their award may be made without explanation of their reasons and without a complete record of their proceedings, the arbitrators' conception of the legal meaning of such statutory requirements as "burden of proof," "reasonable care" or "material fact," see note 1, supra, cannot be examined. Power to vacate an award is limited. While it may be true, as the Court of Appeals thought, that a failure of the arbitrators to decide in accordance with the provisions of the Securities Act would "constitute grounds for vacating the award pursuant to

The Court took cognizance of PIATCO in view of the transcendental importance of the proceedings. Unfortunately, the concept of transcendental importance in connection with the jurisdiction to hear a case has become an instrument of jurisprudential regression.

Thus, from the seemingly harmless pronouncement in *PIATCO relative to the* impropriety of arbitration, the Court stressed the supremacy of the Judiciary over other bodies for resolving disputes arising from contractual relations, notwithstanding the presence of an arbitration agreement duly executed by the contracting parties, the existence of which has not been challenged.

It is unfortunate that the concept of transcendental importance has made the Court envision itself as a governmental Messiah. Although it is true that the Constitution expanded the power of judicial review,[125] as embodied in

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section 10 of the Federal Arbitration Act," that failure would need to be made clearly to appear. In unrestricted submissions, such as the present margin agreements envisage, the interpretations of the law by the arbitrators in contrast to manifest disregard are not subject, in the federal courts, to judicial review for error in interpretation. The United States Arbitration Act contains no provision for judicial determination of legal issues such as is found in the English law. As the protective provisions of the Securities Act require the exercise of judicial direction to fairly assure their effectiveness, it seems to us that Congress must have intended 14, note 6, supra, to apply to waiver of judicial trial and review.).

Likewise, in *Zimmerman v. Continental Airlines, Inc.* (712 F.2d 55, 59 (1983)) (the United States Court of Appeals for the Third Circuit scrutinized and balanced the conflicting interests and provisions with regard to jurisdiction and stay of proceedings in arbitral proceedings on the one hand and bankruptcy proceedings on the other hand. It pronounced: "In the instant case...the competing policies, both representing important congressional concerns, are not easily reconcilable. They are both equally specific and focused and in giving a preference for either, the effectiveness of the other will be proportionally diluted. Bankruptcy proceedings, however, have long held a special place in the federal judicial system. Because of their importance to the smooth functioning of the nation's commercial activities, they are one of the few areas where Congress has expressly preempted state court jurisdiction. While the sanctity of arbitration is a fundamental federal concern, it cannot be said to occupy a position of similar importance.").

125. An excellent discussion of the power of judicial review is found in: Anna Leah Fidelis Castañeda, *The Origins of Judicial Review, 1900-1935*, 46 ATENEO L.J. 107 (2001).

Art VIII, Section 1 thereof, such expansion is not a license for the Court to pervade each aspect and product of governmental action. This is precisely the position adopted by Mr. Justice Vitug in his Dissenting Opinion in PIATCO, to wit:

> This Court is bereft of jurisdiction to hear the petitions at bar. The Constitution provides that the Supreme Court shall exercise original jurisdiction over, among other actual controversies, petitions for certiorari, prohibition, mandamus, quo warranto, and habeas corpus. (citing PHIL. CONST. art. VIII, § 5(1)) The cases in question, although denominated to be petitions for prohibition, actually pray for the nullification of the PIATCO contracts and to restrain respondents from implementing said agreements for being illegal and unconstitutional.
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> Section 2, Rule 65 of the Rules of Court states:
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> > "When the proceedings of any tribunal, corporation, board, officer or person, whether exercising judicial, quasi-judicial or ministerial functions, are without or in excess of its or his jurisdiction, or with grave abuse of discretion amounting to lack or excess of jurisdiction, and there is no appeal or any other plain, speedy and adequate remedy in the ordinary course of law, a person aggrieved thereby may file a verified petition in the proper court, alleging the facts with certainty and praying that the judgment be rendered commanding the respondent to desist from further proceedings in the action or matter specified therein, or otherwise granting such incidental reliefs as law and justice may require."
>
> The Rule is explicit. A petition for prohibition may be filed against a tribunal, corporation, board, officer or person, exercising judicial, quasi-judicial or ministerial functions. What the petitions seek from respondents do not involve judicial, quasi-judicial or ministerial functions. In prohibition, only legal issues affecting the jurisdiction of the tribunal, board or officer involved may be resolved on the basis of undisputed facts. (citing Matuguina Integrated Products, Inc. vs. CA, 263 SCRA 490; Mafinco Trading Corporation vs. Ople, 70 SCRA 139) The parties allege, respectively, contentious evidentiary facts. It would be difficult, if not anomalous, to decide the jurisdictional issue on the basis of the contradictory factual submissions made by the parties. (citing Mafinco Trading Corporation vs. Ople, 70 SCRA 139) As the Court has so often exhorted, it is not a trier of facts.
>
> The petitions, in effect, are in the nature of actions for declaratory relief under Rule 63 of the Rules of Court. The Rules provide that any person interested under a contract may, before breach or violation thereof, bring an action in the appropriate Regional Trial Court to determine any question of construction or validity arising, and for a declaration of his rights or duties thereunder. (citing Rules of Court, Rule 63, § 1) The Supreme Court assumes no jurisdiction over petitions for declaratory relief

> which are cognizable by regional trial courts. (citing *In re* Bermudez, 145 SCRA 160)
>
> As I have so expressed in Tolentino vs. Secretary of Finance 235 SCRA 630, 720), reiterated in Santiago vs. Guingona, Jr. (298 SCRA 795), the Supreme Court should not be thought of as having been tasked with the awesome responsibility of overseeing the entire bureaucracy. Pervasive and limitless, such as it may seem to be under the 1987 Constitution, judicial power still succumbs to the paramount doctrine of separation of powers. The Court may not at good liberty intrude, in the guise of sovereign imprimatur, into every affair of government. What significance can still then remain of the time-honored and widely acclaimed principle of separation of powers if, at every turn, the Court allows itself to pass upon at will the disposition of a co-equal, independent and coordinate branch in our system of government. I dread to think of the so varied uncertainties that such an undue interference can lead to.
>
> Accordingly, I vote for the dismissal of the petition.[126]

By holding that arbitral tribunals are ill-equipped to resolve the disputes presented in *PIATCO*, notwithstanding the fact that arbitral tribunals are precisely triers of fact, the Court has gone back to the case law of the mid-1900s and affirmed what has already been an abandoned doctrine. While other jurisdictions have accepted arbitration as a reliable and effective means of resolving contractual disputes, the Court chooses to uphold its own jurisdiction to take cognizance of the PIATCO controversy in spite of the express stipulation of the contracting parties to submit the same to arbitration.

In ruling that it had jurisdiction to hear fact-based contractual disputes and that it was in fact in a better position than an arbitral body to resolve such disputes, the Court weakened the stature of arbitration as a method of contractual dispute resolution in the Philippines.

IV. RIGHTFUL PLACE OF ARBITRATION IN DISPUTE RESOLUTION

PIATCO is a clear case of a contract dispute that is well within the jurisdiction and competence of the ICC and the ICSID to resolve. The Supreme Court, unfortunately, manifested that is not prepared to accept the

126. Agan v. Philippine International Air Terminals Co., Inc., 402 SCRA 612, 679-80 (2003).

imperatives of international commercial arbitration. The *PIATCO* precedent is an example of the propensity of the Judiciary to work within a parochial framework. Lamentable is the fact that municipal judicial instrumentalities appear to be adverse to the use of international law in resolving disputes that are brought before it. As aptly observed:

> Unfortunately, municipal law itself is often unprepared, or unwilling, to assume the responsibility of effecting international law. While it is true that many constitutions contain explicit references to international law that determine the status of international law within their domestic legal systems, judges across the world usually refuse to live up to the vision of international lawyers, unwilling to give effect to international law if such would mean the abdication of short-term governmental interests.
>
> The Philippines is not spared from these uncertainties. While the Constitution categorically declares "the generally accepted principles of international law [as] part of the law of the land," an examination of the Philippine Supreme Court's occasional decisions that delve into international law reveals a Court that oscillates between an embrace of international law and a global outlook, and a more protectionist, insular judicial attitude that would readily eschew international norms, indicative of the absence of strong philosophical foundations as to the proper role and place international law has under Philippine law. This is not altogether unexpected. The essence of our democracy mandates that the Constitution be given the highest fealty; under its framework, the incorporation of principles of international law by the Judicial branch must compete and harmonize itself with other equally revered (if not more important, at least from the domestic perspective) principles such as the separation of powers, and the primary role given to the Executive and to some extent, the Legislature, in matters of foreign relations.
>
> Therefore, the task Philippine courts are continually faced with is to fashion a sensible working relationship between the two systems; accommodating international law effectively within the Constitutional and statutory landscape of the Philippine legal system.[127]

Viewed from the perspective of international commerce, the manifestly parochial holding in *PIATCO* is a dangerous precedent. Thus, it is necessary to reverse the case law brought about by the *ratio* in *PIATCO* relative to arbitration. Accordingly, it is respectfully proposed that when seized with a suit involving a state contract with a valid and binding arbitral agreement between the contracting parties, the courts should exercise judicial restraint and

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127. Aloysius P. Llamzon, *'The Generally Accepted Principles of International Law' as Philippine Law:* Towards a Structurally Consistent Use of Customary International Law in Philippine Courts, 47 ATENEO L.J. 243, 247-29 (2002).

allow the arbitral proceedings to take its due course in accordance with applicable laws and the intent of the parties.

The quintessential tenets of international commercial law and international commercial arbitration are no doubt recognized in Philippine law. Thus, when faced with a dispute arising from state contracts, the Judiciary should first examine whether or not the execution of the arbitral agreement in issue. Once the court has ascertained and is satisfied that the arbitral agreement is not in issue, then the prudent action by the court is to exercise judicial restraint and allow the dispute to be resolved by means of the arbitral mechanism that was agreed upon by the contracting parties. The role of the court is to enforce existing municipal laws and international treaty obligations and allow the respective rights and duties of the disputing parties to be adjudicated pursuant to their arbitral agreement. By undertaking judicial restraint in this regard, therefore, domestic courts are truly "the executors of international law *par excellance*."[128]

Scherk v. Alberto Culver Co.,[129] the United States Supreme Court had occasion to address the importance of international commercial arbitration and hold that an arbitration clause providing that "any controversy or claim [that] shall arise out of this agreement or the breach thereof" would be referred to arbitration before the ICC is to be respected and enforced by federal courts in accord with the explicit provisions of the United States Arbitration Act. Such an arbitration agreement shall be considered "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." In the words of Mr. Justice Stewart:

> *A contractual provision specifying in advance the forum in which disputes shall be litigated and the law to be applied is, therefore, an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction. Furthermore, such a provision obviates the danger that a dispute under the agreement might be submitted to a forum hostile to the interests of one of the parties or unfamiliar with the problem area involved.*
>
> *A parochial refusal by the courts of one country to enforce an international arbitration agreement would not only frustrate these purposes, but would invite unseemly and mutually destructive jockeying by the parties to secure tactical litigation advantages.*

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128. *Id.* at 374.

129. Scherk v. Alberto Culver Co., 417 U.S. 506 (1974).

> In the present case, for example, it is not inconceivable that if Scherk had anticipated that Alberto-Culver would be able in this country to enjoin resort to arbitration he might have sought an order in France or some other country enjoining Alberto-Culver from proceeding with its litigation in the United States. *Whatever recognition the courts of this country might ultimately have granted to the order of the foreign court, the dicey atmosphere of such a legal no-man's-land would surely damage the fabric of international commerce and trade, and imperil the willingness and ability of businessmen to enter into international commercial agreements.*[130]

Furthermore, the *Scherk* Court held that "an agreement to arbitrate before a specified tribunal is, in effect, a specialized kind of forum-selection clause that posits not only the situs of suit but also the procedure to be used in resolving the dispute. The invalidation of such an agreement in the case before us would not only allow the respondent to repudiate its solemn promise but would, as well, reflect a "parochial concept that all disputes must be resolved under our laws and in our courts.... We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts."[131]

Although *Scherk* did not involve a state contract, it is nonetheless illustrative of the open-minded attitude of the US Supreme Court with respect to arbitral agreements between contracting parties. Mr. Justice Stewart even squarely addressed the detrimental effects of a parochial assertion of judicial egoism as opposed to judicial restraint given the fact that the contracting parties themselves provided for the remedy of arbitration. *Sherck* essentially affirmed the holding of the US Supreme Court in *Shearson*, which abandoned the anti-arbitral doctrine in *Wilko*.

Scherk portrays what is lacking in this jurisdiction. Instead of firmly transplanting in this jurisdiction the progressive doctrine of *Scherk*, the Supreme Court essentially went back to the anti-arbitral era of *Wilko*. In spite of upholding the arbitral autonomy principle, the Court loosened the foundation of arbitration in the Philippines. It is submitted that the *Scherk* doctrine should be transplanted to this jurisdiction as the same is consistent with the primordial aims of arbitration as a method of contractual dispute resolution that the contracting parties themselves intend to avail of in the event that dispute arise in the operation or interpretation of the contract.

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130. *Id.* at 516-17 (emphasis supplied).

131. *Id.* at 519 (citing The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 13-14 (1972)).

V. CONCLUDING THE INQUIRY

Existing laws should have queued the Supreme Court not to go the way it did in *PIATCO*. Yet, the Court chose to take cognizance of a case that was properly the subject of arbitral proceedings as the contracting parties to the NAIA IPT III Contract so stipulation, substituted its own judgment over and above the parties' clear and unequivocal intent.

It should be borne in mind that stipulations of contracting parties as regards recourse to arbitral proceedings, when the same is not contrary to law, morals, public policy, and public order, should be respected by the judicial instrumentalities of this jurisdiction. Anything short of respect towards a licit stipulation as regards arbitral remedies will stir up instability in commercial practice.

It does not benefit commercial practice to know that the Supreme Court is prepared and more than willing to pronounce a contract *null and void* before the factual issues are settled. It would surely bother foreign investors to realize that the highest court of the land, which traditionally rules only on questions of law, considers itself a trier of facts by the mere stroke of the judicial pen when cases of transcendental importance are brought before its halls. The mere fact that such cases are of transcendental importance should lead the Court to exercise greater discretion in taking cognizance of such cases. Exceptionality of circumstances should not always result in the relaxation of the fundamental rules.

By taking cognizance of *PIATCO*, the Court invoked its expansive power of judicial review — a creature of municipal jurisprudence — to deprive a contracting party of its right to avail of arbitral proceedings pursuant to a valid and binding arbitral agreement.

Mr. Justice Holmes stated that "[t]he law is the witness and external deposit of our moral life. Its history is the history of the moral development of the race."[132] He called for exactitude in legal prophecies by reason that the primordial object of the study of law is precisely "the prediction of the incidence of the public force through the instrumentality of the courts."[133]

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132. Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457 (1897).

133. *Id.*

As the final arbiter of legal expectations and guardian of the Philippine legal system, much is required from the Supreme Court. It ought to ensure that expectations arising from contracts be realized in due course. Lest case law in this jurisdiction be regressive, the Court should exercise judicial restraint and respect towards recognized principles of international commercial arbitration.

Absent any question with respect to its due execution, a contractual stipulation specifying the forum through which disputes shall be pleaded and adjudicated by arbitration and the law to be applied should such exigency arise, should be upheld and enforced by the Judiciary. The due respect accorded to such agreement is an indispensable precondition to the achievement predictability essential to any international commercial transaction and towards the approximation of a stable commercial climate.

The purpose of an arbitral agreement is to avoid the unnecessary danger that a contractual dispute might be submitted to a forum that is hostile to the interests of one of the parties or that is unfamiliar with the problem area involved. A parochial refusal by the judicial branch to enforce a duly executed international arbitration agreement runs afoul with and contrary to the very principles espoused by dispute resolution in the international legal order and most certainly damages the conduct of commerce in the Philippines. It should not be forgotten that the protection of investments is the protection of the general interest of developing States.