Arbitration in the Philippines: Wave of the Future?

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I. INTRODUCTION

Settling controversies by arbitration is an ancient practice at common law. In general, it is substitution, by consent of parties, of another court for the tribunals provided by the ordinary processes of law. Its purpose is to ultimately dispose of the issues put forth, expeditiously and economically, so that they may not turn out to be the subject of future litigation between the parties.[1]

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Cite as 52 ATENEO L. J. 1 (2007).

Jurisprudence traces the history of arbitration in this wise:

> Legal history discloses that the early judges called upon to solve private conflicts were primarily the arbiters, persons not specially trained but in whose morality, probity and good sense the parties in conflict reposed full trust. Thus, in Republican Rome, *arbiter* and *judge* (judex) were synonymous. The magistrate or *praetor*, after noting down the conflicting claims of litigants, and clarifying the issues, referred them for decision to a private person designated by the parties, by common agreement, or selected by them from an apposite listing (the *album judicium*) or else by having the arbiter chosen by lot. The judges proper, as specially trained state officials endowed with own power and jurisdiction, and taking cognizance of litigations from beginning to end, only appeared under the Empire, by the so-called *cognitio extra ordinem*.[2]

Arbitration was brought to Philippine shores by Spain and embodied in the Spanish Law of Civil Procedure (*Ley de Enjuiciamiento Civil*).[3] Its repeal, however, prior to the 20th century left the country without an arbitration law for more than 50 years until the passage of Republic Act No. 876 (R.A. No. 876),[4] in 1953. Not surprisingly, in the years between the repeal of the Spanish Law of Civil Procedure and the enactment of R.A. No. 876, arbitration was only occasionally availed of by litigants. And in those few instances where the parties did avail of arbitration, the Supreme Court jealous of its jurisdiction, more often than not, struck down their arbitration agreements as invalid.

Arbitration began to pick up in the second half of the 20th century. After the passage of R.A. No. 876, the Philippines acceded in 1967 to the New York Convention on the Recognition and Enforcement of Foreign

1. *See,* Chan Linte v. Law Union and Rock Ins. Co., 42 Phil. 548 (1921) (citing 5 C.J.S. 16 *Arbitration and Award* § 1).
2. Chung Fu Industries (Phils.), Inc. v. Court of Appeals, 206 SCRA 545, 549 (1992) (citing Jose B.L. Reyes, *Keynote Address at the Second Conference on Voluntary Arbitration (1980), in* VOLUNTARY ARBITRATION: PROCEEDINGS OF THE SECOND CONFERENCE ON VOLUNTARY ARBITRATION — 1980, 1982, at 6).
3. LEY DE ENJUICIAMIENTO CIVIL [L.E. CIV.] (Sp.).
4. 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 [THE ARBITRATION LAW], Republic Act No. 876 (1953) (The New Civil Code that was passed in 1949 contained several provisions on arbitration. These provisions, however, did not provide a comprehensive legal framework but merely laid down certain principles.).

Arbitral Awards (New York Convention).[5] In 2004, Congress passed Republic Act No. 9285 (R.A. No. 9285), or the Alternative Dispute Resolution Act of 2004.[6] Also, relatively more cases reached the Supreme Court, giving the highest tribunal the opportunity to shape the course of arbitration. Most recently, the Court handed down two cases on the matter — *Transfield Philippines, Inc. v. Luzon Hydro Corporation*[7] and *Gonzales v. Climax Mining Ltd.*[8]

The efforts of Congress and the judiciary in improving the system of arbitration are welcome and timely. Today, two contemporary circumstances, one a local problem and the other an international phenomenon, acutely highlight the need to further promote and develop arbitration; these are hopelessly clogged court dockets and growing globalization. An inefficient court system impels aggrieved parties to look elsewhere for swift and impartial justice. Likewise, international trade and transactions unavoidably give rise to disputes between nationals who come from different jurisdictions. The foreign businessman will understandably be wary or uncomfortable with the local courts, therefore prompting him to bring his suit before the more neutral forum of arbitration.

This article will discuss the development of arbitration in the country with particular focus on recent jurisprudence. But first, it will take a look at the condition of Philippine courts. When one speaks of an *alternative* method of dispute resolution, one must necessarily first address the question — *alternative to what?*

II. STATE OF THE JUDICIARY

Arbitration is an alternative to, or a substitute for, traditional litigation in court.[9] Why do we need an alternative to the traditional court litigation? A review of relevant statistics relating to Philippine courts provides the answer.

5. The Convention on the Recognition and Enforcement of Foreign Arbitral Awards was signed at New York on June 10, 1958, and ratified by the Philippines under Senate Resolution No. 71 on May 10, 1965.
6. 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).
7. Transfield Philippines, Inc. v. Luzon Hydro Corporation, 490 SCRA 14 (2006).
8. Gonzales v. Climax Mining Ltd., 452 SCRA 607 (2005) & 512 SCRA 148 (2007).
9. Phil. Veterans Investment Development Corp. v. Velez, 199 SCRA 405, 409 (1991).

Recent data from the Supreme Court, as shown in Table 1 below, reveals that, for the period of January to November 2005, the cases filed outnumber the cases resolved in the Regional Trial Court (RTC), Metropolitan Trial Court (MeTC), Municipal Trial Court in Cities (MTCC), Municipal Trial Court (MTC), and Municipal Circuit Trial Court (MCTC) levels.

TABLE 1
SUMMARY REPORT OF CASES
FROM JANUARY TO DECEMBER 2005[10]

COURTS	CASES NEWLY FILED	CASES DECIDED/RESOLVED
RTC	169,783	133,706
MeTC	73,357	55,507
MTCC	69,364	57,975
MTC	44,156	39,450
MCTC	35,982	34,236

As of 30 November 2004, the total number of pending cases was 785,670, with the trial courts bearing the brunt of the caseload.[11] Significantly, this figure does not vary substantially to the total number of pending cases as of yearend 1998, which is 792,299.[12] Clearly, the caseloads remain formidable and unwieldy insofar as the trial courts are concerned. In fact, the caseloads appear to have gotten a little worse as confirmed in Table 2 below.

TABLE 2
TOTAL NUMBER OF PENDING CASES IN TRIAL COURTS

COURTS	1998[13]	30 Nov. 2004[14]
RTC	225,295	349,085
MeTC	183,024	144,408
MTCC		115,391

10. Data are taken from the Office of the Court Administrator, Supreme Court.
11. Data are taken from the Action Program for Judicial Reform (APJR) published by the Supreme Court, (2004).
12. Data are taken from APJR (1998).
13. Data are taken from APJR (1998).
14. Data are taken from APJR (2004).

MTC	362,888	85,452
MCTC		65,692

Not surprisingly, statistics likewise shows that shortage in judges has persisted through the years. The average vacancy rate of first and second level courts as of 2 February 2006 has hovered at around 30%.[15] As revealed in Table 3, there is not much difference between the figures in 1998 and 2006.

TABLE 3
VACANCY RATE OF JUDGES IN THE TRIAL COURTS

COURTS	1998[16]	02 FEB. 2006[17]
RTC	12.5%	15.55%
MeTC	18.29%	26.83%
MTCC	28.57%	23.90%
MTC	35.40%	38.92%
MCTC	49.27%	53.62%

This shortage in judges is largely due to the relatively low pay of judges, as illustrated in Table 4 below.

TABLE 4
SALARIES AND ALLOWANCES OF JUDGES[18]

COURTS	JAN. 2005
RTC	P44,416.33
MeTC	42,025.66
MTCC	39,108.66
MTC	36,501.00
MCTC	36,501.00

The obvious solution to the problem is to increase the number of judges. This is, however, easier said than done. The salaries of the judges are not determined by market forces but are subject to budget constraints and

15. Data are taken from the Office of the Court Administrator, Supreme Court.
16. Data are taken from the APJR (1998).
17. Data are taken from the Office of the Court Administrator, Supreme Court.
18. Data are taken from the Office of the Court Administrator, Supreme Court.

the priorities of the lawmakers. This results in inefficiency of the courts. While there is no ready data on the average number of years that it takes the courts to resolve disputes, in this author's experience, it usually takes three to five years for a case to be resolved at the trial court level, and another two to four years for a case to be resolved on appeal.

Under the circumstances, the need to promote arbitration becomes pressing. Arbitration directly benefits the parties and indirectly benefits the courts since it diverts cases away from them and into the hands of arbitrators with much less caseloads. This indirect benefit has been recognized both by Congress[19] and the Supreme Court.[20]

III. ARBITRATION THROUGH THE YEARS

A. Arbitration in the First Half of the 20th Century.

The beginning of the 20th century did not augur well for arbitration in the Philippines. The *Ley de Enjuiciamiento Civil*, together with the 21 articles devoted to arbitration found in it, had been repealed prior to the turn of the century. This was unfortunate since these articles *minutely* described the procedure for arbitration. They dealt with the form of the arbitration agreement, the qualifications of the arbitrators, the number of arbitrators, the form of the arbitral award, and the grounds for and period to appeal; thus, the adjusters had to be men who could read and write. The number had to be odd, and could not exceed five. A third person could not be given the power to name them. Unless the agreement of submission was executed before a notary, it was void. It was also void if it did not contain five specified particulars. An adjuster could be challenged if he had an interest in the subject matter of the suit or was manifestly antagonistic to either party, provided the cause for challenge arose or came to the knowledge of the party after the appointment. If the adjuster challenged refused to withdraw, the matter had to be tried in the Court of First Instance where the adjuster resided. The decision of the dispute by the adjusters was void if not made before a notary. Against this decision, the party aggrieved could, within 60 days, prosecute a writ of error in the supreme court of Spain, on the ground that the judgment was rendered outside of the time limited therefor, or that

19. THE ARBITRATION LAW, § 2 ("The State shall encourage and actively promote the use of Alternative Dispute Resolution (ADR) as an important means to achieve speedy and impartial justice and *declog* court dockets.") (emphasis supplied).

20. *See*, La Naval Drug Corporation v. Court of Appeals, 236 SCRA 78 (1994); Allied Banking Corporation v. Court of Appeals, 294 SCRA 803 (1998); Reyes v. Balde II, 498 SCRA 186 (2006).

it decided questions not submitted.[21] If no writ of error was sued out, or if it was dismissed, the judgment of the adjusters was to be executed by the Court of First Instance of the district where the decision was made in the same manner as other judgments.[22]

The repeal of the *Ley de Enjuiciamiento Civil* resulted in the elimination of the then known legal framework for arbitration. It would not be until 1953, with the enactment of R.A. No. 876, that the Philippines would replace the repealed provisions of the *Ley de Enjuiciamiento Civil*. Without a statutory framework to guide them, the courts in the first half of the 20th century showed insecurity towards arbitration.

One of the first cases on arbitration in the Philippines is *Wahl, Jr. v. Donaldson, Sims & Co.*[23] The plaintiffs Rudolph Wahl, Jr. and Dr. Kurt Wahl had leased to defendants Donadlson, Sims & Co. a certain ship called *Petrarch* for the term of six months. The contract between plaintiffs and defendants contained the following clause:

> If there should arise any difference of opinion between the parties to this contract, whether it may be with reference to the principal matter or in any detail, this difference shall be referred for arbitration to two competent persons in Hongkong, one of which shall be selected by each of the contracting parties, with the power to call in a third party in the event of a disagreement; the majority of the opinions will be final and obligatory to the end of compelling any payment. This award may be made a rule of the court.[24]

Plaintiffs subsequently instituted a suit against defendants for damages based on the contract. Defendants questioned the competency of the trial court to hear the case in view of the above arbitration clause. The Supreme Court found the arbitration clause invalid since it encompassed all disputes between the parties and since the parties intended the arbitral to be *final and obligatory*.

The Court found less offensive the arbitration clause in *Chan Linte v. Law Union and Rock Insurance Co., Ltd.*[25] In this case, plaintiff insured with defendants his hemp against loss by fire. Subsequently, the hemp was destroyed by fire and plaintiff sought to recover from the insurance company. The insurer refused to accede to plaintiff's demand. Thus, plaintiff filed his claim to recover the amount of the insurance. After the

21. *See*, L.E. CIV., *supra* note 3, arts. 1670, ¶ 3, 1673, ¶ 3 & 1756 (Sp.).

22. *See*, Cordoba v. Conde, 2 Phil. 445 (1903).

23. Wahl, Jr. v. Donaldson, Sims & Co., 2 Phil. 301 (1903).

24. *Id.* at 302.

25. Chan Linte v. Law Union and Rock Insurance Co., Ltd., 42 Phil. 458 (1921).

commencement of the action, the parties agreed to submit the dispute to arbitration.

The arbitrator found that plaintiff had only seven bales of hemp destroyed in the fire. In addition to the defendant's policy, the same property was covered by two other fire insurance policies, each insuring the property at PhP5,000 against loss. Defendant has offered and is now willing to pay plaintiff its one-third of the loss in full satisfaction of its liability. Dissatisfied with the arbitrator's ruling, plaintiff went back to the trial court for proper action under an amended complaint. The trial court rendered judgment against each of the defendants, and held that plaintiff should pay the costs of the action.

On appeal, plaintiff contended that the arbitration clauses are against public policy; thus, null and void. He cited *Wahl, Jr.*, where the Supreme Court held that "a clause in a contract providing that all matters in dispute between the parties shall be referred to arbitrators and to them alone is contrary to public policy and cannot oust the courts of jurisdiction."[26]

It would seem that the Court upheld the validity of the arbitration clause in *Chan Linte* because the issue submitted for arbitration was, in contrast to the all-encompassing language of the arbitration clause in *Wahl, Jr.*, limited to the determination of the amount of loss or damages. Also, the arbitration clause expressly stated that the referral to arbitration would be a condition precedent to the filing of a court action; thus, implying that the parties recognized the authority of the courts to review arbitral awards.

Three years later, in *Vega v. San Carlos Milling Co., Ltd.*,[27] arbitration took a step backward. There, plaintiff filed an action against defendant for the recovery of 32,959 kilos of centrifugal sugar, or its value, plus the payment of damages and the costs. Clause 23 of the defendant's covenants read as follows:

> 23. That it (the Mill — Party of the first part) will submit any and all differences that may arise between the Mill and the Planters to the decision of arbitrators, two of whom shall be chosen by the Mill and two by the Planters, who in case of inability to agree shall select a fifth arbitrator, and to respect and abide by the decision of said arbitrators, or any three of them, as the case may be.

In addition, clause 14 of the plaintiff's read as follows:

> 14. That they (the Planters — Parties of the second part) will submit any and all differences that may arise between the parties of the first part and the parties of the second part to the decision of arbitrators, two of whom shall be chosen by the said parties of the first part and two by the said party of the second part, who in case of inability to agree, shall select a fifth arbitrator, and will respect and abide by the decision of said arbitrators, or any three of them, as the case may be.[28]

26. *Id.* at 553 (citing Wahl, Jr. v. Donaldson, Sims & Co., 2 Phil. 301, 303 (1903)).

27. Vega v. San Carlos Milling Co., Ltd., 51 Phil. 908 (1924).

In a divided ruling, the Supreme Court affirmed the jurisdiction and judgment of the trial court even without prior resort to arbitration. It was found in the majority opinion that, while the covenants of the plaintiff and defendant were valid, said covenants did not *expressly* declare arbitration to be a condition precedent to judicial action and, therefore, the parties had the option of going directly to court.

In his concurring opinion, Justice Avanceña went further and stated that clause 23 of the plaintiff's covenant and clause 14 of defendant's covenant, were void because they barred judicial intervention.[29] He seemed to be of the mind that arbitration was nothing more than a preliminary determination of the issues subject to court review and approval. The notion that the court was there only to compel compliance with the arbitral award was alien and unacceptable to him.

For his part, Justice Malcolm, in his dissent, lamented the "chaotic condition which exists with reference to the efficacy of arbitration agreements,"[30] thus:

28. *Id.* at 910.

29. *Id.* at 915-16.

> I concur in the majority opinion, but desire to state, however, that my vote on the first error is based upon the fact that inasmuch as clause 23 of the Mill's Covenants, and clause 14 of the Planter's Covenants provide that the parties should respect and abide by the decision of the arbitrators, they bar judicial intervention and consequently are null and void in accordance with the ruling of this court in the case of Wahl and Wahl vs. Donaldson, Sims & Co. (2 Phil., 301). Clause 7 of the Mutual Covenants, naming the Court of First Instance of Iloilo as the one with jurisdiction to try such cases as might arise from the parties' contractual relations, by the very fact that it was made subject to the arbitration clauses previously mentioned, does not render such arbitration merely a condition precedent to judicial action, nor does it change its scope, as clearly indicated by its wording and the intention of the parties. Said clause 7 was doubtless added in case it became necessary to resort to the courts for the purpose of compelling the parties to accept the arbitrators' decision in accordance with the contract, and not in order to submit anew to the courts what had already been decided by the arbitrators, whose decision the contracting parties had bound themselves to abide by and respect.

30. *Id.* at 916.

> I dissent also on another ground, which is, that the parties having formally agreed to submit their differences to arbitrators, while recognizing the jurisdiction of the courts, arbitration has been made a condition precedent to litigation, and should be held valid and enforceable.
>
> Lamentable, to say the least, is the chaotic condition which exists with reference to the efficacy of arbitration agreements. While the variety of reasons advanced by the courts for refusing to compel parties to abide by their arbitration contracts are not always convincing, and while research discloses that the rules have mounted on antiquity rather than on reason, yet we presume that, with or without reason, the general principles must be accepted. A light is, however, breaking through the clouds of obscurity and courts which formerly showed hostility to arbitration are now looking upon it with reluctant favor. The possibly inevitable jealousy of the courts toward anything which deprives them of jurisdiction and the idea which once prevailed that since there are courts, therefore everybody must go to the courts, is, as Federal Judge Hough declares in the case of United States Asphalt Refining Co. vs. Trinidad Lake Petroleum Co. ([1915], 222 Fed., 1006), 'A singular view of juridical sanctity.'[31]

The *light* that Justice Malcolm spoke of as *breaking through the clouds of obscurity* in *Vega* receded once more in *Puentebella v. Negros Coal Co., Ltd.*[32] There, the contract between plaintiff and defendant contained the following arbitration clause:

> That they shall submit each and every one of the differences that may arise between the party of the first part and the party of the second part to the decision of arbitrators, two of whom shall be selected by the party of the first part and two by the party of the second part, who, in case of a disagreement, shall select a fifth arbitrator, and they shall respect and abide by the decision of said arbitrators or any three of them, as the case may be.[33]

The Supreme Court held:

> The arbitration clause in paragraph 17 of the Ferrer contract, Exhibit A, expressly provides that the parties shall '*abide* by the decision of said arbitrators or any three of them, as the case may be.' The clause does not merely provide for arbitration as a condition precedent to recourse to the courts; it provides for a *final* determination of legal rights by arbitration. In other words, an attempt was made to take the disputes between the parties out of the jurisdiction of the courts. An agreement to that effect is contrary to public policy and is not binding upon the parties.[34]

31. *Id.* at 916-17.
32. Puentebella v. Negros Coal, 50 Phil. 69 (1927).
33. *Id.* at 71-72.
34. *Id.* at 90.

The Court did not look with favor upon arbitration clauses that required the parties to "respect and abide by"[35] the arbitral award. Such a phrase was too strictly and rather cynically construed as ousting the courts of their jurisdiction.

B. The New Civil Code

The year 1949 saw the passage of the New Civil Code.[36] Congress added three new provisions to the chapter on arbitration, to wit:

> Art. 2044. Any stipulation that the arbitrators' award or decision shall be final, is valid, without prejudice to articles 2038, 2039, and 2040.
>
> Art. 2045. Any clause giving one of the parties power to choose more arbitrators than the other is void and of no effect.
>
> Art. 2046. The appointment of arbitrators and the procedure for arbitration shall be governed by the provisions of such rules as the Supreme Court shall promulgate.

Article 2044 was the most significant of the three new articles. It, in effect, overrode the previous rulings of the Supreme Court in *Wahl, Jr.*, *Vega*, and *Puentebella*, where any seeming reference to the finality of an arbitral award automatically rendered the arbitration clause void.

The inclusion of article 2044 in the New Civil Code breathed new life into arbitration. Parties could now validly stipulate that the arbitrators' award would be *final*. But what exactly does *final* mean? Later statutes and jurisprudence would clarify that it did not mean that an arbitral award was outside the reach of judicial review. It only meant that the grounds for review were limited.

The value of article 2044 lay in the protection it gave to parties against unduly jealous judges striking down arbitration clauses that required them to respect and abide by the outcome of their contract.

On the other hand, article 2045 laid an additional safeguard to ensure that the arbitral process would be fair and impartial. While Congress acknowledged the right of parties to refer their disputes to private persons for resolution, the State still has the duty to preserve the integrity of the arbitral process.

35. *Id.* at 72.
36. An Act to Ordain and Institute the Civil Code of the Philippines [NEW CIVIL CODE], Republic Act No. 386 (1950) (This is *new* relative to the old Civil Code of 1889.).

C. Republic Act No. 876

While the Supreme Court never got around to promulgating the rules of procedure for arbitration, Congress filled the void in our arbitration law when it passed R.A. No. 876. It was a significant piece of legislation for it provided the legal framework that governed arbitration in the Philippines for 50 years. It gave flesh to several fundamental principles of arbitration such as:

1. It recognized the freedom of the parties to enter into an arbitration agreement and specified that parties may enter into an arbitration agreement either before or after a dispute arises.[37]
2. It specified the form of the arbitration agreement, that is, it must be in writing.[38]
3. It provided the procedure in case one of the parties refused to cooperate or participate in the arbitration.[39]
4. It defined the qualifications of the arbitrators and set forth guidelines for their appointment and challenge.[40]
5. It empowered the arbitrators to issue subpoenas and gave the parties the right to "petition the court to take measures to safeguard and/or conserve any matter which is the subject of the dispute in arbitration."[41]

Significantly, section 24 limited the grounds for vacating an arbitral award.[42] It restricted the scope of judicial review of the arbitral award;

37. THE ARBITRATION LAW, § 2.
38. *Id.* § 4.
39. *Id.* §§ 5-6.
40. *Id.* §§ 8-11.
41. *Id.* § 14.
42. *Id.*,§ 24.

> Section 24. *Grounds for vacating an award.* — In any of the following cases, the court must make an order vacating the award upon the petition of any party to the controversy when such party proves affirmatively that in the arbitration proceedings:
>
> (a) The award was procured by corruption, fraud, or other undue means; or
>
> (b) That there was evident partiality or corruption in the arbitrators or any of them; or
>
> (c) That the arbitrators were guilty of misconduct in refusing to postpone the hearing upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; that one or more of the arbitrators was disqualified to act as such under

Justices and judges show a favorable bias towards careful reasoning and legal scholarship by reading and citing works in law reviews. Some of the early advocates of the law review institution among the judiciary would be Justices Louis Brandeis and Benjamin Cardozo. Justice Cardozo considered law reviews as the "repositories of much of modern legal scholarship,"[23] and found "law review articles of conspicuous utility in the performance of [his] judicial duties,"[24] while Justice Brandeis saw law reviews "as both stimulating discussions in themselves and as potential educators of the legal community."[25] As a mark of the respect Justice Brandeis held for law reviews, he would "not rely on the parties' briefs to obtain citations to law review articles. Rather, Brandeis had his law clerks search law reviews for relevant information."[26]

Interestingly enough, an article written by Justice Brandeis before he became a judge would have a profound impact on the judiciary. Brandeis and Samuel Warren, a former law partner of his, collaborated on an article published in December of 1890 in the *Harvard Law Review*, entitled "The Right to Privacy."[27] The article was so well done that Dean Roscoe Pound said that it did "nothing less than add a chapter to our law."[28] The article would be later cited by a New York judge, who apparently based his opinion on its contents, in holding that a right to privacy did exist and allowed recovery based on that right.[29] A higher court, the New York Court of Appeal, would later rule in another case that no right to privacy existed,[30] thereby repudiating Brandeis and Warren's proposition. Nevertheless, Brandeis was vindicated as, subsequently, the right to privacy became widely recognized, and in 1905, the Georgia Supreme Court, in the case of *Pavesich v. New England Life Insurance Co.*, rejected the doctrine of New York Court of Appeals decision and accepted Brandeis and Warren's view by recognizing that a right to privacy exists.[31]

Professor William Prosser would later state that "The Right to Privacy...has come to be regarded as the outstanding example of the influence of legal periodicals upon American law."[32]

23. George J. Thompson, *et al.*, *Preface to* SELECTED READINGS ON THE LAW OF CONTRACTS v (George J. Thompson, *et al.* eds. 1931).
24. Douglas B. Maggs, *Concerning the Extent to Which the Law Review Contributes to the Development of the Law*, 3 S. CAL. L. REV. 181 (1930);
25. PHILIPPA STRUM, LOUIS D. BRANDEIS: JUSTICE FOR THE PEOPLE 364 (1984).
26. *Id.* at 363.
27. ALPHEUS THOMAS MASON, BRANDEIS: A FREE MAN'S LIFE 70 (1946).
28. *Id.*
29. Manola v. Stevens, N.Y. TIMES, June 15, 18, 21, 1890 (N.Y. Sup. Ct. 1890); *see,* Swygert, *supra* note 1, at 788.
30. Roberson v. Rochester Folding-Box Co., 64 N.E. 442, 443 (N.Y. 1902).
31. Pavesich v. New England Life Insurance Co., 50 S.E. 68 (Ga. 1905).
32. William L. Prosser, *Privacy*, 48 CAL. L. REV. 383, 384- 85 (1960)

What began as an article later became jurisprudence.

One Federal Circuit Court Judge, which, in our jurisdiction, would be equivalent to a Court of Appeals Justice, from the second highest court of the land, stated that law review articles have helped him greatly in a variety of subject matters.[33] In one case, that of *In Re Owen Corning*,[34] Judge Thomas L. Ambro had to deal with a particularly intricate matter of American bankruptcy law. Unable to find jurisprudence or treatises that could aid him in answering the legal issues involved, he went looking for articles[35] and found two articles which directly dealt with the legal issue. Judge Ambro even went so far as to state that he felt he "had found the Rosetta Stone."[36]

In the Philippines, a prominent example of a law review article that became ruling case law is the incisive commentary of known civilist Justice J.B.L. Reyes on article 809 of the Civil Code.[37] Criticizing that provision as "liberalization running riot,"[38] the great civil law expert suggested a possible rewording[39] of that provision so as to provide sufficient guidelines to limit the discretion of judges in applying the law.[40] His commentary was published in the *Lawyer's Journal* in 1950, shortly after the New Civil Code was promulgated.[41] His thoughts on the matter would later be adopted by the Supreme Court, in an exhaustive *ponencia* by Justice Florenz D. Regalado, in the case of *Caneda v. Court of Appeals*.[42] In that case, the Supreme Court even quoted Justice J.B.L. Reyes' comments on article 809 extensively and used examples that the Justice had written.[43]

Justice Azcuna, a present brother in the Court, once wrote an article for the *Ateneo Law Journal* on an obscure legal animal — the Writ of *Amparo*. The Writ of *Amparo* is a remedy to enforce fundamental rights. He wrote that,

> among the different procedures that have been established for the protection of human rights, the primary ones that provide direct and immediate protection are *habeas corpus* and *Amparo*. The difference between these two writs is that *habeas corpus* is designed to enforce the right to freedom of the person, whereas *Amparo* is designed to protect those other fundamental human rights enshrined in the Constitution but not covered by the writ of *habeas corpus*.[44]

The Writ of *Amparo* may well find its place in our Rules of Court as part of our remedial law, and sooner, as part of our jurisprudence.

The influence of law reviews is evident, and in the Philippines, a number of Justices of the Supreme Court have written decisions with citations to law reviews, specifically to that of the *Ateneo Law Journal*. If a personal reference may be cited, my *ponencia* in *Estrada v. Escritor*,[45] had made reference to the *Ateneo Law Journal*.[46]

All in all, the institution of the law review remains a pivotal player in the field of legal scholarship and, concomitantly, in the realm of the judiciary. For how else can we in the judiciary deal with the difficult and nearly incomprehensible questions of law without reference to those who lead the way like canaries in the mining caves probing the darkest corners of the legal field? That is the function of the law review. And it is here that the law review remains a great friend and ally of the judiciary, with an influence all too great, and all too often unrecognized.

REYNATO S. PUNO
Chief Justice
Supreme Court of the Philippines

33. Thomas L. Ambro, *Citing Legal Articles in Judicial Opinions: A Sympathetic Antipathy*, 80 AM. BANKR. L.J. 547, 549 (2006) [hereinafter Ambro].
34. *In Re* Owen Corning, 419 F.3d 195 (3d Cir. 2005).
35. Ambro, *supra* note 33, at 550.
36. *Id.*
37. An Act to Ordain and Institute the Civil Code of the Philippines, Republic Act No. 386, art. 809 (1950).

    > Article 809. In the absence of bad faith, forgery or fraud, or undue and improper pressure and influence, defects and imperfections in the form of attestation or in the language used therein shall not render the will invalid if it is proved that the will was in fact executed and attested in substantial compliance with all the requirements of article 805.

38. RUBEN F. BALANE, JOTTINGS AND JURISPRUDENCE IN CIVIL LAW (SUCCESSION) 105 (2006 ed.) [hereinafter BALANE].
39. *Id.* The rewording which Justice J.B.L. Reyes suggested is as follows,

    > Article 809. In the absence of bad faith, forgery or fraud, or undue and improper pressure and influence, defects and imperfections in the form of attestation or in the language used therein shall not render the will invalid *if such defects and imperfections can be supplied by an examination of the will itself and* it is proved that the will was in fact executed and attested in substantial compliance with all the requirements of Article 805.

40. *Id.* at 105 (citing LAWYER'S JOURNAL, Nov. 30, 1950, at 566).
41. BALANE, *supra* note 38, at 105.
42. Caneda v. Court of Appeals, 222 SCRA 781 (1993).
43. *Id.*
44. Adolfo S. Azcuna, *The Writ of Amparo: A Remedy to Enforce Fundamental Rights*, 37 ATENEO L.J. 13 (1993).
45. Estrada v. Escritor, 455 Phil. 411 (2003).
46. Edilwasif T. Baddiri, *Islam and the 1987 Constitution: An Issue on the Practice of Religion*, 45 ATENEO L. J. 161, 208, n.308 (2001).

non-parties to the PIATCO Contracts which the arbitral tribunal will not be equipped to resolve.[54]

R.A. No. 9285 has overridden the ruling in *Heirs of Salas*. Private parties can no longer avoid their contractual obligation to submit a dispute to arbitration by the mere circumstance or expedient of joining a third party. The court is now duty-bound to refer to arbitration those parties who are bound by the arbitration agreement. As to those parties who are not bound by the arbitration agreement, the civil action may proceed separately against them. Whether the same can be said of disputes involving government contracts is another matter, especially if constitutional and-*public policy* issues are involved.

2. Foreign[55] and Domestic Arbitration

Unlike R.A. No. 876, R.A. No. 9285 provides for a dual system of arbitration — that is, international commercial arbitration and domestic arbitration. Arbitration is considered *international* if it falls within the definition of international arbitration under article 1 (3) of the UNCITRAL Model Law on International Commercial Arbitration (Model Law).[56] In addition, R.A. No. 9285 defines *International Party* as an "entity whose place of business is outside the Philippines. It shall not include a domestic subsidiary of such international party or a co-venturer in a joint venture with a party which has its place of business in the Philippines."[57]

As for the subject matter of international arbitration, it is considered *commercial* if it "covers matters arising from all relationships of a commercial nature."[58] To emphasize the broad range of transactions that qualifies as *commercial*, Congress saw fit to include in the definition of commercial

54. *Id.* at 648.

55. The words *foreign* and *international* are used interchangeably.

56. UNCITRAL Model Law on International Commercial Arbitration art. 1(3), June 21, 1985, 24 ILM 1302 [hereinafter MODEL LAW].

57. ALTERNATIVE DISPUTE RESOLUTION ACT OF 2004, § 3 (p).

58. *Id.* § 21.

> SEC. 21. *Commercial Arbitration.* - An arbitration is 'commercial' if it covers matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of transactions: any trade 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.

transactions, the examples cited in the footnote to article 1 of the Model Law. Domestic arbitration, on the other hand, is defined simply as arbitration that is not international.[59]

International commercial arbitration shall be governed by the Model Law, while domestic arbitration shall continue to be governed by the old law, R.A. No. 876.[60] Despite the distinction that R.A. No. 9285 makes between international and domestic arbitration, there does not appear to be much difference between the two systems. The reason for this is that R.A. No. 9285 has grafted several of the Model Law provisions onto R.A. No. 876.

3. Confidentiality

There was no provision on confidentiality under R.A. No. 876. At most, R.A. No. 876 merely provided that only persons having a direct interest in the arbitration shall have the right to attend the hearings.[61] In contrast, R.A. No. 9285 expressly declares arbitration proceedings, including the records, evidence, and arbitral award, to be confidential.[62] This new provision now allows businessmen to quietly settle their commercial disputes and to shield from competitors their trade secrets and strategies.

4. Substantive Claim Before the Court

Under R.A. No. 876, a party could apply for relief with the courts either before or after the commencement of the arbitration proceedings. What was not clear, however, was whether the arbitration could proceed pending resolution by the court of the related action brought before it. The usual practice was for the party that sought judicial intervention to argue that arbitration proceedings should be suspended until the court is able to act on the matter submitted to it. R.A. No. 9285 now expressly provides that arbitration may nevertheless be commenced or continued, and an award may be made, despite the pendency of a related issue before the court.[63] This new provision ensures that the arbitration proceedings are not stalled or derailed by the court's slow action or inaction.

59. *Id.* § 32.
60. *Id.*
61. THE ARBITRATION LAW, § 12.
62. ALTERNATIVE DISPUTE RESOLUTION ACT OF 2004, § 23.
63. MODEL LAW, art. 8.

5. Qualifications of an Arbitrator

R.A. No. 9285 provides that, unless otherwise agreed by the parties, the arbitrator may be of any nationality.[64] R.A. No. 876 was silent on this point. With this clarification, the parties now have a larger pool of arbitrators to choose from.

In addition, under R.A. No. 876, the filing with the courts of a challenge on the qualifications of an arbitrator automatically suspended the arbitration proceedings.[65] In contrast, under R.A. No. 9285, the arbitral tribunal, including the challenged arbitrator, may, during the pendency of the challenge before the courts, continue the arbitration proceeding and make an award.[66] Again, the purpose of R.A. No. 9285 is to allow the arbitration proceedings to move along as quickly and smoothly as possible, free from the delays that afflict the courts.

6. Interim/Conservatory Measures

R.A. No. 9285 has expanded the powers of the arbitrators and better defined the role of courts in the issuance and enforcement of interim or conservatory measures.

The only power expressly conferred on the arbitrators under R.A. No. 876 was the power to issue subpoenas.[67] This power was "without prejudice to the rights of any party to petition the court to take measures to safeguard and/or conserve any matter which is the subject of the dispute in arbitration."[68] R.A. No. 876 did not say when a party could file a petition for conservatory measures or what type of conservatory measures a party could apply for. The duty of defining these parameters fell to the courts. Unfortunately, the courts did not have much opportunity to shape jurisprudence for the reason that not too many litigants have resorted to arbitration.

One of the first cases to tackle the issue of the power of courts to grant conservatory measures in aid of arbitration came in 1999, in *Home Bankers Savings and Trust Company v. Court of Appeals*.[69] There, after the dispute had been submitted to arbitration pending its resolution, the plaintiff filed in court an action for a sum of money and damages with prayer for preliminary

64. *Id.* art. 11 (1).
65. THE ARBITRATION LAW, § 11.
66. MODEL LAW, art. 13 (3).
67. THE ARBITRATION LAW, § 14.
68. *Id.*
69. Home Bankers Savings and Trust Company v. Court of Appeals, 318 SCRA 558 (1999).

attachment. The other party moved to dismiss the complaint on the ground that the complainant "seeks to enforce an arbitral award which as yet does not exist."[70] Citing section 14 of R.A. No. 876, the Supreme Court upheld the right of the plaintiff to apply for the issuance of a preliminary attachment while the arbitration proceedings were ongoing.

Filling up the gaps in R.A. No. 876, R.A. No. 9285 now expressly declares that "it is not incompatible with an arbitration agreement for a party to request, before constitution of the tribunal, from a court an interim measure of protection and for the Court to grant such measure."[71] R.A. No. 9285 further supplements R.A. No. 876 by stating that, after the constitution of the arbitral tribunal, a request for an interim measure of protection "may be made with the arbitral tribunal or to the extent that the arbitral tribunal has no power to act or is unable to act effectively, the request may be made with the Court."[72]

Thus, in addition to the power of issuing subpoenas, R.A. No. 9285 expressly confers upon the arbitral tribunal the power to issue interim measures of protection. These interim measures may include but shall not be limited to "preliminary injunction directed against a party, appointment of receivers or detention, preservation, inspection of property that is the subject of the dispute in arbitration."[73] Either party may apply with the Court for assistance in implementing or enforcing an interim measure ordered by an arbitral tribunal.

7. Confirmation of Domestic Arbitral Award

A domestic arbitral award is not self-executory. In order to convert the domestic arbitral award into an enforceable judgment, the winning party has to file with the courts a petition for confirmation of the arbitral award within 30 days from receipt of the arbitral award. The court should, as a matter of course, grant the petition, unless there are grounds to vacate the award.

Notably, R.A. No. 9285 expressly declares that any ground other than the grounds specified under the law for vacating a domestic arbitral award "shall be disregarded."[74] This declaration may appear to be mere surplusage since, after all, R.A. No. 876 already specifies the grounds for vacating a domestic arbitral award. A review of the jurisprudence, however, will show that Congress was justified in stating the obvious. There have been a number

70. *Id.* at 561.

71. ALTERNATIVE DISPUTE RESOLUTION ACT OF 2004, § 28 (a).

72. *Id.*

73. *Id.* § 29.

74. *Id.* § 41.

of instances where Philippine courts have modified or reversed arbitral awards, not because there existed grounds to vacate an arbitral award as specified under the law, but because the courts were of the opinion that the arbitrators either failed to appreciate the evidence or misapplied the law. There can be no doubt now that the intention of Congress is to limit the power of the courts to vacate an arbitral award only to those grounds specifically identified under the law.

8. Recognition and Enforcement of Foreign Arbitral Award

R.A. No. 876 was silent on the issue of enforcement of foreign arbitral awards. This gap in the law persisted until 1965, when the Philippine Senate ratified the New York Convention. But even then, the New York Convention only laid down fundamental principles in the enforcement of foreign arbitral awards, leaving it to each Contracting State to supply the procedural details for actual enforcement.

R.A. No. 9285 declares that a party to a foreign arbitral proceeding may oppose the recognition and enforcement of a foreign arbitral award only on those grounds enumerated under article V of the New York Convention.[75] This is nothing new considering that, as mentioned earlier, the Philippines acceded to the New York Convention 40 years ago. What *is* new is the declaration in R.A. No. 9285 that any ground other than the grounds specified in article V of the New York Convention for vacating a foreign arbitral award *shall be disregarded.* As discussed earlier, this categorical declaration is intended to remove all doubt as to the role of courts in arbitration: Courts are not given the power to second guess the arbitrators and to substitute the decision of the arbitrators with theirs.

IV. RECENT JURISPRUDENCE

The Supreme Court recently handed down two decisions in the field of arbitration, both of which have advanced the cause of arbitration.

A. Transfield Philippines, Inc. v. Luzon Hydro Corporation[76]

In this case, the Supreme Court affirmed the enforceability of foreign arbitral awards and the right of the parties to an arbitration proceeding to obtain provisional relief from the courts. The Court had occasion, for the first time, to refer to R.A. No. 9285.

Petitioner Transfield Philippines, Inc. (TPI) and respondent Luzon Hydro Corporation (LHC) entered into a Turnkey Contract whereby

75. *Id.* § 45.

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

petitioner, as Turnkey Contractor, undertook to construct, on a turnkey basis, a 70-megawatt hydro-electric power station (Project). TPI was given the sole responsibility for the design, construction, commissioning, testing, and completion of the Project. The contract provided, among others, that, in case of disputes, the parties are bound to settle their differences through mediation, conciliation and such other means as enumerated under the contract. To secure performance of TPI's obligation under the Turnkey Contract, petitioner opened in favor of LHC two standby letters of credit (Securities). In the course of the construction of the project, TPI sought various extensions to complete the project. LHC, however, denied the requests. This gave rise to a series of legal actions between the parties.

Requests were forwarded for arbitration — one filed by LHC before the Construction Industry Arbitration Commission (CIAC) and another by TPI before the International Chamber of Commerce (ICC). In both arbitration proceedings, the common issues presented were: (a) whether TPI had valid grounds to request for an extension; and (b) whether LHC had the right to terminate the Turnkey Contract for failure of TPI to complete the Project on target date. When TPI filed a petition for review with the Supreme Court, the principal issue raised was whether LHC had the right to call and draw on the Securities before the resolution of their disputes by the appropriate tribunal.

Incidentally, in two of its pleadings in the Supreme Court, LHC charged TPI with forum-shopping. The Court ruled that LHC had the right to call and draw on the Securities; however, it deferred ruling on the issue of forum-shopping until after TPI had been given the opportunity to respond to the charge. It resolved the issue of forum-shopping in its Resolution dated 19 May 2006, where it held that "the disposal of the forum-shopping charge is crucial to the parties to this case on account of its profound effect on the final outcome of the international arbitral proceedings which they have chosen as their principal dispute resolution mechanism."[77]

The Court ruled that there was no forum-shopping since the cause of action in an arbitral proceeding to determine the merits of the case is different from the cause of action in an injunction suit seeking to enjoin respondent banks from releasing the Securities to LHC; thus:

> The essence of forum-shopping is the filing of multiple suits involving the same parties for the same cause of action, either simultaneously or successively, for the purpose of obtaining a favorable judgment. Forum-shopping has likewise been defined as the act of a party against whom an adverse judgment has been rendered in one forum, seeking and possibly getting a favorable opinion in another forum, other than by appeal or the special civil action of certiorari, or the institution of two or more actions or proceedings grounded on the same cause on the supposition that one or the other court would make a favorable disposition.
>
> Thus, for forum-shopping to exist, there must be (a) identity of parties, or at least such parties as represent the same interests in both actions; (b) identity of rights asserted and relief prayed for, the relief being founded on the same facts; and (c) the identity of the two preceding particulars is such that any judgment rendered in the other action will, regardless of which party is successful, amount to *res judicata* in the action under consideration.[78]

77. *Id.* at 15-16.

What is significant in *Transfield* is the Supreme Court's recognition that court-ordered provisional/interim relief extends to *international* arbitration. Previous rulings on the right of the parties to avail of court assistance in aid of arbitration proceedings have pertained to domestic arbitration.[79]

Such ruling sends a positive signal to future litigants that the Philippines is an arbitration-friendly jurisdiction. In contrast, to this day, there is still some disagreement in the United States on the availability of court-ordered interim measures in support of arbitrations governed by the New York Convention.[80] .

The second part of the ruling in *Transfield* affirms the right of a party to an international arbitration to enforce a final award in the Philippines, pursuant to the Model Law and the New York Convention.

B. Gonzales v. Climax Mining Ltd.[81]

The background facts are as follows:

Petitioner Gonzales, as owner of mineral deposits, entered into a co-production, joint venture and/or production-sharing letter-agreement with Geophilippines, Inc., and Inmex Ltd. Under the agreement, petitioner gave collectively to the two companies, the exclusive right to explore and survey the mining claims for 36 months. This period was extended for another three years pursuant to the renegotiation of the parties.

Subsequently, Gonzales, Arimco Mining Corporation, Geophilippines Inc., Inmex Ltd., and Aumex Philippines, Inc. signed an Addendum Contract. The said contract stipulates that Arimco Mining Corporation

78. *Id.* 18-19.

79. *See*, Home Bankers Savings and Trust Company v. Court of Appeals, 318 SCRA 558 (1999).

80. Christopher R. Drahozal, *New Experiences of International Arbitration in the U.S.*, 54 AM. J. COMP. L. 233 (2006).

81. Gonzales v. Climax Mining Ltd., 452 SCRA 607 (2005).

would apply to the Government of the Philippines for permission to mine the claims as the Government's contractor under a Financial and Technical Assistance Agreement (FTAA). Arimco Mining Corporation acquired the FTAA and carried out work under the FTAA. Respondents executed the Operating and Financial Accommodation Contract and Assignment, Accession Agreement. Respondent Climax Mining Corporation (Climax) and respondent Australasian Philippines Mining Inc. (APMI) entered into a Memorandum of Agreement whereby the former transferred its FTAA to the latter.

Before the Panel of Arbitrators (Panel), Region II, Mines and Geosciences Bureau of the Department of Environment and Natural Resources, Gonzales sought the declaration of nullity or termination of all the contracts he entered. The Panel assumed jurisdiction with the notion that the subject dispute involved rights to mining areas. Nevertheless, with regard to the constitutionality of the Addendum Agreement and FTAA, the Panel held that it had no jurisdiction. Respondents assailed the orders of the Panel via a petition for *certiorari* before the Court of Appeals.

The appellate court declared that the Panel did not have jurisdiction over the complaint filed by petitioner; thus, invalidating the orders issued by it. The Court of Appeals pronounced that the Panel's jurisdiction was limited only to the resolution of mining disputes, defined as those which raise a question of fact or matter requiring the technical knowledge and experience of mining authorities.[82] The complaint alleged fraud, oppression, and violation of the Constitution, which called for the interpretation and application of laws, and did not involve any mining dispute. It noted that fraud and duress only make a contract voidable, not inexistent; hence, the contract remains valid until annulled.[83] The Court of Appeals was of the opinion that the petition should have been settled through arbitration under R.A. No. 876, as stated in clause 19.1 of the Addendum Contract. Therefore, it declared as invalid the orders issued by the Panel of Arbitrators.

Gonzales brought the matter before the Supreme Court with the following issues for adjudication: (a) whether the complaint filed by petitioner raises a mining dispute over which the Panel of Arbitrators has jurisdiction, or a judicial question which should properly be brought before

82. *See generally,* Carpio v. Sulu Resources Development Corporation, 387 SCRA 128 (2002) (Jurisdiction of the Panel of Arbitrators, Region II, Mines and Geosciences Bureau of the Department of Environment and Natural Resources).

83. NEW CIVIL CODE, art. 1390 (2). "Those where the consent is vitiated by mistake, violence, intimidation, undue influence or fraud."

> shall be chosen by the said parties of the first part and two by the said party of the second part, who in case of inability to agree, shall select a fifth arbitrator, and will respect and abide by the decision of said arbitrators, or any three of them, as the case may be.[28]

In a divided ruling, the Supreme Court affirmed the jurisdiction and judgment of the trial court even without prior resort to arbitration. It was found in the majority opinion that, while the covenants of the plaintiff and defendant were valid, said covenants did not *expressly* declare arbitration to be a condition precedent to judicial action and, therefore, the parties had the option of going directly to court.

In his concurring opinion, Justice Avanceña went further and stated that clause 23 of the plaintiff's covenant and clause 14 of defendant's covenant, were void because they barred judicial intervention.[29] He seemed to be of the mind that arbitration was nothing more than a preliminary determination of the issues subject to court review and approval. The notion that the court was there only to compel compliance with the arbitral award was alien and unacceptable to him.

For his part, Justice Malcolm, in his dissent, lamented the "chaotic condition which exists with reference to the efficacy of arbitration agreements,"[30] thus:

28. *Id.* at 910.

29. *Id.* at 915-16.

> I concur in the majority opinion, but desire to state, however, that my vote on the first error is based upon the fact that inasmuch as clause 23 of the Mill's Covenants, and clause 14 of the Planter's Covenants provide that the parties should respect and abide by the decision of the arbitrators, they bar judicial intervention and consequently are null and void in accordance with the ruling of this court in the case of Wahl and Wahl vs. Donaldson, Sims & Co. (2 Phil., 301). Clause 7 of the Mutual Covenants, naming the Court of First Instance of Iloilo as the one with jurisdiction to try such cases as might arise from the parties' contractual relations, by the very fact that it was made subject to the arbitration clauses previously mentioned, does not render such arbitration merely a condition precedent to judicial action, nor does it change its scope, as clearly indicated by its wording and the intention of the parties. Said clause 7 was doubtless added in case it became necessary to resort to the courts for the purpose of compelling the parties to accept the arbitrators' decision in accordance with the contract, and not in order to submit anew to the courts what had already been decided by the arbitrators, whose decision the contracting parties had bound themselves to abide by and respect.

30. *Id.* at 916.

> I dissent also on another ground, which is, that the parties having formally agreed to submit their differences to arbitrators, while recognizing the jurisdiction of the courts, arbitration has been made a condition precedent to litigation, and should be held valid and enforceable.
>
> Lamentable, to say the least, is the chaotic condition which exists with reference to the efficacy of arbitration agreements. While the variety of reasons advanced by the courts for refusing to compel parties to abide by their arbitration contracts are not always convincing, and while research discloses that the rules have mounted on antiquity rather than on reason, yet we presume that, with or without reason, the general principles must be accepted. A light is, however, breaking through the clouds of obscurity and courts which formerly showed hostility to arbitration are now looking upon it with reluctant favor. The possibly inevitable jealousy of the courts toward anything which deprives them of jurisdiction and the idea which once prevailed that since there are courts, therefore everybody must go to the courts, is, as Federal Judge Hough declares in the case of United States Asphalt Refining Co. vs. Trinidad Lake Petroleum Co. ([1915], 222 Fed., 1006), 'A singular view of juridical sanctity.'[31]

The *light* that Justice Malcolm spoke of as *breaking through the clouds of obscurity* in *Vega* receded once more in *Puentebella v. Negros Coal Co., Ltd.*[32] There, the contract between plaintiff and defendant contained the following arbitration clause:

> That they shall submit each and every one of the differences that may arise between the party of the first part and the party of the second part to the decision of arbitrators, two of whom shall be selected by the party of the first part and two by the party of the second part, who, in case of a disagreement, shall select a fifth arbitrator, and they shall respect and abide by the decision of said arbitrators or any three of them, as the case may be.[33]

The Supreme Court held:

> The arbitration clause in paragraph 17 of the Ferrer contract, Exhibit A, expressly provides that the parties shall '*abide* by the decision of said arbitrators or any three of them, as the case may be.' The clause does not merely provide for arbitration as a condition precedent to recourse to the courts; it provides for a *final* determination of legal rights by arbitration. In other words, an attempt was made to take the disputes between the parties out of the jurisdiction of the courts. An agreement to that effect is contrary to public policy and is not binding upon the parties.[34]

31. *Id.* at 916-17.
32. Puentebella v. Negros Coal, 50 Phil. 69 (1927).
33. *Id.* at 71-72.
34. *Id.* at 90.

The Court did not look with favor upon arbitration clauses that required the parties to "respect and abide by"[35] the arbitral award. Such a phrase was too strictly and rather cynically construed as ousting the courts of their jurisdiction.

B. The New Civil Code

The year 1949 saw the passage of the New Civil Code.[36] Congress added three new provisions to the chapter on arbitration, to wit:

> Art. 2044. Any stipulation that the arbitrators' award or decision shall be final, is valid, without prejudice to articles 2038, 2039, and 2040.
>
> Art. 2045. Any clause giving one of the parties power to choose more arbitrators than the other is void and of no effect.
>
> Art. 2046. The appointment of arbitrators and the procedure for arbitration shall be governed by the provisions of such rules as the Supreme Court shall promulgate.

Article 2044 was the most significant of the three new articles. It, in effect, overrode the previous rulings of the Supreme Court in *Wahl, Jr.*, *Vega*, and *Puentebella*, where any seeming reference to the finality of an arbitral award automatically rendered the arbitration clause void.

The inclusion of article 2044 in the New Civil Code breathed new life into arbitration. Parties could now validly stipulate that the arbitrators' award would be *final*. But what exactly does *final* mean? Later statutes and jurisprudence would clarify that it did not mean that an arbitral award was outside the reach of judicial review. It only meant that the grounds for review were limited.

The value of article 2044 lay in the protection it gave to parties against unduly jealous judges striking down arbitration clauses that required them to respect and abide by the outcome of their contract.

On the other hand, article 2045 laid an additional safeguard to ensure that the arbitral process would be fair and impartial. While Congress acknowledged the right of parties to refer their disputes to private persons for resolution, the State still has the duty to preserve the integrity of the arbitral process.

35. *Id.* at 72.
36. An Act to Ordain and Institute the Civil Code of the Philippines [NEW CIVIL CODE], Republic Act No. 386 (1950) (This is *new* relative to the old Civil Code of 1889.).

C. Republic Act No. 876

While the Supreme Court never got around to promulgating the rules of procedure for arbitration, Congress filled the void in our arbitration law when it passed R.A. No. 876. It was a significant piece of legislation for it provided the legal framework that governed arbitration in the Philippines for 50 years. It gave flesh to several fundamental principles of arbitration such as:

1. It recognized the freedom of the parties to enter into an arbitration agreement and specified that parties may enter into an arbitration agreement either before or after a dispute arises.[37]
2. It specified the form of the arbitration agreement, that is, it must be in writing.[38]
3. It provided the procedure in case one of the parties refused to cooperate or participate in the arbitration.[39]
4. It defined the qualifications of the arbitrators and set forth guidelines for their appointment and challenge.[40]
5. It empowered the arbitrators to issue subpoenas and gave the parties the right to "petition the court to take measures to safeguard and/or conserve any matter which is the subject of the dispute in arbitration."[41]

Significantly, section 24 limited the grounds for vacating an arbitral award.[42] It restricted the scope of judicial review of the arbitral award;

37. THE ARBITRATION LAW, § 2.
38. *Id.* § 4.
39. *Id.* §§ 5-6.
40. *Id.* §§ 8-11.
41. *Id.* § 14.
42. *Id.*, § 24.

> Section 24. *Grounds for vacating an award.* — In any of the following cases, the court must make an order vacating the award upon the petition of any party to the controversy when such party proves affirmatively that in the arbitration proceedings:
>
> (a) The award was procured by corruption, fraud, or other undue means; or
>
> (b) That there was evident partiality or corruption in the arbitrators or any of them; or
>
> (c) That the arbitrators were guilty of misconduct in refusing to postpone the hearing upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; that one or more of the arbitrators was disqualified to act as such under

to have exceeded his authority. A case in point is *National Steel Corporation v. Regional Trial Court of Lanao del Norte, Br. 2, Iligan City.*[92]

In this case, Edward Wilkom Enterprises Inc. (EWEI) and National Steel Corporation (NSC) executed a Contract for Site Development for the latter's Integrated Iron and Steel Mills Complex to be established in Iligan City. Conflicts later arose between the parties compelling EWEI to file a civil case before the RTC. The action was subsequently dismissed, upon joint motion of the parties as to implement section 19 of the contract which provides for a resolution of any conflict by arbitration. Pursuant with the order and section 19 of the contract, EWEI and NSC constituted an Arbitration Board. The RTC of Lanao del Norte then confirmed the decision of the arbitrators.

NSC assailed the decision of the trial court before the Supreme Court. According to the Court, "[t]he pivot of inquiry here is whether or not the lower court acted with grave abuse of discretion in not vacating the arbitrator's award."[93] The Supreme Court found erroneous certain portions of the Arbitral Board's award and proceeded to modify it accordingly.

Asset Privatization Trust v. Court of Appeals,[94] likewise involved the issue of the proper mode of appeal in arbitration cases. It was a hybrid of the circumstances in *Grogun* and the circumstances in *National Steel.* Like *Grogun,* on one hand, the parties in *Asset Privatization Trust* (APT) agreed to submit their dispute to arbitration *after* the commencement of the court action. On the other hand, like in *National Steel,* the dissatisfied party in *Asset Privatization Trust* filed a special civil action for *certiorari* with the Court of Appeals after the trial court confirmed the Arbitral Committee's award. The Supreme Court held, among others, that, contrary to the ruling of the Court of Appeals, the remedy of a petition for *certiorari* was available to Asset Privatization Trust:

> Section 29 of Republic Act No. 876 provides that:
>
> 'An appeal may be taken from an order made in a proceeding under this Act, or from a judgment entered upon an award through certiorari proceedings, but such appeals shall be limited to questions of law....'
>
> The aforequoted (sic) provision, however, does not preclude a party aggrieved by the arbitral award from resorting to the extraordinary remedy of certiorari under rule 65 of the Rules of Court where, as in this case, the Regional Trial Court to which the award was submitted for confirmation

92. National Steel Corporation v. Regional Trial Court of Lanao del Norte, Br. 2, Iligan City, 304 SCRA 595 (1999).
93. *Id.* at 600.
94. Asset Privatization Trust v. Court of Appeals, 300 SCRA 579 (1998).

> has acted without jurisdiction, or with grave abuse of discretion and there is no appeal, nor any plain, speedy remedy in the course of law....
>
> In the instant case, the respondent court erred in dismissing the special civil action for certiorari, in being clear from the pleadings and the evidence that the trial court lacked jurisdiction and/or committed grave abuse of discretion in taking cognizance of private respondents' motion to confirm the arbitral award and, worse, in confirming said award which is grossly and patently not in accord with the arbitration agreement, as will be hereinafter demonstrated.[95]

The Supreme Court then proceeded to discuss the nature and limits of the arbitrator's powers:

> As a rule, the award of an arbitrator cannot be set aside for mere errors of judgment either as to the law or as to the facts. Courts are without power to amend or overrule merely because of disagreement with matters of law or facts determined by the arbitrators. They will not review the findings of law and fact contained in an award, and will not undertake to substitute their judgment for that of the arbitrators, since any other rule would make an award the commencement, not the end, of litigation. Errors of law and fact, or an erroneous decision of matters submitted to the judgment of the arbitrators, are insufficient to invalidate an award fairly and honestly made. Judicial review of an arbitration is, thus, more limited than judicial review of a trial.
>
> Nonetheless, the arbitrators' award is not absolute and without exceptions. The arbitrators cannot resolve issues beyond the scope of the submission agreement. The parties to such an agreement are bound by the arbitrators award only to the extent and in the manner prescribed by the contract and only if the award is rendered in conformity thereto. Thus, sections 24 and 25 of the Arbitration Law provide grounds for vacating, rescinding or modifying an arbitration award. Where the conditions described in articles 2038, 2039, and 2040 of the Civil Code applicable to compromises and arbitration are attendant, the arbitration award may also be annulled.[96]

95. *Id.* at 601.

96. *Id.* at 603. Justice Romero's dissent, which the Court cited in *Gonzales* in support of its conclusion that the proper remedy from a decision of the RTC affirming an arbitral award is a rule 45 petition, provides:

> The term 'certiorari' in the aforequoted provision refers to an ordinary appeal under rule 45, not the special action of certiorari under rule 65. It is an 'appeal,' as Section 29 proclaims. The proper forum for this action is, under the old and the new rules of procedure, the Supreme Court. Thus, section 2 (c) of rule 41 of the 1997 Rules of Civil Procedure states that, 'In all cases where only questions of law are raised or involved, the appeal shall be to the Supreme Court by petition for review on certiorari in accordance with rule 45.'
>
> Moreover, section 29 limits the appeal to 'questions of law,' another indication that it is referring to an appeal by certiorari under rule 45 which, indeed, is the customary manner of reviewing such issues. On the other hand, the extraordinary remedy of certiorari under rule 65 may be availed of by a party where there is 'no appeal, nor any plain, speedy, and adequate remedy in the course of law,' and under circumstances where 'a tribunal, board or officer exercising judicial functions, has acted without or in excess of its or his jurisdiction, or with grave abuse of discretion.'

If the Supreme Court in *Asset Privatization Trust* had limited its findings to the fact that the trial court had permanently dismissed the complaint and, therefore, lost jurisdiction over the case, its ruling that a rule 65 petition was the proper remedy to assail the trial court's order confirming the arbitral award would certainly have legal basis. In proceeding, however, to review the arbitrators' award and determining that they had exceeded their authority, the ruling seems to imply that a petition for certiorari would have, in any event, been justified.

Second, the *Gonzales* ruling re-affirmed the summary nature of and the RTC's limited and special jurisdiction over petitions to compel arbitration under section 6 of R.A. No. 876, first enunciated in *La Naval Drug Corporation*. The jurisdiction of courts in a petition to compel arbitration is limited to determining the existence of an arbitration agreement. Trial courts should not allow themselves to be drawn into the fatal pitfall of prolonging the proceedings or touching on the merits.

Third, modifying its earlier ruling, the Supreme Court in *Gonzales* introduced the widely-accepted doctrine of separability. This doctrine of separability is, as pointed out by the Supreme Court, found in article 16 (1) of the Model Law, which governs international commercial arbitration.[97] Notably, however, article 16 (1) of the Model Law is not one of the Model Law articles that R.A. No. 9285 grafted unto R.A. No. 876. Sections 32 and 33 of R.A. No. 9285 read as follows:

> Section 32. *Law Governing Domestic Arbitration.* – Domestic arbitration shall continue to be governed by Republic Act No. 876, otherwise known as 'The Arbitration Law' as amended by this Chapter. The term 'domestic arbitration' as used herein shall mean an arbitration that is not international as defined in Article 1(3) of the Model Law.
>
> Section 33. *Applicability to Domestic Arbitration.* – Articles 8, 10, 11, 12, 13, 14, 18 and 19 and 29 to 32 of the Model Law and Sections 22 to 31 of the preceding Chapter 4 shall apply to domestic arbitration.[98]

97. ALTERNATIVE DISPUTE RESOLUTION ACT OF 2004, § 19.

98. *Id.* §§ 32-33.

It seems that the omission of article 16 from the enumeration in section 33 of R.A. No. 9285 was a deliberate one. In any event, the Supreme Court's application of the doctrine of separability in what appears to be a domestic arbitration is welcome. Without such a doctrine, an arbitration agreement, as observed by the Honorable Court, can easily be thwarted by the mere act of repudiating the main contract.

Incidentally, the latest ruling in *Gonzales* refutes former Chief Justice Artemio Panganiban's argument in his concurring opinion in the controversial case of *Agan, Jr.* There, Justice Panganiban wrote:

> Should the dispute be referred to arbitration prior to judicial recourse? Respondent PIATCO claims that Section 10.02 of the Amended and Restated Concession Agreement (ARCA) provides for arbitration under the auspices of the International Chamber of Commerce to settle any dispute or controversy or claim arising in connection with the Concession Agreement, its amendments and supplements. *The government disagrees, however, insisting that there can be no arbitration based on section 10.02 of the ARCA, since all the PIATCO contracts are void ab initio. Therefore, all contractual provisions, including section 10.02 of the ARCA, are likewise void, inexistent and inoperative.* To support its stand, the government cites *Chavez v. Presidential Commission on Good Government*: *'The void agreement will not be rendered operative by the parties' alleged performance (partial or full) of their respective prestations. A contract that violates the Constitution and the law is null and void ab initio and vests no rights and creates no obligations. It produces no legal effect at all.'*
>
> *As will be discussed at length later, the PIATCO contracts are indeed void in their entirety; thus, a resort to the aforesaid provision on arbitration is unavailing.* Besides, petitioners and petitioners-in-intervention have pointed out that, even granting *arguendo* that the arbitration clause remained a valid provision, it still cannot bind them inasmuch as they are not parties to the PIATCO contracts. And in the final analysis, it is unarguable that the arbitration process provided for under section 10.02 of the ARCA, to be undertaken by a panel of three arbitrators appointed in accordance with the Rules of Arbitration of the International Chamber of Commerce, will not be able to address, determine and definitively resolve the constitutional and legal questions that have been raised in the Petitions before us.[99]

V. A RECOMMENDATION TO EDUCATE THE JUDICIARY

Philippine courts are only beginning to gain an understanding and grasp of arbitration. It is necessary that the Supreme Court, perhaps through the Philippine Judicial Academy, educate the members of the judiciary on the nature of arbitration.

99. Agan, Jr. v. Philippine International Air Terminals Co., Inc., 402 SCRA 612, 683-84 (2003) (emphasis supplied).

A. Party Autonomy

The cornerstone of arbitration is party autonomy. This principle can be found in section 2 of R.A. No. 9285, which provides that it is State policy to actively promote party autonomy in the resolution of disputes and the freedom of parties to make their own arrangements to resolve their respective disputes.[100]

The Court in *Agan, Jr.* held that "the object of arbitration is precisely to allow an expeditious determination of a dispute,"[101] and that "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."[102] Such reasoning was reiterated more recently in *European Resources and Technologies, Incorporated v. Ingenieuburo Birkhahn + Nolte, Ingeniurgesellschaft mbh,*[103] where the Supreme Court held that "even if there is an arbitration clause, there are instances when referral to arbitration does not appear to be the most prudent action. The object of arbitration is to allow the expeditious determination of a dispute."[104]

It is submitted that the object of arbitration is not the expeditious resolution of cases – although that may be a reason why parties avail of arbitration – but to hold the parties to their bargain. As held by the Supreme Court in *Fiesta World Mall Corporation v. Linberg Philippines, Inc.*:[105]

> It bears stressing that such arbitration agreement is the law between the parties. Since that agreement is binding between them, they are expected to abide by it in good faith. And because it covers the dispute between them in the present case, either of them may compel the other to arbitrate. Thus, it is well within petitioner's right to demand recourse to arbitration.[106]

The essence of arbitration was best captured by the Supreme Court in *David v. Construction Industry Arbitration Commission*:[107]

100. ALTERNATIVE DISPUTE RESOLUTION ACT OF 2004, § 2.

101. *Agan, Jr.* 402 SCRA at 648.

102. *Id.*

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

104. *Id.* at 258.

105. Fiesta World Mall Corporation v. Linberg Philippines, Inc., 499 SCRA 332 (2006).

106. *Id.* at 338-39.

107. David v. Construction Industry Arbitration Commission, 435 SCRA 654 (2004).

> Voluntary arbitration involves the reference of a dispute to an impartial body, the members of which are chosen by the parties themselves, which parties freely consent in advance to abide by the arbitral award issued after proceedings where both parties had the opportunity to be heard. *The basic objective is to provide a speedy and inexpensive method of settling disputes by allowing the parties to avoid the formalities, delay, expense and aggravation which commonly accompany ordinary litigation, especially litigation which goes through the entire hierarchy of courts* ...
>
> ... The Court will not review the factual findings of an arbitral tribunal upon the artful allegation that such body had 'misapprehended facts' and will not pass upon issues which are, at bottom, issues of fact, no matter how cleverly disguised they might be as 'legal questions.' The parties here had recourse to arbitration and chose the arbitrators themselves; they must have had confidence in such arbitrators. *The Court will not, therefore, permit the parties to relitigate before it the issues of facts previously presented and argued before the Arbitral Tribunal, save only where a clear showing is made that, in reaching its factual conclusions, the Arbitral Tribunal committed an error so egregious and hurtful to one party as to constitute a grave abuse of discretion resulting in lack or loss of jurisdiction.* Prototypical examples would be factual conclusions of the Tribunal which resulted in deprivation of one or the other party of a fair opportunity to present its position before the Arbitral Tribunal, and an award obtained through fraud or the corruption of arbitrators. Any other more relaxed rule would result in setting at naught the basic objective of a voluntary arbitration and would reduce arbitration to a largely inutile institution.[108]

If there is any one lesson that the courts must learn and take to heart, it is the pronouncement in *David.*

B. Judicial Non-Interference

It must be inculcated in the courts that they merely play a supporting part in arbitration and that the lead role belongs to the arbitrators.

In the world of arbitration, courts are, in a sense, like angels hovering in the background. They are not to interfere with the arbitration process except in rare instances. They are not to impose their will on the litigants but should allow them to exercise their freedom and bear the consequences of their actions. When parties opt for arbitration, they are opting out of the court system and the courts must respect that decision.

Arbitration needs sufficient breathing space if it is to flourish and live up to its promise of speedier and less expensive justice. Too much intervention by the courts will stifle its growth and discourage litigants from availing of this dispute resolution mechanism. This is not to say that the courts have no

108. *Id.* at 667 (emphasis supplied).

role to play in arbitration. On the contrary, they retain their sacred role of seeing to it that justice is done. But the courts have to stay in the background and remain there unless called upon to decide whether there are grounds to vacate, modify, or correct the arbitral award. To be sure, the temptation is difficult to resist for the simple reason that it is the nature of courts to consider the facts and the law. The courts may well disagree with the factual and legal findings of the arbitrator, but the success of arbitration as an alternative method of dispute resolution depends on the ability of courts to respect the autonomy of the parties[109] and to exercise restraint and resist substituting their judgment for the judgment of the arbitrator.

C. Judicial Assistance

The principle of judicial non-interference does not mean that the courts have no role to play. They do. There are instances when court intervention becomes necessary as when the adverse party refuses to arbitrate,[110] attempts to transfer or dissipate his assets,[111] or refuses to abide by the arbitral

109. William Golangco Construction Corporation v. Philippine Commercial International Bank, 485 SCRA 293 (2006).

> The autonomous nature of contracts is enunciated in Article 1306 of the Civil Code.
>
> Article 1306. The contracting parties may establish such stipulations, clauses, terms and conditions as they may deem convenient, provided they are not contrary to law, morals, good customs, public order, or public policy.
>
> Obligations arising from contracts have the force of law between the parties and should be complied with in good faith. In characterizing the contract as having the force of law between the parties, the law stresses the obligatory nature of a binding and valid agreement.

110. THE ARBITRATION LAW, § 6.

111. ALTERNATIVE DISPUTE RESOLUTION ACT OF 2004, §§ 28-29. The law has expanded the powers of the arbitrators and better defined the role of courts in the issuance and enforcement of interim/conservatory measures.

> The only power expressly conferred on the arbitrators under the Old Law was the power to issue subpoenas. This power was 'without prejudice to the rights of any party to petition the court to take measures to safeguard and/or conserve any matter which is the subject of the dispute in arbitration.' R.A. No. 876 did not say when a party could file a petition for conservatory measures or what type of conservatory measures a party could apply for. The duty of defining these parameters fell to the courts. Unfortunately, the courts did not have much opportunity to shape jurisprudence for the reason that not too many litigants have resorted to arbitration.
>
> Filling up the gaps in R.A. No. 876, R.A. No. 9285 now expressly declares that 'it is not incompatible with an arbitration agreement for a party to request,

award.[112] The success of arbitration depends on the courts' ability to strike the right balance between judicial intervention and restraint.

While court intervention may, at times be necessary, the courts should always bear in mind that the last thing they should do is re-litigate the case. Worse than too little interference, is too much interference.

D. Finality of Awards

1. Scope of Judicial Review

The exclusive grounds for vacating an arbitral award are set forth in section 24 of R.A. No. 876.[113] Clearly, the role of the court is not to determine

before constitution of the tribunal, from a Court an interim measure of protection and for the Court to grant such measure.' R.A. No. 9285 further supplements R.A. No. 876 by stating that, after the constitution of the arbitral tribunal, a request for an interim measure of protection 'may be made with the arbitral tribunal or to the extent that the arbitral tribunal has no power to act or is unable to act effectively, the request may be made with the Court.' Thus, in addition to the power of issuing subpoenas, R.A. No. 9285 expressly confers upon the arbitral tribunal the power to issue interim measures of protection. These interim measures may include but shall not be limited to 'preliminary injunction directed against a party, appointment of receivers or detention, preservation, inspection of property that is the subject of the dispute in arbitration.' Either party may apply with the Court for assistance in implementing or enforcing an interim measure ordered by an arbitral tribunal.

112. THE ARBITRATION LAW, § 23.

113. *Id.* § 24.

> Section 24. *Grounds for vacating an award.* — In any of the following cases, the court must make an order vacating the award upon the petition of any party to the controversy when such party proves affirmatively that in the arbitration proceedings:
>
> (a) The award was procured by corruption, fraud, or other undue means; or
>
> (b) That there was evident partiality or corruption in the arbitrators or any of them; or
>
> (c) That the arbitrators were guilty of misconduct in refusing to postpone the hearing upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; that one or more of the arbitrators was disqualified to act as such under section nine hereof, and willfully refrained from disclosing such disqualifications or of any other misbehavior by which the rights of any party have been materially prejudiced; or

whether the arbitrator correctly appreciated the facts and applied the law,[114] but simply to ensure that the arbitrator decided the dispute independently and objectively, after giving the parties a sufficient opportunity to be heard. As can be seen from section 24, the grounds for vacating an arbitral award are limited to issues of corruption, evident partiality,[115] due process, and excess of authority.

As discussed above, R.A. No. 9285 expressly declares that any ground other than the grounds under R.A. No. 876 for vacating a domestic arbitral award "shall be disregarded."[116]

2. Scope of Appellate Review

The extent of review by appellate courts under R.A. No. 876 is provided in section 29, which reads:

> Section 29. *Appeals.* — An appeal may be taken from an order made in a proceeding under this Act, or from a judgment entered upon an award

> (d) That the arbitrators exceeded their powers, or so imperfectly executed them, that a mutual, final and definite award upon the subject matter submitted to them was not made.
>
> When an award is vacated, the court, in its discretion, may direct a new hearing either before the same arbitrators or before a new arbitrator or arbitrators to be chosen in the manner provided in the submission or contract for the selection of the original arbitrator or arbitrators, and any provision limiting the time in which the arbitrators may make a decision shall be deemed applicable to the new arbitration to commence from the date of the court's order.
>
> Where the court vacates an award, costs not exceeding fifty pesos and disbursements may be awarded to the prevailing party and the payment thereof may be enforced in like manner as the payment of costs upon the motion in an action.'

114. This is the same rule in the United States, where "[t]he basis on which to vacate an arbitration award under the Federal Arbitration Act is narrow. Mere errors of law or mistakes of fact are *not* grounds for vacating an award." *Cf.* KOLKEY, DANIEL M. ATTACKING ARBITRAL AWARDS: RIGHTS OF APPEAL AND REVIEW IN INTERNATIONAL ARBITRATION (citing Bernhardt v. Polygraphic Co., 350 U.S. 198, 203, n.4 (1956); Sobel v. Hertz, Werner & Co., 469 F. 2d 1211, 1214 (2d Cir. 1972); Reynolds Secs. Inc. v. MacQuown, 459 F. Supp. 943, 945 (W.D. Pa. 1978); 22 INT'L LAW 693 (1988)) (Incidentally, the grounds for vacating a domestic arbitral award under the Federal Arbitration Act are identical to the grounds for vacating an arbitral award under R.A. No. 876.).

115. Adamson v. Court of Appeals, 232 SCRA 602 (1994). In this case, the Supreme Court held that the mere fact that an arbitral award is unfavorable to one party does not, by itself, prove evident partiality.

116. ALTERNATIVE DISPUTE RESOLUTION ACT OF 2004, § 41.

> through certiorari proceedings, but such appeals shall be limited to questions of law. The proceedings upon such an appeal, including the judgment thereon shall be governed by the Rules of Court in so far as they are applicable.[117]

In *Gonzales,* which originated from a petition to compel arbitration, the Supreme Court held that the proper mode of appeal from the decision of the trial court is a petition for review under rule 45. It is submitted that the ruling in *Gonzales* should not be limited to instances where original action involves a petition to compel the other party to arbitrate. A rule 45 petition is the proper remedy even in cases where arbitrators have exceeded their authority and whose awards have been confirmed by the RTC. R.A. No. 876[118] and R.A. No. 9285[119] provide that the confirmation of arbitral award shall be made by the RTC.

On the other hand, the filing of a petition for certiorari under rule 65 to challenge the ruling of the RTC confirming an arbitral award does not appear to be a proper remedy since it implies that the RTC is without jurisdiction to confirm the award. However, as discussed, the law confers upon the RTC the jurisdiction to confirm an arbitral award. Thus, while the arbitrators may have exceeded their authority, the same cannot be said of the RTC.

Also, the ruling in *Grogun* can undermine the *finality* of arbitral awards. The Court of Appeals can, under rule 41, section 2 (a), review the trial court's decision on both questions of fact and of law.[120] It is, however, precisely this broad sort of appellate review that arbitration seeks to avoid.

In a related issue, section 46 of R.A. No. 9285 provides that "a decision of the Regional Trial Court confirming, vacating, setting aside, modifying or correcting an arbitral award may be appealed to the *Court of Appeals* in accordance with the rules of procedure to be promulgated by the Supreme Court."[121] Since section 46 falls under chapter B of section 7, it presumably applies to foreign arbitral awards. If so, this not only gives rise to the issue of the scope of appellate review but may even violate the provisions of the New York Convention, which provides:

> Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the

117. THE ARBITRATION LAW, § 29.

118. *Id.* § 22.

119. ALTERNATIVE DISPUTE RESOLUTION ACT OF 2004, § 40.

120. 1997 RULES OF CIVIL PROCEDURE, rule 41, § 2 (a).

121. ALTERNATIVE DISPUTE RESOLUTION ACT OF 2004, § 46 (emphasis supplied).

> following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition and enforcement of domestic arbitral awards.[122]

Adding another layer to the appeal process is arguably an "onerous" condition. The Court of Appeals usually takes more than a year to resolve cases. Moreover, there does not seem to be any basis for the distinction.

Finally, R.A. No. 876 limits the grounds for vacating an arbitral award to those enumerated under section 24. Thus, it is submitted that appellate review should not only be limited to questions of law (under rule 45) but the questions of law should also be confined to determining the existence of grounds under section 24. Otherwise, the scope of review on appeal will be broader than the scope of judicial review at the RTC level. This could not have been the intention of Congress when they limited the grounds to challenge the arbitral award under R.A. No. 876 and R.A. No. 9285.

In the alternative, if Congress (or the Supreme Court) feels that the State has a compelling public interest in reviewing legal issues contained in an arbitral award, then such judicial review on questions of law should be confined to domestic arbitral awards (and only on limited grounds) and should not extend to foreign arbitral awards, following the Singaporean model.[123]

Unless the courts fully understand the nature of arbitration and their role with respect to it, arbitration will not be a desirable alternative mode of dispute resolution.

E. Special Courts

Related to the proposal to educate the judiciary is the proposal to create special courts for arbitration. Adam Smith's insight that specialization and division of labor brings about greater productivity is applicable to the judiciary. The idea of special courts is not a novel one. In fact, there are presently various types of special courts throughout the country. Courts that are regularly exposed to arbitration and its peculiar set of rules grow naturally more efficient in arbitration than courts that come across it occasionally.

The designation of special courts also allows for the speedier education of the judges concerned.

122. NEW YORK CONVENTION, art. III.

123. *See,* ARBITRATION ACT OF SINGAPORE OF 2001, art. 49. Notably, the parties to a domestic arbitration in Singapore may waive their right to appeal the arbitral award on a question of law.

F. Filing Fees

It has been observed that arbitration is a less expensive method of dispute resolution.[124] This observation is disputable. Arbitration may, in fact be, more expensive in most instances compared to the traditional court litigation, especially so if the arbitration is administered by an institution. Apart from the arbitrators' fees, the parties also have to pay for the administrative fees.

Unfortunately, there is no provision in the Rules of Court that applies expressly to the confirmation or enforcement of arbitral awards. To make arbitration affordable, it is submitted that the filing fees for the enforcement of an arbitral award, domestic or foreign, should not be based on the schedule of fees for money claims under section 7, rule 141 of the Rules of Court. Rather, the filing fees should be fixed.

The ruling in *Mijares v. Ranada,*[125] which involves the issue of the amount of docket fees in the enforcement of foreign arbitral awards against the estate of former president Ferdinand Marcos, is instructive. There, the Supreme Court held:

> The preclusion of an action for enforcement of a foreign judgment in this country merely due to an exorbitant assessment of docket fees is alien to generally accepted practices and principles in international law. Indeed, there are grave concerns in conditioning the amount of the filing fee on the pecuniary award or the value of the property subject of the foreign decision. Such pecuniary award will almost certainly be in foreign denomination, computed in accordance with the applicable laws and standards of the forum. The vagaries of inflation, as well as the relative low-income capacity of the Filipino, to date may very well translate into an award virtually unenforceable in this country, despite its integral validity, if the docket fees for the enforcement thereof were predicated on the amount of the award sought to be enforced. The theory adopted by respondent judge and the Marcos Estate may even lead to absurdities, such as if applied to an award involving real property situated in places such as the United States or Scandinavia where real property values are inexorably high. We cannot very well require that the filing fee be computed based on the value of the foreign property as determined by the standards of the country where it is located.[126]

Since the enforcement of a foreign arbitral is akin to the enforcement of a foreign judgment,[127] there is no reason that the confirmation or enforcement of foreign arbitral awards should cost more. A party seeking to enforce an arbitral award, like a party seeking to enforce a foreign judgment, is not asking the court to hear and try the case anew.

It would impose a heavy and oppressive burden on the parties to arbitration to require them to pay filing fees based on the amount of the claim a second time around. Prohibitive or unreasonably high costs will discourage litigants from availing of arbitration.[128]

G. Rules of Procedure

Article 2046 of the New Civil Code provides: "The appointment of arbitrators and the procedure for arbitration shall be governed by the provisions of such rules as the Supreme Court shall promulgate."[129] More than 50 years since the passage of the New Civil Code, the Court has yet to promulgate the rules of procedure for arbitration. This may seem a trivial matter but it is not. The absence of rules of procedure may be one of the

124. Reyes v. Balde II, 498 SCRA 186, 196-197 (2006) (citing LM Power Engineering Corp. v. Capitol Industrial Construction Groups, Inc., 447 Phil. 705, 714 (2003)):

> It bears to stress that 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. Brushing aside a contractual agreement calling for arbitration between the parties would be a step backward.

125. Mijares v. Ranada, 455 SCRA 397 (2005).

126. *Id.* at 425.

127. Prior to the passage of R.A. No. 9285, there was uncertainty as to whether a foreign arbitral award was to be treated as a foreign judgment. Some jurists espoused the position that an action, similar to a suit to enforce foreign judgments under the 1997 Rules on Civil Procedure, should be filed in order to enforce a foreign arbitral award. The other school of thought adopted the position that the foreign arbitral award may be enforced through a mere petition for confirmation of such award. R.A. No. 9285 now leaves no doubt that a foreign arbitral award is not to be treated as a foreign judgment. It states that a foreign arbitral award, even if confirmed by a foreign court, shall nonetheless be recognized and enforced as a foreign arbitral award and not as a judgment of a foreign court. Under the 1997 Rules of Civil Procedure, a foreign judgment "may be repelled by evidence of a want of jurisdiction, want of notice to the party, collusion, fraud, or clear mistake of law or fact." *See,* 1997 RULES OF CIVIL PROCEDURE, rule 39, § 48. Notably, the ground of 'clear mistake of law or fact' is not among the grounds under article V of the New York Convention. Thus, the grounds for opposing a foreign judgment are broader than the grounds for opposing a foreign arbitral award.

128. *Id.*

129. NEW CIVIL CODE, art. 2046.

reasons why arbitration has not yet become popular. Specific guidelines are a source of comfort and guidance to lawyers and their clients.

VI. CONCLUSION

The task of reforming the judiciary is a herculean one. To be sure, the efforts to reform the judiciary have not been wanting. The Supreme Court has embarked on a comprehensive reform program that is aimed to slay this multi-dimensional problem. During the watch of Chief Justice Hilario Davide, the Court introduced an Action Program for Judicial Reform for the period 2001-06 (APJR). The APJR focuses on institutions development, (for example, construction or improvement of courthouses and halls of justice), human resources development (for example, training, judicial education, or formulation of remuneration policy strategy), and reforms in judicial systems and procedures (for example, court management system), and reforms in the support systems sector (for example, public information for better transparency and access to justice). The APJR budget for the period 2001-2006 was an estimated PhP4.3 billion.[130] The funding came from domestic and external sources. A large portion of the Supreme Court's budget (75.47%) went into the development of institutions.[131]

For its part, in 1998, Congress passed the Speedy Trial Act of 1998,[132] hoping to get the courts to move things along. Judiciary efficiency, however, cannot be achieved overnight. It will take many years before the reforms will bear fruit.

In the meantime, disputes, which can be traced all the way back to the Garden of Eden, will not disappear. Conflict is inherent in human society[133] and the potential for conflict is increased by the march of globalization. More trade means potentially more conflict. Advances in transportation and telecommunications increase the number of transactions — and potential conflicts — even further. Parties wishing to have their conflicts resolved expeditiously will be looking increasingly to alternative means of settling their disputes. This is especially true with businesses, which abhor indefinite

130. Data are taken from APJR (2001).

131. *Id.*

132. An Act to Ensure a Speedy Trial of All Criminal Cases Before the Sandiganbayan, Regional Trial Court, Metropolitan Trial Court, Municipal Trial Court, and Municipal Circuit Trial Court, Appropiating Funds Therefor, and for Other Purposes [SPEEDY TRIAL ACT OF 1998], Republic Act No. 8493 (1998).

133. Chung Fu Industries (Phils.), Inc. v. Court of Appeals, 206 SCRA 545, 549 (1992).

uncertainty. Under these circumstances, arbitration is truly worth cultivating as it possesses many attractive features.

First, unlike judges, arbitrators are not burdened by heavy caseloads. The data shows that, as of November 2005, there are 349,085 pending cases before the RTC. Yet, there are only 804 RTC judges,[134] or an average of 435 cases per judge.[135] Hearing cases, sifting through evidence, and writing decisions is not an easy task. It becomes almost unmanageable if a judge has to contend with 435 cases. In contrast, before appointing an arbitrator, litigants can first verify from a potential nominee whether he or she can devote time to the case.

Second, there is a large pool of arbitrators to draw from. Unlike the traditional judges, arbitrators do not have to be lawyers. They can be architects, engineers, investment bankers, stock brokers, or even laymen, depending on the subject matter or nature of the dispute.

Third, the fees of arbitrators are not fixed by law. They are flexible and adjust according to the complexities of the case and the reputation of the arbitrator. Hence, litigants will be assured of an adequate supply of arbitrators. There is also reason for arbitrators to resist the temptation of corruption. The more competent, honest, and prominent the arbitrator, the higher the price he or she can command.

Fourth, arbitration has the indirect benefit of de-clogging the court dockets by diverting cases away from them. The data shows that the number of cases filed outpace the number of cases decided.[136] Judges can dispose of only so many cases at a time, especially given the restrictions that are imposed upon them. While the courts can only do so much in terms of the outflow of cases, arbitration has the potential of controlling the inflow of cases into the judicial system, especially at the RTC level where the number of cases filed annually have more or less been steady. The court system can begin to work more efficiently only if the number of cases decided exceeds the number of cases filed. Until then, the courts will find themselves trapped in a cycle of inefficiency. Thus, the courts also have a high stake in the success of arbitration.

134. Data are taken from Table 2 of the Vacancy Rate of Judges in the First and Second Level Courts as of February 2, 2006.

135. The 434 cases per RTC judge is based on the figures in the Summary Report of Cases from January to December 2005 (marked as Table 1) on the number of pending cases at the RTC level as of 31 December 2005 (that is, 350,286) divided by the number of RTC judges (that is, 804).

136 Please refer to Table 1 under II. State of the Judiciary.

Fifth, for those of the perception that the courts are unable to "protect investors in an impartial manner,"[137] arbitration addresses the concern of partiality. One of the appealing features of arbitration is that the parties get to choose their own arbitrators.

Sixth, the costs of arbitration are borne by the parties. Arbitration pays for itself. Litigants who are dissatisfied with the judicial system can opt out of the judicial system. The potentially higher fees can be offset by a speedier resolution of the case and a more satisfactory judgment.

The Supreme Court first touted arbitration to be the "wave of the future"[138] in 1998. Eight years later, in 2006, the Court repeated the same observation.[139]

The fact of the matter is, arbitration is no longer the wave of the future but the rave of the present. The wave hit American shores more than a decade ago. Between 1993 and 2003, the international arbitration caseload of the American Arbitration Association (AAA) more than tripled, prompting the AAA to announce in 2002 that it had "become the largest international commercial arbitration institution in the world."[140] The wave has likewise reached the shores of other Asian countries. While the Philippines was one of the first countries to adopt a comprehensive arbitration law (in 1953) and become a signatory to the New York Convention (in 1967), it now lags behind China, Singapore, South Korea, Japan, and Malaysia in terms of international arbitration cases administered by arbitration institutions.[141] The Philippine Dispute Resolution Centre, Inc. (PDRCI) has averaged only three arbitration cases a year.[142] This is unfortunate since the PDRCI has

137. ARSENIO BALISACAN & HAL HILL, THE PHILIPPINE ECONOMY: DEVELOPMENTS, POLICIES, AND CHALLENGES 161 (2003).

138. BF Corporation v. Court of Appeals, 351 Phil. 508 (1998).

139. Reyes v. Balde II, 498 SCRA 186 (2006). The Court states:

> It bears to stress that 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. Brushing aside a contractual agreement calling for arbitration between the parties would be a step backward.

140. Drahozal, *supra* note 80, at 1.

141. *See,* Singapore International Arbitration Centre *at* http://www.siac.org.sg (last accessed July 26, 2007).

142. The Philippine Dispute Resolution Center, Inc. (PDRCI) is a non-stock, non-profit organization incorporated in 1996 out of the Arbitration Committee of the Philippine Chamber of Commerce and Industry for the purpose of promoting and encouraging the use of arbitration as an alternative mode of settling commercial transaction disputes and providing dispute resolution services to the business community. Its membership is composed of prominent lawyers, members of the judiciary, academicians, arbitrators, bankers, and businessmen. PDRCI has broadened its scope of arbitration advocacy mission. It administers arbitration in specialized fields, such as maritime, banking, insurance, securities, and intellectual property disputes.

been able to dispose of the cases filed before them in, on average, 10 months. Clearly, arbitration (both *ad hoc* and institutional) remains an underutilized institution.

The Philippines has come a long way since arbitration made its first appearance in the Spanish Code of Civil Procedure. Now that the wave is upon us, the challenge is to catch and ride it.