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Philippine Court of Appeals affirms enforcement of London judgment without prior dispute adjudication

By Arveen N. Agunday

In a Decision rendered on March 13, 2012 in CA-G.R. CV No. 96502, *Takenaka Corporation and Asahikosan Corporation vs. Philippine International Air Terminals Company, Inc.* (PIATCO), the Philippine Court of Appeals threw out PIATCO's appeal questioning the enforcement of the 2005 Orders issued by London's High Court of Justice, which directed PIATCO to pay Japanese claimants Takenaka Corporation ("Takenaka") and Asahikosan Corporation ("Asahikosan") more than US$83 million for the construction of the Ninoy Aquino International Airport Passenger Terminal 3 in Manila.

PIATCO argued on appeal that the London court had no jurisdiction to render judgment against it on the ground that the dispute arose from the On-Shore Construction Contract and Off-Shore Procurement Contract it entered into with Takenaka and Asahikosan, respectively. According to PIATCO, the contracts provide that in case of dispute, the matter should be decided by the Dispute Adjudication Board. Since Takenaka and Asahikosan filed their complaints directly with the London court, bypassing the Dispute Adjudication Board, the orders issued by the London court were void, PIATCO claimed.

The Court of Appeals noted that the parties stipulated that England should be the forum in the event of dispute, that English law should govern their agreement, and that English should be the controlling language in case the contracts were written in different versions. With the choice of English as forum, law and language, the parties intended the English legal system to govern their relations.

Thus, in case of a dispute, the London court was given wide latitude to decide whether and when it could assume jurisdiction. By recognizing the London court's authority, the parties admitted that only the London court had the final say in

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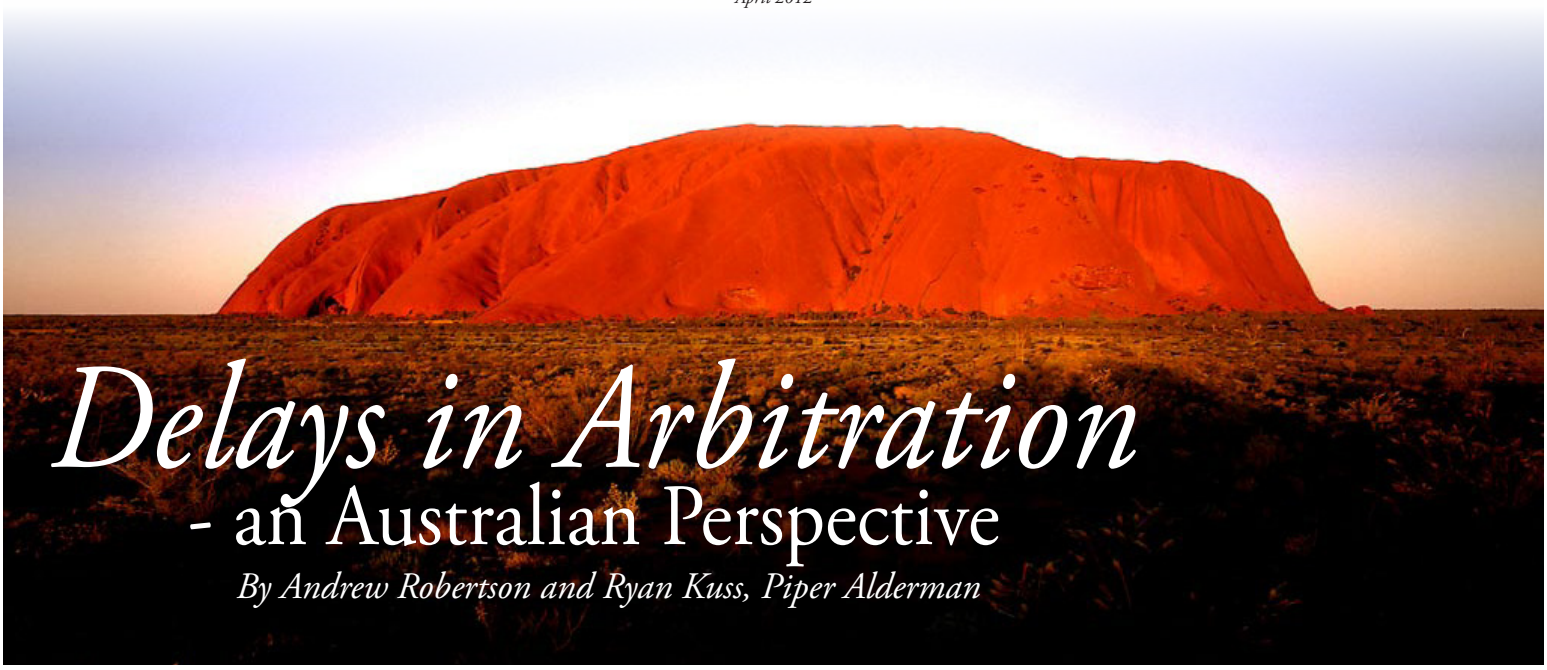

Delays in Arbitration - an Australian Perspective

By Andrew Robertson and Ryan Kuss, Piper Alderman

In the December 2011 edition of *The Philippine ADR Review*, Atty. Roberto Dio discussed delays in arbitration and referred to the adjudication process in the United Kingdom.

Readers may be interested to know that Australia also has a legislated adjudication process for building and construction progress payment claims in each of its six states and two principal territories. Inspired by the United Kingdom model, it does however differ from that model and, frustratingly, from those between the states and territories (Australia is a federal system, which can impede uniformity in such matters).

The system enables a person who does building or construction work, or who supplies goods and services for building and construction work, to claim and recover periodic progress payments for work done or goods and services supplied. The intention is to ensure that cash flow is maintained during the building process. Adjudication has been described as "pay now, argue later."

Disputes over the amount due in respect of a claim for a progress payment under the system can be referred to an adjudicator for determination. These adjudicatory proceedings move at a rapid pace, which in comparison tends to put the more leisurely pace of the arbitral process in a bad light. However, while arbitral tribunals can certainly learn from adjudication in this respect, it should be noted that the process is not arbitration and that the benefits of any comparison are limited.

Timetable for adjudication

Adjudication generally operates on a very restricted timetable. Indeed, the system has demonstrated that a quasi-arbitral function can proceed from the appointment of the adjudicator to an adjudicated determination within 10 to 12 working days,[1] despite dealing with claims that may be significant in terms of volume of material (i.e., several storage boxes of documents) and/or monies (i.e., millions of Australian dollars). Initially many saw this timetable as infeasible, but the process has grown from operating in only one state in 1999 to now being adopted by all major Australian jurisdictions. While the 10-12 working days does not include a preliminary process of defining the issues (which usually involves a further 15 to 35 business days [2]), this is still a fraction of the time of arbitral proceedings, which in some cases can run for several years.

The possibility of resolving disputes in short time frames has encouraged arbitral bodies such as the Institute of Arbitrators and Mediators Australia to promulgate fast-track rules for arbitration. These rules require an award to be made within 150 calendar days from the arbitrator entering onto the reference (the rules are available at the Institute's web site: www.iama.org.au). These rules cut short some of the delays that may be encountered in arbitrations. Nevertheless, 150 calendar days is still considerable in comparison with the timetables adopted in adjudication.

Procedures

That said, comparison of the two dispute resolution mechanisms do suffer from some restriction in their utility.

Adjudicators are compelled by

[1] The exact timing depends on steps taken or not taken by the parties prior to the appointment

[2] Again, the exact timing depends on steps taken or not taken by the parties

legislation to follow the timetables. State and territory legislatures intended that adjudication should move at a rapid pace and at minimal cost to the parties. Arbitration, on the other hand, is generally more flexible and requires each party be given "a full opportunity of presenting his case."[3] That obligation may necessitate a greater time period.

To meet these timetables, adjudicators need to adopt different procedures than those employed in arbitration. Indeed, the rapid turnaround is usually achieved by limiting evidence to written submissions and documentary source materials while utilizing strict timetables for the receipt of those submissions. While it is theoretically possible to hold hearings or to conduct an ocular inspection, the time frames do not permit it. In comparison, arbitration often uses the full range of evidence-gathering techniques, which tends to protract proceedings.

This in turn raises questions if the restricted adjudicatory timetable provides parties with a full opportunity to be heard. While adjudication is faster, it may carry a risk of not discharging the standards required in arbitrations.

Nature of the decision

The adjudication legislation recognizes its difference from arbitration:

- The decision of an adjudicator, while enforceable to ensure that the payment determined by the adjudicator occurs, is not finally determinative of the parties' rights. All payments are on account and litigious or contractual dispute resolution mechanisms can be subsequently utilized if desired. Adjudication is a cash-flow mechanism, not a system for determination of rights [for example, Sec. 32 of the Building and Construction Industry Security of Payment Act (New South Wales) 1999[4] is succinctly described as "pay now, argue later"].

- Adjudicators are subject to a different level of judicial review than arbitrators. In the leading case of *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd* (2010), 78 NSWLR 393,[5] the New South Wales Court of Appeal, in a departure from previous authority, held that an adjudicator's determination could be subject to judicial review and that the Supreme Court has the power to quash the determination of an adjudicator when that adjudicator has erroneously concluded that he or she has jurisdiction to adjudicate a particular payment claim dispute. This significantly broadened the possibilities for judicial review of an adjudicator's determination.

Arbitral awards, on the other hand, are usually finally determinative of rights and there is very limited scope for challenging the jurisdiction of an arbitrator.[6]

Conclusion

Nevertheless the ability of adjudicatory proceedings in Australia to move at such a rapid pace suggests that arbitration can still learn from adjudication.

In 2011, in New South Wales[7] alone, over AUD$91.5 million[8] was claimed through adjudication and just under AUD$44.5 million was awarded. This refers to just one state and is restricted to building and construction. It seems that commercial parties are attracted to speed, even with some imperfections, over the more thorough but also more expensive and prolonged disputed resolution alternatives.

Arbitration is just one dispute resolution mechanism, in a sense competing with alternative mechanisms like mediation, expert determination, adjudication and even litigation.

The process of arbitration can look to learn from all the alternatives to see what parties want from their dispute resolution mechanisms. Adjudication and its timetables may offer some insight in what is possible in improving the speed of arbitration.

About the Authors

Andrew Robertson (arobertson@piperalderman.com.au) is a partner in the dispute resolution division of Piper Alderman and is a Fellow of several arbitral institutions including the Chartered Institute of Arbitrators (UK), the Australian Centre for International Commercial Arbitration, the Institute of Arbitrators and Mediators Australia and the Philippines Institute of Arbitrators. He is a member of several Australian and international arbitrator panels.

Ryan Kuss (rkuss@piperalderman.com.au) is a law clerk in Andrew Robertson's dispute resolution group. He is currently completing a Bachelor of Laws and Legal Practice at Flinders University. In mid-2012 he will be commencing an 18 month associateship in the Supreme Court of South Australia.

Piper Alderman (www.piperalderman.com.au) is a national Australian commercial law firm with offices in 4 cities (Sydney, Melbourne, Brisbane and Adelaide) and over 160 professional staff. The firm assists clients across their full commercial needs including in litigation in State and Federal Courts, both domestic and international arbitration and adjudication.

[3] Art. 18 of the UNCITRAL Model Law and Art. V (1) (b) of the New York Convention speak of an exception to enforcement of an award if a party was "unable to present his case." Australian domestic arbitration legislation, which generally follows the UNCITRAL Model Law, uses "reasonable opportunity" in Sec. 18 in lieu of the language used in Art. 18 of the UNCITRAL Model Law.

[4] This and the other Australian legislation, both state and Commonwealth, referred to in this article can be accessed free of charge at www.austlii.edu.au.

[5] Also available at www.austlii.edu.au.

[6] Other than the exceptions noted in the New York Convention.

[7] http://www.be.unsw.edu.au/sites/default/files/upload/research/centres/arru/Quarterly_Report_No_2_FINAL_DRAFT_.pdf

[8] For comparison purposes the Australian dollar presently sits just above the USA dollar, 1AUD is about 1.05USD

MEMBER SPOTLIGHT

Atty. Charlie Ho

Atty. Charlie Ho was already an accomplished optometrist when he received his law degree at San Beda College in Manila in 2010. He passed the Philippine bar in the same year and joined PDRCI in 2011, where he serves as file counsel.

Atty. Ho became a Doctor of Optometry in 1986. In 1995, he became Fellow of the International Association of Contact Lens Educators after studying at the University of New South Wales in Sydney, Australia. He completed his Masters in Entrepreneurship at the Asian Institute of Management in 2000.

Since 1992, he served as professor and researcher, contributing to the development of the optometry curriculum in the Philippines. He was chairman of the Commission on Higher Education-Technical Panel for Optometry Education in 2000 and a member from 2007-2010. He is currently a visiting lecturer at the University of the Philippines, College of Human Kinetics and a sports vision trainer and consultant of the Philippine Basketball Association and the Ateneo de Manila University.

He is the author of *A Compilation of Optometry Law, Regulations, Issuances, Taxation and Other Related and Subjects (2007)*, and has another book underway.

Atty. Ho is a three-time national president of the Integrated Philippine Association of Optometrists; an International Associate Member of the College of Optometrist In Vision Development in Ohio, U.S.A.; and a founding member of the Asia Federation of Optical Association.

He has received several awards and distinctions, among them: (a) Most Outstanding Professional in the Field of Optometry (2000); (b) Most Outstanding Optometrist of the Year (1998); (c) Golden Vision Award for Legal And Legislative Achievements (1998); (d) Presidential Merit Award for Outstanding Achievements (for passage of the Revised Optometry Law of 1995); and (e) Outstanding Alumnus for Optometry of the Manila Central University (1994).

Philippine Court of Appeals...

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the interpretation of English law and procedural rules as applied to the dispute. To assert that the London court wrongly assumed jurisdiction required convincing and sufficient evidence to overcome the presumption of regularity and propriety in favor of the English proceedings, which PIATCO failed to do.

The Court of Appeals further held that despite PIATCO's argument that the dispute should have been resolved first by the Dispute Adjudication Board before resort to the London court, PIATCO waived any challenge to the London court's jurisdiction when it stated that it would not contest the London court's jurisdiction.

In addition, PIATCO also filed with the London court its Answer to the complaint of Takenaka but failed to appeal the orders of the London court to a higher court in England. Thus, by its acts, which were evident from the record, PIATCO accepted and recognized the London court's jurisdiction over the dispute, notwithstanding its purported non-referral to the Dispute Adjudication Board.

In denying PIATCO's appeal, the Court of Appeals also reiterated the rule that the party attacking a foreign judgment must overcome the presumption of its validity. Absent contrary evidence, it presumed that the London court followed its procedural rules regularly.

The Court of Appeals rejected PIATCO's argument that it did not appeal the orders of the London court to a superior court because of the high cost of appeal. It found evidence showing that the appeal would have cost PIATCO the aggregate sum of only UK£25,000.00 while the award in favor of Takenaka and Asahikosan amounted to US$83 million.

It held that under Philippine law, all that was required for enforcement was for the foreign judgment to be valid under the laws of the court that rendered it. The Court of Appeals found evidence showing that the questioned orders were issued in accordance with English law practice and procedure and were therefore valid and regular.

The Decision confirmed that foreign judgments obtained by international contractors can be enforced without difficulty in the Philippines.

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