The Philippine ADR Review

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BROADENING ITS SCOPE OF ARBITRATION ADVOCACY

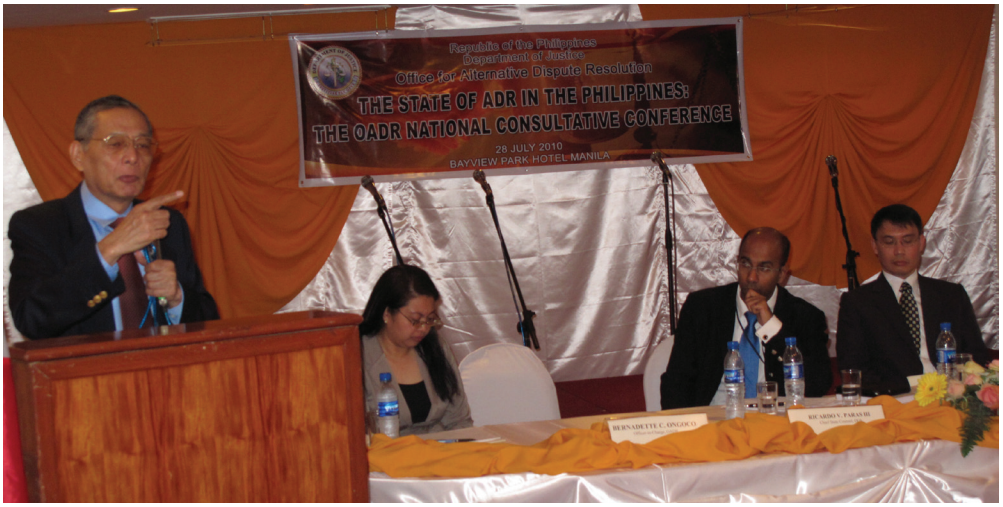
PDRCI
PHILIPPINE DISPUTE RESOLUTION CENTER INC.

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

Office for ADR holds National Consultative Conference

By Salvador S. Panga, Jr.



PDRCI President Victor Lazatin speaks on commercial arbitration in the Philippines during the OADR forum. Behind him are OADR Executive Director Bernadette Ongoco, Asian Development Bank specialist Mohd Sani Mohd Ismail, and PDRCI Secretary General Salvador Panga, Jr.

The Office for Alternative Dispute Resolution (OADR), which was established in December 2009 pursuant to Republic Act 9285 (the ADR Act of 2004), hosted the National Consultative Conference on ADR on July 28, 2010 at the Bayview Park Hotel in Manila.

The conference was organized to allow OADR to obtain baseline data on the nature, extent and quality of all current ADR activities in the Philippines, and the diversity of situations and circumstances under which they are practiced; identify priority areas and sectors for development and engagement; and engage the ADR community in a conversation on the best ways by which the OADR can provide meaningful and effective assistance to its constituents.

Over 150 participants from approximately 50 private organizations, educational institutions and government agencies attended the conference. The participating organizations included those involved in the study, administration, management, or conduct of ADR activities, as well as government agencies or institutions exercising quasi-judicial functions that have

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Commercial Arbitration: A Preferred Alternative to Litigation

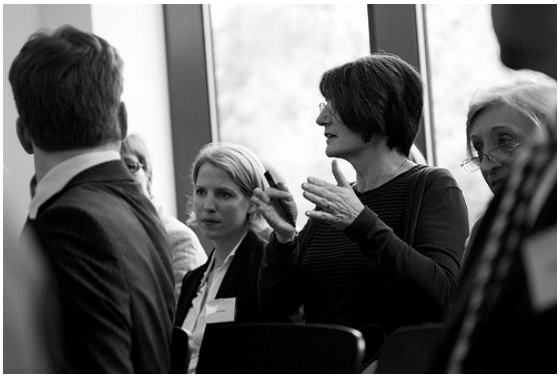
By: Eduardo R. Ceniza

In Part 1 of his article, Atty. Ceniza discussed some of the important reasons why arbitration, in the Philippine setting, ought to be a preferable, if not an altogether compelling choice, as against court litigation, for the resolution of commercial disputes. Among the reasons he cited were (a) speed and economy; and (b) special competence of arbitrators. He discusses the other important reasons in Part 2 of his article.

Neutrality and Party Autonomy

Another advantage of arbitration over court litigation is that in arbitral proceedings, parties can place themselves on an equal footing in at least five key respects. The parties are free to choose the (a) place of arbitration, e.g., it can take place in any city in the Philippines or elsewhere; (b) procedures or rules of law to be applied; (d) nationality of the arbitrators, e.g., in PDRCI there are Filipino and foreign accredited arbitrators; and (e) legal representation, e.g., the parties can be represented by Filipino or foreign lawyers.

In contrast, these key factors are not within the control of the parties in court litigation. In the Philippines, venue is generally fixed by the Rules of Court; the proceedings are governed by the Rules of Court; all judges must be Filipino citizens; and only lawyers who are Filipino citizens and who have been admitted to the practice of law in the Philippines can represent the parties in court.



Final, binding decisions

Although parties to commercial transactions have a number of options for resolving their disputes, only litigation and arbitration can provide a binding and enforceable decision. However, unlike the decisions made by trial courts, arbitral awards are usually not subject to appeal at different levels and become final and binding on the parties once rendered by the arbitral tribunal and confirmed by the courts. As pointed out above, one major cause for undue delay in the disposition of cases in the Philippines is the availability of interminable appeals, often frivolous, at various levels of the hierarchy of courts.

Arbitral awards may be challenged in either the country where the arbitral award is made or where enforcement is sought, but the grounds for challenging arbitral awards are very limited. In contrast, decisions of trial courts are appealable on broad questions of fact or law or both.

International recognition and enforcement of arbitral awards

International commercial arbitration is traditionally hailed as affording the most substantial benefit of producing an award that, in the overwhelming majority of cases, is entitled to recognition and enforcement in 134 countries that have acceded to the New York Convention of 1958. This regime of almost universal recognition and enforcement compares favorably with that regulating the recognition and enforcement of judgments rendered by foreign courts. Those judgments are recognized and enforced only when domestic law or a relevant treaty so provides

The general rule prevailing in civil law systems is that foreign judgments are not recognized or enforced at all or on a basis of reciprocity, with frequent uncertainty as to what form of reciprocity is required. In common law countries, foreign judgments are generally recognized and enforced, but courts retain a significant measure of leeway. European countries have adopted a regional recognition and enforcement scheme laid down in the Brussels Convention, as amended by the Lugano Convention. Generally, however, the liberality in the recognition and enforcement of international arbitral awards prescribed by the New York Convention stands in mark contrast to the uncertain fate that awaits foreign judgments in domestic courts.

Private and confidentiality

Arbitration proceedings are not open to the public, and only the parties themselves receive copies of the award. The parties can expect to keep their trade secrets private from third parties. In contrast, court proceedings are open to the public, and court records are public records.

Institutional arbitration in the Philippines

Institutional arbitration in the Philippines can be either under the ICC International Court of Arbitration or the Philippine Dispute Resolution Center, Inc. (PDRCI). A third arbitral institution is the Construction Industry Arbitration Commission (CIAC), the jurisdiction of which, however, is limited to arbitration of disputes involving construction contracts in the Philippines.

Institutional arbitration is the one in which the proceedings are administered and conducted by an arbitral institution under its pre-established set of rules, while an ad hoc arbitration is constructed by the parties with rules created solely for that specific case. In ad hoc arbitration the parties are "on their own" for all the aspects of the case, they must solve the problem of appointing the arbitrators, addressing issues like "objections, compensation, hearing arrangements

and award procurement."

Advantages of institutional arbitration

- Availability of pre-established rules and procedures;
- Administrative assistance from institutions with a secretariat;
- Lists of experienced arbitrators, often listed by fields of expertise;
- Appointment of arbitrators by the institution if the parties request it;
- Physical facilities and support services for arbitrations;
- Assistance in encouraging reluctant parties to proceed with arbitration; and,
-An established format that has proven workable in prior disputes.

Commentators usually prefer institutional arbitration under most circumstances, arbitral institutions playing a major role in the effectiveness of international and domestic commercial arbitration, by an efficient processing of the cases submitted to them and by assuring impartial administrative services to the parties. Therefore, since very often even ad hoc arbitration requires the application of institutionally promulgated rules of procedure, parties are well advised to opt for institutional arbitration rather than ad hoc.

Different combinations between purely ad hoc and institutional arbitration also exist, such as parties appointing the arbitrators but choosing the applicability of a particular arbitral institution, without giving any function to that institution; or parties choosing an institution to administer their proceeding but excluding the applicability of part of the rules of that institution; or parties mandating an arbitral institution only to appoint the arbitrators. These constructions, although some kind of hybrids between clearly ad hoc or institutional arbitration, are usually considered as being ad hoc proceedings and hereinafter will be treated as such, because they serve only a particular case and are established for the purpose of a single proceeding.

Risks of ad hoc arbitration

A leading authority defined *ad hoc* arbitration "in its purest sense ... (as) a complete agreement between the parties with respect to all aspects of the arbitration, including the law which will be applied, the rules under which the arbitration will be carried out, the method for the selection of the arbitrator, the place where the arbitration will be held, the language, and finally, and most importantly, the scope and issues to be resolved by means of arbitration."

The biggest risk of ad hoc arbitration in the absence of an applicable set of pre-established rules is that lack of party cooperation may easily disrupt the proceeding. The parties can adopt their own set of rules for that particular dispute either by creating new rules and inserting them in the arbitration agreement or by referring to some pre-existing set of rules elaborated by an arbitral institution or by an international organization, such as UNCITRAL or CPR. They may also mandate the arbitral tribunal to decide on the rules as it may consider when the dispute arises. All these prospects assure great flexibility but bring potential complications in the proceeding at the same time. Difficulties usually arise at the moment when one of the parties, otherwise very cooperative at the moment of drafting a liberal ad hoc arbitration clause, later acts in bad faith and refuses to carry out the agreement.

PDRCI: A modern arbitral center

PDRCI has adopted as its own rules the UNCITRAL Arbitration Rules with some modifications to make the rules conform with the ADR Act of 2004. Most arbitrators and arbitration lawyers in the Philippines and abroad are familiar with the UNCITRAL Arbitration Rules.

The following are some of the good reasons why the business community may have their commercial disputes resolved by arbitration under the auspices of PDRCI.

The Philippine Dispute Resolution Center is a modern arbitration institution for international and domestic commercial arbitration. It's roster of members include retired justices and judges, prominent lawyers, distinguished professors of law, prominent engineers, architects, accountants and contractors.

- It has a panel of accredited arbitrators, both local and foreign.

- PDRCI is highly regarded in the Asia Pacific region. It is a founding member of the Asia Pacific Regional Arbitration Group (APRAG), which is composed of 23 leading arbitration centers or institutions in the Asia Pacific region. Some PDRCI members are accredited arbitrators of Singapore International Arbitration Center and the International Arbitration Center of Malaysia.

-PDRCI can provide parties with administrative and physical facilities for arbitration proceedings, including an experienced secretariat, meetings rooms and the use of computers, fax machines, photocopying machines, etc.

- PDRCI's administrative fees as well as arbitrators' fees are very reasonable. Compared with the fees charged by the ICC International Court of Arbitration and those charged by regional arbitral institutions in South Korea, Malaysia, Singapore and Hong Kong, PDRCI's fees are very much lower.

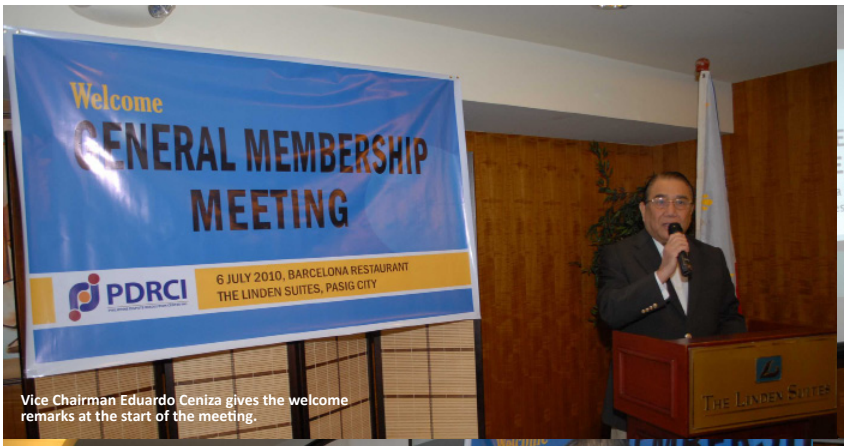
Domestic parties in commercial disputes need not go abroad for the settlement of their disputes by arbitration. Commercial arbitration, both domestic and international, is available in the Philippines at less cost and with the assurance that all required facilities are conveniently available.

About the Author

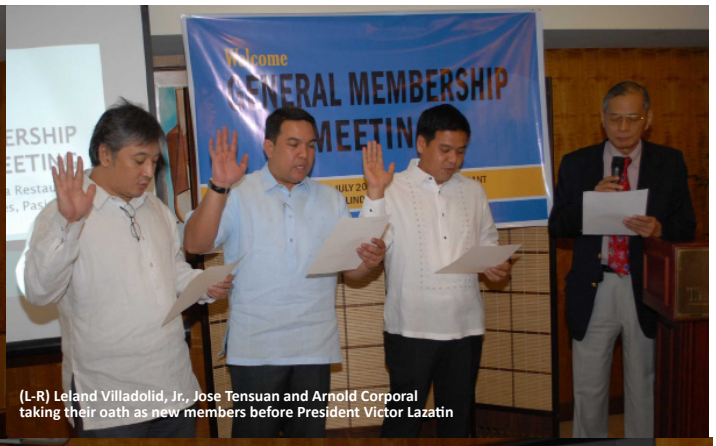
Atty. Eduardo R. Ceniza is the General Counsel of the Lucio Tan Group of Companies and, concurrently, Senior Vice President - General Counsel and Corporate Secretary of Philippine Airlines, Inc. He was past president of PDRCI and incumbent Chairman of the Philippine Institute of Arbitrators. He is also the Chairman of the Philippine Chapter of the East Asia Branch, Chartered Institute of Arbitrators; President of the Philippine Institute of Construction Arbitrators and Mediators; and Vice President for External Relations of the Philippine Dispute Resolution Center, Inc. He is a Fellow of the Chartered Institute of Arbitrators, the Hong Kong Institute of Arbitrators, the Singapore Institute of Arbitrators, and the Philippine Institute of Arbitrators.

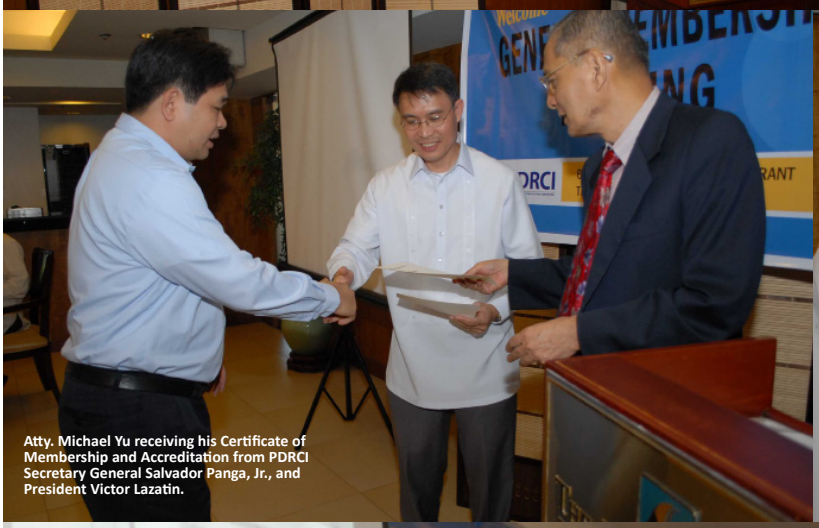
A consistent full university scholar, he graduated from the Lyceum of the Philippine University with the title Associate in Arts, with high honors, in 1956, and with the degree of Bachelor of Laws, summa cum laude, in 1960. He passed the Philippine Bar Examinations (12th place) in 1961.

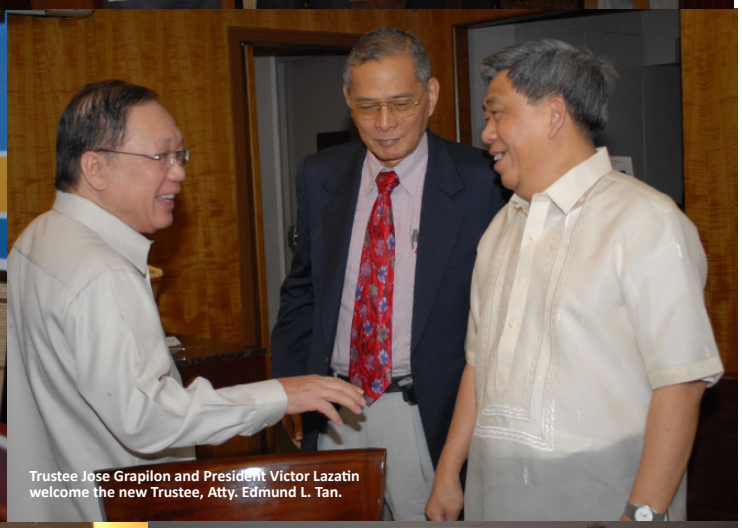
PDRCI ANNUAL MEETING HIGHLIGHTS



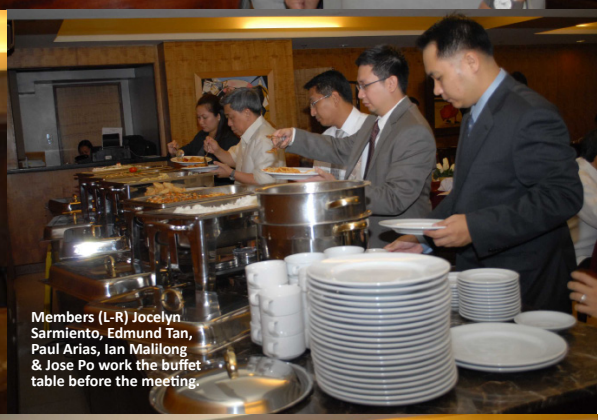
Vice Chairman Eduardo Ceniza gives the welcome remarks at the start of the meeting.

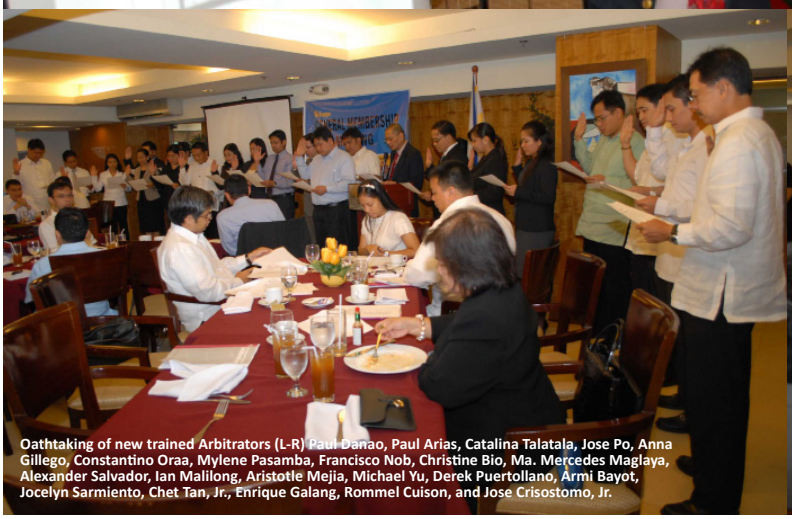

(L-R) Leland Villadolid, Jr., Jose Tensuan and Arnold Corporal taking their oath as new members before President Victor Lazatin


Atty. Michael Yu receiving his Certificate of Membership and Accreditation from PDRCI Secretary General Salvador Panga, Jr., and President Victor Lazatin.


Trustee Jose Grapilon and President Victor Lazatin welcome the new Trustee, Atty. Edmund L. Tan.


President Victor Lazatin presents the layout of the future office of PDRCI.


Members (L-R) Jocelyn Sarmiento, Edmund Tan, Paul Arias, Ian Malilong & Jose Po work the buffet table before the meeting.


Oathtaking of new trained Arbitrators (L-R) Paul Danao, Paul Arias, Catalina Talatala, Jose Po, Anna Gillego, Constantino Oraa, Mylene Pasamba, Francisco Nob, Christine Bio, Ma. Mercedes Maglaya, Alexander Salvador, Ian Malilong, Aristotle Mejia, Michael Yu, Derek Puertollano, Armi Bayot, Jocelyn Sarmiento, Chet Tan, Jr., Enrique Galang, Rommel Cuison, and Jose Crisostomo, Jr.

President Victor Lazatin reports the accomplishments of PDRCI for the 2009-2010 term.

PROBLEMS IN ADR

Choosing the arbitral tribunal

By Roberto N. Dio

In a lecture that he gave during the recent International Chamber of Commerce (ICC) workshop on international commercial arbitration held on July 2 to 4, 2010 in Hong Kong, former International Court of Arbitration Secretary General Yves Derains shared his views on the factors parties should consider in choosing and selecting the arbitral tribunal.

First, he said, is the *value and complexity of the claim*. If the value of the claim is substantial and the issues involved are complex, then a tribunal of three arbitrators is better than a sole arbitrator.

Second is *speed*. A tribunal of three tends to be slower than a sole arbitrator.

Third is *the common misunderstanding by parties that the arbitrator will be a champion of the party nominating him*. The arbitrator, Yves stressed, is independent and neutral. Hence, it would be useless to appoint someone in the expectation that he would be an advocate or friendly to a party's cause.

Fourth is the *arbitrator's availability*, which is very important. The party should inform the nominee arbitrator when the arbitration will be filed so he will be available to join the tribunal. It will be futile to nominate an arbitrator who is so busy that he will only decline the nomination.

Fifth is *the freedom from bias of an arbitrator*. The party should find an arbitrator who has no predilection or antipathy to a certain country, views or legal issues. He cites as an example the tendency of lawyers trained in the common law to prefer a strict interpretation of the law, compared to those trained in the civil law system who are open to interpretation.

Sixth is *the choice of the chairman of the tribunal*. It is best to leave the choice to the two nominees, who will normally have a short list of their preference as chairperson. The ideal chairman should be decisive, able to decide especially within the hearing. He should be able to decide "rightly and correctly on the spot," according to Yves.

Seventh is *the disclosure of conflicting interest*. The party should discuss with the nominee any potential conflict to avoid delay in constituting the tribunal. Ideally, one should appoint an arbitrator who has nothing to disclose or has only a minimal disclosure to make.

Eight is *the interview with the arbitrator*. If a party has to interview an arbitrator prior to nominating him, the interview has to be limited. This is commonly done in the United States, observed Yves, but the ICC has no specific practice guidelines on the contact between a party and an arbitrator prior to his appointment but the arbitrator will have to disclose the interview. Do not discuss the merits of the case during the interview.

The ideal chairman should be decisive, able to decide especially within the hearing.

During the open forum, a question was asked if it would be appropriate for a party or law firm to nominate the same arbitrator in several cases. Yves replied that while an arbitrator should not allow himself to be a "regular" nominee of a party or a law firm, it also depends on the size of the firm and the size of the jurisdiction. In a small jurisdiction, observed another speaker during the forum, it is inevitable that only a few arbitrators will be chosen. However, it will be unusual for an international law firm to regularly nominate the same arbitrator in a big jurisdiction such as the United States.

Comments and contributions on similar or other problems in ADR may be sent to the Editor at secretariat@pdrci.com.ph.

MEMBER SPOTLIGHT

Edmundo L. Tan

Atty. Edmundo L. Tan is the Managing Partner of Tan Acut Lopez & Pison Law Offices, a full-service law firm. He is also a charter member of the PDRCI and a member of the International Law Association, Philippine Branch.

Atty. Tan started his legal career in 1974 as an associate at the Cruz Villarin Ongkiko Academia & Durian Law Offices. He then joined the Angara Abello Concepcion Regala & Cruz Law Offices (ACCRA), where he was eventually made partner. In 1983, Atty. Tan left ACCRA to become a co-founder and senior partner of the Ponce Enrile Cayetano Reyes & Manalastas Law Offices. He set up his own law firm in 1993.

In the course of his practice, Atty. Tan has become a familiar name and corporate law circles. He is the Chairman of the Board of EBC Strategies Holdings Corporation, formerly EBC Investments, Inc. He is also a member of the Board of Directors of listed companies such as APC Group, Inc. (APC), Sinophil Philippines, Inc. and BDO Leasing & Finance, Inc. In addition, he is a director of Philippine Global Communications, Inc. and Aragorn Power and Energy Corporation (APEC). Atty. Tan also acts as Corporate Secretary of various corporations, including Banco de Oro Unibank, Inc., APC, APEC and Aragorn Coal Resources, Inc.

Atty. Tan was born in Bacolod City, Negros Occidental. He obtained his Bachelor of Arts from the De La Salle College, Bacolod City, where he graduated magna cum laude. He later earned his Bachelor of Laws from the University of the Philippines and was admitted to the Philippine Bar in 1974.

香港國際仲裁中心
Hong Kong International Arbitration Centre

HKIAC holds 25th Anniversary Conference in November 2010

The Hong Kong International Arbitration Centre (HKIAC) marks its 25th anniversary this year with a series of events from November 17 to 20, 2010.

A highlight of the celebration is the HKIAC 25th Anniversary Conference to be held on November 18 to 19, 2010 at the JW Marriott Hotel, Hong Kong. The conference theme is "Rethinking International Arbitration."

The keynote speaker of this event will be International Council for Commercial Arbitration President Jan Paulsson. The conference is expected to draw distinguished practitioners from around the world who will serve as presenters or moderators of the various sessions.

PDRCI is among the supporting organizations of the conference. For more information, please contact the PDRCI Secretariat.

Office for ADR holds National Consultative Conference

FROM PAGE 1 ▶ (or are planning to introduce) ADR systems to enhance or improve their dispute resolution services.

PDRCI President Emeritus Custodio Parlade spoke on the background and history of the ADR Act and its IRR, while PDRCI President Victor P. Lazatin made a presentation on ADR in the commercial sector. PDRCI Secretary General Salvador S. Panga, Jr., who as ADR consultant for the Asian Development Bank helped organize the event, served as conference facilitator and host.

Other conference presentors included former Philippine Department of Environment and Natural Resources Undersecretary Elmer Mercado, who spoke on the prospects of ADR in the area of rural development; former Peace Adviser Annabelle Abaya, who spoke on Mediation and Non-Adversarial ADR; Philippine Department of Trade and Industry Director Victor Mario Dimagiba, who spoke on Consumer Protection and ADR; Construction Industry Arbitration Commission Executive Director Kathryn dela Cruz, who spoke on ADR in the Management Staff Director Jocelyn Reyes, who spoke on the NEDA Conflict Prevention and Dispute Resolution Program.

After the presentations, the conference attendees engaged the speakers and the OADR team in a lively discussion during the open forum, which allowed the other participants to air the problems, concerns and challenges of their respective sectors. The OADR is an attached agency of the Philippine Department of Justice.

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

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

***Rommel V. Cuison**, Germai C. Abella, Juan Pablo P. Colet, Staff Writers*