Comprehending Arbitration

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I. A RATHER CONFUSING SITUATION

In the Philippines, there are several dispute resolution processes called "arbitration." Some of these are: labor arbitration under the Labor Code of the Philippines,[1] consumer arbitration under the Consumer Act of the

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The Author hopes that the reader will have at least a rudimentary knowledge of arbitration after reading the Article. He hopes that the Article will enable the reader to make the necessary distinctions between arbitration and the other processes called "arbitration." This Article is about arbitration in the Philippine setting. It focuses on "arbitration" as the term is understood in its traditional sense. It shall, henceforth, be referred to simply as arbitration.

The Author welcomes any notice of error or omission, or any suggestion on how to improve this work. This Article is for information purposes only and should not be considered as professional advice on any issue or entity.

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1. A Decree Instituting a Labor Code Thereby Revising and Consolidating Labor and Social Laws to Afford Protection to Labor, Promote Employment and Human Resources Development and Insure Industrial Peace Based on Social Justice [LABOR CODE], Presidential Decree No. 442, bk. V, tit. VII-A (1974) (as amended). The Articles in this Title provide for the arbitration procedure under the Labor Code. Article 273 defines the arbitration under this procedure —

> Art. 273. [260] *Grievance machinery and voluntary arbitration.* — The parties to a Collective Bargaining Agreement [(CBA)] shall include therein provisions that will ensure the mutual observance of its terms and conditions. They shall establish a machinery for the adjustment and resolution of grievances arising from the interpretation or implementation of their [CBA] and those arising from the interpretation or enforcement of company personnel policies.
>
> All grievances submitted to the grievance machinery which are not settled within seven [ ] calendar days from the date of its submission shall automatically be referred to voluntary arbitration prescribed in the [CBA].
>
> For this purpose, parties to a [CBA] shall name and designate in advance a Voluntary Arbitrator or panel of Voluntary Arbitrators, or include in the agreement a procedure for the selection of such Voluntary Arbitrator or panel of Voluntary Arbitrators, preferably from the listing of qualified Voluntary Arbitrators duly accredited by the Board. In case the parties fail to select a Voluntary Arbitrator or panel of Voluntary Arbitrators, the Board shall designate the Voluntary Arbitrator or panel of Voluntary Arbitrators, as may be necessary, pursuant to the selection procedure agreed upon in the [CBA], which shall act with the same force and effect as if the Arbitrator or panel of Arbitrators has been selected by the parties as described above.

Philippines,[2] construction arbitration under the Construction Industry Arbitration Law,[3] and barangay arbitration under the Local Government Code.[4] There is also the "court-annexed mediation."[5]

Id. art. 260.

2. The Consumer Act of the Philippines [Consumer Act of the Philippines], Republic Act No. 7394, §§ 160-166 (1992). Article 163 provides for the description of the arbitration procedure under this Act —

> Article 163. Investigation Procedure.
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> (a) The consumer arbitration officer shall conduct hearings on any complaint received by him or referred by the Council.
>
> (b) Parties to the case shall be entitled to notice of the hearing, and shall be informed of the date, time[,] and place of the same. A copy of the complaint shall be attached to the notice.
>
> (c) The department shall afford all interested parties the opportunity to submit a statement of facts, arguments, offers of settlements or proposals of adjustments.
>
> (d) The Consumer arbitration officer shall first and foremost ensure that the contending parties come to a settlement of the case.
>
> (e) In the event that a settlement has not been effected, the Mediation officer may now proceed to formally investigate, hear[,] and decide the case.
>
> (f) The Consumer arbitration officer may summon witnesses, administer oaths and affirmations, issue subpoena and subpoena [*duces tecum*], rule upon offers of proof and receive relevant evidence, take or cause deposition to be taken whenever the ends of justice would be served thereby, regulate the course of the hearing, rule on any procedural request or similar matter and decide the complaint. In hearing the complaint, the mediation officer shall use every and all reasonable means to ascertain the facts in each complaint speedily and objectively without regard to strict rules of evidence prevailing in suits before courts. The complaints shall be decided within [ ] 15 days from the time the investigation was terminated.

Id. art. 163.

3. Creating an Arbitration Machinery in the Construction Industry of the Philippines [Construction Industry Arbitration Law], Executive Order No. 1008 (1985). This law creates the Construction Industry Arbitration Commission (CIAC) which is mandated to settle disputes in the construction industry. Section 14 describes the arbitration under this law —

> Sec. 14. *Arbitrators*. A sole arbitrator or three arbitrators may settle a dispute.
>
> Where the parties agree that the dispute shall be settled by a sole arbitrator, they may, by agreement, nominate him from the list of arbitrators accredited by the CIAC for appointment and confirmation. If the parties fail to agree as to the arbitrator, the CIAC taking into consideration the complexities and intricacies of the dispute/s has the option to appoint a single arbitrator or an Arbitral Tribunal.
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> If the CIAC decides to appoint an Arbitral Tribunal, each party may nominate one [ ] arbitrator from the list of arbitrators accredited by the CIAC for appointment and for confirmation. The third arbitrator who is acceptable to both parties confirmed in writing shall be appointed by the CIAC and shall preside over the Tribunal.
>
> Arbitration shall be men of distinction in whom the business sector and the government can have confidence. They shall not be permanently employed with the CIAC. Instead, they shall render services only when called to arbitrate. For each dispute they settle, they shall be given fees.

Id. § 14.

4. An Act Providing for a Local Government Code of 1991 [LOCAL GOV'T CODE], Republic Act No. 7160, ch. VII, §§ 399-422 (1991) (as amended). Section 413 provides for the definition of arbitration under this Code —

> Section 413. *Arbitration*. —
>
> (a) The parties may, at any stage of the proceedings, agree in writing that they shall abide by the arbitration award of the [*lupon*] chairman or the [*pangkat*]. Such agreement to arbitrate may be repudiated within five [ ] days from the date thereof for the same grounds and in accordance with the procedure hereinafter prescribed. The arbitration award shall be made after the lapse of the period for repudiation and within [ ] 10 days thereafter.
>
> (b) The arbitration award shall be in writing in a language or dialect known to the parties. When the parties to the dispute do not use the same language or dialect, the award shall be written in the language or dialect known to them.

Id. § 413.

5. 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, § 3 (l) (2004). It provides — "'Court-Annexed Mediation' means any mediation process conducted under the auspices of the court, after such court has acquired jurisdiction of the dispute." *Id.*

These terms have led to confusion. They use similar words, but they are not conceptually the same since they are governed by different sets of rules.

Jurisprudence has provided no help in obliterating the confusion. It may have even abetted it. Many decisions do not make distinctions, and there are jumbled mixtures of rules applicable to various types of arbitration, as well as arbitration and the other arbitrations — even in litigation. This is illustrated in recent Supreme Court decisions.

In *Korea Technologies Co., Ltd. v. Lerma*,[6] a foreign award became capable of being judicially reviewed under the United Nations Commission on International Trade Law Model Law on International Commercial Arbitration (Model Law),[7] whereas the applicable law should have been the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) which was also mentioned in the decision.[8] In the said decision, both the Model Law and New York Convention were applied, when, as a matter of fact, it should have only been the latter.[9]

In *ABS-CBN Broadcasting Corporation v. World Interactive Network Systems (WINS) Japan Co., Ltd.*,[10] the Court held that challenging what should have been an "international" award could be achieved[11] through a petition to vacate using Republic Act (R.A.) No. 876 or the Arbitration Law,[12] a petition for review under Rule 43 of the Rules of Court,[13] or a petition for

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

7. *Id.* at 23-30.

8. *Id.* at 24 (citing Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *adopted* June 10, 1958, 330 U.N.T.S. 4739 (entered into force June 7, 1959) [hereinafter New York Convention]).

9. *Id.* at 23-30 (citing United Nations Commission on International Trade Law, UNCITRAL Model Law on International Commercial Arbitration, U.N. Doc. A/40/17 (June 21, 1985) [hereinafter UNCITRAL Model Law]). The Model Law has undergone amendments adopted on 7 July 2006.

10. ABS-CBN Broadcasting Corporation v. World Interactive Network Systems (WINS) Japan Co., Ltd., 544 SCRA 308 (2008).

11. *Id.* at 315-16.

12. 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, § 26 (1953). This was the law on arbitration in the Philippines before the enactment of the Alternative Dispute Resolution Act.

13. 1997 RULES OF CIVIL PROCEDURE, rule 43.

certiorari under Rule 65.[14] The arbitral tribunal ended up being lumped together with the instrumentalities of the government[15] instead of being an instrumentality of the parties.

In *Lanuza, Jr. v. BF Corporation*,[16] the Court in an obiter may have equated arbitration — a private process operating extrajudicially — with litigation — a public process — when it applied the policy against multiplicity of suits in arbitration.[17]

Likewise, the current laws related to arbitration have provided no help either.

In R.A. No. 9285 or the Alternative Dispute Resolution Act of 2004 (ADR Act),[18] the definition of the term "arbitration" is wide enough to include arbitration and the other kinds of dispute resolutions —

> 'Arbitration' means a voluntary dispute resolution process in which one or more arbitrators, appointed in accordance with the agreement of the parties, or rules promulgated pursuant to this Act, resolve a dispute by rendering an award.[19]

For that matter, the definition of "arbitration" is found neither in the New York Convention[20] nor in the Model Law.[21]

Instead, what exist are definitions of an "arbitration agreement," but not "arbitration." On one hand, the New York Convention provides —

> Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined

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14. *Id.* rule 65.
15. *ABS-CBN Broadcasting Corporation*, 544 SCRA at 319.
16. Lanuza, Jr. v. BF Corporation, 737 SCRA 275 (2014).
17. *Id.* at 292-95. In his *ponencia*, Justice Marvic Mario Victor F. Leonen states that, "if there is an interpretation that would render effective an arbitration clause for purposes of avoiding litigation and expediting resolution of the dispute, that interpretation shall be adopted." *Id.* at 295.
18. 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).
19. *Id.* § 3 (d).
20. New York Convention, *supra* note 8.
21. UNCITRAL Model Law, *supra* note 9.

> legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.[22]

On the other hand, the Model Law provides —

> 'Arbitration agreement' is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.[23]

II. WHAT IS ARBITRATION?

From the quoted definitions of an arbitration agreement, it can be said that arbitration is a contractual method of resolving disputes. The disputes involved may already exist or may happen in the future. These are in respect of a defined legal relationship which may be contractual or not.

Going back in time, one finds that the resolution of the dispute or disputes in arbitration is traditionally entrusted to one or more persons and to them alone.[24] This implies that the disputants should have the opportunity to present their positions before an impartial tribunal.

As narrated by barristers from United Kingdom, Alan Redfern and Martin Hunter —

> [I]n its origins, the concept of arbitration is a simple one. Parties who are in dispute agree to submit their disagreement to a person whose expertise or judgment they trust. They each put their respective cases to this person — this private individual, this arbitrator — who listens, considers the facts and the arguments, and then makes a decision. This decision is final and binding on the parties; and it is binding because the parties have agreed that it should be, rather than because of the coercive action of any State.[25]

Accordingly, one may find the following definition useful —

> Arbitration is a device whereby the settlement of a question, which is of interest for two or more persons, is entrusted to one or more other persons — the arbitrator or arbitrators — *who derive their powers from a private*

22. New York Convention, *supra* note 8, art. II (1).

23. UNCITRAL Model Law, *supra* note 9, art. 7 (1).

24. *See* Burchell v. Marsh et al., 58 U.S. 344, 349 (1854). The relevant passage states that "[a]rbitrators are judges chosen by the parties to decide the matters submitted to them, finally and without appeal." *Id.*

25. NIGEL BLACKABY, ET AL., REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION 1-2 (5th ed. 2009).

agreement, not from the authorities of a State, and who are to proceed and decide the case on the basis of such an agreement.[26]

From the aforementioned, the components of arbitration are apparent — that arbitration is contractual and may either be adjudicative or judicial.

Likewise, several other characteristics of arbitration may be deduced from the aforementioned. They distinguish arbitration from other kinds of dispute resolutions based on law. Among them are the following:

(1) It is parties- and case-specific;

(2) It is a private dispute resolution process;

(3) The arbitral tribunal is an instrumentality of the parties;

(4) It is evidentiary;

(5) It is a mandatory procedure that will culminate to a final and binding decision or award;

(6) The principle of finality of arbitral awards — or decisions — is based on contract and is a core component of the process;

(7) The award is part of the agreement of the parties and has the same standing as a contractual stipulation; and

(8) The arbitral tribunal has no *imperium*.

III. CLASSIFICATIONS AND SOME USEFUL DEFINITIONS OF ARBITRATION

Before the discussion proceeds, one may find the following classifications and definitions useful.

Arbitration may be *ad hoc* or institutional.[27]

On one hand, *ad hoc* arbitration is a do-it-yourself arbitration. They are subject only to the parties' arbitration agreement and the applicable national arbitration legislation.[28] The parties themselves — together with the arbitral

26. FOUCHARD, GAILLARD, GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION 9 (Emmanuel Gaillard & John Savage eds., 1999) (citing RENÉ DAVID, ARBITRATION IN INTERNATIONAL TRADE 5 (1985)) (emphasis supplied) [hereinafter FOUCHARD, GAILLARD, GOLDMAN].

27. GARY B. BORN, INTERNATIONAL ARBITRATION: LAW AND PRACTICE 27 (2012 ed.).

28. *Id.*

tribunal in the exercise of the latter's discretion — will be the ones laying down the rules.[29]

Meanwhile, the Department of Justice (DOJ) Department Circular No. 98[30] says that "[a]n arbitration administered by an institution shall be regarded as *ad hoc* arbitration if such institution is not a permanent or regular arbitration institution in the Philippines."[31] This rule has no statutory support.

On the other hand, institutional arbitration is administered by an arbitral institution who decides according to its own rules. "[I]n practice, [it is] almost always overseen by an appointing authority with responsibility for constituting the arbitral tribunal, fixing the arbitrators' compensation[,] and similar matters."[32]

An arbitral institution is an organization that provides arbitration services to users.[33]

Pursuant to DOJ Circular No. 98 with respect to domestic arbitration, an arbitral institution is an "entity, which is registered as a domestic corporation with the Securities and Exchange Commission and engaged in, among others, arbitration of disputes in the Philippines on a regular and permanent basis."[34] Again, this has no statutory support.

Notably, opting for institutional arbitration has a price. As a rule, the institutions have a fee schedule which may be by time or — as is usually the case — based on the amount in dispute.[35]

As to the applicable law, arbitration may be foreign or local. Throughout this Article, the Author shall use the term "local" instead of "domestic" in order to make a distinction from the latter, which has been mentioned in Philippine law.

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29. UNCITRAL Model Law, *supra* note 9, art. 19 (1).

30. Rules and Regulations Implementing the Alternative Dispute Resolution Act of 2004, Republic Act No. 9285 (2009) [hereinafter ADR Act IRR].

31. *Id.* art. 1.6 (D) (1).

32. BORN, *supra* note 27.

33. JOHAN BILLIET, INTERNATIONAL INVESTMENT ARBITRATION: A PRACTICAL HANDBOOK 33 (2016 ed.).

34. ADR Act IRR, art. 1.6 (D) (10).

35. United Nations Commission on International Trade Law, UNCITRAL Arbitration Rules, as revised in 2010, A/65/456, art. 43 (Dec. 6, 2010.).

Foreign arbitration occurs when the jurisdictional seat is a country other than the Philippines. As a general proposition, the applicable law of arbitration is the law of the seat of arbitration.[36]

If a foreign award was being enforced in the Philippines, the applicable law is the New York Convention of 1958, if the origin is a State Party to the Convention.[37] A non-convention award may be recognized or enforced, on grounds of comity and reciprocity, as if it was a convention award.[38]

Under Rule 13.12 of the Special Rules of Court on Alternative Dispute Resolution,[39] a non-convention award from a country which does not extend comity and reciprocity to Philippine awards may nevertheless be treated as a foreign judgment enforceable as such under Rule 39, Section 48 of the Rules of Court.[40] This has no statutory support.

The arbitration is local when the Philippines is the jurisdictional seat. A local arbitration may be domestic or international.

A domestic arbitration is one without a foreign element. This is defined by the law in the negative — if it is not international, then it is domestic.[41] The applicable law is the Arbitration Law[42] and Book IV of the Civil Code,[43] as amended or modified by the ADR Act.[44]

An international arbitration is one with a foreign element. This was not defined in the Model Law. Instead, it provided for an enumeration of what

36. *See* UNCITRAL Model Law, *supra* note 9, art. 1 (2). However, it is noteworthy to point out that not all countries are "Model Law Countries." *See generally* United Nations Commission on International Trade Law, Status, *available at* http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html (last accessed Oct. 31, 2016).

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

38. *Id.* §§ 42-43.

39. SPECIAL RULES OF COURT ON ALTERNATIVE DISPUTE RESOLUTION, A.M. No. 07-11-08-SC (Sep. 1, 2009).

40. *Id.* rule 13.12

41. Alternative Dispute Resolution Act of 2004, § 32.

42. *See* The Arbitration Law.

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

44. Alternative Dispute Resolution Act of 2004, §§ 32-33.

may be an international arbitration.[45] As stated in Article 1 (3) of the Model Law —

> An arbitration is international if:
>
> (a) the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States; or
>
> (b) one of the following places is situated outside the State in which the parties have their places of business:
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> (i) the place of arbitration if determined in, or pursuant to, the arbitration agreement;
>
> (ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected; or
>
> (c) the parties have expressly agreed that the subject-matter of the agreement relates to more than one country.[46]

As may be observed, such enumeration did not mention nationalities. The focus is on places, and not on the nationality of the parties.

The governing law of international arbitration is the Model Law, as modified by the ADR Act.[47]

It must be noted that the classification is of relative application. What may be foreign international arbitration in the Philippines would be local international arbitration in the seat of arbitration if located in another country.

In any event, the seat of arbitration — at times called the "place of arbitration" — "is a legal construct, not a geographic location. The arbitral seat is a nation where an international arbitration has its legal domicile or juridical home."[48]

Thus, an arbitration seated in the Philippines is a Philippine arbitration. An arbitration seated in Singapore is a Singaporean arbitration.

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45. UNCITRAL Model Law, *supra* note 9, art. 1 (3).

46. *Id.*

47. Alternative Dispute Resolution Act of 2004, § 19. This provision mandates the adoption of the Model Law.

48. BORN, *supra* note 27, at 105.

Consequently, as a general proposition, the arbitration law of the seat will be the governing law of the arbitration.[49]

The seat of arbitration is not necessarily the place where the proceedings may be held.[50] Thus, it is possible for an international arbitration to be seated in Singapore, but virtually all the proceedings could take place in the Philippines.

In this regard, the Author expounds on the dual components of arbitration.

IV. THE DUAL COMPONENTS OF ARBITRATION

A. Arbitration is Contractual

Simply, as may be inferred from the definition quoted above, the jurisdiction of the tribunal arises from contract and not from law.[51] The agreement of the parties is the only source of the jurisdiction of the arbitral tribunal.[52] Hence, one would frequently read or hear that there could be no arbitration without consent.[53]

This distinguishes arbitration from litigation and other law-based arbitrations.

The jurisdiction of a court and administrative bodies comes from law and not from contract. Using the words in the quoted definition of arbitration, one may deduce that those other bodies derive their powers "from the authorities of a State."[54]

This is not to say that the powers of the tribunal emanate exclusively from agreement. The law may give additional powers to the tribunal, such as the power to issue "interim measures of protection,"[55] which are holding

49. *Id.*

50. Article 20 (2) of the Model Law provides that "the arbitral tribunal may, unless otherwise agreed by the parties, meet at any place it considers appropriate for consultation among its members[.]" UNCITRAL Model Law, *supra* note 9, art. 20 (2).

51. *Id.* art. 7 (1).

52. *Id.* art. 7 (2).

53. *Id.*

54. *See* FOUCHARD, GAILLARD, GOLDMAN, *supra* note 26.

55. Alternative Dispute Resolution Act of 2004, § 28. This Section provides that "a request for an interim measure of protection or modification thereof, may be

orders that are similar to provisional reliefs in litigation. The parties, however, can withhold this power from the arbitral tribunal.[56]

B. Arbitration is Either Adjudicative or Judicial

Again, as evident from the quoted definition, the arbitral tribunal decides the disputes like a judge or as a collective of judges, as the case may be. This implies the use of impartial adjudicative procedure which affords each party an opportunity to present its case.[57]

This distinguishes arbitration from mediation and other alternative dispute resolution (ADR) forms. Generally, in mediation and other ADR forms, it is the parties themselves who decide whether or not they would settle their dispute and what the terms of their settlement would be.

V. GROUNDS TO CHALLENGE AWARDS BASED MAINLY ON THE TWO COMPONENTS OF AN ARBITRATION

Article V of the New York Convention[58] and Articles 34 (1)[59] and 36 (1)[60] of the Model Law — which are substantially similarly worded — show that the

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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." *Id.*

56. *See* UNCITRAL Model Law, *supra* note 9, art. 17.

57. BORN, *supra* note 27, at 4.

58. Article V of the New York Convention provides —

> Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:
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> (a) The parties to the agreement referred to in [A]rticle II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or
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> (b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or
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> (c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission

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

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

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

New York Convention, *supra* note 8, art. V.

59. Article 34 (1) of the Model Law provides —

Article 34. Application for setting aside as exclusive recourse against arbitral award

(1) Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of this Article.

UNCITRAL Model Law, *supra* note 9, art. 34 (1).

60. Article 36 (1) of the Model Law provides that —

Article 36. Grounds for refusing recognition or enforcement

(1) Recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused only:

(a) at the request of the party against whom it is invoked, if that party furnishes to the competent court where recognition or enforcement is sought proof that:

(i) a party to the arbitration agreement referred to in [A]rticle 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

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

(iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the

grounds to challenge awards are based mainly on the two components of an arbitration.

Thus, the grounds to challenge awards, which are mainly based on the two components of arbitration, are essentially the same grounds to challenge the validity of a contractual stipulation. An example of these grounds includes the violation of the right to due process and of the right to be heard. Another ground is that the award was rendered outside the jurisdiction granted to the tribunal, but subject to the rule on separability. Likewise, the fact that the composition of the tribunal or the arbitral procedure is not in accordance with the agreement between the parties or the law applicable to the arbitration is considered another ground. One could also contend that either the dispute is not arbitrable or that the recognition or enforcement of the award is contrary to public policy.

Additionally, an award may also be challenged on the ground that it has not yet become binding on the parties or that it has been set aside or suspended by a court of the country in which, or under the law of which, that award was made.[61]

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award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

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

(v) the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made; or

(b) if the court finds that:

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or

(ii) the recognition or enforcement of the award would be contrary to the public policy of this State.

Id. art. 36 (1).

61. *Id.* art. 36 (1) (a).

VI. ON THE CONTRACTUAL ELEMENT OF ARBITRATION

As may be discerned from the foregoing, arbitration is a creature of contract and not of law. As stated by Gary B. Born, citing United States and Canadian Supreme Court cases,

> [s]imilarly, national courts uniformly hold that 'arbitration' is a creature of contract that owes its existence to the will of the parties alone' and that 'arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute that he has not agreed to so submit.'[62]

Hence, those procedures created by law that were, unfortunately, labeled as "arbitration," can now be excluded.

The process of arbitration is governed by contractual precepts. So, among other things, the focus should be on: consent and capacities in relation to the element of consent, the other elements of a contract, the autonomy of contracts, and the limitations on and the regulations of the freedom to contract.[63]

Correlating these to provisions of Philippine law on the element of consent, one may look at the applicable provisions of contract law and add the requirement that the arbitration agreement should be in writing.[64]

With regard to capacities, the issue as to the choice of law is the application of either the nationality theory or the domiciliary theory.[65] Since the Philippines follows the nationality theory, the provisions concerning the age of majority must be taken into consideration.[66] The disputable

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62. BORN, *supra* note 27, at 4 (citing Dell Computer Corp. v. Union des consommateurs, 2007 SCC 34, ¶ 51 (2007) (Can.) & Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 83 (2002) (citing Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574, 582 (1960))).

63. *See* HECTOR S. DE LEON & HECTOR M. DE LEON, JR., COMMENTS AND CASES ON OBLIGATIONS AND CONTRACTS 445-46 (5th ed. 2010).

64. New York Convention, *supra* note 8, art. II (1) & UNCITRAL Model Law, *supra* note 9, art. 7 (2).

65. New York Convention, *supra* note 8, art. V (1) (a). In relation to capacities of the parties, such provision states that the law which governs is "the law applicable to them." *Id.*

66. The minimum age for capacity to contract is at 18 years old. An Act Lowering the Age of Majority from Twenty-One to Eighteen Years, Amending for the Purpose Executive Order Numbered Two Hundred Nine, and for Other Purposes, Republic Act No. 6809, § 1 (1989).

presumption is that an adult has sufficient discretion and is, consequently, capable of making informed decisions.[67] Likewise, the relevant provisions include those involving agency[68] and the Corporation Code[69] as well as those provisions involving the government, its institutions, and its agencies.

Nevertheless, in international arbitration, the general rule is that a State cannot use its own law to avoid liability.[70] The recognized exception is when the contracting State has made the necessary reservation.[71]

With regard to the other elements of a contract, the mutual agreement in arbitration is to participate in the arbitration and not to go to a public dispute resolution process.[72] The exchange, so to speak, is a mutual agreement whereby one party agrees on what to do and not to do in exchange for a similar agreement by the other party. These obligations are enforceable by law in arbitration-friendly countries whose courts are empowered to refer the parties to arbitration,[73] and to issue so-called anti-suit injunctions where a party to an arbitration agreement may be enjoined from litigating a dispute subject to arbitration, assess damages, refuse to enforce decisions rendered in violation of the arbitration agreement, or to do a combination of any of the aforesaid.[74]

Moreover, arbitration may proceed without the recalcitrant party and may end with an award that is enforceable by courts.[75] If the arbitration were international, then it can be enforced by courts around the world.[76]

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67. *See* CIVIL CODE, arts. 37-39.

68. *Id.* tit. X.

69. The Corporation Code of the Philippines [CORP. CODE], Batas Pambansa Blg. 68, § 36 (1980).

70. BLACKABY, ET AL., *supra* note 25, at 98-99.

71. *Id.*

72. *See generally* FOUCHARD, GAILLARD, GOLDMAN, *supra* note 26, 197-213, ¶¶ 381-414.

73. New York Convention, *supra* note 8, art. II (3) & UNCITRAL Model Law, *supra* note 9, art. 8 (1).

74. *See* Emmanuel Gaillard, *Reflections on the Use of Anti-Suit Injunctions in International Arbitration*, *in* PERVASIVE PROBLEMS IN INTERNATIONAL ARBITRATION 203-04 (Loukas A. Mistelis & Julian D. M. Lew eds., 2006).

75. UNCITRAL Model Law, *supra* note 9, art. 25 (c).

76. *See* New York Convention, *supra* note 8, art. III.

It is to be noted that there is a rule that parties are free to stipulate and their agreement is the law between them.[77] The general exception is that the stipulation should not be contrary to the mandatory provisions of law, expressed in Philippine law as those that are contrary to law, morals, good customs, public order, or public policy.[78]

There are, however, certain disputes that the law may declare as not arbitrable and these instances vary from State to State. Some of these are disputes involving status, marital disputes, criminal liability, and disputes involving payment of bribes.[79] This is called the "non-arbitrability doctrine."[80]

In explaining the doctrine, Redfern and Hunter say that "[e]ach [S]tate decides which matters may or may not be resolved by arbitration in accordance with its own political, social[,] and economic policy."[81] Thus, some States refuse to permit arbitration of some disputes involving labor grievances, intellectual property, real estate, bankruptcy, and domestic relations.[82]

In the excluded cases, the resolution of the disputes lies in judicial or other specialized forums.[83] Likewise, in these cases, courts enforce the exclusions for as long as they are supported by statute.[84]

Thus, in the Philippines and among others, the resolution of disputes arising from contracts covered by the Labor Code,[85] disputes arising from local construction contracts,[86] consumer disputes under the Consumer Act,[87] and disputes covered by the jurisdiction of the Department of Agrarian

77. CIVIL CODE, arts. 1306 & 1315.

78. *Id.* art. 1306.

79. BORN, *supra* note 27, at 82.

80. *Id.*

81. BLACKABY, ET AL., *supra* note 25, at 95.

82. BORN, *supra* note 27, at 82.

83. *Id.* & BLACKABY, ET AL., *supra* note 25, at 95.

84. BORN, *supra* note 27, at 82.

85. LABOR CODE, art. 260.

86. Construction Industry Arbitration Law, § 14.

87. Consumer Act of the Philippines, art. 163.

Reform[88] and the Housing and Land Use Regulatory Board[89] were taken out by law from mainstream arbitration.

Unfortunately, in the Philippines, the law labelled — or, rather, mislabelled — some of the processes as "arbitration," which gave rise to the confusion.

VII. CONTRACTUAL ELEMENT AND CRAFTING THE ARBITRAL PROCEDURE

Based on the premise that arbitration is contractual, the following would be the rule of preference, the first three being contractual precepts:

(1) Mandatory rules — These are rules from which the parties cannot derogate. These are the public policy safeguards and refer to the limitations on the freedom to contract (i.e., the stipulation should not be contrary to law, morals, good customs, public policy, or public order).[90]

(2) Agreement between the parties — Per Philippine law, the agreement between the parties is the law between them.[91]

(3) Default rules — These are provisions of law that apply in the absence or deficiency of agreement. What they do is to "fill-in the blanks," so to speak, and their function is to make the agreement between the parties workable. If the parties, for example, failed to agree on the number of arbitrators, then, the default rule in Article 10 (2) of the Model Law that there should be three arbitrators becomes effective.[92]

88. An Act Instituting a Comprehensive Agrarian Reform Program to Promote Social Justice and Industrialization, Providing the Mechanism for its Implementation, and for Other Purposes [Comprehensive Agrarian Reform Law of 1988], Republic Act No. 6657, § 50 (1988).

89. An Act Providing for a Magna Carta for Homeowners and Homeowners' Association, and for Other Purposes [Magna Carta for Homeowners and Homeowners' Association], Republic Act No. 9904, § 20 (d) (2010).

90. CIVIL CODE, art. 1306.

91. *Id.* art. 1315.

92. UNCITRAL Model Law, *supra* note 9, art. 10 (2).

(4) Arbitrator discretion — This is added by arbitration laws.[93] This is only possible is there is no mandatory rule, no agreement, and no default rule.

VIII. THE CHARACTERISTICS OF ARBITRATION

A. Arbitration is Case- and Parties-Specific

Simply, the arbitration and the award, collectively known as the arbitral decision, are only binding on the parties and in respect of the particular dispute or disputes involved in the arbitration.

Accordingly, two arbitrations involving the same issues but with different parties and different arbitrators may end up with different rulings.

With respect to the disputes, the ruling or award stands alone. As stated by Redfern and Hunter, "[t]here is no system of binding precedents in international arbitration [—] that is to say, no rule which means that an award on a particular issue, or a particular set of facts, is binding on arbitrators confronted with similar issues or similar facts."[94]

The award or decision will only be binding on the parties bound by the relevant arbitration agreement who were, in the proper cases, impleaded in the arbitration. Thus, aside from the signatories to the arbitration agreement, the non-signatories who may be bound by the arbitration agreement include: principal represented by an agent; alter ego of a signatory using veil piercing; assignees or transferees; and successors-in-interest, including those resulting from mergers and business combinations.[95]

A party who is not otherwise bound by an arbitration agreement may find itself bound by the arbitration and the resultant award as a result of waiver or estoppel.[96]

In an *obiter* in *Lanuza, Jr.*, the decision included corporate officers and directors as parties who may be impleaded in arbitration.[97]

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93. *Id.* art. 19 (2).

94. BLACKABY, ET AL., *supra* note 25, at 39.

95. CIVIL CODE, arts. 1311 & 1317 & BORN, *supra* note 27, at 95-99.

96. UNCITRAL Model Law, *supra* note 9, art. 16 (2).

97. *Lanuza, Jr.*, 737 SCRA at 301-02.

However, the propositions including non-signatory corporate officers or directors as parties "are not unanimously followed even in the United States."[98]

Notably, the United States is not a Model Law country, that is, its arbitration law, the Federal Arbitration Act of 1925,[99] is not based on the Model Law.

Moreover, in the given situations, the applicable law is not necessarily the law of the contract or the law applicable to the arbitration. Rather, the choice on the law to be used is dependent on the situation. If the issue is whether or not the principal is bound by the acts of a representative, then this will involve issues of capacity.[100] Hence, such would be governed by the law applicable to the principal. In contrast, in case of waivers or estoppel, then it may well be the law applicable to the arbitration.[101]

B. Arbitration is a Private Dispute Resolution Process

Being contractual, arbitration is an extrajudicial mode of resolving disputes and operates outside the legal and judicial system.

Accordingly, there is, as there should be, minimal interference from the courts and the government in so far as the proceedings are concerned.

As stated in Article 5 of the Model Law — "[i]n matters governed by this Law, no court shall intervene except where so provided by this Law."[102]

Since arbitration operates outside the judicial system, then for an award to be enforceable, the same has to be integrated into the legal system by way of a petition for confirmation with respect to local awards[103] or a petition for recognition with respect to foreign awards.[104] This must be correlated with an action for specific performance.

98. BORN, *supra* note 27, at 99 & *See generally* FOUCHARD, GAILLARD, GOLDMAN, *supra* note 26, at 197-213, ¶¶ 381-414.

99. Federal Arbitration Act, 9 U.S.C. §§ 1-16 (2012).

100. CIVIL CODE, arts. 1311 & 1317 & BORN, *supra* note 27, at 95-99.

101. *See* UNCITRAL Model Law, *supra* note 9, art. 16 (2).

102. UNCITRAL Model Law, *supra* note 9, art. 5.

103. *Id.* art. 35.

104. *Id.* & New York Convention, *supra* note 8, art. III.

C. Tribunal: An Instrumentality of the Parties

In arbitration, the parties will not go to court or an administrative agency to resolve their disputes. Instead, they will, by contract, create their own tribunal. They will appoint, directly or indirectly, their "judges" who will be the arbitrators;[105] craft the procedure;[106] and agree on several categories of choice.

Among others, the parties may determine the number of arbitrators, the procedure of appointing the arbitrators, the procedure to challenge the arbitrators, and the language of the arbitration.[107] In proper cases, they may agree on the place or seat of arbitration and on the law governing their contract,[108] or agree that the dispute shall not be decided according to any system of law but rather based on equity.[109]

The Model Law and the ADR Act, for that matter, are full of provisions allowing agreement between the parties to override default provisions.[110]

As creators, they own the tribunal and, as owners and creators, they can shape the tribunal to what they want it to be. As owners and creators, they pay the expenses of the tribunal that they created. The arbitrators are akin to temporary employees whose job description is to resolve the dispute between the parties. Accordingly, the arbitrators are *functus officio* once they have issued their award, although by law they retain some residual powers.[111]

As apparent from the abovementioned, arbitration affords flexibility to the parties. It could be as cheap or as expensive, as the parties would want it to be. It could be as fast or as slow, as the parties would want it to be. Also, they can structure the procedure to fit their particular needs.

Since the tribunal is an instrumentality of the parties, the rule that courts may exercise its *certiorari* jurisdiction should there be an abuse of discretion on the part of government instrumentalities will not apply.[112]

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105. UNCITRAL Model Law, *supra* note 9, art. 11.

106. *Id.* art. 19.

107. *Id.* arts. 11 (2), 13 (1), & 22 (1).

108. *Id.* arts. 20 & 28 (1).

109. *Id.* art. 28 (3).

110. *Id.* & Alternative Dispute Resolution Act of 2004, §§ 30-31.

111. UNCITRAL Model Law, *supra* note 9, arts. 32 (3) & 33.

112. SPECIAL RULES OF COURT ON ALTERNATIVE DISPUTE RESOLUTION, rule 19.7.

D. Arbitration is Evidentiary

Simply stated, the tribunal has to decide the dispute based on the evidence presented by the parties. Subject to contrary stipulation by the parties, this rule also covers legal and technical issues aside from factual ones. Thus, it is said that there are two kinds of witnesses in arbitration, namely: the witnesses of fact and expert witnesses.[113]

The rule is more often expressed as the principle that the tribunal cannot use its expertise in deciding the dispute. In more technical terms, the tribunal cannot use "secret evidence," or evidence known only to the tribunal, but not to the parties, as the basis for its award.[114] To do so would result to issues involving the right to due process and the right to be heard which would, in turn, provide a ground to vacate, for non-confirmation or for non-recognition, the award.

Hence, as a general proposition, the rule that laws are subject to judicial notice does not apply.

In this respect, similar to litigation, the recognized function of the expert witnesses is to educate the tribunal. Thus, if no expert witness was presented or the expert testimony was proved inadequate, the tribunal may end up dismissing the claim or counterclaim, as the case may be, on the ground that it does not understand the legal or technical basis of the claim.[115]

Furthermore, as previously stated, the parties may, by agreement, diminish or even negate the role of experts.[116]

However, there lies a complex situation in a case where the tribunal happens to be an expert on the issue and it believes that the respective bases of the presentations of the opposing parties are both wrong. In such a case, the practice is to bring the matter down to the parties and ask them or the expert witnesses to comment on the matter. Through this, the legal or technical evidence will no longer be a "secret" and could then be used as

113. International Bar Association, IBA Rules on the Taking of Evidence in International Arbitration, arts. 4 & 5 (May 29, 2010). A witness of fact is any person that the party may want to identify as a witness. An expert witness is considered as Party-Appointed Expert who shall submit an Expert Report which must indicate independence from the party. *Id.*

114. *Id.* art. 9 (3).

115. *Id.* art. 6.

116. UNCITRAL Model Law, *supra* note 9, explan. n. ¶ 29.

basis for the award, assuming that none of the comments would convince the tribunal that it is the one who is wrong.

Unfortunately, in *RCBC Capital Corporation v. Banco de Oro Unibank, Inc.*,[117] the Supreme Court labeled such practice as an indicator of bias and prejudgment, when it ruled in the said case which involved a foreign chair of a tribunal who resorted to that method.[118]

Hence, in the Philippines, the tribunal has to choose one in a situation where the tribunal is confronted with submissions and the same believes that both are wrong.

E. Arbitration is a Mandatory Procedure

Entering into an arbitration agreement is voluntary. However, once the parties entered into the agreement they would be bound to comply with their contract, that is, to resolve the covered disputes through arbitration and not to go to litigation.

As previously stated, the agreement is enforceable by courts and the arbitration may end with an enforceable final and binding award. Such is the reason behind the fact that arbitration is a mandatory procedure. However, given that arbitration is contractual, the parties may both withdraw from their agreement to arbitrate but they cannot do so unilaterally.

F. The Principle of Finality of Arbitral Awards (or Decisions) is Based on Contract and is a Core Component of the Process

In arbitration, the agreement of the parties is to abide by the decision of the tribunal.[119]

That being the case, any appeal based on errors of fact or law, or a mixture of both can be ruled out. However, the aforementioned only applies to the merits. Issues of fact, issues of law, or mixed issues of fact and law may arise from the grounds to vacate the award, to refuse recognition, and to refuse confirmation.[120] Hence, attacks against an award should not focus on the merits, but rather on the procedure.

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

118. *Id.* at 618-28.

119. *Burchell*, 58 U.S. at 349 & BLACKABY, ET AL., *supra* note 25, at 1-2.

120. UNCITRAL Model Law, *supra* note 9, arts. 34 & 36 & New York Convention, *supra* note 8, art. V.

G. The Award is Part of the Agreement of the Parties and has the Same Standing as a Contractual Stipulation

Since the agreement of the parties in arbitration is to abide by the decision of the tribunal, then it follows that the arbitral award or decision is part of the agreement between the parties.

Accordingly, the award is final and binding in the same way that a contractual stipulation is final and binding as the law between the parties.

Moreover, the validity and enforceability of the award is subject to the same rules in contracts. A valid award is enforceable in the same manner as a valid stipulation is enforceable. An invalid award may be vacated or refused recognition in the same way that an invalid stipulation may be ignored. If an award contains both valid and invalid portions, consequently similar to contracts, the principle of separability may be applied to enforce the valid portions and to reject the invalid ones.

Arbitration laws notably have added a saving grace — referral back to the tribunal if the defect could be corrected.[121] However, this is only possible in local awards where the same is rendered in the seat of arbitration, and not in foreign awards.

H. The Arbitral Tribunal Has No Imperium

Given that arbitration is a private dispute resolution process based on contract and not on law, it follows that the tribunal does not have the power to enforce its orders and decision.

Hence, at the end of the day, the tribunal and the parties have to rely on the courts. This is where the courts come in as they provide assistance during the proceedings. In post award proceedings, courts may exercise its supervisory[122] and enforcement[123] jurisdictions.

IX. WHY DISTINGUISH BETWEEN "ARBITRATIONS"?

The obvious reason to distinguish between "arbitrations" is that they are not conceptually one and the same and, therefore, they are governed by different laws. Consequently, they will require different approaches.

121. UNCITRAL Model Law, *supra* note 9, art. 34 (4).

122. *Id.* art. 34.

123. *Id.* art. 35 & New York Convention, *supra* note 8, art. III.

To illustrate, a comparison between "arbitration" with arbitration by the Construction Industry Arbitration Commission (CIAC), a "statute-based" arbitration, would highlight several differences as outlined by the following table:

Arbitration	CIAC Arbitration
Contractual; synonymous with the concept of party autonomy in the resolution of disputes.	Established by statute;[124] Hybrid process; Freedom of the parties to select arbitrators and craft procedure heavily curtailed.[125]
Tribunal is an instrumentality of the parties.	Tribunal is an instrumentality of the government to implement the public policy declaration in Executive Order No. 1008.[126]
Award is a product of private dispute resolution processes; hence, the need for judicial recognition or confirmation.	Resultant award already integrated into the legal system; no need for judicial recognition or confirmation for enforcement.[127]
Principle of finality of awards is based on contract and is a core component of the process.	A review of merits is available.[128]
International awards are enforceable under the New York Convention of 1958.	Not enforceable under the New York Convention.

For instance, looking at the enforcement aspects, CIAC awards are not to be enforced via the same enforcement route as arbitral awards. If the award happened to be "international" as defined in the Model Law,[129] then

124. Construction Industry Arbitration Law, § 3.

125. Construction Industry Arbitration Commission, 2011 Revised Rules of Procedure Governing Construction Arbitration, rule 13, § 13.4 (2011).

126. Construction Industry Arbitration Law, §§ 2-3.

127. *Id.* § 20.

128. 1997 RULES OF CIVIL PROCEDURE, rule 43, § 1.

129. UNCITRAL Model Law, *supra* note 9, art. 1 (3).

the enforcement outside the Philippines should most likely be through means other than the New York Convention, that is, as a court decision or through an action for specific performance.