

# THE PHILIPPINE ADR REVIEW

NOVEMBER 2010

BROADENING ITS SCOPE OF ARBITRATION ADVOCACY



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## PDRCI holds training on commercial arbitration for IP professionals

By Germai C. Abella

PDRCI will conduct a three-day arbitration training seminar for intellectual property professionals on November 8 to 10, 2010 at the University of the Philippines. College of Law in Diliman, Quezon City. This is the second part of the intensive training program on intellectual property rights (IPR) jointly organized by the Philippine Intellectual Property Office (IPO), PDRCI and the World Intellectual Property Office (WIPO).




dent Emeritus Dean Custodio O. Parlade will focus on recognition, enforcement, challenge and vacation of arbitral awards.

The program seeks to provide the participants with basic knowledge of the arbitration laws and recent legal developments in commercial arbitration. The participants are expected to acquire a working knowledge of the arbitration process, both from the perspective of an arbitrator and as counsel of a party in arbitration.

The training will be open to intellectual property professionals from the IPO as well as interested participants from the public.

The training basically consists of step-by-step lectures on commercial arbitration procedure. On the first day of the seminar, PDRCI Trustee Atty. Arthur P. Autea will give an introduction on arbitration, followed by a discussion by PDRCI Secretary General Atty. Salvador S. Panga, Jr. on pre-arbitration issues. On the second day, PDRCI Trustees Atty. Gwen B. De Vera and Atty. Roberto N. Dio will discuss, respectively, the commencement of arbitration and pre-hearing considerations. On the last day of the program, PDRCI President Atty. Victor P. Lazatin will discuss the conduct of arbitration hearings, while PDRCI Presi-

The last training seminar will be conducted by the WIPO on December 8 to 9, 2010 at the same venue. A written assessment examination will be held on the day after the completion of the seminar. The successful examinees will be included in the roster of PDRCI trained arbitrators. 

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## Choosing the forum in international commercial arbitration

By: Shirley F. Alinea

When the parties to a commercial agreement decide on an arbitration clause, one of the issues that sometimes crop up is the designation of the place of arbitration. This is especially true when the contracting parties have their places of business in different countries. Both would, of course, want the place of arbitration to be in their respective states. By way of a compromise, the parties usually agree on a “neutral” foreign place of arbitration. Hence, this question comes about: “How do the parties choose the foreign place of arbitration in international commercial arbitration?”<sup>1</sup>

Republic Act No. 9285, otherwise known as the “Alternative Dispute Resolution Act of 2004” and the UNCITRAL Model Law, which govern international commercial arbitration, do not really state how parties should choose a foreign place of arbitration. All that is settled is the following:

- The parties may provide in the arbitration agreement for the place of arbitration. If there is no such agreement, the place of arbitration shall be in Metro Manila, unless the ar-

bitral tribunal, having regard to the circumstances of the case, including the convenience of the parties, shall decide on a different place of arbitration.<sup>2</sup>

- Notwithstanding the above choice on place of arbitration, the arbitral tribunal may, unless otherwise agreed by the parties, meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for inspection of goods, other property or documents.<sup>3</sup>

Faced with these broad rules on the designation of the place of arbitration, there are three considerations to be borne in mind when choosing a foreign place of arbitration. These are *costs and convenience of the parties, adherence of the foreign place of arbitration to the UNCITRAL Model Law, as well as its adherence to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (“New York Convention”).

Let us go to the first consideration, which is often not the most important one for the parties, i.e., costs and convenience of the parties. While the arbitral tribunal may, unless otherwise agreed by the parties, meet at any place it considers appropriate

for consultation among its members, for hearing witnesses, experts or the parties, or for inspection of goods, other property or documents, it usually happens that hearings are held at the foreign place of arbitration chosen by the parties. The costs and any inconvenience relating to the attendance of such



hearings, while depending on several factors, are based in large part on the chosen foreign place of arbitration. Thus, let us say that the contracting parties are a Singaporean corporation and an Australian corporation. To minimize costs and for the parties’ convenience in the event of arbitration, choosing an Asian country as opposed to a European country as the foreign place of arbitration will generally be the better alternative.

Second, the foreign place of arbitration must ideally be a Model Law

country. In other words, the foreign place of arbitration must have adhered to the UNCITRAL Model Law. This is especially important in cases where the international commercial arbitration is ad hoc. In ad hoc arbitration, the procedural laws of the forum will govern and may thus affect the conduct of the arbitration. If the chosen foreign place of arbitration is a Model Law country, its arbitration laws will be patterned after well-settled and internationally accepted arbitration rules and principles. Hence, the parties will be able to predict the rules

to have been made at (the place of arbitration).” Hence, if the parties want to stipulate a foreign country as the place of arbitration, they should make sure that such country is a contracting state to the New York Convention. That way, in the event that the losing party fails or refuses to voluntarily satisfy the arbitral award, the prevailing party may go to the relevant local courts of another contracting state for enforcement. Its local courts shall have the duty to recognize and enforce the foreign arbitral award as a matter of treaty obligation.

By way of illustration, let us go back to the example of the Singaporean corporation and Australian corporation who decide to include an arbitral clause in their commercial agreement. Let us say that taking heed of the above advice, the parties agree on the Philippines as the place of arbitration in case of a commercial dispute.


and principles that will govern their arbitration, and the chances of unpleasant surprises arising from the application of the forum’s arbitral rules and principles will most likely be minimal.

Third, the foreign place of arbitration must also ideally be a contracting state to the New York Convention. The enforcement and recognition of an arbitral award may be affected by the place of arbitration. Under Article 31(3) of the UNCITRAL Model Law, “(t)he award shall be deemed

arbitration.

For example, the parties can reasonably expect that local courts will not intervene in the conduct of the arbitration, save in the limited instances provided in the UNCITRAL Model Law. This will greatly benefit the success of the arbitration.

Finally, since the Philippines is a party to the New York Convention, any arbitral award will be recognized and enforced as a foreign arbitral award in other contracting states. The petition for recognition and enforcement, if brought before the local courts of another contracting state, may only be opposed by the losing party to the arbitration on the limited grounds enumerated under Article V of the New York Convention.

Thus, the next time the above question is posed by parties in the drafting of an arbitral clause, it will be worthwhile to ask these questions: (a) will the foreign place of arbitration save the parties costs and cause them no or minimal inconvenience?; (b) is the foreign place of arbitration a Model Law country?; and (c) is the foreign place of arbitration a contracting state to the New York Convention? If the answer to these is yes, then the parties’ choice of the foreign place of arbitration is a good one. 



### About the Author

Shirley F. Alinea is a partner in Martinez Vergara Gonzales & Serrano. She specializes in arbitration, litigation, labor and employment, and intellectual property law. She received her Bachelor of Laws degree from the University of the Philippines in 1996.

<sup>1</sup> International commercial arbitration is defined in Chapter I, Article 1(3) of the UNCITRAL Model Law on International Commercial Arbitration of 1985 (the “UNCITRAL Model Law”).

<sup>2</sup> Please see UNCITRAL Model Law, Article 20(1), in relation to Sec. 30 of the ADR Act.

<sup>3</sup> Please see UNCITRAL Model Law, Article 20(2) and Sec. 30 of the ADR Act.

## MEMBER SPOTLIGHT


### Daisy P. Arce



Daisy P. Arce is a corporate lawyer with extensive experience in domestic and international arbitration. She specializes in corporate organization and restructuring, mergers, divisions and acquisitions, and capital restructuring.

She was a member of the arbitration committee of the Philippine Chamber of Commerce and Industry, the predecessor of PDRCI. In 1981, she acted as counsel in an American Arbitration Association Arbitration in Hawaii. She has acted as arbitrator and counsel in arbitrations before the International Chamber of Commerce and PDRCI. She has represented parties in arbitration before the Philippine Construction Industry Arbitration Commission and in arbitrations in Australia, Singapore and the United States.

Ms. Arce was formerly head of the banking and corporate finance group of the oldest law firm in the Philippines. She has served as counsel and negotiator for domestic and foreign investors, handling financial arrangements and restructuring agreements involving information technology, power generation, construction, telecommunications, textile manufacturing, steel manufacturing and the foreign borrowings of the Bangko Sentral ng Pilipinas.

At present, she manages her own law firm. She acts as counsel for two foreign banks in the Philippines. She is the legal adviser to the Philippine Stock Exchange, where she was a member of its then Governance Committee. She is currently the external counsel and secretary of its Market Integrity Board. 

# 25th Anniversary

17-20 November 2010  
Hong Kong

Register Now: [hkiac.org/25th](http://hkiac.org/25th)

## HKIAC 25th Anniversary


The Hong Kong International Arbitration Centre (the "HKIAC") will be celebrating its 25th Anniversary with a series of events from November 17-20 in Hong Kong.

The festivities will commence on November 17, 2010 with the Kaplan Lecture 2010 and the Opening Reception. This year's Kaplan Lecture will be delivered by Toby Landau QC. We are pleased to have Mallesons Stephen Jaques as our primary sponsor providing its generous support with this landmark event.

The HKIAC 25th Anniversary Conference will then be held from November 18-19, 2010. The theme for the Conference is "Rethinking International Arbitration". The Opening Keynote Speaker will be Jan Paulsson. The Conference will include many distinguished practitioners from around the world who will serve as presenters or moderators of the various sessions.

These include Lord Hoffmann, Lord Goldsmith QC, Professor Dr Gabrielle Kaufmann-Kohler, Arthur Marriott QC, Prof. Dr. Albert Jan van den Berg, David W. Rivkin, Dominique Brown-Berset, Hon. Charles Brower, Prof. Dr. Bernard Hanotiau, Christian MJ Kröner, Yu Jialong and others.

On November 29, 2010, the HKIAC will organise a mock arbitration co-supported by the ICC Court of International Arbitration and the Chartered Institute of Arbitrators, East Asia Branch. Eminent practitioners including Louise Barrington, Anthony Canham, Dr. Sabine Stricker-Kellerer, Christopher Lau SC, Prof. Jingzhou Tao, Prof. Doug Jones, Karen Mills and others will role-play an ICC arbitration seated in Hong Kong.

For more details, please visit <http://www.hkiac.org/25th>. 


## PDRCI members complete IP training

The new Arbitration Office of the Philippine Intellectual Property Office (IPO) issued on October 28, 2010 certificates of participation to 15 PDRCI members who completed their training in intellectual property law to qualify them to join the IPO-PDRCI pool of intellectual property arbitrators.

The training focused on copyrights, trademarks and patents, including emerging issues such as user's rights, defenses to copyright infringement, cross-border issues, computer programs, database protection, well-known marks, trademark dilution, web-based infringement, goodwill, and non-traditional marks.

The speakers, who were drawn from the IPO, the academe, private sector stakeholders such as the Licensing Executive Society Philippines and the Filipino Society of Composers, Authors and Publishers, Inc., and IP practitioners, gave in-depth lectures

on IP law and jurisprudence. They presented actual inter-partes cases resolved by the IPO and appeals decided by the Philippine Supreme Court and foreign courts.

The World Intellectual Property Organization (WIPO) will conduct the final phase of the training on December 8 and 9, 2010. 

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