

THE PHILIPPINE ADR REVIEW

JANUARY 2010

BROADENING ITS SCOPE OF ARBITRATION ADVOCACY



Secretariat

Unit 937, 9th Floor,
Cityland Megaplaza Condominium
ADB Avenue corner Garnet Road,
Ortigas Center, Pasig City.
Telephone: +632 9865171
Telefax: +632 9149608
Email: secretariat@pdrcci.org
info.pdrcci@gmail.com
Website: www.pdrcci.org

Officers

Chief Justice Artemio V. Panganiban (Ret.), *Chairman*
Atty. Custodio O. Parlade, *President Emeritus*
Atty. Victor P. Lazatin, *President*

Atty. Miguel B. Varela, *Vice Chairman, Internal Affairs*
Atty. Eduardo R. Ceniza, *Vice Chairman, External Affairs*

Atty. Beda G. Fajardo, *Vice-President*
Atty. Salvador S. Panga, Jr., *Secretary General*
Atty. Mario E. Valderrama, *Deputy Secretary General*
Mr. Gregorio S. Navarro, *Treasurer*
Dr. Eduardo G. Ong, *Assistant Treasurer*
Atty. Gwen Grecia-De Vera, *Corporate Secretary*
Atty. Ricardo Ma. P.G. Ongkiko, *Assistant Corporate Secretary*

Board of Trustees

Atty. Shirley F. Alinea
Atty. Daisy P. Arce
Engr. Salvador P. Castro, Jr.
Atty. Eduardo R. Ceniza
Atty. Wilfredo M. Chato
Atty. Gwen Grecia-De Vera
Atty. Roberto N. Dio
Atty. Beda G. Fajardo
Atty. Jose A. Grapilon
Atty. Victor P. Lazatin
Atty. Bienvenido S. Magnay
Mr. Gregorio S. Navarro
Atty. Rogelio C. Nicandro
Dr. Eduardo G. Ong
Atty. Ricardo Ma. P. G. Ongkiko
Atty. Victoriano V. Orocio
Atty. Claro V. Parlade
Atty. Custodio O. Parlade
Dean Rufus B. Rodriguez
Atty. Mario E. Valderrama
Atty. Miguel B. Varela

PDRCI Unveils Upcoming Projects




By: Erdelyn C. Go

PDRCI has announced its new projects, which include the online dispute resolution system, its new website and newsletter, training on the Special Alternative Dispute Resolution Rules, and the opening of a permanent office.

The online dispute resolution system was proposed earlier by the Board of Trustees. It aims to give broader access to arbitration, mediation and conciliation, and other forms of ADR offered by PDRCI. The Board will establish the protocols and the roster of arbitrators for the new system.


Atty. Roberto Dio is in charge of the website and newsletter projects. PDRCI will come out with a quarterly electronic newsletter that will feature organizational news, member profiles, and updates on ADR developments. It will also publish short articles written by the members and guest authors.

The Philippine Supreme Court recently issued the Special ADR Rules to implement Rep. Act No. 9285 (2004), also known as the "Alternative Dispute Resolution Act of 2004." To introduce the public and practitioners to the new rules, the PDRCI Education Committee headed by Atty. Daisy Arce will sponsor a seminar.

PDRCI has commissioned one of its Trustees, Engr. Salvador Castro, to design its new office to be located at the Bonifacio Global City. The new office will house a conference room, two break-out rooms convertible to a conference or mediation room, a multi-purpose lounge, a library and a room for the Secretariat. 

CONTENTS

Message from the President	4
A brief history of PDRCI.....	4
PDRCI supports Vis moot court Asia competition	3
When litigants may choose own judges	3
SC upholds separability of arbitration clause	2

 The Philippine ADR Review publishes matters of legal interest to PDRCI's members and readers. The articles printed in the Review contain individual views of the authors and do not state PDRCI's policy. Contributions may be sent to the PDRCI Secretariat. All materials submitted for publication become property of PDRCI and are subject to editorial review and revisions. Texts of original legal materials digested are available upon request.

Supreme Court Upholds Doctrine of Separability of Arbitration Clause

By: Juan Paulo P. Colet

In a Decision promulgated last October 23, 2009, the Supreme Court's Second Division ruled that parties may no longer refuse to comply with their arbitration clause or agreement on the ground of invalidity of the main contract.

Background

The Supreme Court's ruling was rendered in G.R. No. 179537, *Philippine Economic Zone Authority vs. Edison (Bataan) Cogeneration Corporation*. The controversy originated from a dispute between the Philippine Economic Zone Authority (PEZA) and Edison (Bataan) Cogeneration Corporation (Edison) over their Power Supply and Purchase Agreement (PSPA).

PEZA and Edison entered into the PSPA in October 25, 1997, whereby Edison undertook to supply electricity to PEZA for resale to business locators in the Bataan Economic Processing Zone. Thereafter, Edison requested PEZA for a tariff increase, noting that PEZA previously granted a tariff increase to another electricity supplier in the Mactan Economic Zone. Despite repeated demands, PEZA refused to grant Edison's request. This prompted Edison to terminate the PSPA and demand payment of a pre-termination fee. When PEZA opposed the demand, Edison requested PEZA to submit the dispute to arbitration pursuant to the arbitration clause of their PSPA. However, PEZA refused to go into arbitration or to nominate its representative to the arbitration committee under the PSPA arbitration clause.



Edison then filed a complaint against PEZA with the Regional Trial Court in Pasay City to enforce the parties' arbitration agreement. The trial court ruled in Edison's favor and appointed retired Supreme Court Chief Justice Andres Narvasa as chairman of the arbitration committee and retired Supreme Court Justices Hugo Gutierrez and Jose Y. FERIA as the PEZA's and Edison's respective representatives to the arbitration committee. The trial court then referred Edison's Request for Arbitration to the said committee.


PEZA appealed the ruling to the Court of Appeals, which upheld the trial court's order. After its motion for reconsideration was denied by the appellate court, PEZA filed a petition for review on certiorari with the Supreme Court.

Doctrine of Separability

PEZA argued that its dispute with Edison was not arbitrable because the provision in the PSPA on payment of pre-termination fee was invalid and unenforceable for being gravely onerous, unconscionable, greatly disadvantageous to the Philippine Government and

against public policy. PEZA cited the Supreme Court's Decision dated February 28, 2005 in the case of *Gonzales vs. Climax Mining Ltd.*, where it was stated that the question of validity of the main contract will affect the applicability of the arbitration clause itself.

The Supreme Court rejected PEZA's argument and held that even assuming that the pre-termination fee clause of the PSPA was illegal, it would not affect the agreement between PEZA and Edison to resolve their dispute by arbitration. In support of its ruling, the High Tribunal applied the doctrine of separability or severability that it previously used in its Resolution dated January 22, 2007 to resolve the dispute in the case of *Gonzales vs. Climax Mining Ltd.*, which modified the Supreme Court's 2005 Decision cited by PEZA.

Under the doctrine of separability, an arbitration agreement is considered as independent of the main contract. Since the two are separate, the arbitration agreement does not automatically terminate when the main contract comes to an end. Moreover, the doctrine of separability holds that the invalidity of the main contract, also known as the "container contract," does not affect the validity of the arbitration agreement. Hence, regardless of the invalidity of the main contract, the arbitration agreement therein remains valid and enforceable. In view of this doctrine, the Supreme Court held that the issues raised by Edison against PEZA were subject to arbitration. 

When Litigants May Choose Their Own Judges

By: Artemio V. Panganiban, Chairman
Reprinted from *The Philippine Daily Inquirer*

The Supreme Court encourages the use of arbitration, because it helps to unclog the dockets of the judiciary and to improve its efficiency. As its distinct advantage, arbitration is the only method in which the litigants can choose their own judges and craft the rules to be used in deciding their disputes. It is akin to “privatizing” the courts, a concept that should endear arbitration to private business.

Because arbitrators are chosen on a case-to-case basis and, therefore, have no other disputes to attend to, they are able to hasten the procedures and the judgment. Equally important, the judgment is credible, because it is rendered by “judges” implicitly trusted by the litigants who chose them.

To be sure, arbitration may be conducted prior to, or in the course of, a court litigation. For this purpose, several privately-run arbitration centers have been organized both in the Philippines and abroad. One such entity that has attained acceptance is the Philippine Dispute Resolution Center, which provides a list of arbitrators, administrative services and hearing facilities. The administrative costs as well as the arbitrators’ fees are borne by the parties. These expenses are pre-agreed upon prior to the arbitration process itself.

Since it encourages arbitration, the Supreme Court almost always upholds the validity of agreements to arbitrate as well as the finality of arbitral awards. To enforce them, there is in general a need for judicial confirmation. But the process is fairly simple and the “execution” of arbitral judgments is almost always granted.

Our laws especially encourage the arbitration of construction disputes. A special government agency, the Construction Industry Arbitration Commission (CIAC), has been organized to handle these problems. Different from ordinary arbitration, those fall-

ing under the CIAC’s jurisdiction do not choose their own arbitrators. To balance this disadvantage, CIAC arbitral awards do not need judicial confirmation.

International arbitration. Arbitration is especially popular in settling international commercial disputes. In fact, most international contracts contain stipulations expressly instituting arbitration as the mode of settling disputes that may arise from them. Sometimes, the parties even specify the country and the private dispute center they want. Consistent with global practice, Sec. 19 of RA 9285 states that “international commercial arbitration shall be governed by the Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law” (UNCITRAL Model Law).

Several global organizations are home to arbitration centers. For instance, the World Bank sponsors the International Center for the Settlement of Investment Disputes in Washington D.C., and the International Chamber of Commerce promotes the International Court of Arbitration in Paris. Though private in character, these arbitral bodies have dispensed awards in the hundreds of millions of dollars.

Retired Supreme Court justices, like Florenz D. Regalado, Florentino P. Feliciano, Vicente V. Mendoza, and Bernardo P. Parado, have served as domestic and international arbitrators.

Some of the Filipino lawyers specializing in arbitration are Custodio O. Parlade, Sedfrey A. Ordoñez (†), Eduardo R. Ceniza, Wilfredo M. Chato, Beda G. Fajardo, Victor P. Lazatin, Eduardo de los Angeles, Eduardo P. Lizares, Claro V. Parlade, Augusto A. San Pedro, Mario E. Valderama, Philip Sigrid Fortun, Jose Vicente B. Salazar, Bi-venenido S. Magnaye, and Rogelio C. Nica-

PDRCI Supports Philippine Participation in Vis Moot Asia Competition

By: Frances Cyrille F. Tandog


PDRCI’s Special Projects Committee, under the leadership of Atty. Mario Valderrama, recently unveiled plans for PDRCI to sponsor the first-ever batch of Philippine participants to the 7th Annual Willem C. Vis (East) International Commercial Arbitration Moot.

The Hong Kong-based student competition, widely known as Vis East, is the sister competition of the Vienna Vis, one of the fastest-growing international competitions for law students. Vis East was launched in Asia to accommodate the increasing number of interested participants from the world’s leading law schools.

The goal of the Vis Moot is to foster the study of international commercial law and arbitration for resolution of international business disputes through its application to a concrete problem of a client. It also seeks to train law leaders of tomorrow in methods of alternative dispute resolution. Participating law students will compete in two crucial phases: the writing of memoranda for both claimant and respondent, and the hearing of oral argument based upon the memoranda - both judged by a panel of arbitration experts.

As PDRCI aims to promote and encourage the use of arbitration as an alternative mode of settling commercial transaction disputes in the Philippine business community, sponsorship of the Philippine team to the Vis East competition is a great fit in terms of spreading awareness among future lawyers and business leaders.

Atty. Valderrama said that the Special Projects Committee would send a team of three Filipino law students (two participants and one alternate) to this year’s competition, with PDRCI to shoulder the registration fee as well as travel and accommodation expenses. The Committee is fine-tuning the process of selecting a team from the country’s top law schools. It hoped to finalize the choice of the Philippines’ first-ever representatives to the prestigious competition before the end of 2009.

The Chartered Institute of Arbitrators East Asia Branch is principal sponsor of the Vis East and School of Law of City University of Hong Kong is this year’s host. This year’s Vis East welcomes over 500 students, coaches and arbitrators from around the world. The final round of Vis East will be held in Hong Kong on March 15-21, 2010. 

From the President



When I assumed the Presidency of PDRCI last 7 July 2009, I immediately pondered on how I could make PDRCI

better ... what projects to undertake. Among several projects, the concept of a written publication by PDRCI – the “Philippine ADR Review” – was the most appealing. Not only would it chronicle news and developments in ADR in the Philippines; but more importantly it would memorialize the thoughts and ideas of our members on ADR practice. Also, the publication was envisioned to be the primary means to connect and communicate with our members, our colleagues and the rest of the world. Moreover, the publication would be solid evidence that PDRCI has indeed ripened into a mature ADR institution.

Equal to this daunting challenge is our first editor – Atty. Roberto “Boy” Dio. He is not only a prolific writer but is also a passionate apostle of ADR. Under his able leadership, he was able to assemble the people and the materials to create this maiden issue.

It is with great hope and abiding faith that I welcome this labor of love – the initial issue of the “Philippine ADR Review.” More power to the PDRCI!



Victor P. Lazatin

A Brief History of PDRCI

By Custodio O. Parlade, President Emeritus

PDRCI started as a Committee on Arbitration created by the Philippine Chamber of Commerce and Industry, Inc. (PCCI) during the incumbency of Mr. Fred Elizalde as President in 1976. In 1986, during the tenure of President Aurelio Periquet, Atty. Miguel Varela was appointed as Committee Chairman. Atty. Valera invited me to join the Committee as Vice Chair. This was sometime in 1986.


In view of my involvement in various PCCI committees, in the succeeding year, on the recommendation of Atty. Valera, I was appointed Chair. Having been given the full authority to select and invite members of the new committee, over the years, at my invitation, the following members joined the committee.: Victor P. Lazatin, Gonzalo T. Santos (deceased), Bienvenido Magnaye, Eliseo B. Alampay, Simeon Marcelo (who became Solicitor General and later Ombudsman), Augusto San Pedro, Daisy P. Arce, Wilfredo M. Chato, Gregorio S. Navarro, Beda G. Fajardo, Rufus B. Rodriguez (now a Congressman), Arthur P. Autea, Joven B. Joaquin, Victoriano V. Orocio, Regulus E. Cabote, and Mario E. Valderama.

The Committee on Arbitration considered its primary task to promote arbitration. This called for an educational campaign to provide necessary information to the business community and their lawyers about arbitration as a form of alternative dispute resolution particularly of commercial disputes. This required dissemination of the arbitration law and the sparse jurisprudence then available.

The Committee held seminars. The

Hong Kong International Arbitration Centre, through Peter Caldwell, offered support and cooperation. The Centre provided resource speakers from Hong Kong in several international seminars sponsored by the Committee over the years. The other speakers were: Louse Barrington, Karen Mills and David Sandborg. These speakers even underwrote their own expenses.

We also invited Filipino resource speakers, among them, Justice Florentino Feliciano and Dean Gonzalo T. Santos. The latter had been appointed as arbitrator in an ICC and ICSID arbitration. At the initiative of PCCI, the Committee also conducted arbitration seminars in the cities of Cebu, Davao and Bacolod in central and southern Philippines.

Eventually, the Committee decided to establish PDRCI as a separate corporate entity, as the arbitration arm of PCCI. PCCI nominated two of its members to be in the PDRCI Board of Trustees, namely: Jaime E. Ladao and, of course, Atty. Miguel B. Varela. Mr. Ladao was replaced later by Dr. Eduardo G. Ong. 

The Philippine ADR Review is a publication of the Philippine Dispute Resolution Center, Inc. All rights reserved. No part of the newsletter may be reproduced in any form without the written permission of the authors.

Roberto N. Dio, Editor

Shirley Alinea, Donemark Calimon, Ramon Samson, Contributors

Juan Paolo P. Colet, Frances Cyrille F. Tandog, Erdelyn C. Go, Staff Writers