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FIRST DIVISION

[G.R. No. 159586. July 26, 2004]

EUROPEAN RESOURCES AND TECHNOLOGIES, INC. and DELFIN J. WENCESLAO, *petitioners, vs.* **INGENIEUBURO BIRKHAHN + NOLTE, Ingeniurgesellschaft mbh and HEERS & BROCKSTEDT GMBH & CO.,** *respondents*.

SYNOPSIS

Respondents, known herein as the German Consortium, entered into a waste management contract with the Clark Development Corporation (CDC). Under their contract, the German Consortium shall undertake to organize a local corporation as its representative for the project. Thus, petitioner corporation (ERTI) was formed. ERTI and the German Consortium entered into a Memorandum of Agreement (MOA) which embodied a provision that certain disputes shall be referred to a panel of arbitrators. ERTI, however, received later a letter from the German Consortium terminating their contract due to disapproval of CDC to their contract. Hence, ERTI sent a letter directly to CDC requesting for a reconsideration of its decision. But before CDC could act upon ERTI's letter, the German Consortium filed a complaint for injunction against ERTI and its co-petitioner before the Regional Trial Court. The German Consortium prayed that petitioner ERTI shall cease and desist from misrepresenting to third parties or the public that it has a right or interest in the waste management center at CSEZ (Clark Special Economic Zone). The trial court granted the injunction. Petitioner went to the Court of Appeals, but it dismissed their petition. Hence, this petition for review.

The decision of the Court of Appeals was reversed and set aside. The Supreme Court annulled the order of the trial court. Hence, the complaint filed by the German Consortium was dismissed for lack of legal capacity to institute an action. According to the Court, in order to subject a foreign corporation doing business in the country to the jurisdiction of our courts, it must acquire a license from the Securities and Exchange

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Commission (SEC) and appoint an agent for service of process. Without such license, the respondent German Consortium cannot institute a suit in the Philippines. An exception to this rule is when a party is estopped from challenging the capacity of an unlicensed foreign corporation where it had obtained benefits from dealings with such corporation and thereafter committed a breach of or reneged on its obligations. This, however, is not present in the case at bar.

SYLLABUS

1. **MERCANTILE LAW; PRIVATE CORPORATIONS; FOREIGN CORPORATIONS; WHEN CONSIDERED DOING BUSINESS IN THE PHILIPPINES.—** There is no general rule or governing principle laid down as to what constitutes "doing" or "engaging in" or "transacting" business in the Philippines. Thus, it has often been held that a single act or transaction may be considered as "doing business" when a corporation performs acts for which it was created or exercises some of the functions for which it was organized. We have held that the act of participating in a bidding process constitutes "doing business" because it shows the foreign corporation's intention to engage in business in the Philippines. In this regard, it is the performance by a foreign corporation of the acts for which it was created, regardless of volume of business, that determines whether a foreign corporation needs a license or not.

2. **ID.; ID.; ID.; UNLICENSED FOREIGN NON-RESIDENT CORPORATIONS CANNOT FILE SUITS IN THE PHILIPPINES AS A GENERAL RULE; EXCEPTION.—** As a general rule, unlicensed foreign non-resident corporations cannot file suits in the Philippines. A corporation has legal status only within the state or territory in which it was organized. For this reason, a corporation organized in another country has no personality to file suits in the Philippines. In order to subject a foreign corporation doing business in the country to the jurisdiction of our courts, it must acquire a license from the Securities and Exchange Commission (SEC) and appoint an agent for service of process. Without such license, it cannot institute a suit in the Philippines. However, there are exceptions to this rule. In a number of cases, we have declared a party

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estopped from challenging or questioning the capacity of an unlicensed foreign corporation from initiating a suit in our courts. In the case of *Communication Materials and Design, Inc. v. Court of Appeals*, a foreign corporation instituted an action before our courts seeking to enjoin a local corporation, with whom it had a "Representative Agreement", from using its corporate name, letter heads, envelopes, sign boards and business dealings as well as the foreign corporation's trademark. The case arose when the foreign corporation discovered that the local corporation has violated certain contractual commitments as stipulated in their agreement. In said case, we held that a foreign corporation doing business in the Philippines without license may sue in Philippine Courts a Philippine citizen or entity that had contracted with and benefited from it. Hence, the party is estopped from questioning the capacity of a foreign corporation to institute an action in our courts where it had obtained benefits from its dealings with such foreign corporation and thereafter committed a breach of or sought to renege on its obligations. The rule relating to estoppel is deeply rooted in the axiom of *commodum ex injuria sua non habere debet* — no person ought to derive any advantage from his own wrong.

3. **ID.; ID.; ID.; REQUIRED TO SECURE A LICENSE; PURPOSE THEREOF.—** The object of requiring a license is not to prevent the foreign corporation from performing single acts, but to prevent it from acquiring domicile for the purpose of business without taking the steps necessary to render it amenable to suits in the local courts. In other words, the foreign corporation is merely prevented from being in a position where it takes the good without accepting the bad.

4. **CIVIL LAW; CONTRACTS; ARBITRATION AGREEMENT; EFFECT THEREOF UPON THE PROCEEDINGS IN THE TRIAL COURT; NOT APPLICABLE IN CASE AT BAR.—** We have ruled in several cases that arbitration agreements are valid, binding, enforceable and not contrary to public policy such that when there obtains a written provision for arbitration which is not complied with, the trial court should suspend the proceedings and order the parties to proceed to arbitration in accordance with the terms of their agreement. In the case at bar, the MOA between petitioner ERTI and respondent German Consortium provided: 17. Should there be a disagreement

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between or among the Parties relative to the interpretation or implementation of this Agreement and the collateral documents including but not limited to the Contract for Services between GERMAN CONSORTIUM and CDC and the Parties cannot resolve the same by themselves, the same shall be endorsed to a panel of arbitrators which shall be convened in accordance with the process ordained under the Arbitration Law of the Republic of the Philippines. Indeed, to brush aside a contractual agreement calling for arbitration in case of disagreement between parties would be a step backward. But there are exceptions to this rule. 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. Clearly, the issue before us could not be speedily and efficiently resolved in its entirety if we allow simultaneous arbitration proceedings and trial, or suspension of trial pending arbitration. As discussed earlier, the dispute between respondent German Consortium and petitioners involves the disapproval by the CDC of the assignment by the German Consortium of its rights under the Contract for Services to petitioner ERTI. Admittedly, the arbitration clause is contained in the MOA to which only the German Consortium and petitioner ERTI were parties. Even if the case is brought before an arbitration panel, the decision will not be binding upon CDC who is a non-party to the arbitration agreement. What is more, the arbitration panel will not be able to completely dispose of all the issues of this case without including CDC in its proceedings. Accordingly, the interest of justice would only be served if the trial court hears and adjudicates the case in a single and complete proceeding.

5. REMEDIAL LAW; PROVISIONAL REMEDIES; PRELIMINARY INJUNCTION; ELEMENTS; NOT PRESENT IN CASE AT BAR.— Before an injunctive writ can be issued, it is essential that the following requisites are present: (1) there must be a right in esse or the existence of a right to be protected; and (2) the act against which injunction to be directed is a violation of such right. The *onus probandi* is on movant to show that there exists a right to be protected, which is directly threatened by the act sought to be enjoined.

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Further, there must be a showing that the invasion of the right is material and substantial and that there is an urgent and paramount necessity for the writ to prevent a serious damage. Thus, it is clear that for the issuance of the writ of preliminary injunction to be proper, it must be shown that the invasion of the right sought to be protected is material and substantial, that the right of complainant is clear and unmistakable and that there is an urgent and paramount necessity for the writ to prevent serious damage. At the time of its application for an injunctive writ, respondents' right to operate and manage the waste management center, to the exclusion of or without any participation by petitioner ERTI, cannot be said to be clear and unmistakable. The MOA executed between respondents and petitioner ERTI has not yet been judicially declared as rescinded when the complaint was lodged in court. Hence, a cloud of doubt exists over respondent German Consortium's exclusive right relating to the waste management center.

APPEARANCES OF COUNSEL

Ponce Enrile Reyes and Manalastas for petitioners.
Ricardo M. Sagmit, Jr. for respondents.

D E C I S I O N

YNARES-SANTIAGO, *J.*:

Assailed in this Petition for Review under Rule 45 of the Rules of Court is the Decision[1] of the Court of Appeals dated May 15, 2003, which sustained the Order of the Regional Trial Court of Angeles City, Branch 61, dated June 28, 2001, and its subsequent Resolution dated August 3, 2003 denying petitioner's motion for reconsideration.

European Resources and Technologies Inc. (hereinafter "ERTI"), a corporation organized and existing under the laws of the Republic of the Philippines, is joined by Delfin J. Wenceslao as petitioner in this case. Ingenieuburo Birkhan + Nolte

[1] Penned by Justice Renato A. Dacudao as concurred in by Justices Godardo A. Jacinto and Danilo B. Pine of the Fourth Division of the Court of Appeals.

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Ingiurgesellschaft mbh and Heers & Brockstedt Gmbh & Co. are German corporations who are respondents in this case and shall be collectively referred to as the "German Consortium".

The German Consortium tendered and submitted its bid to the Clark Development Corporation ("CDC") to construct, operate and manage the Integrated Waste Management Center at the Clark Special Economic Zone ("CSEZ"). CDC accepted the German Consortium's bid and awarded the contract to it. On October 6, 1999, CDC and the German Consortium executed the Contract for Services[2] which embodies the terms and conditions of their agreement.

The Contract for Services provides that the German Consortium shall be empowered to enter into a contract or agreement for the use of the integrated waste management center by corporations, local government units, entities, and persons not only within the CSEZ but also outside. For waste collected within the CSEZ, the German Consortium may impose a "tipping fee" per ton of waste collected from locators and residents of the CSEZ, which fees shall be subject to the schedule agreed upon by the parties and specified in the Contract for Services. For its operations outside of the CSEZ, the German Consortium shall pay CDC US$1.50 per ton of non-hazardous solid waste collected.[3] The CDC shall guarantee that nineteen thousand eighteen hundred (19,800) tons per year of solid waste volume shall be collected from inside and outside the CSEZ.[4] The contract has a term of twenty-five (25) years,[5] during which time the German Consortium shall operate the waste management center on a day-to-day basis.[6]

Article VIII, Section 7 of the Contract for Services provides that the German Consortium shall undertake to organize a local

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[2] Annex C, *Rollo,* p. 63.

[3] Article VII, Section 1.

[4] Article IX, Section 7.

[5] Article XII, Section 1.

[6] Article V, Section 1(b)(vi).

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corporation as its representative for this project. On April 18, 2000, the German Consortium entered into a Joint Venture with D.M. Wenceslao and Associates, Inc. ("DMWAI") and Ma. Elena B. Villarama (doing business as LBV and Associates), embodied in a Memorandum of Understanding[7] ("MOU") signed by the parties. Under the MOU, the parties agreed to jointly form a local corporation to which the German Consortium shall assign its rights under the Contract for Services. Pursuant to this agreement, petitioner European Resources and Technologies, Inc. was incorporated. The parties likewise agreed to prepare and finalize a Shareholders' Agreement within one (1) month from the execution of the MOU, which shall provide that the German Consortium shall own fifteen percent (15%) of the equity in the joint venture corporation, DMWAI shall own seventy percent (70%) and LBV&A shall own fifteen percent (15%). In the event that the parties fail to execute the Shareholders' Agreement, the MOU shall be considered null and void.[8]

On August 1, 2000, without the Shareholders' Agreement having been executed, the German Consortium and petitioner ERTI entered into a Memorandum of Agreement (MOA)[9] whereby the German Consortium ceded its rights and obligations under the Contract for Services in favor of ERTI and assigned unto ERTI, among others, "its license from CDC to engage in the business of providing environmental services needed in the CSEZ in connection with the waste management within the CSEZ and other areas."[10] Likewise, the parties agreed that should there be a disagreement between or among them relative to the interpretation or implementation of the MOA and the collateral documents including but not limited to the Contract for Services between the German Consortium and CDC, the dispute shall be referred to a panel of arbitrators.[11]

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[7] Annex D, *Rollo*, p. 77.

[8] Paragraph 8.

[9] Annex E, *Rollo*, p. 82.

[10] Paragraphs 1 and 2(a).

[11] Paragraph 17.

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On December 11, 2000, ERTI received a letter from BN Consultants Philippines, Inc., signed by Mr. Holger Holst for and on behalf of the German Consortium,[12] stating that the German Consortium's contract with DMWAI, LBV&A and ERTI has been terminated or extinguished on the following grounds: (a) the CDC did not give its approval to the Consortium's request for the approval of the assignment or transfer by the German Consortium in favor of ERTI of its rights and interests under the Contract for Services; (b) the parties failed to prepare and finalize the Shareholders' Agreement pursuant to the provision of the MOU; (c) there is no more factual or legal basis for the joint venture to continue; and (d) with the termination of the MOU, the MOA is also deemed terminated or extinguished.

Attached to the letter was a copy of the letter of the CDC,[13] stating that the German Consortium's assignment of an eighty-five percent (85%) majority interest to another party violated its representation to undertake both the financial and technical aspects of the project. The dilution of the Consortium's interest in ERTI is a substantial modification of the Consortium's representations which were used as bases for the award of the project to it.

On February 20, 2001, petitioner ERTI, through counsel, sent a letter to CDC requesting for the reconsideration of its disapproval of the agreement between ERTI and the German Consortium.

Before CDC could act upon petitioner ERTI's letter, the German Consortium filed a complaint for injunction against herein petitioners before the Regional Trial Court of Angeles City, Branch 61, docketed as Civil Case No. 10049. The German Consortium claimed that petitioner ERTI's continued misrepresentation as to their right to accept solid wastes from third parties for processing at the waste management center will cause irreparable damage to the Consortium and its exclusive right to operate the waste management center at the CSEZ.

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[12] Annex F, *Rollo*, p. 89.

[13] *Rollo, p.* 91.

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Moreover, petitioner ERTI's acts destroy the Consortium's credibility and undermine customer confidence in it. Hence, the German Consortium prayed that a writ of temporary restraining order be issued against petitioner ERTI and, after hearing, a writ of preliminary injunction be likewise issued ordering petitioner ERTI to cease and desist from misrepresenting to third parties or the public that it has any right or interest in the waste management center at CSEZ.[14]

Petitioners filed their Opposition to the application for preliminary injunction on February 7, 2001. The following day, February 8, 2001, petitioners sent respondents, through Mr. Holger Holst, a letter demanding that the parties proceed to arbitration in accordance with Section 17 of the MOA. At the hearings on the application for injunction, petitioners objected to the presentation of evidence on the ground that the trial court had no jurisdiction over the case since the German Consortium was composed of foreign corporations doing business in the country without a license. Moreover, the MOA between the parties provides that the dispute should be referred to arbitration.

The trial court overruled the objection and proceeded with the hearing. On June 28, 2001, the trial court issued an Order granting the writ of preliminary injunction.[15] Petitioners filed a motion for reconsideration, which was denied in a Resolution dated November 21, 2001.

On January 17, 2002, petitioners filed a petition for *certiorari* and prohibition under Rule 65 of the Rules of Court before the Court of Appeals, assailing the trial court's Orders dated June 28, 2001 and November 21, 2001.

Meanwhile, on February 11, 2002, the temporary restraining order issued was lifted in view of respondents' failure to file sufficient bond.[16] On September 6, 2002, all proceedings in

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[14] Complaint, Annex I, *Rollo*, p. 98.

[15] Annex B, *Rollo*, p. 57.

[16] Annex J, *Rollo*, p. 108.

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Civil Case No. 10049 were suspended until the petition for *certiorari* pending before the Court of Appeals shall have been resolved.[17]

On May 15, 2003, the Court of Appeals dismissed the petition for *certiorari*. Petitioners' Motion for Reconsideration was denied in a Resolution dated August 25, 2003.

Hence, this petition arguing that the Court of Appeals committed reversible error in:

(a) Ruling that petitioners are estopped from assailing the capacity of the respondents to institute the suit for injunction

(b) Ruling that respondents are entitled to an injunctive writ.

(c) Not holding that the dispute is covered by the arbitration clause in the memorandum of agreement.

(d) Issuing the writ of preliminary injunction that is tantamount to a decision of the case on the merits.[18]

The petition is partly meritorious.

There is no general rule or governing principle laid down as to what constitutes "doing" or "engaging in" or "transacting" business in the Philippines. Thus, it has often been held that a single act or transaction may be considered as "doing business" when a corporation performs acts for which it was created or exercises some of the functions for which it was organized.[19] We have held that the act of participating in a bidding process constitutes "doing business" because it shows the foreign corporation's intention to engage in business in the Philippines. In this regard, it is the performance by a foreign corporation of the acts for which it was created, regardless of volume of business, that determines whether a foreign corporation needs a license or not. [20]

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[17] Annex K, *Rollo*, p. 109.

[18] *Rollo*, pp. 22-23.

[19] *Communication Materials and Design, Inc. v. Court of Appeals*, G.R. No. 102223, 22 August 1996, 260 SCRA 673.

[20] *Hutchison Ports Philippines Limited v. Subic Bay Metropolitan Authority*, G.R. No. 131367, 31 August 2000, 339 SCRA 434.

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Consequently, the German Consortium is doing business in the Philippines without the appropriate license as required by our laws. By participating in the bidding conducted by the CDC for the operation of the waste management center, the German Consortium exhibited its intent to transact business in the Philippines. Although the Contract for Services provided for the establishment of a local corporation to serve as respondents' representative, it is clear from the other provisions of the Contract for Services as well as the letter by the CDC containing the disapproval that it will be the German Consortium which shall manage and conduct the operations of the waste management center for at least twenty-five years. Moreover, the German Consortium was allowed to transact with other entities outside the CSEZ for solid waste collection. Thus, it is clear that the local corporation to be established will merely act as a conduit or extension of the German Consortium.

As a general rule, unlicensed foreign non-resident corporations cannot file suits in the Philippines. Section 133 of the Corporation Code specifically provides:

> SECTION 133. No foreign corporation transacting business in the Philippines without a license, or its successors or assigns, shall be permitted to maintain or intervene in any action, suit or proceeding in any court or administrative agency of the Philippines, but such corporation may be sued or proceeded against before Philippine courts or administrative tribunals on any valid cause of action recognized under Philippine laws.

A corporation has legal status only within the state or territory in which it was organized. For this reason, a corporation organized in another country has no personality to file suits in the Philippines. In order to subject a foreign corporation doing business in the country to the jurisdiction of our courts, it must acquire a license from the Securities and Exchange Commission (SEC) and appoint an agent for service of process. Without such license, it cannot institute a suit in the Philippines. [21]

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[21] *Subic Bay Metropolitan Authority v. Universal International Group of Taiwan,* G.R. No. 131680, 14 September 2000, 340 SCRA 359, citing *Communication Materials and Design v. Court of Appeals, supra.*

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However, there are exceptions to this rule. In a number of cases,[22] we have declared a party estopped from challenging or questioning the capacity of an unlicensed foreign corporation from initiating a suit in our courts. In the case of *Communication Materials and Design, Inc. v. Court of Appeals*,[23] a foreign corporation instituted an action before our courts seeking to enjoin a local corporation, with whom it had a "Representative Agreement", from using its corporate name, letter heads, envelopes, sign boards and business dealings as well as the foreign corporation's trademark. The case arose when the foreign corporation discovered that the local corporation has violated certain contractual commitments as stipulated in their agreement. In said case, we held that a foreign corporation doing business in the Philippines without license may sue in Philippine Courts a Philippine citizen or entity that had contracted with and benefited from it.

Hence, the party is estopped from questioning the capacity of a foreign corporation to institute an action in our courts where it had obtained benefits from its dealings with such foreign corporation and thereafter committed a breach of or sought to renege on its obligations. The rule relating to estoppel is deeply rooted in the axiom of *commodum ex injuria sua non habere debet* — no person ought to derive any advantage from his own wrong.

In the case at bar, petitioners have clearly not received any benefit from its transactions with the German Consortium. In fact, there is no question that petitioners were the ones who have expended a considerable amount of money and effort preparatory to the implementation of the MOA. Neither do petitioners seek to back out from their obligations under both the MOU and the MOA by challenging respondents' capacity

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[22] *Asia Banking Corporation v. Standard Products*, 46 Phil. 144 (1924); *Antam Consolidated v. Court of Appeals*, G.R. No. L-61523, 31 July 1986, 143 SCRA 288; *Merril Lynch Futures v. Court of Appeals*, G.R. No. 97816, 24 July 1992, 211 SCRA 824; *Georg Grotjahn GMBH & Co. v. Isnani*, G.R. No. 109272, 10 August 1994, 235 SCRA 216.

[23] G.R. No. 102223, 22 August 1996, 260 SCRA 673.

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to sue. The reverse could not be any more accurate. Petitioners are insisting on the full validity and implementation of their agreements with the German Consortium.

To rule that the German Consortium has the capacity to institute an action against petitioners even when the latter have not committed any breach of its obligation would be tantamount to an unlicensed foreign corporation gaining access to our courts for protection and redress. We cannot allow this without violating the very rationale for the law prohibiting a foreign corporation not licensed to do business in the Philippines from suing or maintaining an action in Philippine courts. The object of requiring a license is not to prevent the foreign corporation from performing single acts, but to prevent it from acquiring domicile for the purpose of business without taking the steps necessary to render it amenable to suits in the local courts.[24] In other words, the foreign corporation is merely prevented from being in a position where it takes the good without accepting the bad.

On the issue of whether the respondents were entitled to the injunctive writ, the petitioners claim that respondents' right is not in *esse* but is rather a future right which is contingent upon a judicial declaration that the MOA has been validly rescinded. The Court of Appeals, in its decision, held that the MOA should be deemed subject to a suspensive condition, that is, that CDC's prior written consent must be obtained for the validity of the assignment.

This issue must be resolved in a separate proceeding. It must be noted that the hearing conducted in the trial court was merely a preliminary hearing relating to the issuance of the injunctive writ. In order to fully appreciate the facts of this case and the surrounding circumstances relating to the agreements and contract involved, further proof should be presented for consideration of the court. Likewise, corollary matters, such as whether either of the parties is liable for damages and to what extent, cannot be resolved with absolute certainty, thus rendering any decision we might make incomplete as to fully dispose of this case.

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[24] *Marshall-Wells Co. v. Elser and Co.*, 46 Phil. 70 (1924).

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More importantly, it is evident that CDC must be made a proper party in any case which seeks to resolve the effectivity or ineffectivity of its disapproval of the assignment made between petitioners and respondent German Consortium. Where, as in the instant case, CDC is not impleaded as a party, any decision of the court which will inevitably affect or involve CDC cannot be deemed binding on it.

For the same reason, petitioners' assertion that the instant case should be referred to arbitration pursuant to the provision of the MOA is untenable.

We have ruled in several cases that arbitration agreements are valid, binding, enforceable and not contrary to public policy such that when there obtains a written provision for arbitration which is not complied with, the trial court should suspend the proceedings and order the parties to proceed to arbitration in accordance with the terms of their agreement.[25] In the case at bar, the MOA between petitioner ERTI and respondent German Consortium provided:

> 17. Should there be a disagreement between or among the Parties relative to the interpretation or implementation of this Agreement and the collateral documents including but not limited to the Contract for Services between GERMAN CONSORTIUM and CDC and the Parties cannot resolve the same by themselves, the same shall be endorsed to a panel of arbitrators which shall be convened in accordance with the process ordained under the Arbitration Law of the Republic of the Philippines.[26]

Indeed, to brush aside a contractual agreement calling for arbitration in case of disagreement between parties would be a step backward.[27] But there are exceptions to this rule. Even if

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[25] *Mindanao Portland Cement Corporation v. McDonough Construction Company of Florida,* 126 Phil. 78 (1967); *Chung Fu Industries (Phils.), Inc. v. Court of Appeals*, G.R. No. 96283, 25 February 1992, 206 SCRA 545; *Puromines, Inc. v. Court of Appeals,* G.R. No. 91228, 22 March 1993, 220 SCRA 281; *National Power Corporation v. Court of Appeals,* G.R. No. 107631, 26 February 1996, 254 SCRA 116.

[26] *Rollo,* p. 86.

[27] *BF Corporation v. Court of Appeals*, G.R. No. 120105, 27 March 1998, 288 SCRA 267.

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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. Clearly, the issue before us could not be speedily and efficiently resolved in its entirety if we allow simultaneous arbitration proceedings and trial, or suspension of trial pending arbitration.[28]

As discussed earlier, the dispute between respondent German Consortium and petitioners involves the disapproval by the CDC of the assignment by the German Consortium of its rights under the Contract for Services to petitioner ERTI. Admittedly, the arbitration clause is contained in the MOA to which only the German Consortium and petitioner ERTI were parties. Even if the case is brought before an arbitration panel, the decision will not be binding upon CDC who is a non-party to the arbitration agreement. What is more, the arbitration panel will not be able to completely dispose of all the issues of this case without including CDC in its proceedings. Accordingly, the interest of justice would only be served if the trial court hears and adjudicates the case in a single and complete proceeding.

Lastly, petitioners question the propriety of the issuance of writ of preliminary injunction claiming that such is already tantamount to granting the main prayer of respondents' complaint without the benefit of a trial. Petitioners point out that the purpose of a preliminary injunction is to prevent threatened or continuous irremediable injury to some of the parties before their claims can be thoroughly studied and decided. It cannot be used to railroad the main case and seek a judgment without a full-blown trial as in the instant case.

The Court of Appeals ruled that since petitioners did not raise this issue during the hearing on the application for preliminary injunction before the trial court, the same cannot be raised for the first time on appeal and even in special civil actions for *certiorari* as in this case.

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[28] *Del Monte Corporation-USA v. Court of Appeals*, G.R. No. 136154, 7 February 2001, 351 SCRA 373; see also *Agan, Jr. v. Philippine International Air Terminals Co., Inc.*, G.R. No. 155001, 5 May 2003, 402 SCRA 612.

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At the outset, it must be noted that with the finding that the German Consortium is without any personality to file the petition with the trial court, the propriety of the injunction writ issued is already moot and academic. Even assuming for the sake of argument that respondents have the capacity to file the petition, we find merit in the issue raised by petitioners against the injunction writ issued.

Before an injunctive writ can be issued, it is essential that the following requisites are present: (1) there must be a right *in esse* or the existence of a right to be protected; and (2) the act against which injunction to be directed is a violation of such right.[29] The *onus probandi* is on movant to show that there exists a right to be protected, which is directly threatened by the act sought to be enjoined. Further, there must be a showing that the invasion of the right is material and substantial and that there is an urgent and paramount necessity for the writ to prevent a serious damage.[30]

Thus, it is clear that for the issuance of the writ of preliminary injunction to be proper, it must be shown that the invasion of the right sought to be protected is material and substantial, that the right of complainant is clear and unmistakable and that there is an urgent and paramount necessity for the writ to prevent serious damage.[31] At the time of its application for an injunctive writ, respondents' right to operate and manage the waste management center, to the exclusion of or without any participation by petitioner ERTI, cannot be said to be clear and unmistakable. The MOA executed between respondents and petitioner ERTI has not yet been judicially declared as rescinded when the

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[29] *Philippine Sinter Corporation and Phividec Industrial Authority v. Cagayan Electric Power And Light Co., Inc.,* G.R. No. 127371, 25 April 2002, 381 SCRA 582; see also *Public Estates Authority v. Court of Appeals*, G.R. No. 112172, 20 November 2000, 345 SCRA 96.

[30] *Gustilo v. Real, Sr.,* A.M. No. MTJ-00-1250, 28 February 2001, 353 SCRA 1.

[31] *Zabat v. Court of Appeals*, G.R. No. 122089, 23 August 2000, 338 SCRA 551.

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complaint was lodged in court.[32] Hence, a cloud of doubt exists over respondent German Consortium's exclusive right relating to the waste management center.

WHEREFORE, the decision of the Court of Appeals in CA-G.R. SP No. 68923 dated May 15, 2003 is *REVERSED* and *SET ASIDE*. The Orders of the trial court dated June 28, 2001 and November 21, 2001 are *ANNULLED* and *SET ASIDE* and Civil Case No. 10049 is *DISMISSED* for lack of legal capacity of respondents to institute the action. Costs against respondents.

SO ORDERED.

Davide, Jr., C.J. (Chairman), Quisumbing, Carpio, and *Azcuna, JJ.,* concur.

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[32] Article 1191 of the Civil Code of the Philippines.