Developments in Philippine and International Alternative Dispute Resolution in Commercial Transactions: An Analysis

Angela C. Ylagan[★]

I. INTRODUCTION

> *Discourage litigation.*
>
> *Persuade neighbors to compromise whenever you can.*
>
> *Point out to them how the nominal winner is often the real loser -- in fees, expenses, and a waste of time.*
>
> *As a peacemaker[,] the lawyer has a superior opportunity of becoming a good [person].*
>
> — Abraham Lincoln[1]

★ '14 D.C.L., University of Santo Tomas Graduate School; '95 LL.M., Boston University; '92 LL.B., University of the Philippines School of Law. The Author teaches law at the Ateneo de Manila University School of Law and the Lyceum

It is a declared policy of the Government of the Republic of the Philippines "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."[2] In order to implement this policy, Republic Act No. 9285, otherwise known as the Alternative Dispute Resolution (ADR) Act of 2004, mandates that "the State shall encourage and actively promote the use of ADR as an important means to achieve speedy and impartial justice and de-clog court dockets."[3]

In the 2006 case of *Fiesta World Mall Corporation v. Linberg Philippines, Inc.*,[4] the Supreme Court (SC) held that "[a]lternative dispute resolution methods or ADRs — like arbitration, mediation, negotiation[,] and conciliation — are encouraged by the [SC]. By enabling the parties to resolve their disputes amicably, [it] provide[s] solutions that are less time-consuming, less tedious, less confrontational, and more productive of goodwill and lasting relationships."[5]

This Article will review and analyze the recent developments in Philippine and international alternative dispute resolution in commercial transactions.

II. BACKGROUND OF THE STUDY

And yet there is a disunity
among individuals and among nations

University of the Philippines. This Article was submitted in partial fulfillment of the requirements of the University of Santo Tomas Graduate School. This work was prepared with the assistance and guidance of the Author's adviser, Judge Alicia G. Decano, D.C.L.

Cite as 59 ATENEO L.J. 169 (2014).

1. Boston Law Collaborative, Role of a Neutral - ADR Advocate, *available at* http://www.bostonlawcollaborative.com/blc//resources/quotes---dispute-resolution/role-of-a-neutral---adr-advocate.html (last accessed July 8, 2014).
2. 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 [ADR Act of 2004], Republic Act No. 9285, § 2 (2004).
3. *Id.*
4. Fiesta World Mall Corporation v. Linberg Philippines, Inc., 499 SCRA 332 (2006).
5. *Id.* at 341.

which is in striking contrast
to this perfect order in the universe.

One would think that
the relationships that bind men together
could only be governed by force.

— John Paul XXIII[6]

Short of resolving conflicts by force, the traditional mode of resolving legal disputes is by judicial settlement.[7] Judicial power shall be vested in one Supreme Court (SC) and in such lower courts as may be established by law.[8] Judicial power includes the duty of the courts of justice to settle actual controversies involving rights, which are legally demandable and enforceable, and to determine whether or not there has been a grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of the Government.[9]

The SC shall have administrative supervision over all courts and the personnel thereof.[10] The SC and the lower courts supervise and employ 22,777 people, including judges and non-judicial staff.[11] This number is down from the 26,433 persons employed in 2011.[12]

Of the 22,777 court officials, 1,959[13] are employed by the SC and the Presidential Electoral Tribunal (PET), and 20,818[14] are employed by the lower courts.

Notwithstanding the 22,777 people employed by the SC in 2012,[15] there are still a number of vacant positions,[16] which need to be filled in order to

6. John Paul XXIII, *Pacem in Terris*, Encyclical on Establishing Universal Peace in Truth, Justice, Charity, and Liberty, ¶ 4, April 11, 1963.

7. *See* Encyclopedia Britanica, Definition of Judicial Settlement, *available at* http://www.britannica.com/EBchecked/topic/930705/judicial-settlement (last accessed July 8, 2014).

8. PHIL. CONST. art. VIII, § 1.

9. PHIL. CONST. art. VIII, § 1.

10. PHIL. CONST. art. VIII, § 6.

11. SUPREME COURT, SUPREME COURT OF THE PHILIPPINES ANNUAL REPORT 2012 69 (2012) [hereinafter ANNUAL REPORT 2012].

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

dispense justice speedily. At the end of 2012, the vacancy rate of the positions for judges and justices was at 26.23% with 577 vacancies among the 2,199 positions available.[17]

In 2011, the Judicial and Bar Council (JBC) continued to focus on programs to reduce the vacancy rate and improve the quality of the nominees, thus processing 2,969 applications for 195 judicial positions in the SC, the third-level courts, and the lower courts.[18] While there had been a huge volume of applications for judgeship positions, the JBC balanced the need to fill the gap and the need to find quality magistrates. By the end of 2011, the vacancy rate was at 27%, or 595 vacancies out of the 2,198 available judicial positions.[19] This vacancy rate of 27% as of 2011,[20] hampers the delivery of justice to the people.

The SC reported that while the same problems such as insufficient number of judges and limited facilities continued to create difficulties in the adjudication of cases, the trial courts posted gains in reducing the number of pending cases.[21]

On the matter of Adjudication: Caseload and Disposition by the Lower Courts, the SC reported in its Annual Report for 2011 that —

> In 2012, 347,059 new cases were filed with the lower courts. Overall, the case input for 2012 increased, reaching a total of 988,291 cases. Despite this huge number, however, the lower courts were able to dispose of 376,289 cases, posting a slight increase in its case disposal rate at 38%. By December 31, 2012, there were 606,852 pending cases with the lower courts.[22]

The SC further stated that —

> With the continuation of administrative and judicial reform programs such as the Enhanced Justice on Wheels (EJOW) Program, the Small Claims Project, and the Judiciary Case Management System with its components eAssessment and eCashing System, Electronic Raffling, and Case

17. ANNUAL REPORT 2012, *supra* note 11, at 69.

18. SUPREME COURT, SUPREME COURT OF THE PHILIPPINES ANNUAL REPORT 2011 47 (2011) (citing JUDICIAL AND BAR COUNCIL, 2011 JUDICIAL AND BAR COUNCIL REPORT (2011)) [hereinafter ANNUAL REPORT 2011].

19. *Id.*

20. *Id.*

21. *Id.*

22. ANNUAL REPORT 2012, *supra* note 11, at 71.

> Monitoring and Tracking, the [SC] hopes that further improvement in the case disposal of the lower courts will be achieved in 2012.[23]

This Author is of the opinion that notwithstanding this optimism by the SC, the fact remains that the 606,852 pending cases with the lower courts as of 31 December 2012[24]is very discouraging.

This problem of unresolved and pending cases which clog the dockets of the courts is addressed by the enactment of the ADR Act of 2004.[25] Under the said Act, it is a declared policy of the Government of the Republic of the Philippines "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."[26] In order to implement this policy, the ADR Act of 2004 mandates that "the State shall encourage and actively promote the use of ADR as an important means to achieve speedy and impartial justice and de-clog court dockets."[27]

III. STATEMENT OF THE PROBLEM

The Author is a teacher and a practicing lawyer. As a legal practitioner, the Author observes first-hand the lack of physical facilities of the courts, the dilapidated courtrooms, the disorganized case folders tied in bundles and stacked against the wall from floor to ceiling, and from wall to wall.

The SC in its Annual Report 2012 reported that "[i]n 2012, 347,059 new cases were filed with the lower courts. Overall, the case input for 2012 increased, reaching a total of 988,291 cases. Despite this huge number, however, the lower courts were able to dispose of 376,289 cases, posting a case disposal rate of 38%."[28] Notwithstanding the figures heralded by the SC, the fact remains that 606,852 cases remained pending with the lower courts as of 31 December 2012.[29]

Pending cases and clogged court dockets result in the delay of delivery of justice to the people. "[J]ustice delayed is justice denied."[30]

---

23. ANNUAL REPORT 2011, *supra* note 18, at 48.

24. *See* ANNUAL REPORT 2012, *supra* note 11, at 70–71.

25. ADR Act of 2004.

26. *Id.* § 2.

27. *Id.*

28. ANNUAL REPORT 2012, *supra* note 11, at 71.

29. *Id.*

30. Jacob v. Sandiganbayan Fouth Division, 635 SCRA 94, 105 (2010).

Considering the limitations of the courts in resolving cases filed before it, the concepts of ADR, such as conciliation, mediation, and arbitration, offers another option for the people for the settlement of their disputes.

This Article will analyze the developments in Philippine and international ADR in commercial transactions. The following questions are asked in order to find answers and solutions to some problems in the field of ADR in commercial transactions:

(1) How can ADR in commercial transactions be made known to the public as a mechanism for the speedy disposition of cases?

   (a) How can persons, lawyers, and non-lawyers, who are interested in ADR in commercial transactions be educated and trained as conciliators, mediators, and arbitrators?

   (b) How can the general public be made more aware of and be well-informed about the existence and the advantages of ADR in commercial transactions in the speedy resolution of conflict?

(2) How has ADR in commercial transactions developed in the Philippines?

(3) How has ADR in commercial transactions developed in the international arena?

(4) How can ADR in commercial transactions be enhanced in order to resolve disputes speedily?

IV. OBJECTIVES OF THE STUDY

The objectives of this Article are: (a) to explore methods to propagate ADR in commercial transactions as a mechanism for the speedy disposition of cases; (b) to propose methods for persons, lawyers, and non-lawyers, who are interested in ADR in commercial transactions to be educated and trained as conciliators, mediators, and arbitrators; (c) to explore creative ways for the general public to be made more aware of and be well-informed about the existence and the advantages of ADR in commercial transactions in the speedy resolution of conflict; and (d) to find pioneering ways to enhance ADR in commercial transactions as a mechanism to resolve disputes speedily.

V. SIGNIFICANCE OF THE STUDY

As a human person

he is entitled to the legal protection of his rights, and

such protection must be effective, unbiased, and strictly just.

— John XIII[31]

In consequence of that juriaical order willed by God,
man has his own inalienable right to juridical security.
To him is assigned a certain, well-defined sphere of law,
immune from arbitrary attack.

— Pius XII[32]

The reason for this Article is to encourage the enforcement of the right of the people to speedy disposition of their cases before all judicial, quasi-judicial, or administrative bodies.[33] The fulfillment of this constitutionally guaranteed right to speedy disposition of cases will help to settle disputes swiftly.

The SC has held that the constitutional right to a "speedy disposition of cases" is not limited to the accused in criminal proceedings but extends to all parties in all cases, including civil and administrative cases, and in all proceedings, including judicial and quasi-judicial hearings.[34] Hence, under the Constitution, any party to a case may demand expeditious action from all officials who are tasked with the administration of justice.[35]

The importance of this Article is that it will be helpful in disseminating the usefulness of ADR in commercial transactions to implement the constitutionally guaranteed right of the people to the speedy disposition of cases. Securing the right to speedy disposition of cases insures the delivery of justice to the people and order to the community.

VI. SCOPE AND LIMITATION

This Article shall concentrate on the existing judicial system of the Philippines, and how this judicial system is coping in order to afford the people their constitutional right to speedy disposition of cases.[36] The Author will study the existing laws and rules governing Philippine and international

31. John Paul XXIII, *supra* note 6, ¶ 4.

32. *Id.*

33. PHIL. CONST. art. III, § 16.

34. Roquero v. Chancellor of UP-Manila, 614 SCRA 723, 732 (2010).

35. *Id.*

36. PHIL. CONST. art. III, § 16.

ADR in commercial transactions. The Author will also conduct an in-depth study of existing materials on Philippine and international ADR in commercial transactions and synthesize findings as a result of such study. Considering that there is a dearth of raw statistical data regarding ADR in commercial transactions by virtue of its being in the natal stage in the Philippines, this Article shall focus on articles, treatises, and researches conducted by ADR agencies which have studied issues involving ADR in commercial transactions.

The period of study for this Article is from 2004, the year of the enactment and effectivity of the ADR Act of 2004,[37] to 2010. (However, it is anticipated that data may not be readily available for 2010 as these may still be in the process of compilation by the organizations, bodies, and agencies concerned.)

VII. ALTERNATIVE DISPUTE RESOUTION IN PHILIPPINE AND INTERNATIONAL COMMERCIAL TRANSACTIONS

A. Alternative Dispute Resolution: In General

An ADR System means —

> [A]ny process or procedure used to resolve a dispute or controversy, other than by adjudication of a presiding judge of a court or an officer of a government agency, as defined in R.A. 9285, in which a neutral third party participates to assist in the resolution of issues, which includes arbitration, mediation, conciliation, early neutral evaluation, mini-trial, or any combination thereof.[38]

In the case of *LM Power Engineering Corporation v. Capitol Industrial Construction Groups, Inc.*,[39] the SC encouraged ADR methods for the settlement of disputes —

> Being an inexpensive, speedy[,] and amicable method of settling disputes, arbitration — along with mediation, conciliation[,] and negotiation — is encouraged by the [SC]. Aside from unclogging judicial dockets, arbitration also hastens the resolution of disputes, especially of the commercial kind. It is thus regarded as the ['wave of the future'] in international civil and commercial disputes.[40]

37. ADR Act of 2004.

38. *Id.* § 3 (a).

39. LM Power Engineering Corporation v. Capitol Industrial Construction Groups, Inc., 399 SCRA 562 (2003).

40. *Id.* at 569.

B. Alternative Dispute Resolution in Commercial Transactions: International

It seems that there is no definite period, which can be pointed to as the beginning of arbitration as an ADR method —

> No one knows exactly when arbitration got started but it was long before the twentieth century as many workers wrongly believe. King Solomon was an arbitrator. Philip the Second, the father of Alexander the Great, used arbitration as a means to settle territorial disputes arriving from a peace treaty he had negotiated with the southern states of Greece as far back as 337 B.C. [ ] In England, arbitration is older than the common law system, which the United States courts later inherited. In fact, England used arbitration as a common means of commercial dispute resolution as far back as 1224. [ ] In ancient Rome arbitration was one of the preferred methods of settling disputes and was the preferred method of settling commercial disputes in the Middle Ages.[41]

1. In the Asian Region

The areas included in the study of the development of ADR in the Asian region are Singapore, Hong Kong, China, and India. Singapore and Hong Kong were chosen because of their prominence as established arbitration centers in Asia.[42] China and India were chosen because of their economic stature as major emerging national economies of Brazil, Russia, India, China, and South Africa (BRICS).[43]

The Singaporean arbitration system has a dual system whereby its International Arbitration Act of 1995 governs international arbitration,[44] and

41. Robert V. Massey, Jr., History of Arbitration and Grievance Arbitration in the United States (An Unpublished Paper Submitted to the Institute of Labor Studies and Research in West Virginia Unversity), *available at* http://www.laborstudiesandresearch.ext.wvu.edu/r/download/32003 (last accessed July 8, 2014).

42. Jones Day, International Commercial Arbitration In Asia (An Unpublished Article Describing International Commercial Arbitration in Asia), *available at* http://www.jonesday.com/files/Publication/d5d0b710-b68a-4254-9abf-c97d9209fd40/Presentation/PublicationAttachment/d14c7619-75be-4258-b7f9-cde1c6d98a10/Intl%20Com%20Arb%20in%20Asia.pdf (last accessed July 8, 2014).

43. Times Higher Education, BRICS & Emerging Economies Rankings 2014 coming today, *available at* http://www.timeshighereducation.co.uk/news/bric-and-emerging-economies-rankings-2014-coming-soon/2008771.article (last accessed July 8, 2014).

44. International Arbitration Act, 1994, 23 (Sing).

its Arbitration Act of 2001 governs domestic arbitration.[45] This dual system of arbitration is similar to the Philippine dual system for arbitration. In the Philippines there is only one law, the ADR Act of 2004[46] but within that one law, there is a demarcation whereby international commercial arbitration is governed by the United Nations Commission on International Trade Law Model Law on International Commercial Arbitration of 1985 (UNCITRAL 1985),[47] and domestic arbitration is governed by the Arbitration Law which was passed in 1953.[48]

The Hong Kong arbitration system on the other hand has undergone several changes, from starting out as a unitary system, to transitioning into a dual system, and then reverting back to a unitary system of arbitration.[49] Under the Hong Kong system of arbitration, there is a unitary system for international arbitration and domestic arbitration — both governed by the UNCITRAL Model Law for International Commercial Arbitration of 2006.[50]

For the Philippine arbitration experience, it is unfortunate that at the time of adoption of the ADR Act of 2004,[51] the version of the UNCITRAL Model Law in existence in 2004 was the UNCITRAL Model Law of 1985.[52] Hence, what was incorporated in the Philippine ADR Act of 2004 is the UNCITRAL Model Law of 1985. Two years after the passage of the

45. Arbitration Act, 2001 (Sing.).

46. ADR Act of 2004.

47. United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration of 1985, 24 I.L.M. 1302 (1985) [hereinafter UNCITRAL 1985].

48. An Act To Authorize The Making Of Arbitration And Submission Agreements, To Provide For The Appointment Of Arbitrators And The Procedure For Arbitration In Civil Controversies, And For Other Purposes [The Arbitration Law], Republic Act No. 876 (1953).

49. Financier Worldwide, TalkingPoint: ARBITRATION IN HONG KONG (An Unpublished Report Done By Financier Worldwide Limited) 3-4 , *available at* http://www.troutmansanders.com/files/Uploads/Documents/TALKING POINT%20Arbitration%20in%20Hong%20Kong_Troutman.pdf (last accessed July 8, 2014).

50. United Nations Commission on International Trade Law, UNCITRAL Model Law on International Commercial Arbitration 1985: with amendments as adopted in 2006, *available at* http://www.uncitral.org/pdf/english/texts/ arbitration/ml-arb/07-86998_Ebook.pdf (last accessed July 8, 2014).

51. ADR Act of 2004.

52. UNCITRAL 1985, *supra* note 47.

Philippine ADR Act of 2004, there came out a new UNCITRAL Model Law of International Commercial Arbitration Law of 2006.[53]

The Author recommends that the ADR Act of 2004 be amended to adopt and incorporate the UNCITRAL Model Law of 2006. A proposed draft bill to amend the ADR Act of 2004 is presented herein.

It is also recommended that the ADR Act of 2004 be amended to provide for a unitary system of arbitration,[54] instead of the existing dual system of arbitration embodied in the ADR Act of 2004. The proposed amendment to the ADR Act of 2004 will provide that domestic arbitration shall, like international commercial arbitration, be governed by the UNCITRAL Model Law of 2006. With this proposed amendment to the ADR Act of 2004, both international commercial arbitration and domestic arbitration shall be governed by the UNCITRAL Model Law of 2006. This proposed amendment for a unitary system of arbitration will be convenient for ADR practitioners in that there will no longer be any confusion as to what arbitration law to apply to a particular arbitration matter.

China is one of the five major emerging national economies of BRICS.[55] China, being a prosperous nation, has voluminous commercial transactions.[56] With every brisk business activity arises a possible conflict. Conflicts may best and speedily be resolved by alternative means of dispute resolution, like arbitration.[57] One of the problems experienced in arbitration in China is that of local protectionism.[58] Although the Chinese central government is advertising a favorable investment climate to encourage

53. *Id.*

54. *See* The Arbitration Law.

55. MunKnee, Shift From U.S. Dollar As World Reserve Currency Underway – What Will This Mean for America?, *available at* http://www.munknee.com /shift-from-u-s-dollar-as-world-reserve-currency-underway-what-will-this-mean-for-america/ (last accessed July 8, 2014).

56. William C. Kirby, China's Prosperous Age: A Century in the Making, *available at* http://www.chinaheritagequarterly.org/features.php?searchterm=026_kirby.inc&issue=026 (last accessed July 8, 2014).

57. New York City Bar, Alternative Dispute Resolution: How To Resolve Your Dispute Without Going To Court, *available at* http://www.nycbar.org/media-aamp-publications/brochuresbooks/alternative-dispute-resolution-how-to-resolve-your-dispute-without-going-to-court (last accessed July 8, 2014).

58. China Law & Practice, Local Protectionism a Sword Rather than a Shield, *available at* http://www.chinalawandpractice.com/Article/1694099/Channel/9930/Local-Protectionism-a-Sword-Rather-than-a-Shield.html (last accessed July 8, 2014).

foreign parties, the local government units in China engage in domestic protectionism by interfering with arbitration procedures and by deliberately refusing to recognize and enforce foreign judgments.[59] This problem of local protectionism in China is seen in an online article which states that —

> A recently reported case from the Jinan People's Court in China is the first known instance of a Chinese court denying enforcement of an arbitral award on public policy grounds.
>
> ...
>
> As noted, this case was recently reported in several publications and provides one of the first ever reported instances of the denial of an award based upon public policy considerations in China.[60]

India, for its part, has an abundant history of arbitration beginning during the time of ancient India, where the dispute was settled by a third person chosen by the parties.[61] India adopted its Arbitration and Conciliation Act in 1996 (1996 Act of India).[62] This 1996 Act of India provides for the settlement of disputes for both domestic and international commercial arbitration.[63] With this 1996 Act of India, the law governing domestic and international arbitration were consolidated.[64] The 1996 Act of India promotes the arbitration principle of party autonomy and limited judicial intervention in the arbitral process.[65]

2. In the European Region

In the European Union (EU), the Brussels Regulation provides for the jurisdiction, and also the recognition and enforcement of judgment in commercial and civil matters in the EU.[66] The Brussels Regulation does not

59. *Id.*

60. Nathan D. O'Malley, Chinese Court Denies Enforcement on Public Policy Grounds, *available at* http://www.conway-partners.com/en/blog/international-arbitration-/chinese-court-denies-enforcement-on-public-policy-grounds (last accessed July 8, 2014).

61. Sarah E. Hilmer, *Did Arbitration Fail India Or Did India Fail Arbitration?*, 10 INT'L ARB. L. REV. 33, 33-37 (2007).

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. Dutch Civil Law, The Brussels I Regulation (No 44/2001), *available at* http://www.dutchcivillaw.com/content/brusselsone011.htm (last accessed July 8, 2014).

include arbitration in its scope of application. If the European Parliament will decide to remove the exclusion of arbitration from the scope of the Brussels Regulation, there is fear among the members of the EU that courts will interfere in arbitration proceedings.[67]

In the United Kingdom (U.K.), its arbitration law is embodied in the U.K. Arbitration Act of 1996.[68] The U.K. Arbitration Act of 1996 does not prescribe any specific procedure for arbitration, other than complying with the guideline whereby the arbitrators are obliged "to adopt procedures suitable to the circumstances, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters failing to be determined."[69]

In the early stages of ADR in the U.K., including arbitration, the English courts refrained from citing international arbitration law and international arbitral awards as sources of law.[70] However, recent developments in the field of arbitration in the U.K. indicate an that an inclusive approach to international and comparative law now extends to arbitral awards as well.[71] Also, arbitral awards are now cited as sources of law by English judges.

English courts are careful to exercise restraint in disregarding the limited judicial intervention over arbitral awards. There is judicial restraint in overturning arbitral awards.[72] In the U.K., the judicial review of arbitral awards is limited and the grounds to vacate arbitral awards are also limited.[73] The finality of arbitral awards is respected by the courts.[74]

The Swiss Rules of International Arbitration provide for an expedited arbitration procedure for small claims, or claims of less than $1,000,000.00.[75]

67. *Id.*

68. Arbitration Act, 1996, 23 (Eng.).

69. *Id.* art. 33, ¶ 1 (b).

70. UK: International Arbitration in London, *available at* http://business.takelegaladvice.com/news-and-information/articles/uk-international-arbitration-in-london/?area=&issue=&page=1 (last accessed July 8, 2014).

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. Swiss Chambers' Arbitration Institution, Swiss Rules of International Arbitration (An Unpublised Rulebook About Swiss Arbitration) 28-29, *available at* http://www.swissarbitration.org/sa/download/SRIA_english_2012.pdf (last accessed July 8, 2014).

The Swiss arbitration experience has shown that the full-sized arbitration procedure is too lengthy to wait for the settlement of small claims of less than $1,000,000.00.[76]

The German economy is reported as Europe's largest economy.[77] Being the largest economy in Europe, business and commercial transactions in Germany are prolific. In Germany, the volume of commercial transactions is substantial. This welcome economic situation unavoidably results in commercial disputes. Because of this bustling business activity in Germany, its populations is known as leading users of arbitration.[78] In 2008, the German Institute of Arbitration issued its "Supplementary Rules for Expedited Proceedings."[79] Under the German rules, the parties commit to fast-track arbitration[80] and said arbitral proceedings are conducted within a fixed and accelerated schedule.[81]

3. In the Middle East

In some of the countries in the Middle East, namely, Saudi Arabia, United Arab Emirates, Qatar, and Egypt, the arbitration system is generally characterized by the allowance of a wide scope of judicial review of arbitral awards.[82] These Middle East countries are prosperous, mainly because of the oil reserves that they hold.[83] With prosperity comes increased economic activity, which in return also means the occasion for more conflict in commercial transactions. This increase in exposure to international commercial transactions will develop the ADR system in the Middle East countries of Saudi Arabia, United Arab Emirates, Qatar, and Egypt.

76. *Id.*

77. Central Intelligence Agency, The World Factbook: Europe: Germany, *available at* https://www.cia.gov/library/publications/the-world-factbook/geos/gm.html (last accessed July 8, 2014).

78. Philipp K. Wagner, Arbitration in Germany, NEW YORK STATE BAR ASSOCIATION INTERNATIONAL LAW PRACTICUM 105 (2010).

79. *Id.* at 108.

80. *Id.*

81. *Id.*

82. Central Intelligence Agency, The World Factbook: Middle East: Saudi Arabia, *available at* https://www.cia.gov/library/publications/the-world-factbook/geos/sa.html (last accessed July 8, 2014) [hereinafter World Factbook: Saudi Arabia].

83. *Id.*

The Kingdom of Saudi Arabia was founded in 1932 and is one of the G-20 major economies.[84] Arbitration in Saudi Arabia is governed by its Arbitration Regulations of 1983,[85] and also by its Implementing Rules of 1985.[86] In Saudi Arabia, party autonomy in arbitration is limited, and the courts in Saudi Arabia closely monitor the arbitration process.[87]

The grounds for annulment of an arbitral award are wider under the New Saudi Arbitration Law,[88] than the grounds for annulment of arbitral awards under the UNCITRAL Model Law of 2006. On the matter of judicial review of an arbitral award in Saudi Arabia, a Saudi Arabian court may review an arbitral award in order to determine that the arbitral award complies with Sharia law and Saudi Arabian public order.[89]

The United Arab Emirates was formed in 1971.[90] The features of the United Arab Emirates arbitration system are: (1) there is no right to appeal an arbitral award; (2) that an arbitral award is not enforceable until ratified by the courts of the United Arab Emirates; and (3) the judicial review of arbitral awards does not include a judicial review of the merits of the decision of the arbiter.[91] The United Arab Emirates, is a country in the Middle East, where, unlike its neighbors, its courts do not exercise wide discretion to annul arbitral awards.[92]

Qatar is an absolute monarchy which was a former British Protectorate until it gained its independence in 1971.[93] In the State of Qatar, its arbitration law is governed by its Commercial Procedure Code of 1990, which provides for the challenge of the arbitral award based on several

84. *Id.*

85. *See* Mondaq Official Website, Saudi Arabia: The New Saudi Arbitration Law, *available at* http://www.mondaq.com/x/195958/court+procedure/The+United+States+Further+Expands+Sanctions+Against+Iran (last accessed July 8, 2014).

86. World Factbook: Saudi Arabia, *supra* note 82.

87. *Id.*

88. Law of Arbitration of 16 April 2012 (Kingdom of Saudi Arabia).

89. *Id.*

90. Central Intelligence Agency, The World Factbook: Middle East: United Arab Emirates, *available at* https://www.cia.gov/library/publications/the-world-factbook/geos/ae.html (last accessed July 8, 2014).

91. *Id.*

92. *Id.*

93. Central Intelligence Agency, The World Factbook: Middle East: Qatar, *available at* https://www.cia.gov/library/publications/the-world-factbook/geos/qa.html (last accessed July 8, 2014).

grounds, and for the availability of an appeal from the arbitral award based on the merits.[94] Arbitration law in Qatar, however, allows for the parties to a dispute to waive their right to appeal the award of arbitration.[95]

Qatar has acceded to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.[96] However, in the case of *ITIIC v. Dyncorp*,[97] the courts of Qatar declared the foreign arbitral award as null and void and made its own decision reversing the decision of the arbitrator.[98]

Arbitration in Egypt is governed by the Egyptian Arbitration Law of 1994 and the new Egyptian Commercial Law of 1999.[99] In Egypt, disputes involving technology transfer arrangements are arbitrable. However, in Egypt, technology transfer arrangements are closely monitored and highly regulated such that party autonomy plays a less important part.[100] In Egypt, the arbitration principle of party autonomy gives way to legal regulation by the Egyptian government in order to protect the Egyptian people who are the users of such technology.[101]

4. In the Americas

The United States (U.S.) is a member of the Group of Eight which is composed of countries with the largest economies.[102] The U.S. is also a

94. *Id.*

95. *Id.*

96. Reza Mohtashami & Merryl Lawry-White, *The (Non)-Application of the New York Convention by the Qatari Courts: ITIIC v. Dyncorp*, 29 J. INT'L ARB. 429, 429-36 (2012).

97. International Trading And Industrial Investment Company v. Dyncorp Aerospace Technology, 763 F.Supp.2d 12 (2d. Cir. 2011) (U.S.).

98. Mohtashami & Lawry-White, *supra* note 96, at 429-36.

99. Embassy of the Kingdom of the Netherlands, Doing Business in Egypt: 2010 Guideline for Netherlands Companies, *available at* http://egypt.nlembassy.org/binaries/content/assets/postenweb/e/egypte/netherlands-embassy-in-cairo/import/products_and_services/guidelines-for-doing-business-in-egypt (last accessed July 8, 2014).

100. *Id.*

101. *Id.*

102. Zachary Laub, The Group of Eight (G8) Industrialized Nations, *available at* http://www.cfr.org/international-organizations-and-alliances/group-eight-g8-industrialized-nations/p10647 (last accessed July 8, 2014).

permanent member of the United Nations (UN) Security Council.[103] The history of arbitration in the U.S. can be traced to the early Native American tribes who utilized arbitration to settle disputes, not only within the tribe, but also to decide conflict between different tribes.[104]

In the U.S. in the 1900s, the individual states of the U.S. began to have a collective interest in methodical alternative dispute resolution as a substitute for litigation.[105] In 1926, the American Arbitration Association (AAA) was established to assist the arbitration practitioners and persons availing of ADR mechanisms.[106]

The U.S. lays claim to the 1958 New York Convention on the Recognition and Enforcement of Arbitral Awards[107] as "the most successful international treaty in the field of private international law because of its widespread adoption."[108]

Canada is a federal parliamentary and a constitutional monarchy.[109] Just like the U.S., Canada is also a member of the Group of Eight which is composed of countries with the largest economies.[110] Considering its prosperous economic stature, international commercial arbitration has found a place to flourish in Canada.[111] In 12 May 1986, Canada became a signatory

103. *Id.*

104. Legal Information Institute, Alternative Dispute Resolution, *available at* http://www.law.cornell.edu/wex/alternative_dispute_resolution (last accessed July 8, 2014).

105. Central Intelligence Agency, The World Factbook: North America: United States of America, *available at* https://www.cia.gov/library/publications/the-world-factbook/geos/us.html (last accessed July 8, 2014).

106. *Id.*

107. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *opened for signature* June 10, 1958, 330 U.N.T.S. 3 [hereinafter New York Convention].

108. James D. Fry, *De'sordre Public International under the New York Convention: Wither Truly International Public Policy*, 29 CHINA J. INT'L ARB. 81, 82 (2012).

109. Central Intelligence Agency, The World Factbook : North America: Canada, *available at* https://www.cia.gov/library/publications/the-world-factbook/geos/ca.html (last accessed July 8, 2014).

110. *Id.*

111. Claude R. Thomson & Annie M.K. Finn, *International Commercial Arbitration: A Canadian Perspective*, 18 ARBITRATION INT'L. 205 (2002).

to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.[112]

On the matter of judicial review by Canadian courts of arbitral awards, Canadian courts have purposely limited their review of awards in international commercial arbitration.[113]

Canada, together with the U.S. and Mexico, entered into the North American Free Trade Agreement (NAFTA) which came into force on 1 Januaray 1994.[114] NAFTA urges the use of the modes of ADR in the settlement of disputes arising from private commercial disputes under NAFTA.[115]

The Argentine Republic is a federal republic which is considered a middle power or a country with moderate influence and moderate international recognition.[116] Being a federal republic, its legislative body has the power to pass arbitration rules for the country, but each province of Argentina has its own arbitration rules.[117]

It is significant to note that Argentina has not adopted the UNCITRAL Model Law on International Commercial Arbitration. Argentina is, however, a party to both the 1958 New York Convention on the

112. New York Arbitration Convention, New York Convention Countries, *available* http://www.newyorkconvention.org/contracting-states/list-of-contracting-states (last accessed July 8, 2014).

113. The Ontario Court of Appeals said that Canadian courts should "guard against advertently or inadvertently straying into the merits of an international arbitral panel's decision." *See* Laurie Livingston, Canadian Court Clarifies the Standard for Review for International Arbitration Awards - the case of Mexican Cola & American Sweetener - but does the standard taste any better?, *available at* http://www.gowlings.com/KnowledgeCentre/article.asp?pubID=2367&lang=0 (last accessed July 8, 2014).

114. Office of the United States Trade Representative, North American Free Trade Agreement (NAFTA), *available at* http://www.ustr.gov/trade-agreements/free-trade-agreements/north-american-free-trade-agreement-nafta (last accessed July 8, 2014).

115. *Id.*

116. Central Intelligence Agency, The World Factbook: South America: Argentina, *available at* https://www.cia.gov/library/publications/the-world-factbook/geos/ar.html (last accessed July 8, 2014).

117. *Id.*

Recognition and Enforcement of Foreign Arbitral Awards,[118] and the 1975 Inter-American Convention on International Commercial Arbitration.[119]

The arbitration law in Argentina is contained in its Civil and Commercial Procedure Code.[120] In an arbitration agreement in Argentina, the parties have almost total party autonomy because the arbitration rules in Argentina are wide-ranging, and the parties have freedom to agree on which particular arbitration rules to follow.[121]

On the matter of selection of arbitrators in Argentina, arbitration in Argentina does not limit the independence of the parties in choosing its arbitrators.[122]

In Argentina, even if the arbitration principle of *kompetenz-kompetenz*[123] is not enshrined in the arbitration laws of Argentina, nevertheless, the Argentine courts have ruled that arbitrators indeed have the competence to decide the scope of their own jurisdiction.[124]

On the matter of independence and self-sufficiency of the arbitral agreement, the SC of Argentina upheld the autonomy of the arbitration clause.[125]

C. Alternative Dispute Resolution In Commercial Transactions: Philippines

1. Pre-Spanish Period (Before 1521)

118. New York Convention, *supra* note 107.

119. Department of International Law, Multilateral Treaties, *available at* http://www.oas.org/juridico/english/sigs/b-35.html (last accessed July 8, 2014).

120. *See* CÓDIGO PROCESAL CIVIL Y COMERCIAL DE LA NACIÓN [CÓD. PROC. CIV. Y COM.] [Civil and Commercial Procedure Code] arts. 517-519 & 736-773.

121. *See* Gustavo Parodi, Arbitration - Argentina, *available at* http://latinlawyer.com/reference/article/40656/argentina/ (last accessed July 28, 2014).

122. *Id.*

123. The principle of *kompetenz-kompetenz* is the "ability of the arbitral tribunal to rule on the question on whether it has jurisdiction." Kompetenz-kompetenz, Practical Law: A Thomson Reuters Legal Solution, *available at* http://uk.practicallaw.com/4-205-6045?service=arbitration (last accessed July 8, 2014) [hereinafter *Kompetenz-kompetenz*].

124. Parodi, *supra* note 121.

125. *Id.*

Dispute settlement in the Philippines may be traced to the pre-Spanish times. Before the colonization of the Philippines by Spain in 1521, the *barangay* was the unit of government.[126] According to a noted author of Philippine history —

> The *barangay* was the unit of government and consisted of from 30 to 100 families. The Tagalog word *barangay* was derived from the Malay *balangay*, a boat, which transported them to these shores. Each *barangay* was independent although some chieftains were more powerful than others and consequently respected by the other chiefs. The multiplicity of *barangays* implies that there was no national or central government. It was the primary duty of a chieftain to rule and govern his subjects and to promote their welfare and interests. A chieftain had wide powers, for he exercised all the functions of government. He was the executive, the legislator, and the judge. He was, naturally, the supreme commander in time of war.[127]

On the matter of settling disputes during the pre-colonial period, the same author of Philippine history states that —

> Disputes are inevitable in any society, and Filipino society before the arrival of the Spaniards was not an exception. But disputes in the latter case were usually, though probably not always, decided peacefully through a 'court' composed of the chieftain as judge and the *barangay* elders as 'jury[.'] Conflicts arising between subjects of different *barangays* were resolved by arbitration in which a board composed of elders from neutral *barangays* acted as arbiter.[128]

2. Spanish (1521 to 1898)

A noted author on arbitration explained the history of arbitration in the Philippines as follows — "[i]n the Philippines, during the time when it was a colony of Spain, the Spanish *Ley de Enjuiciamento Civil* which was applied to the Philippines, contained provisions for the appointment by the parties of friendly adjusters, known as *juicion de amigables componedores*, for the settlement of their differences."[129]

3. American (1898 to 1946)

126. Orville C. Gargantiel, Barangay as Historical Concept, *available at* http://www.hinatuan.com/barangay.htm (last accessed July 8, 2014).

127. TEODORO A. AGONCILLO, HISTORY OF THE FILIPINO PEOPLE 40-41 (1990).

128. *Id.* at 42-43.

129. CUSTODIO O. PARLADE, ALTERNATIVE DISPUTE RESOLUTION ACT OF 2004 45 (2004).

The same noted author on arbitration explained further the history of arbitration in the Philippines as follows —

> With the advent of American rule, the Code of Civil Procedure which came into force impliedly repealed the provisions of the *Ley* which were deemed procedural in character. Among those repealed were provisions authorizing the appointment of the *juicio de amigables componederos*. This implied repeal deprived arbitral awards the legal basis for their enforcement.[130]

4. Republic of the Philippines

a. Barangay Justice System or Katarungang Pambarangay

Throughout Philippine history, the *Barangay* Justice System has endured the ages and has served as an effective mechanism to settle disputes.[131]

Presently, the *Barangay* Justice System is embodied in The Local Government Code of the Philippines (LGC).[132] The LGC revised the law on *Katarungan Pambarangay*, and expressly repealed Presidential Decree No. 1508.[133]

In *Uy v. Contreras*,[134] The SC explained the revisions to the *Katarungan Pambarangay* made by the LGC as follows:

> It may thus be observed that the revised *katarungang pambarangay* law has at least three new significant features, to wit:
>
> 1. It increased the authority of the *lupon* in criminal offenses[;]
>
> 2. As to venue, it provides that disputes arising at the workplace where the contending parties are employed or at the institution where such parties are enrolled for study, shall be brought in the *barangay* where such workplace or institution is located[; and]
>
> 3. It provides for the suspension of the prescriptive periods of offenses during the pendency of the mediation, conciliation, or arbitration process.[135]

---

130. *Id.*

131. Rome R. Robiso, Barangay Justice System, *available at* http://philjustfoundation.blogspot.com/p/plgr.html (last accessed July 8, 2014).

132. An Act Providing for a Local Government Code of 1991, Republic Act No. 7160, [LOCAL GOVERNMENT CODE of 1991], Republic Act No. 7160 (1992).

133. Uy v. Contreras, 237 SCRA 167, 174 (1994).

134. *Id.*

135. *Id.* at 177.

The SC in the same case explained further that —

> The first feature has necessarily broadened the jurisdiction of the *lupon* and if the mediation and conciliation process at that level would be effectively pursued, few cases would reach the regular courts, justice would be achieved at less expense to the litigants, cordial relationships among protagonists in a small community would be restored, and peace and order therein enhanced.
>
> The second feature, which is covered by paragraph (d), Section 409 of the [LGC], also broadens the authority of the *lupon* in the sense that appropriate civil and criminal cases arising from incidents occurring in workplaces or institutions of learning shall be brought in the barangay where such workplace or institution is located. That barangay may not be the appropriate venue in either paragraph (a) or paragraph (b) of the said section. This rule provides convenience to the parties. Procedural rules including those relating to venue are designed to insure a fair and convenient hearing to the parties with complete justice between them as a result. Elsewise stated, convenience is the *raison d'etre* of the rule on venue.
>
> The third feature is aimed at maximizing the effectiveness of the mediation, conciliation, or arbitration process. It discourages any intentional delay of the referral to a date close to the expiration of the prescriptive period and then invoking the proximity of such expiration as the reason for immediate recourse to the courts. It also affords the parties sufficient time to cool off and face each other with less emotionalism and more objectivity which are essential ingredients in the resolution of their dispute. The [60] day suspension of the prescriptive period could spell the difference between peace and a full-blown, wearisome, and expensive litigation between the parties.[136]

While Presidential Decree No. 1508 has been repealed by the LGC of 1991, the jurisprudence built thereon regarding prior referral to the *lupon* as a pre-condition to the filing of an action in court remains applicable because its provisions on prior referral were substantially reproduced in the LGC of 1991.[137]

b. The New Civil Code of the Philippines (Republic Act No. 386, Effective August 30, 1950)

In 1950, the New Civil Code of the Philippines (Civil Code) contained provisions on Compromises (Articles 2028 to 2041) and Arbitration (Articles

136. *Id.* at 177-78.

137. *Id.*

2042 to 2046).[138] In 1950, Arbitration was already recognized as a mode of dispute settlement in the Philippines. The SC has held in the case of *BF Corporation v. Court of Appeals*[139] that —

> It should be noted that in this jurisdiction, arbitration has been held valid and constitutional. Even before the approval on [19 June 1953] of Republic Act No. 876, this Court has countenanced the settlement of disputes through arbitration. Republic Act No. 876 was adopted to supplement the [Civil Code's] provisions on arbitration. Its potentials as one of the alternative dispute resolution methods that are now rightfully vaunted as ['']the wave of the future['] in international relations, is recognized worldwide. To brush aside a contractual agreement calling for arbitration in case of disagreement between the parties would therefore be a step backward.[140]

Prior to the passage into law of the Civil Code, the issue of the finality of the arbitral award was not settled. With the enactment of the Civil Code on 30 August 1950 and the inclusion of the provisions on Arbitration, the matter of the finality of the arbitral award was established as stated in jurisprudence, which states —

> The [Civil Code] finally settled the issue by providing in Article 2044 [of the Civil Code] that: 'Any stipulation that the arbitrators' award or decision shall be final, is valid, without prejudice to articles 2038, 2039, and 2040.' These articles allow the setting aside of an arbitration agreement due to recognized causes for setting aside a contract.[141]

c. The Arbitration Law (Republic Act No. 876, Effective 1953)

An article on arbitration on the Philippines expounded on the development of arbitration in the Philippines which are as follows:[142]

> (1) "The need for a law to regulate arbitration in general was acknowledged when Republic Act No. 876 or Philippine Arbitration Law of 1953 was passed[;]"[143]

138. An Act to Ordain and Institue the Civil Code of the Philippines [CIVIL CODE], Republic Act No. 386 (1950), arts. 2028-2046.

139. BF Corporation v. Court Of Appeals, 288 SCRA 267 (1998).

140. *Id.* at 286.

141. PARLADE, *supra* note 129, at 46.

142. Marthe Lois V. Cordia, *Alternative Dispute Resolution in the Philippines: Wave of the Future or the Road Less Traveled?*, 51 U. STO. TOMAS L. REV. (2006).

(2) "[Republic Act No.] 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[; and]"[144]

(3) "The enactment of [Republic Act] No. 876 officially adopted the view that arbitration is a speedy and effective method of settling disputes."[145]

In the case of *Insular Savings Bank v. Far East Bank And Trust Company*,[146] the SC recognized that "arbitration proceedings are mainly governed by the Arbitration Law and suppletorily by the Rules of Court"[147]

A noted author listed the principles of arbitration contained in Republic Act No. 876. He said that —

It gave flesh to several fundamental principles of arbitration such as:

(1) It recognized the freedom of the parties to enter into an arbitration agreement and specified that parties may enter into an arbitration agreement either before or after the dispute arises.

(2) It specified the form of the arbitration agreement, that is, it must be in writing.

(3) It provided the procedure in case one of the parties refused to cooperate or participate in arbitration.

(4) It defined the qualifications of the arbitrators and set forth guidelines for their appointment and challenge.

(5) It empowered the arbitrators to issue subpoenas and gave the parties the right to ['] petition the court to take measures to safeguard and / or conserve any matter which is the subject of the dispute in arbitration.['][148]

---

143. *Id.* (citing R. RODRIGUEZ, PHILIPPINE ARBITRATION AND THE UNCITRAL (UNITED STATES COMMISSION OF INTERNATIONAL TRADE LAW) MODEL LAW (1996)).

144. *Id.* (citing Chung Fu Industries v. CA, 206 SCRA 545, 551 (1992)).

145. *Id.*

146. Insular Savings Bank v. Far East Bank and Trust Company, 492 SCRA 145 (2006).

147. *Id.* at 158.

148. Laurence Hector B. Arroyo, *Arbitration in the Philippines: Wave of the Future?*, 52 ATENEO L.J. 1, 12 (2007).

With the passage in 1953 of the Arbitration Law, Republic Act No. 876, arbitration as an alternative dispute resolution mechanism was embodied as law, as stated in an article that —

> The Civil Code finally settled the issue by providing in Article 2044 of the Civil Code that: 'Any stipulation that the arbitrators' award or decision shall be final, is valid, without prejudice to articles 2038, 2039, and 2040.' These articles allow the setting aside of an arbitration agreement due to recognized causes for setting aside a contract. Thereafter, the arbitration law, Republic Act No. 876 was passed. With its approval, the Congress has officially adopted the modern view that arbitration, as an inexpensive, speedy[,] and amicable method of settling disputes and as a means of avoiding litigation, should receive every encouragement from the courts.[149]

d. New York Convention on Recognition and Enforcement of Foreign Arbitral Awards (1958, Signed by the Philippines on 1967)

James Fry, in his article, said that the International Arbitration Law Review gives the background about the 1958 New York Convention on Recognition and Enforcement of Foreign Arbitral Awards.[150] He said that —

> The [1958 New York Convention on Recognition and Enforcement of Foreign Arbitral Awards] was negotiated at an international conference held over a three-week period between [20 May 1958 and 10 June 1958] at the UN Headquarters in New York City. The International Chamber of Commerce submitted the first draft of the Convention to the United Nations Economic and Social Council (ECOSOC) five years earlier. Adoption of the [1958 New York Convention on Recognition and Enforcement of Foreign Arbitral Awards] during this conference established a legal framework under which international arbitration agreements and arbitral awards were to be enforced in the courts of contracting states.[151]

Fry emphasizes that the 1958 New York Convention on Recognition and Enforcement of Foreign Arbitral Awards is the most effective international treaty because of its extensive adoption by 134 States. To wit —

> The [1958 New York Convention on Recognition and Enforcement of Foreign Arbitral Awards] is often heralded as the most successful international treaty in the field of private international law because of its

149. PARLADE, *supra* note 129, at 46.

150. New York Convention, *supra* note 107.

151. James D. Fry, *The Federal Arbitration Act, UNCITRAL Model Law and New York*, 8 INT'L ARB. L. REV. 1, 1-13 (2005).

> widespread adoption. One hundred and thirty-four [S]tates are parties to [it and] [a]ll of the major powers of the world have ratified the [it]. The [1958 New York Convention on Recognition and Enforcement of Foreign Arbitral Awards'] success is especially notable when compared with the unsuccessful efforts of the international community to create a global multilateral treaty for recognising and enforcing court judgments.[152]

Fry explains that the state of New York, in the year 1920, enacted the New York Arbitration statute, which established the benchmark for arbitration procedure.[153] He said that

> by enacting the first modern arbitration statute in 1920, New York State was the pioneer of arbitration in the [U.S.]. Although British and Scottish arbitration laws predated the New York statute, this was the first step in establishing arbitration in the Western Hemisphere. The New York arbitration statute created the standard of validity, enforceability[,] and irrevocability of all arbitration agreements, both regarding existing and future disputes. Congress modelled the Federal Arbitration Act on the New York statute, which applied this standard nationwide. The New York Convention aimed to unify the standards of arbitration agreement enforcement throughout the world. This standard has lent stability and predictability to trade and commerce. The UNCITRAL Model Law provides even greater stability and predictability by ameliorating some of the New York Convention's weaknesses. Inasmuch as New York was the first to adopt this standard in the [U.S.], and New York provided the arbitration-friendly environment within which the New York Convention was adopted, New York's role must not be forgotten during the anniversary celebrations of the Federal Arbitration Act and the UNCITRAL Model Law.[154]

On 10 June 1958, the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards was adopted.[155] On 6 July 1967, the Philippines signed and acceded to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.[156]

VIII. ADVANTAGES AND DISADVANTAGES OF ALTERNATIVE DISPUTE RESOLUTION IN COMMERCIAL TRANSACTIONS

152. *Id.*

153. *Id.*

154. *Id.*

155. New York Convention, *supra* note 107.

156. *Id.*

A. Advantages

1. Speedy Resolution of Cases

On the matter of the speedy resolution of cases, the SC, in the case of *Tuna Processing, Inc. v. Philippine Kingford, Inc.*,[157] held that "[s]urely, there is a need to take cognizance of the case[,] not only to guide the bench and the bar, but if only to strengthen arbitration as a means of dispute resolution, and uphold the policy of the State embodied in the [ADR] Act of 2004[.]"[158]

2. Reasonable Cost

Considering that the arbitral process is more concise than the process in a protracted litigation, then the costs of arbitration are relatively more reasonable than the expenses for a full blown litigation which can last for several years.

3. Party Autonomy

On the matter of party autonomy, Rule 2.2 of the Special Rules Of Court On Alternative Dispute Resolution (Special ADR Rules),[159] provide that there is party autonomy in arbitration, to wit:

> Rule 2.2. *Policy on arbitration.* [—] (A) Where the parties have agreed to submit their dispute to arbitration, courts shall refer the parties to arbitration pursuant to Republic Act No. 9285 bearing in mind that such arbitration agreement is the law between the parties and that they are expected to abide by it in good faith.[160]

4. Principle of *Kompetenz-Kompetenz*

Rule 2.2 of the Special ADR Rules specifically acknowledge the principle of *kopetenz-kompetenz*.[161] The SC has said that —

> The Special ADR Rules recognize the principle of competence-competence, which means that the arbitral tribunal may initially rule on its own jurisdiction, including any objections with respect to the existence or

157. Tuna Processing, Inc., vs. Philippine Kingford, Inc., 667 SCRA 287 (2012).

158. *Id.* at 308.

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

160. *Id.* rule 2.2.

161. *Kompetenz-kompetenz*, *supra* note 123.

> validity of the arbitration agreement or any condition precedent to the filing of a request for arbitration.[162]

Moreover, Rule 2.4 of the Special ADR Rules provide for the rule to execute the principle of *kompetenz-kompetenz* which states that —

> Rule 2.4. *Policy implementing competence-competence principle.* [—] The arbitral tribunal shall be accorded the first opportunity or competence to rule on the issue of whether or not it has the competence or jurisdiction to decide a dispute submitted to it for decision, including any objection with respect to the existence or validity of the arbitration agreement. When a court is asked to rule upon issue/s affecting the competence or jurisdiction of an arbitral tribunal in a dispute brought before it, either before or after the arbitral tribunal is constituted, the court must exercise judicial restraint and defer to the competence or jurisdiction of the arbitral tribunal by allowing the arbitral tribunal the first opportunity to rule upon such issues.
>
> Where the court is asked to make a determination of whether the arbitration agreement is null and void, inoperative[,] or incapable of being performed, under this policy of judicial restraint, the court must make no more than a *prima facie* determination of that issue.
>
> Unless the court, pursuant to such *prima facie* determination, concludes that the arbitration agreement is null and void, inoperative[,] or incapable of being performed, the court must suspend the action before it and refer the parties to arbitration pursuant to the arbitration agreement.[163]

5. Separability Doctrine

The Special ADR Rules also provide for and recognize the separability doctrine in arbitration. The Rules states —

> The Special ADR Rules recognize the principle of separability of the arbitration clause, which means that said clause shall be treated as an agreement independent of the other terms of the contract of which it forms part. A decision that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause.[164]

The SC, in the case of *Cargill Philippines, Inc., v. San Fernando Regala Trading, Inc.*,[165] had the occasion to apply the principle of separability in arbitration. The Court ruled that —

---

162. SPECIAL RULES OF COURT ON ALTERNATIVE DISPUTE RESOLUTION, rule 2.2.

163. *Id.* rule 2.4.

164. *Id.* rule 2.2.

165. Cargill Philippines, Inc., v. San Fernando Regala Trading, Inc., 641 SCRA 31 (2011).

> [T]he validity of the contract containing the arbitration agreement does not affect the applicability of the arbitration clause itself ... thus[,]
>
> ['']The doctrine of separability, or severability as other writers call it, enunciates that an arbitration agreement is independent of the main contract. The arbitration agreement is to be treated as a separate agreement and the arbitration agreement does not automatically terminate when the contract of which it is a part comes to an end. The separability of the arbitration agreement is especially significant to the determination of whether the invalidity of the main contract also nullifies the arbitration clause. Indeed, the doctrine denotes that the invalidity of the main contract, also referred to as the ['']container['] contract, does not affect the validity of the arbitration agreement. Irrespective of the fact that the main contract is invalid, the arbitration clause/agreement still remains valid and enforceable.['']166

B. Disadvantages

1. Judicial Review of Arbitral Award

In order for ADR, like arbitration, to be effective it is necessary that the arbitral award must have finality, and that opportunities for judicial review of an arbitral award should be kept at a minimum. Rule 11.4 of the Special ADR Rules provide for the bases for an arbitral award to be vacated.167

---

166. *Id.* at 46.

167. Rule 11.4 of the Special Rules Of Court On Alternative Dispute Resolution states that —

> Rule 11.4. *Grounds.* [—] (A) *To vacate an arbitral award.* [—] The arbitral award may be vacated on the following grounds:
>
> a. The arbitral award was procured through corruption, fraud or other undue means;
>
> b. There was evident partiality or corruption in the arbitral tribunal or any of its members;
>
> c. The arbitral tribunal was guilty of misconduct or any form of misbehavior that has materially prejudiced the rights of any party such as refusing to postpone a hearing upon sufficient cause shown or to hear evidence pertinent and material to the controversy;
>
> d. One or more of the arbitrators was disqualified to act as such under the law and willfully refrained from disclosing such disqualification; or
>
> e.The arbitral tribunal exceeded its powers, or so imperfectly executed them, such that a complete, final and definite award upon the subject matter submitted to them was not made.
>
> The award may also be vacated on any or all of the following grounds:

2. Non-Recognition & Refusal to Enforce a Foreign Arbitral Award

In order for ADR to prosper it is beneficial to have a reasonable system of recognition and enforcement of foreign arbitral awards. Rule 12.4 of the Special ADR Rules provide for limited instances when the court will not recognize and not enforce a foreign arbitral award.[168]

---

a. The arbitration agreement did not exist, or is invalid for any ground for the revocation of a contract or is otherwise unenforceable; or

b. A party to arbitration is a minor or a person judicially declared to be incompetent.

The petition to vacate an arbitral award on the ground that the party to arbitration is a minor or a person judicially declared to be incompetent shall be filed only on behalf of the minor or incompetent and shall allege that (a) the other party to arbitration had knowingly entered into a submission or agreement with such minor or incompetent, or (b) the submission to arbitration was made by a guardian or guardian ad litem who was not authorized to do so by a competent court.

In deciding the petition to vacate the arbitral award, the court shall disregard any other ground than those enumerated above.

SPECIAL RULES OF COURT ON ALTERNATIVE DISPUTE RESOLUTION, rule 11.4.

168. Rule 12.4 of the Special Rules Of Court On Alternative Dispute Resolution states that —

Rule 12.4. *Grounds to set aside or resist enforcement.* [—] The court may set aside or refuse the enforcement of the arbitral award only if:

a. The party making the application furnishes proof that:

(i). A party to the arbitration agreement 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 thereof, under Philippine law; or

(ii). The party making the application to set aside or resist enforcement 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 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, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside or only that part of the award which contains decisions on matters submitted to arbitration may be enforced; or

(iv). The composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement

IX. CONCLUSION

The foregoing research has shown that ADR in Commercial Transactions in the international arena is very dynamic and progressive.[169] The jurisdictions which were made a part of this study show robust movement toward ADR. These countries have a vibrant ADR system working because of the high volume of economic and financial activity in those countries.

Philippine ADR in Commercial Transactions is gaining ground with the enactment of the ADR Act of 2004. This was followed by the promulgation of the Special Rules of Court on Alternative Dispute Resolution. With the basic legal infrastructure in place, the Philippines is well equipped to function as an arbitration center for commercial transactions. This, however, presupposes that there is a sufficient volume of economic activity, domestic and international, in the Philippines, in order that there is the resultant dispute resolution from commercial interaction.

ADR practitioners have a common vision for the Philippines to have an established arbitration center just like its Asian neighbors, the Singapore

---

was in conflict with a provision of Philippine law from which the parties cannot derogate, or, failing such agreement, was not in accordance with Philippine law;

b. The court finds that:

(i). The subject-matter of the dispute is not capable of settlement by arbitration under the law of the Philippines; or

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

In deciding the petition, the Court shall disregard any other ground to set aside or enforce the arbitral award other than those enumerated above.

The petition to set-aside or a pleading resisting the enforcement of an arbitral award on the ground that a party was a minor or an incompetent shall be filed only on behalf of the minor or incompetent and shall allege that (a) the other party to arbitration had knowingly entered into a submission or agreement with such minor or incompetent, or (b) the submission to arbitration was made by a guardian or guardian ad litem who was not authorized to do so by a competent court.

Id. rule 12.4.

169. *See* Williams Kastner & Randy J. Alliment, Alternative Business Resolution In International Business Transactions, *available at* http://www.metrocorpcounsel.com/articles/11783/alternative-dispute-resolution-international-business-transactions (last accessed July 8, 2014).

International Arbitration Centre (SIAC)[170] for Singapore and the Hong Kong International Arbitration Centre (HKIAC) for Hong Kong.[171] In order for this vision to become a reality, the Philippines has to spur rapid economic growth to establish itself as an Asian Tiger, like Hong Kong, Singapore, South Korea, and Republic of China (Taiwan).

X. RECOMMENDATIONS

In addition to the foregoing whereby ADR education is already required for law students and lawyers, and there is the presence of the OADR "to promote ADR in the private and public sectors," this Author recommends that ADR be a required subject and be included in the curriculum for grade school, high school, and college students. ADR should be taught as a separate subject. ADR should also be required to be integrated and included as a required topic in subjects like "Araling Panlipunan," "Philippine History" in conjunction with the Pre-Spanish period and the *barangay* system.

In order to fulfill its mandate, the OADR should be more active and aggressive in its information campaign (i.e., print advertising in major newspapers, radio advertisements, television advertisements, radio program on ADR, television program on ADR).

ADR in commercial transactions in the Philippines can be improved significantly by the adoption of arbitration rules on expedited proceedings, as is provided for in Switzerland and Germany.

The Swiss Rules of International Arbitration provide for an expedited arbitration procedure for small claims, or claims of less than $1,000,000.00. The Swiss arbitration experience has shown to the Swiss that the full-sized arbitration procedure is too lengthy to wait for the settlement of small claims of less than $1,000,000.00.

The German economy is reported as Europe's largest economy. Being the largest economy in Europe, business and commercial transactions in Germany is prosperous. In Germany, the volume of commercial transactions is voluminous. This welcome economic situation unavoidably results in commercial disputes. Because of this bustling business activity in Germany, the Germans are known as leading users of arbitration. In 2008, the German Institute of Arbitration issued its "Supplementary Rules for Expedited

170. *See* Singapore International Arbitration Centre, About Us, *available at* http://www.siac.org.sg/about-us (last accessed July 8, 2014).

171. *See* Hong Kong International Arbitration Centre, About Us, *available at* http://www.hkiac.org/en/hkiac/about-us (last accessed July 8, 2014).

Proceedings." Under these German rules, the parties commit to fast-track arbitration and said arbitral proceedings are conducted within a fixed and accelerated schedule.

Existing Philippine arbitration proceedings can benefit from the adoption of such expedited arbitration proceedings in the Philippine jurisdiction. There is the caveat however, that in order for expedited arbitration proceedings to be effective and actually expedited, then the parties must faithfully adhere to the fixed and accelerated schedule of such expedited arbitral proceeding.

> *My joy was boundless.*
>
> *I had learnt the true practice of law.*
>
> *I had learnt to find the better side of human nature and to enter men's [sic] hearts.*
>
> *I realized that the true function of a lawyer is to unite parties riven asunder.*
>
> *The lesson was indelibly burnt into me that a large part of my time during the twenty years of my practice as a lawyer was occupied in bringing about private compromises of cases.*
>
> *I lost nothing thereby – not even money, certainly not my soul.*
>
> — Mahatma Gandhi, The Story of My Experiments with Truth[172]

172. Boston Law Collaborative, *supra* note 1.