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THE TRADITIONAL AFRICAN METHOD OF SETTLING DISPUTES (TAMSD): THE 'NEW' ALTERNATIVE DISPUTE RESOLUTION (ADR)?

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ABSTRACT

The concept behind the customary dispute resolution or the Traditional African Method of Settling Disputes (TAMSD) in Nigerian societies dates far beyond the formal organisation and reorganisation of Nigeria space, that is, before the amalgamation of the protectorate of northern Nigeria and the colony and protectorate of southern Nigeria in 1914. They had dispute-resolution mechanisms within those societies, which continued to function even after amalgamation and the advent of colonialism; for instance, in the Eastern part of Nigeria, every family had a head of the family who oversaw the activities of the entire family and doubled as the resolver of family disputes. The head of the family or the traditional head of the community sat as what is now known as an arbitrator or mediator when disputes arose within those communities or villages. This paper evaluates the perceptions of both the users and stakeholders of the

LMDC and ESMDC scheme that affirms that the pre-arbitral method of settling disputes, or the Traditional African method (TAMSD) was the main method of settling disputes before modernised ADR. The paper employs socio-legal and ethnographic research methods through observations while concluding on how to promote customary dispute resolution at the national and international levels.

Keywords: Traditional African Method of Settling Dispute, Customary Dispute Resolution, Alternative Dispute Resolution, Lagos Multi-Door Courthouse, Enugu State Multi-Door Courthouse; Africa, Nigeria.

1. Introduction

1.1 ADR / TAMSD-History and Format of Dispute Resolution

The African societies had their methods of conflict resolution through informal means before the Western countries colonised them. These methods were not acknowledged and were marginalised with the advent of court-based litigation systems favoured by British and Western colonisers and settlers. As a result, the promotion of Alternative Dispute Resolution (ADR) in Nigeria can be interpreted as a rediscovery of informal methods of conflict resolution, such as mediation, arbitration, negotiation and adjudication. This is new because it challenges traditional academic wisdom, according to which a legal transplant must always move or usually move from a more complex society to a less complex society.[1] In various jurisdictions like England[2] U.S., and Canada,[3] parties prefer the use of ADR to litigation.[4] In hindsight, ADR in the common law practice has its origins in the English legal system; this was evidenced as early as the 'Norman Conquest. legal charters and official papers indicate that English citizenry instituted actions concerning private wrongs, presided by highly valued male members of a community, in informal, quasi-adjudicatory settings.'[5] In some

[1] Elisabetta Grande, Alternative Dispute Resolution, Africa and the Structure of Law and Power: The Horn in Context. 43 J. Afr. L. 63 (1999) 63

[2] Chinwe Umegbolu, Dispensation of Justice: Lagos Multi-Door Courthouse (LMDC) as a case study in Nigeria (PhD Thesis submitted at the University of Brighton 2021) 10.

[3] L. Yves Fortier, The Law and Economics of Dispute Resolution in the Canada-United States Context: The Canadian Perspective, 17 Can.-U.S. L.J. 231 (1991) 233

[4] Susan Blake, Julie Browne, Stuart Sime, *The Jackson ADR Handbook* (3rd Edn, Oxford University Press 2021 with the Support of the Civil Mediation Council) 4

[5] Micheal Mcmanus, Brianna, Silverstein, 'Brief History of Alternative Dispute Resolution in the United States' (2011) Vol I Issue 3 Cadmus 100

cases, the king used these local fora as an extension of his legal authority.[6] It then follows through that common law ADR has been around for centuries.[7] However, some scholars like Greco established that 'the developing communities or societies normally lend themselves to a kind of dispute resolution that is more informal and less adversarial than the methods attempting to be implemented based on Western-style court systems.'[8]

Similarly, Professor Onyema argued that ADR originated from Africa,[9] while others contended that it originated from ancient Greece.[10] To the ancient Greeks, arbitration was not merely mythology.[11] As Athenian courts became crowded, the city-state instituted the position of public arbitrator sometime around 400 B.C.[12] However, in the African experience, it has been argued that the modern ADR or repackaged ADR is not the first time that the African continent has encountered Alternative Dispute Resolution (ADR). In line with the above submission, Olufemi et al. indicated that:

> *Undoubtedly, "before there were Courts, there were temples; before there were judges, there were elders and priests, and before there were lawyers, there were clergymen...[13]* '

Conversely, Chinua Achebe in 'Things Fall Apart' stated that:

> The white man is very clever. He came quietly and peaceably with his religion. We were amused at his foolishness and allowed him to stay. Now, he has won our brothers, and our clan can no longer act like one. He has put a knife on the things that held us together, and we have fallen apart.[14]

It follows that most of the African continents have always had their aboriginal

[6] Ibid
[7] Ibid 101
[8] Anthony P. Greco, ADR and a Smile: Neocolonialism and the West's Newest Export in Africa, 10 Pepp. Disp. Resol. L.J. Iss. 3 (2010) 657
[9] Maria Federica Moscati, Palmer Michael, Roberts, Marian (eds), *Comparative Dispute Resolution* (Edward Elgar Publishing 2020) 519
[10] Jerome. T. Barrett, Joseph Barrett, *A History of Alternative Dispute Resolution: The Story of a Political, Social and Cultural Movement* (First Edition, 2004) 6.
[11] Ibid.
[12] Ibid
[13] Olufemi Abifarin, J.O Olatoke, N.O. Aljaiya, Dispute Resolution Within/Between Religious Organisations in Nigeria: Litigation or Alternative Dispute Resolution? 6
[14] Dipo Faloyin, Africa is Not A Country: Breaking Stereotypes of Modern Africa Penguin Books, 2022 38

means of settling disputes before the advent of the Europeans which brought so many changes like religion, Education, and new laws. [15] The Westerns did not just stop at introducing the above-mentioned into the African continent; they modified or converted their customary jurisprudence into their own. However, as hard as they clad it up as a humanitarian or Christian attempt to rid African natives of their so-called inherent backwardness[16] they went ahead and embraced that same backwardness; without acknowledging that it originated from the Africans. Elisabetta Grande elaborated more on the above subject matter- in her article which begged the following questions,[17] Are we experiencing a new kind of legal transplant? From less complex to more complex societies? It is imperative to point out that Grande stated that 'data collected in 1993 shows that legal transplants usually take place from more complex societies to a less complex society.'[18]

On the other hand, the westerners who colonised these African countries had the opportunity to witness the benefits[19] associated with the TAMSD - peaceful settlement. As opposed to the battlefield or anarchy depicted in the adversarial system, they decided to key into TAMSD by repackaging it as - Alternative Dispute Resolution (ADR).

Suffix it to say that TAMSD was later transplanted back to Africa as a new method of settling disputes.[20] The inference here that this 'new' method of dispute resolution was in any way a 'second' or 'alternative' choice is merely fictitious, overlooking the African value and culture of settling disputes amicably which enables living in harmony.[21] Thus, from the African perspective, litigation may rightly be seen as the 'alternative' form of dispute resolution. Nevertheless, on its reappearance, ADR has been formalised as a one-stop shop.[22]

Consequently, ADR can be defined as a 'process deployed by an institution or a

[15] Paul Obo Idornigie, Arbitration: The International Journal of Arbitration, Mediation and Dispute Management Volume 73, Issue 1 (2007) 73
[16] Dipo Faloyin, Africa is Not A Country: Breaking Stereotypes of Modern Africa (Penguin Books, 2022) 38
[17] C. Egbunike-Umegbolu, The Chronicles of the Pre-Colonial Method of Settling Disputes: Nigeria as a Case Study Transnational Dispute Management (2022) 13
[18] Ibid
[19] Chinwe Umegbolu, 'Bargaining in the Shadow of the Law: The Facts of Divorce As They Stand Today' (2020) 39 (1) Resolution Institute | the arbitrator & mediator 143
[20] Ibid
[21] Ibid
[22] Mark Feldman, 'One-Stop' Commercial Dispute Resolution Services: Implications for International Investment Law (2019) (October 18, 2019). Available at SSRN: https://ssrn.com/abstract=3471695 or http://dx.doi.org/10.2139/ssrn.3471695

private individual within or outside a structured court system to resolve disputes in an acceptable informal manner facilitated by a neutral party.'[23]

Following the above, as a concept, ADR has no "agreed definition;"[24] it is instead approached from divergent points of view or different historical views or perceptions. Though it seems these views are divergent, no doubt the substance is still very much the same.[25] However, it is classified into different units known as Arbitration, Mediation, Negotiation, Conciliation, and Early Neutral Evaluation which overlaps the different units in the TAMSD and they are both Adjudicative and Non-Adjudicative in nature.[26] However, where the two differs is that ADR involves a lot of written confidential documentation and trained professionals, called 'neutrals,'[27] who are educated and have the prerequisite skills. Seen in this light, the ADR mechanisms have 'evolved' from the TAMSD.

1.2 The LMDC and ESMDC as a Case Study

The ADR centre at Igbosere Road, Lagos Island is a public-private partnership between the High court of Justice Lagos state and the Negotiation and Conflict Management Group (NCMG) under the sponsorship of Kehinde Aina the founder of the NCMG, and the Multi-Door court scheme in Nigeria.[28] The LMDC was birthed in 2002, and LMDC law was enacted in 2007 (and reviewed in 2015);[29] in a bid to reduce the dockets of the court and promote a faster case flow management system which aligns with the overriding objective of the LMDC as stipulated in Section 29 of LMDC Act 2007.[30]

The reason for using LMDC as a case study is that Lagos as a city has an intrinsic

[23] Chinwe Stella Umegbolu, "Why I am excited about Research" (BBS Staff and Student Research Conference. 2019) accessed on 28th August 2022.
[24] Susan Blake, Julie Browne, Stuart Sime, *The Jackson ADR Handbook* (3rd Edn, Oxford University Press 2021 with the Support of the Civil Mediation Council) 2
[25] Ibid
[26] Ibid
[27] Ibid
[28] MDC in America was founded by the late Professor Frank Sander in 1976, *cited* in A. Leo Levin, Russell R. Wheeler (ed), *The Pound Conference Perspectives on Justice in the Future* (West Publishing Co. St Paul Minnesota 1979) 166
[29] Chinwe Umegbolu, Dispensation of Justice: Lagos Multi-Door Courthouse (LMDC) as a Case Study in Nigeria (A PhD thesis submitted at the University of Brighton, 2021)

[30] Aina pointed out that he was inspired by the Multi-Door Court Scheme in America *cited* in The Lagos Multi-Door Courthouse...The ADR Centre... The Lagos Multi-Door Courthouse Neutrals' Handbook 2016. 10

force of always being ahead of other cities in capturing civilisation particularly as new laws and policies usually originate from Lagos.[31] Hence, it is therefore not surprising that the LMDC was the first to replicate the Multi-Door Court (MDC) in Nigeria which is a court-connected ADR centre located on the court premises where the judge can refer parties to resolve their disputes or parties can sue motto walk into the centre. One can see the positive impact of the LMDC not only on the justice delivery pattern of Lagos State but also on other States of the Federation.[32]

Similarly, the Enugu State Multi-Door Courthouse (ESMDC) in September 2018, which is in the southeastern part of Nigeria formally opened its doors to the public, replicating the Lagos Multi-Door Courthouse (LMDC) framework. This process of replication and adoption had Justice P.N. Emehelu, the Enugu State Chief Judge, spearheaded the campaign, which is recognised as the ESMDC. It is essential to point out that Justice P.N Emehelu, in her efforts to ensure the sustainability of the newly established ESMDC, invited the former Director of the LMDC Mrs Caroline Etuk to start up this scheme in the Eastern part of Nigeria-Enugu State.

1.3 Whether the Traditional African Method of Settling Disputes (TAMSD) Evolved into ADR and whether it can be regarded as a Legal Transplant from Africa?

Inspired by Confucianism, in ancient China, ADR can be argued to be the primary method of settling conflicts.[33] In other words, the philosophy of Confucius was rooted in peace, harmony, and compromise[34] which is similar to the African philosophy of 'Ubuntu' a Nguni Bantu word which signifies 'Humanity' or 'I am because we are.' [35]

In Africa, everybody comes from kindred; thus, an average Africa defines himself within his family, within his group. The African would be defined by what his group says of him or thinks of him. This is a common thing and is a general practice in Africa. Although it can be argued that we are all social beings, however for

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[31] The Association of Multi-Door Courthouse of Nigeria, A compendium of Articles on Alternative Dispute Resolution (ADR) 2013 7.

[32] Bukola, Faturoti, Institutionalised ADR and Access to Justice: The Changing Faces of the Nigerian Judicial System 2014 Research Gate, 68.

[33] Emdadul Haque, Law History: Origin of ADR (2011) Issue 205 <https://www.thedailystar.net/law/2011/02/02/history.htm> accessed on 29th September 2022

[34] Ibid

[35] Center for Khemitology, Short Course on Ubuntu Philosophy (2020) cited in *Chinwe Umegbolu, Episode 7: The Similarities between the Customary arbitration and the Modern day Arbitration* (Edublogs 2020)

Africans their society influences them; what they usually think of themselves is what people in the group or unit, like their parents, friends, siblings, and colleagues, think of them.

Peter Ebigbo's harmony restoration theory[36] validated the above viewpoint:

> *'Africans view an individual in his holistic totality within oneself in relation to the forces the individual believes in- the ancestors, the various spirits, powerful forces emanating from the supreme being (God) and infused into trees, humans, forces of nature, fauna and flora, and of course in smaller gods. For the African, one is not at ease, or is indeed ill, if there is an alteration' or conflict between himself and the person's world of relationships.'… "The relationships that are important to the individual outside the family also belong to the mesocosmos, in other words, co-workers, classmates, roommates, co-religious members, friends, etc. To the extent that there is a relationship between the individual and places, situations, objects, animals such as pets, etc. The mesocosmos and the exocosmos represent a vital world of relationship to the ancestors, spirits, deities, gods, and indeed all forces outside of one but which are outside the concrete world of relationships.'*

Putting the above view into context, where dispute or conflict has reared its ugly head, then it follows through that 'things have fallen apart' between oneself and/ or his unit, church or group, professional body and yard co-inhabitant[37] which invariably leads to frustration and distress.

This frustration or distress will be restored as soon as the conflict or dispute is resolved. The writer embraces the theory mentioned above but not wholly because faulty relationships can be likened to conflict and cannot be entirely resolved' without those groups or kindred sitting down to listen, dialogue and arrive at a decision which leads to good communal living.

Consequently, the person at fault will either apologize to the kindred/ groups or unit after they must have given their verdict. Therefore, harmony/peace is restored, which is the main stronghold of 'Traditional African Dispute Resolution.'

[36] Peter O. Ebigbo, Harmony Restoration Therapy: Theory And Practice International (2017) Journal for Psychotherapy in Africa (2:1) 6

[37] Peter Onyekwere Ebigbo, Nigeria in Distress: What Can Psychology Do? (Paper presented at Baze University of Nigeria at the National Congress of Nigerian Association of Clinical Psychologists 2022) 8

This practically enables living as one- 'Ubuntu,' which is one of the many benefits of the Traditional African Society (TAS).[38] Therefore, this saying in Africa, *"a tree cannot make a forest"*[39] validates the above thinking - which is relatable or in tune with how disputes or conflicts are resolved in Nigeria.

The above-stated assertion resonates with the 'Ubuntu philosophy'[40] which signifies respect for humanity and respect for living in harmony with their group.[41] On the other hand, some proponents of the Traditional African Method of Settling Disputes (TAMSD) have insisted that this dispute settlement service brings the parties involved closer and that this mode of dispute resolution was an African thing.

Lending credence to the above is the statement made by Professor Onyema. Who pointed out that the Dispute Resolution Processes (DRPs) of the Western African States were initially shifted from Africa to the Western states.[42] She revealed 'that the primary cause of these shift was foreign influences which brought - colonialism, brought with it foreign laws, litigation, state courts, foreign languages and legal systems; and the foreign religions of Islam and Christianity.'[43] The DRPs of the West African States[44] were then modified into the modern-day ADR processes.[45] However, some leaders in the alternative dispute resolution movement have pointed out that these traditional institutions are no longer as important as they once were in fostering social harmony or settling disputes.[46]

It is essential to point out that in the case of a land dispute or a rift in a relationship, the elders and the chiefs (as the case may be) in the village or in the community will try to resolve the matter either by both parties making concessions by either

[38] Chinwe Umegbolu, 'Bargaining in the Shadow of the Law: The Facts of Divorce As They Stand Today' (2020) 39 (1) Resolution Institute | the arbitrator & mediator 3

[39] Ugo Ikwuka, 'Perceptions of Mental Illness in Southeastern Nigeria: Causal Beliefs, Attitudes, Help-Seeking Pathways and Perceived Barriers To Help-Seeking', University of Wolverhampton 2016) p.i

[40] Mfuniselwa Bhengu, 'The Locus of Ubuntu within the Christian Church in Africa' (2016) Academia Edu 10

[41] Ibid

[42] Maria Federica Moscati, Palmer Michael, Roberts, Marian (eds), *Comparative Dispute Resolution* (Edward Elgar Publishing 2020) 519

[43] Ibid

[44] According to Onyema, these western African States consist of "*Benin, Burkina Faso, Cape Verde, Gambia, Ghana, Guinea, Guinea Bissau, Ivory Coast, Liberia, Mali, Mauritania, Niger, Nigeria, Sao Tome & Principe, Senegal, Sierra Leone and Togo. Some sources, such as the United Nations, list 18 states in West Africa, with the inclusion of the island state of Saint Helena, which is a British Overseas Territory. Saint Helena. Mauritania may also be listed as part of North Africa."* Cited in Ibid (n24) 519.

[45] Ibid

[46] Discussion I had with some ADR Judges in Lagos State on the 20th of October 2020

giving up the land entirely or half of the land before the dispute is resolved or the rift in their relationship will be fully mended. The above viewpoint is supported by the recent case of Chief Emenike Mgbemena v. Nze Ezeakaibie,[47] where the Traditional Supreme Council of Obosi (TSCO) elder/ kindred (a neutral party) settled the dispute between the aforesaid parties after listening to the complaint from both parties, a verdict was reached. Nze Ezeakaibie was asked to apologise to Chief Emenike for peace to reign in both families.

Conversely, in the case of *Agu v Ikewribe*, [48] it was noted that 'the referral of a dispute to one or more laymen for decisions has deep roots in the Customary Law of many Nigerian communities. Certainly, in the remote villages, such a method of dispute resolution was the only reasonable one, for the wise men or the chiefs were the only accessible judicial authorities.'[49]

The above arguments validate the point regarding dispute resolution in Africa - as people who are not on good terms with their families and communities tend to suffer a lot of seclusion like 'ostracisation,' which is still prevalent. It is pertinent to point out that in Africa, Nigeria to be precise, they do not have enough psychotherapists,[50]but what comes to help with health problems and in the same vein in restoring conflict/dispute is the social groups - the elders, the families, the strong extended family's system, the kindred, the villagers and in recent years the churches[51] and the mediators.

The aforesaid highlights the many benefits associated with ADR and TAMSD respectively and reinforces the similarity between the two. Hence, there is nothing new about the use of informal and non-adversarial dispute resolution in African states. Many of them have a long tradition of using customary dispute resolution processes including negotiation, mediation, and arbitration to resolve legal and social conflicts to date[52]at a time well before the advent of colonial rule — though still prevalent in this millennium.[53] Against this backdrop, does it then

[47] Chinwe Umegbolu, Bargaining in the Shadow of the Law: The Facts of Divorce As They Stand Today (2020) 39 (1) Resolution Institute | the arbitrator & mediator 3
[48] Virtus Chitoo Igbokwe, The Law and Practice of Customary Arbitration in Nigeria: Agu v. Ikewibe and Applicable Law Issues Revisited. Journal of African Law (1997) School of Oriental and African studies vol. 41, No. 2 201
[49] Ibid
[50] Ebigbo, 'Harmony Restoration Therapy: Theory And Practice' 50
[51] Ibid
[52] Jacqueline Nolan-Haley, Mediation and Access to Justice in Africa: Perspectives from Ghana Harvard Negotiation Law Review Vol. 21:59
[53] A typical example is a recent case reported at Okwuolisa Traditional Supreme Council Obosi (Ancient Traditional Supreme Council 2019) by Chief Emenike Mgbenena (Oboli Obosi) v Nze Okey Ogbazi

mean that the modern ADR or repackaged ADR is a legal transplant?[54]

1.4 Findings and Analysis

The Format of Dispute Resolution in the Southeastern Part of Nigeria / Legal Transplant

The format of dispute resolution in Africa varies, but there are a lot of similarities. However, the work focused on the mode of settling disputes in the Southeastern part of Nigeria. This is evidenced in two villages or communities in the southeastern part of Nigeria, precisely Amaofuo and Onitsha where the writer conducted ethnographic research. [55] The traditional rulers outlined similar procedures to the modern ADR utilised in settling disputes in the villages or communities. First, the disputants try to settle their dispute/conflict themselves (negotiation). If this did not work, then a neutral party, usually an older person or the first son (Diokpa) of that clan from a family unit would be sought (mediation).[56] If this second step failed to produce an agreement, then the matter would be taken to the Headman of the Neighbourhood, where the defendant

(Ezeakaibe Ugeji). The complainant Chief Emenike Mgbenena complained that he was insulted by Nze O. Ogbezi at a meeting of the Obosi forum held in Nze Ezeakaibe's house (his house in London) by attempting to break Chief E. Mgbemena's head with an empty bottle of brandy. He also repeatedly called him by his name Emenike Mgbemena instead of calling him by his chieftaincy title (Oboli Obosi). They both exchange words, and Chief E. Mgbemena even cursed the defendant (Nze Ezeakaibie) in the presence of his wife. They were calmed down by the remaining members present, and at the end of the day, the defendant was asked to bring a bottle of brandy which he presented to oboli obosi; he prayed over it, and they hugged and shook hands. The defendant believed that the matter was over. However, some days later, he was summoned by the Traditional Supreme Council Obosi, and he responded via phone to put up a defence from his home in London. Judgment was passed by the council heads known as the 'Isi Muo' in Igbo (Spirit head) at Obosi. They ruled that the case lacked merit and ruled in the defendant's favour. Nevertheless, due to the oral appeal of Nze Okey Ogbazi (the defendant) that he would not like to stage a case with Chief E. Mgbemena, the 'Isi Muo' Obosi, the council advised Nze Okey Ogbazi to bear and take any person of his choice, with a bottle of brandy to pay a visit to the complainant so that final peaceful reconciliation will stand for both and friendly representation of Obosi Kingdom will therefore continue. The main point of this case is that traditional mediation or customary arbitration is still very much alive in Nigeria, and people from the Igbo community still recognise the council heads, and any decision they make is binding on its people. That is why the defendant responded and obeyed the rulings given because he would not want his family and himself to be ostracised from the meeting and the community cited in–Chinwe Umegbolu, *Bargaining in the Shadow of the Law The facts of Divorce as they stand today* (2021) Resolution Institute, 167

[54] Legal transplant simply means to carry or take an idea from one aspect of law or take the whole law from one place to another place. Cited in C. Egbunike-Umegbolu, *The Chronicles of the Pre-Colonial Method of Settling Disputes: Nigeria as a Case Study* (Transnational Dispute Management (2022) 1

[55] Ibid

[56] Chinwe Umegbolu, Bargaining in the Shadow of the Law: The Facts of Divorce As They Stand Today (2020) 39 (1) Resolution Institute | the arbitrator & mediator 3

resided (neutral evaluation/mediation).[57] If this still dispute/conflict lingered on, then it would be referred to a Chief or Igwe for a binding decision (arbitration).[58]

In sum, the traditional rulers affirmed that ADR is a form of legal transplant from a less complex (in this instance connotes villages or communities) to a more complex society. ADR is a reversal or an exception to the conclusion of scholars particularly Grande that legal transplant must always move or usually move from a more complex society to a less complex society.[59] However, the colonisation era ushered in the western system of settling a dispute, known as litigation. Again, these finding aligns with that of the LMDC[60] where most of the perceptions of the respondents confirmed that the above discourse, which was recognised as a legal transplant took flight or moved from a less complex country to a more complex country. Though modified, its benefits remain the same.

1.5 Has the Court-Connected ADR Replicated the Pre-Colonial Arbitral Method of Settling Disputes?

As stated in the LMDC findings, there has been a debate in the reviewed literature on whether ADR was a legal transplant from the western world to the African continent or vice versa.[61] Thus, this is the first study to provide insights on whether the ESMDC has replicated the pre-arbitral colonial method of settling disputes in view of offering additional evidence on the impact of the LMDC on other states in particular ESMDC. This was a recurring finding in all categories in both schemes. One such finding revealed by **ESMDC case manager 1** states

> *No, you know those days it has to be a discussion, but someone gives a verdict. However, at the ESMDC nobody gives a verdict except if it is arbitration, so I say it has not been replicated because*

[57] Ibid

[58] Jerome T Barrett, A History of Alternative Dispute Resolution: The Story of a Political, Cultural, and Social Movement (First Edition, Jossey-Bass 2004), 5 cited in C. Egbunike-Umegbolu, *The Chronicles of the Pre-Colonial Method of Settling Disputes: Nigeria as a Case Study Transnational Dispute Management (2022)* 16.

[59] C. Egbunike-Umegbolu, The Chronicles of the Pre-Colonial Method of Settling Disputes: Nigeria as a Case Study Transnational Dispute Management (2022) 34

[60] This finding has shown that in all the categories that 95% of all the participants attested to the LMDC as replicating the pre-arbitral method of settling disputes. Out of that 95%, some believed it had been repackaged, improved, modified, or modernized on its return. However, the other 3% believes that LMDC should take it back to the traditional way (incorporating the Oba's -Kings) that the westerns have refused to or without acknowledging that ADR was from Africa. In comparison, 2% asserted that there had been no transplant. Cited in Ibid.

[61] Elisabetta Grande, Alternative Dispute Resolution, Africa and the Structure of Law and Power: The Horn in Context. 43 J. Afr. L. 63 (1999) 63

now you have the neutrals. The neutrals are not there to give verdicts that if you do not follow, they will be ostracized.

It is just the two parties, basically the applicants and the respondents. And then the facilitator says okay how do we resolve this? So, the neutral is just facilitating, and he/she would ask the parties' -what do you want? The party will say. The neutral will then ask do you accept what this person says? Both parties will reach an agreement; the parties will agree on the terms, so it is not the traditional thing because the chief will say 'you say your own and I will say my own after the two speaks. The chief then gives his verdict- that you have to vacate or do this or do that. He tells the defaulting party to apologise.

On the contrary, **Case manager 3** confirms-

> *That the MDC is a concept that originated in America and has replicated the pre-arbitral method of settling disputes; however, they took out the bits that weren't good like oath-taking and ostracising. The westerners took those out and modernised it and called it ADR and that was moved back to us. Yes, both the LMDC and ESMDC have replicated the pre-arbitral method of settling disputes, but it is a modified version that we are witnessing today.*

Case manager 2 elaborates that going by history ESMDC has replicated the pre-arbitral method of settling disputes. She observes that even as

We speak to the traditional rulers who are part of the prospects the ESMDC is making to involve the traditional rulers as part of mediators because at their palaces and kingdoms they settle disputes between their communities and their king's men.

So they will have expert knowledge of mediation. I will say it has always been there -that is the traditional African method of settling

> *disputes has not been replicated; instead, ADR replicated the traditional method of settling disputes.*

Finally, **Case manager 2** pointed out,

> *That is why we as proponents of ADR are trying to make African ADR Relevant and see if that can be added as criteria to become a SAN or a Judge. That is another way of encouraging lawyers to explore even for judges and magistrates too, which will be part of their returns.*

About 98% of the respondents affirmed that the ESMDC replicated the pre-arbitral method of settling a dispute but with modifications with the exception of two respondents who pointed out that ESMDC is 'modified to align with civilisation in the sense that it is in tune with modern disputes- there is no banishment or ostracisation like they do in traditional African method of settling dispute (TAMSD).' Though in recent years some of those practices have been expunged however some traits of the pre-colonial arbitral method are still portrayed in the MDC. Such traits as greetings, language and who apologises first. Such cultural nuances are prevalent in both ESMDC and LMDC. It was observed that parties are encouraged to speak the Igbo language, and the mediator states this at the beginning of his or her opening statement; thus, there is no language barrier between the parties and the mediator.

Mediator 2 'portrays a picture that the parties are allowed to speak their native language immediately after the dispute resolution begins.' What this does is that once the parties realise that they can communicate in their local dialect to the mediator their language and traditional insinuations and cultural nuances- tend to open up very fast and thereby disputes settle faster. Also, at the mediation session, simple things mediators do at the beginning of the mediation session are vital, like who sits down first? Who greets whom? Addressing the parties in their proper names as in Oba, Chief or Igwe or an Elder and for instance who apologises first. These are the traditional mode of operation by the forefathers in Nigeria that has been passed down from one generation to the other.

Consequently, these findings affirm that respondents both from the LMDC and ESMDC that both schemes have replicated the TAMSD and that the modes

mentioned above of showing respect have settled cases faster than even the core things that are in dispute during the mediation session. The writer observed from a party's statement at the LMDC that unambiguously expressed that he 'got angry not because they pulled down his yam barn but because a woman[62] who should be giving him respect did it.' The role of cultural nuance in settling disputes fast in both LMDC and ESMDC is one of the main ingredients and benefits of TAMSD and why it thrived. Custom or culture reveals itself in the sense that in Africa, customary arbitration already forms an intrinsic part of their culture and all that happens in ADR is obtainable in customary arbitration except oath-taking. For instance, they are three elements to this-the first is that in arbitration, the group of people be it the Obi, Igwe, Chief etc who otherwise act as arbitrators over a dispute between the parties.

Therefore, it shows firstly parties volunteering to submit and which is the element of customary dispute resolution or TAMSD overlapping with the ADR, a voluntary submission. The second is that parties will accept the terms and acceptance, which is what happens in the TAMSD; it also overlaps ADR. The third and final one, parties, be it Kinsmen will agree that they will be bound and sometimes in order to be binding, it involves some oath-taking in customary rudimental arbitration and the same binding nature that flows through the new ADR now institutionalised.[63] Thus, a constant reminder of this, helps the African lawyers and the end-users to opt for ADR and at the same time embrace the TAMSD which in the final analysis is their own customary jurisprudence.

From the findings thus far, it can be argued that both the ESMDC and LMDC have replicated the pre-colonial arbitral method of settling disputes.

Recommendation:

The above submissions raise prevalent questions like 'How do we promote customary dispute resolution at the national level and international context?' The writer recommends the following:

[62] Chinwe Umegbolu, Dispensation of Justice: Lagos Multi-Door Courthouse (LMDC) as a case study in Nigeria (PhD Thesis submitted at the University of Brighton 2021) 342
[63] Chinwe Umegbolu, Episode 7: The Similarities between the Customary arbitration and the Modern day Arbitration (Edublogs 2020)

Education: First, the need for mass advocacy or awareness about Customary Dispute Resolution is paramount through podcasting and other digital dissemination. Second, it must be recognised as a legal transplant from a less complex society to a more complex society. How do we achieve the above? More scholars should lend their voices by way of publication through journals, articles, blogging and books. Finally, the need for Customary Dispute Resolution or TAMSD to be included in the education curriculum; creates a balanced story. Students are not even allowed to specialise in Arbitration or mediation as a core dispute resolution course, unlike their counterpart's litigation. However, ADR is not as widely recognised as litigation but its gradually getting there while the traditional African dispute resolution (TAMSD) has been marginalised.

Cultural Nuance:

Nigeria is a multi-ethnic society encompassing more than two hundred and fifty (250) ethnic groups with more than five hundred (500) languages whose origins date back to about 500 BC.[64]

These diverse Ethnicities were systematically brought together by the British colonists and given the name Nigeria.[65] However, despite gaining independence from British colonialism, Nigeria is still plagued with divisions among the various subcultures that make up the country.[66] These subcultures exist in the form of ethnic, religious, political, professional, and other social groups.[67] Though ESMDC and LMDC portray a picture that the parties are allowed to speak their native language (which easily shows which ethnic group they are from) immediately, the dispute resolution begins.'

Conversely, the mediators are trained to embrace the above-stated attributes. For instance, Mediators from both schemes maintained that they respected the parties by not addressing them by their first names, especially the elderly ones which indicates respect in African culture.[68] These made parties open more during the mediation process; hence the writer recommends that these cultural nuances should be incorporated by all African mediators during the mediation session.

[64] Peter Onyekwere Ebigbo, Nigeria in Distress: What Can Psychology Do? (Paper presented at Baze University of Nigeria at the National Congress of Nigerian Association of Clinical Psychologists 2022) 2
[65] Ibid
[66] Ibid
[67] Ibid 4
[68] Chinwe Umegbolu, Dispensation of Justice: Lagos Multi-Door Courthouse (LMDC) as a case study in Nigeria (PhD Thesis submitted at the University of Brighton 2021) 369

Prof Peter Ebigbo argued that 'like many African countries that suffered from Western colonialism, the Nigerian masses have lost hope in the country and wrongly perceive that the country will never improve. Hence, citizens are generally passive and reactive, accepting their fate with hopelessness while antagonising the system.' [69] This resonates with the researcher, and this psychological explanation describes or readily explains why Nigerians are yet to adopt their own laws (Traditional African Method of Settling Disputes-TAMSD) as the main law or first choice- both at the national and international level.

Though it can be argued that there are different methods of dispute resolution in Africa. [70] For mediation, it is possible because it will be of great credit if the people in Africa adopt or choose their own customary jurisprudence then it will be great. The writer is of the opinion that African countries should not or cannot continue like this. For instance, in England, they had different communities and different languages before it was merged, but they were still able to bring or use one law before the introduction of Alternative Dispute Resolution (ADR).

In Nigeria, they should embrace the same, as they have different languages and are diverse; they can unify the traditional African mediation using a common approach as it has many benefits[71] and is easily adaptable as it originates from Africa. Hence it is best suited to them than the English mediation which is foreign to them; at the same time, African countries should restore the TAMSD to its former glory or enact it into law as the main alternative.

Communications /Collaboration:

Communication/collaboration between the African States is quite inadequate though the African mediation network is bridging the gap; however, it is mainly in research and not in sensitising the populace about Customary Dispute Resolution or TAMSD through various modern readership formats. Only a more united Africa through an All-TAMSD Union can make this dream become a reality.

Decolonisation: Litigation is being imposed on many unwilling recipients in sub-

[69] Peter Onyekwere Ebigbo, Nigeria in Distress: What Can Psychology Do? (Paper presented at Baze University of Nigeria at the National Congress of Nigerian Association of Clinical Psychologists 2022) 3
[70] Panel 3 Session -Customary dispute resolution mechanisms in Africa, its promotion in national and international context at the 3rd Annual International Arbitration Conference 3-5 November 2022, Accra, Ghana.
[71] Ibid

Saharan and east African countries, irrespective of whether it is appropriate or not for the local context.[72]

A good case in point is Rwanda. In pre-colonial Rwanda, when customary dispute resolution was applied, kings ruled over many different sections of Rwanda. The king, within Rwandan society, embodied power, justice, and knowledge and was the mediator of any major dispute within their region. However, before disputes were brought to the kings, they were heard locally by wise men as what is referred to as Gacaca.[73] Like other African countries due to the advent of colonialism, litigation became their main method of settling disputes.[74] However, in 2001 the Rwanda government established the Gacaca Court (it is argued to be retributive rather than reconciliatory in nature-it's a criminal court) which is a method of transitional justice that came with the desire to leave Decolonisation -leaving Western law behind, with a legal, formalized, institutional infrastructure.[75] The writer argues that the Gacaca courts failed because of corruption. [76]This then begs the question -How do we curb corruption?

Conclusion

The work has analysed the history of ADR vis a vis TAMSD, and its benefits. These benefits highlighted, therefore, assist in the reader's perception or appreciation of customary dispute resolution or TAMSD's role in the development of ADR and the Multi-Door Courthouse or the Court-Connected ADR in Lagos and Enugu State and would further highlight the fact that these alternative processes complement the mainstream litigation. It has also enhanced the reader's understanding of the current state of customary dispute resolution or TAMSD which is very much effective and widespread to date- which is why it

[72] Discussion I had with the traditional Rulers during my research in 2021.

[73]Chinwe Umegbolu, Dispensation of Justice: Lagos Multi-Door Courthouse (LMDC) as a case study in Nigeria (PhD Thesis submitted at the University of Brighton 2021) 346

[74]For instance, in some communities or villages in Nigeria to be precise Enugu State, the law recognises customary courts, and they still have the customary courts and even have the customary courts of appeal where the appeal from the customary courts goes, even after the institutionalisation of arbitration in Nigeria. In other words, they still utilise the customary method of settling disputes.

[75]Anthony P. Greco, ADR and a Smile: Neocolonialism and the West's Newest Export in Africa, 10 Pepp. Disp. Resol. L.J. Iss. 3 (2010) 14.

[76]'One of the biggest problems with gacaca is the crimes we cannot discuss. We are told that certain crimes, those killings by the RPF, cannot be discussed in *gacaca* even though the families need to talk. We are told to be quiet on these matters. It's a big problem. It's not justice," said a relative of a victim of crimes by soldiers of the current ruling party. Cited in *Gacaca Court <https://en.wikipedia.org/wiki/Gacaca_court>* accessed 4th September 2022

should be recognised on its own merits and given a place in the educational system/curriculum not only in Africa but nationwide.

In the grand scheme of things, the colonialist, resolute to save Africa brought a new brand of control, replacing fake pacts and rifles with a modern, dangerous weapon[77]: litigation and even more dangerous: ADR. The reason why the writer called ADR a more dangerous weapon is because the Westerners are yet to acknowledge that this new law is in fact a legal transplant or taken from Africa. The reason why this is still debatable is that most people from Africa are still suffering from mental slavery or from law enslavement; another reason is succinctly captured by this Igbo Proverb, this Igbo proverb "Okwu a na-ekwu aso anya anaghi ebi ngwa ngwa" (When you are solving conflict or dispute and at the same time afraid, that solution would never be found in time).[78]

Africa is a paradox which illustrates and highlights neo-colonialism. For example, the court-connected ADR is borrowed from America, but ADR itself was borrowed from Africa. African countries are busy modifying or developing other borrowed laws or foreign laws without thinking of developing and establishing their own customary dispute resolution or TAMSD as the number one or main method of settling disputes; so that other countries can then borrow and utilise them appropriately. This is quite dangerous and does not create a 'balanced story.' This trend must be stopped by the carefully planned expansion of our own TAMSD by organising seminars like the African Arbitration Association (AFAA) Convention, starting podcasts like Expert Views on ADR (EVA), blogging, publications, and constant research on how to enhance and adopt those modes of Customary dispute resolution in Africa which has so many benefits associated with it.

[77] Dipo Faloyin, Africa Is Not A Country: Breaking Stereotypes of Modern Africa (Penguin Books, 2022) 34
[78] Ibid 22

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INTERIM MEASURES AGAINST A GUARANTOR: CONDITIONS FOR ISSUANCE IN ARBITRATION FROM THE RUSSIAN LAW PERSPECTIVE

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Under what conditions may an arbitral tribunal or emergency arbitrator grant an interim measure against a guarantor or surety for the performance of an obligation to a party to the arbitration? [1]

Most of the well-known arbitration rules provide for a possibility for the arbitral tribunal to issue orders for various interim measures at the request of an interested party, usually the claimant[2].

Moreover, many arbitral institutions also provide for emergency arbitration[3]: urgent interim measures at the request of an interested party before the arbitral tribunal is constituted. Such measures may consist, for example, of a prohibition

[1] This article, with slight differences, was first published in Russian in the sixth collection of papers of the International Arbitration Court at the Chamber of Commerce and Industry of the Republic of Kyrgyzstan "Arbitration: silhouettes and shadows", 2023.
[2] For example, Article 23.2 – 23.7 of the 2018 HKIAC Administered Arbitration Rules; Article 28(1) of the ICC Arbitration Rules.
[3] For example, Article 23.1 of 2018 HKIAC Administered Arbitration Rules; Article 29 of the ICC Arbitration Rules and Appendix V ("Emergency Arbitrator Provisions").

to alienate the property that is the subject of the dispute, to make a payment, to fulfil an obligation, or to perform other actions.

The question of whether the arbitral tribunal or emergency arbitrator has the power to make such orders is relatively straightforward when it comes to interim measures against a party to the arbitration proceedings directly bound by the arbitration agreement - usually the respondent.

A more complex issue arises when the measure sought is a prohibition or an obligation to perform certain acts addressed to a person other than a party to the arbitration. Such a person may be a guarantor or a bank or other commercial organisation (hereinafter "guarantor") that has provided a guarantee of performance by a party to a contract containing an arbitration clause in favour of the other party.

For example, according to Clauses 1 of Articles 368 and 370 of the Civil Code of Russia, under an independent guarantee the guarantor undertakes at the request of another person (the principal) the obligation to pay a certain sum of money to a third party (the beneficiary) specified by him (the guarantor) in accordance with the terms of the obligation given by the guarantor, regardless of the validity of the obligation secured by such a guarantee. The obligation of the guarantor to the beneficiary stipulated by an independent guarantee does not depend, as between them, on the main obligation to secure the fulfilment of which it was issued, on the relations between the principal and the guarantor, as well as on any other obligations, even if the independent guarantee contains references to them.

Independent guarantees are also governed by the United Nations Convention on independent guarantees and stand-by letters of credit.[4]

In particular, it is not uncommon for a guarantor to undertake to pay a sum of money within certain limits in the event of non-performance or improper performance by the seller or buyer of its obligations.

In the event of fulfilment of obligations under a guarantee, the rights of claim against the principal may pass to the bank by virtue of the terms of the guarantee itself or by law. Such a substitution of a party to the dispute may have unfavourable consequences for the principal, including because the amount has

[4] United Nations Convention on Independent Guarantees and Stand-by Letters of Credit (New York, 1995) https://uncitral.un.org/en/texts/payments/conventions/independent_guarantees

already been paid. In practice, there are cases where a party, in order to avoid such a situation, applies to an arbitral institution for an urgent interim measure to prohibit the guarantor from making payments under the guarantee by way of emergency arbitration if the arbitral tribunal has not yet been constituted. Or, if the arbitral tribunal has already been constituted, such an application shall be submitted to it.

In any event, the question arises as to whether there is authority to impose such measures in light of the fact that the guarantor as such is not a party to the underlying contract in dispute.

This issue is not explicitly regulated in the legislation. It should be considered in the context of the more general problem of extending the arbitration agreement to persons who did not sign it (hereinafter "third parties").The general rule is that an arbitration agreement extends only to the parties who signed it.

Interpretation of a third party's consent to be bound by the terms of the arbitration agreement.

This implies the need for the consent of the third party to voluntarily submit to the terms of the arbitration agreement, and therefore to the jurisdiction of the relevant arbitral body.

As far as Russian law is concerned, it is worth recalling the Ruling of the Constitutional Court of Russia that if a decision of an arbitral tribunal affects the rights and interests of third parties who "did not participate in the arbitration proceedings and did not consent to them, this circumstance is a ground for refusing to enforce the arbitral award", as such an award "contains rulings on matters outside the scope of the arbitration agreement, i.e. does not comply with the law"[5].

The question arises, however, whether such consent must be express, or whether it may be implied and following from the circumstances.

There are various theories on this subject.
Thus, Swedish doctrine and court practice allow that in some cases the arbitration

[5] Resolution of the Constitutional Court of the Russian Federation of 26.05.2011 No. 10-P.

clause may be extended to guarantors (sureties) who have provided security for obligations between a debtor and a creditor. For example, in a case concerning setting aside of an award under the rules of the SCC Arbitration Institute (*E. Export Company Ltd (Israel), Asia House Ltd (Israel) v Kazakhstan*), Kazakhstan was the guarantor of a transaction between a Kazakh and an Israeli company. It argued that there was no binding arbitration agreement because it had not entered into one.[6] The arbitral tribunal, however, held that the guarantor was bound by the arbitration clause because of the close subject-matter relationship (between the principal obligation and the guarantee) and the close relationship between the guarantor and the debtor, similar to a parent-subsidiary relationship. The Svea District Court agreed, concluding that the knowledge and apparent affiliation between the guarantor and the debtor bound the guarantor to the terms of the arbitration agreement between the creditor and the debtor.

However, this is a special situation where the guarantor is directly affiliated with a party to the arbitration. Even this position is far from universally recognised: it arguably constitutes a specific case of application of the doctrine of piercing the corporate veil. Whether it provides a basis for extending the arbitration agreement to the affiliate is questionable. The German Federal Court in a recent case answered this question in the negative.[7]

If there are no such factual circumstances of affiliation, as a general rule, a guarantor of the parties' underlying contract is not bound by the arbitration clause.

This general approach is reflected in arbitration practice. For example, in one of the cases, the arbitral tribunal of the International Commercial Arbitration Court (ICAC)[8] at the Russian Chamber of Commerce and Industry considered the buyer's request to involve as a co-defendant in its claim against the seller a third party that had issued a guarantee of the return of the money paid by the buyer to the seller in the event of non-delivery of the goods. The arbitral tribunal rejected this request, concluding that there was no arbitration agreement between the buyer and the third party.[9] The arbitral tribunal therefore refused to extend the

[6] Hassler Åke. Skiljeförfarande. Stockholm: Norstedt, 1966. P. 38-39. Cited in Zykov R.O. International Arbitration in Sweden: Law and Practice. Statut 2014. Pp. 16, 18 and 19.
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[8] http://mkas.tpprf.ru/en/.
[9] Decision of the ICAC at the Chamber of Commerce and Industry of the Russian Federation in Case No. 37 // Rosenberg M., Practice of the International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation for 2005 // Statute. 2006. // JPS Consultant Plus.

arbitration clause to the third-party guarantor.

However, there may be exceptions to this general rule and this issue should be analyzed when considering an application for (urgent) interim measures.
How exactly this issue can be analyzed is further illustrated by the circumstances of a recent case study.

The claim to prohibit the guarantor from making payments under the independent guarantee.

A Russian commercial organisation (seller, claimant) applied to the Russian Arbitration Centre at the Russian Institute of Modern Arbitration (hereinafter - RAC)[10] for urgent interim measures to prohibit a bank from making payments under a bank guarantee at the request of the Russian buyer (defendant). In support of its application, the claimant referred to the following circumstances.
The claimant asserted arbitration claim against the respondent based on an arbitration clause in the equipment supply contract. The subject of the claim was the invalidation of the defendant's claim to the bank for the payment of a sum of money under an independent guarantee.

The Bank issued to the defendant (beneficiary) an independent guarantee of the proper fulfilment by the claimant (principal) of its obligations to return the amount of the advance payment made under the contract (hereinafter the "Contract").

The claimant delivered the equipment. The defendant, believing that the equipment had quality defects, applied to the guarantor with a claim for payment of the amount (part of the advance payment) under the independent guarantee.
The claimant requested as an urgent interim measure to prohibit the guarantor from making payments under the bank guarantee in respect of this claim of the defendant. In the claimant's opinion, fulfilment by the guarantor of the defendant's claims under the bank guarantee would result in the guarantor's disputed claims against the claimant.

The claimant argued that the adoption of these interim measures is aimed at the actual realisation of the purpose of such measures - to prevent damage to the claimant in case of satisfaction of the claim. In case of non-acceptance of interim measures, the buyer would receive the funds under the bank guarantee

[10] https://centerarbitr.ru/.

regardless of the outcome of the case, which, in case of satisfaction of the claims, would entail additional procedures for the claimant to restore its infringed right associated with the filing of new lawsuits aimed, in particular, at the return of unjust enrichment of the defendant at the expense of the claimant.

The application for urgent interim measures shall be considered by the emergency arbitrator (Art. 48.1 of the RAC Arbitration Rules).[11]

In considering the application in question, the first test is whether there was an arbitration agreement between the parties. In that case, there was such an agreement: the claimant and the defendant entered into a contract including an arbitration clause stating that any dispute, controversy, claim or demand arising out of or in connection with the contract, including those relating to its breach, conclusion, modification, termination or invalidity, shall be resolved at the claimant's option, including by arbitration administered by the RAC.

The next question is whether, in principle, the law and arbitration rules applicable to arbitration allow the possibility of interim measures. In this case, it is true that in accordance with Art. 47.1 of the RAC Arbitration Rules, unless the parties agree otherwise, interim measures may be taken at the request of any party prior to the formation of the arbitral tribunal. They are called emergency interim measures.

This provision of the Arbitration Rules is based on Article 17 of the Federal Law No. 382-FZ dated 29.12.2015 "On Arbitration (Arbitral Proceedings) in the Russian Federation" (hereinafter - the "Arbitration Law").

The parties concluded no agreement to the effect that interim measures may not be taken. Consequently, there was a possibility in principle that interim measures could be taken on the application of a party in the present case.

The Emergency Arbitrator found that all procedural requirements of the Arbitration Rules had been complied with. Therefore, the RAC had authority to accept the request for urgent interim measures and the emergency arbitrator possessed competence to consider it.

Possibility of taking an urgent interim measure to prohibit the guarantor from making payments under the bank guarantee.

[11] Available at: https://centerarbitr.ru/en/arbitration-rules-2021/.

As a general rule, an arbitration agreement constitutes a prerequisite for the arbitral tribunal to consider a claim. Likewise, as a general rule, it is a prerequisite for a person authorised under the arbitration rules to consider an application for interim measures in connection with the arbitral proceedings.

Given the applicability of Russian arbitration law in this case, the arbitration agreement only in exceptional cases applies to persons who did not conclude it[12]. The same approach is applied in most other developed legal systems.[13]

In particular, if it follows from the guarantee agreement that the guarantee is subject to the arbitration provisions contained in the form of a clause in the main contract, the guarantor may be considered a party to the arbitration agreement along with the parties to the main contract. This position has been reflected in court practice[14].

In this regard, for the purposes of determining whether an urgent interim measure may be available against the guarantor, it is first necessary to consider whether there is a basis for extending the arbitration clause contained in the underlying contract to the guarantor.

Pursuant to Article 7(5) of the Arbitration Law, a reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement concluded in writing, provided that the said reference allows such clause to be considered part of the contract.

In explanation of this provision, the Plenum of the Russian Supreme Court stated: "A reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement concluded in writing, provided that the said reference allows such a clause to be considered part of the contract (Article 7(5) of the Arbitration Law, Article 7(6) of the International Commercial Arbitration Act), i.e. the court establishes the existence of the will of the parties to extend the terms of that document to the relations arising out of the contract. In particular, a reference in the contract to the fact that all disputes shall be settled in accordance with the procedure provided for in another document in the text of which the

[12] See, for example, the ruling of the Moscow Commercial Court of 21.08.2020 in case No. A40-264409/19-68-1743.

[13] For example, see *Peterson Farms Inc v. C&M Farming Ltd*. 4 February 2004. Langley, J. Commercial Court. [2004] EWHC 121; Woolhouse S. P. Group of Companies Doctrine and English Arbitration Law // Arbitration International. 2004. Vol. 2, Issue 24. P. 435-436; *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Manning*, 578 U.S. (2016).

[14] Ruling of the Moscow District Commercial Court of 09.08.2016 in case No. A40-217538/15.

arbitration clause is included (for example, a certain model contract) makes the relevant clause part of the parties' contract"[15].

In applying this rule, by analogy or directly, to an independent guarantee, it should be ascertained whether its reference to the main contract allows its arbitration clause to be considered part of the guarantee. In the case at hand, the guarantee merely stated that the guarantor was notified of the conclusion of the Contract and undertook to pay the beneficiary a sum of money in the event that the principal failed to fulfil or improperly fulfilled its obligations to the beneficiary to return the amount of the advance payment made under the Contract.

The key question is whether there is a clause in the guarantee by which the guarantor has expressed its will to arbitrate disputes related to it in accordance with the same rules as provided for in the main contract. If there is such a clause, then it can be assumed that all parties to the legal relationship are bound by the arbitration agreement and can arbitrate disputes and issue interim measures against, among others, the guarantor.

In the case at hand there was no such case: the guarantee provided that disputes arising in connection with the fulfilment of obligations under the guarantee were to be considered by the Commercial Court of Moscow.

Consequently, the guarantor did not expressly consent in the guarantee to the jurisdiction of the arbitral institution over disputes in connection with the guarantee itself and the Contract, the fulfilment of the seller's obligations under which it secured.

On the contrary, the guarantor expressed its intention to be bound by the jurisdiction of another body, the Moscow Commercial Court, in respect of disputes related to the fulfilment of obligations under the bank guarantee.

In this regard, there is no will of the guarantor to extend the arbitration clause of the Contract to the relations arising out of the guarantee.

The next step is to ascertain whether the guarantor has applied to join the arbitration in the case as an additional party (Article 34(3)(3) of the RAC Arbitration Rules) or otherwise agreed to participate in the arbitration in the case.

[15] Resolution of the Plenum of the Supreme Court of Russia of 10.12.2019 No. 53 "On the performance by the courts of the Russian Federation of the functions of assistance and control in relation to arbitration proceedings, international commercial arbitration" (para. 22).

Also, whether the parties have applied for the guarantor to join the arbitration as an additional party in the manner prescribed by the RAC Arbitration Rules.
No such applications were present in the case in question.

Consequently, there is no basis for extending the arbitration clause contained in the Contract to the guarantor: there is neither express nor implied consent of the guarantor to do so.

In such a situation, it should be concluded that there are no jurisdictional grounds for taking an urgent interim measure against the guarantor; the application for urgent interim measures should be refused without examining their validity on the merits.

If the guarantor had consented in any way to participate in the arbitration, then it would matter whether the parties had consented to such participation. Such consent may follow from the very existence of the guarantee, which is issued at the request of one party (the principal) in favour of the other party (the beneficiary). In any case, it is possible to speak about the implied consent of the principal. Or that the principal expresses such consent (acceptance) when applying for interim measures against the guarantor. Then *arguendo* there is an implied arbitration agreement between the latter and the guarantor, which binds the guarantor to the principal contract in such a way that interim measures, if well substantiated on the merits, may be taken against the guarantor upon the principal's application.

Conclusion

The issue of extending the arbitration agreement to third parties is very sensitive. The absence of a person's consent to participate in the arbitration, including with respect to interim measures, constitutes a basis for concluding that the arbitral tribunal or, accordingly, the emergency arbitrator, possesses no authority to hear claims or interim measures against such a person. However, the assessment of the existence of such consent should not be approached formally. Consent may follow from the circumstances of the case. This is quite relevant for guarantors and sureties.

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PUBLIC POLICY AND POST-AWARD CHALLENGE IN PHILIPPINE JURISPRUDENCE

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I. Introduction: arbitration laws and rules in the Philippines

Philippine law defines arbitration as “a “voluntary dispute resolution process in which one or more arbitrators, appointed following the agreement of the parties, or rules promulgated pursuant to [Republic Act No. 9285 or the Alternative Dispute Resolution Act of 2004 (“ADR Act of 2004”)], “resolve a dispute by rendering an award”.[1] Arbitration in the Philippines is governed by Republic Act No. 876[2] (“Domestic Arbitration Law”),[3] the ADR Act of 2004, judicial decisions

[1] Section 3(d) of the ADR Act of 2004.
[2] The Domestic Arbitration Law does not provide a definition of arbitration.
[3] The Domestic Arbitration Law had been enacted in 1953, predating the New York Convention and the Model Law

of the Supreme Court of the Philippines that apply or interpret the laws or the Philippine Constitution,[4] and A.M. No. 07-11-08-SC ("Special ADR Rules").

Domestic arbitration in the Philippines is governed by the Domestic Arbitration Law,[5] a 1953 statute, and the more recent ADR Act of 2004 which incorporates several articles of the United Nations Commission on International Trade Law (UNCITRAL) Model Law of 1985 ("1985 Model Law") to form part of the domestic arbitration legal framework in the Philippines.[6]

It is also the ADR Act of 2004 which adopted the 1985 Model Law to govern international commercial arbitration in the Philippines.[7] While the UNCITRAL Model Law was amended in 2006, the Philippines has not yet adopted the said amendment; therefore, it is still the 1985 Model Law that applies in the country.

Interestingly, the Domestic Arbitration Law does not define domestic arbitration, while the ADR Act of 2004 only states that domestic arbitration shall mean an arbitration that is not international as defined in Article (3) of the 1985 Model Law,[8] which reads:

> "An arbitration is international if:
>
> (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
> (iii) the parties have expressly agreed that the subject

[4] Article 8 of the Philippine Civil Code provides that judicial decisions applying or interpreting the laws or the Constitution shall form a part of the legal system of the Philippines.
[5] Section 32 of the Domestic Arbitration Law.
[6] Section 33 of the Alternative Dispute Resolution Act of 2004 states that Articles 8, 10, 11, 12, 13, 14, 18 and 19 and 29 to 32 of the Model Law and Section 22 to 31 of the preceding Chapter 4 shall apply to domestic arbitration.
[7] Section 19 of the ADR Act of 2004.
[8] *Id.* at Sec. 32.

matter of the arbitration agreement relates to more than one country.

Hence, if the arbitration does not fall under any of the scenarios that are considered international under Article (3) of the 1985 Model Law, then the arbitration is domestic. But if the arbitration is covered by any of the foregoing scenarios and the dispute is commercial, then it is an international commercial arbitration in the Philippines.

Since the Philippines is a signatory of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention"),[9] arbitral awards rendered in the Contracting States of the New York Convention are enforceable in the Philippines.

II. Non-Arbitrable Disputes in the Philippines

In the Philippines, not all conflicts can be submitted for resolution through arbitration. Labor disputes covered by the Labor Code of the Philippines, civil status of persons, validity of a marriage, any ground for legal separation, jurisdiction of courts, future legitime, criminal liability, future support, and those which by law cannot be compromised cannot be subject to arbitration in the Philippines.[10]

III. Post-Award Challenges in the Philippine legal framework

A. Challenging a Domestic Arbitral Award

A domestic arbitral award can be challenged before the appropriate regional trial court in the Philippines by a party to the domestic arbitration through a petition to vacate the arbitral award. The Domestic Arbitration Law enumerates the following grounds for vacating a domestic arbitral award: (a) the arbitral award was procured through corruption, fraud, or other undue means; (b) there was evident partiality or corruption in the arbitrators or any of them; (c) the arbitrators were guilty of misconduct in refusing to postpone the hearing upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the

[9] Section 3(w) of the ADR Act of 2004. The Philippines is among the first countries to sign the New York Convention. It then ratified the New York Convention through Senate Resolution No. 71 on 6 July 1967.
[10] Section 6 of the ADR Act of 2004; Article 2035 of the Civil Code of the Philippines.

controversy; that one or more of the arbitrators was disqualified to act as such under the law and willfully refrained from disclosing such disqualifications or of any other misbehavior by which the rights of any party have been materially prejudiced; or (d) the arbitrators exceeded their powers, or so imperfectly executed them, such that a mutual, final and definite award upon the subject matter submitted to them was not made.

In connection therewith, the ADR Act of 2004 states that "[a] party to a domestic arbitration may question the arbitral award with the appropriate regional trial court in accordance with the rules of procedure to be promulgated by the Supreme Court only on those grounds enumerated in Section 25 of Republic Act No. 876. Any other ground raised against a domestic arbitral award shall be disregarded by the regional trial court".[11] Based on the express language of the ADR Act of 2004, the grounds to vacate a domestic arbitral award are exclusive and limited to those enumerated in the Domestic Arbitration Law.

However, while the Special ADR Rules lists the same grounds as the Domestic Arbitration Law to vacate a domestic arbitral award,[12] this procedural rule issued by the Supreme Court of the Philippines includes three additional grounds that may be invoked to vacate a domestic arbitral award. The Special ADR Rules state that a domestic arbitral award may also be vacated on any of these grounds: (1) The arbitration agreement did not exist, or is invalid for any ground for the revocation of a contract or is otherwise unenforceable; (2) a party to the arbitration is a minor or a person judicially declared to be incompetent;[13] or (3) if the arbitral award amounts to a violation of public policy.[14]

B. Challenging an International Commercial Arbitration Award and a Foreign Arbitral Award

A petition to set aside or resist enforcement can be filed with the appropriate regional trial court by any party to an international commercial arbitration to challenge an international commercial arbitration award. On the other hand, a foreign arbitral award cannot be set aside by a Philippine court. Instead, a Philippine court may refuse the recognition and enforcement of a foreign arbitral

[11] Section 41 of the ADR Act of 2004. There is a typographical error in this section of the law since it makes reference to Section 25 of the Domestic Arbitration Law, which refers to grounds for modifying or correcting an award. The correct section of the Domestic Arbitration Law is Section 24 which enumerates the grounds to vacate a domestic arbitral award.
[12] Rule 11.4.(A) of the Special ADR Rules.
[13] Rule 11.4. of the Special ADR Rules.
[14] Rule 19.10. of the Special ADR Rules.

award.

The Special ADR Rules enumerate the available grounds to set aside or resist enforcement of an international commercial arbitration award as well as refuse recognition and enforcement of a foreign arbitral award.

International Commercial Arbitration Award (Setting Aside or Resist Enforcement)[15]	**Foreign Arbitral Award (Refuse Recognition and Enforcement)[16]**
A party to the international commercial arbitration furnishes proof of any of the following: 1. 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 Philippine law. 2. The party making the application to set aside or resist enforcement was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case. 3. The international commercial arbitration award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters	A party to the foreign arbitration furnishes proof of any of the following 1. 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. 2. 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. 3. 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;

[15] Rule 12.4. of the Special ADR Rules.
[16] Rule 13.4. of the Special ADR Rules.

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 only that part of the award which contains decisions on matters submitted to arbitration may be enforced. 4. The composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of Philippine law from which the parties cannot derogate, or, failing such agreement, was not in accordance with Philippine law.	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. 4. 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. 5. 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.
The Court makes a finding of any of the following: 1. The subject-matter of the dispute is not capable of settlement by arbitration under the law of the Philippines. 2. The recognition or enforcement of the award would be contrary to public policy.	The Court makes a finding of any of the following: 1. The subject-matter of the dispute is not capable of settlement or resolution by arbitration under Philippine law. 2. The recognition or enforcement of the award would be contrary to public policy.

Rule 12.4 of the Special ADR Rules, which specifies the grounds to set aside or resist enforcement of an international commercial arbitration award, mirrors Article 34(1)(2) of the 1985 Model Law; while Rule 13.4 of the Special ADR Rules, which indicates the grounds to refuse recognition and enforcement of a foreign arbitral award mirrors Article V of the New York Convention.

Based on Rules 12.4 and 13.4 of the Special ADR Rules, a court can set aside or resist enforcement of an international commercial arbitration award if its recognition or enforcement would be contrary to public policy, and a court can likewise refuse recognition and enforcement of a foreign arbitral award if its recognition or enforcement would also be against public policy.

However, neither the Model Law of 1985, the New York Convention, the Domestic Arbitration Law, the ADR Act of 2004, nor the Special ADR Rules provide any guidance on how to define public policy and what constitutes a violation of public policy insofar as confirmation, recognition, and enforcement of arbitral awards are concerned.

IV. Jurisprudence on the Public Policy Exception in the Autonomy of Arbitral Awards

To date, there are only three cases decided by the Philippine Supreme Court that deal with the public policy exception to the autonomy of arbitral awards. Each of these cases will be discussed separately hereunder.

(1) Mabuhay Holding Corporation v. Sembcorp Logistics Limited (2018)[17]

i. Background of the case

In January 1996, Mabuhay Holdings Corporation (“Mabuhay Holdings”) and Infrastructure Development & Holdings Inc. (“IDHI”), both corporations duly organized under the laws of the Republic of the Philippines, entered into a Shareholders’ Agreement with Sembcorp Logistics Limited (“Sembcorp”), a company incorporated in the Republic of Singapore. In the Shareholders Agreement, Mabuhay Holdings and IDHI voluntarily agreed to jointly guarantee that Sembcorp would receive a minimum accounting return (Guaranteed Return) for its investment in two joint ventures of Mabuhay Holdings and IDHI. The

[17] G.R. No. 212734, December 05, 2018.

Shareholders Agreement included an arbitration clause with Singapore as the seat of arbitration and that the arbitration should be conducted under the arbitration rules of the International Chamber of Commerce ("ICC").

When Mabuhay Holdings failed to pay the Guarantee Return, Sembcorp filed a Request for Arbitration before the International Court of Arbitration of the ICC. The sole arbitrator appointed by the ICC rendered an award in favor of Sembcorp and directed Mabuhay Holdings to pay Sembcorp half of the Guarantee Return, interest at the rate of 12% per annum, and reimbursement of half of the costs of arbitration.

Sembcorp then filed a Petition for Recognition and Enforcement of a Foreign Arbitral Award with a Regional Trial Court in the Philippines. Mabuhay Holdings opposed the recognition and enforcement of the award by invoking Article V of the New York Convention, and arguing, among others, that recognition and enforcement of the award would be contrary to the public policy of the Philippines. The Regional Trial Court dismissed the Petition for Recognition and Enforcement of the Foreign Arbitral Award and ruled that the controversy was an intra-corporate matter and that the sole arbitrator who issued the award lacked the necessary expertise to decide the matter. The Regional Trial Court, however, did not decide on the public policy argument raised by Mabuhay Holdings. Upon appeal, the Court of Appeals reversed and set aside the decision of the Regional Trial Court on the basis that the lower court attacked the merits of the award which is prohibited under Philippine arbitration laws.

Mabuhay Holdings elevated the case to the Philippine Supreme Court which then affirmed the ruling of the Court of Appeals. The Philippine Supreme Court ruled that the enforcement of the foreign arbitral award favoring Sembcorp would not be contrary to the public policy of the Philippines.

ii. The narrow approach in defining public policy

In this case, the Philippine Supreme Court declared that "most arbitral jurisdictions adopt a narrow and restrictive approach in defining public policy pursuant to the pro-enforcement policy of the New York Convention" [18]. Explaining this narrow approach, the Philippine Supreme Court stated that in several jurisdictions, public policy may be only invoked "where the enforcement of the award would violate the forum state's most basic notions of morality and

[18] *Ibid*.

justice".

The Philippine Supreme Court then adopts this narrow approach in determining whether enforcement of an award is contrary to public policy in the Philippines. According to the Philippine Supreme Court, "[m]ere errors of in the interpretation of the law or factual findings would not suffice to warrant refusal of enforcement under the public policy ground. The illegality or immorality of an award must reach a certain threshold such that, enforcement of the same would be against Our State's fundamental tenets of justice and morality, or would blatantly be injurious to the public, or the interests of the society." The Philippine Supreme Court further held that "the restrictive approach to public policy necessarily implies that not all violations of the law may be deemed contrary to public policy. It is not uncommon for the courts in Contracting States of the New York Convention to enforce awards which do not conform to their domestic laws." Applying this narrow approach, the Philippine Supreme Court ruled that the arguments raised by Mabuhay Holdings in assailing the award are insufficient to set aside on public policy grounds.

iii. A commentary on *Mabuhay Holdings*

The *Mabuhay Holdings* case, the decision of which was promulgated by the Supreme Court of the Philippines in 2018 or more than nine years since it issued the Special ADR Rules and sixty years since the Philippines signed the New York Convention, is a landmark decision clarifying the public policy exception to the autonomy of arbitral awards. This is the first Supreme Court ruling in the Philippines that defines what constitutes a violation of public policy that renders an arbitral award incapable of being recognized and enforced in the Philippines.

With the Philippine Supreme Court's adoption of the narrow or restrictive approach to public policy, the public policy objection becomes less of a catch-all ground that can be used in opposition to the enforcement and recognition of foreign arbitral awards in the Philippines.[19] It also means that an error of law in the award cannot be deemed a violation of public policy if such error does not go against the Philippine State's "fundamental tenets of justice and morality, or would blatantly be injurious to the public, or the interests of the society".

Moreover, the Supreme Court declared that the public policy exception pertains

[19] Santiago, Jay Patrick, and Muti Nusaybah, The Philippines' Pro-Arbitration Policy: A Step Forward Gone Too Far? <https://arbitrationblog.kluwerarbitration.com/2019/04/09/the-philippines-pro-arbitration-policy-a-step-forward-gone-too-far/> last accessed at 05 October 2023.

to domestic public policy. In other words, it should be the public policy of the Philippines, not the public policy of the seat of arbitration, if the seat is a State other than the Philippines, or that of any other State, or any concept of international or transnational public policy, that can be used as a ground to refuse recognition and enforcement of a foreign arbitral award.

2. Maynilad Water Services Inc. v. National Water and Resource Board, et al. (2021)[20]

i. Background of the case

The Metropolitan Waterworks and Sewerage System ("MWSS") is a government corporation that has jurisdiction, supervision, and control over all waterworks and sewerage systems in Metro Manila and its neighboring provinces of Rizal and Cavite.

During the national water crisis in the mid-nineties, the Philippine government proceeded to bid out the waterworks and sewerage operations in Metro Manila, dividing the area into two and awarding concessions to two private entities. Service Area East was awarded to Manila Water Company Inc. ("Manila Water") while Service Area West was awarded to Maynilad Water Services Inc. ("Maynilad"). Separate Concession Agreements with MWSS were entered into by Manila Water and Maynilad. The Concession Agreements provided for the rights and obligations of the parties under the concession, the mechanisms for setting the rates chargeable to water consumers, and a dispute resolution mechanism where the parties must first endeavor to resort to mutual consultation and negotiation, and should these fail, they shall submit their dispute to arbitration before an Appeals Panel whose decisions shall be final and binding upon them.

In November 2002, the Supreme Court of the Philippines promulgated its ruling in the case of Republic of the Philippines v. MERALCO[21] where it held that public utilities are prohibited from including income taxes as operating expense in the computation of the rates that can be charged to customers. A dispute then arose between MWSS and Maynilad as well as between MWSS and Manila Water because the Regulatory Office of MWSS declared that Manila Water and Maynilad are prohibited from including their corporate income taxes as expenditures that they can recover from water consumers.

[20] G.R. No. 181764, 7 December 2021.
[21] G.R. No. 141314, 15 November 2002.

Maynilad and Manila Water respectively submitted their disputes with MWSS to arbitration pursuant to their Concession Agreements. In the domestic arbitration instituted by Manila Water against MWSS,[22] the Appeals Panel issued an award holding that corporate income tax was not an allowable expenditure. On the other hand, in the domestic arbitration case initiated by Maynilad,[23] the Appeals Panel issued an award with a completely opposite ruling because it held that Maynilad may include its corporate income taxes as an item of expenditure in its future cash flows.

Subsequently, Maynilad filed a Petition for Confirmation and Execution of Arbitral Award ("Petition for Confirmation") before the Regional Trial Court. MWSS opposed the Petition for Confirmation arguing that the implementation of the award would violate the equal protection clause, since in a separate arbitral proceeding involving Manila Water for the Service Area East, the Appeals Panel held that Manila Water may not include corporate income taxes in the computation of tariff rates chargeable to the consumers and that if the award in favor of Maynilad is implemented, it would create a disparity in the cost of water between Service Area West and Service Area East in Metro Manila.

The Regional Trial Court granted Maynilad's Petition for Confirmation and upheld the agreement of the parties to hold "final and binding" upon them any decision or award of the Appeals Panel. When the case reached the Court of Appeals, the appellate court affirmed the ruling of the Regional Trial Court. MWSS then brought the case to the Philippine Supreme Court and argued that the implementation of the award in favor of Maynilad violates public policy and should be vacated.

ii. Violation of public policy as a ground to vacate a domestic award

The Philippine Supreme Court that the award in favor of Maynilad cannot be confirmed. Here, the Supreme Court of the Philippines anchored its ruling on Rule 19.10 of the Special ADR Rules that allows a court to set aside an arbitral award, whether domestic or international if recognizing the award will amount to a violation of public policy.

While the Supreme Court reiterated its discussion in the *Mabuhay Holdings* case on what constitutes a violation of public policy, it differentiated the Maynilad case

[22] Arbitration Case No. UNC 131/CYK.
[23] Arbitration Case No. UNC 141/CYK.

from the Mabuhay Holdings case by declaring that "recognizing and enforcing the arbitral award in Mabuhay Holdings will have no injurious effect to the public, unlike confirming the arbitral award in the [Maynilad case]"[24] because the arbitral award in *Mabuhay Holdings* affects a private entity while the award in the *Maynilad* case will adversely affect the public, particularly the water consumers in Service Area West in Metro Manila. As held by the Philippine Supreme Court, confirming the award in favor of Maynilad will be injurious to the public and will be contrary to the equal protection clause guaranteed by the Philippine Constitution as there is no substantial distinction between the water consumers in Service Area West and Service Area East, and yet there will be a disproportionate price difference in the water rates between the two areas. Since confirming the arbitral award in favor of Maynilad will injure the public, it "therefore cannot be recognized for being contrary to public policy"[25].

iii. A Commentary on *Maynilad Water Services*

The Domestic Arbitration Law and the ADR Act of 2004 do not include public policy as a ground for vacating a domestic arbitral award. Section 41 of the ADR Act of 2004 expressly provides that only the grounds enumerated in the Domestic Arbitration Law can be used as a basis for vacating a domestic arbitral award and that "[a]ny other ground raised against a domestic arbitral award shall be disregarded by the regional trial court".[26]

It is in Rule 19.10 of the Special ADR Rules, which is a procedural rule issued by the Philippine Supreme Court, that public policy first appeared as a ground for vacating a domestic arbitral award. By confirming in *Maynilad* that a domestic arbitral award can be vacated on public policy considerations, and anchoring its decision on Rule 19.10 of the Special ADR Rules, the Philippine Supreme Court judicially legislated the public policy exception as a ground to vacate a domestic arbitral award in the Philippines. This may be problematic because the Philippine Supreme Court ruling on this matter is not based on any of the arbitration laws in the Philippines, or an interpretation of these laws. Rather, the Philippine Supreme Court invoked a procedural rule that it itself issued.

Moreover, while there is a discussion of *Mabuhay Holdings*, there is no clarity on how to apply the narrow and restrictive approach in order to determine if the

[24] G.R. No. 181764, 7 December 2021.
[25] *Ibid.*
[26] *Id*.

award favoring Maynilad goes against public policy. What is clear is that if the award in favor of Maynilad is confirmed, there would be a violation of the equal protection clause guaranteed by the Philippine Constitution.

3. Lone Congressional District of Benguet Province v. Lepanto Consolidated Mining (2022)[27]

i. Background of the case

In March 1990, the Republic of the Philippines, through its Department of Environment and Natural Resources entered into a Mineral Production Sharing Agreement (MPSA) No. 001-90 with Lepanto Consolidated Mining Company ("Lepanto Mining") and Far Southeast Gold Resources Inc. ("FSGRI"). MPSA No. 001-90 authorized these mining companies to conduct mining operations on land that is part of the ancestral domains of the Mankayan Indigenous Cultural Communities/Indigenous Peoples ("ICC/IP"). MPSA No. 001-90 provides for an initial term of 25 years that is renewable for another 25 years subject to mutual agreement of the parties or as may be provided for by law.

Then in March 1995, the Philippine Congress enacted the Philippine Mining Act of 1995,[28] regulating the exploration, development, utilization, and conservation of mineral resources. Subsequently, in October 1997, the Philippine Congress enacted the Indigenous People's Rights Act of 1997 ("IPRA") enjoining all departments and other government agencies from granting, issuing or renewing any concession, license or lease, or from entering into any production-sharing agreement, without prior certification from the National Commission on Indigenous Peoples ("NCIP") that the area affected does not overlap with any ancestral domains. In particular, the IPRA requires the "Free and Prior Informed and Written Consent" (FPIC) of the affected ICCs/IPs as a condition for the issuance of the certificate. The requirement is herein referred to as "FPIC and NCIP Certification Precondition."

Near the expiration of MPSA No. 001-90 in March 2015, Lepanto Mining and FSGRI wrote to the Mines and Geosciences Bureau ("MGB") expressing their intention to renew the agreement. The MGB advised that the joint renewal application would be endorsed to the NCIP for the FPIC and NCIP Certification Precondition. Both Lepanto Mining and FSGRI argued that MPSA No. 001-90 is

[27] Lone Congressional District of Benguet Province v. Lepanto Consolidated Mining Company, G.R. No. 244063, 21 June 2022.
[28] Republic Act No. 7942.

exempt from the IPRA requirement on the FPIC and NCIP Certification Precondition.

In February 2015, Lepanto Mining and FSGRI initiated arbitration against the Republic of the Philippines. In November 2015, the arbitral tribunal issued its final award which held that the issue arising from the FPIC and NCIP Certification Precondition is arbitrable. The Republic of the Philippines disagreed with the ruling of the arbitral tribunal and filed a Petition to Vacate the Arbitral Award ("Petition to Vacate") with a Regional Trial Court. One of the arguments of the Republic of the Philippines in its Petition to Vacate is that the "application of IPRA is a matter of public policy which cannot be subject to the will of the parties, or to the determination of the Arbitral Tribunal and this public policy on the protection and promotion of the interests of the ICCs/IPs is deemed written in the MPSA {No. 001-90]." [29] In its Resolution, the Regional Trial Court sustained the arguments of the Republic of the Philippines. Lepanto Mining and FSGRI then elevated the case to the Court of Appeals which reversed the ruling of the Regional Trial Court.

The Republic of the Philippines then brought the case before the Philippine Supreme Courts, invoking the public policy exception. According to the Republic of the Philippines, the public policy underlying the IPRA which requires the FPIC and NCIP Certification Precondition for the renewal of MPSA No. 001-90 is the Philippine State's policy "to protect and promote the rights of the indigenous cultural communities to their ancestral lands to ensure their economic, social, cultural and well-being."[30]

i. Vacation of a domestic award to protect the rights of indigenous cultural communities / indigenous peoples

In its Decision, the Philippine Supreme Court reversed the ruling of the Court of Appeals and ordered that the award be vacated. On the basis of Rule 19.10 of the Special ADR Rules, the Philippine Supreme Court held that an award may be vacated if it conflicts with the public policy of the Philippines.

The Philippine Supreme Court held that the non-application of the FCIP and NCIP Certification Precondition would violate a "strong and compelling public policy on the protection of the rights of the Mankayan ICCs/IPs to their ancestral

[29] G.R. No. 244063, 21 June 2022.
[30] *Ibid*.

domains”[31], and that "rights of indigenous cultural communities to their ancestral lands to ensure their economic, social, and cultural well-being, is a Constitutionally declared policy of the State which is also reflected in the IPRA and the Philippine Mining Act of 1995”[32]. The Philippine Supreme Court further held that by excusing Lepanto Mining and FSGRI from the FPIC and NCIP Certification Precondition requirement, the arbitral tribunal manifestly disregarded the IPRA and the law’s underlying public policy, and by doing so, the arbitral tribunal "exceeded [its] powers, [and] so imperfectly executed them, that a mutual, final and definite award upon the subject matter submitted to [it] was not made"[33]. The Philippine Supreme Court also held that the said requirement “proceeds from public policy and social justice finding support in no less than the Constitution. This requirement cannot be done away with arbitration, the basis of which is the mere contractual will of the mining companies and the State granting them mere mining privileges”[34].

i. Commentary on *Lone Congressional District of Benguet Province*

Of the three Philippine Supreme Court cases that discuss the public policy exception to the autonomy of arbitral awards, *Lone Congressional District of Benguet Province* is the latest. However, it does not make any reference to the two previous cases.

But similar to the *Maynilad* case, the Supreme Court in *Lone Congressional District of Benguet Province* vacated a domestic award for being violative of public policy on the basis of a procedural rule, and not on any Philippine law. It therefore affirms the judicial legislation made in *Maynilad* that Rule 19.10 of the Special ADR Rules can be cited to vacate a domestic award that conflicts with public policy.

In addition, just like the *Maynilad* case, the public policy violation in this case is ultimately rooted in a violation of the Philippine Constitution. In the Maynilad case, the confirmation of the award would result in a violation of the equal protection clause guaranteed by the Philippine Constitution, while the confirmation of the award in *Lone Congressional District of Benguet Province* would result in a violation of the Philippine State’s constitutional duty to protect the rights of indigenous cultural communities.

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[31] *Id.*
[32] *Id.*
[33] *Id.*
[34] *Id.*

Furthermore, similar to *Maynilad*, there is no clear application of the narrow and restrictive approach to determining if there is a public policy violation that would warrant vacating the domestic award. In this case, there is total silence on the narrow and restrictive approach introduced in *Mabuhay Holdings*.

V. Conclusion

Philippine jurisprudence provides much-needed guidance on what would be considered a violation of public policy that would render an award incapable of being confirmed, recognized, or enforced. So far, the Philippine Supreme Court has adopted the narrow and restrictive approach to defining public policy violations as shown in *Mabuhay Holdings*, the first Supreme Court case dealing with the public policy exception to the autonomy of arbitral awards.

However, in subsequent Supreme Court cases, wherein the domestic awards were found to be violative of public policy, the Supreme Court did not definitively demonstrate the application of this narrow and restrictive approach. In the *Maynilad* and *Lone Congressional District of Benguet Province* cases, the confirmation of the domestic award would be considered a violation of public policy as it would ultimately result in contravention of the Philippine Constitution, particularly the equal protection clause as well as the duty of the Philippine State to protect the rights of indigenous cultural communities. Based therefore on these cases, it appears that an award can be vacated on public policy grounds if its confirmation would violate the Philippine Constitution.

Further, the *Maynilad* and *Lone Congressional District of Benguet Province* has shown that a domestic award can be vacated if its confirmation goes against public policy, even if the ADR Act of 2004 specifically states that the grounds to vacate a domestic award are exclusive and limited only to the enumeration in the Domestic Arbitration Law, which does not include public policy.

Considering that there have only been three Philippine Supreme Court cases on the subject matter, future jurisprudential pronouncements on the public policy exception would be a welcome development.

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