Commercial Arbitration in the Philippines in Light of the ASEAN Integration

*Ma. Venarisse V. Verga**

I. INTRODUCTION 630
II. COMMERCIAL ARBITRATION LAW IN THE PHILIPPINES 631
  A. *Arbitration Agreements and the Principle of Competence-Competence*
  B. *The Doctrine of Separability*
  C. *The Role of the Courts*
  D. *The Arbitral Award and its Enforcement*
III. THE RISING PROMINENCE OF ARBITRATION AS A MEANS OF RESOLVING COMMERCIAL DISPUTES IN THE ASEAN REGION...646
  A. *Institutionalized Arbitration in the ASEAN*
  B. *Arbitration under the ASEAN Comprehensive Investment Agreement*
IV. CONCLUSION 650

I. INTRODUCTION

In May 2014, the Association of Southeast Asian Nations (ASEAN)[1] envisioned to establish the ASEAN Economic Community (AEC) by 2015,[2] which will allow "the free flow of goods, services, investment[,] and skilled [labor,] and the freer flow of capital"[3] across the region. By virtue of the AEC, ASEAN Member States such as the Philippines can expect more international transactions and investments translating to contracts that can be a source of potential disputes. Now more than ever, the Philippines needs to strengthen its system of settling commercial disputes which is necessary to

---

* '08 J.D. Ateneo de Manila University School of Law. The Author is a former member of the Board of Editors of the *Ateneo Law Journal* and is currently taking up her Master of Laws degree in International and European Law at Tilburg University. The Author previously wrote *Defanging a Paper Tiger: A Comment on the Supreme Court's Decision on Presidential Proclamation 1017*, 51 ATENEO L.J. 240 (2006).

Cite as 60 ATENEO L.J. 630 (2016).

1. ASEAN, About ASEAN, *available at* http://www.asean.org/asean/about-asean (last accessed Feb. 15, 2016).
2. 24th Association of Southeast Asian Nations Summit, Nay Pyi Taw Declaration, Myan., May 10-11, 2014, *Nay Pyi Taw Declaration on Realisation of the ASEAN Community by 2015*, 1-2.
3. *Id.* at 6.

achieve the economic growth and development that is envisioned by the ASEAN integration.[4]

In 2004, the Philippine Congress passed Republic Act (R.A.) No. 9285, or the Alternative Dispute Resolution Act of 2004 (ADR Act of 2004),[5] which reflected the policy of the state to "actively promote party autonomy in the resolution of disputes or the freedom of the party to make their own arrangements to resolve their disputes."[6] This law specifically adopted the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Arbitration (Model Law),[7] as its annex, in order to govern international arbitration.[8]

At the onset, it can be said that in terms of legislation, the Philippines has a procedural mechanism in settling international commercial disputes. However, the question as to whether this procedural system is comprehensive enough to cope with the demands of the ASEAN integration is yet to be answered. To this end, this Article aims to present the notable features of arbitration in the Philippines in order to determine if such a system is in line with the method of dispute resolution necessary to keep up with the demands of the ASEAN integration.

II. COMMERCIAL ARBITRATION LAW IN THE PHILIPPINES

Mechanisms for alternative dispute resolution in the Philippines can be considered a reflection of Filipino culture, as Filipinos, in general, prefer to undergo amicable settlement rather than use adversarial proceedings.[9] Hence, alternative dispute resolution, as a substitute to costly litigation, is encouraged; it is also considered as valid and constitutional even before the

4. *See* Ricardo J. Romulo, *Enforcing contracts through arbitration*, PHIL. DAILY INQ., Oct. 31, 2010, *available at* http://opinion.inquirer.net/89919/enforcing-contracts-through-arbitration (last accessed Feb. 15, 2016).

5. An Act to Institutionalize the Use of an Alternative Dispute Resolution System in the Philippines and to Establish the Office for Alternative Dispute Resolution, and for Other Purposes [Alternative Dispute Resolution Act of 2004], Republic Act No. 9285 (2004) [hereinafter ADR Act of 2004].

6. *Id.* § 2.

7. UNCITRAL Model Law on International Commercial Arbitration, G.A. Res. 40/72, U.N. Doc. A/RES/40/17, Annex I (June 21, 1985) [hereinafter Model Law].

8. ADR Act of 2004, § 19.

9. *See* Merzenaida Donovan, *Culture as accessory to mediation: 'Sikolohiyang Pinoy,'* PHIL. STAR, Mar. 11, 2007, *available at* http://www.philstar.com/cebu-lifestyle/389040/culture-accessory-mediation-look-sikolohiyang-pinoy (last accessed Feb. 15, 2016).

approval of R.A. No. 876 or the Arbitration Law in 1953.[10] As early as 1918, and long before there existed a provision in civil law relating to arbitration, the Supreme Court already emphasized the need to respect the agreement of the parties to settle any future disputes through amicable procedures, to wit —

> [C]onsidered as a species of arbitration, it was a convenient and proper method, duly agreed upon between the parties, to determine questions that would necessarily arise in the performance of the contract, about which men might honestly differ ... Unless the agreement is such as absolutely to close the doors of the courts against the parties, which agreement would be void ... courts will look with favor upon such amicable arrangements and will only[,] with great reluctance[,] interfere to anticipate or nullify the action of the arbitrator.[11]

There are three alternative dispute resolution mechanisms in the Philippines: mediation, arbitration, and conciliation.[12] For the purpose of this Article, we shall focus on arbitration which is defined as "a voluntary dispute resolution process in which one or more arbitrators, appointed in accordance with the agreement of the parties, or rules ... resolve a dispute by rendering an award."[13] In 1921, the Supreme Court defined arbitration as

> a substitution, by consent of the parties, of another tribunal[,] for the tribunals provided by the ordinary processes of the law ... depending upon the voluntary act of the parties ... [the object of which] is the final disposition, in a speedy and expensive way, of matters involved, so that they may not become the subject of future litigation[.][14]

Due to the increasing demand for arbitration as a mode of settling disputes, the Congress enacted the Arbitration Law in 1953[15] which authorized the formulation of arbitration and submission agreements,[16] governed the appointment of arbitrators,[17] and laid down the procedure for

---

10. 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). *See also* Puromines, Inc. v. Court of Appeals, 220 SCRA 281, 289 (1993).
11. Allen v. Province of Tayabas, 38 Phil. 356, 363-64 (1918).
12. Domingo P. Disini, Jr. et al., Dispute Resolution Mechanisms in the Philippines (A Paper Published by the Institute of Developing Economics as part of its Asian Law Series No. 18) 17, *available at* http://www.ide.go.jp/English/Publish/Download/Als/pdf/18.pdf (last accessed Feb. 15, 2016).
13. ADR Act of 2004, § 3 (d).
14. Chan Linte v. Law Union and Rock Ins. Co., etc., 42 Phil. 548, 555 (1921).
15. *See generally* The Arbitration Law.
16. The Arbitration Law, §§ 4 & 5.
17. *Id.* §§ 8, 9, & 10.

arbitration in civil controversies.[18] The legislation of the Arbitration Law was followed by the ratification by the Philippines of the United Nations (U.N.) Convention on the Recognition and the Enforcement of Foreign Arbitral Award (New York Convention)[19] on 6 July 1967.[20] However, despite the ratification of the New York Convention, the Philippines lacked any procedure in conducting international arbitration as well as enforcing arbitral awards.[21] Hence, there was a necessity of enacting a law that would deal with this legal lacuna.

The ADR Act of 2004 was passed to keep up with the demands of the growing international trade in the country.[22] It is the primary source law for both international and domestic commercial arbitrations.[23] Chapter Five of the ADR Act of 2004 provides that domestic arbitration shall continue to be governed by the Arbitration Law of 1953,[24] including some provisions of the Model Law.[25] In addition, the ADR Act of 2004 specifically provides that international commercial arbitration shall be governed by the Model Law,[26] the New York Convention,[27] as well as Agreements and treaties entered into by the Philippines with other nations.[28]

---

18. *Id.* §§ 5, 6, & 11–29.
19. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *entered into force* June 7, 1959, 330 U.N.T.S. 3.
20. United Nations Treaty Collection, Database, *available at* https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXII-1&chapter=22&lang=en (last accessed Feb. 15, 2016).
21. Victor P. Lazatin & Patricia Ann. T. Prodigalidad, Arbitration in the Philippines (A Paper Presented to the 9th General Assembly of the ASEAN Law Association) 3, *available at* http://www.aseanlawassociation.org/9GAdocs/w4_Philipines.pdf (last accessed Feb. 15, 2016).
22. *Id.* at 4.
23. *See generally* Lazatin & Prodigalidad, *supra* note 21, at 3, 4, & 7.
24. ADR Act of 2004, § 32. The Section states that "[d]omestic arbitration shall continue to be governed by Republic Act No. 876, otherwise known as 'The Arbitration Law' as amended by this Chapter. The term 'domestic arbitration' as used herein shall mean an arbitration that is not international as defined in Article (3) of the Model Law." *Id.*
25. *Id.* § 33. The provision reads — "Article[s] 8, 10, 11, 12, 13, 14, 18 and 19[,] and 29 to 32 of the Model Law and Section[s] 22 to 31 of the preceding Chapter 4 shall apply to domestic arbitration." *Id.*
26. *Id.* § 19. This Section provides — "International commercial arbitration shall be governed by the Model Law on International Commercial Arbitration (the 'Model Law') adopted by the United Nations Commission on International Trade Law on [21 June] 1985." *Id.*
27. *Id.* § 42.
28. *See* ADR Act of 2004, §§ 43-45.

For both domestic and international commercial arbitration, general provisions of the Philippine Civil Code on arbitrations contained in Article 2042 until Article 2046[29] shall also be made applicable. Article 2042 of the Civil Code provides that "the same persons who may enter into a compromise may submit their controversies to one or more arbitrators for decision."[30] Hence, the provisions on Compromise found in Articles 2028 until 2041 of the Civil Code shall also be made applicable to arbitration.[31]

A. Arbitration Agreements and the Principle of Competence-Competence

The basis of arbitration is the existence of an agreement to arbitrate wherein the parties choose the law which will govern the arbitration proceedings.[32] Arbitral agreements are defined as "those agreements of parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not."[33]

The binding effect and treatment of arbitral agreements in the Philippines may depend on whether we are dealing with domestic or international commercial arbitration.

Domestic arbitration occurs when parties agree to apply Philippine law in the proceedings, and as such, the arbitration agreement shall be treated like any other kind of contract governed by the Civil Code.[34] As mentioned

---

29. The provisions go as follows:

> Art. 2042. The same persons who may enter into a compromise may submit their controversies to one or more arbitrators for decision.
>
> Art. 2043. The provisions of the preceding Chapter upon compromises shall also be applicable to arbitrations.
>
> Art. 2044. Any stipulation that the arbitrators' award or decision shall be final, is valid, without prejudice to Articles 2038, 2039, and 2040.
>
> Art. 2045. Any clause giving one of the parties power to choose more arbitrators than the other is void and of no effect.
>
> Art. 2046. The appointment of arbitrators and the procedure for arbitration shall be governed by the provisions of such rules of court as the Supreme Court shall promulgate.

An Act to Ordain and Institute the Civil Code of the Philippines [CIVIL CODE], Republic Act No. 386 (1950), arts. 2042-2046.

30. *Id.* art. 2042.

31. *Id.* art. 2043.

32. Lazatin & Prodigalidad, *supra* note 21, at 10.

33. Model Law, *supra* note 7, art. 7.

34. Lazatin & Prodigalidad, *supra* note 21, at 10-11.

above, domestic arbitrations are governed by the Arbitration Law of 1953 which specifically provides the following —

> Two or more persons or parties may submit to the arbitration of one or more arbitrators any controversy existing between them at the time of the submission and which may be the subject of an action, or the parties to any contract may in such contract agree to settle by arbitration a controversy thereafter arising between them. Such submission or contract shall be valid, enforceable[,] and irrevocable, save upon such grounds as exist at law for the revocation of any contract.[35]

Like all contracts, when parties agreed to settle their dispute through arbitration, they are mandated by law to abide by such contractual commitment in good faith.[36] The binding effect of arbitration agreements is bolstered by Section 7 of The Arbitration Law which provides that the court shall stay an action or proceeding which can be referred to arbitration,[37] unless it "finds that the arbitration agreement is null and void, inoperative[,] or incapable of being performed."[38] Section 6 of the ADR Act of 2004 likewise enumerates certain disputes which cannot be settled or resolved through arbitration.[39] In domestic arbitration where a party failed or refused to submit a dispute in accordance with an arbitration agreement previously entered with another party, the aggrieved party "may petition the court for an order directing that such arbitration proceed in the manner provided for in such agreement."[40]

Under the ADR Act of 2004, in relation to the Model Law, parties are free to choose the law and procedure that will govern an international arbitration proceeding.[41] Like in domestic arbitration, the courts shall stay an action if it finds that the parties have an agreement to arbitrate, unless such an agreement is "null and void, inoperative[,] or incapable of being

---

35. The Arbitration Law, § 2.
36. Quillian v. Court of Appeals, 169 SCRA 279, 283 (1989).
37. The Arbitration Law, § 7.
38. ADR Act of 2004, § 24.
39. *Id.* § 6. The provision reads —

    > 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 which by law cannot be compromised.

    Id.
40. The Arbitration Law, § 6.
41. *See* ADR Act of 2004, § 40 & Model Law, *supra* note 7, arts. 19 & 28.

performed."[42] This is in keeping with the policy of the State in favor of arbitration, whether it is domestic or international.[43] Hence, in the case of *Lanuza v. BF Corporation*,[44] the Supreme Court ruled that in keeping with the policy "to adopt arbitration as a manner of settling disputes, arbitration clauses are liberally construed in favor of arbitration."[45] Similarly, the ADR Act of 2004 highlights that courts "shall have due regard to the policy of the law in favor of arbitration."[46]

Following the Model Law, the arbitral tribunals in the Philippines apply the principle of *competence-competence*,[47] as it rules on issues relating to its own jurisdiction, "including any objections with respect to the existence or validity of the arbitration agreement."[48] This principle has been extensively discussed in *Koppel, Inc. v. Makati Rotary Club Foundation, Inc.*,[49] which is a

---

42. ADR Act of 2004, § 24.

43. *Id.* § 25.

44. Lanuza, Jr., v. BF Corporation, 737 SCRA 275 (2014).

45. *Id.* at 293. This case further stressed that "any doubt should be resolved in favor of arbitration." *Id.* at 294. This is in keeping with the Supreme Court's ruling in the case of *LM Power Engineering Corporation v. Capitol Industrial Construction Groups, Inc. Id.* at 293 (citing LM Power Engineering Corporation v. Capitol Industrial Construction Groups, Inc. 399 SCRA 562, 570 (2003)).

46. ADR Act of 2004, § 25. It reads —

> In interpreting the Act, the court shall have due regard to the policy of the law in favor of arbitration. Where action is commenced by or against multiple parties, one or more of whom are parties who are bound by the arbitration agreement although the civil action may continue as to those who are not bound by such arbitration agreement.

Id.

47. This is called *compétence de la compétence* in French. As explained,

> [f]irstly, it means that arbitrators are judges of their own jurisdiction and have the right to rule on their own competence. Therefore, if the validity of the arbitration agreement *itself* and thus the competence of the arbitration is impugned, he or she doesn't not have to stop the proceedings but can continue and consider whether he or she has jurisdiction. Secondly ... the arbitration agreement outs the initial jurisdiction of ordinary courts. If the *prima facie* existence of the arbitration agreement is objected to, a court must refer the dispute to arbitration.

Jack Tsen-Ta Lee, *Separability, Competence-Competence and the Arbitration's Jurisdiction in Singapore*, 7 SING. ACAD. L.J. 421, 421-22 (1995).

48. Model Law, *supra* note 7, art 16 (1).

49. Koppel, Inc. v. Makati Rotary Club Foundation, Inc., 705 SCRA 142 (2013).

case involving an arbitration clause in a lease contract.[50] The Supreme Court ruled that the case pending before the court should have been stayed and that it should have been referred to arbitration pursuant to the arbitration clause of the contract.[51] In making such a ruling, the Supreme Court highlighted Rule 2.4 of the Special Rules of Court on Alternative Dispute Resolution (Special Rules)[52] which stressed the Court's policy of implementing the *competence-competence* principle.[53] The provision reads —

> 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.
>
> ...
>
> 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.[54]

Philippine jurisprudence enforced the principle that "bona fide arbitration agreements are recognized as valid,"[55] and that they are protected and enforced as a matter of public policy.[56] Any question relating to the competence or jurisdiction of the tribunal shall be dealt with by the tribunal itself and not by the courts.[57]

Hence, in both domestic and international arbitration, the Court will exercise caution and will often stay any action that should be referred to arbitration by virtue of an arbitration agreement.

---

50. *Id.* at 145.
51. *Id.* at 168.
52. SPECIAL RULES OF COURT ON ALTERNATIVE DISPUTE RESOLUTION, A.M. No. 07-11-08-SC, Sep. 1, 2009 [hereinafter SPECIAL RULES].
53. *Id.* rule 2.4.
54. *Id.*
55. *Koppel, Inc.*, 705 SCRA at 169.
56. Chung Fu Industries (Phils.), Inc. v. Court of Appeals, 206 SCRA 545, 552 (1992).
57. SPECIAL RULES, rule 2.4.

B. The Doctrine of Separability

In both domestic and international commercial arbitrations, the Philippines respects the principle of separability, which provides that "an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract."[58] Following the Model Law, "[a] decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause."[59] Hence, in the case of *Gonzales v. Climax Mining Ltd.*,[60] the Supreme Court enforced the doctrine of separability and ruled, to wit —

> 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.[61]

In this case, the petitioner alleged that the court acted with grave abuse of discretion in ordering the parties to proceed with arbitration considering that the addendum to the contract was allegedly void.[62] Thus, the petitioner argued that the arbitration clause should be considered void as well.[63] In ruling that the petitioner's argument is untenable, the Supreme Court explained —

> First, the proceeding in a petition for arbitration under R.A. No. 876 is limited only to the resolution of the question of whether the arbitration agreement exists. Second, the separability of the arbitration clause from the Addendum Contract means that [the] validity or invalidity of the Addendum Contract will not affect the enforceability of the agreement to arbitrate.[64]

The reason for upholding the doctrine of separability was explained by the Supreme Court in the case of *Philippine Economic Zone Authority v. Edison*

58. Model Law, *supra* note 7, art. 16 (1).

59. *Id.*

60. Gonzales v. Climax Mining Ltd., 512 SCRA 148 (2007).

61. *Id.* at 170 (citing PHILLIP CAPPER, INTERNATIONAL ARBITRATION: A HANDBOOK 12 (3d ed. 2004)).

62. *Id.* at 156.

63. *Id.*

64. *Id.* at 172.

(*Bataan*) *Cogeneration Corporation*[65] where it stated that parties cannot be allowed to repudiate the contract in order to avoid arbitration,[66] to wit —

> [W]e now hold that the validity of the contract containing the agreement to submit to arbitration does not affect the applicability of the arbitration clause itself. A contrary 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.[67]

Hence, in cases where there exists an agreement on the part of the parties to submit the case for arbitration, courts will not take cognizance of any action, and will actually order the parties to arbitrate even if there are allegations that the main contract is invalid. This is in keeping with the principle that the validity or invalidity of the agreement does not affect the applicability of the arbitration clause.

C. The Role of the Courts

The ADR Act of 2004, nevertheless, provides parties with an opportunity to seek judicial assistance before and during the course of the arbitration.[68] However, these mechanisms should not be construed as an enforcement of the primacy of courts, or an abandonment of the *competence-competence* principle. At all times, courts are mandated to "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."[69]

1. On the Issue of Existence and Validity of the Arbitration Agreement and Jurisdiction of the Arbitral Tribunal

Rule 3.2 of the Special Rules allow any party to an arbitration agreement to "petition the appropriate [c]ourt to determine any question concerning the existence, validity[,] and enforceability of such arbitration agreement"[70] at any time prior to the commencement of arbitration.[71] However, the Special Rules stress that the pendency of such a petition shall not bar the arbitral tribunal from commencing and continuing to render an award.[72] Likewise,

---

65. Philippine Economic Zone Authority v. Edison (Bataan) Cogeneration Corporation, 604 SCRA 349 (2009).

66. *Id.* at 357.

67. *Id.*

68. *See* ADR Act of 2004, § 3 (a).

69. SPECIAL RULES, rule 2.4.

70. *Id.* rule 3.2.

71. *Id.* rule 3.3.

72. *Id.*

the *prima facie* determination of the court upholding the arbitration agreement shall not prejudice a party in raising the "issue of existence, validity[,] and enforceability of the arbitration agreement before the arbitral tribunal."[73]

Rule 3.12 of the Special Rules further allows any party to the arbitration to file a petition in court "for judicial relief from the ruling of the arbitral tribunal on a preliminary question upholding or declining its jurisdiction"[74] within 30 days from the receipt of the ruling.[75] The court shall resolve the petition within 30 days from submitting the same for resolution.[76] As always, the pendency of the petition in court shall "not prevent the arbitral tribunal from continuing the proceedings and rendering its award."[77]

It bears to note, however, that in case the arbitral tribunal defers in ruling on the question of its jurisdiction until the final award, no judicial relief questioning such deferral can be made, and a party must "await the final arbitral award before seeking appropriate judicial recourse."[78] In instances where the arbitral tribunal renders a final arbitral award while a petition questioning its ruling on its jurisdiction is pending before the court, the petition in court shall be rendered moot and academic without prejudice on the part of the losing party to file the appropriate petition to "vacate or set aside the award."[79]

2. Court Assistance in Referring the Case to Arbitration and Interim Measures of Protection

Rule 4.1 of the Special Rules allows a party to request the court to refer the case to arbitration in accordance with an arbitration clause or submission agreement.[80] The proceedings shall be stayed and the court will refer the case to arbitration if it finds "*prima facie*, based on the pleadings and supporting documents ... that there is an arbitration agreement."[81] Such an order referring the case for arbitration shall be immediately executory.[82]

73. *Id.* rule 3.11.
74. *Id.* rule 3.12.
75. SPECIAL RULES, rule 3.13.
76. *Id.* rule 3.18.
77. *Id.*
78. *Id.* rule 3.20.
79. *Id.* rule 3.21.
80. *Id.* rule 4.1.
81. SPECIAL RULES, rule 4.5.
82. *Id.* rule 4.6.

Moreover, arbitrators in the Philippines are empowered to order any interim measures of protection such as, but not limited to, "preliminary injunction directed against a party, appointment of receivers[,] or detention, preservation, [and] inspection of property that is subject of dispute."[83] The courts can assist arbitration in the implementation and enforcement of such interim measures upon application by a party for court assistance.[84]

It is worth noting that in the Philippine jurisdiction, "it is not incompatible with an arbitration agreement for a party to request, before constitution of the tribunal, from a [c]ourt[,] an interim measure of protection[,] and for the [c]ourt to grant such measure."[85] Such interim measure may be filed in order to:

(a) Prevent irreparable loss or injury;[86]

(b) Provide security for the performance of any obligation;[87]

(c) Produce or preserve any evidence;[88] or

(d) Compel any other appropriate act or omission."[89]

In case there is a conflict or inconsistency between the interim measure of protection that is issued by the court and the arbitral tribunal, the latter shall have the authority to resolve such an issue.[90] Likewise, the court shall defer any action on a petition for interim measure as soon as the arbitral tribunal is constituted.[91] This evidences the fact that in Philippine jurisdiction, the arbitral tribunal is given the first priority to rule on issues which it has competence.

3. Appointment of Arbitrators

The Special Rules provide that the court shall act as appointing authority only in the following instances:

(a) Parties in an institutional arbitration failed or refused to appoint an arbitrator or when the parties have failed to reach an agreement on the sole arbitrator or when two designated arbitrators have

83. ADR Act of 2004, § 29.

84. *Id. See also* SPECIAL RULES, rule 5.15.

85. ADR Act of 2004, § 28.

86. *Id.* § 28 (b) (2) (i).

87. *Id.* § 28 (b) (2) (ii).

88. *Id.* § 28 (b) (2) (iii).

89. *Id.* § 28 (b) (2) (iv).

90. SPECIAL RULES, rule 5.14.

91. *Id.* rule 5.15.

failed to reach an agreement on a third or presiding arbitrator and the institution failed to appoint one;[92]

(b) In *ad hoc* arbitration and the parties failed to provide a method for appointing or replacing an arbitrator, or the method agreed upon is ineffective;[93] or

(c) Where the parties agreed that their dispute be resolved by three arbitrators but no method of appointing those arbitrators have been agreed upon.[94]

Likewise, courts may assist the tribunal in case there is a challenge on the appointment of an arbitrator, provided that such a challenge has been previously referred to the appointing authority and such authority fails or refuses to act on the challenge within 30 days from receipt of the request.[95]

In cases where any of the parties to an arbitration requests for the termination of the mandate of an arbitrator because such arbitrator becomes *de jure* or *de facto* unable to perform his functions, a petition to terminate the mandate may likewise be filed in court provided that that the following party has exhausted all remedies.[96] The party must have requested that the arbitrator withdraw from office, and such arbitrator refused.[97] Next, the request must likewise be brought before the appointing authority, and the latter failed or refused to decide on the termination of the mandate of the arbitrator within 30 days from the time of request.[98]

4. Assistance in Taking Evidence and Issuance of Confidentiality or Protective Orders

The Special Rules allow a party to a domestic or foreign arbitration the right to request a court for assistance in taking evidence.[99] A party who is in need of assistance may file a petition in court for the issuance of a *subpoena ad testificandum* and/or *subpoena duces tecum* to any person or entity found in the Philippines.[100] The party may also petition the court to compel a witness to appear before an officer for the taking of his deposition, to allow the physical examination of the condition of persons, inspection of things and premises, and to allow the examination and copying of documents, and other similar

92. *Id.* rule 6.1 (a).

93. *Id.* rule 6.1 (b).

94. *Id.* rule 6.1 (c).

95. *Id.* rule 7.2.

96. SPECIAL RULES, rule 8.1.

97. *Id.* rule 8.1.

98. *Id.* rule 8.2.

99. *Id.* rule 9.1.

100. *Id.* rule 9.5.

acts.[101] Through these actions, the court will be able to assist the tribunal in the gathering of evidence which will be used as the basis of the award. At the same time, this will give more teeth to the tribunal's proceedings as courts may impose sanctions on persons who disobey an order to testify or to perform an act required.[102]

One important feature of arbitration is the option of rendering the proceedings confidential in order to protect the reputation of the parties involved.[103] Confidential matters such as technical data, recipes, and trade secrets and procedures may materially prejudice a party if divulged or disclosed. Hence, courts can issue, on the basis of a petition filed by any party, protective orders enjoining parties or persons from divulging confidential information.[104] A court may likewise impose sanctions on any person who disobeys an order to cease from divulging confidential information.[105] These protective measures are very important to businesses and companies that are planning to invest more funds in the ASEAN region by virtue of the AEC considering that they have their image and names to protect.

D. The Arbitral Award and its Enforcement

It is very important, for the parties, that the tribunal be able to issue an award in order to finally settle the dispute in the most expeditious manner possible. Due to the clogging of Philippine court dockets, arbitration became a very attractive alternative considering that tribunals are mandated to render an award "within [30] days after the closing of the hearings" in case of domestic arbitration;[106] and within the period agreed upon by the parties in case of international commercial arbitration.[107]

In both domestic and international arbitration, the award, which shall be confined only on the matters which have been submitted by the parties,[108] shall be "made in writing and signed and acknowledged by a majority of the arbitrators, if more than one; and by the sole arbitrator, if there is only one."[109] The award should provide "the reason upon which it is based,

---

101. *Id.*

102. SPECIAL RULES, rule 9.11.

103. *See* KYRIAKI NOUSSIA, CONFIDENTIALITY IN INTERNATIONAL COMMERCIAL ARBITRATION 177 (2010).

104. *See generally* SPECIAL RULES, rules 10.1, 10.2, & 10.8.

105. *Id.* rule 10.10.

106. The Arbitration Law, § 19.

107. Model Law, *supra* note 7, art. 28 (1).

108. The Arbitration Law, § 20.

109. *Id.*

unless the parties have agreed that no reasons are to be given,"[110] as well as the date and place of arbitration.[111] In case the parties have nevertheless reached an amicable settlement of the dispute, such settlement shall still be reflected in an award which shall be signed by the arbitrators.[112]

On one hand, domestic Arbitral awards may be challenged or vacated based solely on the following grounds:

(a) Corruption, fraud, or other undue means of procuring an arbitral award;[113]

(b) Evident partiality or corruption in the arbitral tribunal or any of its members;[114]

(c) Misconduct or any form of misbehavior on the part of the arbitral tribunal;[115]

(d) Disqualification of any of the arbitrators;[116] or

(e) Arbitral tribunal exceeded it powers.[117]

On the other hand, foreign arbitral awards may be challenged upon furnishing proof that:

(a) A party to the arbitration agreement has no capacity or that the agreement is invalid under the law which the parties have chosen to govern it;[118]

(b) No proper notice was given to a party of the appointment of an arbitrator;[119]

(c) The award deals with a dispute that is not falling within the terms of the submission to arbitration or contains matters beyond the scope of the arbitration;[120]

110. Model Law, *supra* note 7, art. 31 (2).

111. *Id.* § 31 (3).

112. The Arbitration Law, § 20.

113. Department of Justice, Implementing Rules and Regulations of the Alternative Dispute Resolution Act of 2004, Republic Act No. 9285, art. 5.35 (a) (i), (2009).

114. *Id.* art. 5.35 (a) (ii).

115. *Id.* art. 5.35 (a) (iii).

116. *Id.* art. 5.35 (a) (iv).

117. *Id.* art. 5.35 (a) (v).

118. *Id.* art. 4.34 (b) (i) (aa).

119. Rules and Regulations Implementing ADR Act of 2004, art. 4.34 (b) (i) (bb).

120. *Id.* art. 4.34 (b) (i) (cc).

(d) Composition of the tribunal or the procedure was not done in accordance with the agreement of the parties;[121]

(e) The subject matter of the dispute is not capable of being settled by arbitration under Philippine law;[122] and

(f) The award contravened Philippine public policy.[123]

In all instances, the challenge should be filed with the Regional Trial Court (RTC).[124]

In case there is no challenge, the ADR Act of 2004, which governs confirmation of domestic arbitral awards, provides that the award shall first be confirmed by the lower court and shall then be enforced "in the same manner as final and executory decisions of the [RTC]."[125] The confirmation procedure as mentioned above shall be governed by the Arbitration Law.[126] It bears to note that the Arbitration Law provides that a confirmed award shall have the same force and effect of a judgment in an action.[127] Hence, it can be immediately executed.

The Implementing Rules and Regulations (IRR) of the ADR Act of 2004 provides the following —

> The party relying on an award or applying for its enforcement shall file with the [RTC] the original or duly authenticated copy of the award and

---

121. *Id.* art. 4.34 (b) (i) (dd).

122. *Id.* art. 4.34 (b) (ii) (aa).

123. *Id.* art. 4.34 (b) (ii) (bb).

124. *See* Rules and Regulations Implementing ADR Act of 2004, art. 4.6.

125. ADR Act of 2004, § 40. It reads —

> A domestic arbitral award when confirmed shall be enforced in the same manner as final and executory decisions of the Regional Trial Court. The confirmation of a domestic award shall be made by the regional trial court in accordance with the Rules of Procedure to be promulgated by the Supreme Court.

Id.

126. *See* The Arbitration Law, § 23. The provision reads —

> At any time within one month after the award is made, any party to the controversy which was arbitrated may apply to the court having jurisdiction, as provided in [S]ection [28], for an order confirming the award; and thereupon the court must grant such order unless the award is vacated, modified or corrected, as prescribed herein. Notice of such motion must be served upon the adverse party or his attorney as prescribed by law for the service of such notice upon an attorney in action in the same court.

Id.

127. *Id.* § 28.

> the original arbitration agreement ... or a duly authenticated copy thereof. If the award or agreement is not made in an official language of the Philippines, the party shall supply a duly certified translation thereof into such language.[128]

The IRR of the ADR Act of 2004 likewise distinguishes between Convention and Non-Convention Awards. Rule 6, Article 4.35 (b) (i) provides that "the New York Convention shall govern the recognition and enforcement of arbitral awards covered by the said Convention"[129] while those not covered shall be done "in accordance with procedural rules to be promulgated by the Supreme Court."[130] As a party to the New York Convention, Philippine courts shall recognize and enforce arbitration awards made in countries that are likewise parties to the said convention.[131]

Lastly, it bears to note that final arbitral awards, whether domestic or international, bar the filing of a case in court with respect to the same subject matter, in the same way that "a foreign [c]ourt judgment may ... bar an arbitration, on the same subject matter and involving the same parties."[132] Stated differently, as much as a final award or decision bars subsequent actions involving the same parties, the same subject matter, and the same issues, a final arbitral award likewise have the same *res judicata* effect.[133]

III. THE RISING PROMINENCE OF ARBITRATION AS A MEANS OF RESOLVING COMMERCIAL DISPUTES IN THE ASEAN REGION

It is evident that international arbitration has become one of the primary means of resolving international commercial disputes in the ASEAN region.[134] This is brought about by the steady rise of cross border disputes involving entities in Asia.[135] There is distrust of these entities in the local courts[136] as they are not considered as the most efficient means of resolving

128. Rules and Regulations Implementing ADR Act of 2004, art. 4.35 (c).

129. *Id.* rule 6, art. 4.35 (b) (i). *See also* ADR Act of 2004, § 42.

130. Rules and Regulations Implementing ADR Act of 2004, rule 6, art. 4.35 (b) (ii). *See also* ADR Act of 2004, § 42.

131. Rules and Regulations Implementing ADR Act of 2004, rule 6, art. 4.35 (b) (i).

132. BAKER AND MCKENZIE, THE BAKER AND MCKENZIE INTERNATIONAL ARBITRATION YEARBOOK 71 (2009).

133. *Id.*

134. RUSSELL WEINTRAUB, INTERNATIONAL LITIGATION AND ARBITRATION: PRACTICE AND PLANNING 621 (6th ed. 2011).

135. Kanishk Verghese, Arbitration in Asia: The Next Generation?, *available at* www.legalbusinessonline.com/reports/arbitration-asia-next-generation (last accessed Feb. 15, 2016).

136. Romulo, *supra* note 4.

international commercial disputes,[137] since they do not have the same flexibility, efficiency, neutrality, enforceability, and technical experience embodied by arbitral tribunals.[138] Hence, arbitration is considered an attractive alternative compared to an unfamiliar national judicial system because the parties have a choice not only in the law and venue, but also in the arbitrators who will resolve their dispute. This actually builds more confidence on the part of the parties.

A. Institutionalized Arbitration in the ASEAN

The Philippines has several institutions where institutionalized arbitration may be conducted, including, but not limited to the Philippines Dispute Resolution Center Inc.[139] There is the Construction Industry Arbitration Commission for construction disputes.[140] Disputing parties may likewise choose other Asian destinations such as the Hong Kong International Arbitration Centre,[141] the Singapore International Arbitration Centre,[142] or the Kuala Lumpur Regional Centre for Arbitration.[143]

With the dawn of the AEC, people can expect more complex economic activities in the region such that businesses must be abreast of legal developments in all of the ASEAN countries.[144] Moreover, as Ranajit Dam observed, the diversity of languages and legal regimes in Asia creates a complex environment for a local lawyer to act in behalf of his clients.[145] Hence, institutional arbitration centers, which present neutral grounds and embody the capacity to resolve disputes despite the increasing complexities of legal developments across the region, are seen to be more cost-efficient.

---

137. *Id.*

138. Tom Cummins, Anatomy of an arbitration Part I: Why arbitrate?, *available at* https://www.ashurst.com/publication-item.aspx?id_Content=8840 (last accessed Feb. 15, 2016).

139. Lazatin & Prodigalidad, *supra* note 21, at 5.

140. *Id.* at 6.

141. *Id.*

142. *Id.*

143. *See* KLRCA, Rules, *available at* http://klrca.org/rules/arbitration (last accessed Feb. 15, 2016).

144. Ranajit Dam, Arbitration and the AEC, *available at* http://www.legalbusinessonline.com/features/arbitration-and-aec/70536 (last accessed Feb. 15, 2016).

145. *Id.*

B. Arbitration under the ASEAN Comprehensive Investment Agreement

The coming into effect of the ASEAN Comprehensive Investment Agreement (ACIA) last 29 March 2012[146] has a huge impact on the practice of arbitration within the Philippines and ASEAN in general. At the onset, this Agreement, of which the Philippines is a signatory, aims to promote its four pillars of Liberalization, Protection, Facilitation, and Promotion.[147] One important aim of the ACIA is to ensure equality in treatment for ASEAN investors and their investments.[148] Hence, it enforced the Most-Favored Nation (MFN) Treatment clause which mandates each Member State to accord investors and investments of another Member State treatment no less favorable than that it accords to investors or investments of any other Member State.[149] In addition to the MFN, the ACIA likewise mandates its Member States to extend investors and investments of other Member States treatment no less favorable than it accords to national investors and investments in its own country or territory.[150]

In order to promote its four pillars, the ACIA included an Investor-Dispute Settlement Mechanism (ISDS) which can be used by ASEAN investors in resolving their disputes with a Member State.[151] The said mechanism likewise applies to breach of any rights that are conferred by the Agreement with respect to the investment of such investor,[152] without prejudice to the right of the disputing investor to seek "administrative or judicial settlement available within the country of a disputing Member [S]tate."[153]

---

146. Association of Southeast Asian Nations, ASEAN Comprehensive Investment Agreement, *available at* http://www.asean.org/?static_post=asean-comprehensive-investment-agreement-cha-am-thailand-26-february-2009 (last accessed Feb. 15, 2016) [hereinafter ACIA].

147. INSTITUTE OF SOUTHEAST ASIAN STUDIES, REALIZING THE ASEAN ECONOMIC COMMUNITY 85 (Michael G. Plummer & Chia Siow Yue eds., 2009).

148. Dej-Udom & Associates, ACIA Overview, *available at* http://www.dejudomlaw.com/asean-law/the-asean-comprehensive-investment-agreement-an-overview (last accessed Feb. 15, 2016).

149. ACIA, *supra* note 146, art. 6 (1).

150. *Id.* art. 5.

151. Dej-Udom & Associates, *supra* note 148.

152. ACIA, *supra* note 146, art. 29 (1). The breach referred to in this article refers to the provisions on National Treatment, Most Favored Nation, Senior Management and Board Directors, Treatment of Investment, Compensation in Cases of Strife, Transfers, and Expropriation and Compensation. *Id.* art. 32.

153. *Id.* art. 29 (4).

The ACIA encourages disputing parties to first submit their issues to conciliation.[154] In case the dispute is not resolved within a period of 180 days from receipt of notice by the Member State, the investor may submit the issue for arbitration.[155] In accordance with Article 33 of the ACIA, a disputing investor may submit a claim:

(a) To courts of administrative tribunals of the disputing Member State;[156]

(b) Under the ICSID Convention and the ICSID Rules of Procedure for Arbitration Proceedings, provided that both parties are state parties to the ICSID Convention;[157]

(c) Under the ICSID Additional Facility Rules;[158]

(d) Under the UNCITRAL Arbitration Rules;[159]

(e) To any regional center for arbitration in the ASEAN;[160] or

(f) To any other arbitration institution.[161]

It must be noted, however, that in the case of the Philippines, a claim to ICSID and its rules of procedure shall be "subject to a written agreement between the disputing parties."[162] Likewise, the choice of one fora or rule shall be deemed to exclude resort to other rules.[163]

Other notable features of the ACIA include the following:

(a) Respect to the principle of *competence-competence* as ACIA provides that "where issues relating to jurisdiction or admissibility are raised," the tribunal shall be the one to decide "before proceeding to the merits;"[164]

(b) In terms of appointment of arbitrators, the ACIA requires three persons to be appointed, with one coming from a

154. *Id.* art. 30.

155. *Id.* art. 32.

156. *Id.* art. 33 ¶ 1 (a).

157. ACIA, *supra* note 146, art. 33 ¶ 1 (b).

158. *Id.* art. 33 (1) (c).

159. *Id.* art. 33 (1) (d).

160. *Id.* art. 33 (1) (e).

161. *Id.* art. 33 (1) (f).

162. *Id.* art. 33 (1) (b).

163. ACIA, *supra* note 146, art. 33 (1).

164. *Id.* art. 36 (1).

non-ASEAN country.[165] The third arbitrator should not be a resident of the host country or the investor's home country as well;[166] and

(c) No punitive damages shall be awarded[167] and each ASEAN state is mandated by the ACIA to provide for the enforcement of the arbitral award in its territory.[168] Awards may be in (a) monetary form,[169] or (b) restitution of property.[170]

It is worth noting, however, that the ISDR mechanism under the ACIA is not without any limitations. First, considering that this mechanism only covers the ACIA, the types of disputes that it can encompass are likewise limited to (1) issues of breach of the provisions of this agreement as enumerated in Article 32, and (2) only those industries where ACIA is applicable.[171] Second, considering that ACIA is an agreement between sovereign States, it allowed for reservations which in turn further limited the coverage of the treaty. Third, although the ACIA mandates it Member States to provide for means to enforce arbitral awards, we still have to keep in mind that we are dealing with sovereign States, which in turn, makes enforcement difficult. Most arbitral awards may need to be enforced through a local court. Unfortunately, not all local courts may enforce an award against its own government.[172]

IV. CONCLUSION

The Supreme Court in the case of *BF Corporation v. Court of Appeals*[173] noted that "arbitration ... is now rightfully vaunted as 'the wave of the future' in international relations, and is recognized worldwide."[174] Its potentials, practicability, and benefits cannot be undermined. The Philippines may not have yet reached the prominence of arbitration venues compared to Singapore, Hong Kong, or Kuala Lumpur. However, the

165. *See* ACIA, *supra* note 146, art. 35.

166. *Id.*

167. ACIA, *supra* note 146, art. 41 (4).

168. *Id.* art. 41 (9).

169. *Id.* art. 41 (2) (a).

170. *Id.* art. 41 (2) (b).

171. There are manufacturing, agriculture, fishery, forestry, mining, and services related to these industries. *Id.* art. 3 (3).

172. *See* John Frangos, *Investor-state arbitration in the ASEAN Economic Community*, 22 ASIA PAC. REGIONAL FORUM NEWS 18, 20 (2015).

173. BF Corporation v. Court of Appeals, 288 SCRA 267 (1998).

174. *Id.* at 286.

discussion above shows that the Philippines has well-established laws, rules, and regulations which are comprehensive enough to make this country a possible choice of venue for ASEAN disputants. With the coming of the AEC, the Philippine arbitration system, which applies the Model Law, can keep up with the demands of the ASEAN integration. Philippine jurisprudence likewise reflects its adherence to basic arbitration doctrines and principles in line with the practice of most States in the world.

At present, there are a number of mechanisms that can be chosen from, which are based in the ASEAN, in resolving disputes. These apply particularly in cases of investor-State investment disputes. It is true that the capabilities of the ISDR are yet to be tested. It is likewise plagued with limitations. However, the mechanism it presents can, nevertheless, be an attractive alternative to investors, and can build their confidence towards investing in the ASEAN region. The steady rise of arbitration centers within the ASEAN, including institutions in the Philippines and the ISDR, guarantee parties that they will never be left without a choice.

It is, however, important to note that the national courts still play a role in arbitration. Hence, while alternative dispute mechanisms are being developed, the judicial system in the Philippines as well as in other ASEAN nations should also be improved to ensure that it will not hamper the prominence and usefulness of arbitration. In the same way that there is an increasing number of arbitration practitioners in Asia, there is also a great need for local litigation lawyers and court staff to have an international mindset and skills in dealing with multi-national disputes. Otherwise, arbitration will be rendered useless if the judicial system is grossly inefficient in enforcing the arbitral awards.

In order to keep up with the demands of the ASEAN integration, it is not enough for countries like the Philippines to develop and focus only on its mechanisms for alternative dispute resolution. The courts must not be forgotten as both arbitration and the judiciary play an important role in ensuring that the Philippines and other ASEAN nations can keep up with the demands of the AEC. Building the confidence of the parties in entering into cross border transactions will eventually benefit ASEAN states. Hence, parties must be able to have full confidence that in case they encounter disputes by virtue of these transactions, such disputes will be resolved efficiently, fairly, and in the most cost-effective manner possible. To this end, it is necessary that the Philippines, as a member of the ASEAN, should aim for a parallel development of the judiciary and the arbitral tribunals in order to achieve a balance between a strong alternative means of dispute settlement and an effective enforcement of the awards through the local courts.