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Playing Patch-Up: Intra-Corporate Arbitration Under the Philippines' Revised Corporation Code

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Late last year, the Securities and Exchange Commission of the Philippines (“SEC”) issued its [Memorandum Circular No. 8 \(s. 2022\)](#) (“MC 8”). MC 8 gives effect to Section 181 of the [Revised Corporation Code](#) (“RCC”) and, among other things, specifies the role of the SEC in arbitrations involving intra-corporate disputes. Section 181 of the RCC and MC 8 remove any doubt with regard to the arbitrability of intra-corporate disputes involving companies incorporated in the Philippines. They also strengthen the country’s policy of promoting the use of various modes of alternative dispute resolution (“ADR”) to resolve commercial disputes.

In general, Section 181 of the RCC expressly allows shareholders, directors, and other corporate officers to resolve their intra-corporate disputes¹⁾ through arbitration when an agreement to arbitrate is found in the corporation’s articles of incorporation, by-laws, or in a separate agreement. It also provides that the SEC shall serve as the default appointing authority if the independent third party designated by the parties in the arbitration agreement fails to appoint the arbitrator in the manner and within the period specified in the arbitration agreement.

While Section 181 was introduced with good intentions, it has been criticised by arbitration practitioners as inconsistent with the Philippines’ main legislation on ADR, i.e. the Republic Act No. 9285, otherwise known as the [Alternative Dispute Resolution Act of 2004](#) (“ADR Act”). Among others, the RCC is inconsistent with the ADR Act with respect to the parties bound by an arbitration agreement, the requirements for a valid and enforceable arbitration agreement, and the enforcement of arbitral awards. Further, the RCC provides that the power to appoint the arbitral tribunal shall be granted to a designated independent third party, as opposed to the parties (which is the position under the ADR Act). The RCC is also unclear regarding the use of other modes of ADR, such as mediation.

MC 8 was drafted to harmonize Section 181 of the RCC with the ADR Act. As is the case with many implementing rules and regulations, MC 8 was intended to *patch up* the deficiencies of Section 181. As such, MC 8 contains the following provisions, which are either not expressly provided in Section 181 of the RCC or are intended to harmonize the language of Section 181 of the RCC and the provisions of the ADR Act:

1. MC 8 applies to domestic corporations only.²⁾
2. MC 8 applies if the seat of arbitration is the Philippines.³⁾ If the arbitration agreement is silent on

- the seat of arbitration, the seat of arbitration is presumed to be the Philippines.⁴⁾
3. Parties are to refer their disputes to arbitration only after compliance with any agreed pre-arbitration alternative forms of dispute resolution.⁵⁾
 4. Despite not being signatories to the articles of incorporation, by-laws or the relevant arbitration agreement,⁶⁾ the arbitration agreement shall be binding on the corporation, its directors, trustees, officers, and executives or managers.
 5. MC 8 applies only if the applicable arbitration agreement complies with the requirements of the RCC, i.e., it must specify (i) the number of arbitrators, (ii) the appointing authority, (iii) the procedure for appointment of the arbitrator(s), and (iv) the period within which the arbitrator(s) are to be appointed. In case the applicable arbitration agreement does not comply with these requirements, the same may still be considered a valid arbitration agreement under the ADR Act.⁷⁾
 6. The parties are deemed to have agreed on an appointment procedure (as required by the RCC) if the arbitration agreement provides for the application of a set of arbitration rules that include an appointment procedure and a designated appointing authority.⁸⁾
 7. Any party may request the SEC to make an appointment by completing and submitting the form in Schedule 1 of MC 8, with payment of an appointment fee. Unless otherwise requested by the SEC, all communications shall be made electronically.⁹⁾
 8. MC 8 provides guidelines on the factors that the SEC should consider when making an appointment. These factors include the nature of the dispute and the identity and nationality of the parties.¹⁰⁾
 9. Only arbitrators who are accredited by the SEC or the Office for Alternative Dispute Resolution of the Philippines can be appointed by the SEC.¹¹⁾
 10. The appointment of sole or presiding arbitrators will be made under a list-procedure process, similar to the appointment process under the UNCITRAL Arbitration Rules. The list-procedure is not required for the appointment of the first and second arbitrators.¹²⁾
 11. The SEC may decide challenges to arbitrators who are appointed under the rules of MC 8. MC 8 also provides the relevant challenge procedure.¹³⁾
 12. In the broader interests of justice and in order to best serve public interests, the SEC may suspend the strict application of MC 8 in exceptional cases and apply such suitable, fair and reasonable procedures to improve the delivery of public service and to assist the parties in obtaining a speedy and judicious disposition of cases.¹⁴⁾
 13. The pertinent provisions of the ADR Act and its implementing rules and regulations, the SEC Rules of Procedure, and the Special Rules of Court on Alternative Dispute Resolution (“**Special ADR Rules**“) may, in the interest of expeditious dispensation of justice and whenever practicable, be applied by analogy or in a suppletory character and effect.¹⁵⁾

Notwithstanding MC 8, several inconsistencies between the RCC and the ADR Act remain. These issues were not addressed by MC 8 as it was considered that they would be more aptly addressed by the Philippines’ Supreme Court as the authority that issues the procedural rules applicable to court proceedings. Two examples of such inconsistencies are set out below:

1. Under the Special ADR Rules, a case filed in court in violation of an arbitration agreement is allowed to proceed unless a party applies to refer the case to ADR before the pre-trial conference.

In contrast, the RCC requires the Court to dismiss a case before the termination of the pre-trial conference if it determines that the parties have an arbitration agreement.

2. The RCC provides that a final arbitral award shall be executory¹⁶⁾ after 15 days from the date on which the parties receive the award, and the enforcement of the award may be stayed only by the filing of a bond or the issuance by the appellate court of an injunctive writ. In contrast, there is no similar provision under the Special ADR Rules. Generally, a party is required to file a petition to enforce an arbitral award. Moreover, the filing of a bond does not automatically suspend the enforcement of an arbitral award.

Based on the above, in a practical sense, an arbitration under MC 8 may proceed. However, unless the Supreme Court issues the relevant rules on enforcement, the enforcement of an arbitral award rendered by a tribunal constituted under MC 8 remains uncertain.

The authors look forward to the issuance of the relevant procedural rules by the Supreme Court, which will hopefully help to clarify the remaining inconsistencies between the ADR Act and Section 181 of the RCC. While these inconsistencies persist, it may be difficult for Section 181 to achieve its intended purpose of promoting the use of alternative modes of dispute resolution and so de-clog court dockets.

This article is based on a talk on the salient provisions of MC 8 that one of the authors of this article, Mr. Jay Patrick Santiago, gave at the monthly fellowship meeting of the Philippine Institute of Arbitrators. Mr. Santiago took part in the drafting of MC 8.

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References

- ?1** MC No. 8 defines an “*intra-corporate dispute*” as “*any dispute involving the rights and obligations, its directors, trustees, officers, and stockholders/members arising from the implementation of the article of incorporation or bylaws, or from intra-corporate relations.*”
- ?2, ?3** MC 8, Sec. 2.
- ?4** MC 8, Sec. 9.
- ?5, ?6** MC 8, Sec. 6.
- ?7** MC 8, Sec. 8.
- ?8** MC 8, Sec. 14.
- ?9, ?10, ?12** MC 8, Sec. 15.
- ?11** MC 8, Sec. 10.
- ?13** MC 8, Sec. 12.
- ?14** MC 8, Sec. 24.
- ?15** MC 8, Sec. 25.
- ?16** This means that a winning party would have the right to enforce the arbitral award as a matter of right without further proceedings that may provide the losing party an opportunity to object to the execution.

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