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BROADENING ITS SCOPE OF ARBITRATION ADVOCACY

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Philippines is 111th member of Permanent Court of Arbitration

By: Juan Paulo E. Colet

The Philippines became the 111th member of the Permanent Court of Arbitration (PCA) last September 11, 2010.

Department of Foreign Affairs Assistant Secretary J. Eduardo Malaya, in his article "International dispute resolution through arbitration" published on March 4, 2011 in www.philstar.com, reported that the Philippine Ambassador to the Netherlands deposited the country's Act of Accession to the 1907 Convention for the Pacific Settlement of Disputes at the Dutch Ministry of Foreign Affairs, which was the necessary step for membership in the PCA.

The PCA is an inter-governmental organization providing a variety of dispute resolution services to the international community. It was established by treaty during the first Hague Peace Conference in 1899, which was convened at the initiative of Czar Nicholas II of Russia. The PCA is based in the Peace Palace at the Hague, the Netherlands.

Originally established to facilitate arbitration and other forms of dispute resolution between states, the PCA has evolved to provide services for the resolution of disputes involving various combinations of states, state entities, intergovernmental organizations, and private parties.

The disputes submitted to the PCA cover not only the application of public international law, but also private international law. Disputes handled by the PCA include territorial, treaty, and human rights disputes between states, as well as commercial and investment disputes, such as disputes arising under bilateral and multilateral investment treaties.

The Peace Palace at The Hague

In his article, Asec. Malaya clarified that the PCA is not a court, but a mechanism for the creation of ad hoc arbitral tribunals to resolve disputes. "It has a permanent administrative council and an international bureau (or secretariat) that provides support to the tribunals set up. The basis of the 'Court' is a panel of arbitrators to which parties may nominate a maximum of four persons. When parties agree to submit a dispute, each appoints two arbitrators to the panel, and the four arbitrators select an umpire."

Asec. Malaya added, "Just like in ICJ (International Court of Justice) **PAGE 4** ▶

CONTENTS

Interim Measures of Protection

By Victor P. Lazatin

Under the ADR Act, it is possible to request an interim measure of protection from both the courts and the arbitral tribunal.

Courts or Tribunal?

It is not incompatible with an arbitration agreement for a party to request, before constitution of the tribunal, from a court an interim measure of protection and for the court to grant such measure. After the constitution of the arbitral tribunal, or during the arbitral proceedings, a request for an interim measure of protection, or its modification if one has been issued, may be made with arbitral tribunal or with the court to the extent that the arbitral tribunal has no power to act or is unable to act effectively. The arbitral tribunal is deemed constituted when the sole arbitrator or the third arbitrator, who has been nominated, has accepted the nomination and written communications of said nomination and acceptance has been received by the party making the request. (ADR Act, Sec. 28)

Examples where the arbitral tribunal has no power to act –

- When the interim measure of protection is directed at third parties who are not parties to the arbitration and therefore are not subject to the jurisdiction of the tribunal.
- When the sole arbitrator or majority of the tribunal has become incapacitated.
- When a court has issued an anti-arbitration injunction against the tribunal.

Examples where the arbitral tribunal is unable to act effectively –

- When sole arbitrator or members of the tribunal is/are physically located abroad and it is not practical for them to act quickly on an urgent request.
- When police or coercive powers are necessary to enforce the interim measures of protection as the tribunal does not possess, on its own, such police or coercive powers.
- When the files have not yet been transmitted to the sole arbitrator/arbitral tribunal.

There are advantages of applying with the courts for an interim measure of protection, rather than with the tribunal. These include the following:

1. A court may grant pre-arbitral relief, i.e., even before commencement of arbitration, whereas relief is generally not available until the tribunal has been constituted.

2. In urgent cases, it is generally quicker to obtain a provisional relief from the courts than from a tribunal, especially where it comprises three arbitrators who may likely be holding offices in various locations and may not be available to meet and consider an urgent application quickly.

3. Orders granted by the courts are more likely to be effective against third parties than those from the tribunal, which has jurisdiction only over the parties to the dispute.

4. The courts have police or coercive powers of enforcement, and this is especially useful where the party (or even a third party) is within its jurisdiction.

5. The courts have more extensive powers from those of the tribunal, such as the power of contempt and to deputize law enforcement agencies to enforce the orders.

On the other hand, the advantages of applying with the tribunal include the following:

1. Where the other party is outside the jurisdiction of the courts, an interim order from the court of the seat of arbitration may be of limited value. In contrast, while a tribunal may not have coercive powers, a party may be more inclined to comply with an order made by the tribunal, fully aware that the tribunal will ultimately render an award on the merits of the case, which will be enforced in foreign jurisdictions.

2. The tribunal is often more familiar with the dispute and

able to make a better and more appropriate decision based on a broader perspective of the dispute rather than on "first impression" and narrow issues presented in a petition for interim relief filed with the court.

3. There is greater likelihood that an interim measure in the form of an award issued by a tribunal may be more readily enforceable internationally than an equivalent court order issued by a local court.

4. The tribunal has the ultimate authority to modify, amend or revoke any interim measure, including those issued by the courts, and to resolve any conflict between the interim measure issued by the court and that issued by the tribunal.

5. By proving to the tribunal the applicant's clear entitlement to an interim measure, the evidence and arguments presented will likely be persuasive to the tribunal when it decides the merits of the case.

Grounds

Interim or provisional relief may be granted:

(i) To prevent irreparable loss or injury.

(ii) To provide security for the performance of any obligation.

(iii) To produce or preserve any evidence; or

(iv) To compel any other appropriate act or omission.

Types of Interim Measures of Protection

Types of interim measure of protection include preliminary injunction directed against a party, appointment of receivers or detention, preservation, and inspection of property subject of the dispute in arbitration.

Notice Requirement

Ordinarily, notice to the other party is required. Under Article 26(3) of the PDRCI Rules, "interim or provisional relief is requested by written application transmitted by reasonable means to the court or arbitral tribunal as the case may be and the party against whom the relief is sought."

Under Rule 5.7 of the Special ADR Rules, however, "(p)rior notice to the other party may be dispensed with when the petitioner alleges in the petition that there is an urgent need to either (a) preserve property, (b) prevent the respondent from disposing of, or concealing property, or (c) prevent the relief prayed for from becoming illusory because of prior notice and the court finds that the reason/s given by the petitioner are meritorious". Under Rule 5.11, the "court shall not deny any application for assistance in implementing or enforcing an interim measure of protection ordered by an arbitral tribunal on (the ground) that the arbitral tribunal granted the interim relief ex parte – clearly implying that the arbitral tribunal can grant an interim relief ex parte using the same justification under Rule 5.7. Moreover, Section 29 of the ADR Act provides that "(u)nless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order any party to take such interim measures of protection as the arbitral tribunal may consider necessary in respect of the subject matter of the dispute following the rules in Section 28, paragraph 2." Note that notice to the other party is not specifically required.

Ultimate Authority – Courts or Tribunal?

With respect to an interim measure of protection, the Special ADR Rules places greater authority on the arbitral tribunal vis-à-vis the courts. Under Rule 5.9 of the Special ADR Rules, a court "order granting … any application for Interim Measure of Protection in aid of arbitration must indicate that it is issued without prejudice to subsequent grant, modification, amendment, revision or revocation of an arbitral tribunal." Further, Rule 5.13 stares that an interim measure of protection issued by the arbitral tribunal, upon its issuance, shall be deemed *ipso jure* to have modified, amended, revised or revoked an interim measure of protection previously issued by the court to the extent that it is inconsistent with the subsequent interim measure of protection issued by the arbitral tribunal.

Lastly, under Rule 5.14, any question involving a conflict or inconsistency between the interim measure of protection issued by the court and by the arbitral tribunal shall be immediately referred by the court to the arbitral tribunal which shall have the authority to decide such question. Under Rule 5.15, the court shall defer action on any pending petition for an interim measure of protection upon being informed of the constitution of the arbitral tribunal. However, the court may act upon such petition only if it is established by the petitioner that the arbitral tribunal has no power to act on such interim measure of protection or is unable to act effectively on the petition.

About the Author

Atty. Victor P. Lazatin is serving his second term as President of PDRCI. He is a senior litigation partner and former managing partner of one of the Philippines' leading law firms, Angara Abello Concepcion Regala & Cruz. He specializes in civil and commercial litigation, domestic and international arbitration, and construction arbitration.

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Ms. Gwen Grecia-de Vera is a Trustee and Corporate Secretary of the Philippine Dispute Resolution Center, Inc. She is a partner of Puyat Jacinto & Santos, where she heads the firm's intellectual property and information technology law practice. She continues to be involved in dispute resolution, especially litigation and special projects.

Gwen received her Bachelor of Laws (Ll.B.) degree from the University of the Philippines in 1995 and was admitted to the Philippine Bar in 1996, placing 7th in the bar examinations. She received her Master of Laws (Ll.M.) degree from Northwestern University (with honors) in 2010.

She clerked for Supreme Court Associate Justice Vicente V. Mendoza before going into private practice. She is a faculty member of the University of the Philippines College of Law since 1997, teaching constitutional law, commercial law review, alternative dispute resolution, and legal history. As a member of the academe, she has written articles on negotiation. She currently serves as Director of the Institute of International Legal Studies of the U.P. Law Center.

As part of a panel, Gwen helped determine best practices towards sound corporate governance in a government-owned and controlled corporation. She handled litigation involving the sale and purchase of government assets through the then Asset Privatization Trust. She is also a consultant of the Cyberspace Policy Center of the Philippines (CPCAP) on its online dispute resolution project.

ARBITRATION ADVICE

Ten tips for success

By Arveen N. Agunday

In his article "Arbitration Advice: Ten Tips for Success" (http://www.mansfieldtanick.com), Mr. Marshall Tanick discussed the advantages and disadvantages of arbitration. The advantages of arbitration are: cost-efficient, expertise of decision-makers, and speed and confidentiality of proceedings.

On the other hand, arbitration has the following disadvantages: limitations on discovery and other fact-gathering devices, lack of clear-cut precedents for guidance of parties, and absence of meaningful appellate review.

After discussing the advantages and disadvantages, Mr. Tanick shared the following tips on how to maximize the advantages of arbitration:

1. Parties should include an arbitration clause in their contract/agreement.

2. Whether the arbitration proceedings are to be conducted before a sole arbitrator or a panel of three arbitrators, the parties should carefully choose the arbitrator/s.

3. In choosing the place of arbitration, it is best if the parties agree on a neutral site.

4. The parties may agree to set the extent of damages that may be awarded to the prevailing party, to prevent injurious results to the losing party.

5. The parties should agree on the rules regarding the payment of attorney's fees and legal expenses.

6. The parties should attempt to negotiate a settlement even if an arbitration proceeding is pending.

7. The parties should properly prepare for the proceedings by collating their documentary evidence and interviewing their witnesses in advance.

8. The parties may avail of the modes of discovery prior to and during the arbitration hearings.

9. The parties should agree on the rules of evidence, procedure and other processes beforehand.

10. The parties should keep in mind that they have little or no opportunity to appeal an arbitral award.

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FROM PAGE 1 ▶ sides can define the issues to be resolved and the law and procedure to be observed. The arbitrators may even be authorized to apply not only law but also equitable consideration in efforts to reach a just solution."

Aside from the PCA, other prominent international arbitration institutions are the World Bank's International Centre for Settlement of Investment Disputes, the World Trade Organization's Dispute Settlement Board, and the International Court of Arbitration of the International Chamber of Commerce.

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