Evolution of International Arbitration Law in the Philippines

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I. INTRODUCTION

Law is a living organism.[1] It is "based on a factual and social reality"[2] that has its foundation in the type of behavior that is deemed acceptable and desirable to society.[3] Law is a discourse and its "connection to this fluid reality implies that it too [must change]."[4] The change can be "drastic and easily identifiable"[5] or it can be "gradual and cannot [sometimes] be seen without the proper distance and perspective."[6] Either way, the law must be flexible enough to reflect the change in society without actually creating a gap between it and reality. For example, the Negotiable Instruments Law (NIL) of the Philippines was enacted on 3 February 1911.[7] 103 years later, the NIL, without any amendments, still works well even with the advent of computers and the online banking system. However, there are certain instances wherein a gap is created between reality and law because the latter

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1. AHARON BARAK, THE JUDGE IN A DEMOCRACY 3 (2006).
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. The Negotiable Instruments Law, Act No. 2031 (1911).

is not flexible enough.[8] For example, tax laws are constantly changing in order to be able to address the state of flux in the economy. Thus, the law is "not just logic and experience [but] a renewal based on [these] which adapt[s] [law] to the new social reality."[9]

A. Alternative Dispute Resolution

It is noted that, "[w]ith increasing regularity,"[10] people are resorting to modes of alternative dispute resolution such as arbitration in resolving contractual disagreements.[11] Generally, "'arbitration' is formally defined as 'a voluntary dispute resolution process in which one or more arbitrators, appointed in accordance with the agreement of the parties, or rules promulgated pursuant to law, resolve a dispute by rendering an award.'"[12] Arbitration is a matter of contract — "to be obliged to arbitrate a controversy, a person must agree to do so."[13] The composition, the jurisdiction, and the rules of procedure are agreed upon by the parties in a *compromise d'arbitrage*.[14]

Generally, there are two kinds of arbitration: (1) domestic; and (2) international. Arbitration is considered international if the following elements are present:

> (1) [T]he parties to an arbitration agreement have, at the time of the conclusion of such agreement, their places of business in different [s]tates (countries); or

8. BARAK, *supra* note 1, at 4.

9. *Id.*

10. *See* National Arbitration Forum, Business-to-Business Mediation/Arbitration vs. Litigation (An Unpublished Paper Showing How Commercial Mediation and Commercial Arbitration Compare to the Litigation System) 1, *available at* http://www.adrforum.com/users/naf/resources/GeneralCommercialWP.pdf (last accessed July 8, 2014).

11. *Id.*

12. Quisumbing Torres Law Office, Doing Business in the Philippines (An Unpublished Report on How to Do Business in the Philippines) 32, *available at* http://www.bakermckenzie.com/files/Uploads/Documents/Supporting%20Your%20Business/Global%20Markets%20QRGs/DBI%20Philippines/bk_dbi_philippines_arbitration.pdf (last accessed July 8, 2014).

13. American Bar Association Rule of Law Initiative, Analysis of the 1997 Civil Procedure Rules (An Unpublished Analysis of the 1997 Rules of Civil Procedure) 37, *available at* http://www.americanbar.org/content/dam/aba/directories/roli/philippines/philippines-civil-pro-rules-1997.authcheckdam.pdf (last accessed July 8, 2014). *See also* Del Monte Corporation-USA v. Court of Appeals, 351 SCRA 373, 381 (2001).

14. JOAQUIN G. BERNAS, S.J., INTRODUCTION TO PUBLIC INTERNATIONAL LAW 269 (2009).

(2) [O]ne of the following places is situated outside the [s]tate in which the parties have their places of business:

(i) the place of arbitration if determined in, or pursuant to the arbitration agreement;

(ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject matter of the dispute is most closely connected; or

(3) [T]he parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one country.[15]

The other kind, "domestic arbitration[,] is simply defined as arbitration that is not international."[16] Thus, "if the dispute is between parties who have their place of business in the Philippines, and [whose] obligations are to be performed in the Philippines,"[17] and if, additionally, their contract does not contain stipulations regarding the object of the agreement being "related" to the jurisdiction of another country, the arbitration shall be considered domestic.[18]

1. International Arbitration

International arbitration is considered as the "preferred method for resolving transnational commercial disputes, and other categories of international disputes[.]"[19] Instead of going to the courts, "parties instead submit a dispute to a person or number of persons whom they trust, known as arbitrators."[20]

Compared with the normal litigation processes, international arbitration is more advantageous in the following ways: (1) "foreign investors, who are not familiar with local court procedures, may prefer [a] more neutral process"[21] wherein they can control the rules that govern the procedures;[22] (2) "disputes submitted [for] arbitration are more speedily resolved[;]"[23] (3)

15. Quisumbing Torres Law Office, *supra* note 12, at 32–33.

16. *Id.* at 33 (emphasis omitted).

17. *Id.*

18. *Id.*

19. International Arbitration Attorney Network, What is International Arbitration?, *available at* http://www.international-arbitration-attorney.com/about-international-arbitration/ (last accessed July 8, 2014).

20. *Id.*

21. Quisumbing Torres Law Office, *supra* note 12, at 31.

22. *Id.*

23. *Id.*

the parties can appoint someone who is actually an expert on the subject matter;[24] and (4) "arbitration proceedings are confidential."[25]

In this Essay, the Author will discuss how international arbitration law — particularly its recognition and enforcement — has evolved in the past, its current state, and how it may further evolve in the future.

II. EVOLUTION OF INTERNATIONAL ARBITRATION IN THE PHILIPPINES

A. The Past

As early as 1921, the Philippines had already recognized arbitration as a mode of settling disputes.[26] In the case of *Chan Linte v. Law Union and Rock Insurance Co., et al.*,[27] the Supreme Court (SC) held that "[a]rbitration as a method of settling disputes and controversies is recognized at common law … [and its awards are] binding on the parties."[28] Furthermore, the SC held that "it is a substitution by the consent of the parties of a tribunal that will decide the disputed matter in a speedy and inexpensive way."[29] However, despite such recognition, the courts then still refused to abide by arbitration clauses because, during that period, it was said that the courts were jealous of anything that would deprive them of their jurisdiction,[30] and that "since there are courts, [everybody] must go to the courts."[31] This all changed in *Vega v. San Carlos Milling Co.*[32] where the SC held that "unless the agreement is such as absolutely to close the doors of the courts against the parties, which agreement would be void, the courts will look with favor upon such amicable arrangement and will only interfere with great reluctance to anticipate or nullify the action of the arbitrator."[33] The same doctrine was reiterated by the SC in subsequent cases.[34]

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24. *Id.* at 32.

25. *Id.*

26. *See* Chan Linte v. Law Union and Rock Ins. Co., etc., 42 Phil. 548, 550 (1921).

27. *Id.*

28. *Id.*

29. *Id.*

30. Vega v. San Carlos Milling Co., 51 Phil. 908, 917 (1924) (J. Malcolm, dissenting opinion).

31. *Id.* (citing United States Asphalt Refining Co. v. Trinidad Lake Petroleum Co., 222 F. 1006 (1915) (U.S.)).

32. *Vega*, 51 Phil. (J. Malcolm, dissenting opinion).

33. *Id.* at 917.

34. *See also* Manila Electric Co. v. Pasay Transportation Co., 57 Phil. 600, 603 (1932).

Arbitration as a mode of settling disputes was first institutionalized in Articles 2042 and 2046 of the Civil Code,[35] to wit:

> (1) "Art. 2042. The same persons who may enter into a compromise may submit their controversies to one or more arbitrators for decision[;]"[36] and
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> (2) "Art. 2046. The appointment of the arbitrators and the procedure for arbitration shall be governed by the provisions of such rules of court as the [SC] shall promulgate."[37]

The procedures for arbitration were subsequently promulgated — not by the SC — but by the Legislature when it enacted Republic Act No. 876 or the Arbitration Law.[38] The Arbitration Law was adopted to supplement — not to supplant — the provisions of the Civil Code on Arbitration.[39] Section 31 of the Arbitration Law expressly declares that "the provisions of [C]hapters one and two, Title XIV, Book IV of the Civil Code shall remain in force."[40]

However, the Arbitration Law generally deals with domestic arbitration awards.[41] Thus, there was yet no law that catered specifically to the recognition and enforcement of foreign arbitral awards. The result was that parties who sought to have their foreign arbitral awards recognized and enforced applied the provisions on the enforcement and recognition of a *foreign judgment.* This was seen in the case of *Eastboard Navigation, Ltd. v. Juan Ysmael and Co., Inc.*,[42] when Eastboard Navigation, Ltd. brought an action to enforce the foreign arbitral award rendered by the three arbitrators in New York City "pursuant to Section 48 [of] Rule 39 of the Rules of Court."[43]

The problem with using the procedure for the recognition and enforcement of a foreign jugement to enforce a foreign arbitral award lies in

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

36. *Id.* art. 2042.

37. *Id.* art. 2046.

38. *See* 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).

39. Umbao v. Yap, 100 Phil. 1008, 1011 (1957).

40. The Arbitration Law, § 31.

41. *See Del Monte Corporation-USA*, 351 SCRA at 380.

42. Eastboard Navigation, Ltd. v. Juan Ysmael and Co., Inc., 102 Phil. 1 (1957).

43. *Id.* at 7.

the distinctions between the two.[44] A foreign judgment is a judgment decreed by a foreign court.[45] On the other hand, a foreign arbitral award is an award rendered by an arbitrator or panel of arbitrators in a foreign country.[46] Most importantly, a foreign judgment is generally not binding upon the parties,[47] while a foreign arbitral award is. Thus, to apply the procedure on the recognition and enforcement of a foreign judgment to the recognition and enforcement of a foreign arbitral award would create inconsistencies in the law because applying the former would treat foreign arbitral awards as *not* binding in the Philippines. Section 48 of Rule 39 of the 1997 Rules of Civil Procedure states the effect of foreign judgments, to wit —

> Section. 48. *Effect of foreign judgments or final orders.* The effect of a judgment or final order of a tribunal of a foreign country, having jurisdiciton to render the judgment or final order is as follows:
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> ...
>
> (b) In case of a judgment or final order against a person, the judgment or final order is *presumptive evidence* of a right as between the parties and their [successors-in-interest] by a subsequent title.[48]

Thus, when the procedure laid out in Section 48 of Rule 39 of the 1997 Rules Civil Procedure is applied to the recognition and enforcement of a foreign arbitral award, the latter shall only be considered *presumptively valid*.[49]

This inconsistency was supposed to be cured when the Philippines ratified the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (Convention)[50] on 6 July 1967.[51] Such ratification was considered the point at which the Philippines recognized international

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44. *See* Thes C. Gonzales, *Recognition and Enforcement of a Foreign Arbitral Award in the Philippines*, 11 ARELLANO L. & POL'Y REV. 18, 19 (2012).

45. *Id.* at 20.

46. *Id.* at 19.

47. *See* 1997 Rules of Civil Procedure, rule 39, § 48.

48. Rules of Civil Procedure, rule 39, § 48 (emphasis supplied).

49. *Id.*

50. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *entered into force* June 7, 1959, 330 U.N.T.S. 38 [hereinafter Convention on Foreign Arbitral Awards].

51. *See also* Victor P. Lazatin & Patricia Ann T. Prodigalidad, Arbitration in the Philippines (An Unpublished Paper Submitted to the Association of South East Asian Nations Law Association) 3, *available at* http://www.aseanlawassociation.org/9GAdocs/w4_Philipines.pdf (last accessed July 8, 2014).

arbitration as a method of settling disputes.[52] The Convention pertinently provides that:

> (1) Each [c]ontracting [s]tate shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement of arbitration[;]
>
> (2) The term 'agreement in writing' shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties[,] or contained in an exchange of letters or telegrams[; and]
>
> (3) The court of a [c]ontracting [s]tate, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of [Article Two of the Convention], shall, at the request of one of the parties, refer the parties of arbitration, unless it finds that the said agreement is null and void, inoperative[,] or incapable of being performed.[53]

Under the Convention, international arbitration agreements between parties of different nationalites are given reciprocal recognition and enforcement.[54] Article III of the Convention states that "[e]ach contracting [s]tate shall recognize arbitral awards as binding and *enforce them in accordance with the rules of procedure of the territory where the award is relied upon*[.]"[55] However, despite the clear mandate of the Convention, no rules of procedure governing the recognition and enforcement of foreign arbitral awards were enacted.[56] Thus, for over half a century, foreign arbitral awards were still treated by the courts as akin to foreign judgments.[57]

B. The Present

1. Alternative Dispute Resolution Act of 2004

On 2 April 2004, the Alternative Dispute Resolution Act of 2004 (ADR)[58] was passed. The ADR adopts the declared policy of Congress to "promote

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52. *See* National Union Fire Insurance Company of Pittsburg v. Stolt-Nielsen Philippines, Inc., 184 SCRA 682, 688-89 (1990).

53. Convention on Foreign Arbitral Awards, *supra* note 50, art. 2.

54. *Id.* art 1.

55. *Id.* art. 3 (emphasis supplied).

56. *See* Lazatin & Prodigalidad, *supra* note 51, at 3.

57. *Id.*

58. 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).

party autonomy in the resolution of disputes or the freedom of the party to make their own arrangements to resolve their disputes."[59] Prior to its enactment, "there were no laws prescribing the [procedure] for the conduct of international arbitration."[60] In fact, parties were often required to agree to international arbitration in a foreign country under rules of a foreign arbitrator.[61] Thus, the ADR is considered as a milestone in the evolution of international arbitration law in the Philippines.

The importance of the ADR was higlighted in the case of *Korea Technologies Co., Ltd. v. Lerma.* In *Korea Technologies Co. Ltd.*,[62] where the SC said that "[f]or domestic arbitration proceedings, [the Court has particular local] agencies to arbitrate disputes arising from contractual relations. In case a foreign arbitral body is chosen by the parties, the arbitration rules of [the] domestic arbitration bodies would not be applied."[63] *Korea Technologies Co.* impliedly created a dividing line between domestic arbitration and international arbitration. It recognizes that different procedures must apply to domestic arbitration and international arbitration respectively.[64] Gone are the days when only one set of procedure is applied to both.[65] Essentially, *Korea Technologies Co.* butresses the idea that international arbitration must have its own rules of procedure — the ADR.[66]

The ADR also fortified the use and purpose of the Convention. It specifically mandated that the "Convention shall [still] govern the recognition and enforcement of [foreign arbitral awards]."[67] And similar to the mandate of the Convention and the doctrine in *Korea Technologies Co.*, the ADR recognizes that foreign arbitral awards must be recognized and enforced in "accordance with [its own] rules of procedure."[68] Thus, pursuant to this mandate, on 1 September 2009, the SC promulgated the SADR — the rules of procedure that governs the "[r]ecognition and [e]nforcement of a [f]oreign [a]rbitral [a]ward[.]"[69]

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59. *Id.* § 2.

60. Lazatin & Prodigalidad, *supra* note 51, at 3.

61. *Id.*

62. Korea Technologies Co., Ltd. v. Lerma, 542 SCRA 1 (2008).

63. *Id.* at 23.

64. *Id.*

65. *See* Lazatin & Prodigalidad, *supra* note 51 at 1-4.

66. *See* Alternative Dispute Resolution Act of 2004, §§ 42-48.

67. *Id.* § 42.

68. *Id.*

69. SPECIAL RULES OF COURT ON ALTERNATIVE DISPUTE RESOLUTION, A.M. No. 07-08-SC, Sep. 1, 2009, rule 1.1 (j). The SC held that the enforcement and recognition of foreign arbitral awards shall be subject to the Special Rules on

2. SADR

i. Nature and Venue of the Proceedings

Rule 1.2 of the SADR provides that "[a]ll proceedings under the [SADR] are special proceedings."[70] A special proceeding is defined as "the act by which [a party] seeks to establish the status or right of a party, or a particular fact."[71] A special proceeding is merely a declaration of a right or fact.[72] It is distinguished from an ordinary civil action where the party sues another for the protection and enforcement of a right or the prevention or redress of a wrong.[73] The classification of the SADR as a special proceeding is consistent with the non-litigious and summary nature of the recognition and enforcement of foreign arbitral awards.

Implicit in the summary nature of the SADR proceedings is the separable or independent character of the arbitration clause.[74] The Doctrine of Separability states that the arbitration clause shall be treated as a separate agreement.[75] Therefore, the arbitration clause shall still be valid even if the contract to which it is a part of ends.[76]

The Doctrine of Separability is particularly significant in void contracts because, generally, if the main or principal contract is void, all the clauses are also void.[77] A contrary ruling would suggest that a party can avoid arbitration by merely disagreeing. It would also likely give way to various dilatory tactics. Thus, the Doctrine ensures that referral to arbitration would still be the most expedient remedy to resolve a dispute.[78]

Rule 13.3 provides for the venue of the proceedings, to wit —

> Rule 13.3. *Venue.* — The petition to recognize and enforce a foreign arbitral award shall be filed, at the option of the petitioner, with the

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Alternative Dispute Resoliution. *See* China National Machinery & Equipment Corp. (Group) v. Santamaria, 665 SCRA 189, 213 (2012).

70. SPECIAL RULES OF COURT ON ALTERNATIVE DISPUTE RESOLUTION, rule 1.2.

71. Alfredo Villavert, Jr., *Special Proceedings*, 39 PHIL. L. J. 213, 213 (1964).

72. *Id.*

73. *Id.*

74. Gonzales v. Climax Mining Ltd., 512 SCRA 148, 170 (2007).

75. *Id.*

76. *Id.*

77. *See* CIVIL CODE, art. 1420.

78. *But see* European Resources and Technologies, Inc. v. Ingenieuburo Birkhahn + Nolte, Ingeniurgesellschaft mbh, 435 SCRA 246, 258 (2004). Even if there is an arbitration clause, there are instances when referal to arbitration is not the most prudent action such as when the court "allow[s] simultaneous arbitration proceedings and trial, or suspension of trial pending arbitration." *Id.*

> Regional Trial Court [(RTC):] (a) where the assets to be attached or levied upon is located[;] (b) where the act to be enjoined is being performed[;] (c) in the principal place of business in the Philippines of any of the parties[;] (d) if any of the parties is an individual, where any of those individuals resides[;] or (e) in the National Capital Judicial Region.[79]

This Rule on venue applies with equal force to a non-convention award,[80] which on the grounds of comity and reciprocity, may be recognized and enforced as an award rendered under the Convention.[81]

ii. How to Commence an Action for the Recognition and Enforcement of a Foreign Arbitral Award

The SADR provides that "any party to a foreign arbitration"[82] may petition the court "at any time after receipt of the foreign arbitral award[.]"[83] The petition shall state the following: (1) the address of the parties; (2) the country where the arbitral award was made and whether or not such country is a signatory to the Convention; (3) the relief sought; (4) an authentic copy of the arbitration agreement; and (4) an authentic copy of the arbitral award.[84] The SADR further provides that the petition shall be verified[85] and accompanied by a Certificate of Non-forum Shopping.[86]

iii. Filing Fees

Generally, Rule 141 of the Rules of Court governs filing fees. Section 1 thereof states that "[u]pon the filing of the pleading or other application which initiates an action or proceeding, the fees prescribed therefore shall be paid in full."[87] Only upon the payment of filing fees will the court have jurisdiction over the case.

In the 2005 case of *Mijares v. Ranada*,[88] the SC was confronted with the novel issue of whether the action for the recognition and enforcement of a foreign judgment is one incapable of pecuniary estimation as to warrant the

79. SPECIAL RULES OF COURT ON ALTERNATIVE DISPUTE RESOLUTION, rule 13.3.

80. *Id.* rule 13.12.

81. *Id.*

82. *Id.* rule 13.1.

83. *Id.*

84. *Id.* rule 13.5.

85. SPECIAL RULES OF COURT ON ALTERNATIVE DISPUTE RESOLUTION, rule 1.4.

86. *Id.* rule 1.5.

87. RESOLUTION AMENDING RULE 141 (LEGAL FEES) OF THE RULES OF COURT, A.M. No. 00-2-01-SC, Mar. 1, 2000, § 1.

88. Mijares v. Ranada, 455 SCRA 397 (2005).

payment of a minimal filing fee.[89] In that case, the victims of human rights violations filed a petition in the RTC of Makati for the enforcement of the 2.25 billion dollar award rendered in their favor by the United States (U.S.) District Court of Hawaii.[90] The Marcos Estate (Estate) moved for the dismissal of the case because petitioners only paid the minimal filing fee of ₱410.00.[91] The Estate claimed that the amount of filing fees must be computed based on the amount of the claim; thus, petitioners should have paid ₱472 million in fees.[92] The SC held that

> the complaint to enforce the [U.S.] District Court judgment is one capable of pecuniary estimation. But at the same time, it is also an action based on judgment against an estate, thus placing it beyond the ambit of Section 7 (a) of Rule 141. What provision then governs the proper computation of the filing fees over the instant complaint? For this case and *other similarly situated instances*, [the Court] finds that it is covered by Section 7 (b) (3), involving as it does, 'other actions not involving property.'[93]

The ruling of the SC in the *Mijares* case can also be applied to the petition to recognize and enforce a foreign arbitral award given that the latter is a "similarly situated instance."[94] Thus, the last paragraph of Rule 20.1 of the SADR provides that "[t]he minimal filing fee payable in 'all other actions not involving property' shall be paid by the petitioner seeking to enforce foreign arbitral awards under the [Convention] in the Philippines."[95]

iv. Opposition

When the RTC finds the petition to be in order, it shall cause notice and a copy of the petition to be delivered to the respondent allowing him to file an opposition thereto within 30 days from receipt of the notice and petition.[96] The opposition must also be verified.[97]

89. *Id.*

90. *Id.* at 402.

91. *Id.*

92. *Id.* at 403.

93. *Id.* at 416 (emphasis supplied).

94. *Mijares*, 455 SCRA at 416.

95. SPECIAL RULES OF COURT ON ALTERNATIVE DISPUTE RESOLUTION, rule 20.1.

96. *Id.* rule 13.6.

97. *Id.* rule 13.7.

Article V of the Convention states the grounds for the refusal of recognition and enforcement of foreign arbitral awards.[98] Rule 13.4 is just a reproduction of Article V, to wit —

> A Philippine court shall not set aside a foreign arbitral award but may refuse it recognition and enforcement on any or all of the following grounds:
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> a. The party making the application to refuse recognition and enforcement of the award furnishes proof that:
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> (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
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> (iv) The composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties 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
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> b. The court finds that:
>
> (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.[99]

The SADR, as well as the ADR, provides that the RTC will entertain no grounds other than those enumerated in Article V of the Convention.[100] This is consistent with the policy of both the SADR and the ADR that the

98. *Id.* rule 13.4. *See also* Convention on Foreign Arbitral Awards, *supra* note 50, art. 5.

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

100. *Id.*

Convention still governs the recognition and enforcement of foreign arbitral awards.

In resolving the opposition, the RTC only has the capacity of either recognizing and enforcing the award, or refusing to recognize and enforce the award.[101] The RTC does not have the capacity to annul a foreign arbitral award rendered by a foreign arbiter.[102] Rule 19.11 is explicit that the RTC "shall have no power to vacate or set aside a foreign arbitral award."[103] The RTC is not tasked to determine the validity of the arbitral award.[104] It can only refuse to recognize such an award if the grounds stated in Article Five of the Convention and in Rule 13.4 are present. Therefore, the foreign arbitral award remains valid even if the RTC refuses to recognize it. This is consistent with Rule 13.11 which states that the court "shall not disturb the arbitral tribunal's determination of facts and/or interpretation of law[,]"[105] and that "[i]t is presumed that a foreign arbitral award was made and released in due course of arbitration and is subject to enforcement by the [RTC]."[106] Thus, the opposition shall only contain matters regarding the recognition and enforcement of the foreign arbitral award and not matters regarding its validity.

v. Hearing, Decision, and Appeal

The RTC's inquiry is only limited on whether or not the foreign arbitral award shall be recognized and enforced.[107] Matters regarding the validity of a foreign arbitral award shall be within the exclusive jurisdiction of the foreign tribunal. In fact, even if the case is already being heard in the RTC, the foreign tribunal still retains its jurisdiction over the matter. Rule 13.10 states that

> [t]he court before which a petition to recognize and enforce a foreign arbitral award is pending, may adjourn or defer rendering a decision thereon if, in the meantime, an application for the setting aside or suspension of the award has been made with a competent authority in the country where the award was made.[108]

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101. *Id.* rule 13.11.

102. *Id.*

103. *Id.* rule 19.11.

104. *Id.*

105. SPECIAL RULES OF COURT ON ALTERNATIVE DISPUTE RESOLUTION, rule 13.11.

106. *Id.*

107. *Id.*

108. *Id.* rule 13.10.

The SADR also provides that foreign arbitral awards made in a country not a party to the Convention may still be recognized, to wit —

> [t]he court shall, only upon grounds provided by [the SADR], recognize and enforce a foreign arbitral award made in a country not a signatory to the [Convention] when such country extends comity and reciprocity to awards made in the Philippines. If that country does not extend comity and reciprocity to awards made in the Philippines, the [RTC] may nevertheless treat such award as a foreign judgment enforceable as such under [Section 48 of Rule 39 of the 1997 Rules of Civil Procedure].[109]
>
> The decision of the RTC shall also be immediately executory.[110]

As a general rule, the foreign arbitral award cannot be set aside for mere errors of judgment of fact or law of the arbitrator. The SADR prohibits the parties from filing an appeal to question the merits of the foreign arbitral award.[111] The RTC cannot review the findings of the arbitrator nor substitute its own findings; otherwise, the foreign arbitral award would be the commencement and not the end of litigation. Thus, an appeal is limited only to the following instances: (1) orders of the RTC recognizing and enforcing a foreign arbitral award;[112] and (2) orders of the RTC refusing to recognize and enforce a foreign arbitral award.[113] Thus, judicial review of arbitration is "more limited than judicial review of trial."[114]

However, a perfected appeal will still not preclude the enforcement of the foreign arbitral award. Rule 19.22 provides that an "appeal shall not stay the award, judgment, final order[,] or resolution sought to be reviewed unless the Court of Appeals directs otherwise upon such terms as it may deem just."[115] This ensures that the foreign arbitral award is not rendered illusory by any dilatory tactics of the losing party.

3. Present Status in the Philippines

The Convention provides the initial framework for the recognition and enforcement of foreign arbitral awards. The subsequent enactments — the SADR and the ADR — elaborate the procedures to be followed. However, there are still glaring pitfalls in the current laws. For example, even a cursory

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109. *Id.* rule 13.12.

110. *Id.* rule 13.11.

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

112. *Id.* rule 19.12 (j).

113. *Id.* rule 19.12 (k).

114. *See* Asset Privatization Trust v. Court of Appeals, 300 SCRA 579, 602 (1998).

115. SPECIAL RULES OF COURT ON ALTERNATIVE DISPUTE RESOLUTION, rule 19.22.

reading of the SADR and the ADR would yield that both laws do not have provisions which categorically state that foreign arbitral awards are conclusively binding in the Philippines. In fact, in *National Power Corporation v. Alonzo-Legasto*,[116] the SC held that an arbitration award is "not absolute and without exceptions. Where the conditions described in Articles 2038, 2039[,] and 2040 of the Civil Code [are present], the arbitrator's award may be annulled[.]"[117]

Curiously, Rule 13.12 of the SADR even makes a distinction between foreign arbitral awards rendered by a country which is a party to the Convention and foreign arbitral awards rendered by a country which is *not* a party to the Convention.[118] Rule 13.12 implies that if the country is *not* a party to the Convention, foreign arbitral awards rendered by it shall only be "presumptively valid."[119] Lastly, the procedure for the recognition and enforcement of foreign judgment are still being applied in the recognition and enforcement of foreign arbitral awards.

Arbitration has been touted as the "wave of the future" in international relations.[120] Thus, the next step in the evolution of arbitration law must address this issue.

C. The Future

On 10 December 2012, the SC, together with the University of the Philippines Law Center and the Integrated Bar of the Philippines, launched a project to overhaul the current 1997 Rules of Civil Procedure.[121] The SC said that "the current [1997 Rules of Civil Procedure] is patterned after the American model, which is designed for [the] jury system."[122] Also, according to SC Justice Roberto A. Abad, the chairperson of the committee overseeing the project, "many of the [provisions of the current 1997 Rules of Civil Procedure] are antiquated and are no longer relevant to our needs."[123] Thus, the current 1997 Rules of Civil Procedure are perceived to be "unresponsive" to the needs of the judicial system — which results to case

116. National Power Corporation v. Alonzo-Legasto, 443 SCRA 342 (2004).

117. *Id.* at 359 (citing CIVIL CODE, arts. 2038-2040).

118. *See* Rules of Civil Procedure, rule 39, § 48 & SPECIAL RULES OF COURT ON ALTERNATIVE DISPUTE RESOLUTION, rule 13.12.

119. SPECIAL RULES OF COURT ON ALTERNATIVE DISPUTE RESOLUTION, rule 13.12.

120. BF Corporation vs. Court of Appeals, 288 SCRA 267, 286 (1998).

121. Trixie Cruz-Angles & Luisa Legaspi Rosales, *SC-IBP-UPLC launch project to revise Civil Procedure*, THE BAR TRIBUNE, December 2012, at 1.

122. *Id.* at 3.

123. *Id.*

delays for up to seven years.[124] On 30 May 2013, the SC released the First Draft of the Revised Rules of Civil Procedure (First Draft).[125]

In what is perceived to be the next step in the evolution of international arbitration law, the First Draft adds an entirely new provision specifically for the recognition and confirmation of foreign arbitral awards, to wit —

> SEC. 4.49. *Effect of a foreign arbitral award.* — The judgment or final order of a foreign arbitral body having jurisdiction to render the judgment or final order shall be binding and conclusive on the parties. An action for confirmation and enforcement of a foreign arbitral award shall be subject to the following:
>
> (a) *Foreign arbitral award not subject to court review.* — A foreign arbitral award shall not be subject to judicial review. Any judicial inquiry will be limited to the question of whether there was an agreement to arbitrate or whether the arbitration was conducted in a lawful manner[;]
>
> (b) *Confirmation of foreign arbitral award.* — A court must confirm a foreign arbitral award unless:
>
> 1. It is shown that there is no valid agreement to arbitrate;
>
> 2. It is shown that the arbitration was conducted in an unlawful manner or not in accordance with the agreement of the parties[;]
>
> (c) The award is attended by fraud, collusion[,] or a clear mistaken of fact or law.[126]

The new provision addresses all the deficiencies and shortcomings of the SADR and the ADR. Section 4.49 of the First Draft categorically outlines the procedure for the recognition and enforcement of foreign arbitral awards.[127] The immediate effect of this provision is that the courts and the parties will no longer apply the provisions for the recognition and enforcement of foreign judgments to foreign arbitral awards. The recognition and enforcement of foreign arbitral awards will now have its own position in the Revised Rules of Civil Procedure.

Although jurisprudence and the Convention hold that foreign arbitral awards are binding between the parties, inconsistensies in the law might

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124. *Id.*

125. National Conference for the Revision of the Rules of Civil Procedure, First Draft of the Revised Rules of Civil Procedure (The Unpublished First Draft of the Revised Rules of Civil Procedure), *available at* http://lawphil.net/courts/rules/drafts/FIRST%20DRAFT%202013%20Revised%20Rules%20of%20Civil%20Procedure.pdf (last accessed July 8, 2014) [hereinafter Draft of the Revised Rules of Civil Procedure].

126. *Id.* at 149-50.

127. *Id.*

confuse party litigants and the courts regarding the effect of foreign arbitral awards. The enactment of Section 4.49 finally clears the cloud on whether foreign arbitral awards are conclusively binding or only presumptively valid against the parties.[128] Paragraph 1 of Section 4.49 states that "[t]he judgment or final order of a foreign arbitral body having jurisdiction to render the judgment or final order shall be *binding and conclusive* on the parties."[129]

Lastly, Paragraph A of Section 4.49 reiterates the policy that courts have no power to inquire into the validity of the foreign arbitral award.[130] Any judicial review will be limited "to the question of whether there was an agreement to arbitrate or whether the arbitration was conducted in a lawful manner."[131] Meanwhile, Paragraph B of Section 4.49 embodies the "speedy purpose" of arbitration.[132] It provides that a court "must" confirm a foreign arbitral award if the grounds stated are not present.[133] The provision precludes any dilatory tactics of the opposing party.

III. CONCLUSION

Emerging in 1921 and continuing to this day, international arbitration law in the Philippines is almost 100 years old. Of course, as the Philippines enters the dawn of the new millenium, it will continue to grow. The past, present, and future evolution of international arbitration law can be divided into four stages: (1) when the courts disfavored it; (2) when the courts favored it; (3) when it was treated as presumptively valid; and (4) when it will be treated as conclusively binding. The Author believes that, with the imminent revision to the 1997 Rules of Civil Procedure, international arbitration law is on the cusp of the 4th stage.

Aside from domestic influences, foreign and international forces also affect the evolution of arbitration law. In the last two decades, international trade grew by 5.3%.[134] According to the World Trade Organiztion, international trade is expeced to grow by 4.7% in 2014 and 5.3% in 2015.[135] Nowadays, more and more people exchange goods, products, and services

128. *Id.*

129. *Id.* at 140 (emphasis supplied).

130. *Id.*

131. Draft of the Revised Rules of Civil Procedure, *supra* note 125, at 149.

132. *Id.* at 149-50.

133. *Id.*

134. ET Bureau, WTO sees global trade growing at 4.7% in 2014, *available at* http://economictimes.indiatimes.com/news/economy/indicators/wto-sees-global-trade-growing-at-4-7-in-2014/articleshow/33747888.cms (last accessed July 8, 2014).

135. *Id.*

across international boundaries. According to the World Bank, international trade is increasingly recognized as a vital engine for economic development.[136] It allows markets to expand and enables these markets to get people the goods they desire.

Inevitably, because of the interplay of different jurisdictions with different parties and properties located in different countries as well as the inherent legal and cultural differences between trading nations, international trade will give rise to international disputes. An international dispute is a "disagreement on a point of law or fact, a conflict of legal views or interests between two persons."[137] The manner of resolution of such disputes makes it hard to do business in the Philippines. Traditional litigation to settle such disputes is viewed as a rigid process involving technicalites that often produce delay rather than avert it. Foreign investors describe the "inefficiency and uncertainty of the judicial system as a significant disincentive for investment."[138] Investment disputes in the Philippines can take years to resolve.[139] Also, should a party feel that a favorable arbitral award abroad would not be recognized and could not be enforced in the Philippines, the party may be disinclined to enter into commercial relationships, or make transactions concerning goods located within the Philippines. Foreign investors are always looking for methods of alternative dispute resolution which would be the least detrimental to their businesses.

It has been said that "the law is never static[.]"[140] It is a living organism that follows social and economic change and that responds to the needs of the people. At present, Singapore and Hongkong are considered as the world's arbitration hubs.[141] However, with the imminent revision to the 1997 Rules of Civil Procedure and the acuity of the Filipinos to the English language, the Philippines could easily become an important venue for arbitration. The next step in the evolution of international arbitration law could be the defining move towards that direction.

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136. International Federation of Customs Brokers Associations, New trends in international trade, emerging business models, and the needs of small and medium-sizes business in preparing the Framework of Standards to Secure and Facilitate Global Trade (An Unpublished Paper Identifying New Trends in International Trade) 3, *available at* http://www.ifcba.org/UserFiles/File/wcotrendsdoc.pdf (last accessed July 8, 2014).

137. BERNAS, *supra* note 14, at 267.

138. INTERNATIONAL BUSINESS PUBLICATIONS, PHILIPPINES DOING BUSINESS, INVESTING IN PHILIPPINES GUIDE 67 (2013).

139. *Id.*

140. PHIL HARRIS, AN INTRODUCTION TO LAW 1 (7th ed. 2007).

141. Lazatin & Prodigalidad, *supra* note 51, at 46.