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BROADENING ITS SCOPE OF ARBITRATION ADVOCACY

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Arbitration in Asia

By Arveen N. Agunday

The Asian Lawyer, the regional edition of *The American Lawyer*, recently took note of the growing arbitration practice in Asia. In his article *"Arbitration at Arm's Length: Are U.S. Firms Missing an Opportunity in Asia?,"* writer Ben Lewis observed in the magazine's January 30, 2012 issue that Asian arbitration has become a growth industry.

The Asian Lawyer

The magazine reported that eight of Asia's major arbitral institutions – two in China, one each in Singapore, South Korea, Vietnam, Japan, Hong Kong and the Philippines – administered 722 disputes in 2010, a number that was not too far behind the American Arbitration Association's International Centre for Dispute Resolution, based in New York, which administered 888 disputes in the same year.

In the face of this emerging trend, Mr. Lewis found that American arbitration lawyers are scarce on the ground in Asia. He stated that of the 10 American law firms that handled the largest arbitrations in 2009-2010, four have no arbitration partners based in Asia-Pacific countries, while other top-ranked firms have limited presence in the region.

Mr. Lewis posits some factors that may have stunted the expansion in Asia of American arbitration law firms or otherwise limited their presence in the region. These are: (a) the presence of British firms, who have been in the region since the 1980s; (b) the tendency of regional clients to refer arbitrable disputes to domestic Asian firms; (c) the tendency of U.S. firms to run their arbitration practices through their mainland offices; (d) the small amounts usually involved in Asian arbitration disputes; and (e) the scarcity of talent in the region.

Mr. Lewis believes that although some U.S. firms are trying to expand their presence in Asia and that those who already have arbitration partners in the region are consolidating their positions, American firms on the whole may be missing on a potentially lucrative opportunity, as there are advantages to going local.

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PART ONE

The Arbitral Award (and writing it)

By Daisy P. Arce

When parties go through the trouble and expense of submitting their disputes to international arbitration, they do so in the expectation that unless a settlement is reached along the way, the proceedings will end in an award.

Definitions

Republic Act No. 9285 (2004), the ADR Act, defines "award" as a partial or final decision by an arbitrator in resolving the issue in a controversy.[2] The UNCITRAL Model Law on International Commercial Arbitration ("Model Law"), which was adopted by the ADR Act,[3] does not provide a definition of the same term.

Alan Redfern and Martin Hunter proposed the following definition: "Award means a final award which disposes of all issues submitted to the arbitral tribunal and any other decision of the arbitral tribunal, which finally determines any question of substance or the question of its competence or any other question of procedure but, in the latter case, only if the arbitral tribunal terms its decision an award." [4]

Kinds

The Model Law contemplates that there may be more than one award in the course of an arbitration. For example, a plea that the arbitral tribunal does not have jurisdiction may be dealt with either in the final award or as a "preliminary question."

Some commentators attempt to classify awards as follows:

- Award on jurisdiction – This can be qualified as interim or final, depending on whether the arbitral tribunal admits or declines jurisdiction.

- Interim, interlocutory or preliminary award – An interim or interlocutory award is one rendered in the course of the arbitral procedure, without ending it.

- Partial award – A partial judgment is one that adjudicates a part of the dispute as defined by the prayers for relief of the parties.

- Final award – This refers to the award, be it unique or the last one, which decides all the claims referred to the arbitrator, or at least those

[1] Alan Redfern and Martin Hunter with Nigel Blackaby and Constantine Partasides, Law and Practice of International Arbitration § 8-01, p. 416 (Sweet & Maxwell, 2004).
[2] ADR Act, Sec. 3(f).
[3] ADR Act, Sec. 19.
[4] Redfern & Hunter, § 8-05, citing Broches, "Recourse Against the Award; Enforcement of the Award", UNCITRAL's Project for a Model Law on International Commercial Arbitration, ICCA Congress Series No. 2 (a984), p. 208.

remaining to be decided, and thus puts an end to the proceedings.

• Default award – This may be deemed no different from one made following proceedings where all the parties participate, the essential point being that the defaulting party must have been offered the opportunity to appear and present its case.

• Agreed or consent awards – It embodies a settlement reached by the parties. To the extent that it determines all the claims referred to the arbitrators, it ends the proceedings. It differs from a final award by its object, which consists in the consent of the parties and not in a decision of the arbitral tribunal, and by the absence of reasons.[5]

Writing the award

How does one begin writing an internationally enforceable award?

First, the arbitral tribunal must initially satisfy itself that it has jurisdiction to determine the matters it is called upon to determine.

Second, the arbitral tribunal must comply with any procedural rules governing the arbitration. This will include having the award formally approved by an arbitral institution as required in an International Chamber of Commerce arbitration.

Finally, the arbitral tribunal must sign and date the award and ensure that it is communicated to the parties in the manner set out in the relevant law or in the rules that apply to the arbitration.[6]

Essential elements of an award

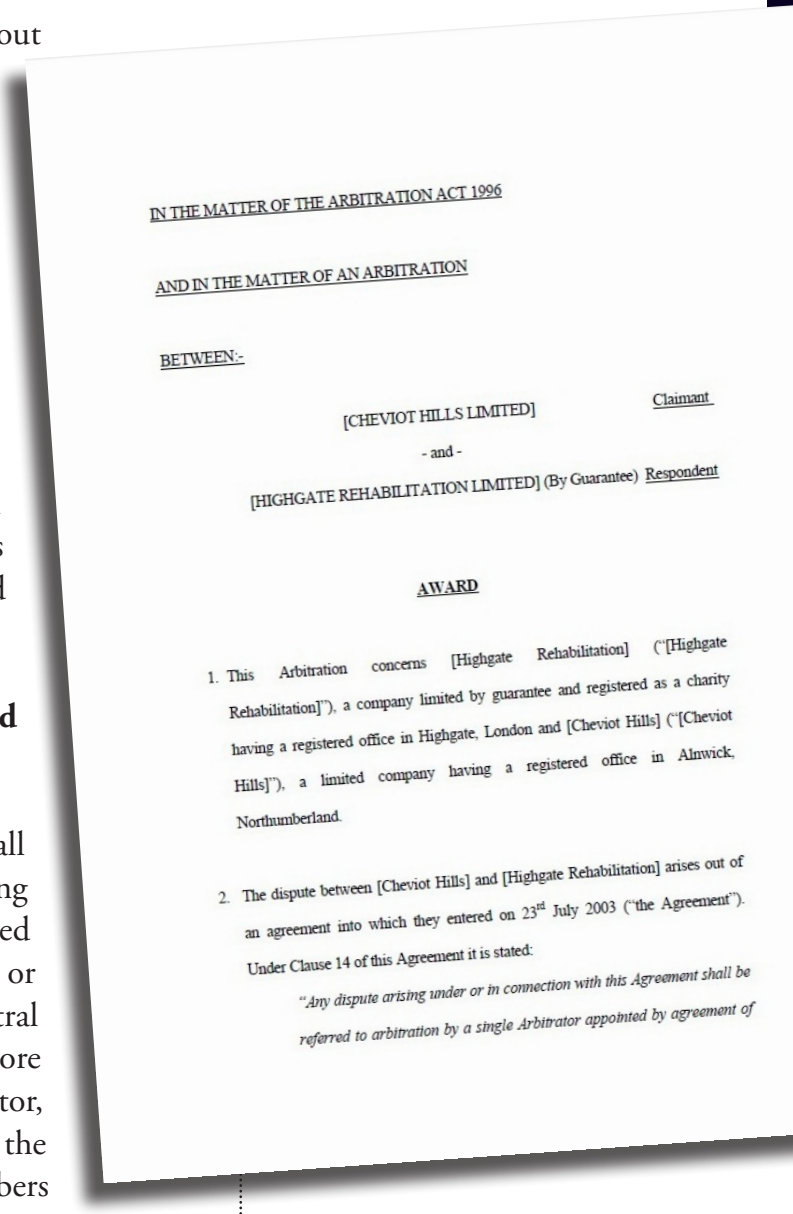
Article 31 of the Model Law sets out the formal requirements of a valid and enforceable award:

Form and contents of award

(1) The award shall be made in writing and shall be signed by the arbitrator or arbitrators. In arbitral proceedings with more than one arbitrator, the signatures of the majority of all members of the arbitral tribunal shall suffice, provided that the reason for any omitted signature is stated.

(2) The award shall state the reasons upon which it is based, unless the parties have agreed that no reasons are to be given or the award is an award on agreed terms under article 30.

(3) The award shall state its date and the place of arbitration as determined in accordance with article 20(1). The award shall be deemed to have been made at that place.



IN THE MATTER OF THE ARBITRATION ACT 1996

AND IN THE MATTER OF AN ARBITRATION

BETWEEN:-

[CHEVIOT HILLS LIMITED] Claimant

- and -

[HIGHGATE REHABILITATION LIMITED] (By Guarantee) Respondent

AWARD

1. This Arbitration concerns [Highgate Rehabilitation] ("[Highgate Rehabilitation]"), a company limited by guarantee and registered as a charity having a registered office in Highgate, London and [Cheviot Hills] ("[Cheviot Hills]"), a limited company having a registered office in Alnwick, Northumberland.

2. The dispute between [Cheviot Hills] and [Highgate Rehabilitation] arises out of an agreement into which they entered on 23rd July 2003 ("the Agreement"). Under Clause 14 of this Agreement it is stated:

"Any dispute arising under or in connection with this Agreement shall be referred to arbitration by a single Arbitrator appointed by agreement of

(4) After the award is made, a copy signed by the arbitrators in accordance with paragraph (1) of this article shall be delivered to each party.

About the Author

Daisy P. Arce is a corporate lawyer with extensive experience in domestic and international arbitration. She specializes in corporate organization and restructuring, mergers, divisions and acquisitions, and capital restructuring.

[5] Jean-Francois Poudret and SebastienBesson, Comparative Law of International Arbitration 644-648 (Sweet & Maxwell, 2007).
[6] Redfern & Hunter, § 8-04.

MEMBER SPOTLIGHT

Atty. Dina D. Lucenario

Atty. Dina D. Lucenario is a senior partner of Castillo Laman Tan Pantaleon and San Jose. She has extensive experience in corporations, food and drugs, and intellectual property. She is an accredited arbitrator of the Philippine Dispute and Resolution Center, Inc. and an accredited mediator of the Intellectual Property Office of the Philippines.

She obtained both her Bachelor of Arts degree in Journalism, *cum laude,* in 1983 and her Bachelor of Laws degree, in 1988, from the University of the Philippines (U.P.). She was admitted to the Philippine Bar in 1989. She is a professorial lecturer at the U.P. College of Law, where she teaches taxation.

Atty. Lucenario is a trustee of IP Alumni Association, a member of the Licensing Executives International (Philippine Chapter), and a member of the Intellectual Property Association of the Philippines. She is writing a textbook on taxation.

Arbitration in Asia *By Arveen N. Agunday*

FROM PAGE 1 ▶ He writes that selecting the right tribunal is a critical part of arbitration strategy, because "if you get the tribunal right, you're halfway there." Since many of the region's top arbitrators are independent or attached to barristers' chambers, knowing which arbitrator is suitable for a particular dispute comes only through familiarity.

In addition, not having an established presence in Asia increases the cost of arbitration while having a local contact is considered "good service" because clients respond better to someone whom they can meet locally or at least contact in the same time zone.

JICA holds dispute board seminar

More than 40 participants attended the recent dispute board (DB) seminar held on February 9, 2012 at the Hyatt Hotel in Manila. Japan International Cooperation Agency (JICA) hosted the seminar in cooperation with *Federacion International des Ingenieurs-Conseils* (FIDIC) and the Dispute Resolution Board Foundation (DRBF).

PDRCI Trustee and DRBF country representative Salvador P. Castro, Jr. spoke on the resolution of construction disputes in the Philippines, particularly by the Construction Industry Arbitration Commission, and the perceived barriers and issues on the use of dispute boards such as the "high cost" of international DB, cost of training locals for the national list of DB practitioners, enforceability of DB decisions, lack of appreciation of DB and its benefits, and the absence of contract budget for the cost of DB.

The seminar featured a host of DB experts, including two international practitioners in the FIDIC President's List, Dr. Toshihiko Omoto and Dr. Gotz-Sebastian Hok. Dr. Omoto spoke on the practice of DB, its advantages, and a featured case study. Dr.Hok discussed the key requirements of DB adjudicators such as good command of FIDIC contracts and requirements of international construction business, ethical standards, language skills, and soft skills.

Hamid Sharif, Principal Director of the Asian Development Bank, talked on the challenges to the successful implementation of DB and the importance of post-award monitoring. Mr. Takashi Ito shared JICA's experience, initiatives and way forward on DB, while Yoshihiko Yamashita of the Association of Japanese Consulting Engineers described the creation of the national list of Japanese adjudicators. Yukinobu Hayashi of Nippon Koei Co., Ltd. gave a lecture on the basics of DB.

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