The Philippine ADR Review

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Foreign businesses laud greater use of ADR in the Philippines

By Arveen N. Agunday

The Joint Foreign Chambers of the Philippines (JFC) recently released its Third Anniversary Assessment report lauding the country's greater use of alternative dispute resolution in resolving business disputes at the Third *Arangkada* Philippine forum on February 26, 2014 at the Makati Shangri-la Hotel.

The report updated the participants of the Philippines' progress in meeting the 471 recommendations listed in the original *Arangkada Philippines: A Business Perspective* report published in December 2010. The recommendations covered several fields, including recommendations for the administration of justice.

The *Arangkada* recommendations were based on the insights of nearly 300 Filipino and foreign investors who participated in nine focus group discussions. It aimed to attract US$75 billion in new foreign investments, create 10 million jobs, and generate over P1 trillion in revenues for the Philippines before the year 2020.

Twelve reforms to the judicial system were included in the *Arangkada* recommendations. Among those recommendations were: (a) "make greater use of alternative dispute resolution and arbitration to resolve civil disputes outside of courts, which should reduce the backlog of cases and hasten justice" (Recommendation 5); and (b) "in order to strengthen foreign arbitration, it will be essential to change the rules of the court. ▶ **PAGE 4**

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PART ONE

Dealing with recalcitrant lawyers

By Roberto N. Dio

The Oxford dictionary defines "recalcitrant" as an adjective that means "having an obstinately uncooperative attitude toward authority or discipline." When applied to arbitration, the term refers to parties and their counsel who refuse to shed their habit of litigating their dispute. The "authority" that they refuse to cooperate may be the tribunal, the appointing authority, or the institution that hears or administers the arbitration.

That was the author's experience in some construction arbitration cases before the Construction Industry Arbitration Commission of the Philippines (CIAC) and in some commercial arbitration, both domestic and international. In most instances, the recalcitrant lawyer is often unaware that he is behaving in an obstinately uncooperative manner.

He, or she in some cases, will likely disagree with the characterization that he is recalcitrant. As counsel, his first duty is to his client, and he will do everything within the bounds of law to accomplish that purpose.

That may include making the proceedings prolonged, vexatious and costly. It may begin with an objection to the substantial jurisdiction of the appointing authority or institution administering the arbitration or to the jurisdiction of the tribunal. It may then proceed to a challenge against one or more arbitrators, usually one appointed by the other party or by the appointing authority. The challenge may be repeatedly renewed until it is exhausted.

After exhausting the challenge, the recalcitrant counsel may attack the process itself by resorting to court intervention, raising repeated interlocutory motions or by refusing to follow the procedural rules or the directions of the tribunal given in a written order or as instructions during the pre-hearing conference. He could obstruct the preliminary conference, a site inspection, or the oral hearing on the merits by any or all of the following means:

- Refusing to receive communications from the appointing authority or tribunal
- Refusing to pay the party's share of the arbitration fees and cost or the fee of the appointing authority
- Refusing to agree on the appointing authority, the procedural rules, the language of the arbitration or the venue of hearings

- Refusing to stipulate on facts, documents or issues
- Refusing to sign or accede to the terms of reference or procedural directions
- Refusing to agree on the time table
- Raising procedural objections and renewing the objections if overruled
- Contesting procedural orders and filing motions to suppress
- Dilatory tactics like coming to meetings and hearings late or asking extensions of time and last-minute cancellation of hearings
- Disrupting the proceeding by withholding information and documents, by interrupting the hearings, or by protests and walkouts
- Harassing and threatening witnesses, the opposing party and the tribunal, such as by filing harassment and nuisance suits against them

Causes of recalcitrance

The main culprit in many cases is the parties' and counsel's lack of familiarity with arbitration, even if their contract already contains an arbitration clause. Litigation lawyers who represent parties in arbitration bring their litigious mindset with them, infecting their client's cases with the same litigiousness. Lawyers schooled in the Rules of Court wrongly assume that it applies *pari passu* or with equal force in arbitration.

In one construction arbitration, a counsel was required by the tribunal to explain his failure to follow the CIAC Arbitration Rules and the directions of the tribunal. He responded with this naïve but impudent question,

"Why, is the CIAC Arbitration Rules superior to the Rules of Court?" It was a similar error that led the Court of Appeals in one case to hold that a motion for new trial after award is allowed since it is so provided in the Rules of Court. In one recent case, the Supreme Court issued a temporary restraining order to stop the tribunal from admitting evidence in a commercial arbitration.

Some lawyers wrongly assume that the filing of a motion to dismiss suspends the period to file an Answer to the Statement of Claim, or that a preliminary conference— which is the equivalent of a pre-trial conference in civil cases—can be set only after the issues have been joined, or that a prohibition against splitting a cause of action applies to construction arbitration. In another commercial arbitration, a lawyer petitioned the Court of Appeals to issue a writ of *certiorari* to review the tribunal's ruling sustaining its substantive jurisdiction over the dispute.

Recalcitrance may also arise from a lawyer's perception of arbitration as a dispute process *inferior* to court litigation. This frequently happens in construction arbitration, where the tribunal may be composed entirely of non-lawyers such as architects and engineers. In a few cases before the CIAC, recalcitrance was traced to the belief that a tribunal of non-lawyers is incapable of dealing with issues purely legal in character.

A lawyer may appear during an arbitration conference or hearing wearing a tieless shirt or in mini skirt, comparing arbitration to a process before an administrative body that permits casual attire. The confusion does not lack legal basis, however. Rule 43, Section 1 of the 1997 Rules of Civil Procedure on appeals from quasi-judicial bodies permits an appeal to the Court of Appeals from an award of a voluntary arbitrator "authorized by law," creating the impression that arbitration is an administrative proceeding.

Next issue: Case management and the IBA Guidelines on Party Representation

About the Author

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Atty. Lat has attended or spoken at various conferences such as the 2013 Seminar on the New Philippine Insurance Code, 2013 Suretyship Summit in Makati City, 2013 Philippine Insurance and Reinsurance Association Stakeholders Convention, 2011 International Claims Convention in Kuala Lumpur, Malaysia, and the East Asian Insurance Congress, among others.

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ARANGKADA PHILIPPINES
MOVE TWICE AS FAST

◄ **PAGE 1** While Philippine law provides that arbitration awards have to be confirmed by Philippine courts for execution, it is necessary that the courts not reopen the cases but just confirm them. Reopening of cases should be limited to proven gross negligence of the arbiters" (Recommendation 6).

The Third Assessment Report identified clogged dockets, rulings that negatively impact the business climate, the use of courts and sheriffs for legal harassment, and the issuance of questionable temporary restraining orders among the challenges that must be overcome to facilitate the administration of justice and achieve the objectives of the Arangkada recommendations.

The report states that there was substantial progress in the implementation of Recommendation 5 over the past three years. It noted that more parties are now encouraged to resort to arbitration instead of court litigation.

The report also noted the introduction of a "second tier" of alternative dispute resolution for courts—the judicial dispute resolution—but commented that its efficiency was largely dependent on the judge's time and effort.

With respect to Recommendation 6, the report said that the adoption of procedural rules for the enforcement of foreign arbitral awards has started with the adoption of the Special ADR Rules for the courts as well as the submission of proposed revisions to the Revised Rules of Court of the Philippines.

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