The Philippine ADR Review

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BROADENING ITS SCOPE OF ARBITRATION ADVOCACY

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PDRCI to open new office at BGC

PDRCI will soon open its new office at the Commerce & Industry Plaza in Bonifacio Global City, which is developing into the newest central business district in Metro Manila. The move to a new location was made possible by the Philippine Chamber of Commerce and Industry, Inc., which will host the new office.

The PDRCI office will be located on the third floor of the 16-storey glass and steel building. Located on Campus Avenue of McKinley Town Center, it will be a short walk from the new headquarters of the Intellectual Property Office (IPO) Philippines, with whom PDRCI will jointly administer a new intellectual property arbitration service.

The new office will have a wood-floored reception area to receive filings and visitors. It will have a hearing room that doubles as a board room, two breakout rooms, a library and a file room. The hearing room will have state-of-the-art recording and communication facilities, and will have a panoramic view of the nearby Venice Piazza Mall.

The fit-out will be turned over this month to PDRCI. Once the furniture and recording and communication facilities are installed, the new office will be inaugurated in March 2011.

PDRCI leases its current office space at the ninth floor of City & Land Megaplaza Condominium in Ortigas Center, Pasig City.

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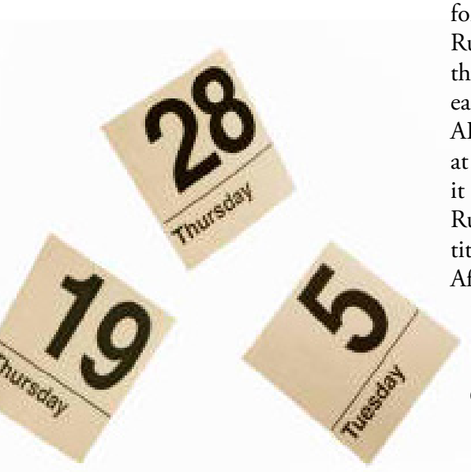
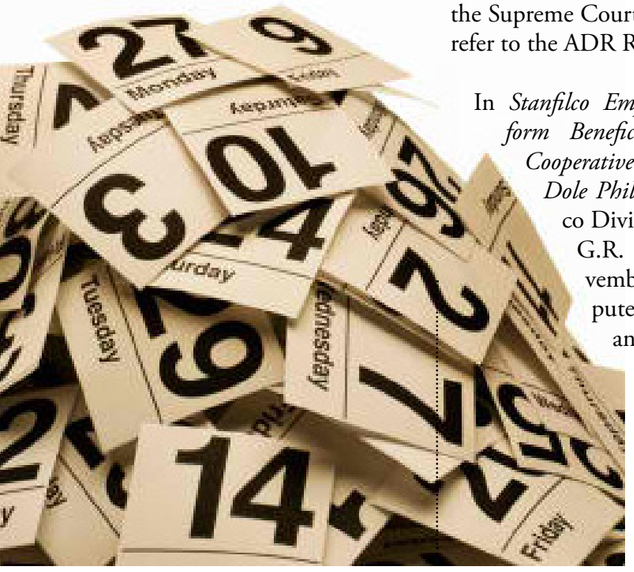
The Special ADR Rules: a year later

By Donemark J.L. Calimon

The Supreme Court's Special Rules on Alternative Dispute Resolution ("ADR Rules") took effect in October 2009, finally providing clear guidance on the role of the courts in arbitration proceedings – from the basic issue of the type of pleading needed to commence court proceedings in aid of arbitration to the more contentious issue of recourse against arbitral awards. More importantly, the ADR rules are expected to provide some degree of predictability in the way arbitration laws, arbitration agreements and arbitral awards are enforced in this jurisdiction.





It will be worth looking into Supreme Court decisions during the past year for an insight as to whether the ADR Rules are reflected, if at all, in the way the Court thinks. While it may be too early for issues directly involving the ADR Rules to reach the Supreme Court at this early stage in its implementation, it is interesting to find out if the ADR Rules positively affected the Court's attitude towards arbitration-related issues. After all, the ADR Rules are procedural rules that may be given retroactive effect, as held in *Korea Technologies Co., Ltd., v. Hon. Alberto A. Lerma, et al.,* G.R. No. 143581, January 7, 2008.

Three particular cases are particularly noteworthy. Unfortunately, while the cases involved arbitration-related issues, the Supreme Court omitted to apply or refer to the ADR Rules.

In *Stanfilco Employees Agrarian Reform Beneficiaries Multi-Purpose Cooperative* (SEARBEMCO) v. *Dole Philippines, Inc.* (Stanfilco Division) ["Dole"], *et al.*, G.R. No. 154048, November 27, 2009, a dispute arose between Dole and SEARBEMCO in connection with their Banana Production and Purchase Agreement (BPPA). Dole filed a civil action not only against SEARBEMCO but also against certain third persons who were not parties to the BPPA.

On the issue of whether or not a civil action should be referred to arbitration when only some of the parties are bound by an arbitration agreement, the Supreme Court ruled in the negative. IT held that Dole's civil complaint was not premature, notwithstanding non-submission to arbitration, because it impleaded persons who were not parties to the BPPA with respect to whom any arbitral award will not be binding. Notably, the ruling is contrary to Rule 4.7 of the ADR Rules that courts shall not decline to refer some or all of the parties (to a civil action) to arbitration on the ground that not all of them are bound by the arbitration agreement or that referral to arbitration will result in multiplicity of suits.

The *Stanfilco* ruling is also notable for holding, albeit in an *obiter*, that since the dispute need not be referred to arbitration because of the inclusion of third parties, the parties are also not required to submit to the Barangay Agrarian Reform Committee for mediation and conciliation pursuant to Republic Act No. 6657 or the Comprehensive Agrarian Reform Law of 1988. The Court apparently failed to take into account the difference between arbitration as a mode of alternative dispute resolution, which is essentially voluntary, and mandatory dispute resolution proceedings required by law. Please see *Benguet Corporation v. Department of Environment and Natural Resources - Mines Adjudication Board and J.G. Realty and Mining*, G.R. No. 163101, February 13, 2008.

In *Uy v. Public Estates Authority*, G.R. Nos. 147925-26, July 7, 2010, the Supreme Court applied the doctrine of *res judicata* to an award rendered by the Construction Industry Arbitration Commission (CIAC), holding that "a party, either by varying the form or action or by bringing forward in a second case additional parties or arguments, cannot escape the effects of res judicata when the facts remain the same, at least where such new parties or matter could have been impleaded or pleaded in the prior action."

The question of whether and how the doctrine of *res judicata* should be applied to arbitral awards and proceedings continues to be the subject of discussions in the area of international arbitration. See, for instance, Filip de Ly and Audley Sheppard, *ILA Recommendations on Lis Pendens and Res Judicata and Arbitration, Arbitration International,* 25 Kluwer Law International Issue 1, 83-5 (2009). But there seems to be no real disagreement that the doctrine should be applied to arbitral awards. As such, the ruling in *Uy* may be considered a significant step forward insofar as Philippine arbitration is concerned.

However, how the doctrine of *res judicata* should be applied to arbitral awards and arbitral proceedings should be carefully considered in the context of Philippine arbitration law and the ADR Rules. Since, the application of *res judicata* requires an examination of pending or terminated arbitrations for purposes of determining its applicability to parallel or subsequent arbitrations, how will the application of the doctrine impact the confidential nature of arbitration proceedings? See Miguel Temboury Redondo, *Preliminary Judgments, Lis Pendens and Res Judicata in Arbitration Proceedings* in M.A. Fernandez-Ballesteros and David Arias (Eds.), Liber Amicorim, Bernardo Cremades, (La Ley 2010) pp. 1131-1145, http:kluwerarbitrationcom. Moreover, will the doctrine of r*es judicata* also bring about the application of the prohibition against splitting of causes of action, which renders an action dismissible under Philippine rules either on the ground of *litis pendentia or res judicata (Chua, et al. v. Viray, et al.,* G.R. No. 182311, August 19, 2009)?

Finally, in *Prudential Guarantee and Assurance, Inc. v. Anscor Land, Inc.,* G.R. No. 177240, September 8, 2010, the Supreme Court was confronted with the issue of whether an arbitration agreement could bind third persons who were not signatories. Anscor Land, Inc. (ALI) and Kraft Realty and Development Corporation (KRDC) entered into a contract to construct a townhouse. As part of its undertaking, KRDC submitted a performance bond to guarantee the supply of labor, materials, tools, equipment, and necessary supervision to complete the project. The bond was issued in favor of ALI by Prudential Guarantee and Assurance, Inc. (PGAI), which was not a signatory to the construction contract. ALI subsequently commenced arbitration proceedings against KRDC and PGAI in the CIAC.

The Supreme Court ruled that the arbitration clause in the construction agreement was binding on PGAI pursuant to the "complementary contracts construed together" doctrine, citing *Velasquez v. Court of Appeals,* G.R. No. 124049, June 30, 1999. Applying the doctrine, the Court ruled that the silence of the accessory contract in this case could only be construed as acquiescence to the main contract, adding that the construction contract breathes life into the performance bond.

Notably, the *Prudential Guarantee* case does not explain how a principle of statutory construction can override the express requirement of law that arbitration agreements must be in writing and/or subscribed by the party sought to be charged (Rep. Act 876, Sec. 4; UNCITRAL Model Law, Art. 7). With respect to arbitration of construction disputes, Section 35 of the ADR Act specifically limits the jurisdiction of the CIAC to those who are bound by an arbitration agreement, whether directly or by reference. In this regard, the UNCITRAL Model Law provides that the reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing and the reference is such as to make that clause part of the contract.

Moreover, the ruling does not seem to take into account the principle of separability of the arbitration clause which recognizes that the arbitration clause should be treated separately from the agreement containing it. In other words, the application of the principle of "complementary contracts construed together" does not necessarily extend to the arbitration clause of either contract which, as aforesaid, should be treated separately from the container contract.

In conclusion, while the ADR Rules may be a significant development in the history of Philippine arbitration, it will only be effective if the courts will be consistent in its application. The cases described do not yet show this, but it is hoped that this will change sooner than later.

About the Author

Donemark J.L. Calimon is a senior associate at the Litigation and Dispute Resolution Group of Quisumbing Torres Law Offices, a member firm of Baker & McKenzie International. He is a member and an accredited arbitrator of PDRCI, an associate of the Chartered Institute of Arbitrators, East Asia Branch (Philippine Chapter) and a director/officer of the Philippine Institute of Arbitrators. He obtained his law degree at the University of the Philippines in 2000 and was admitted to the Philippine Bar in 2001.

MEMBER SPOTLIGHT

Gregorio S. Navarro

Gregorio S. Navarro is a Trustee and Treasurer of PDRCI as well as an Eminent Mediator trained by the Conflict Resolution Group Foundation, Inc. He is a former Managing Partner and Chief Executive Officer of Punongbayan & Araullo, one of the country's largest accounting firms, and past President of the Financial Executives Institute of the Philippines (FINEX).

Greg has amassed 35 years of experience in accounting, auditing, management consulting and corporate finance. He started his accounting career at SyCip Gorres Velayo & Co., a regional audit firm, and later became a senior executive at Atlantic Gulf & Pacific Company of Manila, Inc., a major construction firm. In 2005, Greg became President of the Association of Certified Public Accountants in Public Practice. His accomplishments earned him the Philippine Institute of Certified Public Accountants' Young PICPA Achiever Award.

Greg is active in various organizations. He is currently the President of the Carl Jung Center Circle Philippines; a Governor of the Management Association of the Philippines (MAP); a Fellow of the Institute of Corporate Directors and Institute of Solidarity in Asia; a member of the Philippine Financial Reporting Standards Council, the Philippine Military Academy's Board of Visitors and the Makati City Development Council; and a founding director of the Capital Markets Institute of the Philippines.

Greg served as President of the Credit Information Corporation, which was created under Republic Act No. 9510 (2008) or the Credit Information System Act, under former President Gloria Macapagal-Arroyo.

Greg is a leading good corporate and public governance advocate. He has edited and published a handbook on the Organization of Economic Cooperation and Development (OECD) Corporate Governance Principles. He is a lecturer at the Corporate Governance Institute of the Philippines.

Greg obtained his accounting degree from the University of the East and posted the second highest overall rating in the CPA licensure exams in October 1976. In 1992, he participated in the Partner Development Program at the Kellogg School of Management of Northwestern University in Illinois and in 2003, completed the Senior Executive Program of the Columbia Business School in New York.

Accreditation exam for IPO/PDRCI arbitrators

A total of 27 arbitrators and intellectual property (IP) practitioners recently took the accreditation examination for IP arbitrators jointly administered by the Intellectual Property Office (IPO) Philippines and PDRCI last January 14, 2011.

Fourteen arbitrators, including PDRCI President Victor P. Lazatin and several trustees, joined 13 IP practitioners in taking the three-hour examination held at the University of the Philippines Law Center in Diliman, Quezon City. The examination for the arbitrators focused on the IP Code and the IPO Arbitration Rules, which were patterned after the World Intellectual Property Organization (WIPO) Arbitration Rules. The questions related to theories and concepts in copyright, trademarks and patents. The examinees were presented with problems that required analysis and practical application of the law and the IPO Arbitration Rules.

The examination for IP practitioners focused on the Arbitration Law, Alternative Dispute Resolution Act of 2004, UNCITRAL Model Law, and the Special ADR Rules. The IPO Arbitration Rules were also included in the problem questions.

According to Prof. Gwen de Vera, PDRCI corporate secretary, the results of the accreditation examination will be announced in the next two weeks. The IPO arbitration program will be launched on January 28, 2011 in time for the Settlement Month in February 2011. During the Settlement Month, the IPO will refers cases to mediation. Cases not successfully mediated will be referred to arbitration upon agreement of the parties.

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