

## CHAPTER 10

### ALTERNATIVE DISPUTE RESOLUTION

Disputes and controversies in civil cases may be resolved prior to the institution of court litigation or pending final resolution of the case through compromise or arbitration. The Arbitration Law<sup>1</sup> permits parties to submit to arbitration to one or more arbitrators any controversy existing between them which may be the subject of an action or the stipulation in the contract requires them to submit to arbitration any controversy arising therefrom. The applicable articles of the Civil Code also governs arbitration.<sup>2</sup>

In any civil action, parties and their attorneys are required to appear in a pre-trial conference before the court to consider the possibility of amicable settlement or of submission to alternative modes of dispute resolution. Failure on part of plaintiff to appear shall be a cause for dismissal of the action and a similar failure on part of the defendant shall cause plaintiff to present his evidence *ex parte* and court to render judgment on basis thereof.<sup>3</sup>

Recently, the Supreme Court, in Resolution AM No. 04-3-15-SC-PHILJA dated 23 March 2004, approved among other things, the following ADR resolutions and guidelines on court-annexed and court-referred mediation:

- Approval of re-accreditation of 179 PHILJA Mediators;
- Implementing Rules and Regulations Governing Mediation in Trial Courts;
- Guidelines on the Role of Lawyers in Mediation;
- Revised Guidelines for the Payment of Mediation Fees to the Mediators and Daily Supervisors.

Thus, the trial court, after determining the possibility of an amicable settlement or of a submission to the alternative modes of dispute resolution, shall issue an Order referring the case to the Philippine Mediation Center (PMC)<sup>4</sup> unit for

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<sup>1</sup> Rep Act No 876 (1953).

<sup>2</sup> Art 2042. The same persons who may enter into a compromise may submit their controversies to one or more arbitrators for decision.

Art 2043. The provisions of the preceding Chapter upon compromises shall also be applicable to arbitrations.

Art 2044. Any stipulation that the arbitrators' award or decision shall be final, is valid, without prejudice to articles 2038, 2039 & 2040.

Art 2045. Any clause giving one of the powers to choose more arbitrators than the other is void and of no effect.

Art 2046. The appointment of arbitrators and the procedure for arbitration shall be governed by the provisions of such Rules of Court as the Supreme Court may promulgate.

<sup>3</sup> 1997 Rules of Civil Procedure, Rule 18, s 5.

<sup>4</sup> Under the Supreme Court of the Philippines, Philippine Judicial Academy.

mediation which shall be personally given to the parties during the pre-trial together with the complaint and answers.

The coverage of court-annexed mediation are:<sup>5</sup>

(a) all civil cases, settlement of estates and cases covered by the Rule on Summary Procedure, except those which by law may not be compromised;

(b) cases cognizable by the *Lupong Tagapamayapa* under the *Katarungang Pambarangay* Law;

(c) the civil aspect of BP 22 cases; and

(d) the civil aspect of quasi-offenses under Title 14 of the Revised Penal Code.

The places where the Philippine Mediation Center is presently operating are: Metro Manila, Metro Davao, Metro Cebu, Cagayan de Oro City, Bacolod City, San Fernando City, Pampanga, Tacloban City, and General Santos City.

Insofar as labor cases are concerned, it is a state policy to promote and emphasize the primacy of free collective bargaining and negotiations, including voluntary arbitration, mediation and conciliation as modes of settling labor or industrial disputes. In collective bargaining agreements (CBA), parties are required to include in their agreement the establishment of grievance machinery for adjustment and resolution of grievances and those arising from the interpretation or implementation of their CBAs and those arising from the interpretation and implementation of company personnel policies. Grievances not settled before grievance machinery shall automatically be referred to a voluntary mediator or a panel of voluntary arbitrators.<sup>6</sup>

Specialized arbitration involves particular industries or kind disputes. In the construction industry, Executive Order No. 1008 (1985) created the Construction Industry Arbitration Commission (CIAC). Subject to the agreement of the parties to submit the dispute to voluntary arbitration, the CIAC was given the original and exclusive jurisdiction over all construction disputes. Banking disputes on clearing of checks are resolved by a specialized system administered under the auspices of the Bankers' Association of the Philippines. Lately, the Philippine Legislature has promoted arbitration by enacting more laws with arbitration as a basic feature. Among these are the Consumer Act of 1992,<sup>7</sup> the Mining Act of 1995,<sup>8</sup> and the Intellectual Property Code of the Philippines.<sup>9</sup>

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<sup>5</sup> Second Revised Guidelines on Mediation, AM No 01-10-05-SC-PHILJA, 06 October 2001.

<sup>6</sup> LABOR CODE, arts 260 & 261.

<sup>7</sup> Rep Act No 7394 (1992).

<sup>8</sup> Rep Act No 7942 (1995).

<sup>9</sup> Rep Act No 8293 (1998).

On April 2, 2004, the enactment of the Alternative Dispute Resolution Act<sup>10</sup> institutionalizes the use of the alternative dispute system as well as the establishment of the Office for Alternative Dispute Resolution. It defines “alternative dispute resolution system” 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 in which a neutral third party participates to assist in the resolution of issues, which includes arbitration, mediation, conciliation, early neutral evaluation, mini-trial or any combination thereof.<sup>11</sup> Here, mediation includes conciliation.

Under this Act, a mediator is not required to have special qualifications by background or profession unless required in the mediation agreement or by the parties.<sup>12</sup> Before accepting a mediation, the mediator must disclose to the parties any such fact known or learned as soon as it is practical and indicate such conflict of interest.<sup>13</sup> A party may designate a lawyer or any other person to provide assistance in mediation. A waiver of this right shall be made in writing by the person waiving it but it may be rescinded at any time.<sup>14</sup> The parties are free to agree on the place of mediation but can be any place convenient and appropriate to all parties.<sup>15</sup> If an agreement contains a provision to submit a dispute to mediation by an institution, it shall include an agreement to be bound by the internal mediation and administrative policies of such institution.<sup>16</sup>

A settlement agreement following a successful mediation shall be prepared by the parties with the assistance of their respective counsel, if any, and by the mediator. It should make adequate provisions for the contingency of breach to avoid conflicting interpretations of the argument. It should be signed by the parties and their counsels and the mediator must explain its contents to the parties in a language known to them.<sup>17</sup> The parties may agree that the mediator shall become a sole arbitrator for the dispute and shall treat the settlement agreement as an arbitral award subject to the enforcement under Republic Act No. 876. If the parties so desire, they may deposit such agreement with the appropriate Clerk of a Regional Trial Court of the place where one of the parties reside. Enforcement of the agreement may be made by filing a petition in the same court; in which case, the court shall proceed in accordance with the Rules on Summary Procedure.<sup>18</sup>

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<sup>10</sup> Rep Act No 9285 (2004).

<sup>11</sup> *Id.*, s 3(a).

<sup>12</sup> *Id.*, s 13(b).

<sup>13</sup> *Id.*, s 13.

<sup>14</sup> *Id.*, s 14.

<sup>15</sup> Rep Act No 9285 (2004), s 15.

<sup>16</sup> *Id.*, s 16.

<sup>17</sup> *Id.*, s 17(a) & (b).

<sup>18</sup> *Id.*, s 17© & (d).

Information obtained through mediation proceedings shall be privileged and confidential and shall not be subject to discovery and well inadmissible in any adversarial proceeding, whether judicial or quasi-judicial.<sup>19</sup> Neither may a mediator be called to testify to provide information gathered in mediation. A mediator who is wrongfully subpoenaed shall be reimbursed the full cost of his attorney's fees and related expenses.<sup>20</sup> However, a privilege arising from the confidentiality of information may be waived in a record, or orally during a proceeding by the mediator and the mediation parties. A person who discloses confidential information shall be precluded from asserting the privilege. If a person suffers loss or damage as a result of the disclosure, he shall be entitled to damages in a judicial proceeding against the person making the disclosure.<sup>21</sup>

There is no privilege against disclosure if mediation communication is: (1) in an agreement evidenced by a record authenticated by all parties to the agreement; (2) available to the public or is made during an open session of the mediation to the public; (3) a threat or statement of a plan to inflict bodily harm or commit a crime of violence; (4) intentionally used to plan a crime, attempt to commit or conceal an ongoing crime or criminal activity; (5) sought or offered to prove or disprove a claim or complaint of professional misconduct or malpractice filed against mediator in a proceeding; or (7) sought or offered to prove or disprove a claim or complaint of professional conduct or malpractice filed against a party, nonparty participant, or representative of a party based on conduct occurring during a mediation.<sup>22</sup> There is also no privilege if a court or administrative agency finds after a hearing in camera, that the party seeking discovery of the proponent of the evidence has shown that the evidence is not otherwise available and that evidence substantially outweighs the interest in protecting confidentiality in: (1) a court proceeding involving a crime or felony; or (2) a proceeding to prove a claim or defense that under the law is sufficient to reform to avoid a liability on a contract arising out of mediation.<sup>23</sup>

The Act also adopts the Model Law on International Commercial Arbitration which was approved by UN Commission on International Trade Law (UNCITRAL) on 21 June 1985.<sup>24</sup> in the interpretation of the Model Law, regard shall be had to its international origin and resort may be made to the *travaux preparatoires* and the report of the Secretary-General of the UNCITRAL dated March 25, 1985 entitled "International Commercial Arbitration: Analytical Commentary on Draft Text".<sup>25</sup>

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<sup>19</sup> Rep Act No 9285 (2004), s 9(a) & (c).

<sup>20</sup> *Id.*, s 9(d) & (f).

<sup>21</sup> *Id.*, s 10.

<sup>22</sup> Rep Act No 9285 (2004), s 11(a).

<sup>23</sup> *Id.*, s 11(b).

<sup>24</sup> *Id.*, sec 19. See UN Doc A/40/17 and recommended for enactment by UN General Assembly Resolution No 40/72, 11 December 1985.

<sup>25</sup> Rep Act No 9285 (2004), s 20. See UN A/CN.9/264.

An arbitration is “commercial” if it covers matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature includes but are not limited to the following transactions: any trade transaction for the supply or exchange 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 corporation; carriage of goods or passengers by sea, air, rail or road.<sup>26</sup>

If international arbitration is conducted in the Philippines, a party may be represented by any person of his choice provided that such representative, unless admitted to the practice of law in the Philippines, shall not be authorized to appear as counsel in any Philippine court or any other quasi-judicial body whether or not such appearance is in relation to the arbitration in which he appears.<sup>27</sup>

The arbitration proceedings, including its records, evidence and arbitral award shall be considered confidential and shall not be published except with the consent of the parties or for the purpose of disclosing to the court of relevant documents, in cases where resort to the court is allowed. However, the court in which the action or appeal is pending may issue a protective order to prevent or prohibit disclosure of documents or information containing secret processes, developments, research and other information where it is shown that the applicant shall be materially prejudiced by an authorized disclosure thereof.<sup>28</sup>

A court before which an action is brought in a manner is the subject matter of an arbitration agreement shall, if at least one party so requests not later than the pre-trial conference, or upon the request of both parties thereafter, refer the parties to arbitration unless it finds that the arbitration agreement is null and void, inoperative or incapable of being performed.<sup>29</sup>

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<sup>26</sup> *Id*, s 21.

<sup>27</sup> *Id*, s 22.

<sup>28</sup> Rep Act No 9285 (2004), s 23.

<sup>29</sup> *Id*, s 24.