

THE PHILIPPINE ADR REVIEW

OCTOBER 2012

BROADENING ITS SCOPE OF ARBITRATION ADVOCACY



SECRETARIAT

3rd Floor, Commerce and Industry Plaza
(besides Blue Leaf and Venice Piazza Mall)
1030 Campus Avenue cor. Park Avenue
McKinley Town Center, Fort Bonifacio
1634 Taguig City

Telefax: 822-4102
Email: secretariat@pdrcl.org
Website: www.pdrcl.org

OFFICERS

Chief Justice Artemio V. Panganiban (Ret.)
Chairman

Atty. Custodio O. Parlade
President Emeritus

Atty. Victor P. Lazatin
President

Atty. Miguel B. Varela
Vice Chairman, Internal Affairs

Atty. Eduardo R. Ceniza
Vice Chairman, External Affairs

Atty. Beda G. Fajardo
Vice-President

Atty. Salvador S. Panga, Jr.
Secretary General

Atty. Mario E. Valderrama
Deputy Secretary General

Mr. Gregorio S. Navarro
Treasurer

Dr. Eduardo G. Ong
Assistant Treasurer

Atty. Gwen Grecia-De Vera
Corporate Secretary

Atty. Ricardo Ma. P.G. Ongkiko
Assistant Corporate Secretary

BOARD OF TRUSTEES

Atty. Shirley F. Alinea

Atty. Daisy P. Arce

Atty. Arthur P. Autea

Atty. Donemark J.L. Calimon

Engr. Salvador P. Castro, Jr.

Atty. Eduardo R. Ceniza

Atty. Gwen Grecia-De Vera

Atty. Roberto N. Dio

Atty. Beda G. Fajardo

Atty. Jose A. Grapilon

Atty. Victor P. Lazatin

Mr. Gregorio S. Navarro

Atty. Rogelio C. Nicandro

Dr. Eduardo G. Ong

Atty. Ricardo Ma. P. G. Ongkiko

Atty. Victoriano V. Oracio

Atty. Salvador S. Panga, Jr.

Atty. Edmund L. Tan

Atty. Mario E. Valderrama

Atty. Miguel B. Varela

PDRCI members train in FIDIC adjudication

By Leonid C. Nolasco



Japan International Cooperation Agency (JICA) recently conducted its FIDIC (*Fédération Internationale Des Ingénieurs-Conseils*) Contracts training workshop last August 13-17, 2012. The five-day workshop was organized by Nippon Koei, Co., Ltd. and took place at the Asian Development Bank Building (Auditorium Zone C) in Mandaluyong City.

The workshop was divided into two modules, the practical use of FIDIC Contracts and the management of claims and resolution of disputes. Geoffrey Smith, a solicitor and engineer as well as an Accredited International Trainer of FIDIC, lectured for four days on the FIDIC contract terms and construction adjudication. Yukinobu Hayashi, General Manager of Nippon Koei Co., Ltd. and Vice Chairman of the Professional Training Committee of the Association of Japanese Consulting Engineers (AJCE), and Yoshihiko Yamashita, Secretary General of the AJCE, spoke to the participants on the first and last days of the training.

The first module covered FIDIC Contract concepts and principles, responsibilities of the main parties, management of projects, financial clauses and procedures, and risk, *force majeure* and termination. The second module covered managing variations in FIDIC Contracts,

notices and claims procedures, contractor's claims, claims for delay, claims for additional payment, employer's financial claims, and procedure for resolution of disputes.

In addition to the lectures, the participants engaged in case studies and workshop exercises to gain practical experience on the use and application of FIDIC Contracts. On the third day of training, they took a written evaluation examination based on actual and hypothetical contract disputes, which most of the participants described as tough. After the written examination, the participants underwent oral evaluation interviews to screen them for further training.

The workshop was attended by 45 participants from the Philippines, Vietnam, Indonesia and Sri Lanka. Of the 10 Philippine participants, seven were from PDRCI.

CONTENTS

| | |
|---|-----|
| PDRCI members train in FIDIC adjudication | 1 |
| The court's jurisdiction in aid of arbitration (Part One) | 2-3 |
| Member Spotlight | 3 |
| International Conference on ADR | 4 |



The court's jurisdiction in aid of arbitration

By Arthur P. Autea

It is the declared policy of the State, expressed in Section 2 of Republic Act No. 9285 (2004), otherwise known as the Alternative Dispute Resolution Act of 2004, 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. The Special Rules of Court on Alternative Dispute Resolution (A.M. No. 07-11-08-SC), or SADR, refined the policy by adding in its Rule 2.1, "... with the greatest cooperation of and the least intervention from the courts." Thus, presently, it 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".

With the implementation of this policy, it is of special interest to know the areas where the courts continue to exercise jurisdiction in aid of arbitration.



First, the Regional Trial Court has the power to dispense relief on the issue of existence, validity or enforceability of the arbitration agreement (SADR, Rule 1.1). *Before the commencement of arbitration*, any party to an arbitration agreement may petition the court to determine any question concerning the existence, validity and enforceability of such arbitration agreement (SADR, Rule 3.2). Subject to the policy of judicial restraint expressed in Rule 2.4 of the Special ADR Rules, the court has the power to make a *prima facie* determination of whether the arbitration agreement is null and void, inoperative or incapable of being performed.

If the petition is filed in court *after the arbitration has commenced* and the

arbitral tribunal has made a ruling on a preliminary question upholding or declining its jurisdiction, the court has the power to affirm or reverse the ruling of the arbitral tribunal (SADR, Rule 3.12), in which case the ruling of the court is no longer *prima facie* in nature.

Second, where an arbitrable dispute is filed in court in violation of an arbitration agreement, the court, upon application of a party, shall refer the dispute to arbitration unless it finds that the arbitration agreement is null and void, inoperative, or incapable of being performed (RA 9285, Section 24).


Third, it is not incompatible with an arbitration agreement for a party to request from a court, before the constitution of the arbitral tribunal, an interim measure of protection and for the court to grant such measure. After the constitution of the arbitral tribunal and during arbitral proceedings, a request for an interim

measure of protection may still be made with the court *if the arbitral tribunal has no power to act on the request or is unable to act effectively* (RA 9285, Section 28). The power of the court to grant interim relief is significant considering that in most cases where the disputants apply for provisional remedies in court the purpose is to prevent irreparable loss or injury, to provide security for the performance of any obligation, to produce or preserve any evidence, or to compel any other appropriate act or omission.

In the event that the interim measure of protection was obtained from the arbitral tribunal, and not from the court, either party may apply with the court for assistance in implementing or enforcing an interim measure ordered by the arbitral tribunal (RA 9285, Section 28[6]).

Fourth, where any of the parties in an *institutional* arbitration failed or refused to appoint an arbitrator or when the parties have failed to reach an agreement on the sole arbitrator (in an arbitration before a sole arbitrator) or when the two designated arbitrators have failed to reach an agreement on the third or presiding arbitrator (in an arbitration before a panel of three arbitrators), and the institution under whose rules arbitration is to be conducted fails or is unable to perform its duty as appointing authority within a reasonable time from receipt of the request for appointment, the court shall act as Appointing Authority

(SADR, Rule 6.1[a]).

In the case of *ad hoc* arbitration, where the parties fail to provide a method for appointing or replacing an arbitrator, or substitute arbitrator, or the method agreed upon is ineffective, and the National President of the Integrated Bar of the Philippines (IBP) or his duly authorized representative fails or refuses to act within such period as may be allowed under the pertinent rules of the IBP or within such period as may be agreed upon by the parties, or in the absence thereof, within 30 days from receipt of such request for appointment, the court shall act as Appointing Authority (SADR, Rule 6.1[b]). 

Next issue: Part Two will discuss six more areas where the court continues to exercise its jurisdiction in aid of arbitration.

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.

MEMBER SPOTLIGHT

Atty. Arnold M. Corporal



Atty. Arnold M. Corporal is a partner at the litigation and dispute resolution department of Angara Abello Concepcion Regala & Cruz (ACCRALAW).


Aside from litigation, he handles banking, securities, telecommunications, aviation and environmental law. He also serves as director of various companies.

Atty. Corporal's experience in arbitration and dispute resolution include representing clients before the Construction Industry Arbitration Commission (CIAC), Philippine Dispute Resolution Center, Inc. (PDRCI), and the International Chamber of Commerce (ICC).

At CIAC, he represented Fluor Daniel, Inc. Philippines in asserting a claim against Fil-Estate Properties, Inc., which arose from a dispute involving the construction of the latter's Fairways & Bluewater Resort in Boracay, Aklan. He also represented the owner, Herbal Cove Realty Development Corporation, against the contractors of a project in Tagaytay City.

At PDRCI, Atty. Corporal handled Philippine Long Distance Telephone Co.'s (PLDT) claim against the Department of Transportation and Communications (DOTC) for suspension and termination of a financial lease agreement for the management, operation, maintenance and development of the Bohol Telecommunications System of the Municipal Telephone Project Office of Bohol. He also represented PLDT subsidiary Pilipino Telephone Co. against DOTC in another claim for suspension and termination of a lease agreement for the management, operation, maintenance and development of the Palawan Telecommunications System of the Municipal Telephone Project Office of Palawan.

At ICC, Atty. Corporal is currently representing and advising an investment company, a business process outsourcing company, and a universal bank in prosecuting their respective claims.

Atty. Corporal graduated from the Ateneo de Manila University School of Law in 1997. He obtained his undergraduate degree in Philosophy and Letters from San Beda College in 1993 and was admitted to the Philippine Bar in 1998. 

The Philippine ADR Review is a publication of the Philippine Dispute Resolution Center, Inc. All rights reserved. No part of the newsletter may be reproduced in any form without the written permission of the authors.

Roberto N. Dio, *Editor*

Shirley Alinea, Donemark Calimon,
Ramon Samson, *Contributors*

Arveen N. Agunday, Juan Paolo E. Colet,
Leonid C. Nolasco, and Ryan P. Oliva
Staff Writers



International Conference on Alternative Dispute Resolution

THEME: SHARING ADR BEST PRACTICES HERE AND ABROAD

November 8 - 9, 2012

INTERCONTINENTAL HOTEL MAKATI, PHILIPPINES

CONFERENCE TRACK:

This two day conference will highlight the Public-Private Partnership (PPP) opportunities in the Philippines, global trends and best practices on arbitration and other alternative dispute resolution modes. Learn from the international experts as they share their knowledge and experiences on international legal and commercial ADR. This event will mark the integration of the arbitration industry in the Philippines.

WHO SHOULD ATTEND?

Increase your knowledge on the latest developments in alternative dispute resolution and network with

- Academicians
- Arbitration Professionals
- Business Personnel
- Contract Managers
- Contractors
- Developers
- Government Agency Heads
- Government Procurement Officers
- International Arbitration Experts
- Judges
- Lawyers
- Project Managers / Owners

CONFERENCE HIGHLIGHTS:

Discover the latest trends in alternative dispute resolution:

- Regional Developments (Trends and Best Practices)
- IBA Guidelines on Disclosure
- Arbitrators Ethical Conduct and Challenges
- Dispute Resolution in PPP – International Perspective
- Recent Development on the Concept of "Public Policy"
- Procedural, Process and Evidence
- Public Policy and Enforcement/Recognition of Arbitral Awards
- Due Process and Arbitrator Discretion in Commercial Arbitration
- Institutional Arbitration – Recent Challenges
- Procedural Due Process and Evidence

REGISTRATION FEE:

Local Delegates:

Php 12,000.00 – Regular Rate

Php 10,000.00 – Early Bird Rate (up to August 31, 2012)

REGISTER NOW FOR EARLY BIRD DISCOUNTS



BUSINESS REPLY FORM

Please fax to **(632)750-8585** or email **ICADR@globallinkmp.com**

- I am interested to:
- Be a delegate. Please send me details.
 - Be a sponsor. Please send me sponsorship opportunities.
- I am not interested in this conference.

Name: _____

Position: _____

Company Name: _____

Address: _____

Tel. _____ Fax: _____ Email: _____