The Philippine ADR Review

JANUARY 2012

BROADENING ITS SCOPE OF ARBITRATION ADVOCACY

PDRCI
PHILIPPINE DISPUTE RESOLUTION CENTER INC.

Secretariat

3rd Floor, Commerce and Industry Plaza
(besides Blue Leaf and Venice Piazza Mall)
1030 Campus Avenue cor. Park Avenue
McKinley Town Center, Fort Bonifacio
1634 Taguig City

Telefax: 822-4102
Email: secretariat@pdrci.org
Website: www.pdrci.org

PDRCI partners with ABA in arbitration training for DOJ, OADR and OGCC

By: Salvador S. Panga, Jr.

The PDRCI, in partnership with the American Bar Association, Rule of Law Initiative (ABA ROLI) and the Office for Alternative Dispute Resolution (OADR), will conduct a basic training seminar in commercial arbitration law and practice for approximately 50 lawyers of the Department of Justice, the OADR and the Office of the Government Corporate Counsel (OGCC) on March 19-23, 2012. The training, to be held in Metro Manila, will equip lawyers in government service with the necessary background and skills to serve as counsel in commercial arbitration.

ABA ROLI is a mission-driven, non-profit program grounded on the belief that rule of law promotion is the most effective long-term antidote to the most pressing problems facing the world today, including poverty, conflict, endemic corruption and disregard for human rights.

The ABA established the program in 2007 to consolidate its five overseas rule of law programs, including the Central European and Eurasian Law Initiative (CEELI), which it created in 1990 after the fall of the Berlin Wall.

Today, ABA ROLI implements legal reform programs in more than 40 countries in Africa, Asia, Europe and Eurasia, Latin America and the Caribbean and the Middle East and North Africa.

CONTENTS

PART TWO

Delays in arbitration

By Roberto N. Dio

Editor's note: In our last issue, the author discussed arbitration and adjudication, the recent rise of arbitration as the "new litigation," and pathological arbitration clauses as a cause of delay in arbitration. In this issue, he will discuss the other causes of delay in arbitration and what arbitrators may do to avoid delay.

Inexperienced lawyers and arbitrators

While business users and their internal counsel often correctly insist on mediation and conciliation, followed by arbitration, in the dispute resolution clauses of their transactional documents, these choices are sometimes made without much thought by decision makers and counsel who are *inexperienced* in the arbitration process. They may not have been involved in a previous arbitration or mediation, let alone in a dispute. Often a boilerplate arbitration clause is inserted in the document at the eleventh hour prior to signing. The result is a poorly-designed dispute resolution process.

Delay may be avoided during the drafting stage by using arbitration in a way that best serves economy, efficiency, and other business priorities. These may include adjudication or mediation as a pre-arbitration settlement step and putting time and value limits on adjudication and mediation, thereby eliminating small claims and other cost-inefficient issues from arbitration. Where appropriate, fast track and sole arbitration can be used in lieu of a full tribunal of three arbitrators.

Parties can avoid delay by choosing experienced and qualified counsel to represent them in arbitration as well as arbitrators who are experts and who have strong case management skills. Lawyers who handle arbitration for the first time tend to fall back on their litigation training and apply court procedures in drafting their submissions, presenting evidence, writing orders and awards, and in managing the case. Whether as an advocate or arbitrator, lawyers must adopt a commercially efficient approach to arbitration, which should not be conducted similar to court proceedings.

At the start of the arbitration, the parties are given much leeway in deciding the procedure for themselves, consistent with party autonomy. They can agree on the most efficient time table for presenting evidence, how it will be presented, what kind of evidence will be produced, the number of witnesses, submission of pleadings and memorials, motions allowed or prohibited, penalties for and consequences of delay, and rendition of the award. Once an efficient procedure is fixed, however, the tribunal takes responsibility for the case and enforces the rules of procedure. Arbitrators are encouraged to deal robustly with parties seeking to cause delay by applying penalties and consequences where appropriate.

Challenges to arbitrators

Recently, there has been a marked increase in challenges to arbitrators both in domestic and international arbitrations, especially where the claims involve substantial amounts. Recalcitrant parties have more opportunities to use challenges to delay arbitration or to deny the other party the arbitrator of its choice. Disclosure of any relationship, no matter how minor or serious, has too often led to objections, challenges, and withdrawal or removal of the arbitrator (Gary Born, International Arbitration and Forum Selection Agreements: Drafting and Enforcing 331).

Tactical challenges are made merely for dilatory purposes or procedural advantages, usually by the respondent who will benefit from the resulting delay in the appointment process and in the arbitration proceeding. As a result,

only a minority of the challenges succeed, especially in institutional arbitration where the arbitrator is scrutinized before being appointed (Julian Lew, *et al.*, Comparative International Commercial Arbitration 303).

When challenged, the arbitrator may invite the other party to comment before acting on the challenge. If the other party agrees to the challenge, the arbitrator is removed. On the other hand, if the other party opposes the challenge, this will prevent the removal of the arbitrator in case he rejects the challenge. If the challenge is evidently made for delay, it would likely be rejected when renewed before the provider organization or with the court. The arbitration will proceed to hearing and award pending the challenge.

In domestic arbitration, the grounds for challenge will be resolved by applying national law. In the Philippines, it is the Arbitration Law (Rep. Act No. 876), the ADR Act of 2004, Art. 12 of the UNCITRAL Model Law, and Rule 3, Art. 5.10(a) of the IRR of the ADR Act of 2004.

In international commercial arbitration, it will depend on the law of the place of arbitration, the lex *loci arbitrii*, and the rules of procedure of the arbitral institution. The IBA Guidelines on Conflicts of Interest in International Arbitration, which PDRCI has adopted as its code of ethical standards for arbitrators, reflects the best current international practice and is intended to promote clarity and uniformity in questions of conflicts of interest and disclosure in international arbitration (Loukas Mistelis & Julian Lew, Pervasive Problems in International Arbitration 130-131).

One author has warned that the loss of a challenge may leave the challenged arbitrator as well as the tribunal resentful of the challenging party, particularly if they are convinced that the challenge was made to delay. Parties who use the challenge to delay the arbitration should understand that the process could damage their case if it causes them to lose credibility before the tribunal (Margaret Moses, the Principles and Practice of International Commercial Arbitration 142).

Substantial amounts and complex issues at stake

Preemptive claims, inflated claims, aggressive lawyering, and flooding the proceedings with complex issues to obscure the real issues are becoming increasingly common. In a mock mediation involving a fictional European bookstore chain and a point-of-sale technology supplier that the author joined in a recent training conducted by the World Intellectual Property Organization for PDRCI member arbitrators, the claimant bookstore was aggressive in inflating its claims and asserting all sorts or rights against the respondent supplier. Although the participants were only play acting, the actors representing the respondent were overwhelmed by the aggressiveness of the claimant and turned timid.

In many large international arbitrations, noted one author, "there are broad frontal attacks from all sides, using every weapon imaginable for preemption, for deterrence, for success at any cost, or at least reaching a favorable settlement than would otherwise have been the case." (Arthur W. Rovine, Contemporary Issues in International Arbitration and Mediation: The Fordham Papers 2007 150). Bigger and bigger amounts and more and more complex issues obscure the focus and consume a lot of time.

Already, there are arbitrations pending for a decade or more, with no end in sight. Observed Rovine, "This is an abomination and a sign that something is wrong. This is also a threat to the administration of justice and hence to the reputation of arbitration as a mode (of) effective dispute resolution."

He cautioned parties and counsel to show restraint, and advised arbitrators to use "every trick in the book" to avoid having cases literally explode in mass and complexity. He also criticized the practice of assessing administrative charges and arbitrator's fees according to the amount of the claim, which can make cases involving substantial claims unnecessarily complex due to the financial interest of the arbitrator in collecting his fee.

Conflict between arbitration law, procedural rules, and contractual clauses

Since the tribunal's jurisdiction is determined by the arbitration clause or agreement, any conflict between the contractual provision and the applicable substantive law and rules of procedure will have to be resolved ahead of the merits of the claim and counterclaim. This may result in a bifurcated proceeding, which can delay the arbitration.

Once the proceeding is bifurcated, the tribunal may require the parties to prove its jurisdiction first before hearing their evidence on the merits. If it sustains its jurisdiction and renders an award, the losing party may later apply with the court to set aside the arbitral award. The arbitration then ends if the court sustains the tribunal's jurisdiction and enforces the award. However, if the court sets aside the award, the party who prevailed in the arbitration could have by then incurred substantial cost and would no longer be in a position to resubmit the same evidence in court or in another arbitration.

In closing, Rovine advises arbitrators to adopt proactive measures to secure a reasonably swift proceeding. "It is in the interest of arbitrators," he said, "to decide the scope of the arbitration early on, so as to make the dispute resolution efficient in the eyes of the parties. The arbitrators who manage this well will add to their chances of handing down an award acceptable to all, will earn respect, and will get repeat business. The arbitrators who are unable to run a tight ship will not. To a party, having paid substantial amounts in fees for arbitration, believed to be swifter than courts, almost nothing could be worse than finding out that time and good money had been wasted because matters were dealt with inefficiently and/or in backward sequence." (*Supra*, at 150-151) .

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. Ramon G. Samson

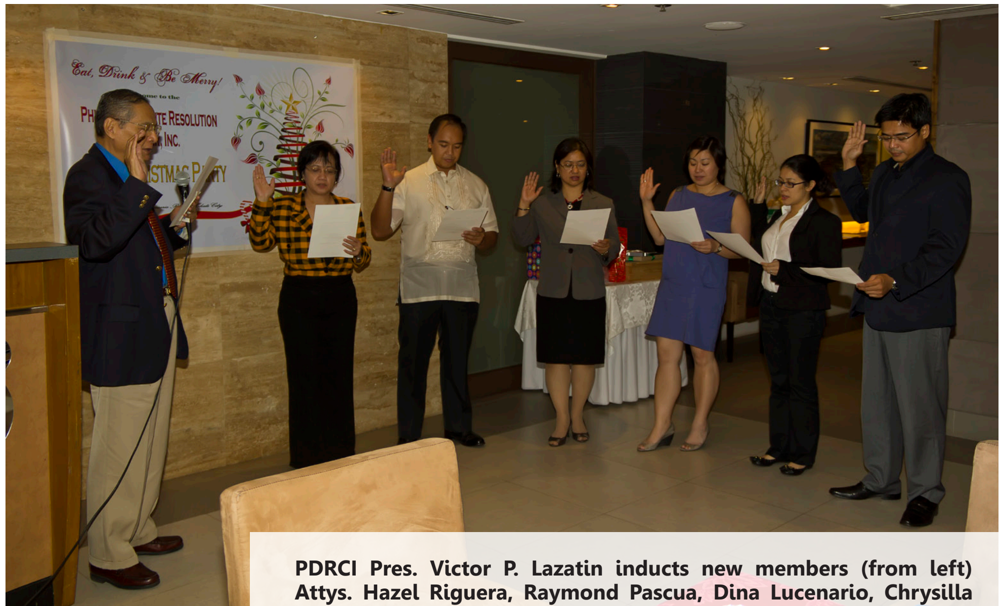
Atty. Ramon G. Samon is a senior partner and the head of the Litigation and Dispute Resolution group of Angara Abello Concepcion Regala & Cruz (ACCRA), one of Philippines' largest law firms.

He joined ACCRA in 1981, where he specialized in litigation and dispute resolution. His practice areas include commercial litigation, intra-corporate disputes, civil and criminal law, estate proceedings, alternative dispute resolution, intellectual property rights protection and enforcement, land disputes/foreclosures, product liability, and constitutional issues. He also served as director in various corporations.

Aside from his membership in PDRCI, Atty. Samson is actively involved in various organizations, including the Integrated Bar of the Philippines, Philippine Bar Association, Legal Management Council of the Philippines, and the alumni associations of the University of the Philippines and the University of Santo Tomas (UST). He is also a member of the United Methodist Church, were he served as legal adviser to the Bishop of the church's Manila Episcopal Area and a member of its Board of Trustees.

Atty. Samson finished Bachelor of Arts, major in Political Science, at the University of the Philippines in Diliman. He earned his Bachelor of Laws degree from the UST Faculty of Civil Law, where he was conferred the Rector's Award, its highest honor for academic excellence in law. Atty. Samson is also an avid golfer.

SNAPSHOT



PDRCI Pres. Victor P. Lazatin inducts new members (from left) Attys. Hazel Riguera, Raymond Pascua, Dina Lucenario, Chrysilla Bautista, Patricia Clemente, and Rosauro David at the PDRCI year-end meeting on December 19, 2011 at The Brasserie, Makati City.

LETTER TO THE EDITOR

Hello

Catching up on my Christmas reading I have just read your interesting article in the PDRCI December Newsletter.

I thought you may be interested to know Australia now has an adjudication system for building and construction payment claims in each of the 6 States and 2 Territories. Inspired by the United Kingdom model it does however differs from that model and frustratingly between States and Territories (we are a Federal system). Generally it has a very restricted timetable but the decision while enforceable is not finally determinative of rights. All payments are on account and litigious/contractual dispute resolution mechanisms can be subsequently utilised if desired - however it is designed to ensure cash flows are maintained during the building process. It has been described as "pay now, argue later".

Anecdotally the prompt and broad, but sometimes imperfect, resolution often results in a situation where neither party sees merit in ultimately pursuing issues further and so de facto the resolution becomes the final resolution. The truncated timetable of the adjudication (weeks) does tend to show the more leisurely arbitral process in a bad light.

If you are interested I can send you some more information on the process.

Yours faithfully,
Andrew Robertson
Partner | Piper Alderman

Roberto N. Dio, *Editor*

Shirley Alinea, Donemark Calimon, Ramon Samson, *Contributors*

Arveen N. Agunday & Juan Paolo E. Colet *Staff Writers*