The Philippine ADR Review

APRIL 2013 BROADENING ITS SCOPE OF ARBITRATION ADVOCACY

PDRCI
PHILIPPINE DISPUTE RESOLUTION CENTER INC.

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@pdrci.org
Website: www.pdrci.org

CIETAC invites Filipino international arbitrators

By Leonid C. Nolasco

The Shanghai Council for the Promotion of International Trade (CPIT Shanghai) has invited Filipino candidates to apply for the China International Economic and Trade Arbitration Commission (CIETAC) of Shanghai Panel of Arbitrators.

The CIETAC is one of the permanent arbitration institutions in the world. Formerly known as the Foreign Trade Arbitration Commission, CIETAC was set up in April 1956 to meet China's developing economic and trade relations with foreign countries after the adoption of its "reform and opening-up" policy.

Since 1987, CIETAC has accepted nearly 5,000 cases from 65 countries and regions. Its awards have been successfully enforced in 35 countries and regions.

Headquartered in Beijing and with sub-commissions in Shenzhen, Shanghai, Tianjin and Chongqing, CIETAC maintains a Panel of Arbitrators composed of nearly 1,000 professionals, all of whom are renowned experts in arbitration or in specialized trades either at home or abroad. Among them are nearly 300 arbitrators from more than 30 foreign jurisdictions.

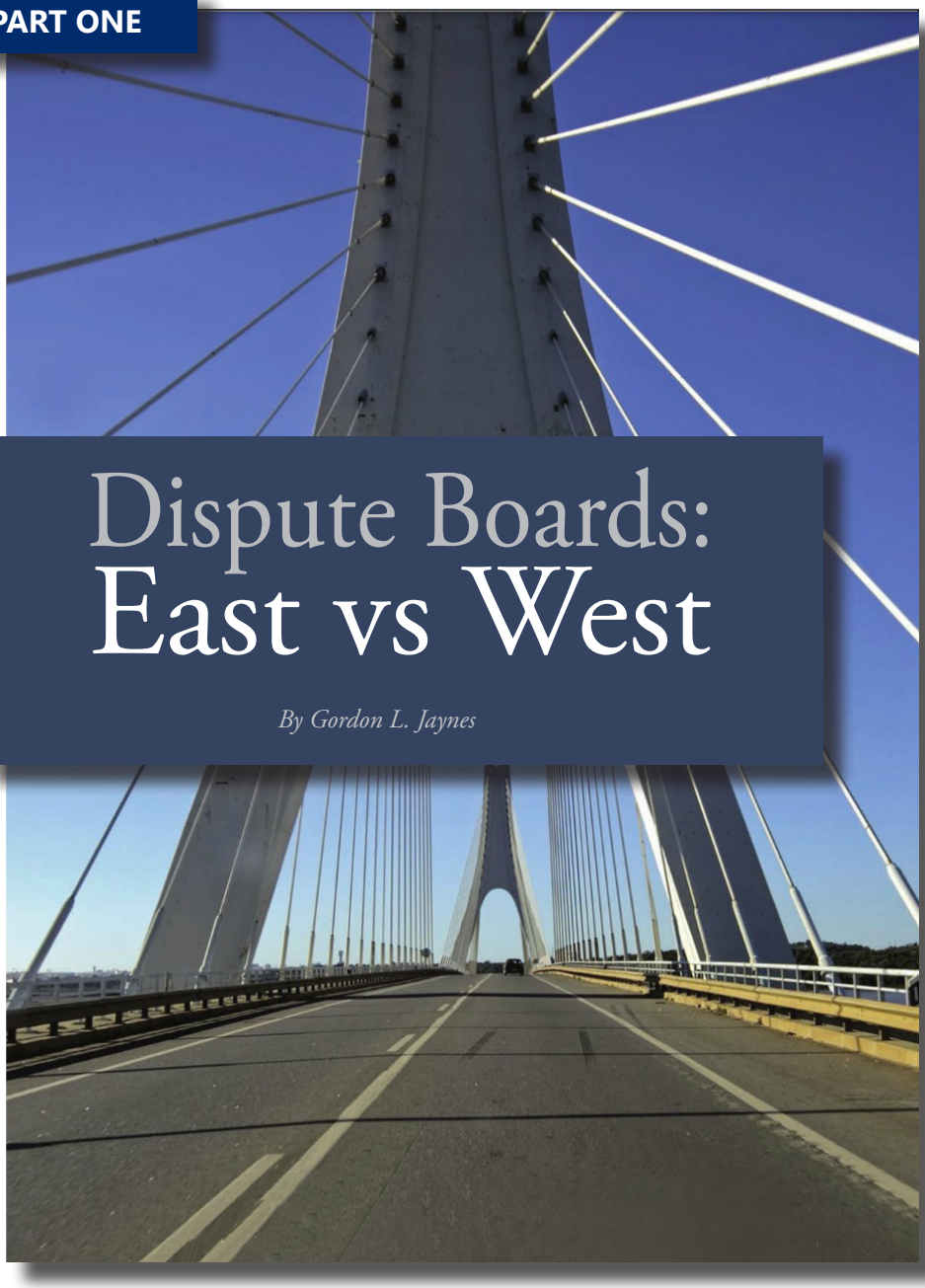
Candidates for the CIETAC Panel of Arbitrators must have either of the following: (a) at least eight years experience in arbitration; (b) at least eight years working experience as a lawyer; (c) a former judge with at least eight years working experience as a judge; (d) a legal researcher or teacher with high-class professional title; or (e) practitioners with legal background and high-class professional title.

Due to a limit on the number arbitrators for the same country or region, candidates must also: (a) have a widely recognized reputation for integrity and competence in commerce, legal research or legal practice; and (b) be fluent in English. Priorities shall be allowed for candidates who have: (a) experience in other arbitral institutes of other countries, whether as an arbitrator, lawyer or legal expert; and (b) good knowledge of the Chinese legal system or business.

Interested candidates may submit their applications to Ms. Emily Lu, International department, CPIT Shanghai at luluo@cpitsh.org.

CONTENTS

PART ONE



Dispute Boards: East vs West

By Gordon L. Jaynes

Broadly speaking, Dispute Boards in the United States—despite the fact that typically they make non-binding "Recommendations"—have a remarkable record of assisting contract parties to avoid further dispute arenas, such as litigation or arbitration. If the Recommendations are not accepted as written, it seems that they enable the parties to resume negotiations and settle amicably. It is this record which has led to the adoption of Dispute Boards in many government agencies in the U.S.

There has been much speculation regarding why comparable success has not been achieved in countries East of the U.S. Some commentators have suggested that it is the high cost of litigation and arbitration in the U.S. which accounts for much of the success of Dispute Boards there. However, speaking as an observer of the cost of litigation and arbitration East of the USA, this suggestion seems to me questionable. Litigation and arbitration of construction disputes is not cheap East of the U.S.A.

This paper suggests that there are three principal problem areas which are restraining a more successful use of Dispute Boards in the East. In alphabetical order they are education, cost, and philosophy.

Education: the acceptance of Dispute Boards in the U.S. has been a gradual process, beginning with a tunnelling project in 1975. Gradually, and in large part through the "missionary" efforts of the DRB Foundation, it has come to be widely used, especially by Departments of Transportation of the various states. That educational process has extended over almost four decades and continues today, fostered by the DRB Foundation and its public conferences and workshops, as well as in-house training programs for Dispute Board users.

By comparison, use of Dispute Boards in the East is new. The first use of Dispute Board outside the United States was the *El Cajon* hydropower project in Honduras in 1981. The use was successful and no disputes went to arbitration or litigation. Yet it was not until 1995 that the World Bank, which had financed the *El Cajon* project, introduced the Dispute Board to its Standard Bidding Document, "Procurement of Works," for use on construction contracts in which the design is performed by others.

That same year, FIDIC introduced its form of Dispute Board in its Conditions for Design-Build and Turnkey Contracts. Thus, some 14 years had elapsed between initial successful use and wider use. Use by other multilateral development banks (MDB) was sporadic, and it was not until 2005 that widespread use by the banks began with the

adoption of the FIDIC MDB Harmonised Edition of the Conditions for Construction. This "harmonization" of the procurement practices of the MDBs was an outgrowth of the United Nations' Millennium Development Goals.

Comparing West and East, the lengths of educational efforts have been some four decades versus 1.5 decades. Also, during the comparatively short time that educational efforts have progressed in the East, those efforts have been focused almost exclusively on the FIDIC version of the Dispute Board, the "Dispute Adjudication Board," which has as a distinguishing feature the Board's ability to make contractually binding decisions, subject only to resorting to international commercial arbitration. Of that, more later.

During the seven years since the MDBs began use of the FIDIC Harmonised Conditions, and until very recently, no organized training of bank staff and borrower staff has appeared, despite the fact that in many developing countries the FIDIC Conditions and the role of Dispute Boards were practically unknown. This lack of education has led to misuse, and the appearance of many dysfunctional Dispute Boards.

Cost: In the West, Dispute Board members are paid for the time worked. In the East, under the model developed by the World Bank, each Dispute Member is paid two types of fee: a monthly retainer fee and a daily fee. The retainer fee is for availability to come to the project site on other than regularly scheduled visits, for becoming acquainted with the contract and remaining acquainted with its development and maintaining relevant office files, and for other work not covered by the daily fee. The daily fee is for travel to and from the site, for the duration of site visits, for time spent in hearings not held during regular site visits, study of documents submitted regarding disputes, private conferring by the Board members, and preparation of its decisions.

Initially, the World Bank's Dispute Board provisions set the monthly retainer at three times the daily fee, and the daily fee was set as the equivalent of the daily fee for an arbitrator under the U.N. International Center for Settlement of Investment Disputes (ICSID), unless the contract parties agreed to a different daily fee. FIDIC did not set any benchmark fee rates but adopted the two fees approach, as did (later) the ICC Dispute Board Rules.

The ICSID daily fee for its arbitrators has risen to a current rate of US$3,000. If one applies this to a three-person Dispute Board on a project of three years' duration, with regularly-scheduled quarterly site visits, the cost exceeds US$1 million even if there are no disputes that require hearings outside regularly scheduled site visits.

That US$1 million amount also excludes significant expenses of the Dispute Board such as air fares and hotel accommodations. Such expenses become significant because typically Dispute Board members have come predominantly from developed countries, travelling significant distances to serve.

Paradoxically, the MDBs that require the use of Dispute Boards have not developed a consistent policy of extending their financing of the contract to the cost of the Dispute Board, or even the foreign currency cost of a Dispute Board. The European Union is still pursuing a policy toward Dispute Boards that regards them as a form of litigation and thus ineligible for financing by the E.U.

The result has been that especially in developing countries, the Employers/Owners have sought to avoid or reduce the cost of the Boards. In some contracts, despite the requirement for the use of Dispute Board the parties have not established a Board. In other contracts, cost reduction efforts have led, in too many cases, to dysfunctional Dispute Boards. Examples are ignoring the contract provisions and postponing the establishment of the Board until after a dispute has arisen, which the parties are unable to resolve by discussion and negotiation, restricting regularly-scheduled site visits to once a year, and using a single Board on multiple concurrent contracts at different sites.

Next issue: Philosophy as the third problem area limiting the widespread use of Dispute Boards outside the U.S. and efforts being done to overcome such problem areas.

About the Author

Gordon L. Jaynes is a lawyer in private practice, based in England and specialized in contractual aspects of international construction projects. His work in international Dispute Boards began in 1994 when he served as a consultant to the World Bank in establishing its contract provisions for use of such Boards. He was a member of the Task Force that produced the International Chamber of Commerce Dispute Board Rules, and a founding member of FIDIC's Assessment Panel for Adjudicators, vetting applicants for entry to the FIDIC President's List of Approved Adjudicators, for service in DABs on contracts using FIDIC Conditions.

Gordon has received the DRB Foundation's Al Mathews Award for outstanding service in promoting international use of Dispute Boards. The Award is the Foundation's highest honour. Gordon can be reached at glj4law@aol.com.

MEMBER SPOTLIGHT

Atty. Teodoro Kalaw IV

Atty. Teddy Kalaw manages his firm, Kalaw Sy Selva & Campos, which specializes in commercial litigation and dispute resolution. Apart from arbitration, his areas of practice include corporate governance, intellectual property, realty, securities, and public policy representation.

He is the first and only Filipino diplomate in international commercial arbitration of the Chartered Institute of Arbitrators (CIArb) of the United Kingdom and is one of three Filipino CIArb Fellows.

Atty. Kalaw is currently the Executive Vice-President of the Philippine Institute of Arbitrators (PIArb) and is the Chapter Warden of the Philippine Chapter of the CIArb East Asia Branch headquartered in Hong Kong. He is among the youngest to be elected a Fellow of CIArb, PIArb, the Singapore Institute of Arbitrators (SIArb), and the Hong Kong Institute of Arbitrators (HKIArb). He is the first and only Filipino Sustaining Member of the International Association of Facilitators.

He is also an accredited arbitrator of the Intellectual Property Office of the Philippines, the Construction Industry Arbitration Commission, and the Wholesale Electricity Spot Market regulated by the Philippine Energy Regulatory Commission.

Atty. Kalaw was admitted to the Philippine Bar in 1998, New York State Bar in 2002, and the Bar of the United States Supreme Court in 2011. Prior to co-founding the law firm that bears his name, he was a senior associate at the intellectual property and information technology practice of Quisumbing Torres, a member firm of Baker & McKenzie International.

He received his Juris Doctor degree, second honors, from Ateneo de Manila University in 1997. In 2001, he finished Master of Laws from Harvard Law School. He obtained his Master in Public Administration (Dean's Medal) from the University of the Philippines's National College of Public Administration and Governance in 2010. In 2012, he earned his Master of Business Administration degree under the joint Executive Master of Business Administration Program of the Kellogg School of Management at Northwestern University and the Hong Kong University of Science & Technology Business School.

Atty. Kalaw currently serves as a member of the faculty of the National College of Public Administration and Governance of the University of the Philippines and the Ateneo de Manila University School of Law.

ABA seeks ADR consultant

By Leonid C. Nolasco

The American Bar Association Rule of Law Initiative (ABA ROLI) under the USAID-funded Justice Project has invited candidates to apply as Alternative Dispute Resolution (ADR) consultant for a number of its ADR-related projects.

The ABA ROLI is looking for an experienced attorney with significant local and international ADR experience. The projects to be handled by the selected ADR consultant will be administered by Philippine government agencies and judicial systems in collaboration with the ABA ROLI. The consultant will work with partners to develop administrative rules and policies regarding the implementation of ADR practices, develop various sets of ADR guidelines, draft manuals, memoranda and reports, conduct trainings, and facilitate high-level meetings and workshops.

Interested applicants must have the following qualifications: (a) a member of the Philippine Bar; (b) engaged in ADR practice locally or internationally for five to 10 years; (c) proficient in managing multiple assignments; (d) knowledgeable in Microsoft Office applications; (e) excellent in oral and written communication; and (f) willing to travel to various regions in the Philippines.

Interested applicants may submit their comprehensive resumes with samples of their written works via e-mail to abaroli_hr@yahoo.com. Only candidates selected for interview will be contacted.