ALTERNATIVE DISPUTE RESOLUTION IN THE PHILIPPINES:

Wave of the Future or the Road Less Traveled?

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"Life cannot subsist in society but by reciprocal concessions."

– Edmund Burke

Clogged court dockets, expensive litigation fees, slow-paced court proceedings and the rigid and adversarial system of courts have encouraged parties to disputes to resort to several forms of alternative dispute resolution (ADR) procedures. Considered an alternative to litigation, ADR procedures include arbitration, mediation, conciliation, mini-trial and early neutral evaluation, among others. ADR methods are encouraged by the Philippine Supreme Court and have been held valid and constitutional in our jurisdiction even before laws were enacted to regulate these procedures.[1] As embodied in section 2 of Republic Act No. 9285 or the Alternative Dispute Resolution Act of 2004[2] enacted by the Philippine Congress, it is the declared policy of the State to actively promote party autonomy in the resolution of disputes or the freedom of the parties to make their own arrangements to resolve their disputes. Towards this end, the State shall encourage and actively promote the use of ADR as an important means to achieve speedy and impartial justice and declog court dockets. To achieve this, the State shall provide means for the use of ADR as an effective tool and alternative procedure for the resolution of appropriate cases.

The commonly used ADR methods are **arbitration, mediation and conciliation.** These three are primarily resorted to by parties as an expedient and cost-effective ways of settling disputes.

Arbitration has been defined under the ADR Act as a *voluntary dispute resolution process in which one or more arbitrators appointed in accordance with the agreement of the parties resolve a dispute by rendering an award.* It is a non-adversarial settlement wherein the parties are free to choose the arbitrators that will compose the tribunal, the procedure to be followed in the proceedings, the venue of arbitration, and the substantive law that will govern the proceedings.[3]

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[1] *Puromines v. CA,* 220 SCRA 281 (1993), at 289.

[2] Hereinafter referred as ADR Act.

[3] ADR Act, §1. (Italics supplied)

Another form of ADR is mediation which includes conciliation. Mediation, under the ADR Act, is defined as *a voluntary process in which a mediator, selected by the disputing parties facilitates communication and negotiation and assists the parties, in reaching a voluntary agreement regarding a dispute.* Unlike an arbitrator, however, a mediator selected by the parties usually does not have the power to compel the parties to accept a recommended solution. Nevertheless, the parties may agree in the settlement agreement that the mediator shall become a sole arbitrator for the dispute and shall treat the settlement agreement as an arbitral award.[4] Although parties have the freedom to agree to submit their disputes to these alternative dispute resolution methods, it must be noted that not all subject matters of disputes may be resolved through these means. Section 6 of the ADR Act provides for exceptions to the application of the Act. In general, resort to ADR methods cannot be had if the dispute involves matters which are, as the law provides, not subject to compromise.

ADR methods in this jurisdiction can be traced as far back as the barangay and other forms of village governments before the Spaniards came in 1521. In these early days, the *datus* used to settle disputes of their constituents, and their decisions were invariably accepted as having authority and finality.[5]

The need for a law to regulate arbitration in general was acknowledged when Republic Act No. 876 or Philippine Arbitration Law of 1953[6] was passed.[7] R.A. 876 was adopted to supplement the provisions of chapters one and two, Title XIV of the 1950 Civil Code of the Philippines on compromises and arbitrations.[8] The enactment of R.A. No. 876 officially adopted the view that arbitration is a speedy and effective method of settling disputes.

Concomitant to the increasing growth of global commerce as well as to the advances in the means of communication and transportation is

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[4] ADR Act, §.17, ¶ d.

[5] J. Manguiat, Commercial Arbitration,Voluntary Arbitration: Whys and Wherefores (1987)

[6] Hereinafter referred as R.A. 876.

[7] R. Rodriguez, Philippine Arbitration and the UNCITRAL (United Nations Commission of International Trade Law) Model Law (1996).

[8] *Chung Fu Industries v. CA,* 206 SCRA 545 (1992), at 551.

the rising number of commercial transactions which unavoidably give rise to commercial disputes. As a result of the rapid globalization of the world economy, it is inevitable that parties to a contract are of different nationalities and have their places of business in different countries. Necessarily, each party will prefer to resolve the dispute in his own country where he is familiar with the laws, language and customs than to submit to the laws and procedures of the other party's country. The reluctance of parties to have matters resolved in a foreign court gave rise to Alternative Dispute Resolution methods.

These ADR methods, as cited by the Supreme Court in the case of *BF Corp. v. CA,* are now rightfully vaunted as the "wave of the future" in international relations.[9]

As a consequence of the increasing awareness that ADR methods, particularly arbitration, are better alternatives to litigation in resolving disputes especially in the field of international commerce, the United Nations Commission on International Trade Law adopted the UNCITRAL Model Law. The Model Law is designed to meet concerns relating to the current state of national laws on arbitration and is intended to be used as a basis for the harmonization and improvement of national laws.[10] The main thrust of the law is to meet head on the inadequacies and disparities of domestic laws on arbitration which make them inappropriate and inapplicable to international cases. The Model Law is also designed to encourage states to update their own domestic laws by enacting modern legislation with respect to domestic cases.

Consistent with the UNCITRAL Model Law, the ADR Act of 2004 entitled "An act to institutionalize the use of an ADR system in the Philippines and to establish the office for ADR, and for other purposes" was recently enacted. The law promotes the use of different methods of ADR for the speedy and impartial dispensation of justice. The ADR Act expressly adopted under Section 19 the UNCITRAL Model Law as the law governing international commercial arbitration in the Philippines. By embracing the Model Law, the ADR Act has partly eased the concern and the unwilling-

[9] 288 SCRA 267 (1998), at 286.

[10] Explanatory Note by the UNCITRAL Secretariat on the Model Law on International Commercial Arbitration, http://www.sice.oas.org/DISPUTE/comarb/UNCITRAL/icomarbe3.asp (last accessed January 29, 2007).

ness of foreign parties to a contract to have matters submitted for arbitration here in the Philippines. The Act has now opened the window for the Philippines to be a venue for international commercial arbitration and mediation. However, in so far as domestic cases are concerned, the ADR Act provides that the same shall still be governed by Republic Act No. 876.

Aside from the ADR Act and Republic Act No. 876, Executive Order No. 1008 otherwise known as the "Construction Industry Arbitration Law of 1985" governs arbitration of construction disputes in the Philippines. Currently, there are several organizations and centers dealing with ADR methods in the Philippines: the PCHC (Philippine Clearing House Corporation) wherein member banks cannot invoke the jurisdiction of the trial court without prior recourse to the PCHC Arbitration Committee; the Philippine Dispute Resolution Centre, Inc. (PDRCI) established by the Philippine Chamber of Commerce and Industry which was created to encourage the use of modes of ADR for settlement of domestic and international disputes in the Philippines; the Office for ADR, an agency attached to the DOJ which is currently being formed to promote the use of ADR in the private and public sector; the Construction Industry Arbitration Commission (CIAC) which has original and exclusive jurisdiction over construction disputes which are subject to an arbitration clause or arbitration agreement; and those voluntary arbitrators governed by the Labor Code.

In the international setting, the most popular choices for arbitration venue are the financial capitals Hongkong, Singapore and Paris. The International Chamber of Commerce (ICC) International Arbitration Court remains to be the most established and reputable international arbitral institution. In Asia, the two leading centers for international commercial arbitration are the Singapore International Arbitration Centre (SIAC) of Singapore and the Hongkong International Arbitration Centre (HKIAC) of Hongkong.

ADR AS A BETTER ALTERNATIVE TO LITIGATION

Time and again, ADR methods, particularly arbitration, have been proven to be more advantageous than the traditional and rigid court litigation. Parties to commercial disputes have been attracted to the unique attribute of, as well as to the benefits that may be gained from

these friendly proceedings. Set forth below are the advantages of ADR methods which make them better and effective alternatives to court litigation.[11]

Party Autonomy

ADR methods are primarily highlighted by their unique attribute of party autonomy. The emphasis of these procedures is on the voluntary agreement of the parties in submitting their dispute and in choosing the arbitrators, the venue or place of arbitration, the language to be used, and the rules or procedure to be followed. In no way can the parties freely agree on these matters when they file a case in court. As mentioned earlier, Section 2 of the ADR Act declares it a policy of the State to actively promote part autonomy in the resolution of disputes or the freedom of the party to make their own arrangements to resolve their disputes. The freedom of the parties to agree on the different aspects, which will help them resolve their dispute, has definitely added to the appeal of ADR methods.

Party autonomy is best illustrated in several aspects. The *first aspect* is the freedom of the parties to choose the would-be judges to their dispute. While cases filed in courts are being raffled before they are assigned to a judge, parties in ADR procedures are free to select the mediator or the arbitrator or panel of arbitrators. In this way, parties are assured and confident that the arbitrator of their choice is competent to resolve their dispute. Party autonomy allows the parties to choose arbitrators who are experts in the field relevant to the subject matter of the dispute when the cases are technical in nature and are therefore better equipped to resolve the dispute as soon as possible.

The *second aspect* is the freedom of the parties to agree on the procedure to be followed by the tribunal in conducting the proceedings. Such is explicitly recognized under Article 19 (International Commercial Arbitration) and under Article 6 (International Commercial Conciliation) of the UNCITRAL Model Law. The proceedings being less formal and

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[11] M. Marcos, *Concept, Legal Basis and Scope of Commercial Arbitration, Commercial Arbitration,* UP Law Center (1983); B. Ambion, *Commercial Arbitration Facilities and Procedure,* 3 PHIL. INT'L. L. J. 8 (1964); E. Ceniza, *International Commercial Arbitration: Its relevance in the Philippines,* http://www.pdrci.org/v1/index.php? (last accessed December 28, 2006).

in conformity with the agreement of the parties, entail the presentation by the parties of the evidence they desire without being bound by the strict Rules on Evidence. As a result, the parties are given full opportunity to present their respective sides.

The *third aspect* is the freedom of the parties to choose the place of arbitration which is expressly provided in the ADR Act[12] and the UNCITRAL Model Law. This advantage is particularly useful in international commercial transactions where the parties have their places of business in different states. The place of arbitration or mediation can be any place agreed upon by the parties. In contrast, parties to a commercial transaction, as a general rule, should only file a case in a court found in the place where either party has his business.

The *last aspect* is the privilege given to the parties to choose the language to be used in ADR proceedings. Under the ADR Act,[13] if parties fail to agree on the language to be used, the language shall be English in international arbitration and English or Filipino in domestic arbitration.

Speed and Cost

Generally, ADR methods are considered as a speedy and cost-efficient ways of settling disputes. Issues submitted to arbitral tribunals and through the help of mediators are resolved in a very short period of time. Usually, awards are rendered and agreements are reached in a few months, depending on the complexity of the issue involved. On the contrary, due to clogged court dockets and appeals resorted to by a party, a simple commercial or civil case can drag on for years. Thus resorting to judicial process can be excessively costly unlike resorting to ADR methods. Although the parties in ADR proceedings will also incur expenses such as filing fees, administrative fees, and arbitrator's fees, these costs are still much lower than the cost of going to court, considering that the issues are resolved in a short period of time.

Privacy and Confidentiality

Unlike court litigation, greater degree of privacy and confidentiality can be enjoyed by the parties in ADR proceedings. The proceedings are

[12] ADR Act, § 15 and 30.

[13] *Ibid.,* § 31.

not open to third persons who are not party to the transaction, much more to the public. Section 9 of the ADR Act provides that information obtained through mediation shall be privileged and confidential subject to certain exceptions as provided for in Section 11 of the same Act. Inasmuch as arbitration is concerned, Section 23 of the same Act states that arbitration proceedings, including the records, evidence, and the arbitral award, shall be considered confidential and shall not be published subject to two exceptions provided in the same section. The confidentiality of ADR proceedings protects the parties from unwanted intrusion thereby hastening the dispute resolution process.

Awards are Final and Binding

As a rule, an award rendered by an arbitral tribunal is final and binding on the parties. Generally, courts shall not review the findings of fact made by the arbitral tribunals. However, this rule admits of exceptions. Article 34 paragraph 1 of the UNCITRAL Model Law on International Commercial Arbitration provides that:

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

At the same time, Section 41 of ADR Act of 2004 provides:

> Vacation Award. – A party to a domestic arbitration may question the arbitral award with the appropriate regional trial court in accordance with the rules of procedure to be promulgated by the Supreme Court only on those grounds enumerated in Section 25 of Republic Act No. 876.

Hence, the awards may be subject to judicial review only on limited grounds specifically provided for by laws.

PROCEDURE IN ADR METHODS

In order to avoid confusion, it would be better to concentrate on one particular method and the procedure involved in such. A look into the procedure involved in arbitration proceedings shall be useful in order for one to understand the process of ADR methods.

Since resort to arbitration generally depends on the agreement of the parties, the same can only be commenced by the demand of one party to the other to submit a controversy to arbitration. On the other hand, in cases where there is no arbitration clause in the contract, parties may execute a submission agreement to arbitrate. The demand for arbitration in accordance with the contract shall be served upon the other party.[14] Thereafter, parties will appoint the arbitrator/arbitral tribunal based on the procedure agreed upon by them.[15] Failing such agreement, in arbitration with three arbitrators, each party shall appoint one arbitrator, and the two chosen arbitrators shall appoint the third arbitrator.

Generally, arbitration proceedings are administered by an arbitral institution or entity, an example of which is the International Chamber of Commerce (ICC). These arbitral institutions have a list of qualified and competent arbitrators from which the parties shall choose the arbitrators who will adjudicate their dispute. The arbitrator appointed shall either accept or decline the appointment but must first disclose circumstances likely to give rise to justifiable doubts as to his impartiality or independence.[16] An arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to his impartiality or independence, or if he does not possess qualifications agreed to by the parties.[17]

After their appointment, the arbitrators shall set the time and place for the hearing of the matter submitted to them and must cause notice thereof to be given to the parties. Subject to any contrary agreement by the parties, the Arbitral Tribunal shall decide whether to hold oral hearings for the presentation of evidence or to conduct proceedings on the basis of documents and other materials.[18] Parties may even agree to conduct an informal hearing which may be held at any place. During the hearing, all statements, documents or other information supplied to the Arbitral Tribunal by one party shall be communicated to the other party.[19]

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[14] Rep. Act No. 876, §5 (a).

[15] Implementing Rules and Regulations (IRR)-ADR Act, § 4.3.11.2.

[16] *Ibid.,* § 4.3.12..1.

[17] *Ibid.,* § 4.3.12.2.

[18] *Ibid.,* § 4.5.24.1.

[19] *Ibid.,* § 4.5.24.

The arbitrators shall be the sole judge of the materiality/relevancy of the evidence offered and shall not be bound to conform to the rules on evidence.[20] After the close of the hearing, the arbitral tribunal shall then render an award. The award shall be made in writing and shall be signed by the arbitrator or arbitrators.[21] It shall state the reasons upon which it is based and the date and place of arbitration.[22] A copy of the award shall be delivered to each party. An arbitral award may be set aside by the court on limited grounds provided under section 4.5.34.2 IRR-ADR Act. In case no appeal is taken by a party to the courts to set aside the arbitral ward, the same shall become final and executory.

SALIENT FEATURES OF ADR ACT

A study of the ADR Act of 2004 adopting the UNCITRAL Model Law can shed some light in understanding its salient features. At this point, this article will focus on Chapter 4 of the ADR Act which deals with International Commercial Arbitration, particularly, the Act's provisions with regard to jurisdiction, venue, specific cases of court involvement and recognition and enforcement of awards.

Jurisdiction

An arbitral body once constituted has the power to examine the question of its own competence. The UNCITRAL Model Law under Article 16, paragraph 1 adopts the principle of *"kompetenz-kompetenz,"* which means that the arbitral tribunal has the power to rule on its own jurisdiction, that is, on the very foundation of its mandate and power.[23] As a rule, the arbitral tribunal can take cognizance only of those disputes submitted to it. Parties may not always intend arbitration to be the sole means of settling disputes. They may agree to refer to the courts those disputes arising from other aspects of the contract. In this case, the arbitral tribunal will have no jurisdiction since the same were

[20] R.A. 876, § 15.

[21] IRR-ADR Act, § 4.5.31.1.

[22] IRR ADR Act, § 4.5.31.2-3.

[23] Explanatory Note by the UNCITRAL Secretariat on the Model Law on International Commercial Arbitration, http//www.sice.oas.org/DISPUTE/comarb/UNCITRAL/icomarbe3.asp (last accessed January 29, 2007).

not submitted to it for resolution. Furthermore, the terms of the award rendered by the tribunal should be confined to such disputes submitted to them.

In International Commercial Arbitration, parties are free to agree as to what issues shall be submitted to arbitration. The Act merely defined the term "commercial" but does not specifically provide for exceptions where international commercial arbitration shall not apply. As to matters not particularly pertaining to commercial transactions, the Act expressly provides for several exceptions which cannot be the proper subjects of ADR methods.[24]

Article 16, paragraph 1 of the UNCITRAL Model Law adopted in the ADR Act,[25] also enunciates the independent character of the arbitration clause, also known as the doctrine of separability or severability, – an arbitration agreement is independent of the main contract. The arbitration agreement is to be treated as separate from the main contract and it does not automatically terminate when the contract of which it is a part of comes to an end.[26] The separability doctrine was dwelt upon in the recent case of *Gonzales and Panel of Arbitrators v. Climax Mining Ltd.*[27] where the Supreme Court held that petitioner's argument that the Addendum contract was null and void and, therefore, the arbitration clause therein was void as well, was not tenable. The validity of the contract containing the agreement to submit to arbitration does not affect the applicability of the arbitration clause itself. A contrary

[24] ADR Act § 6 – Exception to the application of this Act – The provisions of this Act shall not apply to resolution or settlement of the following:

a) labor disputes covered by Presidential Decree No. 442, otherwise known as the Labor Code of the Philippines, as amended and its Implementing Rules and Regulations;
b) the civil status of persons;
c) the validity of a marriage;
d) any ground for legal separation;
e) the jurisdiction of courts;
f) future legitime;
g) criminal liability; and
h) those by which by law cannot be compromised

[25] Rep. Act No. 9285, Implementing Rules and Regulations, § 4.4.16.1.

[26] P. Capper, *International Arbitration: A Handbook* (2004), at 12, cited in the case of *Gonzales and Panel of Arbitrators vs. Climax Mining Ltd.*

[27] G.R. No. 161957, January 22, 2007.

ruling would suggest that a party's mere repudiation of the main contract is sufficient to avoid arbitration. That is exactly the situation that the separability doctrine, as well as jurisprudence applying it, seeks to avoid.

The doctrine was also applied by the Singapore High Court in the case of *Government of the Philippines v. PIATCO.*[28] The dispute between the parties arose from a project involving the construction of a third terminal building at the Ninoy Aquino International Airport in Manila. There had been a long history of dealings between the parties which resulted in the conclusion of various concession agreements including the 1997 concession contract, an Amended and Restated Concession Agreement (ARCA) dated November 26, 1998 and various amendments and supplements.

The situation that existed in this case was that there had been several petitioners in the Philippine Supreme Court challenging the validity of the ARCA and that the Philippine Supreme Court had come to a decision that the ARCA was null and void. One of the Government of the Philippines' grounds for challenging the jurisdiction of the Singapore Arbitral tribunal was that the ARCA being void, nothing remained and no arbitration tribunal could be constituted to consider disputes of parties arising from a non-existent contract. Yet at the same time, the Arbitration tribunal was being asked to consider what law governed the arbitration agreement and what law governed the procedure of the tribunal.[29] The High Court of Singapore upheld the contention of PIATCO that consideration of the principle of severability was a necessary ingredient in the tribunal's reasoning. It held that the arbitration agreement survived despite the Philippine Supreme Court's nullification of the main contract.

Venue and Place of Arbitration

As a rule, parties are free to agree on the place or venue of arbitration. In international commercial arbitration, parties can even agree

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[28] Suit No. OM 3/2005, SGHC 206, 17 November 2006, (http://lwb.lawnet.sg/legal/lgl/rss/supremecourt/51718.html [last accessed January 29, 2007]).

[29] *Government of the Philippines v. PIATCO,* Suit No. OM 3/2005, SGHC 206, 17 November 2006. (http://lwb.lawnet.sg/legal/lgl/rss/supremecourt/51718.html [last accessed January 29, 2007]), SGHC 206 at par. 28.

to conduct the arbitration proceedings in a third state or a neutral state to ensure impartiality. In case the parties fail to agree, the ADR Act provides that the arbitral tribunal, having regard to the circumstances of the case as well as the convenience of the parties shall determine the place of arbitration. Aside from this, the Act also provides that in the absence of any agreement between the parties and the decision of the tribunal as to the venue, the place or locale of arbitration shall be in Metro Manila.[30]

In contrast, as previously stated, disputes between parties having their places of business in different countries may file a case only in the jurisdiction where either party has a place of business. In this jurisdiction, venue of litigation is governed by the Rules of Court.[31]

When the parties involved are from different states, both prefer to submit the dispute to international commercial arbitration in a neutral state as they want to avoid the adverse influence of each other's national law. Venue is therefore important in this kind of arbitration due to the fact that the courts of the place where the arbitration proceedings are conducted always have a role in such proceedings.

Specific Cases of Court Involvement

Section 4.1.5.1 of the Implementing Rules and Regulation of the ADR Act of 2004 clearly states that "In matters governed by this chapter, no court shall intervene except where so provided in the ADR Act." This not only emphasizes the limited role of the court in arbitration proceedings but also affirms the promotion of arbitration as a means to achieve speedy and impartial justice. The said rule admits of several exceptions that recognize the support role of the courts in arbitration:

- **First exception**

As a rule, courts are permitted to grant interim and provisional reliefs during the pendency of arbitral proceedings. On the other hand, arbitral tribunals are also given the authority to grant interim measures such as, but not limited to preliminary injunction, appointment of

[30] ADR Act, § 30.

[31] RULES OF COURT, Rule 4.

receivers, detention, preservation and inspection of property.[32] Since both the court and the arbitral tribunal are given the same power, does it mean that the parties have the freedom to choose which body, the court or the arbitral tribunal, to request interim measures from?

The ADR Act provides in Section 28, paragraph (a) that: "It is not incompatible with an arbitration agreement for a party, before constitution of the arbitral tribunal, to request from a Court an interim measure of protection and for the Court to grant such measure. After constitution of the arbitral tribunal and during arbitral proceedings, a request for an interim measure of protection, or modification thereof, may be made with the arbitral tribunal or to the extent that the arbitral tribunal has no power to act or is unable to act effectively, the request may be made with the Court." Although the court has authority to grant interim measures, the same is limited by the phrase "to the extent that the arbitral tribunal has no power to act or is unable to act effectively." This definitely does not provide for concurrent power of the courts and the arbitral tribunal to grant interim measure of protection.[33] At the very

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[32] ADR Act, § 28 ¶ b The following rules on interim or provisional relief shall be observed:

1) Any party may request that interim and provisional relief be granted against the adverse party.

2) Such relief may be granted:

i) to prevent irreparable loss or injury

ii) to provide security for the performance of any obligation;

iii) to produce or preserve any evidence; or

iv) to compel any other appropriate act or omission.

3) The order granting provisional relief may be conditioned upon the provision of security or any act or omission specified in the order.

4) Interim or provisional relief is requested by written application transmitted by reasonable means to the court or arbitral tribunal as the case may be and the party against whom the relief is sought, describing in appropriate detail the precise relief, the party against whom the relief is requested, the grounds for the relief, and evidence supporting the request.

5) The order shall be binding upon the parties.

6) Either party may apply with the Court for assistance in implementing and enforcing an interim measure ordered by an arbitral tribunal.

7) A party who does not comply with the order shall be liable for all damages resulting from noncompliance, including all expenses, and reasonable attorney's fees, paid in obtaining the order's judicial enforcement.

[33] E. Ceniza, *Interim Measures: The Role of the Arbitral Tribunal and the Courts* (http:/pdrci.org/page 4.html [last accessed on December 17, 2006]).

least, the court's power to grant interim measures comes into play only when these are beyond the power of the tribunal to grant. Likewise, the limited authority of the court is recognized in instances when parties apply with the court for assistance in implementing or enforcing an interim measure ordered by an arbitral tribunal.

With the limitations provided by law as to the court's participation in granting interim reliefs, the same cannot be contemplated as a form of court intervention. Just the same the courts must be reminded to exercise such power sparingly, recognizing the power of the arbitral tribunal in order to avoid court involvement and thereby strengthening the role of arbitration.

❑ Second exception

A party may request the Regional Trial Court (RTC) to decide whether the arbitral tribunal has jurisdiction after the latter has ruled against a plea made by a party claiming that it has no jurisdiction.[34] The ADR Act also provides that while such request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award. Notably, the law is silent as to what will happen in case the court rules that the arbitral tribunal has no jurisdiction over the dispute. Will the arbitral proceedings and the award made by the arbitral tribunal pending the request in court be binding on the parties? Or will the court's decision in effect nullify the award and render the arbitral proceedings useless? This is one aspect that lawmakers should consider in order to avoid conflicting decisions and in order to fulfill the purpose of arbitration.

In the case of *Agan Jr. v. PIATCO,*[35] the Supreme Court nullified the contract entered into by the Philippine government and respondent PIATCO and declared the arbitration clause unenforceable. Be that as it may the Philippine government is currently participating in the PIATCO initiated arbitration in Singapore. In the event that the arbitral tribunal renders an award, the question is, can that be enforced in the Philippines despite the Supreme Court's decision nullifying the contract?

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[34] IRR-ADR Act, § 4.4.16.3.

[35] *Agan Jr. et. al v. PIATCO,* 402 SCRA 612 (2003)

In the opinion of Mario E. Valderrama,[36] Deputy Secretary General of the Philippine Dispute Resolution Center, Inc., "the contract contains an international arbitration clause; therefore the dispute between the Government and PIATCO is international, not local. And therefore, the rules are the international rules, not the local rules. Insofar as the legal relationship between the parties to the contract is concerned, the supremacy of the Supreme Court is only within the territorial boundaries of the Philippines. Beyond that, the arbitral tribunal in Singapore is "more supreme" than our Supreme Court because the arbitrators are not bound to follow the result of a national court, except that the arbitrators are under the supervisory jurisdiction of the Singapore Court. At the end of the day it is the decision of the arbitrators that would be recognized and could be enforced in the international scene."[37]

❑ **Third exception**

Recourse to a court against an arbitral award may be made only by an application for setting aside an award. The ADR Act, adopting the grounds laid down by the UNCITRAL Model Law in setting aside an award rendered by the arbitral tribunal provides in Section 4.5.34.2 of its Implementing Rules and Regulations that:

An arbitral award may be set aside by the Regional Trial Court only if:

(a) The party making the application furnishes proof that:

(i) a party to the arbitration agreement referred to in Article 4.5.7 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 Philippines; or

(ii) the party making the application 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, provided that, if the decisions on matters submitted to arbitration can be

[36] He is a professorial lecturer, a Fellow of the Chartered Institute of Arbitrators (UK) affiliated with its East Asia Branch and a Fellow of the Hong Kong Institute of Arbitrators. (M. Valderrama, *Should local courts interfere in the NAIA3 mess?,* http://www.pdrci.org/v1/index.php? [last accessed December 28, 2006]).

[37] M. Valderrama, *Should local courts interfere in the NAIA3 mess?,* (http://www.pdrci.org/v1/index.php? [last accessed December 28, 2006]).

> separated from those not so submitted, only the part of the award which contains decisions on matters not submitted to arbitration may be set aside; or
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> (iv) the composition of the Arbitral Tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of ADR Act from which the parties cannot derogate, or, failing such agreement, was not in accordance with ADR Act; or
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> (b) the Court finds that:
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> (i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of the Philippines;
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> (ii) or the award is in conflict with the public policy of the Philippines.

The grounds for setting aside an award mostly deal with the procedural aspect of arbitration proceedings and the jurisdiction of the arbitral tribunal. In these limited cases, the law allows the parties to resort to court in order to determine whether the requirements have been met and, in case they have not been complied with, the court is given the power to set aside the award rendered.

- **Fourth exception**

The court plays a major role in enforcing arbitral awards in recognition and enforcement of awards. Section 42 of the ADR Act provides that an application for the recognition and enforcement of a foreign arbitral award shall be filed with the Regional Trial Court in accordance with the rules to be promulgated by the Supreme Court. Section 44 of the ADR Act further states that "a foreign arbitral award, when confirmed by the regional trial court, shall be enforced in the same manner as final and executory decisions of courts of law of the Philippines."

Recognition and Enforcement of Awards

It can be said that the recognition and enforcement of awards make up a major reason why arbitration is considered a better alternative in the international setting.

Compared to foreign judgments, arbitral awards in International Commercial Arbitration are readily enforced pursuant to the New York Convention of 1958. The Convention obliges participant countries to enforce arbitral awards as if the awards were made in their countries,

subject to limited grounds on which enforcement may be refused. These grounds are those enumerated under Article V of the New York Convention. As a signatory[38] to the New York Convention, the Philippines has adopted under the ADR Act[39] the provisions of the New York Convention regarding the recognition and enforcement of arbitral awards covered by said convention. As regards foreign arbitral awards not covered by the New York Convention, their recognition and enforcement must be in accordance with the procedural rules to be promulgated by the Supreme Court.[40]

A distinct feature of the ADR Act which must be given emphasis is its provision under Section 44 which distinguishes a foreign arbitral award from a foreign judgment. This characteristic given to arbitral awards definitely adds to the appeal of arbitration. Unlike foreign judgments which are generally not enforceable in other jurisdictions except in cases of reciprocity and comity, arbitral awards are more readily enforceable. The party applying for the enforcement of the arbitral award only needs to file with the RTC the original or duly authenticated copy of the award and the arbitration agreement.[41] Section 44 also provides that "a foreign arbitral award, when confirmed by the RTC, shall be enforced in the same manner as final and executory decisions of courts of law of the Philippines. This provision gives teeth to the very reason behind arbitration as a mode of ADR; otherwise arbitration will not serve its purpose. If parties were allowed to question the award rendered by the tribunal on any ground, then the arbitration proceedings conducted will be rendered useless.

As mentioned earlier, although foreign arbitral awards are recognized and enforceable in this jurisdiction as a result of its adherence to the New York Convention, these may be refused on equitable grounds specifically provided for by the Act.[42] These grounds must be borne in

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[38] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, signed at New York on June 10, 1958 and ratified by the Philippines under Senate Resolution No. 71.

[39] ADR Act, § 42.

[40] ADR Act, § 43.

[41] ADR Act, § 42.

[42] Rep. Act No. 9285, Implementing Rules and Regulations, § 4.6.36.1 (similar to the grounds for setting aside the arbitral award).

mind by judges in order to avoid unlimited interference by the courts, thereby fulfilling its pronouncement that arbitration is encouraged in this jurisdiction. Any other ground raised shall be disregarded by the courts.

The case of *Oil and Gas Commission v. Court of Appeals*[43] is illustrative of the courts' interference contrary to the mandate enshrined in the ADR Act. The Supreme Court in this case held that the outright ruling and adherence to the foreign court's order adopting by reference an arbitrator's award was misplaced. It further states that the adjudication of the case demands a full ventilation of the facts and issues and the presentation of their respective arguments in support and in rebuttal of the claims of the contending parties. The order of the court that the case be remanded to the RTC for trial on the merits did not offer any explanation why the enforcement of the award should be refused. Neither were the grounds provided under the ADR Act which allows the courts to refuse enforcement present. The courts' attitude toward the award rendered by arbitral tribunals should be changed. They should refuse enforcement only on those grounds provided by law and should not abuse the exercise of such power.

CONCLUSION

With the enactment of the ADR Act of 2004, the Philippines may be said to have adopted the modern view of encouraging parties to make their own arrangements with regard to solving disputes arising from transactions entered into by them. One cannot ignore the numerous benefits that may be gained by resorting to ADR methods instead of litigating in court. Although the passing of ADR Act signifies the promotion of the use of ADR methods, it can be said that its implementation in the Philippines is still in its initial stage. It is sad that ADR methods in the Philippines are considered the road less traveled.

When a dispute arises parties automatically resort to the courts to obtain relief. In the domestic setting, lack of awareness of the parties is one of the contributing factors why ADR methods are seldom resorted to. On the other hand, in the international setting, the Philippines is still

[43] 293 SCRA 26 (1998).

not yet equipped, in this author's view, to be an effective venue of international commercial arbitration due to two factors. First, centers for ADR in the Philippines–for example, PDRCI, are relatively young and have yet to gain a strong foothold in the field of international commercial arbitration.[44] Second, the unbridled intervention of its courts in arbitration proceedings prevents parties from choosing the Philippines as a venue for arbitration.

It is hoped that parties to transactions would support the use of ADR methods as an alternative to litigation and respect awards rendered by the tribunals appointed by them instead of going to courts every time they receive an unfavorable judgment. This way, the very purpose and objective of ADR proceedings will be achieved. On the other hand, courts should be true to their pronouncement that ADR methods are encouraged in this jurisdiction by limiting court involvement in ADR proceedings. Courts must always be reminded of the law's policy in favor of arbitration as well as the role of ADR proceedings in order for them not to go beyond the authority granted to them by the ADR Act. Only when these developments happen can the Philippines be an effective seat of international arbitration and the ADR methods considered the "wave of the future."

[44] E. Ceniza, International Commercial Arbitration: Its Relevance in the Philippines (http://www. Pdrci.org/v1/index.php [last accessed December 28, 2006]).