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BROADENING ITS SCOPE OF ARBITRATION ADVOCACY

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IPO, WIPO hold IP mediation workshop

By: Juan Paolo E. Colet

The Intellectual Property Office of the Philippines (IPO) and the World Intellectual Property Office Arbitration and Mediation Center (WIPO AMC), in cooperation with the PDRCI, held a mediation workshop for intellectual property law practitioners last December 12 and 13, 2011 at the Intellectual Property Center in Bonifacio Global City.

The two-day training workshop was led by WIPO AMC Director Erik Wilbers. The first day of the workshop featured sessions on IP dispute resolution before the IPO and WIPO AMC. PDRCI Trustee Gwen B. Grecia de Vera gave an overview of the IPO arbitration and mediation procedures. This was followed by Mr. Wilbers' overview of WIPO mediation principles, the role of the WIPO AMC, and trends in IP alternative dispute resolution.

David Perkins, a partner of Arnold & Porter (UK) LLP, and Mr. Wilbers then provided examples of IP disputes, including the series of trademark disputes between Apples Corporation, the holding company founded by the Beatles band, and Apple Computer (now Apple, Inc.) of Steve Jobs. They also discussed methods of submitting disputes to WIPO mediation.

Peter Moody, a partner at BrookStreet des Roches LLP, led the sessions on the roles of lawyers and parties in IP mediation as well the steps in commencing IP mediation. Mr. Moody, together with Mr. Perkins, also discussed others aspects of IP mediation preparation.

The second day of the workshop featured a session focused on the IP mediation meeting phase. Messrs. Moody and Perkins discussed the conduct of a typical mediation, from opening of the meeting until conclusion of a settlement agreement. Workshop attendees also participated in simulations of mediation scenarios involving a hypothetical claim for damages suffered by the claimant, a European bookstore chain, against a software supplier who designed and installed a point-of-sale system.

Messrs. Wilbers, Moody and Perkins shared their experiences and insights on mediation, and gave tips on how to handle the parties and their counsel during the process.

The workshop ended with the closing remarks of IPO Bureau of Legal Affairs Director Nathaniel S. Arevalo.

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PART ONE

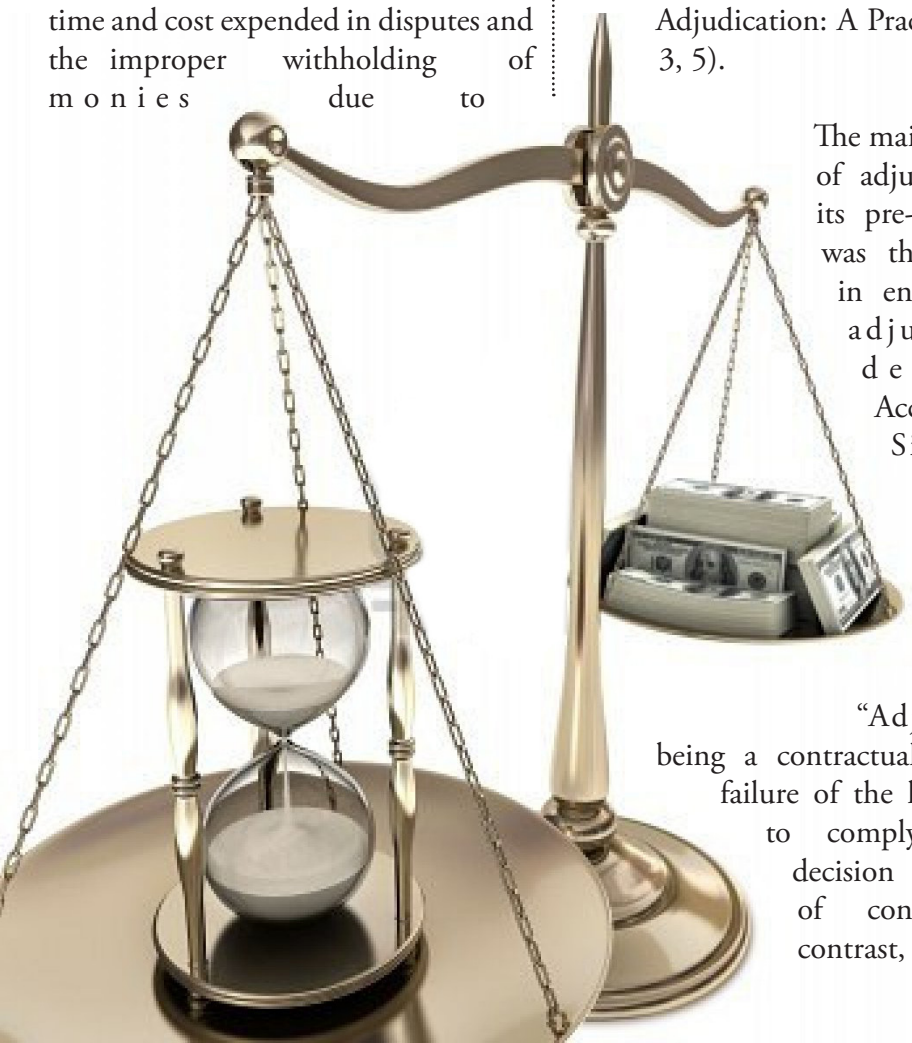
Delays in arbitration

By: Roberto N. Dio

Arbitration is broadly defined in the implementing rules of the ADR Act of 2004 as a voluntary dispute resolution process in which one or more arbitrators, appointed in accordance with the agreement of the parties or the rules, resolve a dispute by rendering an award (IRR of Rep. Act No. 9285, Dept. of Justice Circ. No. 8, s. 2009, Rule 2, Art. 1.6, A.3).

It is similar to *adjudication*, a statutory remedy introduced by the United Kingdom in Part II of its Housing, Construction and Regeneration Act of 1996 to address complaints in the construction industry of mounting time and cost expended in disputes and the improper withholding of monies due to contractors, which was causing severe cash flow problems. Like arbitration, a neutral third party examines the arguments of the contracting parties and decides the dispute.

It differs from arbitration in that the resolution is temporary pending final determination of the dispute by arbitration or litigation, although the adjudicator's decision may become final and binding upon agreement of the parties or upon the lapse of time for referral to arbitration or litigation. In the UK, it is often a condition precedent to arbitration (Derek Simmonds, Statutory Adjudication: A Practical Guide 3, 5).



The main drawback of adjudication in its pre-1996 form was the difficulty in enforcing the adjudicator's decision. According to Simmonds, "Adjudication being a contractual provision, failure of the losing party to comply with a decision is a breach of contract." In contrast, arbitral awards could be enforced summarily.

However, adjudication was speedy and – in many cases where the parties acted in good faith in resolving their disputes – efficient and effective. Arbitration, which was designed to put an end to the cost, delay and acrimony of litigation, was falling into the same trap it was designed to overcome.

The rise of "Litarbigation"

The London Court of International Arbitration declared in lofty terms the merits of arbitration upon its founding on November 23, 1892:

> This Chamber is to have all the virtues in which the law lacks. It is expeditious were the law is slow, cheap where the law is costly, simple where the law is technical, a peace-maker instead of a stirrer of strife.

Arbitration's success in the century that followed these ringing words was founded on its private, commercial, and confidential nature. Merchants wanted an expeditious settlement of their disputes without regard to technical rules of evidence or the niceties of contract law. It was informal and rudimentary, without the need for lawyers or technical experts.

Two traders, in dispute over the price or quality of goods delivered, would turn to a third person whom they knew and trusted for his decision

on the dispute. Or two merchants, arguing over damaged merchandise, would settle their dispute by accepting the judgment of a fellow merchant. And they would do it not because of a legal sanction, but because this was expected of them in a community where they carried on their business (Alan Redfern, Law and Practice of International Commercial Arbitration 3).

Arbitration is largely self-regulated by the parties. According to a French author, it was conceived "… as an institution of peace, the purpose of which was not primarily to ensure the rule of law but rather to maintain harmony between persons who were destined to live together." (René David, Arbitration in International Trade 29).

However, as commercial arbitration has gained wide acceptance and popularity, counsel have become more sophisticated in the process. Since most arbitration practitioners are also litigators, arbitration now often incorporates many elements of a court trial. One author called this the "juridization" of the arbitral process (Peter Sanders, Quo Vadis Arbitration? Sixty Years of Arbitration Practice: A Comparative Study 22). He noted the attempts to introduce court procedures, resorts to discovery, and submissions of "car loads" of documents to swamp the arbitrators.

Arbitration, traditionally seen as a no-nonsense method of dispute resolution, relying more on technical assessment rather than on the application of judicial nuances, has for a number of years become overly legalistic, leading the House of Lords to observe in one case, *Northern Regional Health Authority v. Derek Crouch Construction Company, Ltd.* (1984), that "Arbitration is usually no more and no less than litigation in the private sector." (Peter R. Hibberd and Paul Newman, ADR and Adjudication in Construction Disputes 17)

In an article in the summer 2011 issue of Litigation magazine, JAMS managing director Richard Chernick noted that "Litigation constructs such as pleadings, broad-based discovery, provisional relief, dispositive motions, and formal rules of evidence are now commonly part of arbitration, as is the review of arbitration orders and awards on the merits and for procedural error." Arbitration is now referred to as the "new litigation" or by the portmanteau term "Litarbigation."

Causes of delay in arbitration

Delays and disruptions in the arbitration may be caused by the parties, their counsel, the arbitrators, and by the provider organization. As a rule, delay occurs when any of the following conditions are present: (a) pathological arbitration clauses; (b) inexperienced counsel and arbitrators; (c) substantial amounts and complex issues at stake; and (d) conflict between the substantive arbitration law, procedural rules, and contractual clauses.

Pathological arbitration clauses

An enforceable arbitration clause should contain at least some of the following substantial elements: an intention to arbitrate clearly expressed in the clause, scope of the arbitration, the arbitration institution or rules for *ad hoc* arbitration, place of arbitration, arbitral rules, and effect of arbitral award. An arbitration clause that fails to satisfy these substantial elements is called a pathological clause, a term first coined by Dr. Frederic Eisemann to describe arbitration clauses so affected by gaps, ambiguities and imprecision as to render them ineffective (Jean-Louise Delvolve, *et al.*, French Arbitration Law and Practice: A Dynamic Civil Law Approach to International Arbitration 65).

A pathological arbitration clause is one "… drafted in such a way that (it) may lead to disputes over the interpretation of the arbitration agreement, may result in failure of the arbitral clause or may result in the unenforceability of an award." (Vijay Bhatia, Christopher Candlin & Maurizio Gotti, The Discourses of Dispute Resolution 151)

Pathological clauses are caused by the parties and their counsel's inattention during the drafting process and by the desire to immediately close the deal. Such clauses may result in so-called parasitic litigation just to ferret out the parties' real intention to settle their dispute, which can tie up the arbitration for years.

Next issue: Other causes of delay in arbitration.

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

MEMBER SPOTLIGHT

Chief Justice Artemio V. Panganiban

Hon. Artemio V. Panganiban served as the 21st Chief Justice of the Supreme Court of the Philippines in 2005. Before his elevation to the rank of chief magistrate, he served as an Associate Justice from 1995 to 2005.

During his 11-year tenure in the Supreme Court, he penned about 1,200 full-length decisions, 100 separate opinions, and several thousand minute resolutions disposing of various controversies. While a member of the Supreme Court, he also authored 11 books.

At his retirement ceremony on December 6, 2006, Chief Justice Panganiban was unanimously honored by his colleagues as the "21st Century's Renaissance Jurist" because "his watch ushered a judicial renaissance, during which the Court set new and loftier standards for adjudication and reform."

Prior to his judicial service, he was as a practicing lawyer, law professor, Catholic lay worker, civic leader, and businessman. He founded the Panganiban Benitez Parlade Africa and Barinaga Law Offices, which he headed until he joined the Supreme Court in 1995. He has been, among others, vice-president of the Philippine Chamber of Commerce and Industry; governor of the Management Association of the Philippines; president of *The Philippine Daily Inquirer*; and president of the Rotary Club of Manila. In addition, he was the only Filipino appointed by the late Pope John Paul II to the Pontifical Council for the Laity for the 1996-2001 term.

Chief Justice Panganiban writes a weekly column in *The Philippine Daily Inquirer*. He also serves as independent director in several leading Philippine corporations. He sits as Chairman of the Philippine Dispute Resolution Center, Inc., Chairman of the Board of Advisers of the Metrobank Foundation, and President of the Manila Cathedral-Basilica Foundation. He also acts as adviser of the World Bank, Dela Salle University College of Law, Asian Institute of Management Corporate Governance Center, Johann Strauss Society and Mapa Blue Falcon Honor Society.

He obtained his bachelor of laws degree, *cum laude*, from the Far Eastern University in 1960 and placed sixth in the bar examinations of that same year. He turned 75 on December 20, 2011, which he celebrated with a musical about his life.

PDRCI explores collaboration with ABA on arbitration

PDRCI President Victor P. Lazatin and trustee Roberto N. Dio recently met with the American Bar Association (ABA) to discuss initiatives on arbitration education and training in the Philippines. The ABA was represented by its Rule of Law Initiative, Asia Division country head for the Philippines, Scott Ciment, and advisor Katherine Southwick. Senior advisor Anthony Valcke also attended the meeting on December 21, 2011 at the Tower Club in Makati City.

The ABA has collaborated with the Philippine government on several rule of law initiatives, including the creation of small claims courts and the publication of the second edition of The Bench Book for Trial Court Judges through the Philippine Supreme Court and the Philippine Judicial Academy. It is also involved in the implementation of Executive Order No. 45 issued by President Benigno S. Aquino III on June 9, 2011, which created the Office of Competition. The ABA is currently assisting the Office of Alternative Dispute Resolution (OADR) pursue its mandate of promoting alternative dispute resolution (ADR), and consulted PDRCI on a possible collaboration.

President Lazatin briefed the ABA on PDRCI's involvement in the drafting of the implementing rules and regulations of the ADR Act of 2004 and the Special ADR Rules of the Supreme Court. He described the training modules of PDRCI, its membership and list of accredited arbitrators, its new offices and facilities, and its recent partnership with the Philippine Intellectual Property Office and the World IntellectualProperty Organization on intellectual property mediation and arbitration. He also discussed recent developments in ADR law in the Philippines, including the adoption of mediation and arbitration rules by the Office of the Solicitor General to govern disputes between agencies and corporations of the Philippine government.

ABA expressed interest in helping the OADR produce a video training kit for arbitration, as proposed by President Lazatin, for use by courts, lawyers and the different chambers of commerce in the country. The training, which may be done by PDRCI, will initially involve the OADR and will eventually include the courts and lawyers. The ABA agreed with President Lazatin that the international and local chambers of commerce should be encouraged to have their members trained and accredited by PDRCI as arbitrators.

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