The Philippine ADR Review

AUGUST 2012

BROADENING ITS SCOPE OF ARBITRATION ADVOCACY

PDRCI
PHILIPPINE DISPUTE RESOLUTION CENTER INC.

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PDRCI reelects Board of Trustees

THE TRUSTEES AND MEMBERS STAND IN HONOR of the Philippine national anthem at the start of the annual meeting last July 3, 2012. From left: Edmund Tan, Rommel Cuison, Salvador Castro, Miguel Valera, Victoriano Orocio (partly hidden), Eduardo Ceniza, Roberto Dio (partly hidden), Chief Justice Artemio Panganiban, and Beda Fajardo.

PDRCI held its annual general membership meeting on July 3, 2012 at its office at the Commerce & Industry Plaza, McKinley Hills, Taguig City and reelected the Board of Trustees to serve for the term July 2012 to June 2013.

In his report to the members, President Atty. Victor P. Lazatin highlighted PDRCI's achievements for the preceding 2011-12 term. This included the inauguration of PDRCI's new office in June 2011; the mediation workshop for intellectual property law practitioners conducted by the Intellectual Property Office of the Philippines and the World Intellectual Property Office's Arbitration and Mediation Center, in cooperation with the PDRCI, in December 2011; and the basic arbitration training for government lawyers organized by PDRCI in partnership with the American Bar Association's Rule of Law Institute and the Office for Alternative Dispute Resolution in March 2012.

In the same term, PDRCI received nine new cases, with claims and counterclaims for royalties, fees, arrearages and damages totaling ₱2.3 billion.

PDRCI admitted six new members: Atty. Patricia Tysmans-Clemente, Atty. Rosauro A. David, Atty. Dina D. Lucenario, Atty. Raymond Joseph Pascua, Atty. Patricia Ann Prodigalidad, and Atty. Ma. Lourdes Rivera.

Atty. Lazatin also announced that PDRCI will hold an international conference on alternative dispute resolution in November 2012, which will be co-sponsored with the Philippine Institute of Arbitrators, Inc. and the Philippine Institute of Construction Arbitrators and Mediators, Inc. PDRCI is updating its internal rules and administrative guidelines, which will be published this year, and will launch its new website.

CONTENTS

PART ONE

Going off the record

Turning off the audio recorder can save time and costs.

By Roberto N. Dio

Oral hearings are an important feature of domestic and international arbitrations. In most cases, the right to be heard, if allowed by law or stipulated by contract, is an essential part of due process [David J. A. Cairns, "Oral Advocacy and Time Control in International Arbitration," in A.J. van den Berg & Van Den Berg, Arbitration Advocacy in Changing Times 187 (Kluwer, 2011)].

Oral hearings in domestic arbitration

The Arbitration Law [Rep. Act No. 876 (1953)] requires the tribunal to hold a hearing within five days from their appointment, if the parties reside within the same city or province, or within 15 days if the parties reside in different provinces. At the hearing, the tribunal may ask both parties for an agreed stipulation of facts and brief statements of the issues (Sec. 15), after which the parties may offer such evidence as they desire and such additional evidence as the tribunal may require *(Ibid.)*.

All the arbitrators appointed must attend all the hearings and hear all the allegations and proofs of the parties (Sec. 14). They shall arrange for the taking of a stenographic record of the testimony when such a record is requested is requested by one or more parties, and when payment of the cost is assumed by such party or parties (Sec. 12, par. four). The tribunal shall receive as exhibits "any document which the parties may wish to submit," properly identified at the time of submission (Sec. 15).

At the close of the hearings, the tribunal shall "specifically inquire of all parties" if they have any further proof or witnesses to present and, upon receipt of a negative reply from all the parties, the tribunal shall declare the hearing closed unless the parties have signified an intention to file briefs (Sec. 16). The hearing shall be closed after receipt of the briefs and/or reply briefs *(Ibid.)*. The hearing may only be reopened by the tribunal upon its own motion or upon the request of any party, upon good cause at any time before the award is made (Sec. 17).

However, the parties may by written agreement submit their dispute to arbitration other than by oral hearing, on the basis of an agreed stipulation of facts, written witness statements, documents, and arguments (Sec. 18). Based on the law, the default procedure in domestic arbitration is to conduct oral hearings unless the parties agree to waive it in writing.

Oral hearings in international arbitration

The right to a reasonable opportunity to be heard in international arbitration does not necessarily include a right to an oral hearing [Thomas Schultz, Information Technology and Arbitration: A Practitioner's Guide 111 (Kluwer, 2006)]. Unless the law of the forum guarantees such right, a party can not demand an oral hearing.

The law governing the arbitration procedure, which may provide for a possible right to an oral hearing, varies from country to country but, according to Schulz, there are two possible situations. Either there exists *no* right to an oral hearing (as is true under English and Swiss law) or there *is* a right to an oral hearing but it may be waived (which is the case in the Philippines as well as in most jurisdictions such as Germany, France, Italy, the Netherlands, Belgium, Sweden as well as under the UNCITRAL Model Law) [Schultz, at 111-12].

The European Convention on Human Rights, for example, requires an oral

hearing only if it is indispensable for the protection of the "interest of the person concerned" and if the person concerned has not waived that right *(Ibid.)*. Hence, an oral hearing is not necessary to comply with the principle of equal treatment of the parties in Article 18 of the UNCITRAL Model Law. However, if so requested by any party, the tribunal shall hold oral hearings "at an appropriate stage of the proceedings." (Art. 24.1)

Time and cost of oral hearings

The oral hearing, and particularly lengthy oral hearing, is a characteristic of common law procedure (Cairns, at 182). But two common features of international arbitration have successfully reduced the length of oral hearings: (a) the current preference for written submissions, written witness statements, and written briefs; and (b) the displacement of the potential functions of an oral hearing to other parts of the arbitral process, such as the appointment of common experts in place of extensive adversarial evidence by the parties and the submission of written reports in lieu of oral expert testimony *(Ibid.)*. The International Chamber of Commerce, in its manual *Techniques for Controlling Time and Cost in Arbitration*, has noted that "Hearings are expensive and time-consuming. If the length and number of hearings requiring the physical attendance of the arbitral tribunal and the parties are minimized, this will significantly reduce the time and cost of the proceeding."

The length and number of hearings depend on several factors such as (1) advocacy skills and procedural efficiency of counsel; (2) due process; and (3) party agreement.

Advocacy skills and procedural efficiency of counsel

The primary function of the oral hearing is the examination of witness, especially cross-examination. Ideally, the parties, witnesses, expert, counsel, and arbitrators must all prepare for the hearing. When that happens, all the participants are fully focused on the case *at the same time* (Cairns, at 184). In theory, an imminent hearing "concentrates minds wonderfully" and this contemporaneous focus can be a powerful force *(Ibid.)*. As a result, the parties may suddenly settle a matter that previously proved intractable, or counsel may dispense with witnesses and arguments previously deemed indispensable *(Ibid.)*.

In practice, however, multiple professional and work responsibilities leave the counsel, witnesses, and the arbitrators with little or no time to prepare for the hearing. Moreover, counsel who bill on the basis of time or who argue in the presence of the client are tempted to substitute wit for wisdom and commonly fall prey to the tendency to over-examine a witness or over-argue a position. This prompts opposing counsel to respond in kind. The result is a lengthy and costly oral hearing.

Next issue: Due process and getting off the record.

About the Author

Atty. Roberto N. Dio is a senior litigation partner of Castillo Laman Tan Pantaleon & San Jose. He is an accredited construction arbitrator and a mediator of the Court of Appeals. He is also a trained intellectual property arbitrator. He serves as a trustee of PDRCI and editor of *The Philippine ADR Review.* In August, he will undergo dispute board adjudication training under the auspices of the Japan International Cooperation Agency and *FIDIC*.

MEMBER SPOTLIGHT

Atty. Martin Israel L. Pison

Atty. Martin Israel L. Pison finished law in 1993 and comparative literature in 1989 at the University of the Philippines. In law school, he wrote for the *Philippine Law Journal* and he received the Roberto Sabido Award for best legal research paper.

After passing the bar examinations, Atty. Pison joined the law firm that now bears his name— Tan Acut Lopez & Pison. He handled a broad range of civil, criminal, commercial and administrative cases. He handled several high-profile cases such as the defense of Atty. Edward S. Serapio, co-accused of President Joseph E. Estrada in the plunder case filed against them and the *BW (Best World Resources Corporation) scam* case, among others.

As counsel for Rio Tuba Nickel Mining Corporation, Atty. Pison successfully handled on appeal a case filed by various individuals and non-governmental organizations to declare as void an Environmental Compliance Certificate issued by the Philippine Department of Environment and Natural Resources for a P10 billion hydrometallurgical processing plant in Palawan.

He briefly worked in government as an Undersecretary in the Office of the Chief Presidential Legal Counsel during the term of President Estrada. Atty. Pison advised then First Lady Luisa P. Ejercito Estrada on various contracts relating to rural development projects, acquisition of medical equipment for rural medical missions, and micro-finance.

Atty. Pison mentors his firm's associates in research, pleading, trial practice and corporate retainer services. He also acts as corporate secretary and director of several companies.

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