The Evolution of Arbitration in the Philippines

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I. INTRODUCTION

Before the year 1953, the Philippines only had five legal provisions relating to arbitration. These were all found in Republic Act (R.A.) No. 386, otherwise known as the Civil Code,[1] which was, in itself, enacted only in 1950. Said provisions are the following —

> Article 2042. The same persons who may enter into a compromise may submit their controversies to one or more arbitrators for decision.[2]
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> Article 2043. The provisions of the preceding Chapter upon compromises shall also be applicable to arbitrations.[3]

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1. An Act to Ordain and Institute the Civil Code of the Philippines [CIVIL CODE], Republic Act No. 386 (1950).
2. *Id.* art. 2042.

> Article 2044. Any stipulation that the arbitrators' award or decision shall be final, is valid, without prejudice to [A]rticles 2038, 2039, and 2040.[4]
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> Article 2045. Any clause giving one of the parties power to choose more arbitrators than the other is void and of no effect.[5]
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> Article 2046. The appointment of arbitrators and the procedure for arbitration shall be governed by the provisions of such rules of courts as the Supreme Court shall promulgate.[6]

It can be observed that the provisions quoted do not dovetail together to form a complete system for resolving disputes through arbitration. Given that these were the only provisions available prior to 1953, there was no law or set of rules which provided for a systematic, step-by-step procedure on how to resort to arbitration for the resolution of a dispute.

In 1953, however, the Philippine Congress enacted its first arbitration law — R.A. No. 876, or The Arbitration Law.[7] The statute contains provisions on the commencement of arbitration,[8] the appointment of arbitrators,[9] the hearing for the presentation of evidence before the arbitrators,[10] the rendition of the arbitral award,[11] and the remedies after the arbitral award has been rendered.[12]

The Arbitration Law is — in contrast to the provisions on arbitration found in the Civil Code — a clear improvement on the process of arbitration, as it provides for a complete procedure for the settlement of disputes of parties through arbitration.

Notwithstanding the passage of The Arbitration Law, however, arbitration did not immediately develop into a preferred method for settling

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3. *Id.* art. 2043.
4. *Id.* art. 2044.
5. *Id.* art. 2045.
6. *Id.* art. 2046.
7. 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).
8. *Id.* § 5.
9. *Id.* §§ 8-10.
10. *Id.* §§ 12 & 15-17.
11. *Id.* §§ 19-20.
12. *Id.* §§ 23-29.

disputes.[13] Litigation in court continued to be the conventional method of dispute resolution.[14] In one case, the Supreme Court even took notice of the "litigious character of most Filipinos[,] as demonstrated by the number of cases filed in the courts daily."[15]

Since its passage, the Arbitration Law had long remained the only arbitration law in the Philippines. There are, however, some flaws in its provisions. Some observe that its provisions are too broad and fail to satisfy the standards of arbitration systems elsewhere.[16] Furthermore, a perusal of the wording of the law itself shows that the only type of arbitration it covers is domestic arbitration[17] — a fact that has been affirmed by the Supreme Court.[18] At that time, however, it was noted that the Philippines direly needed to keep pace with the developments in arbitration occurring in other countries.[19] Moreover, there was no complementary statute for the conduct of international arbitration in the Philippines.

Things changed in 2004, when Congress approved R.A. No. 9285,[20] otherwise known as the Alternative Dispute Resolution Act of 2004 (ADR Act). The law provides a more comprehensive, updated set of rules to govern alternative dispute resolution (ADR) in the country, and has paved the way to making ADR a more viable option for resolving disputes. This Article aims to discuss key aspects of the ADR Act, as well as its accompanying rules, the Special Rules of Court on Alternative Dispute Resolution[21] (Special ADR Rules), in order to trace the evolution of

13. Victor P. Lazatin & Patricia Anne T. Prodigalidad, Arbitration in the Philippines 2, *available at* http://www.aseanlawassociation.org/9GAdocs/w4_Philipines.pdf (last accessed Oct. 31, 2016).

14. *Id.*

15. *See* Urbano v. Chavez, 183 SCRA 347, 359 (1990).

16. *See generally* MICHAEL CHARLES PRYLES, DISPUTE RESOLUTION IN ASIA 326 (2006).

17. The Arbitration Law, §§ 3-4.

18. *See* Gonzales v. Climax Mining Ltd., 512 SCRA 148, 166 (2007).

19. PRYLES, *supra* note 16.

20. 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).

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

arbitration in the Philippines, and how they make ADR a state-sanctioned means of settling disputes.

II. TILTING THE BALANCE IN FAVOR OF ALTERNATIVE DISPUTE RESOLUTION

The passage of the ADR Act introduced an alternative to litigation, the conventional method of dispute resolution in the Philippines.[22] It granted to parties the opportunity to resolve disputes out of court, in a private process granted special validity by the ADR Act and the Special ADR Rules. This Section of the Article will discuss, in further detail, how the law and its rules favor the ADR process.

A. Statutory Recognition of Private Processes for Dispute Resolution

ADR provides for a procedure to resolve a dispute or controversy "other than by adjudication of a presiding judge of a court or an officer of a government agency, in which a neutral third party participates to assist in the resolution of issues[.]"[23] It takes the dispute out of mainstream litigation, and provides an alternative avenue for dispute resolution.

ADR is an innovation in the Philippine legal system as it alters the traditional way legal conflicts are resolved. Domestic practice has often been characterized as having a litigious culture, where parties are accustomed to going to courts for the resolution of their disputes.[24]

The innovative nature of ADR is a challenge to its own development in the Philippine legal system. Because of the aforementioned litigious culture in the country, the population generally recognizes an appointee of the sovereign power — a judge in the case of the judicial system, or an administrative officer in the case of the quasi-judicial system — as the official authority that can put an end to a dispute, and whose decision is final and binding. Contrary to this popular practice, ADR recognizes a private person or entity as the neutral third party who will bring the parties together to a

22. Alternative Dispute Resolution Act of 2004, §§ 2 & 3 (a).

23. *Id.* § 3 (a).

24. *See Urbano*, 183 SCRA at 359 & Domingo P. Disini, Jr., et al. & Dispute Resolution Mechanisms in the Philippines (A Paper Prepared for the Institute of Developing Economies, Japan External Trade Organization) 5, *available at* http://www.ide.go.jp/English/Publish/Download/Als/pdf/18.pdf (last accessed Oct. 31, 2016).

resolution of their dispute.[25] The presence of a judge or administrative officer is dispensed with. Section 3 (a) of the ADR Act provides for the different forms of ADR such as "arbitration, mediation, conciliation, early neutral evaluation, mini-trial, or any combination thereof[.]"[26] In all of these examples, the neutral third party is not a public officer or employee.

With the introduction of ADR into the legal system through the ADR Act, the use of ADR methods is officially recognized and encouraged.[27] Thus, Section 2 of the ADR Act states —

> It is hereby declared the policy of the State to actively promote party autonomy in the resolution of disputes or the freedom of the parties to make their own arrangements to resolve their disputes. Towards this end, *the State shall encourage and actively promote the use of* [ ] [*ADR*] *as an important means to achieve speedy and impartial justice and de-clog court dockets.* As such, the State shall provide means for the use of ADR as an efficient tool and an alternative procedure for the resolution of appropriate cases. Likewise, *the State shall enlist active private sector participation in the settlement of disputes through ADR.*[28]

The declaration of the national policy to encourage the use of ADR, however, is not an empty statement. The ADR Act is a significant shift from the Arbitration Law, and has served to create a new environment for a viable ADR System — an example of which is commercial arbitration.

B. Policy of Judicial Restraint

Before the passage of the ADR Act in 2004, it was not difficult to prevent commercial arbitration from proceeding. This used to be done by means of court injunctions. Courts were not restrained from intervening in commercial arbitration.

The passage of the ADR Act was instrumental in the promulgation of the Special ADR Rules by the Supreme Court, which took effect on 30 October 2009.[29] The Special ADR Rules contained several policies that dramatically altered the practice of arbitration in the country. One of them is the promotion of a policy of judicial restraint.

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25. *See* Alternative Dispute Resolution Act of 2004, § 3 (a).

26. *Id.*

27. *Id.* § 2.

28. *Id.* (emphases supplied).

29. SPECIAL RULES OF COURT ON ALTERNATIVE DISPUTE RESOLUTION, pmbl.

Rule 2.4 of the Special ADR Rules imposes a policy of judicial restraint to protect the jurisdiction of the arbitral tribunal.[30] It 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.*
>
> 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.[31]

Rule 2.4 of the Special ADR Rules states that if a party files an action in court on jurisdictional grounds, in order to prevent either the constitution of an arbitral tribunal or the continuance of on-going arbitration of an existing arbitral tribunal, or the rendering of an award after arbitration proceedings are conducted, the court shall exercise judicial restraint and allow the arbitral tribunal to rule on its own jurisdiction first.[32] Consequently, the court cannot readily issue an injunction to enjoin the arbitration proceedings. Even if the tribunal has not yet been appointed, Rule 2.4 allows the tribunal to be constituted first, and, after its constitution, to rule on the challenge to its jurisdiction. This is clear from the phrase "either before or after the tribunal is constituted[.]"[33]

In fact, while the jurisdiction of an arbitral tribunal is a pending issue in court and while there is an on-going arbitration proceeding being conducted by the tribunal, Rule 3.18 (B) of the Special ADR Rules specifically

30. *Id.* rule 2.4.

31. *Id.* (emphasis supplied).

32. *Id.*

33. *Id.*

prohibits the court from enjoining the arbitral proceedings.[34] This is a far cry from the previous state of the law before the ADR Act was enacted, and before the Special ADR Rules were promulgated, where the court had the discretion to restrain the arbitral proceedings while the issue on the jurisdiction of the arbitral tribunal was still under consideration.[35]

In the current legal regime, the laws favor arbitration.[36] This can be observed from the insulation of the arbitral proceedings from undue court intervention.[37] In addition, it is expressed as both a legislative[38] and judicial policy.[39] Section 2 of the ADR Act declares that "the policy of the State to actively promote party autonomy in the resolution of disputes or the freedom of the parties to make their own arrangements to resolve their disputes,"[40] and Rule 2.1 of the Special ADR Rules adds the phrase — "with the greatest cooperation of and the least intervention from the courts."[41] In addition, while Rule 2.1 preserves the court's power of judicial review over ADR proceedings, it provides that "courts shall intervene only in the cases allowed by law or [by the] Special ADR Rules."[42]

The result is that the unrestrained exercise of judicial discretion prior to the passage of the ADR Act, which hindered arbitral proceedings, has been

34. *Id.* rule 3.18 (B) provides —

> (B) *No injunction of arbitration proceedings.* [—] The court shall not enjoin the arbitration proceedings during the pendency of the petition.
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> Judicial recourse to the court shall not prevent the arbitral tribunal from continuing the proceedings and rendering its award.

SPECIAL RULES OF COURT ON ALTERNATIVE DISPUTE RESOLUTION, rule 3.18 (B).

35. *See* The Arbitration Law, § 6. The provision grants the courts authority to summarily hear the issue of whether or not an agreement to arbitrate a controversy was made. *Id.*

36. Lazatin & Prodigalidad, *supra* note 13, at 3.

37. SPECIAL RULES OF COURT ON ALTERNATIVE DISPUTE RESOLUTION, rule 2.4.

38. Alternative Dispute Resolution Act of 2004, § 2.

39. SPECIAL RULES OF COURT ON ALTERNATIVE DISPUTE RESOLUTION, rule 2.1.

40. Alternative Dispute Resolution Act of 2004, § 2.

41. SPECIAL RULES OF COURT ON ALTERNATIVE DISPUTE RESOLUTION, rule 2.1.

42. *Id.*

mitigated. Arbitral tribunals are now able to arbitrate disputes with minimal judicial interference.[43]

III. SIGNIFICANCE OF APPOINTING AUTHORITY

Rules 3.2 and 3.3 of the Special ADR Rules allow a party, prior to the commencement of arbitration, to file a petition in court to determine any question concerning the existence, validity, and enforceability of an arbitration agreement.[44] However, despite the pendency of the petition, arbitral proceedings may nevertheless be commenced and completed by the rendition of an award, while the issue is pending before the court.[45]

In spite of this, how is it possible to commence arbitration if the existence, validity, and enforceability of the arbitration agreement are being questioned in court, and if the arbitral tribunal has not yet been appointed? Furthermore, how is it possible to appoint an arbitral tribunal if one of the parties to the arbitration agreement refuses to cooperate while his petition is pending in court?

The answers lie in the statutory recognition of the appointing authority in institutional arbitration, and the creation of an appointing authority in *ad hoc* arbitration. Section 26 of the ADR Act recognizes as appointing authority "the person or institution named in the arbitration agreement as the appointing authority[,]"[46] or "the regular arbitration institution under

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43. *See* Arthur P. Autea, *Emerging Legal Trends and Practices in Commercial Arbitration in the Philippines*, 86 PHIL. L.J. 225, 273 (2012).

44. SPECIAL RULES OF COURT ON ALTERNATIVE DISPUTE RESOLUTION, rules 3.2 & 3.3.

45. *Id.* rule 3.3.

46. Alternative Dispute Resolution Act of 2004, § 26. Said provision provides —

> Section 26. *Meaning of 'Appointing Authority'* [—] 'Appointing Authority' as used in the Model Law shall mean the person or institution named in the arbitration agreement as the appointing authority; or the regular arbitration institution under whose rules the arbitration is agreed to be conducted. Where the parties have agreed to submit their dispute to institutional arbitration rules, and unless they have agreed to a different procedure, they shall be deemed to have agreed to the procedure under such arbitration rules for the selection and appointment of arbitrators. In [*ad hoc*] arbitration, the default appointment of an arbitrator shall be made by the National President of the Integrated Bar of the Philippines (IBP) or his duly authorized representative.

Id.

whose rules the arbitration is agreed to be conducted."[47] In *ad hoc* arbitration, Section 26 also confers upon the National President of the Integrated Bar of the Philippines, or his duly authorized representative, the power of an appointing authority.[48] Section 26 of the ADR Act is reproduced verbatim in Rule 1.11 (b) of the Special ADR Rules.[49]

As a result, if a petition to determine any question concerning the existence, validity, and enforceability of an arbitration agreement is filed in court prior to the commencement of arbitration, a party to the arbitration agreement can initiate arbitration proceedings leading to the appointment of an arbitral tribunal by calling upon the appointing authority, even if the petitioner in court refuses to cooperate in the selection of the arbitral tribunal.[50] The recognition of an appointing authority in the legal system, whether the arbitration is institutional or *ad hoc*, has allowed arbitration to pursue without being enjoined by a related pending case.

The pendency of an issue in court concerning the existence, validity, and enforceability of an arbitration agreement is not the only instance where the significance of an appointing authority in arbitration is evident. When a party disregards an arbitration agreement, and files an action in court to litigate an otherwise arbitrable dispute, Section 24 of the ADR Act provides that a party to the court case may ask the court to refer the dispute to arbitration.[51] The ADR Act provides —

> Section 24. *Referral to Arbitration* [—] A court before which an action is brought in a matter which is the subject matter of an arbitration agreement shall, if at least one party so requests not later than the pre-trial conference, or upon the request of both parties thereafter, refer the parties to arbitration unless it finds that the arbitration agreement is null and void, inoperative[,] or incapable of being performed.[52]

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47. *Id.*

48. *Id.*

49. SPECIAL RULES OF COURT ON ALTERNATIVE DISPUTE RESOLUTION, rule 1.11 (b).

50. *See* SPECIAL RULES OF COURT ON ALTERNATIVE DISPUTE RESOLUTION, rule 6.1. *Compare* Alternative Dispute Resolution Act of 2004, § 27, *with* United Nations Commission on International Trade Law, UNCITRAL Model Law on International Commercial Arbitration, art. 11, U.N. Doc. A/40/17 (June 21, 1985) [hereinafter UNCITRAL Model Law] & G.A. Res. 61/33, U.N. Doc. A/RES/61/33 (Dec. 18, 2006).

51. Alternative Dispute Resolution Act of 2004, § 24.

52. *Id.*

Said Section gives the court discretion in deciding whether to refer the dispute to arbitration or not.[53] If the court "finds that the arbitration agreement is null and void, inoperative[,] or incapable of being performed[,]"[54] then it is not under any obligation to refer the dispute to arbitration.[55]

Assuming that there is no question about the arbitrable nature of the dispute, and that the arbitration agreement is not impaired by any of the defects mentioned in Section 24 (i.e., it is not null and void, inoperative, or incapable of being performed), the progress of the arbitration is still dependent on the period of time within which the court shall favorably endorse the referral to arbitration. This is where the appointing authority becomes useful. Rule 4.8 of the Special ADR Rules provides that "despite the pendency of the action[,] [ ] arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the action is pending before the court."[56] It would not be possible for Rule 4.8 to come into operation and for an arbitration proceeding to be established without an appointing authority.

Evidently, arbitration cannot proceed without an arbitral tribunal. An arbitral tribunal cannot be appointed if one of the parties to the arbitration agreement refuses to cooperate with the other party in the selection of the arbitrator or arbitrators who will constitute the arbitral tribunal.[57] This deadlock can be avoided by calling on the appointing authority to exercise its power to appoint on behalf of the party that refuses to appoint an arbitrator.[58] It is only then, as provided in Rule 4.8, that the "arbitral proceedings may [ ] be commenced or continued, and an award may be made, while the action is pending before the court."[59] The commencement of arbitration ceases to depend on the period within which the court will rule to refer the dispute to arbitration.

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53. *Id.*

54. *Id.*

55. *Id.*

56. SPECIAL RULES OF COURT ON ALTERNATIVE DISPUTE RESOLUTION, rule 4.8.

57. *See* Alternative Dispute Resolution Act of 2004, § 27 & UNCITRAL Model Law, *supra* note 50, art. 11 (on the need for parties to agree on the composition of the arbitral tribunal).

58. SPECIAL RULES OF COURT ON ALTERNATIVE DISPUTE RESOLUTION, rule 4.8.

59. *Id.*

The significance of the statutory recognition of an appointing authority is illustrated in the succeeding discussion of two scenarios:

(1) When the appointing authority proves to be indispensable in the commencement of arbitration while the issue of the existence, validity, or enforceability of the arbitration agreement is a pending issue in court; and

(2) When the appointing authority proves to be indispensable in the commencement of arbitration while the court is in the process of resolving whether to refer a complaint to arbitration or not.

The statutory recognition of an appointing authority in the ADR Act achieved a substantial reduction in the delay in the arbitration proceedings. Before the ADR Act, and during the time that the Arbitration Law was the only arbitration statute in place, the failure to constitute an arbitral tribunal necessitated the filing of a petition in court for the appointment of an arbitrator or arbitrators.[60] This tedious process, however, could be avoided if the arbitration agreement designated an appointing authority as Section 8 of the Arbitration Law respects the contractual stipulation to that effect.[61] It provides "[i]f, in the contract for arbitration or in the submission described in [S]ection [2], provision is made for a method of naming or appointing an arbitrator or arbitrators, such method shall be followed[.]"[62]

However, if the arbitration agreement did not designate an appointing authority, then it was necessary for the parties to file a petition to ask the court to appoint an arbitrator or arbitrators.[63] The Arbitration Law provides that —

> [I]f no method be provided therein[,] the [Regional Trial Court] shall designate an arbitrator or arbitrators.
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> The [Regional Trial Court] shall appoint an arbitrator or arbitrators, as the case may be, in the following instances:
>
> (a) If the parties to the contract or submission are unable to agree upon a single arbitrator; or
>
> (b) If an arbitrator appointed by the parties is unwilling or unable to serve, and his successor has not been appointed in the manner in which he was appointed; or

60. The Arbitration Law, § 8.

61. *Id.*

62. *Id.*

63. *Id.*

> (c) If either party to the contract fails or refuses to name his arbitrator within [15] days after receipt of the demand for arbitration; or
>
> (d) If the arbitrators appointed by each party to the contract, or appointed by one party to the contract and by the proper [c]ourt, shall fail to agree upon or to select the third arbitrator.[64]

The necessary implication, therefore, is that the arbitration will not be able to proceed until the court resolves the petition for appointment of one or three arbitrators. Otherwise stated, the arbitration is delayed for as long as the matter of appointing arbitrators remains unresolved in court.

In contrast to the Arbitration Law, Section 26 of the ADR Act avoids the filing a petition in court for the appointment of one or three arbitrators by providing for an appointing authority in institutional arbitration and the designation of one in *ad hoc* arbitration, unless the appointing authority fails to discharge his or her duty.[65]

IV. MODIFICATION IN THE RULE ON THE CHALLENGE OF ARBITRATORS

Challenging an arbitrator is similar to the filing of a motion in court to ask the judge to voluntarily disqualify or inhibit himself from further hearing a case. Any of the parties involved may challenge an arbitrator.[66] An arbitrator may be challenged on any of the grounds for challenge provided for in the ADR Act, Implementing Rules and Regulations of the ADR Act (ADR Rules),[67] the Arbitration Law, or the United Nations Commission on International Trade Law Model Law on International Commercial Arbitration (Model Law).[68] When a party challenges an arbitrator, the challenging party alleges that the arbitrator does not possess the qualifications to be an arbitrator, or that he possesses a disqualification from being an

64. *Id.*

65. SPECIAL RULES OF COURT ON ALTERNATIVE DISPUTE RESOLUTION, rule 6.1. *See* Alternative Dispute Resolution Act of 2004, § 26.

66. SPECIAL RULES OF COURT ON ALTERNATIVE DISPUTE RESOLUTION, rule 7.1.

67. Rules and Regulations Implementing the Alternative Dispute Resolution Act of 2004, Republic Act No. 9285, ch. III, rule 3, art. 4.12 (b) (2009).

68. UNCITRAL Model Law, *supra* note 50, art. 12.

arbitrator.[69] An arbitrator may be challenged if circumstances that give rise to justifiable doubts as to his or her impartiality or independence exist.[70]

A challenge is a potential cause of delay in the arbitration. In previous laws, when an arbitrator was challenged, and he or she rejects it, the party challenging could renew the challenge before a court, in which case the arbitration proceedings would be suspended during the pendency of the challenge before the court.[71] This rule made the pace of arbitration dependent upon the court proceedings on the challenge.

The rule on challenges was modified when the ADR Act took effect in 2004 and when the Model Law was adopted.[72] Despite the pendency in court of a challenge against an arbitrator, the arbitral tribunal may continue the arbitral proceedings and make an award.[73] The present rule maintains the autonomy of arbitration, and reduces the delay that a challenge may possibly cause in arbitration.

V. INTERIM MEASURES OF PROTECTION

In the subject of interim measures of protection, litigation and arbitration also exhibit substantial differences. Interim measures of protection refer to those provisional remedies available to a party that may be granted to prevent irreparable loss or injury, to provide security for the performance of any obligation, to produce or preserve any evidence, or to compel any other appropriate act or omission.[74] An interim measure of protection may also be referred to as an interim relief, interim remedy, provisional relief, or provisional remedy.

Under the old Arbitration Law, a party to an arbitration proceeding in need of provisional relief had the option of applying for the remedy either in court or in the arbitral tribunal — "The arbitrator or arbitrators shall have the power at any time, before rendering the award, without prejudice to the

69. SPECIAL RULES OF COURT ON ALTERNATIVE DISPUTE RESOLUTION, rule 7.4.

70. The Arbitration Law, §§ 10 & 11.

71. *Id.* § 11.

72. Alternative Dispute Resolution Act of 2004, §§ 32 & 33.

73. UNCITRAL Model Law, *supra* note 50, art. 13 (3).

74. Alternative Dispute Resolution Act of 2004, § 28 (b).

rights of any party to petition the court to take measures to safeguard and/or conserve any matter which is the subject of the dispute in arbitration."[75]

The choice of venue and enforcement of the remedy belonged to the applicant.[76]

At present, the rule is that an interim relief must be obtained primarily from the arbitral tribunal.[77] In exceptional cases, it may be obtained from the court. Section 28 (a) of the ADR Act expresses the general rule —

> 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. *After constitution of the arbitral tribunal and during arbitral proceedings, a request for an interim measure of protection, or modification thereof, may be made with the arbitral tribunal or to the extent that the arbitral tribunal has no power to act or is unable to act effectively, the request may be made with the [c]ourt.* The arbitral tribunal is deemed constituted when the sole arbitrator or the third arbitrator, who has been nominated, has accepted the nomination and written communication of said nomination[,] and acceptance has been received by the party making the request.[78]

As a general rule, after the constitution of the arbitral tribunal and during arbitral proceedings, an application for interim relief should be addressed to the tribunal.[79] However, there are three instances when an application for interim relief may be filed in court, namely:

(1) When a party is in need of interim relief *before the arbitral tribunal has been constituted*;[80]

(2) When a party is in need of interim relief after the arbitral tribunal has been constituted, but the *tribunal has no power to act on the application for interim relief*;[81] and

(3) When a party is in need of interim relief after the arbitral tribunal has been constituted, and the tribunal has the power to

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75. The Arbitration Law, § 14.

76. Alternative Dispute Resolution Act of 2004, § 47.

77. *Id.* § 28 (a).

78. *Id.* (emphasis supplied).

79. *See* Autea, *supra* note 43, at 276.

80. Alternative Dispute Resolution Act of 2004, § 28 (a).

81. *Id.*

> grant interim relief, but is *unable to act effectively on the application for interim relief.*[82]

The first exception refers to the period of time before the arbitral tribunal is constituted.[83] Necessarily, this includes the period of time before the arbitration was commenced, which is an earlier period than the constitution of the arbitral tribunal — a party has to initiate the commencement of arbitration first before both parties to the arbitration agreement appoint the arbitrator or arbitrators who will compose the arbitral tribunal.[84] Thus, a party to an arbitration agreement may petition the court for interim measures of protection:

> (a) before the arbitration is commenced[;]
>
> (b) after the arbitration is commenced but before the constitution of the arbitral tribunal[;] or
>
> (c) after the constitution of the arbitral tribunal and at any time during arbitral proceedings but, at this stage, only to the extent that the arbitral tribunal has no power to act or is unable to act effectively.[85]

However, while the court may rule on an application for interim relief before the constitution of the arbitral tribunal, Rule 5.15 of the Special ADR Rules provides that the court shall defer any action once the court is informed that the tribunal has been constituted while the application is pending in court.[86] More specifically, the Rule states —

> Rule 5.15. *Court to defer action on petition for an interim measure of protection when informed of constitution of the arbitral tribunal.* — The court shall defer action on any pending petition for an interim measure of protection filed by a party to an arbitration agreement arising from or in connection with a dispute thereunder upon being informed that an arbitral tribunal has been constituted pursuant to such agreement. The court may act upon such petition only if it is established by the petitioner that the arbitral tribunal has no power to act on any such interim measure of protection or is unable to act thereon effectively.[87]

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82. *Id.*

83. *Id.*

84. SPECIAL RULES OF COURT ON ALTERNATIVE DISPUTE RESOLUTION, rules 2.1, 4.1, & 6.2.

85. *Id.* rules 5.1 & 5.2.

86. *Id.* rule 5.15.

87. *Id.*

The second exception is when the arbitral tribunal constituted was not conferred the power to act on an application for interim relief.[88] A reading of Sections 28 and 29 of the ADR Act leaves no doubt that an arbitral tribunal may grant interim relief.[89] However, an arbitral tribunal primarily draws its power from the arbitration agreement, which stipulates the appointment of arbitrators.[90] The jurisdiction of an arbitral tribunal depends upon the scope of authority that the parties' arbitration agreement conferred to the arbitral tribunal.[91] Consequently, in the exercise of the autonomy of the parties, they are at liberty to confine the powers only to the rendition of the final award on the merits are and without the ancillary power to issue interim measures of protection.

The third exception is when the arbitral tribunal constituted has the power to act on an application for interim relief, but is unable to act effectively.[92] One possible cause is the limited nature of its jurisdiction. An arbitral tribunal can only exercise jurisdiction over the parties to the arbitration agreement.[93] For example, when a third party is involved in the concealment of the assets of a party to an arbitration agreement, in order to defeat the claim of the other party, the arbitral tribunal is powerless as against the third party, in which case, it is the court which is the right source of interim measure of protection and which can act effectively.[94]

Other than these three exceptional instances, a party to an arbitration agreement has to file an application for interim relief with the arbitral tribunal, and the tribunal has the power to act on the application either by granting or denying it.[95]

The actions an arbitral tribunal may take on an application for interim relief are not limited to the grant and the denial of such. Section 28 (a) of the

88. Alternative Dispute Resolution Act of 2004, § 28 (a).

89. *Id.* §§ 28-29.

90. The Arbitration Law, § 2.

91. *Id.*

92. Alternative Dispute Resolution Act of 2004, § 28 (a).

93. The Arbitration Law, § 2. One must not forget that an agreement to submit a dispute to arbitration is generally regarded by law as a contract between the parties, and thus follows the general rule of the relativity of contracts. *See* Chung Fu Industries (Phils.), Inc. v. Court of Appeals, 206 SCRA 545, 552 (1992).

94. SPECIAL RULES OF COURT ON ALTERNATIVE DISPUTE RESOLUTION, rules 5.6, 5.14, & 5.16.

95. *Id.* rule 5.15.

ADR Act also provides for the tribunal's power to modify an interim measure of protection.[96] There is no question that an arbitral tribunal can modify its own action on a previous application for interim relief filed by a party. Despite this, can an arbitral tribunal modify a court's ruling on an application for interim relief, such as an interim measure of protection issued by a court before the tribunal was constituted?

The Special ADR Rules answers the question in the affirmative and removes any doubt about the primacy of the arbitral tribunal's action over an application for interim relief.[97] It reads —

> Rule 5.13. *Modification, amendment, revision*[,] *or revocation of court's previously issued interim measure of protection.* [—] Any court order granting or denying interim measure/s of protection is issued without prejudice to subsequent grant, modification, amendment, revision[,] or revocation by the arbitral tribunal as may be warranted.
>
> An interim measure of protection issued by the arbitral tribunal shall, upon its issuance, be deemed to have *ipso jure* modified, amended, revised[,] or revoked an interim measure of protection previously issued by the court to the extent that it is inconsistent with the subsequent interim measure of protection issued by the arbitral tribunal.[98]

This provision substantially alters the scope of ADR. The arbitral tribunal is composed only of a private individual or of private individuals, while the court is presided by a judge, an appointee of the sovereign power. Nonetheless, Rule 5.13 provides that, in the matter of interim measures of protection, the ruling of a private nature from an arbitral tribunal is superior to the ruling of a public character from a court of justice.[99] An arbitrator can modify, amend, revise, or even revoke an interim relief issued by a court.[100]

Moreover, according to Rule 5.14 of the Special ADR Rules, where there is a conflict or inconsistency between an interim relief issued by an arbitral tribunal and one issued by a court, the conflict or inconsistency shall be resolved by the arbitral tribunal, and not by the courts[101] —

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96. Alternative Dispute Resolution Act of 2004, § 28 (a).

97. SPECIAL RULES OF COURT ON ALTERNATIVE DISPUTE RESOLUTION, rule 5.13.

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.* rule 5.14.

> Rule 5.14. *Conflict or inconsistency between interim measure of protection issued by the court and by the arbitral tribunal.* [—] Any question involving a conflict or inconsistency between an interim measure of protection issued by the court and by the arbitral tribunal shall be immediately referred by the court to the arbitral tribunal which shall have the authority to decide such question.[102]

The rule gives real power to an arbitral tribunal in addressing applications for interim measures of protection.

VI. THE ARBITRAL AWARD

The Special ADR Rules provide for a certain measure of protection for arbitral awards against court intervention by limiting the power of judicial review —

> Rule 19.7. *No appeal or certiorari on the merits of an arbitral award.* — An agreement to refer a dispute to arbitration shall mean that the arbitral award shall be final and binding. Consequently, a party to an arbitration is precluded from filing an appeal or a petition for [*certiorari*] questioning the merits of an arbitral award.[103]

This Rule renders unquestionable the arbitral tribunal's power to determine the merits of the dispute. Formerly, awards rendered by voluntary arbitrators authorized by law may be appealed to the Court of Appeals through a petition for review,[104] and the scope of appeal encompasses "questions of fact, of law, or mixed questions of fact and law."[105] With the present Rule 19.7 of the Special ADR Rules, the merits of an arbitral award can no longer be altered on appeal or *certiorari*.[106]

This rule is supported by rules found in other sections of the Special ADR Rules which prevent the courts from disturbing the arbitral tribunal's determination of facts and interpretation of law, whether the award was rendered in domestic, international, or foreign arbitration.[107]

In domestic arbitration, Rule 11.9 of the Special ADR Rules prohibits the court from disturbing "the arbitral tribunal's determination of facts

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102. *Id.*

103. *Id.* rule 19.7.

104. 1997 RULES OF CIVIL PROCEDURE, rule 43, § 1.

105. *Id.* rule 43, § 3.

106. SPECIAL RULES OF COURT ON ALTERNATIVE DISPUTE RESOLUTION, rule 19.7.

107. *Id.* rules 11.9 & 12.13.

and/or interpretation of law"[108] when the arbitral award is brought before it through a petition for confirmation or a petition to vacate.[109] The power of judicial review still exists but the court can only vacate an arbitral award based on any of the following seven 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 wilfully refrained from disclosing such disqualification;
>
> (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;
>
> ...
>
> (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.[110]

It is specifically provided that, "in deciding the petition to vacate the arbitral award, the court shall disregard any other ground than those enumerated above."[111] It is significant to observe that none of the seven grounds to vacate deals with the merits of the arbitral award.

Without the Special ADR Rules so providing, the burden rests on the shoulders of the losing party in arbitration to prove to the court why an arbitral award should not be enforced. There is a legal presumption in favor of confirmation and enforcement of a domestic arbitral award and, unless a

108. *Id.* rule 11.9.

109. *Id.*

110. *Id.* rule 11.4 (A).

111. *Id.*

ground to vacate is fully established, the court is mandated to confirm the award.[112]

In international and foreign arbitration, the same rule that prohibits the court from disturbing the arbitral tribunal's determination of facts or interpretation of law or both is enforced.[113] As in domestic arbitration, the same legal presumption in favor of enforcement holds true for arbitral awards rendered in international and foreign arbitration.[114] The court is mandated to enforce the award, unless the following grounds are established to set aside an award in international arbitration[115] or to refuse recognition of a foreign arbitral award:[116]

> (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 the law of the country where the award was made; or
>
> (ii) The party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or
>
> (iii) The award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, 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
>
> (iv) The composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where arbitration took place; or
>
> (v) The award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which that award was made; or
>
> ...

112. SPECIAL RULES OF COURT ON ALTERNATIVE DISPUTE RESOLUTION, rule 11.9.

113. *Id.* rules 12.13 & 13.11.

114. *Id.*

115. *Id.* rule 12.14.

116. *Id.* rule 13.4 & UNCITRAL Model Law, *supra* note 50, arts. 34 (2) & 36 (1).

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

(ii) The recognition or enforcement of the award would be contrary to public policy.[117]

The ground that the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which that award was made is not included among the grounds to set aside an award rendered in international arbitration.[118]

In both cases of international arbitration and foreign arbitration, it is provided that the court shall disregard any other ground to set aside or to refuse recognition of the award.[119]

The rules are consistent in domestic arbitration, international arbitration, and foreign arbitration — the arbitral award cannot be assailed on the merits through appeal or *certiorari*, and the court is prohibited from disturbing the arbitral tribunal's interpretation of law.

VII. CONCLUSION

There are other reforms that should be undertaken to improve commercial arbitration in the Philippines. At present, the Philippines has made substantial and constructive changes compared to where ADR was before the passage of the ADR Act and the promulgation of the Special ADR Rules. The resolution of disputes through arbitration has received legislative and judicial support. More particularly, the declaration of a policy of judicial restraint has insulated arbitral proceedings from undue judicial interference. The implementation of the Special ADR Rules has enabled arbitrators to conduct proceedings and resolve disputes with firm authority — which was lacking before the passage of the ADR Act — to act on applications for relief submitted by the parties in arbitration. The present prohibition of appeal and *certiorari* as remedies to question the merits of an arbitral award is a significant assurance to the final and binding character of arbitral awards on the merits of the dispute. The combined effect of the ADR Act and the Special ADR Rules has made commercial arbitration not only a thriving practice for dispute resolution, but also a viable alternative for the resolution of disputes.

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117. SPECIAL RULES OF COURT ON ALTERNATIVE DISPUTE RESOLUTION, rule 13.4.

118. UNCITRAL Model Law, *supra* note 50, art. 34 (2).

119. *Id.* & SPECIAL RULES OF COURT ON ALTERNATIVE DISPUTE RESOLUTION, rules 12.4. & 13.4.