The Enforcement of International Arbitral Awards

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I. INTRODUCTION

In the case of *LM Power Engineering Corporations v. Capitol Industrial Construction Groups, Inc.*,[1] the Supreme Court hailed arbitration as an alternative way of resolving civil and commercial disputes,[2] to wit —

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> Being an inexpensive, speedy[,] and amicable method of settling disputes, [arbitration —] along with mediation, conciliation[,] and [negotiation — is] encouraged by the Supreme Court. Aside from unclogging judicial dockets, arbitration also hastens the resolution of disputes, especially of the commercial kind. It is thus regarded as the 'wave of the future' in international civil and commercial disputes.[3]

Frequently, the promulgation of the arbitral award does not put an end to the dispute. It merely opens the gate for the next sequence of controversies — the enforcement of the arbitral award. The arbitral tribunal itself has no power to enforce the award.[4] The winning party will have to file a case with a national court.[5]

Article 54 (3) of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States[6] provides —

> Execution of the award shall be governed by the laws concerning the execution of judgments in force in the State in whose territories such execution is sought.[7]

Article 34 (6) of the 2012 International Chamber of Commerce Rules[8] simply says —

Commission, 30 ATENEO L.J. 31 (1986); *Corporate Watch-Dogs*, 27 ATENEO L.J. 15 (1982); *The Jurisdiction of the Courts Under the Judiciary Reorganization Act of 1980*, 26 ATENEO L.J. 93 (1982); *The New Bouncing Check Law*, 25 ATENEO L.J. 1 (1980); & *Treating of Treaties*, 16 ATENEO L.J. 100 (1967).

1. LM Power Engineering Corporations v. Capitol Industrial Construction Groups, Inc., 399 SCRA 562 (2003).
2. *Id.* at 563 & 569.
3. *Id.* at 569.
4. *See* Korea Technologies Co., Ltd. v. Lerma, 542 SCRA 1, 25-26 (2008).
5. *Id.* at 26.
6. Convention on the Settlement of Investment Disputes between States and Nationals of Other States, *opened for signature* Mar. 18, 1965, 575 U.N.T.S. 159 (entered into force Oct. 14, 1966).
7. *Id.* art. 54 (3).
8. International Chamber of Commerce, ICC Rules of Arbitration, *available at* http://www.iccwbo.org/products-and-services/arbitration-and-adr/arbitration/icc-rules-of-arbitration (last accessed Mar. 1, 2017).

> Every Award shall be binding on the parties. By submitting the dispute to arbitration under [these] Rules, the parties undertake to carry out any Award without delay and shall be deemed to have waived their right to any form of recourse insofar as such waiver can validly be made.[9]

The Revised United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules[10] are silent as to the enforcement of arbitral awards. Usually, however, the losing party opposes the enforcement of the arbitral award.

II. Recognition and Enforcement of Arbitral Awards

On 11 October 1965, the Philippines ratified the Convention on the Recognition and Enforcement of Foreign Arbitral Awards[11] (New York Convention), which was adopted in New York City, United States, on 10 June 1958.[12]

Article IV of the New York Convention enumerated the procedural requirements for recognition and enforcement as follows:

> (1) To obtain the recognition and enforcement mentioned in the preceding [A]rticle, the party applying for recognition and enforcement shall, at the time of the application, supply:
>
> (a) The duly authenticated original award or a duly certified copy thereof[;]
>
> (b) The original agreement referred to in [A]rticle II or a duly certified copy thereof.
>
> (2) If the said award or agreement is not made in an official language of the country in which the award is relied upon, the party applying for recognition and enforcement of the award shall produce a translation of these documents into such language. The translation shall be

9. *Id.*

10. United Nations Commission on International Trade Law, UNCITRAL Arbitration Rules, *available at* https://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/arb-rules-revised-2010-e.pdf (last accessed Mar. 1, 2017).

11. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *opened for signature* June 10, 1958, 330 U.N.T.S. 3 [hereinafter New York Convention].

12. *Id.* at 3.

certified by an official or sworn translator or by a diplomatic or consular agent.[13]

Article V lists the grounds for denial of recognition and enforcement:

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

(a) The parties to the agreement referred to in [A]rticle II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

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

(c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award[,] which contains decisions on matters submitted to arbitration may be recogni[z]ed and enforced; or

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

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

(2) Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

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

(b) The recognition or enforcement of the award would be contrary to the public policy of that country.[14]

13. *Id.* art. IV.

A. Exclusiveness of Defenses

Section 45 of the Alternative Dispute Resolution (ADR) Act[15] provides —

> A party to a foreign arbitration proceeding may oppose an application for recognition and enforcement of the arbitral award in accordance with the procedural rules to be promulgated by the Supreme Court only on those grounds enumerated under Article V of the New York Convention. Any other ground raised shall be disregarded by the [R]egional [T]rial [C]ourt.[16]

The case of *Tuna Processing, Inc. v. Philippine Kingford, Inc.*[17] involved a petition for the enforcement of a foreign arbitral award.[18]

Kanemitsu Yamaoka owned the American, Philippine, and Indonesian patents for tuna processing.[19] He formed a corporation in California with five Philippine tuna processors to exploit his patents.[20] He named the corporation Tuna Processors, Inc. (TPI)[21] Later on, Philippine Kingford, Inc., (Kingford), one of the two processors, withdrew from the corporation because of a dispute.[22]

TPI filed a petition for arbitration with the International Centre for Dispute Resolution in California.[23] The Arbitral Tribunal decided in its favor and awarded damages to it.[24] It filed a petition in the Philippines for enforcement of the arbitral award.[25] Kingford invoked the defense that since

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14. *Id.* art. V.
15. An Act to Institutionalize the Use of An Alternative Dispute Resolution System in the Philippines and to Establish the Office for Alternative Dispute Resolution, and for Other Purposes [Alternative Dispute Resolution Act of 2004], Republic Act No. 9285 (2004).
16. *Id.* § 45.
17. Tuna Processing, Inc. v. Philippine Kingford, Inc., 667 SCRA 287 (2012).
18. *Id.* at 296.
19. *Id.* at 293-94.
20. *Id.* at 294.
21. *Id.*
22. *Id.* at 295.
23. *Tuna Processing, Inc.*, 667 SCRA at 295.
24. *Id.* at 295-96.
25. *Id.* at 296.

TPI was engaging in business in the Philippines without a license, it could not maintain the lawsuit under Section 133 of the Corporation Code.[26]

The Supreme Court rejected the contention.[27] It explained, to wit —

> We reiterate that the foreign corporation's capacity to sue in the Philippines is not material insofar as the recognition and enforcement of a foreign arbitral award is concerned.[28]

B. Objections to Recognition and Enforcement of Arbitral Award

1. Jurisdiction of Court

It is only the courts of the seat of arbitration and the courts of the country whose law was chosen by the parties to govern the arbitration that can set aside an arbitral award.[29]

The parties may choose the location of the seat of the arbitration.[30] If the parties made no choices, the arbitral institution or the arbitrators themselves may choose the seat of the arbitration.[31]

2. Defenses

a. Absence of Valid Arbitration Agreement (Article V (1) (a))

This defense applies to the issues of capacity of the parties, existence of an arbitration agreement, and its validity.[32]

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26. *Id.* at 296-97 (citing The Corporation Code of the Philippines [CORP. CODE], Batas Pambansa Bilang 68, § 133 (1980)).

27. *Tuna Processing, Inc.*, 667 SCRA at 297.

28. *Id.* at 307.

29. *See* PHILIPPE FOUCHARD, ET AL., FOUCHARD GAILLARD GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION 978 (Emmanuel Gaillard & John Savage eds., 1999). *See also* Nadia Darwazeh, *Article V(1)(e), in* RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS: A GLOBAL COMMENTARY ON THE NEW YORK CONVENTIONS 319-21 (Herbert Kronke, et al. eds., 2010).

30. *See* FOUCHARD, ET AL., *supra* note 29, at 990.

31. *Id.*

32. *See* 3 GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION, at 3452 (2d ed. 2014).

Recognition and enforcement of an arbitral award may be refused because a party to the arbitration agreement was incapacitated or the consent was vitiated.[33]

The rules of fraud, mistake, duress, lack of consideration, unconscionability, impossibility, frustration, termination, rescission, failure to comply with a condition precedent, illegality, and lack of mutuality have been applied to resolve both the formation and the validity of international arbitration agreements.[34]

Lack of consent may also be based on misrepresentation or undue influence.[35]

Claims may also be made that the underlying contract does not exist because the signature of a party was forged, that the underlying contract was never executed, or that the representative who signed it lacked authority.[36]

Article 1420 of the Civil Code[37] provides —

> In case of a divisible contract, if the illegal terms can be separated from the legal ones, the latter may be enforced.[38]

In *Cargill Philippines, Inc. v. San Fernando Regala Trading, Inc.*,[39] the Supreme Court ruled —

> Applying the [Gonzales v. Climax Mining, Ltd.] ruling, an arbitration agreement which forms part of the main contract shall not be regarded as invalid or non-existent just because the main contract is invalid or did not

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33. *See* FOUCHARD, ET AL., *supra* note 29, at 984 (citing New York Convention, *supra* note 11, art. V ¶ 1 (a)).

34. *See* 3 BORN, *supra* note 32, at 3455-56 & 3470.

35. *See* ALBERT JAN VAN DEN BERG, THE NEW YORK CONVENTION OF 1958: TOWARDS A UNIFORM JUDICIAL INTERPRETATION 287 (1994).

36. *See* 3 BORN, *supra* note 32, at 3457-59. *See, e.g.*, De Maio Giuseppe e Fratelli snc v. Interskins Ltd. XXVII Y.B. COMM. ARB. 492, 497 (2002) (It.); Kaplan v. First Options of Chicago, Inc., 19 F.3d 1503, 1509-10 (3d Cir. 1994) (U.S.); & Quanqing (Changshu) Cloth-Making Co. v. Pilgrim Worldwide Trading, Inc., 2010 WL 2674589, at *2 (D.N.J. 2010) (Westlaw, U.S.).

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

38. *Id.* art. 1420.

39. Cargill Philippines, Inc. v. San Fernando Regala Trading, Inc., 641 SCRA 31 (2011).

> come into existence, since the arbitration agreement shall be treated as a separate agreement independent of the main contract.[40]

If the arbitration agreement is void, but the arbitrators rendered an award, the award will be void.[41]

An arbitral award cannot be enforced if the arbitration agreement is void under the choice of law of the parties to govern the arbitration or under the law of the seat of arbitration in the absence of a choice of law.[42]

b. Denial of Opportunity to Present Case (Article V (1) (b))

Since the New York Convention deals with international arbitrations, it is the international standards prescribed in Article V (1) (b) which should be followed.[43] Recognition and enforcement of an award may be refused if the party against whom the award is invoked is not given proper notice of the arbitrator, of the arbitration proceedings, or was otherwise unable to present his or her case.[44]

Additionally, it should be noted that:

(1) The violation of due process also constitutes violation of public policy.[45]

(2) The party alleging lack of notice bears the burden of proof.[46]

(3) An arbitral award cannot be enforced if the request for arbitration was sent to the former address of the defendant and was not received.[47]

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40. *Id.* at 47 (citing Gonzales v. Climax Mining Ltd., 452 SCRA 607 (2005)).

41. *See* 3 BORN, *supra* note 32, at 3448 & FOUCHARD, ET AL., *supra* note 29, at 984.

42. *See* 3 BORN, *supra* note 32, at 3462-69.

43. *Id.* at 3499-50.

44. New York Convention, *supra* note 11, art. V (1) (b).

45. *See* VAN DEN BERG, *supra* note 35, at 302. Violation of public policy is a ground for non-enforcement under Article V (2) (b) of the New York Convention. New York Convention, *supra* note 11, art. V (2) (b).

46. *See* Andrés Jana, et al., *Article V(1)(b), in* RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS: A GLOBAL COMMENTARY ON THE NEW YORK CONVENTIONS 245-46 (Herbert Kronke, et al. eds., 2010).

(4) A party who refuses to accept a notice is deemed to have been properly notified.[48]

(5) The notice must include the names of the arbitrators, so that the parties may be able to challenge any of them for partiality.[49]

(6) An arbitral award based on facts or arguments which were not presented and deprived the adverse party of the opportunity to address them violates due process.[50]

c. Excess of Authority (Article V (1) (c))

This involves two situations. First, the arbitral tribunal failed to decide matters properly submitted to it falling within the scope.[51] Second, the arbitral tribunal decided matters that were not submitted to it by the parties.[52] This must be disqualified from a situation in which the parties had not agreed to arbitrate.[53]

International arbitration agreements should be interpreted liberally.[54] If two disputes involving separate contracts were consolidated, the arbitral award based on the consolidation was upheld when it was questioned in court.[55]

47. *See* MARIKE PAULSSON, THE 1958 NEW YORK CONVENTION IN ACTION 186 (2016) (citing Lenmorniiproekt OAO (Russian Federation) v. Arne Larsson & Partner Leasing Aktiebolag (Sweden), 35 Y.B. COM. ARB. 456, 456-57 (2010) (Swed.)).

48. Subject, however, to some conditions. *See* New York Convention, *supra* note 11, art. V.

49. *See* VAN DEN BERG, *supra* note 35, at 305 & Jana, et al., *supra* note 46, at 241.

50. *See* 3 BORN, *supra* note 32, at 3517.

51. *Id.* at 3293 & 3541.

52. *Id.* at 3289.

53. *Id.* at 3143.

54. *Id.* at 3549.

55. Nicola Christine Port, et al., *Article V(1)(c), in* RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS: A GLOBAL COMMENTARY ON THE NEW YORK CONVENTIONS 267 (Herbert Kronke, et al. eds., 2010).

The arbitral tribunal may decide issues arising from or incidental to those submitted by the parties.[56] The arbitral tribunal may grant reliefs provided by law, such as payment of interest, costs of suit, as well as damages.[57] It may also award injunctive relief.[58]

d. Impartiality and Independence of Arbitrators (Article IV (1) (d))

Impartiality is connected with the actual or apparent bias of an arbitrator in favor of one of the parties or in relation to the issues in dispute.[59] It is subjective and involves the state of the mind.[60]

Independence is concerned with questions arising from the relationship between an arbitrator and one of the parties, whether financial or otherwise.[61] Independence is an objective test, because it has nothing to do with the state of the mind of an arbitrator.[62]

The International Bar Association has formulated guidelines on conflicts of interest in international arbitration.[63] It also designated disclosure requirements.[64]

First, an arbitrator must decline appointment as arbitrator if he doubts his ability to be impartial or independent, irrespective of whether or not his doubts are justified or resemble.[65]

Second, an arbitrator must decline appointment if a third person has justifiable doubts as to his impartiality or independence, unless the parties have accepted him.[66]

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56. 3 BORN, *supra* note 32, at 3546.

57. *See* 3 BORN, *supra* note 32, at 3546-47.

58. *Id.* at 3553.

59. *Id.* at 3276-78.

60. *Id.* at 3279-81.

61. NIGEL BLACKABY, ET AL., REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION 254-55 (6th ed. 2015).

62. *Id.*

63. International Bar Association, IBA Guidelines on Conflicts of Interest in International Arbitration (Oct. 23, 2014).

64. *Id.* pt. I, (3).

65. *Id.* pt. I, (2) (a).

66. *Id.* pt. I, (2) (b).

Third, doubts are justifiable if a reasonable third party will conclude that it is likely that the arbitrator may be influenced by factors other than the merits of the case.[67]

Fourth, justifiable doubts necessarily exist as to the arbitrator's partiality or independence in any of the situations described subject to the Non-Waivable Red List.[68]

Afterwards, the International Bar Association classified into four groups the practical application of the general standards as follows:

First, the Non-Waivable Red List contains examples in which an arbitrator should not accept appointment even with the consent of all parties, because no person should be a judge of his own case.[69]

Second, the Waivable Red List contains examples of situations which lead to disqualification but may be accepted by express agreement of the parties.[70]

Third, the Orange List enumerates specific situations which in the eyes of the parties give rise to doubts as to the impartiality or independence of the arbitrator, but the parties failed to make timely objection.[71]

Fourth, the Green List contains examples of situations in which since objectively there is no conflict of interest, the arbitrator has no duty to make a disclosure.[72]

In the case of *RCBC Capital Corporation v. Banco de Oro Unibank, Inc.*,[73] RCBC Capital Corporation (RCBC) entered into a contract with Equitable PCI Bank, Inc. (Equitable) for the purchase of shares of stock of Bankard, Inc.[74] Later on, RCBC claimed that since the overstatement of the valuation

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67. *Id.* pt. I, (2) (c).

68. *Id.* pt. I, (2) (d).

69. BLACKABY, ET AL., *supra* note 61, at 257.

70. *Id.*

71. Blackaby, et al. clarify that "[t]his category is intended to deal with circumstances that a prospective arbitrator has a duty to disclose. It is contemplated that, once properly disclosed, the parties will be deemed to have waived their rights if they fail to make a timely challenge[.]" *Id.*

72. *Id.*

73. RCBC Capital Corporation v. Banco de Oro Unibank, Inc., 687 SCRA 583 (2012).

74. *Id.* at 587-88.

of the shares of stock violated the warranty of Bankard, Inc. and its stockholders.[75] As the parties failed to agree on a settlement, RCBC filed an arbitration case with the International Chamber of Commerce (ICC).[76]

RCBC filed a claim for damages in the amount of ₱809,796,082 plus legal interest.[77] In turn, Equitable and the individual stockholders filed a counterclaim for $300,000 for litigation expenses, as well as moral and exemplary damages.[78]

The ICC assessed the parties for the payment of $350,000 as advance on the costs of arbitration.[79] RCBC paid its one-half share of the assessment.[80] Equitable refused to pay its share because the claim of RCBC was more than 40 times the amount of its counterclaim.[81] The ICC instructed the Arbitration Tribunal to suspend the proceedings.[82]

Nine months later, the ICC increased the assessment for costs by $100,000, but Equitable reiterated its objection to pay its share.[83]

The Chairman of the Arbitration Tribunal, Ian Barker, wrote the parties that he had no power to give any relief and that the apportionment of the shares of the parties in the costs would be determined after the submission of the case.[84]

RCBC paid the $100,000 balance of the assessment to prevent the suspension of the proceedings.[85]

The Arbitration Tribunal issued a partial award, which provided that the issue regarding the apportionment of the costs would be decided in the final order.[86]

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75. *Id.* at 588.

76. *Id.*

77. *Id.* at 589.

78. *Id.*

79. *RCBC Capital Corporation*, 687 SCRA at 590.

80. *Id.*

81. *Id.*

82. *Id.* at 591.

83. *Id.* at 592.

84. *Id.* at 593.

85. *RCBC Capital Corporation*, 687 SCRA at 593.

86. *Id.* at 594-95

The ICC increased the assessment for costs by $130,000.[87] RCBC paid it and asked that the counterclaim be deemed withdrawn.[88]

Chairman Barker then asked RCBC to clarify if it was applying for a partial award because of the failure of Equitable to pay its share in the assessments for advances on costs.[89] RCBC prayed that there be an issuance of a second partial award reimbursing it for paying Equitable's share.[90] Equitable argued that the reimbursement of the advances for costs was outside the scope of the procedure.[91]

Thereafter, Chairman Barker furnished both parties an article which appeared in ICC Bulletin Vol. 14, No. 1 to assist both sides to address the issue.[92]

RCBC cited the article, which stated that the Arbitration Tribunal had jurisdiction to render an award for reimbursement of the advance payment for the costs paid.[93]

The Arbitration Tribunal rendered a Second Partial Award that ordered Equitable to reimburse RCBC and declared its counterclaim withdrawn.[94]

When the issue of the validity of the Second Partial Award was raised in the Supreme Court, it upheld the vacation of the Second Partial Award by the Court of Appeals on the ground of evident partiality of Chairman Barker by providing the parties with copies of the ICC Bulletin.[95]

The Supreme Court explained at length —

> We affirm the foregoing findings and conclusion of the appellate court save for its reference to the [*obiter*] in [Commonwealth Coatings v. Continental Cas.] that arbitrators are held to the same standard of conduct imposed on judges. Instead, the Court adopts the *reasonable impression of partiality* standard, which requires a showing that a reasonable person would have to

87. *Id.* at 595.

88. *Id.* at 596.

89. *Id.*

90. *Id.*

91. *RCBC Capital Corporation*, 687 SCRA, at 598.

92. *Id.* at 598-99.

93. *Id.* at 599.

94. *Id.* at 600.

95. *Id.* at 624.

> conclude that an arbitrator was partial to the other party to the arbitration. Such interest or bias, moreover, 'must be direct, definite[,] and capable of demonstration rather than remote, uncertain, or speculative.' When a claim of arbitrator's evident partiality is made, 'the court must ascertain from such record as is available whether the arbitrators' conduct was so biased and prejudiced as to destroy fundamental fairness.'
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> ...
>
> By furnishing the parties with a copy of this article, Chairman Barker practically armed RCBC with supporting legal arguments under the 'contractual approach' discussed by Secomb. True enough, RCBC in its Application for Reimbursement of Advance Costs Paid utilized said approach as it singularly focused on Article 30 [(3)] of the ICC Rules and fiercely argued that BDO was contractually bound to share in the advance costs fixed by the ICC.[96]

Before reaching its decision, the Supreme Court pointed out that in the Terms of Reference, the parties agreed that the issues would be resolved in accordance with the laws of the Philippines, and the proceedings would be governed by the International Chamber of Commerce Rules of Arbitration.[97] The Supreme Court interpreted the agreement of the parties to mean that Philippine law should be applied since both parties were residents of the Philippines.[98]

d. Non-binding Awards (Article IV (1) (e))

There are three grounds which can be invoked as defenses under this provision. First, the arbitral award has not yet become binding.[99] Second, it was set aside.[100] Third, it was suspended.[101]

The delegates who drafted the New York Convention failed to reach a consensus as to the interpretation of the word "binding."[102] The arbitral

96. *Id.* at 623-25 (citing Commonwealth Coatings Corp. v. Continental Casualty Co. et al., 393 U.S. 145 (1968); Tamari v. Bache Halsey Stuart, Inc., 619 F.2d 1196, 1200 (7th Cir. 1980) (U.S.); & Catz American Co., Inc. v. Pearl Grange Fruit Exchange, Inc., 292 F.Supp. 549, 551-52 (S.D.N.Y. 1968) (U.S.)).

97. *RCBC Capital Corporation*, 687 SCRA at 614.

98. *Id.*

99. VAN DEN BERG, *supra* note 35, at 331 (citing New York Convention, *supra* note 11, art. VI (1) (e)).

100. *Id.*

101. *Id.*

award may also be set aside or suspended by a competent court in the seat of the arbitration, or in accordance with choice of law used as basis for the award.[103] However, the New York Convention does not provide the grounds for setting aside or suspending the arbitral award.[104]

3. Refusal of Recognition and Enforcement of Arbitral Award

Article 2035 of the Civil Code provides —

> No compromise upon the following questions shall be valid:
>
> (1) The civil status of person;
>
> (2) The validity of a marriage or a legal separation;
>
> (3) Any ground for legal separation;
>
> (4) Future support;
>
> (5) The jurisdiction of courts;
>
> (6) Future legitime.[105]

Article 2043 of the Civil Code provides —

> The provisions of the preceding Chapter upon compromises shall also be applicable to arbitrations.[106]

4. Violation of Public Policy (Article V (2) (b))

a. Law

Article 17 of the Civil Code provides —

> Prohibitive laws concerning persons, their acts or property, and those which have for their object public order, public policy[,] and good customs

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102. PAULSSON, *supra* note 47, at 196; Darwazeh, *supra* note 29, at 311; & 3 BORN, *supra* note 32, at 3611.

103. *See* Dirk Otto & Omaia Elwan, *Article V(2), in* RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS: A GLOBAL COMMENTARY ON THE NEW YORK CONVENTIONS 319-21 (Herbert Kronke, et al. eds., 2010).

104. *See* BLACKABY, ET AL., *supra* note 61, at 635.

105. CIVIL CODE, art. 2035.

106. *Id.* art. 2043.

> shall not be rendered ineffective by laws or judgments promulgated, or by determinations or conventions agreed upon in a foreign country.[107]

b. Concept of Public Policy

The most comprehensive explanation of the scope of public policy was made in the case of *Gabriel v. de Piedad etc.*[108] —

> In the absence of express legislation or constitutional prohibition, a court, in order to declare a contract void as against public policy, must find that the contract as to the consideration or thing to be done, has a tendency to injure the public, is against the public good, or contravenes some established interests of society, or is inconsistent with sound policy and good morals, or tends clearly to undermine the security of individual rights, whether of personal liability or of private property.[109]

c. Law and Jurisprudence

Article 2045 of the Civil Code provides:

> Any clause giving one of the parties power to choose more arbitrators than the other is void and of no effect.[110]

The purpose of this provision is to ensure equality in the selection of the arbitrators, because this may affect the fairness of the arbitration.[111]

What is controversial is the decision of the Court of Appeals in the case of *Luzon Hydro Corporation v. Hon. Rommel O. Baybay and Transfield Philippines, Inc.*[112] regarding a hydro-electric power station. The contract provided that Transfield Philippines, Inc. (Transfield) was entitled to ask for extension of line for variations, fortuitous events, and delay caused by Luzon Hydro Corporation (Luzon).[113]

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107. *Id.* art. 17, para. 3.

108. Gabriel v. de Piedad etc., 71 Phil. 497 (1941).

109. *Id.* 500-01.

110. CIVIL CODE, art. 2045.

111. 6 AMBROSIO PADILLA, CIVIL LAW: CIVIL CODE ANNOTATED, at 745 (7th ed. 1987).

112. Luzon Hydro Corporation v. Hon. Rommel O. Baybay and Transfield Philippines, Inc., C.A.-G.R. SP No. 94318, Nov. 29, 2006.

113. *Id.*

Luzon denied the requests of Transfield because of a typhoon, barricades, and demonstrations.[114] This gave rise to arbitration before the ICC in Singapore.[115]

When Transfield filed a petition in court for enforcement of the arbitral award,[116] Luzon filed a petition in the Court of Appeals to enjoin the enforcement of the arbitral award.[117]

The Court of Appeals promptly rendered a decision annulling the entire arbitral award and ordered the dismissal of the petition for enforcement of the arbitral award.[118] It reasoned —

> The arbitral tribunal allegedly gravely abused its discretion when it casually disregarded substantive Philippine law in favor of an alien principle 'costs follow the event.' The award is null and void as a matter of law and Philippine public policy with respect to the grant to Transfield of its arbitration costs and litigation expenses; this part of the award amounts to [$]10,817,898.00. It is a well-settled public policy of the Philippines, that in the absence of bad faith, a litigant cannot be penalized for the exercise of its rights to litigate, and the arbitrators did not and could not have found Luzon to have acted in bad faith in resisting the claims of the private respondent, and in presenting its own claims in the arbitration which the arbitration in fact upheld.[119]

The Court of Appeals added —

> The final award must not be given effect because to do so would result in supplanting our own laws and public policies with a judgment that is issued on foreign law despite the clear obligation of the arbitral tribunal to apply Philippine law in resolving the commercial dispute between Luzon and Transfield.[120]

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114. *Id.*

115. ANTON G. MAURER, THE PUBLIC POLICY EXCEPTION UNDER THE NEW YORK CONVENTION 154 (2d ed. 2013) (citing *Luzon Hydro Corporation*, CA-G.R. SP. No. 94318). This book makes reference to the case of *Luzon Hydro Corporation* as it was reprinted in the International Council for Commercial Arbitration Yearbook of Commercial Arbitration, Volume XXXII (2007).

116. *Luzon Hydro Corporation*, CA-G.R. SP. No. 94318.

117. *Id.*

118. *Id.*

119. MAURER, *supra* note 115, at 155 (citing *Luzon Hydro Corporation*, CA-G.R. SP. No. 94318).

120. *Id.*

In the related 2006 case of *Transfield Philippines, Inc. v. Luzon Hydro Corporation*,[121] the Supreme Court ruled —

> R.A. No. [9285] provides that international commercial arbitrations shall be governed by the Model Law on International Commercial Arbitration ('Model Law') adopted by the [UNCITRAL]. The UNCITRAL Model Law provides:
>
> [Article] 35. *Recognition and enforcement*
>
> (1) An arbitral award, irrespective of the country in which it was made, shall be recognized as binding and, upon application in writing to the competent court, shall be enforced subject to the provisions of this [A]rticle and of [A]rticle 36[;]
>
> (2) The party relying on an award or applying for its enforcement shall supply the duly authenticated original award or a duly certified copy thereof, and the original arbitration agreement referred to in [A]rticle 7 or a duly certified copy thereof. If the award or agreement is not made in an official language of this State, the party shall supply a duly certified translation thereof into such language.[122]

Moreover, the New York Convention, to which the Philippines is a signatory,[123] governs the recognition and enforcement of foreign arbitral awards.[124] The applicability of the New York Convention in the Philippines was confirmed in Section 42 of the ADR Act.[125]

III. CONCLUSION

Despite its ills, international commercial arbitration is here to stay. It need not be born again.

Gary B. Born observed, thus —

> There are a number of reasons why arbitration is the preferred means of resolving international commercial dispute. Put simply, and as explained in greater detail below, businesses perceive international arbitration as providing a neutral, speedy[,] and expert dispute resolution process, largely

121. Transfield Philippines, Inc. v. Luzon Hydro Corporation, 490 SCRA 14 (2006).

122. *Id.* at 23-24.

123. New York Arbitration Convention, Contracting States, *available at* http://www.newyorkconvention.org/countries (last accessed Mar. 1, 2017).

124. New York Convention, *supra* note 11, art. 1.

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

> subject to the parties' control, in a single, centralized forum, with internationally-enforceable dispute resolution agreements and decisions.
>
> ...
>
> While far from perfect, international arbitration is, rightly, regarded as generally suffering fewer ills than litigation of international disputes in national courts and as offering more workable and effective opportunities for remedying or avoiding those ills which do exist.[126]

126. 1 GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION, at 73 (2d ed. 2014).