

# THE PHILIPPINE ADR REVIEW

MARCH 2012

BROADENING ITS SCOPE OF ARBITRATION ADVOCACY



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## Singapore Court of Appeals clarifies enforcement of DAB award under FIDIC Red Book

By Juan Paolo E. Colet

In a Judgment rendered on July 13, 2011 in Civil Appeal No. 59 of 2000, *CRW Joint Operation v. PT Perusahaan Gas Negara (Persero) TBK*, the Singapore Court of Appeals (SCA) clarified the dispute resolution mechanism under the 1999 FIDIC Red Book, formally known as the “Conditions of Contract for Construction: For Building and Engineering Works Designed by the Employer,” particularly the nature and enforcement of the Dispute Adjudication Board’s (DAB) decision and the effect of a referral of such decision to arbitration.



In 2006, CRW Joint Operation (CRW) and PT Perusahaan Gas Negara (Persero) TBK (PGN) entered into a gas pipeline construction contract that adopted, with some modifications, the standard provisions in the Red Book. A dispute under the contract was referred to the DAB consisting of a single adjudicator.

In 2008, the DAB awarded the sum of \$17,298,834.57 to CRW. PGN promptly filed a notice of dissatisfaction (NOD), while CRW proceeded to invoice PGN for the award. CRW subsequently filed a request for arbitration under Sub-clause 20.6 of the Red Book with the ICC International Court of Arbitration for the sole purpose of giving prompt effect to the DAB’s decision.

In 2009, the arbitral tribunal consisting of three members issued a Final Award in favor of CRW. It ruled that PGN was required under the Red Book to immediately

comply with the DAB’s decision and pay CRW the awarded sum. The arbitral tribunal did not hear the parties on the merits of the DAB’s decision, since it held that PGN was not entitled to open up, review and revise the DAB’s decision. However, it stated PGN had a right to commence fresh arbitration to revise the DAB’s decision.

The matter was elevated to the Singapore High Court, which set aside the Final Award, holding, among others, that the arbitral tribunal erred in issuing a Final Award without hearing the parties on the merits of the DAB’s decision. CRW appealed the court’s decision to the SCA, which dismissed the appeal.

The SCA discussed Sub-clauses 20.4 to 20.7 of the Red Book, which deal with dispute resolution. It noted that under the Red Book, the DAB’s decision “shall be binding on both Parties, who shall promptly give effect to it unless and until it shall be revised in an amicable settlement or an arbitral award.” The Red Book also

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# The Elements of Arbitration

By: Ma. Cecilia A. Gironella



Arbitration enables parties to resolve their disputes amicably. It provides solutions that are less time-consuming, less tedious, less confrontational, and more productive of goodwill and lasting relationship.<sup>1</sup>

Still, many parties do not resort to arbitration, or do their utmost to avoid arbitration even when it is a proper remedy. Sometimes, this is due to lack of understanding of what arbitration is.

The Arbitration Law, Republic Act No. 876 (1953), does not

directly define arbitration. Instead, it describes how an arbitration comes about:

Section 2. *Persons and matters subject to arbitration.* - Two or more persons or parties may submit to the arbitration of one or more arbitrators any controversy existing between them at the time of the submission and which may be the subject of an action, or the parties to any contract may in such contract agree to settle by arbitration a controversy

thereafter arising between them. Such submission or contract shall be valid, enforceable and irrevocable, save upon such grounds as exist at law for the revocation of any contract.

Such submission or contract may include questions arising out of valuations, appraisals or other controversies that may be collateral, incidental, precedent or subsequent to any issue between the parties.

A controversy cannot be arbitrated where one of the parties to the controversy is an infant, or a person judicially declared to be incompetent, unless the appropriate court having jurisdiction approves a petition for permission to submit such controversy to arbitration made by the general guardian or guardian *ad litem* of the infant or of the incompetent.

But where a person capable of entering into a submission or contract has knowingly entered into the same with a person incapable of so doing, the objection on the ground of incapacity can be taken only in behalf of the person so incapacitated.

The broader Alternative Dispute Resolution Act of 2004, Republic Act No. 9285 (2004), provides that arbitration is a “voluntary dispute resolution process in which one or more arbitrators, appointed in accordance with the agreement of the parties, or rules promulgated pursuant to said Act, resolve a dispute by rendering an award.”<sup>2</sup>

Still, arbitration has yet to acquire a singular international definition.

<sup>1</sup> *Fiesta World Mall Corporation vs. Linberg Philippines*, 499 SCRA 332, 338 (2006); *L.M. Power Engineering Corporation vs. Capitol Industrial Construction Groups, Inc.*, 399 SCRA 562, 571-2 (2003).

<sup>2</sup> Rep. Act No. 9285 (2004), Sec. 3 (d).

<sup>3</sup> Module 5.1 is available at <http://www.unctad.org>.

<sup>4</sup> *B.F. Corporation vs. Court of Appeals, et al.*, 288 SCRA 267, 286 (1998).

As pointed out by Eric E. Bergsten in his Module 5.1, *International Arbitration*,<sup>3</sup> for the United Nations Conference on Trade and Development (UNCTAD) Course on Dispute Settlement in International Trade, Investment and Intellectual Property, Article II, paragraph I of the New York Convention on the Enforcement of Arbitral Awards provides that “Each contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration...” but the Convention itself does not define what an arbitration is.

Identifying the elements of arbitration will help in understanding this “wave of the future”<sup>4</sup> in dispute resolution. Bergsten suggests the following principal characteristics that define arbitration:

- (1) Arbitration is a mechanism for the settlement of disputes.
- (2) Arbitration is consensual.
- (3) Arbitration is a private procedure.
- (4) Arbitration leads to a final and binding determination of the rights and obligations of the parties.

The generally consensual nature of the agreement to arbitrate is recognized by the Philippine Supreme Court. It has held several times that an agreement to submit all

disputes to arbitration is a contract.<sup>5</sup> In an August 2009 decision, it said that:


Except where a compulsory arbitration is provided by statute, the first step toward the settlement of a difference by arbitration is the entry by the parties into a valid agreement to arbitrate. An agreement to arbitrate is a contract, the relation of the parties is contractual, and the rights and liabilities of the parties are controlled by the law of contracts. In an agreement for arbitration, the ordinary elements of a valid contract must appear, including an agreement to arbitrate some specific thing, and an agreement to abide by the award, either in express language or by implication.

As such, the arbitration agreement binds the parties thereto, as well as their assigns and heirs, and as long as it does not exclude the courts totally, may be enforced with the assistance of the courts even though arbitration is not undertaken in court.<sup>6</sup>

The Supreme Court also provided in its Special Rules on Alternative Dispute Resolution, which became effective on October 30, 2009, that where the parties have agreed to submit their dispute to arbitration, courts shall refer the parties to arbitration pursuant to the ADR Act of 2004, bearing in mind that such arbitration agreement is the law between the parties and that they are expected to abide by it in good faith.

The Special ADR Rules further directs the courts not to whimsically or jealously refuse to refer parties to

arbitration.<sup>7</sup> The courts may not refuse to refer a dispute to arbitration even if (a) the referral tends to oust a court of its jurisdiction; (b) the court is in a better position to resolve the dispute subject of arbitration; (c) the referral would result in multiplicity of suits; (d) the arbitration proceeding has not commenced; (e) the place of arbitration is in a foreign country; (f) one or more of the issues are legal and one or more of the arbitrators are not lawyers; (g) one or more of the arbitrators are not Philippine nationals; or (h) one or more of the arbitrators are alleged not to possess the required qualification under the arbitration agreement or law.<sup>8</sup>

The value of arbitral awards in finally determining parties’ rights and obligations is emphasized by the arbitral laws and rules. While agreements to arbitrate still allow limited involvement by the courts, Philippine arbitral laws and rules provide for very specific grounds upon which courts may vacate or refuse to enforce awards. These grounds conflate with similar grounds allowed in the New York Convention. 

### About the Author



Atty. Ma. Cecilia A. Gironella has several years’ experience in litigation, arbitration, corporate transactions, security and risk assessment and intellectual property protection, having represented clients before Philippine trial and appellate courts, the International Commercial Court in Singapore, and administrative agencies such as the Securities and Exchange Commission, National Telecommunications Commission, Commission on Elections, Intellectual Property Office, and Board of Investments.

<sup>3</sup> Maria Luisa Park Association, Inc. vs. Samantha T. Almendras and Pia Angela T. Almendras, 588 SCRA 663 (2009); Heirs of Augusto L. Salas, Jr. vs. Laperal Realty Corporation, , 320 SCRA 610, 614 (1999); Korea Technologies Co., Ltd. vs. Hon. Alberto A. Lerma, *et al.*, 542 SCRA 1 (2008).

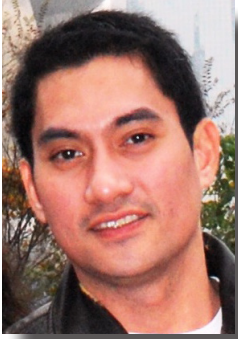
<sup>4</sup> Ormoc Sugarcane Planters’ Association, Inc., *et al.* vs. The Court of Appeals (Special Former Sixth Division), *et al.*, G.R. No. 156660, 24 August 2009.

<sup>7</sup> Special ADR Rules, Rule 2.2 (A).

<sup>8</sup> Special ADR Rules, Rule 2.2 (A) (a) to (g).

## MEMBER SPOTLIGHT


### Atty. Rommel V. Cuison



Atty. Rommel V. Cuison is a litigation partner of Castillo Laman Tan Pantaleon and San Jose (CLTPSJ). He obtained both his undergraduate (A.B. Philosophy, 1995) and law (LL.B., 1999) degrees from the University of the Philippines, where he was an Oblation Scholar.

He joined CLTPSJ straight out of law school and immediately specialized in commercial and criminal litigation, corporate rehabilitation and labor law. In 2004, he joined Esguerra and Blanco, where he was as a senior associate for two years. He rejoined CLTPSJ in October 2006 and was admitted into the partnership in July 2009.

Atty. Cuison was involved in several high-profile litigation involving the constitutionality of a government administrative order authorizing the parallel importation of branded pharmaceutical products, a class suit filed by banana plantation farmers claiming mass sterility, the validity of the Voters' Registration and Identification System, the takeover of a major discount retailer, and the mass litigation involving multi-million peso claims against a leading cola drink due to an error in the winning number of a promotional game.

Atty. Cuison has been a member of PDRCI since 2009. He is also an active member of the Integrated Bar of the Philippines and a former Lord Chancellor of the Alpha Phi Beta Fraternity of the U.P. College of Law. He is an avid golfer, bowler, mountain biker and runner, and hopes to carry on with his active lifestyle well after his retirement from law practice. 

## Singapore Court of Appeals...


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provides that “unless settled amicably, any dispute in respect of which the DAB’s decision (if any) has not become final and binding shall be finally settled by international arbitration.” The Red Book’s arbitration clause also states that “the arbitrator(s) shall have full power to open up, review and revise ... any decision of the DAB, relevant to the dispute.”

In summary, the SCA clarified the dispute resolution scheme under the FIDIC Red Book as follows: (a) the DAB’s decision is contractually binding on the parties and immediately enforceable, but it is not considered final if it has been referred to arbitration; (b) in such case, the enforcement of the DAB’s binding but non-final decision depends on the terms of the contract, but “the practical response is for the successful party in the DAB proceedings to secure an interim or partial award from the arbitral tribunal in respect of the DAB decision pending consideration of the merits of the parties’


dispute(s) in the same arbitration;” and (c) the Red Book’s arbitration clause contemplates a single arbitration that will resolve all the differences of the parties with respect to the DAB’s decision.

Based on this analysis, the SCA held that the arbitral tribunal erred when it resolved the immediate enforceability of the DAB’s decision through a Final Award, but failed to hear and resolve the substantive dispute of the parties on the merits of that decision. This contravened the Red Book’s requirement that arbitration must comprehensively resolve the parties’ dispute as to the DAB’s decision.

The SCA stated that the correct procedure under the Red Book was for the arbitral tribunal to first, make an interim or partial award in favor of CRW for the amount awarded by the DAB, consistent with the immediately enforceable nature of the DAB’s decision; and, second, proceed to hear and resolve the substance of the parties’ dispute as regards the DAB’s decision before issuing a Final Award. 

## PDRCI thanks donors

PDRCI’s Board of Trustees expressed gratitude to its donors during its meeting last February 20, 2012. PDRCI acknowledged the donation by President Victor P. Lazatin of a Polycom SoundStation 2 audio conference phone, with two external microphones, and eleven books on arbitration.

PDRCI President Emeritus Custodio O. Parlade donated two arbitration books, while External Affairs Vice Chairman Eduardo R. Ceniza donated a book on arbitration. PDRCI Trustees Arthur P. Autea and Edmundo L. Tan pledged two arbitration books each, while the law firm of Quisimbing Torres pledged four books on the same topic. Prof. Eduardo P. Lizares gave two arbitration books as well. The books will enhance the PDRCI Library’s collection of books on international and domestic arbitration. 



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