The Philippine ADR Review

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BROADENING ITS SCOPE OF ARBITRATION ADVOCACY

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Philippines scores high in world arbitration survey

By: Gerrmai C. Abella

In its Investing Across Borders 2010 report, the World Bank gave high marks in arbitration to the Philippines based on its arbitration laws and jurisprudence. It further acknowledged the Philippine Dispute Resolution Center, Inc. (PDRCI) as the country's main arbitral institution.

However, it found that enforcement of arbitral awards in the country is slow, as in most of the countries in the East Asia region.

The World Bank report provides cross-country comparisons of laws, regulations, and practices affecting foreign direct investment in 87 economies, including the Philippines. The study includes an assessment of the strength of commercial arbitration systems of the 87 countries.

According to the report, for governments interested in attracting foreign direct investment, improving the rule of law, including the country's dispute resolution mechanisms, should be a top priority.

In analyzing the arbitration regimes of the countries, the report used Arbitrating Commercial Dispute (ACD) quantitative indicators that comprise three principal components, such as the "strength of laws" index (0–100 maximum), the "ease of arbitration process" index (0–100 maximum), and the "extent of judicial assistance" index (0–100 maximum).

The strength of laws index analyzes the strength of countries' legal frameworks for alternative dispute resolution as well as the countries' adherence to the main international conventions related to international arbitration. The ease of arbitration process index assesses whether there are restrictions or other obstacles that the disputing parties face in seeking a resolution to their dispute. Lastly, the extent of judicial assistance index measures the interaction between domestic courts and arbitral tribunals, including the courts' willingness to assist during the arbitration process and their effectiveness in enforcing arbitration awards. **PAGE 4 ▶**

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FRIA Arbitration

By Roberto N. Dio

The Asian currency crisis of July 1997 and the recent U.S. subprime mortgage crisis triggered a rash of bankruptcy filings in the Philippines.

In response to the 1997 crisis, the Philippine Supreme Court issued the Interim Rules of Procedure on Corporate Rehabilitation ("Interim Rules"), which took effect on December 15, 2000. Adopted from the Rules of Procedure on Corporate Recovery of the Securities and Exchange Commission (SEC), it created a new remedy that allowed defaulting debtors to indefinitely stay the claims of secured and unsecured lenders.

Because the Interim Rules were debtor friendly, many corporations deeply in debt took advantage of its protective provisions. Instead of undergoing an orderly insolvency or liquidation, corporate debtors simply filed a petition for corporate rehabilitation based on a business plan that promised repayment in 10 or 20 long years. Once the rehabilitation court issued a stay order, all claims against the debtor were suspended. No creditor could enforce a final judgment against the debtor and all foreclosure actions were stopped.

Because courts were unfamiliar at the outset with corporate rehabilitation, let alone debt restructuring or business recovery, corporate rehabilitation was a slow and costly proceeding. On the surface it was supposed to be summary but in practice the petition took on myriad incidents such as creditors' meetings, challenges to the receiver, multiple appeals by the creditors, amendments to the rehabilitation plan, and termination of the proceeding. The number of creditors often determined the complexity of the proceeding.

On December 2, 2008, the Supreme Court issued the new Rules of Procedure on Corporate Rehabilitation ("new Rules"), which took effect on January 16, 2009. The new Rules enhanced the protection to creditors in case of corporate rehabilitation but retained the power of the courts to cram down the rehabilitation plan over the objections of creditors. The new Rules also allowed the recognition of foreign bankruptcy proceedings.

One issue that the Interim Rules and the new Rules failed to address was the effect of the stay order on an ongoing domestic or foreign arbitration. Because arbitration is a private dispute resolution mechanism, is it suspended by the stay order of the rehabilitation court? The answer seems to favor suspension especially in arbitrations where the Philippine debtor corporation is a respondent, but what if the debtor were the claimant?

In one case involving a Philippine debtor corporation and a foreign claimant, the arbitral tribunal applied Singapore arbitration law as the lex loci arbitrii and refused to suspend the arbitration despite a stay order issued by a Philippine rehabilitation court. The arbitral tribunal ignored the legal consequences of enforcing a foreign arbitral award in the Philippines where the corporate rehabilitation was pending. As a result, the Philippine respondent was forced to withdraw from the arbitration and opposed the claim when the arbitral award was subsequently enforced in the Philippines.

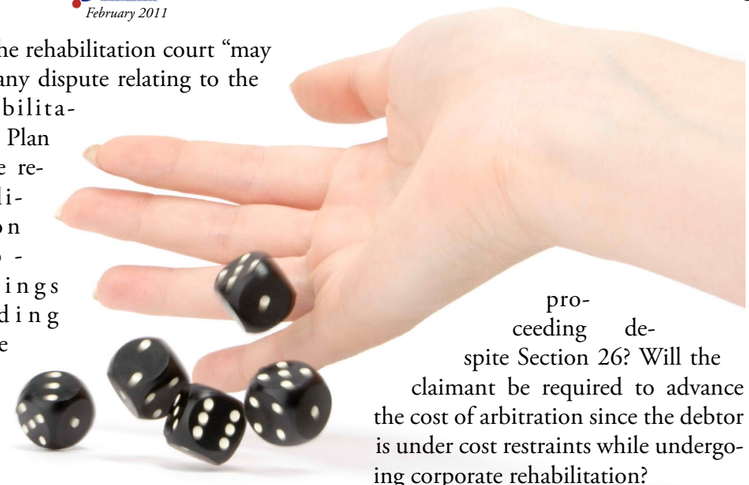
Practical considerations should have moved the arbitral tribunal to suspend the arbitration because corporate rehabilitation is a proceeding in rem that is binding on the whole world. Even if the arbitration law of the place of arbitration prohibits foreign court interference in the arbitral process, the final award could be challenged by the respondent before the rehabilitation court for being contrary to Philippine law or public policy.

Instead of proceeding with the arbitration, the claimant may move to suspend the arbitration and file its claim with the rehabilitation court. This will allow the rehabilitation receiver to evaluate the claim and either (a) include it in the schedule of debts and liabilities subject to repayment in the rehabilitation plan; or (b) reject it as an invalid or unliquidated claim.

If the claim is recognized by the receiver and included in the rehabilitation plan, the creditor would have avoided arbitration and saved on costs, including legal fees. However, what will the creditor do if the claim were rejected? Under the Interim Rules and the new Rules, the creditor will have no remedy other than to appeal to the rehabilitation court and, if the court sustains the receiver, to the Court of Appeals and eventually to the Supreme Court, a process that may take years of costly litigation.

Fortunately, the Philippine Congress recently passed Republic Act No. 10142 (2010), the Financial Rehabilitation and Insolvency Act (FRIA), which became law on September 1, 2010 after it was published in two newspapers of national circulation on August 16, 2010.

Section 26 of the new law provides that the rehabilitation court "may refer any dispute relating to the Rehabilitation Plan or the rehabilitation proceedings pending before it to arbitration or other modes of dispute resolution, as provided for under Republic Act No. 9285, or the Alternative Dispute Resolution Act of 2004, should it determine that such mode will resolve the dispute more quickly, fairly and efficiently than the court."



The FRIA provision on arbitration and other modes of alternative dispute resolution gives creditors and other stakeholders in the bankruptcy process an effective tool to avoid delay in resolving their claims in case of the debtor's bankruptcy. Instead of undergoing a long and costly appeal process, creditors may now avail of conciliation and mediation, arbitration, expert determination, mini-trial and other ADR modes to timely file their claims. There is no question that in case of rejection of a creditor's claims, any of the modes of ADR will resolve the dispute "more quickly, fairly and efficiently than the court."

However, since the special FRIA rules have yet to be promulgated by the Supreme Court, Section 26 raises several questions. For example, who will administer the ADR? Will the Supreme Court recommend institutional ADR instead of ad hoc ADR as a default process? What if there is an ongoing arbitration between the parties, will the stay order have the effect of suspending the proceeding despite Section 26? Will the claimant be required to advance the cost of arbitration since the debtor is under cost restraints while undergoing corporate rehabilitation?

There are also other legal issues. Since ADR is a voluntary process, may the debtor refuse to consent to undergo ADR? It would seem at first glance that the debtor could not legally refuse to submit to ADR, especially where it initiated the petition, because it would be deemed to have accepted the special FRIA rules. But what if it were the creditors who filed the petition for corporate rehabilitation?

These and other crucial questions will be resolved in the special FRIA rules that the Supreme Court will issue in the coming months. Meanwhile, arbitrators are well advised to brush up on the FRIA, which is a lengthy piece of legislation, and on bankruptcy principles.

About the Author

Atty. Dio is the editor of The Philippine ADR Review. He is a senior litigation partner of Castillo Laman Tan Pantaleon& San Jose, where he has practiced for the past 25 years. He is an accredited Court of Appeals mediator, construction arbitrator, and bankruptcy practitioner. He has represented claimants and respondents in both domestic and foreign arbitrations.

MEMBER SPOTLIGHT

Atty. Rogelio C. Nicandro

Atty. Roger Nicandro is a partner, executive committee vice chairman, and head of the intellectual property practice of Romulo Mabanta Buenaventura Sayoc & De los Angeles, one of the Philippines' oldest law firms, which celebrated its centennial in 2002.

After receiving his law degree from the Ateneo de Manila University, Roger practiced as a litigator with his former professor, William R. Veto of Tanada Carreon & Tanada. He became active in human rights advocacy during the Marcos regime, when he joined the August Twenty One Movement (ATOM) and co-founded BONIFACIO, an alliance of human rights lawyers from Makati law firms.

Since 1987, Roger has been a legal consultant of the Asian Development Bank. In his present firm, he shifted to intellectual property and won for the firm's clients several landmark cases such as *Pagasa Industrial Corporation vs. Court of Appeals* in 1982 and *Shangri-la International Hotel Management, Ltd. vs. Developers Group of Companies, Inc*. in 2006.

Currently, he is the president of the Licensing Executives Society of the Philippines, and vice president of the Intellectual Property Association of the Philippines. He was formerly a president of the Legal Management Council of the Philippines.

Roger was inspired by Custodio Parlade and Eduardo Ceniza, president emeritus and past president, respectively, of PDRCI and he became active in ADR practice, eventually becoming a trustee in PDRCI. Roger handles mediation and arbitration for his firm and currently chairs an arbitral tribunal in a pending commercial dispute.

Intellectual Property Office of the Philippines

List of new IP arbitrators

The Intellectual Property Office of the Philippines (IPOPHL) and PDRCI recently released the list of 30 new accredited IP arbitrators.

They are, in alphabetical order:

- Atty. Zenaida Ongkiko-Acorda
- Atty. Thursday Alciso
- Atty. Shirley Alinea
- Atty. Arthur Autea
- Atty. Donemark Joseph Calimon
- Atty. Louie Calvario
- Atty. Victor de Leon
- Atty. Roberto N. Dio
- Atty. Rolando Eco
- Atty. Ramon Esguerra
- Atty. Jose Aguila Grapilon
- Atty. Editha Hechanova
- Atty. Simeon Hildawa
- Atty. Teodoro Kalaw IV
- Atty. Victor Lazatin
- Atty. Dina Lucenario
- Atty. Jesusito Morallos
- Engr. Rey Abraham Negre
- Atty. Rogelio Nicandro
- Atty. Ricardo Ma. P.G. Ongkiko
- Atty. Victoriano Orocio
- Atty. Antonio Ortiguerra
- Atty. Divina Ilas-Panganiban
- Atty. Teresa Paz Pascual
- Atty. Ray Anthony Pinoy
- Atty. Martin Pison
- Asst. Sol. Gen. Reynaldo L. Saludares
- Atty. Regina Sarmiento
- Atty. Gladys Vilchez

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FROM PAGE 1 ▶ Applying these indicators, the Philippines garnered a score of 95.4 in the strength of law index, 87.0 in the ease of arbitration process index, but only 33.7 in the extent of judicial assistance index. The report found that on average, it takes around 135 weeks to enforce a domestic arbitral award, from filing an application to a writ of execution attaching assets (assuming there is no appeal), and 126 weeks for a foreign award.

According to the report, countries that perform well on their indicators also tend to attract more foreign direct investment relative to the size of their economies and population. Conversely, countries that score poorly tend to have higher incidence of corruption, higher levels of political risk, and weaker governance structures.

While these indicators do not cover all aspects of a country's arbitration regime, they may provide a starting point for governments wanting to improve their global investment competitiveness.

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