THE PHILIPPINE ADR REVIEW

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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@pdrci.org
info.pdrci@gmail.com
Website: www.pdrci.org

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PDRCI trains 53 new arbitrators

By: Salvador S. Panga, Jr.

PDRCI President *Emeritus* Custodio Parlade discusses the enforcement and recognition of and challenges to arbitral awards.

PDRCI held last May 26-29, 2010 a training seminar on "The Law and Practice of Commercial Arbitration" at The Linden Suites, Ortigas Center, Pasig City, Philippines. The seminar was attended by 53 participants, almost half of whom were from the Office of the Solicitor General, with the rest coming from private practitioners.

The course lecturers, which included some of the most experienced arbitrators and arbitration counsel in the country, discussed the fundamentals of arbitration law and practice and guided the participants in step-by-step fashion through the entire arbitral process. The topics included drafting of the arbitration agreement, preparation of the arbitration claims and defenses, selection of arbitrators, pre-hearing considerations, up to conducting the arbitration hearings and the recognition, enforcement and challenge of arbitral awards.

The speakers were led by PDRCI President Victor P. Lazatin, President Emeritus Custodio O. Parlade, and trustees Gwen B. Grecia-de Vera, Salvador S. Panga, Jr., **PAGE 4 ▶**

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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.

Effect of a pathological clause in an arbitration agreement

By: Custodio O. Parlade [1]

A pathological clause is a defective clause. It is defective because it may be incomplete or ambiguous. It presents problems of interpretation and implementation which may require prior resolution before the arbitration moves forward. In the worst case, it makes the arbitration clause dysfunctional or inoperative unless a court intervenes.

A typical incomplete clause is one that simply provides that a dispute arising from a contract between the parties "shall be submitted to arbitration."

If the parties have their place of business in the Philippines, the parties will be presumed to have intended that Philippine arbitration laws shall apply. Fortunately, Philippine ADR laws supply the deficiency in the form of default provisions. First, it will be presumed that the parties had provided for ad hoc, as opposed to, institutional arbitration; second that in default of agreement of the parties, the number of arbitrators shall be three; third, that the parties agree that the place where arbitration proceedings shall be conducted shall be in Metro Manila; and fourth, that the language of the arbitration shall be English.

But if at least one of the parties has a place of business outside the Philippines, e.g., Thailand, the threshold question would be, "What arbitration law will apply?" There could well be a serious controversy concerning this matter if the Thai party insists that the applicable arbitration law should be Thai law and the default provisions under Thai arbitration law happen to be different from those in the Philippine ADR Act.

However, if the claim involves a construction dispute and one of the parties invoked the jurisdiction of the Philippine Construction Industry Arbitration Commission (CIAC), the arbitration would be administered by CIAC and the CIAC Arbitration Rules would apply, in which case none of the difficulties discussed above would arise.

These problems in a non-CIAC arbitration would be minimized if the parties agreed on institutional arbitration. Thus, if the parties stipulated that any dispute arising from a contract shall be submitted to arbitration under the arbitration rules of the Philippine Dispute Resolution Center, Inc. (PDRCI), it would be presumed that Philippine ADR laws shall apply and the PDRCI arbitration rules would supply the deficiencies in the arbitration agreement of the parties.

But when providing for institutional arbitration, care should be taken to properly describe the institution under whose rules the proceedings shall be conducted. In a case, the arbitration clause provided that the arbitration shall be administered by "the Arbitration Committee of the Republic of the Philippines, Chamber of Commerce," a non-existent institution. The Philippine Court of Appeals implicitly decided that the arbitration shall be ad hoc and that the trial court should appoint the arbitrators.

In drawing up an arbitration clause where the parties intend to limit the jurisdiction of an arbitral tribunal, questions often arise if the arbitral tribunal may decide claims which ostensibly are outside the scope of the arbitration clause but which are necessary to the resolution of the defined issues. The Philippine Supreme Court has been held that a court should liberally construe arbitration clauses. Any doubt should be resolved in favor of arbitration.

Where an arbitration agreement provides for both arbitration and litigation

[1] President *Emeritus*, PDRCI.

as modes of resolving disputes arising under a contract, care should be taken to delineate when a party may have recourse to either. The problem is exemplified in the following cases:

(a) "Any question between the contracting parties that may arise out of or in connection with the Contract, or breach thereof, shall be litigated in the courts of Quezon City except when otherwise specifically submitted for settlement through arbitration as provided herein." The difficulty arose from the failure of the parties to delineate what disputes may be resolved by arbitration and what may be submitted to the courts.

(b) "If at any time any controversy should arise between the contractor and subcontractor which controversy is not controlled or determined by section 27-A or other provisions of this subcontract will be submitted to arbitration. The controversy shall be decided in accordance with current rules of the AAA." The incomplete sentence rendered uncertain the disputes that should be submitted to arbitration and those that should be decided by the court.

(c) "If judicial action is necessary, the forum shall be any court of appropriate jurisdiction." On the other hand, the general conditions of the contract provides for CIAC jurisdiction. "In case of irreconcilable conflict, the Subcontract shall prevail."

The permissive "may" as in the provision that a party "may have recourse to arbitration" should be avoided. In one case, the Philippine Court of Appeals held that the contract as a whole suggests that referral of the parties' dispute to arbitration was merely an option and not a definite agreement to resort to arbitration as an alternative mode. This was indicated by the fact that the agreement of the parties was not restrictive but merely permissive. Hence, the appellate court held that before any dispute could be referred to arbitration, the mutual consent of the parties was required.

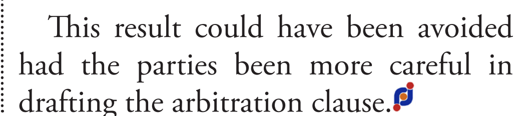
It is not uncommon in contracts to provide for a multi-layered dispute arbitration clause. A mediation or conciliation, or a dispute board adjudication, or even a serious effort negotiation may be provided for in a contract before a party may have recourse to arbitration. The agreement to arbitrate must state whether these additional modes of dispute resolution are a condition precedent or an alternative to arbitration.

Fortunately, in the cases where problems arise because of incomplete or ambiguous arbitration clauses, the issues raised can be resolved by an arbitral tribunal after hearing the parties. The adverse result may only be a delay in proceeding with the arbitration. But in a few exceptional cases, the issues raised are fundamental and require the intervention of the court.

This was what happened in *Magellan Capital Management Corporation and Magellan Capital Holdings Corporation v. Zosa*, involving a management agreement whereby Magellan Capital Holdings Corporation (MCHC) appointed Magellan Capital Management Corporation (MCMC) as its manager to operate its business. MMCH and MCMC then hired Zosa as President and Chief Executive Officer of MCHC. The employment agreement included an arbitration clause which provided that any dispute arising therein should be submitted to a final and binding arbitration by a panel of three arbitrators, one of whom would be appointed by MCMC, another by MCHC, and the third by Zosa.

At the end of one year, Zosa was not reappointed allegedly due to loss of trust and confidence. Zosa sued for damages. Defendant corporations moved to dismiss arguing that the court had no jurisdiction since the dispute should be resolved by arbitration. The trial court found the arbitration agreement partially void since the two corporations represented the same interest and each of them was entitled to appoint one arbitrator and Zosa the third arbitrator. It invoked Article 2045 of the Civil Code, which provides that "Any clause giving one of the parties power to choose more arbitrators than the other is void and of no effect." This decision was affirmed by the Supreme Court.

This result could have been avoided had the parties been more careful in drafting the arbitration clause.



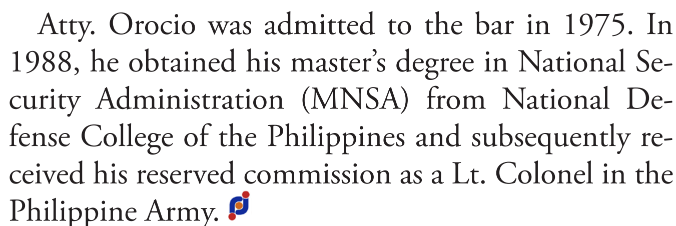
MEMBER SPOTLIGHT

Victoriano V. Orocio

Atty. Victoriano V. Orocio manages his firm, V.V. Orocio & Associates, which specializes in real estate and energy litigation such as power rate adjustments, recovery of ownership and possession of land, and right-of-way acquisitions. He also represents government employees who were unjustly dismissed from service. Prior to his private practice, Atty. Orocio was connected with the legal department of the state-owned National Power Corporation for 18 years.

After leaving NPC in 1994, Atty. Orocio, at the behest and encouragement of his mentor and dean Custodio O. Parlade, immersed himself in commercial arbitration, both domestic and foreign. Due to his active participation in and advocacy of commercial arbitration as an alternative mode of settling disputes, he has been a member of the PDRCI Board of Trustees since 2001 up to present, where he currently chairs its membership committee.

Atty. Orocio has successfully prosecuted three personal cases with the Philippine Supreme Court: *Victoriano V. Orocio vs. Commission on Audit, et al.*, G.R. No. 75959, 213 SCRA 109 (1992); A*tty. Victoriano V. Orocio vs. Justice Vicente Q. Roxas,* A.M. Nos. 07-115-CA-J and CA-08-46-J, August 19, 2008; and *Atty. Victoriano V. Orocio vs. Edmund P. Anguluan and NPC,* G.R. No. 179892-93, January 30, 2009. He recently won from the Supreme Court an award for Php33 billion in backwages, benefits and separation pay on behalf of 9,000 illegally dismissed NPC employees.



Atty. Orocio was admitted to the bar in 1975. In 1988, he obtained his master's degree in National Security Administration (MNSA) from National Defense College of the Philippines and subsequently received his reserved commission as a Lt. Colonel in the Philippine Army.

PDRC trains 53 new arbitrators

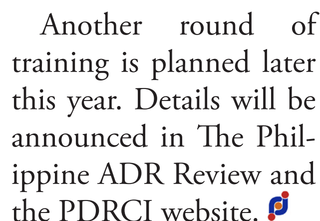
◀ Seminar participants listen to Prof. Art Autea during the discussion.

PDRCI President Victor P. Lazatin emphasizes a point in his lecture on conducting hearings. ▶

FROM PAGE 1 Daisy P. Arce, Roberto N. Dio, and member Arthur P. Autea.

The lecturers also discussed in depth the relevant laws on arbitration, including the ADR Act of 2004, the Arbitration Law, and the UNCITRAL Model Law on International Commercial Arbitration. Also covered were recent developments in commercial arbitration, including the Special ADR Rules of Court and the Implementing Rules and Regulations of the ADR Act (DOJ Department Circular No. 98), which took effect in October 2009 and December 2009, respectively.

At the end of the seminar, the PDRCI administered an optional written assessment for participants who wished to be included in the list of PDRCI-trained arbitrators.



Another round of training is planned later this year. Details will be announced in The Philippine ADR Review and the PDRCI website.

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***Roberto N. Dio**, Editor*

***Shirley Alinea, Donemark Calimon, Ramon Samson**, Contributors*

***Germai C. Abella, Juan Paolo P. Colet, Erdelyne C. Go**, Staff Writers*