EMERGING LEGAL TRENDS AND PRACTICES IN COMMERCIAL ARBITRATION IN THE PHILIPPINES*

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INTRODUCTION

It is the declared policy of the State expressed in Section 2 of Republic Act No. 9285[1] "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." To this, the Special Alternative Dispute Resolution Rules (SADR)[2] adds "... with the greatest cooperation of and the least intervention from the courts." Now the current provision reads:

> "It is the policy of the State to actively promote the use of various modes of ADR and *to respect party autonomy or the freedom of the parties to make their own arrangements in the resolution of disputes with the greatest cooperation of and the least intervention from the courts.* To this end, the objectives of the Special ADR Rules are to encourage and promote the use of ADR, particularly arbitration and mediation, as an important means to achieve speedy and efficient resolution of disputes, impartial justice, curb a litigious culture and to de-clog court dockets."[3]

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[1] Rep. Act No. 9285 (2004). This is the Alternative Dispute Resolution Act of 2004.

[2] A.M. No. 07-11-08-SC, Rule 2.1 (2009). This is the Special Rules of Court on Alternative Dispute Resolution.

[3] Rule 2.1. Emphasis supplied.

Party autonomy is that special feature in arbitration (and other forms of alternative dispute resolution) where the parties can select their arbitrators or have a direct participation in the process of selecting the arbitrators (in contrast, the parties in litigation cannot select the judge who will preside over the case). It is that special feature in arbitration where the parties can select the law that will govern the substance of the dispute, and determine their rights and obligations (in contrast, the parties in litigation cannot impose on the judge the substantive law that will be used to resolve the dispute unless they have a pre-existing choice of law clause in the contract subject of litigation). In the exercise of party autonomy, the parties are at liberty to choose the procedure that will govern the arbitral proceedings (in contrast, the parties in litigation cannot choose the procedure that the judge will observe in conducting the court proceedings). Through party autonomy, the parties can select the place of arbitration (in contrast, the parties in litigation cannot select the venue of court proceedings unless they provide a venue stipulation clause in their contract). That is why party autonomy is a distinctive feature of arbitration which sets it apart from litigation.

It may be observed that the policy of the law is to minimize the areas in alternative dispute resolution where the courts may intervene. Although the policy refers to "various modes of ADR," the effect of the policy is best felt in arbitration because it is only in arbitration, among the various forms of alternative dispute resolution, where the neutral third-party – the arbitrator – makes binding and enforceable rulings which may be the subject of judicial review. Further, the SADR provides that "the court shall exercise the power of judicial review as provided by these Special ADR Rules. Courts shall intervene *only in the cases allowed by law or these Special ADR Rules.*"[4] Such provision is an illustration of how the aforementioned policy of the law makes the greatest impact on arbitration.

What are the cases allowed by law or the SADR where the courts may intervene? An examination of the areas where the courts may intervene in arbitration shows that those areas are shrinking. Cases in point are in the areas of appointing arbitrators, obtaining interim relief, and appealing from arbitral awards.

[4] Rule 2.1. Emphasis supplied.

Appointing Arbitrators

It has been the rule for domestic arbitration under Republic Act No. 876 that where there is a failure or refusal to appoint an arbitrator, a party may call upon the court to step in right away and appoint an arbitrator. This rule is expressed as follows:

> The Court of First Instance (now the Regional Trial Court) shall appoint an arbitrator or arbitrators, as the case may be, in the following instances:
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> (a) If the parties to the contract or submission are unable to agree upon a single arbitrator; or
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> (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
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> (c) If either party to the contract fails or refuses to name his arbitrator within fifteen days after receipt of the demand for arbitration; or
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> (d) If the arbitrators appointed by each party to the contract, or appointed by one party to the contract and by the proper Court, shall fail to agree upon or to select the third arbitrator.[5]

The rule has been modified especially in the case of *ad hoc* arbitration, as opposed to institutional arbitration, which is what is contemplated by the Republic Act No. 876. In *ad hoc* arbitration, the court shall act as Appointing Authority *only* where:

> the parties failed to provide a method for appointing or replacing an arbitrator, or substitute arbitrator, or the method agreed upon is ineffective, *and* the National President of the Integrated Bar of the Philippines (IBP) or his duly authorized representative fails or refuses to act within such period as may be allowed under the pertinent rules of the IBP or within such period as may be agreed

[5] Rep. Act No. 876, § 8 (1953). This is The Arbitration Law.

> upon by the parties, or in the absence thereof, within thirty (30) days from receipt of such request for appointment.[6]

The insertion of the role of the IBP National President or his duly authorized representative as an intermediate step before a court may act as an Appointing Authority in *ad hoc* arbitration serves to lessen the delay which the failure to appoint an arbitrator brings about. Before the parties are subjected to the process of filing a petition in court for the appointment of an arbitrator, paying the filing fee, lining up with the other cases in the docket of the court (although now a petition for appointment of an arbitrator is subject to summary proceedings[7]), an administrative procedure is made available to them by making the request for appointment of an arbitrator to the IBP National President or his duly authorized representative. This is quicker.

Although the immediate effect is to hasten the appointment of the arbitrator, there is another consequence which is institutional in character. The provision has created a "buffer zone" before the courts may intervene to appoint an arbitrator. Unlike before where a party may run to the courts right away to appoint an arbitrator in the event of disagreement between the parties in the selection of arbitrators, the present state of the law has placed certain conditions before the courts may step in. This is just one among several areas in arbitration where the law puts in place certain measures to minimize court intervention, pursuant to the declared policy of respecting party autonomy "with the least intervention from the courts."

Interim Measures of Protection

Before the passage of Republic Act No. 9285 in 2004, interim measures of protection needed by a party to an arbitration proceeding may be obtained either from the arbitral tribunal or from the court. Republic Act No. 876 provides that "the arbitrator or arbitrators shall have the power at any time, before rendering the award, without prejudice to the right 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."[8] Under such previous rule, a court had concurrent power with an arbitral tribunal to grant interim measures of protection.

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[6] A.M. No. 07-11-08-SC, Rules 6.1(b). Emphasis supplied.

[7] Rule 1.3.

[8] Rep. Act No. 876, § 14.

The rule was modified when Republic Act No. 9285 was passed. Certain conditions were imposed before a court may grant interim relief. Before the constitution of an arbitral tribunal, a court has the sole power to grant interim measures of protection.[9] That is understandable because the court is the only source of interim relief needed by a party if there is no arbitral tribunal existing yet. However, after the constitution of the arbitral tribunal and during the arbitral proceedings, a court may grant interim relief upon the condition that "the arbitral tribunal has no power to act or is unable to act effectively."[10] The rule now reads as follows:

> SEC. 28. *Grant of Interim Measure or Protection.* – (a) It is not incompatible with an arbitration agreement for a party to request, *before constitution of the tribunal*, from a Court an interim measure of protection and for the Court to grant such measure. *After constitution of the arbitral tribunal and during arbitral proceedings*, a request for interim measure of protection, or modification thereof, may be made with the arbitral tribunal or *to the extent that the arbitral tribunal has no power to act or is unable to act effectively*, the request may be made with the Court. 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.[11]

Under the present rule, where the arbitral tribunal has been constituted, the concurrence of power formerly shared by the court and the arbitral tribunal prior to the passage of Republic Act No. 9285 has been altered in favor of the arbitral tribunal. The general rule now is that interim relief may only be obtained from the arbitral tribunal. By way of exception, interim relief may be obtained from the court provided that the arbitral tribunal has no power to act or is unable to act effectively.

With the promulgation of the SADR and its taking effect in 2009, the power of an arbitral tribunal, as contrasted to the power of the court, to grant

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[9] Rep. Act No. 9285, § 28.

[10] § 28.

[11] Emphasis supplied.

interim relief became more pronounced. It is now expressly provided that "[a]ny 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.*"[12] Thus, an arbitral tribunal not only has the power to modify an interim relief earlier granted by a court before the tribunal was constituted but even has the power to revoke it.

This is a novelty in the Philippine legal system. An arbitrator is a private individual.[13] Though he is a private individual, he is vested with the power to modify, amend, revise, and even revoke an interim relief granted by a court. 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.[14]

Appeal from an Arbitral Award

There is a clear thrust under the present state of the law to confer finality on arbitral awards.

Conferring finality on arbitral awards is not a new concept. Under Article 2044 of the Civil Code, it is provided that "any stipulation that the arbitrators' award or decision shall be final is valid, without prejudice to Articles 2038,[15] 2039,[16] and 2040.[17]" Article 2044 leaves it to the parties to stipulate if they want the arbitrators' award or decision to be final or not.

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[12] A.M. No. 07-11-08-SC, Rule 5.13. Emphasis supplied.

[13] § 3(a) of RA 9285 defines "Alternative Dispute Resolution System", which includes arbitration, as any process or procedure used to resolve a dispute or controversy, *other than by adjudication of a presiding judge of a court or an officer of a government agency*, as defined in this Act, in which a neutral third party participates to assist in the resolution of the issues.

[14] A.M. No. 07-11-08-SC, Rule 5.14

[15] Art. 2038. A compromise in which there is mistake, fraud, violence, intimidation, undue influence, or falsity of documents, is subject to the provisions of Article 1330 of the Civil Code.

However, one of the parties cannot set up a mistake of fact as against the other if the latter, by virtue of the compromise, has withdrawn from a litigation already commenced.

[16] Art. 2039. When the parties compromise generally on all differences which they might have with each other, the discovery of documents referring to one or more but not to all of the questions settled shall not itself be a cause for annulment or rescission of the compromise, unless said documents have been concealed by one of the parties.

If they decide not to so stipulate, the 1997 Rules of Civil Procedure provides a procedure for appeal to the Court of Appeals from an arbitral award. Section 1 of Rule 43[18] provides as follows:

> Section 1. *Scope.* – This Rule shall apply to appeals from judgments or final orders of the Court of Tax Appeals and from awards, judgments, final orders or resolutions of or authorized by any quasi-judicial agency in the exercise of its quasi-judicial functions. Among these agencies are the Civil Service Commission, Central Board of Assessment Appeals, Securities and Exchange Commission, Office of the President, ... Construction Industry Arbitration Commission, and *voluntary arbitrators* authorized by law.[19]

Sixty years later from the enactment of the Civil Code in 1949, and under the regime of the SADR which took effect in 2009, the non-appealability of arbitral awards has ceased to be dependent on the stipulation of the parties. Rule 19.7 of the SADR has imposed the non-appealability of arbitral awards:

> 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.

While appeal on the merits has been taken away, there are still remedies to assail an arbitral award, such as a petition to vacate a domestic

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But the compromise may be annulled or rescinded if it refers only to one thing to which one of the parties has no right, as shown by the newly-discovered documents.

[17] Art. 2040. If after a litigation has been decided by a final judgment, a compromise should be agreed upon, either or both parties being unaware of the existence of the final judgment, the compromise may be rescinded.

Ignorance of a judgment which may be revoked or set aside is not a valid ground for attacking a compromise.

[18] Appeals from the Court of Tax Appeals and Quasi-Judicial Agencies to the Court of Appeals

[19] Emphasis supplied.

arbitral award,[20] or a petition to set aside an international arbitral award,[21] or a petition to refuse recognition or enforcement of a foreign arbitral award.[22] However, none of them allows questioning the merits of the arbitral award. The grounds to vacate, to set aside, and to refuse recognition or enforcement do not dwell on the merits of the arbitral award and those grounds are rather external to the arbitral award.

From an order of the Regional Trial Court confirming, vacating, setting aside, modifying or correcting an arbitral award, an appeal may be filed with the Court of Appeals on the condition that the losing party who appeals from the judgment of the court confirming or enforcing an arbitral award, or denying a petition to set aside or vacate the arbitral award, shall be required by the appellate court to post a counterbond executed in favor of the prevailing party equal to the amount of the award. Failure to post such bond shall be a ground for the Court of Appeals to dismiss the appeal.[23]

Here again is an instance where judicial intervention in arbitration is minimized. The right of a party to appeal directly from an arbitral award has been taken away. In addition, in those limited instances when a party may appeal from a court order acting upon an arbitral award, the appeal has been saddled with an additional requirement to post a counterbond.

Competence-Competence Principle

The principle of *competence-competence* is widely recognized in various jurisdictions. It is succinctly expressed in Article 16(1) of the Model Law as the competence of an arbitral tribunal to rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement.

The SADR recognizes the principle of *competence-competence*[24] but it does so with a specific policy that limits the area where the courts may intervene on

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[20] Rep. Act No. 876, § 24; A.M. No. 07-11-08-SC, Rule 11.

[21] UNCITRAL Model Law on International Commercial Arbitration, (hereinafter "Model Law"), Article 34 (1985), in relation to Rep. Act No. 9285, § 19; A.M. No. 07-11-08-SC, Rule 12.

[22] United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter "NY Convention"), Article V (1958); Model Law, Article 36, in relation to Rep Act No. 9285, § 19; A.M. No. 07-11-08-SC, Rule 13.

[23] Rep. Act No. 9285, § 46; A.M. No. 07-11-08-SC, Rule 19.25.

[24] A.M. No. 07-11-08-SC, Rule 2.2.

the issue of the jurisdiction of the arbitral tribunal. That policy provides that 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 issues 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, the court must make no more than a *prima facie* determination of that issue, as per the policy of judicial restraint. 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.[25]

This is new in the Philippine legal system. A voluntary arbitrator is comprehended within the concept of a quasi-judicial instrumentality, and the award or decision of the voluntary arbitrator has been equated with that of the regional trial court.[26] It is basic that any issue on the jurisdiction of quasi-judicial instrumentalities is within the competence of a court to decide. This is where the novelty comes. In the case of commercial arbitration, there is a specific policy of judicial restraint when it is the jurisdiction of the arbitral tribunal that is in question. 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 on the issue involving its own jurisdiction.

In the procedure crafted under the SADR for the judicial determination of the existence, validity, and enforceability of an arbitration agreement; there is a noticeable intention to insulate the progress of arbitral

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[25] Rule 2.4.

[26] Luzon Development Bank v. Association of Luzon Development Bank Employees, 249 SCRA 162, G.R. No. 120319, Oct. 6, 1995.

proceedings from the dilatory effect of this issue. The protective mantle that insulates the arbitral proceedings applies both before and after the commencement of arbitral proceedings.

Before the commencement of arbitration, any party to an arbitration agreement may petition the appropriate court to determine any question concerning the existence, validity, and enforceability of such arbitration agreement.[27] However, despite the pendency of the petition in court, arbitral proceedings may nevertheless be commenced and continue to the rendition of an award while the issue is pending before the court.[28] This procedure frees the arbitral proceedings from the shackling effect of posing the issue on the existence, validity, and enforceability of the arbitration agreement as a preliminary issue that must first be resolved before the arbitration may proceed.

A *prima facie* determination by the court upholding the existence, validity or enforceability of an arbitration agreement shall not be subject to a motion for reconsideration, appeal or certiorari.[29] The obvious effect of this provision is to prevent delay in the arbitration by forbidding the elevation of the issue on the existence, validity or enforceability of the arbitration agreement to higher courts.

To ensure that the arbitration does not deviate from the arbitration agreement that gave rise to it, it is also provided that such *prima facie* determination will not, however, prejudice the right of any party to raise the issue of the existence, validity and enforceability of the arbitration agreement before the arbitral tribunal or the court in an action to vacate or set aside the arbitral award. In the latter case, the court's review of the arbitral tribunal's ruling upholding the existence, validity or enforceability of the arbitration agreement shall no longer be limited to a mere *prima facie* determination of such issue or issues as prescribed in this Rule, but shall be a full review of such issue or issues with due regard, however, to the standard for review for arbitral awards prescribed in these SADR.[30]

If the issue on the existence, validity and enforceability of the arbitration agreement is raised in court after the commencement of arbitration

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[27] Rule 3.2.
[28] Rule 3.3.
[29] Rule 3.11.
[30] Rule 3.11.

and after the arbitral tribunal had made a ruling on a preliminary question upholding or declining its jurisdiction, the judicial recourse to the court shall not prevent the arbitral tribunal from continuing the proceedings and rendering its award.[31] Here again, the intention is obvious to free the arbitration from the shackling effect of holding it up while the preliminary question on the arbitral tribunal's jurisdiction is pending in court. In fact, it is specifically provided that the court shall not enjoin the arbitration proceedings during the pendency of the petition.

Summary Proceedings

The institution of summary procedure in the determination of the existence, validity, and enforceability of an arbitration agreement[32] puts an accent on the intention to prevent preliminary questions from dragging the arbitral proceedings. Where a party goes to court to raise the issue on the existence, validity, and enforceability of an arbitration agreement, the hearing that the court may hold is limited to one day, and only for the purpose of clarifying facts.[33] The obvious implication is that no protracted hearings are to be conducted as they will delay the resolution of the issue. Moreover, it is specified that that one-day hearing shall be set no later than five days from the lapse of the period for filing the opposition or comment.[34] The court is mandated to resolve the matter within thirty days from the day of the hearing.[35]

Following the summary proceedings strictly under the SADR, the issue on the existence, validity, and enforceability of an arbitration agreement gets resolved in less than two months.

Summary proceedings under the SADR apply also in cases involving issues on referral to ADR (where a party moves that a dispute filed in court be referred to ADR instead), interim measures of protection, appointment of

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[31] Rule 3.18.
[32] Rule 3.1(a).
[33] Rule 1.3(C).
[34] Rule 1.3(B).
[35] Rule 1.3(D).

arbitrator, challenge to appointment of arbitrator, termination of mandate of arbitrator, assistance in taking evidence, confidentiality/protective orders, and deposit and enforcement of mediated settlement agreements.[36]

With this, the areas for judicial intervention under the SADR as well as the possibilities of delay in the circumstances where the courts may intervene are minimized.

CONCLUSION: THE NET EFFECT

The enactment of Republic Act No. 9285, also known as the *Alternative Dispute Resolution Act of 2004*, augmented the acceptability of arbitration as an alternative to court litigation. This is shown by the gradually increasing number of disputes being referred to arbitration instead of litigation. In addition, the promulgation of the SADR, which took effect in 2009, has reduced the possible sources of delay in the resolution of disputes referred to arbitration. The power of judicial review over arbitrable disputes has been rightfully retained but the implementation of the declared policies of the law shows a shrinking of judicial intervention in the resolution of arbitrable disputes.

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[36] Rule 1.3.