

COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION

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At the outset, the book offers a comprehensive definition of international arbitration. It defines international arbitration as a specially established mechanism for the final and binding determination of disputes, concerning a contractual or other relationship with an international element, by independent arbitrators, in accordance with procedures, structures and substantive legal or non-legal standards chosen directly or indirectly by the parties. The two principal types of arbitration are ad hoc and institutional arbitration. In ad hoc arbitration, the arbitration mechanism is specifically established for the particular agreement. In institutional arbitration, on the one hand, the parties submit their disputes to an arbitration procedure, which is conducted under the auspices of an existing institution.

Taking into account the inevitability of disputes arising from various factors ranging from commercial and legal expectations, cultural approaches to geographical situations in many commercial transactions, parties have often preferred arbitration as a method for resolving contractual disputes. It is a recognized fact that parties to international commercial contracts frequently perceive arbitration as a private, independent and neutral system.

The authors have identified four fundamental features of arbitration i.e., as an alternative to national court; as a private mechanism for dispute

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resolution; selected and controlled by the parties; and final and binding determination of parties' rights and obligations. Of these fundamental features of arbitration, however, the authors have singled out party autonomy as a major reason why arbitration has achieved worldwide acceptance as the favored and principal mechanism for resolving disputes arising out of international commercial transactions. It is further contended that party autonomy has been the main influence on the development of truly transnational rules and practices for international arbitration. These rules and practices have crossed the barriers of legal systems and national laws.

The book also acknowledges the influence of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (NY Convention) as being instrumental in the acceptance of international arbitration as a mode of dispute resolution in the commercial world. The NY Convention imposed upon member-states the obligation to recognize and give effect to the agreement of the parties to refer their disputes to arbitration in preference to a national court jurisdiction. More importantly, the Convention established the system to ensure the maximum possibility for the simple enforceability of arbitration awards.

Following the successful operation of the NY Convention, the United Nations Commission for International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration has stripped out the differences of national arbitration laws. The Model Law contains provisions acceptable to most systems.

The book delves into numerous significant issues relating to arbitration such as the conflict between the autonomous character of arbitration and the national laws of the parties, the legal nature of arbitration and the applicability of the separability clause, among others. The authors' comparative approach illuminates us in our understanding of these gray areas of international arbitration.

Autonomy of the Arbitral Agreement

It is said that the arbitration agreement is the key factor to the existence of every arbitration. It would not be possible for the parties to undergo the arbitration process absent any valid agreement to settle their disputes before an arbitral tribunal.

The authors take note that in practice too little attention is given to the drafting of the arbitration agreement. The arbitration clause is often an afterthought in contract negotiations. Accordingly, numerous arbitration clauses are ambiguous or defective and the litigation process becomes protracted. Lengthy disputes as to the validity and content of the arbitration agreement may therefore defeat one of its primary function, that is, to expedite the process of dispute resolution.

Arbitration agreements can take different forms. They may be contained in a separate document or they may also be specifically drafted for the particular contract or standard clauses. Most arbitration agreements, however, are contained in an arbitration clause inserted in the main contract. It is in these cases where the autonomy of the arbitration clause is put in issue.

Equally important and relevant to the concept of autonomy of the arbitration agreement is the doctrine of the separability of the arbitration clause. The doctrine of separability recognizes that the arbitration clause is separate, independent and distinct from the main contract. The essence of the doctrine is that the validity of the arbitration clause is not dependent upon the main contract and vice versa. Hence, the invalidity of the main contract does not automatically result in the invalidity of the arbitration agreement.

Moreover, separability protects the integrity of the agreement to arbitrate and plays an important role in ensuring that the parties' intention to submit disputes is not easily defeated. In this way it also protects the jurisdiction of the arbitration tribunal. It is for this reason that the doctrine of separability is now entrenched in most modern arbitration laws. The UNCITRAL Model Law, in particular, has adopted this doctrine. Furthermore, the doctrine of separability has been adopted not only by countries embracing the Model Law but also in other jurisdictions including those which were previously reluctant to fully recognize the doctrine.

The applicability of the doctrine of separability is illustrated in the case of *PIATCO v. The Government of the Philippines*. The dispute between the parties arose from a project involving the construction of the third terminal building of the Ninoy Aquino International Airport. The dealings between the parties resulted in the conclusion of various concession agreements, including a 1997 concession contract, an amended

and restated concession agreements (ARCA). Section 10.2 of the ARCA contains the arbitration agreement wherein it provides that all disputes, claim or controversies arising from or relating to the construction of the said project shall be settled by arbitration under the Rules of Arbitration in the Singapore-based International Chamber of Commerce. Yet when the terminal was practically ready to start operations, the Philippine Government advised PIATCO that the award of the project and the concession contracts to the latter were null and void. In response, PIATCO filed its request for arbitration before the International Chamber of Commerce (ICC). However, during the pendency of the arbitration before the ICC, the Supreme Court of the Philippines, in the case of *Agan v. PIATCO*,¹ declared the ARCA which contained the arbitration agreement null and void for being violative of public policy. The Philippine Government anchored its argument on the nullification of the ARCA in its objection of the ICC's jurisdiction over the case. In the main, it is asserted that the Court's nullification of the ARCA necessarily nullified the parties' reference to the ICC arbitration contained in that agreement. In a decision penned by Singapore High Court Judge Judith Prakash in a motion to set aside the partial award of the Arbitral Tribunal regarding the law governing the arbitration agreement, it rejected the argument, applying the principle of severability or separability. It held that the arbitration agreement survived despite the Supreme Court's nullification of the main contract.²

Conclusion

On the whole, the book takes us on a journey towards a deeper understanding of the various aspects of arbitration. It draws our attention to certain aspects of arbitration that need to be carefully looked into in order to avoid ambiguous and defective arbitration agreements which frequently result in a prolonged adjudication process, thereby defeating one of arbitration's primary functions, i.e., the speedy settlement of contractual disputes.

Indeed, the inevitable conclusion, as for the authors' submission, is that no two arbitrations are exactly the same despite efforts to have a

¹ *Agan et al. v. PIATCO et. al.*, 402 SCRA 62 (2003).

² *Government of the Philippines v. PIATCO*, SGHC 206 (2006), http://lwb.lawnet.com.sg/legal/lgl/rss/supreme_court/51718.html (last accessed January 4, 2007).

standardized arbitration process through the adoption of the UNCITRAL Model Law and the New York Convention which shared the differences in national arbitration laws. To be sure, there are few absolutes. There are no hard and fast rules in the arbitration process. The differences in the conduct of arbitration process are largely attributed to the arbitration agreement, the procedure agreed upon by the parties, the composition of the tribunal, the choice of law, the scope of the arbitration and many other factors.

The magnitude of the role played by arbitration in international commercial transactions cannot be denied. Parties must cautiously deliberate when entering into an arbitration agreement and in thus entering, to take into account the various aspects of arbitration which will ensure the utmost success for the settlement of disputes arising from their transactions.