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BROADENING ITS SCOPE OF ARBITRATION ADVOCACY

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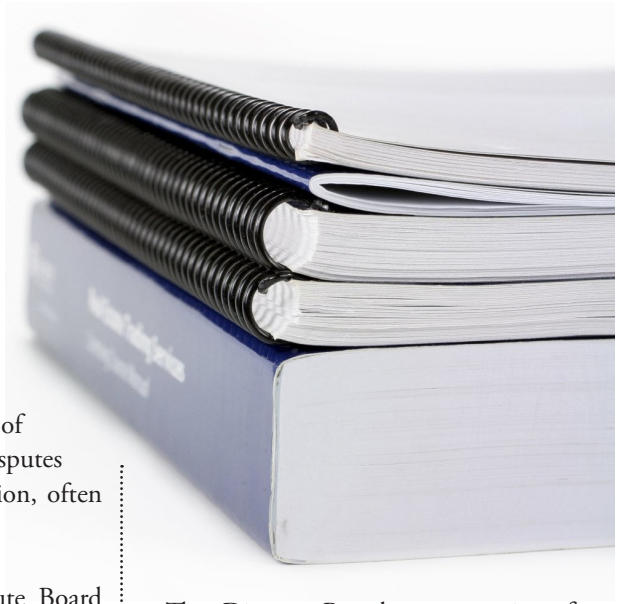
JICA issues Dispute Board Manual

By Arveen N. Agunday



Japan International Cooperation Agency (JICA) recently released its Dispute Board Manual to assist stakeholders in setting up dispute boards to resolve disputes relating to the implementation of Japanese Official Development Assistance (ODA) Loan projects, among others. JICA advocates the use of dispute boards, which have "proven to be a remarkably successful method of avoiding and resolving contract disputes without use of arbitration or litigation, often before completion of construction."

The Manual discusses the Dispute Board required under Clause 20 of the Conditions of Contract for Construction (Multilateral Development Bank Harmonised Edition, 2010). The Dispute Board is considered an "essential member of the Contract team" whose purpose is "to assist the parties and the Engineer to prevent disagreements from becoming formal disputes."

If the disagreement becomes a formal dispute, the Dispute Board may render a decision that is binding on the parties. The Dispute Board's decision is immediately executory even if one of the parties decides to refer the dispute to arbitration pursuant to the contract.

The Manual suggests that for the Dispute Board to serve its purpose, it must be established at the beginning of the contract, before there are any disagreements between the parties. It should continue working until the Performance Certificate is issued and the "Defects Notification Period" has expired.

The Dispute Board may consist of one person, but for larger and more complex contracts, a Dispute Board composed of three members is recommended. The members of the Dispute Board shall be chosen by agreement of the parties, and the cost and expenses of its operations shall be borne by both parties.

To qualify as a member, one must be: (a) experienced in the type of work to be carried out under the contract; (b) experienced in the interpretation of contracts; (c) fluent in the stipulated language for communication, as provided in the contract; and (d) independent of both parties and must not have any ties to either of them and the Engineer. **PAGE 4 ▶**

CONTENTS

Judicial restraint in arbitrable disputes

By Arthur P. Autea

Party autonomy is the defining feature of arbitration that distinguishes it from conventional litigation. Section 2 of Republic Act No. 9285 (2004) defines party autonomy as the freedom of the parties to make their own arrangements to resolve their disputes. Beyond its definition, party autonomy is best felt within the arbitral forum itself where the arbitrator, though capable of exercising the coercive powers of a judge over the parties, is nevertheless guided and bound by the terms of reference that the parties themselves helped shape.

When the Special Rules of Court on Alternative Dispute Resolution (A.M. No. 07-11-08-SC, or SADR) became effective four years later in 2009, the concept of party autonomy was enhanced. As originally formulated in Section 2 of RA 9285, it was declared "the policy of the State to actively promote party autonomy in the resolution of disputes or the freedom of the parties to make their own arrangements to resolve their disputes." To this, the SADR adds, "… with the greatest cooperation of and the least intervention from the courts." As expressed in Rule 2.1 of the SADR, the provision now reads: "It is the policy of the State to actively promote the use of various modes of ADR and *to respect party autonomy or the freedom of the parties to make their own arrangements in the resolution of disputes with the greatest cooperation of and the least intervention from the courts…"*

From RA 9285 in 2004 to the SADR in 2009, what is observable is the refinement of the concept of party autonomy with the introduction of the policy of judicial restraint. The prescription for "the greatest cooperation of and the least intervention from the courts" is not a motherhood statement. There are several other provisions in the SADR where the policy of judicial restraint is imposed by affirmative provisions.

Rule 2.2 of the SADR recognizes the principle of competence-competence, which means that the arbitral tribunal may initially rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement or any condition precedent to the filing of a request for arbitration. In implementing the principle of competence-competence, Rule 2.4 of the SADR provides that "[t]he arbitral tribunal shall be accorded the first opportunity or competence to rule on the issue of whether or not it has the competence or jurisdiction to decide a dispute submitted to it for decision, including any objection with respect to the existence or validity of the arbitration agreement. When a court is asked to rule upon issue/s affecting the competence or jurisdiction of an arbitral tribunal in a dispute brought before it, either before or after the arbitral tribunal is constituted, *the court must exercise judicial restraint* and defer to the competence or jurisdiction of the arbitral tribunal by allowing the arbitral tribunal the first opportunity to rule upon such issues."

As Rule 2.4 indicates, a court may be confronted with an issue on the arbitral tribunal's jurisdiction either before or after it is constituted.

Before the arbitral tribunal is constituted, in fact even before the arbitration commences, the policy of judicial restraint is already in effect. Rule 3.3 of the SADR provides that at any time prior to the commencement of arbitration, a party may file a petition for judicial determination of the existence, validity and/or enforceability of an arbitration agreement. At this point, the court is the only existing dispute resolution forum that can rule on the existence, validity and/or enforceability of an arbitration agreement, for the obvious reason that the arbitral tribunal is still inexistent. Yet, although Rule 3.5 of the SADR recognizes that the court may rule that the arbitration agreement is, under the applicable law, invalid, void, unenforceable or inexistent, Rule 3.8 in relation to Rule 2.4 of the SADR expressly provides that, under the policy of judicial restraint, the court must make no more than a *prima facie* determination of that issue. In the absence of a *prima facie* ruling that the arbitration agreement is null and void, inoperative or incapable of being performed, the court is duty-bound under Rule 2.4 to "suspend the action before it and refer the parties to arbitration pursuant to the arbitration agreement."

The ruling of the court is *prima facie* because Rule 3.11 of the SADR recognizes the right of any party to resurrect the issue of the existence, validity and enforceability of the arbitration agreement *before the arbitral tribunal* or the court in a subsequent action to vacate or set aside the arbitral award. This is something novel in the Philippine legal system – a panel of *private individuals* constituted as an arbitral tribunal passing upon the ruling of a court of justice.

In a different scenario where judicial intervention is invoked *after the arbitral tribunal has been constituted*, and the court is called upon to review a preliminary ruling of the arbitral tribunal either upholding or declining its jurisdiction under the arbitration agreement, as contemplated in Rule 3.12 of the SADR, the policy of judicial restraint is still observable in light of Rule 3.19 of the SADR, which provides that "the ruling of the court affirming the arbitral tribunal's jurisdiction shall not be subject to a petition for certiorari." On the other hand, *"the ruling of the court that the arbitral tribunal has no jurisdiction may be the subject of a petition for certiorari."*

The policy of judicial restraint is significantly observable with reference to the matter of interim relief. Under Section 14 of RA 876, which is a 1953 statute, there was a concurrence of power equally shared by the court and the arbitral tribunal in granting interim relief. Section 14 provides that *"[t]he arbitrator or arbitrators shall have the power at any time*, before rendering the award, *without prejudice to the rights of any party to petition the court*, to take measures to safeguard and/or conserve any matter which is the subject of the dispute in arbitration."

This concurrence of power between the court and the arbitral tribunal was diluted by the policy of judicial restraint with the enactment of RA 9285 in 2004. Section 28 provides that "[i]t is not incompatible with an arbitration agreement for a party to request, before the constitution of the tribunal, from a Court an interim measure of protection and for the Court to grant such measure. *After constitution of the arbitral tribunal and during arbitral proceedings*, a request for an interim measure or protection, or modification thereof, may be made with the arbitral tribunal or to the extent that the arbitral tribunal has no power to act or is unable to act effectively, the request may be made with the Court…" In other words, the general rule in Section 28 of RA 9285 is that it is the arbitral tribunal which is the primary authority to grant interim relief subject to two exceptions: (1) when the arbitral tribunal has no power to act, or (2) when it is unable to act effectively.

Before the constitution of the arbitral tribunal where the court is the only existing dispute resolution forum that can grant interim relief, judicial restraint is nevertheless in place as Rule 5.15 of the SADR provides that "[t] he court shall defer action on any pending petition for an interim measure of protection filed by a party to an arbitration agreement arising from or in connection with a dispute thereunder upon being informed that an arbitral tribunal has been constituted pursuant to such agreement …"

The policy of judicial restraint is made more pronounced by Rule 5.13 of the SADR which provides that "[a]ny court order granting or denying interim measure/s of protection is issued without prejudice to subsequent grant, modification, amendment, revision or revocation by the arbitral tribunal as may be warranted. An interim measure of protection issued by the arbitral tribunal shall, upon its issuance be deemed to have *ipso jure* modified, amended, revised or revoked an interim measure of protection previously issued by the court to the extent that it is inconsistent with the subsequent interim measure of protection issued by the arbitral tribunal." Any question involving a conflict or inconsistency between an interim measure of protection issued by the court and by the arbitral tribunal, according to Rule 5.14 of the SADR, shall be immediately referred by the court to the arbitral tribunal which shall have the authority to decide such question.

About the Author

Atty. Arthur P. Autea is a founding member of the PDRCI and a member of its Board of Trustees. He is the Managing Partner of his law firm, Arthur Autea and Associates.

Atty. Autea started his legal career in 1987, eventually becoming a partner in Quisumbing Torres, a member firm of Baker & McKenzie International, before establishing his own practice. Atty. Autea also served as Deputy Executive Secretary under Philippine President Gloria Macapagal Arroyo.

JICA issues Dispute Board Manual

FROM PAGE 1 ▶ Upon appointment of each member of the Dispute Board, the employer/project owner, the contractor, and the Dispute Board member shall execute a tripartite agreement which, among others, shall provide for the general conditions of the Dispute Board Agreement and the procedural rules to be adopted by the Dispute Board.

In performing its functions, the Dispute Board is authorized to conduct regular site visits, the first of which must be made as soon as the Dispute Board is constituted. Regular site visits shall be between 70 to 140 days apart and are intended to apprise the Dispute Board of the current status and progress of the works.

After each visit, the Dispute Board shall prepare a Site Visit Report. During the intervals between site visits, the Dispute Board may request from the parties any information regarding the contract, including contract documents, progress reports, variation instructions, certificates and other relevant documents.

At any time, the parties may request the Dispute Board to issue non-binding, informal opinions or recommendations regarding certain matters, which the parties may use in negotiating the settlement of contractual or performance concerns.

If any concern or matter is not amicably resolved by the parties among themselves, the issue may be referred to the Dispute Board for its decision. The Dispute Board will then require the parties to file written submissions and conduct a hearing. Once the Dispute Board decides the issue, its decision is binding on the parties and is immediately enforceable.

However, either party may give a timely Notice of Dissatisfaction with the Dispute Board's decision, in which case the dispute will be referred to arbitration. Nevertheless, unless the arbitral tribunal rules otherwise during the arbitration, the decision of the Dispute Board remains binding and enforceable.

The complete text of the Manual is available at http://www.jica.go.jp/english/operations/schemes/oda_loans/oda_op_info/guide/pdf/guide09.pdf.

MEMBER SPOTLIGHT

Atty. Regina Sarmiento

Atty. Regina Sarmiento is the managing partner of Escaño Sarmiento & Partners, where she has been a partner since 1997. She received her law degree from the University of the Philippines in 1993 and passed the Philippine bar the next year.

Prior to becoming a lawyer, Atty. Sarmiento studied French at the Ecole Internationale de Langue et de Civilisation Françaises in Paris, France, Institution Château Mont-Chiosi in Lausanne, Switzerland, and Alliance Française in Manila. She also took up her undergraduate studies in Foreign Service and received her diploma in Modern French at the University of the Philippines. She served as an instructor and lecturer in French at the same University from 1976 to 1993.

Due to her proficiency in French, Atty. Sarmiento is active part in foreign service and labor organizations. She was appointed Ambassador Extraordinary and Plenipotentiary to the Republic of Cuba in 2001 and to the Czech Republic in 2008.

She has chaired various conferences of the International Labor Organization, among them the 13th Asian Regional Meeting in Bangkok, Thailand (2001), the 85th Session of the International Labor Conference (1997), and the Conference on Employment and Social Policy (1999).

She served as Labor Attaché II at the Department of Labor and Employment from 1996 to 2002 and Head Executive Assistant at the Office of the Secretary of Labor and Employment in 1996.

India declares it will enforce arbitration awards from China and Hong Kong

By Mary Thomson

On March 19, 2012, the government of India declared that the People's Republic of China, including the Hong Kong Special Administrative Region and the Macau Special Administrative Region, is a territory to which the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (commonly known as the "New York Convention") applies for the purpose of enforcement of foreign arbitral awards in India. The formal notification is expected to be published shortly in the official Gazette of India.

Indian Arbitration Law

Foreign entities often view international arbitration as the best way to enforce their rights in India because litigation in Indian courts is perceived as lengthy and burdensome. India is a signatory to the New York Convention. In most countries that are signatories to the Convention, foreign arbitral awards issued in any of the other signatory countries are readily recognized and enforced. However, Indian arbitration law imposes local restrictions on the enforcement of foreign awards and this has posed some difficulties.

Under Section 44 of the India Arbitration and Conciliation Act 1996 ("Arbitration Act"), the Indian court recognizes and enforces foreign arbitral awards only if the awards satisfy the following two conditions:

1. there is a valid agreement in writing for arbitration to which the New York Convention applies; and
2. the arbitral award is made in a territory which the Indian Government, being satisfied that reciprocal provisions have been made may, by notification in the official Gazette, declare to be a territory to which the New York Convention applies.

The second condition has posed obstacles to parties wishing to have certain foreign arbitral awards enforced in India. Of the 146 New York Convention countries, only about 47 countries have been notified in the Official Gazette of India as countries to which the New York Convention applies. While most of the major international arbitration centers are included in that official list, Hong Kong has been a notable omission. As a result, most India-related contracts encouraged parties to choose a seat other than Hong Kong to arbitrate their disputes.

Enforcement

With the addition of China to the official list, any remaining doubts as to the enforcement in India of Mainland Chinese and Hong Kong arbitral awards is dispelled.

In line with the provisions of the New York Convention, the enforcement of foreign awards may only be refused by the Indian courts in very limited cases:

1. the subject-matter is not capable of settlement by arbitration under the law of India; or
2. the enforcement of the award would be contrary to the public policy of India.

Conclusion

With Sino-Indian trade on the increase, this clarification has long been awaited and much welcomed by the arbitral community in the region. The clarification provides an additional choice of seats for the growing number of arbitration cases involving Indian parties. Hong Kong is also likely to benefit most since it is a popular seat for arbitrating international disputes given that it is one of the few common law jurisdictions in the Far East, has a developed pro-arbitration legal and judiciary system and a relatively large arbitral community.

About the Author

Mary Thomson is a partner at Brandt Chan & Partners, which is associated with SNR Denton. Mary is a commercial dispute resolution specialist in high court litigation, including the Court of Final Appeal, and arbitration.

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