Arbitration: A Preferred Mode in Dispute Resolution in International Commercial Transactions

by Atty. Geraldine Quimosing-Tiu[1]

The last two decades saw the rapid growth in telecommunications and the dramatic rise of internet resulting in increased connectivity and interdependence of economies among nations. This created several opportunities in the world markets and businesses as people across nations find it easier to travel, communicate, and do business internationally. Unfortunately, owing to the diverse cultures and legal systems of persons engaged in international transactions, disputes and disagreements are certain to arise.

The remedies available to parties in cases of disputes arising from international business transactions are varied. The modes of dispute resolution include (1) filing an action in court; and (2) availing of an administrative process called arbitration. The first mode is governed by an established set of procedural rules and legal principles. With clogged court dockets, a judicial process in the Philippines usually takes an average of 3-5 years before the court decides upon the merits of the case. Judicial process is also riddled with uncertainties as it often involves conflicts of laws problems on jurisdiction, the parties' legal capacity to sue, choice of law, and recognition and enforcement of judgment. The second mode, arbitration, allows the expeditious determination of a dispute.[2] It has gained acceptance in the Philippine

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[2] Coquia, Jorge R., Annotation, Arbitration as a Means of Reducing Court Congestion, 29 July 1977, 78 SCRA 121 cited in *Del Monte Corporation-USA, et al., v. Court of Appeals*, et al., G.R. No. 136154 (2001).

legal system in dispute resolution, both domestic and international because of its unique features where the parties' agreement prevails in most aspects of the proceeding. Touted to be the "new wave of the future" in international relations,[3] Congress has reinforced arbitration and the Supreme Court has expressly promoted it under the new special rules of procedure. Consequently, to further strengthen the use of arbitration in international commercial transactions, significant modifications were made in legal principles providing for exemptions in long established legal doctrines.

Historical background of arbitration in the Philippines

As early as 1921, the Philippine legal system recognized and accepted arbitration as an alternative mode of dispute resolution in Chan Linte v. Law Union and Rock Insurance Co, Ltd., et al.[4] citing *Allen v. Province of Tayabas*,[5] the Supreme Court held that

> It would be highly improper for courts out of untoward jealousy to annul laws or agreements which seek to oust the courts of their jurisdiction.... Unless the agreement is such as absolutely to close the doors of the courts against the parties, which agreement would be void (*Wahl and Wahl v. Donaldson, Sims and Co.* [1903], 2 Phil., 301), courts will look with favor upon such amicable arrangements and will only with great reluctance interfere to anticipate or nullify the action of the arbitrator.

The foregoing ruling notwithstanding, it was only in 1953 that concrete legal framework for arbitration was put in place in the Philippines when Congress passed Republic Act No. 876, otherwise known as the Arbitration Law. Meant to supplement the provisions on arbitration[6] in the New Civil Code, R.A. 876 authorized the making of arbitration and submission agreements and provided for the appointment of arbitrators and the procedure for arbitration in

[3] *BF Corporation v. Court of Appeals*, G.R. No. 120105 (1998), 288 SCRA 267, 286.

[4] 42 Phil. 548 (1921).

[5] 38 Phil. 356.

[6] *Korea Technologies Co., Ltd v. Lerma*, G.R. No. 143581 (2008), citing *BF Corporation v. Court of Appeals, supra.*

civil controversies. However, it was silent about foreign arbitration involving controversies of international character.

On May 10, 1965, the Philippine Senate passed Resolution No. 71 adhering to the United Nations Convention on the Recognition and the Enforcement of Foreign Arbitral Awards of 1958[7] ("the New York Convention").[8] The Resolution gave reciprocal recognition and allowed enforcement of international arbitration agreements between parties of different nationalities within a contracting state.[9] This paved the way for the Philippines to recognize foreign arbitration as a system of settling commercial disputes.

In 1985, the United Nations Commission on International Trade Law (UNCITRAL) came up with UNCITRAL Model Law on International Commercial Arbitration (the "Model Law") which was amended in 2006. The Model Law was developed to address considerable disparities in national laws on arbitration and to provide international standard based on solutions acceptable to parties from different legal systems. The need for improvement and harmonization was based on a finding that national laws were often inappropriate for international cases[10] as most national laws, even those that appear to be up-to-date and comprehensive, usually cater to domestic arbitration.[11] Thus, traditional local concepts were often imposed on international cases. This is further aggravated by the fact that national laws differ widely. Hence, one source of concern for international arbitration is that at least one of the parties is confronted with foreign and unfamiliar provisions and procedures. The uncertainties brought about by such foreign element is seen to adversely affect the functioning of the arbitral process and to impact on the selection of the place of arbitration and, ultimately, on the parties' predisposition to resort to arbitral process.

[7] *Del Monte Corporation-USA, et al. v. Court of Appeals*, et al., G.R. No. 136154 (2001).

[8] The New York Convention was ratified on July 6, 1967.

[9] *Del Monte Corporation-USA, et. al., supra.*

[10] Explanation Note by the UNCITRAL Secretariat on the 1985 Model Law on International Commercial Arbitration as amended in 2006.

[11] *Id.*

In 2004, the Philippine Congress enacted Republic Act No. 9285, also known as the Alternative Dispute Resolution Act of 2004, which officially adopted the UNCITRAL Model Law[12] while at the same time reinforced the application of the New York Convention insofar as recognition and enforcement of arbitral awards covered by the said convention.[13] It primarily supplemented the parties' agreement in cases of international commercial arbitration. The enactment of R.A. 9285 paved the way for the Philippines to be a venue for international commercial arbitration.

On September 1, 2009, the Supreme Court passed a resolution approving and adopting A.M. No. 07-11-08-SC, the Special Rules of Court on Alternative Dispute Resolution (hereinafter, ADR Rules). Recognizing the importance of arbitration in achieving speedy and efficient resolution of disputes and impartial justice, in curbing a litigious culture and de-clogging court dockets, the ADR Rules expressly encouraged and promoted the use of ADR, particularly arbitration and mediation, in dispute resolution.[14]

Arbitration: Basic Concepts

Arbitration is a voluntary dispute resolution process in which one or more arbitrators appointed in accordance with the agreement of the parties resolve a dispute by rendering an award.[15] In this sense, the arbitral tribunal draws authority to adjudicate the controversy from the contractual stipulations of the parties. Absent any contract or agreement, the arbitral tribunal is bereft of jurisdiction to conduct arbitration proceedings, much less render judgment on the controversy. Cargill Philippines, Inc. v. San Fernando Regala Trading, Inc.[16] articulated the basic principle in arbitration that "a contract is required for arbitration to take place and to be binding."

[12] *R.A. 9285, § 19.*

[13] *Id, § 42.*

[14] Rule 2.1.

[15] See R.A. 9285, "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", § 3(d).

[16] G.R. No. 175404 (2011).

Just like any ordinary contract, the parties are free to make stipulations in the arbitration agreement subject only to limitations imposed by law, morals and good customs, public order or public policy. They are free to define or limit the issues to be submitted for arbitration,[17] or agree on the number of arbitrators,[18] the procedure for their selection[19] as well as for challenging their selection,[20] the procedural rules to be followed,[21] the venue of the proceedings,[22] the commencement of arbitral proceedings,[23] language to be used in the arbitral proceedings,[24] deadlines for submission of claims or for amendment thereof,[25] the propriety or manner of conducting hearings,[26] among others.

The arbitration agreement may be in the form of a separate contract, or may be part of the main contract. In the latter case, the arbitration agreement is a "part of that contract and is itself a contract."[27] This means that the arbitration clause takes on a separate and independent existence even if the main contract is declared null and void. In Gonzales v. Climax Mining Ltd.[28] the Court explains, thus,

> [T]he validity of the contract containing the agreement to submit to arbitration does not affect the applicability of the arbitration clause itself. A contrary ruling would suggest that a party's mere repudiation of the main contract is sufficient to avoid arbitration. That is exactly the situation that the separability doctrine, as well as jurisprudence applying it, seeks to avoid.

[17] *Western Minolco Corporation, v. Court of Appeals,* G.R. No. L-51996 (1988).

[18] UNCITRAL Model Law, Article 10 (1).

[19] *Id,* Article 11(3).

[20] *Id,* Article 13 (1).

[21] *Id,* Article 19 (1) .

[22] *Id,* Article 20(1), RA 9285 S 30.

[23] *Id,* Article 21.

[24] *Id,* Article 22(1); RA 9285 S 31.

[25] *Id,* Article 23.

[26] *Id,* Article 24.

[27] *Del Monte Corporation-USA, supra.*

[28] 512 *SCRA* 148 (2007), 172-173.

Subsequently, in *Cargill, supra,* citing *Gonzales, supra,* the Court elucidates,

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

The foregoing ruling is consistent with Article 16 (1) of the Model Law which provides:

> The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause.

The separability doctrine is now embodied in the new ADR Rules as one of its declared policies, to wit:

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

Since arbitration has for its basis the parties' agreement, it minimizes uncertainties in the procedure and the outcome of proceedings. Section

2[29] of R.A. 9285 reflects this sentiment. The nature of arbitration proceeding is administrative and arbitrators or the arbitral tribunal performs quasi-judicial functions. As such, the arbitration process is unfettered by the rigidity of technical rules of procedure and evidence but is subject only to observance of fundamental and essential requirements of due process.[30] For instance, the right to cross-examine a witness is held to be not indispensable in arbitration proceeding.[31]

Arbitration laws, such as R.A. 9285, are considered procedural laws that may be given retroactive effect and be applied to a dispute pending arbitration where an arbitral award has not yet been rendered.[32]

International Commercial Arbitration

Under the UNCITRAL Model Law, arbitration is international when (a) the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States; or (b) one of the following places is situated outside the State 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 (c) the parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one country.[33]

It is commercial if it covers matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of transactions include any trade transaction for the supply or exchange

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[29] Section 2. *Declaration of Policy.* It is hereby declared the policy of the State to actively promote party autonomy in the resolution of disputes or the freedom of the party to make their own arrangements to resolve their disputes. Towards this end, the State shall encourage and actively promote the use of Alternative Dispute Resolution (ADR) as an important means to achieve speedy and impartial justice and declog court dockets. xxx

[30] *Suma Kamagai, Inc. et al v. Romago Incorporated,* G.R. No. 177210 (2009).

[31] *Equitable PCI Banking Corporation, et al., v. RCBC Capital Corporation,* G.R. No. 182248 (2008).

[32] *Korea Technologies Co., Ltd v. Lerma, supra.*

[33] Model Law, Article 1(3).

of goods or services; distribution agreements; construction of works; commercial representation or agency; factoring; leasing, consulting; engineering; licensing; investment; financing; banking; insurance; joint venture and other forms of industrial or business cooperation; carriage of goods or passengers by air, sea, rail or road.[34]

International Arbitration: RA 9285 and the Model Law

R.A. 9285 allows international commercial arbitration to be conducted in the Philippines. It specifically adopts the Model Law to govern such proceedings. Under the Model Law, an arbitral proceeding is generally commenced when a request or referral for arbitration is received by the respondent.[35] The appointment of an arbitrator or panel of arbitrators is governed by the agreement of the parties. Absent such agreement, an arbitrator shall be chosen by the appointing authority or by the court.[36] The arbitral tribunal is deemed constituted when the arbitrator has accepted the nomination and written communication of said nomination and acceptance has been received by the party making the request.[37]

Once constituted, the arbitral tribunal assumes jurisdiction over the case including the power to grant interim reliefs or modify those earlier granted by the court.[38] Under R.A. 9285, the request for interim relief shall be in writing with notice to the other party, describing in detail the appropriate relief sought, the grounds therefor and the evidence in support thereof. The order granting interim reliefs is binding upon the parties. Non-compliance with such order entitles the other party to damages, including expenses, and reasonable attorney's fees.[39] The power of the arbitral tribunal to grant interim measure includes preliminary injunction, receivership, detention, preservation, and inspection of

[34] RA 9285, § 21.

[35] Model Law, Article 21.

[36] *Id*, Article 11; RA 9285 S 27.

[37] R.A. 9285, § 28(a).

[38] *Id*, § 28.

[39] *Id*, § 28

property subject of the dispute in arbitration.[40] Parties may apply to the courts for assistance in the implementation or enforcement of interim measures ordered by the arbitral tribunal.[41]

Model Law defines "interim measure" as any temporary measure, whether in the form of an award or in another form, by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party to (a) maintain or restore the status quo pending determination of the dispute; (b) take action that would prevent, or refrain from taking action that is likely to cause current or imminent harm or prejudice to the arbitral process itself; (c) provide a means of preserving assets out of which a subsequent award may be satisfied; or (d) preserve evidence that may be relevant and material to the resolution of the dispute.[42]

Both R.A. 9285[43] and the Model Law[44] grant the courts power and jurisdiction to issue interim measures. *Transfield Philippines, Inc. v. Luzon Hydro Corporation*, cited in Korea Technologies Co., Ltd. v. Lerman, *supra*, held that "the pendency of an arbitral proceeding does not foreclose resort to the courts for provisional reliefs."

> The Rules of the ICC, which governs the parties' arbitral dispute, allows the application of a party to a judicial authority for interim or conservatory measures. Likewise, Section 14 of Republic Act (R.A.) No. 876 (The Arbitration Law) recognizes the 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. In addition, R.A. 9285, otherwise known as the "Alternative Dispute Resolution Act of 2004," allows the filing of provisional or interim measures with the regular courts whenever the arbitral tribunal has no power to act or to act effectively.[45]

[40] R.A. 9285, § 29

[41] *Id.*

[42] Model Law, Article 17 (2)

[43] § 28

[44] Model Law, Article 17J

[45] G.R. No. 146717 (2006), 490 SCRA 14, 20-21.

Within the period of time agreed upon by the parties or determined by the arbitral tribunal, the claimant shall state the facts supporting his claim, the issues and reliefs sought and the respondent shall state his defense in respect of these particulars, unless the parties have otherwise agreed as to the required elements of such statements.[46] The arbitral tribunal may hold hearings or set the case for oral arguments, unless the parties agree otherwise.[47] The arbitral tribunal shall decide the dispute in accordance with the law chosen by the parties as applicable to the substance of the dispute, or in the absence of such agreement, the law determined by the arbitral tribunal under the applicable conflicts of law rules.[48] The arbitral award shall be in writing, signed by the arbitrators, and shall state its date and the place of arbitration, and, unless otherwise agreed upon by the parties, the reasons upon which it is based.[49] Arbitral proceeding is deemed terminated by the final award, or when a claim is withdrawn by the claimant, or the parties agree on the termination of the proceedings, or when the arbitral tribunal finds the continuation of the proceedings unnecessary.[50]

In the Model Law, an arbitral award may be set aside by the court on grounds similar to those provided under Article V of the New York Convention.[51] Similarly, R.A. 9285,[52] allows a party to a foreign arbitration proceeding to reject the arbitral award by opposing the application for recognition or enforcement thereof under the ADR Rules but only on those grounds enumerated under Article V[53] of the New

[46] Model Law, Article 21(1).

[47] *Id*, Article 24.

[48] Model Law, Article 28.

[49] *Id*, Article 31.

[50] *Id*, Article 32.

[51] *Id*, Article 34.

[52] § 45.

[53] Article V. 1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

(a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

York Convention. R.A. 9285 makes it clear that foreign arbitral awards are not foreign judgments. Interpreting Sections 44[54], 47[55], and 48[56] Korean Technologies Co., Ltd. v. Lerma, *supra*, the Court explains,

> It is now clear that foreign arbitral awards when confirmed by the RTC are deemed not as a judgment of a foreign court but as a foreign arbitral award, and when confirmed, are enforced as final and executory decisions of our courts of law.

(b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

(c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it 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, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(d) The composition of the arbitral authority 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 the arbitration took place; or

(e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

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

[54] SEC. 44. Foreign Arbitral Award Not Foreign Judgment. A foreign arbitral award when confirmed by a court of a foreign country, shall be recognized and enforced as a foreign arbitral award and not as a judgment of a foreign court.

A foreign arbitral award, when confirmed by the Regional Trial Court, shall be enforced in the same manner as final and executory decisions of courts of law of the Philippines xxx

[55] SEC. 47. Venue and Jurisdiction. Proceedings for recognition and enforcement of an arbitration agreement or for vacations, setting aside, correction or modification of an arbitral award, and any application with a court for arbitration assistance and supervision shall be deemed as special proceedings and shall be filed with the Regional Trial Court (i) where arbitration proceedings are conducted; (ii) where the asset to be attached or levied upon, or the act to be enjoined is located; (iii) where any of the parties to the dispute resides or has his place of business; or (iv) in the National Judicial Capital Region, at the option of the applicant.

[56] SEC. 48. *Notice of Proceeding to Parties.* In a special proceeding for recognition and enforcement of an arbitral award, the Court shall send notice to the parties at their address of record in the arbitration, or if any part cannot be served notice at such address, at such party's last known address. The notice shall be sent al least fifteen (15) days before the date set for the initial hearing of the application.

Enforcement of a foreign arbitral award requires court confirmation[57] as illustrated in Korea Technologies Co., Ltd. v. Lerma, *supra*. Sec. 35[58] of the UNCITRAL Model Law stipulates the requirement for the arbitral award to be recognized by a competent court for enforcement, which court under Sec. 36 of the UNCITRAL Model Law may refuse recognition or enforcement. R.A. 9285 incorporated these provisos to Sections 42, 43, and 44 relative to Sections 47 and 48.

To be entitled to enforcement of a foreign arbitral award under the New York Convention, the applicant must show that the country where the award was made is a party to the New York Convention.[59] However, for those arbitral awards not covered by the New York Convention, recognition and enforcement thereof shall be done in accordance with the ADR Rules.[60]

When an application is made to reject, set aside, or vacate a foreign arbitral award, or when an application for recognition or enforcement of a foreign arbitral award is opposed, the court is then called to exercise its power of judicial review[61] as shown in Korea Technologies

[57] (2) Foreign arbitral awards must be confirmed by the RTC. foreign arbitral awards while mutually stipulated by the parties in the arbitration clause to be final and binding are not immediately enforceable or cannot be implemented immediately.

[58] *Id.* Art. 35(1) provides:

(1) An arbitral award, irrespective of the country in which it was made, shall be recognized as binding and, upon application in writing to the competent court, shall be enforced subject to the provisions of this article and of article 36.

[59] R.A. 9285, § 42.

[60] *Id*, § 43.

[61] (3) The RTC has jurisdiction to review foreign arbitral awards.

Sec. 42 in relation to Sec. 45 of RA 9285 designated and vested the RTC with specific authority and jurisdiction to set aside, reject, or vacate a foreign arbitral award on grounds provided under Art. 34(2) of the UNCITRAL Model Law. Secs. 42 and 45 provide:

SEC. 42. *Application of the New York Convention.* The New York Convention shall govern the recognition and enforcement of arbitral awards covered by said Convention. The recognition and enforcement of such arbitral awards shall be filed with the Regional Trial Court in accordance with the rules of procedure to be promulgated by the Supreme Court. Said procedural rules shall provide that the party relying on the award or applying for its enforcement shall file with the court the original or authenticated copy of the award and the arbitration agreement. If the award or agreement is not made in any of the official languages, the party shall supply a duly certified translation thereof into any of such languages.

The applicant shall establish that the country in which foreign arbitration award was made is party to the New York Convention.

If the application for rejection or suspension of enforcement of an award has been made,

Co. Ltd. v. Lerma, *supra*.

> Thus, while the RTC does not have jurisdiction over disputes governed by arbitration mutually agreed upon by the parties, still the foreign arbitral award is subject to judicial review by the RTC which can set aside, reject, or vacate it. In this sense, what this Court held in *Chung Fu Industries (Phils.), Inc.* relied upon by KOGIES is applicable insofar as the foreign arbitral awards, while final and binding, do not oust courts of jurisdiction since these arbitral awards are not absolute and without exceptions as they are still judicially reviewable. xxx

The decision of the court confirming or rejecting a foreign arbitral award is appealable to the Court of Appeals under the ADR Rules.[62] The decision of the Court of Appeals may be reviewed by the Supreme Court via petition for review under Rule 45 of the Rules of Court.[63] Significant modifications in well-established legal doctrines are brought by the institutionalization of arbitration as a preferred mode of dispute resolution. The promotion of arbitration has brought new policies respecting dispute resolution which serve as basic guidelines to courts confronted with arbitration issues. These new policies are now reflected in the ADR Rules.[64]

the Regional Trial Court may, if it considers it proper, vacate its decision and may also, on the application of the party claiming recognition or enforcement of the award, order the party to provide appropriate security xxx

SEC. 45. *Rejection of a Foreign Arbitral Award.*--A party to a foreign arbitration proceeding may oppose an application for recognition and enforcement of the arbitral award in accordance with the procedures and rules to be promulgated by the Supreme Court only on those grounds enumerated under Article V of the New York Convention. Any other ground raised shall be disregarded by the Regional Trial Court.

[62] R.A. 9285, § 46.

[63] *Korea Technologies Co, Ltd. v. Lerma, supra.*

[64] Rule 2.2. *Policy on arbitration.* A) Where the parties have agreed to submit their dispute to arbitration, courts shall refer the parties to arbitration pursuant to Republic Act No. 9285 bearing in mind that such arbitration agreement is the law between the parties and that they are expected to abide by it in good faith. Further, the courts shall not refuse to refer parties to arbitration for reasons including, but not limited to, the following:

a. The referral tends to oust a court of its jurisdiction;
b. The court is in a better position to resolve the dispute subject of arbitration;
c. The referral would result in multiplicity of suits;
d. The arbitration proceeding has not commenced;
e. The place of arbitration is in a foreign country;
f. One or more of the issues are legal and one or more of the arbitrators are not lawyers;

With the recent legislations and policies put in place to encourage and promote the use of arbitration in dispute resolution, a new set of jurisprudence has emerged highlighting the preferred treatment given to arbitration as it provides exceptions to well established legal doctrines in areas of jurisdiction and a party's legal capacity to sue and be sued.

There is no rule in procedural law as basic as the precept that jurisdiction is conferred by law and not by the parties' action or conduct.[65] In cases involving international transactions, jurisdiction is determined by the conflict of law rule on *forum non conveniens,* which was explained in The Manila Hotel Corp. and Manila Hotel Intl. Ltd. v. National Labor Relations Commission, et. al.[66]

> Under the rule of *forum non conveniens*, a Philippine court or agency *may* assume jurisdiction over the case if it chooses to do so *provided*: (1) that the Philippine court is one to which the parties may conveniently resort to; (2) that the Philippine court is in a position to make an intelligent decision as to the law and the facts; and (3) that the Philippine court has or is likely to have power to enforce its decision.

g. One or more of the arbitrators are not Philippine nationals; or
h. One or more of the arbitrators are alleged not to possess the required qualification under the arbitration agreement or law.

(B) Where court intervention is allowed under ADR Laws or the Special ADR Rules, courts shall not refuse to grant relief, as provided herein, for any of the following reasons:

a. Prior to the constitution of the arbitral tribunal, the court finds that the principal action is the subject of an arbitration agreement; or
b. The principal action is already pending before an arbitral tribunal.

The Special ADR Rules recognize the principle of competence-competence, which means that the arbitral tribunal may initially rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement or any condition precedent to the filing of a request for arbitration.

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

[65] *Machado v. Gatdula,* G.R. No. 156287 (2010), 612 SCRA 546, 559, citing *Spouses Vargas v. Spouses Caminas,* G.R. Nos. 137839-40 (2008), 554 SCRA 305, 317; *Metromedia Times Corporation v. Pastorin,* G.R. No. 154295 (2005), 465 SCRA 320, 335; and *Dy v. National Labor Relations Commission,* 229 Phil. 234, 242 (1986) cited in *Magno v. People of the Philippines,* G.R. No. 171542 (2011).

[66] G. R. No. 120077 (2000).

In arbitration, however, jurisdiction of an arbitral tribunal is conferred solely upon agreement of the parties. As *Cargill, supra,* succinctly puts it, "a contract is required for arbitration to take place and to be binding".

Parties qualified to enter into contracts of an international character are generally capacitated to sue on their contracts. However, Section 133 of the Philippine Corporation Code expressly prohibits an unlicensed foreign corporation doing business from filing a suit in the Philippines. This prohibition is inapplicable where an unlicensed foreign corporation doing business in the Philippines files an action for recognition or enforcement of an arbitral award as found in Tuna Processing, Inc. v. Philippine Kingford, Inc.[67] Parenthetically, the Supreme Court rejects a foreign corporation's invocation of immunity from suit where that foreign corporation has agreed to submit disputes to arbitration. In its *En Banc* decision in China National Machinery & Equipment Corp. (Group) v. Santamaria,[68] the Supreme Court explains,

> In the United States, the Foreign Sovereign Immunities Act of 1976 provides for a waiver by implication of state immunity. In the said law, the agreement to submit disputes to arbitration in a foreign country is construed as an implicit waiver of immunity from suit. Although there is no similar law in the Philippines, there is reason to apply the legal reasoning behind the waiver in this case.

Conclusion

It is readily apparent that arbitration has found a niche in the Philippine legal system as a preferred mode of dispute resolution. Although the concept of arbitration had been accepted in the Philippine legal system almost a century ago, it has yet to gain popularity among legal practitioners whose training in law schools was centered on the traditional mode of dispute settlement – *i.e.,* litigation. International arbitration, on the other hand, is still a novel concept among legal

[67] G.R. No. 185582 (2012).

[68] G.R. No. 185572 (2012).

practitioners as the legal framework and policies for its use continue to evolve.

Nonetheless, the promise of arbitration as a "wave of the future" in international relations is slowly being realized when Philippines became a venue of international arbitration. With the increasing trend of globalization, it is hoped that the Philippines will one day become a hub for international arbitration in Asia.