

THE PHILIPPINE ADR REVIEW

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BROADENING ITS SCOPE OF ARBITRATION ADVOCACY



SECRETARIAT

3rd Floor, Commerce and Industry Plaza
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

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DRBF holds international conference and workshop in Singapore

By Oscar Carlo F. Cajucum

The Dispute Resolution Board Foundation (DRBF) recently held its 14th annual international conference and workshop on May 15 to 17, 2014 at The Fullerton Hotel in Singapore, the first time that the event was held in Asia.

More than 120 delegates and speakers from 26 countries, including 12 delegates from the Philippines, attended the conference. The participants represented a broad spectrum of stakeholders in the construction industry, such as engineers, architects, consultants, owners and lawyers. Many of the Philippine participants were from the government sector.

The first day of the conference was devoted to workshops on the dispute board process. The basic workshop was an introductory course for those who were new to the dispute board process, while the advanced workshop was attended by dispute board practitioners and those who previously completed the basic workshop. PDRCI Secretary General Roberto Dio joined the advanced workshop.



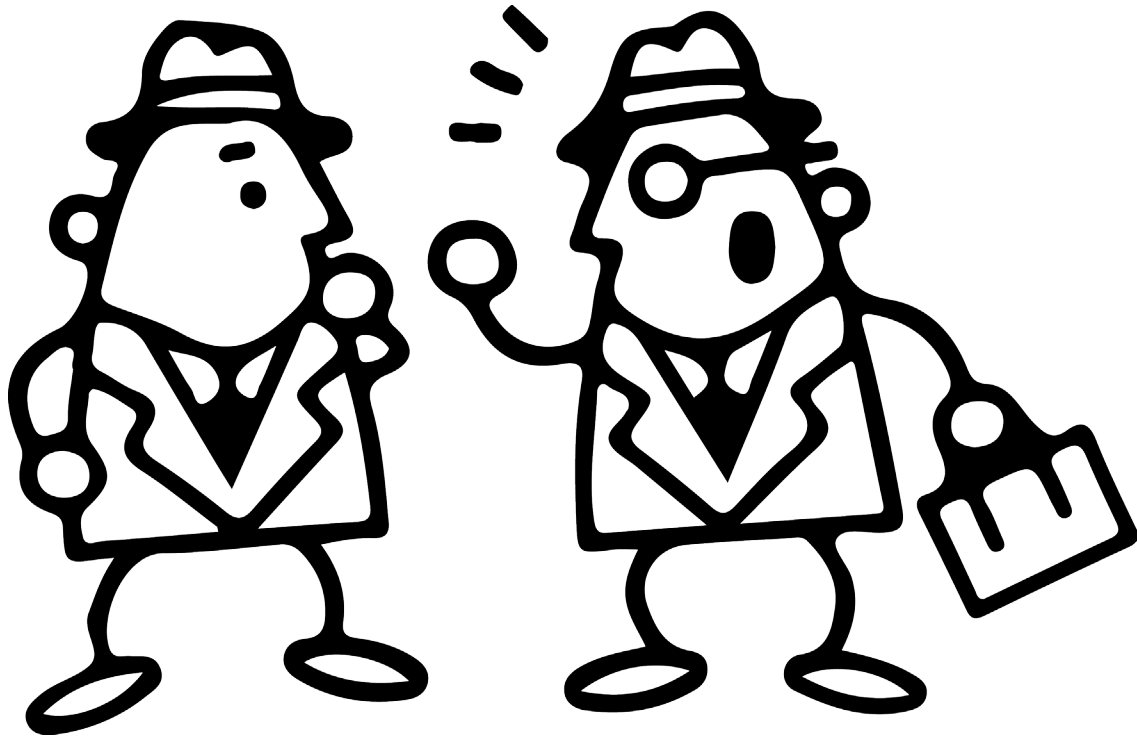
Justice Quentin Loh of the Supreme Court of Singapore delivered the keynote address on the second day of the conference.

The conference then broke into four sessions, where panel speakers discussed the divergence or convergence of dispute board internationally, the growth of dispute boards around the world, the perspective of international financing institutions, and case studies involving the practical application of dispute boards.

On the last day of the conference, the panel speakers shared their views on the cost and benefit of dispute boards, the status of institutional developments in the Philippines, Indonesia, and Thailand, and the future of dispute boards in the ASEAN region. ► **PAGE 4**

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PART TWO


Dealing with recalcitrant lawyers

By Roberto N. Dio

Part I discussed what are recalcitrant parties and their counsel, and the cause of recalcitrance.

Case management

Here is where case management becomes a useful tool because many opportunities for recalcitrance can be removed. The true test of the arbitrator's skill and judgment is in dealing with these situations "with the requisite mix of fairness and firmness." [Merkin & Flannery, Arbitration Act of 1996 132 (2014)]. It is good for an arbitrator to anticipate that a lawyer who is a novice in arbitration may need to be instructed to follow the (a) substantive arbitration laws such as the Arbitration Law, the Alternative Dispute Resolution Act of 2004, and the UNCITRAL Model Law, which

was adopted as part of Philippine law, as well as (b) applicable institutional or ad hoc procedural rules, instead of the Rules of Court. This should be done at the earliest opportunity, even in the order inviting the parties to a preliminary conference.

When a procedural direction is ignored by a recalcitrant party or counsel, an arbitrator must not lose his cool. There is a saying in the vernacular that a person who loses his cool, loses himself. He must avoid embarrassing the lawyer and use discreet language in conveying the sentiment of the tribunal. The arbitrator must lead by example by coming to the conference and hearing on time. He may privately convey to counsel the need to be properly attired. The arbitrator must also conduct the proceeding in a

manner that deserves respect, such as by being prompt in the issuance of procedural directions and by being transparent in dealing with the parties and their representatives.

The tribunal should remember to treat the parties equally, including the recalcitrant ones, and to give each of them a full opportunity to present its case as provided in Article 18 of the UNCITRAL Model Law.

IBA Guidelines on Party Representation

The most difficult challenge to an arbitrator is not recalcitrance *per se* but deliberate obstruction by a lawyer who perceives that his client's case is weak or who, by nature or by constant practice before the court, believes

that an adverse party, to win his case, must run the gauntlet. To address this problem, the International Bar Association (IBA) has issued its Guidelines on Party Representation (“Guidelines”). The Guidelines were inspired by the principle that party representatives such as counsel should act with integrity and should not engage in activities designed to produce unnecessary delay and expense, including tactics aimed at obstructing the arbitration.



Adopted by the IBA on May 25, 2013, the Guidelines offer the tribunal an approach to the issue of party representation designed to account for the multi-faceted nature of international arbitration, in lieu of a choice-of-law rule or private international law analysis in choosing the applicable domestic or national rule. It attempts to address the gap in substantive arbitration laws as well as diverse and conflicting domestic rules on professional conduct in international arbitration, which range from those of the counsel’s home jurisdiction, the arbitral seat, and the place where the arbitration is held. The Guidelines recognize that domestic rules developed for judicial litigation are ill suited to international commercial arbitration due to the legal and cultural differences and the complex, multinational nature of the disputes.

The parties may adopt the Guidelines or parts of it. The tribunal, after consultation with the parties and determining that it has authority to rule on matters of party representation to ensure the integrity and fairness of the arbitration, may apply the Guidelines but subject to other applicable mandatory rules on party


representation. The Guidelines are not intended to displace mandatory laws, professional or disciplinary rules, or agreed arbitration rules that may be applicable to party representation.

Guidelines 9 to 11 state a counsel’s *duty of candor or honesty to the tribunal*. It prohibits the (a) false submission of facts, and (b) submission of evidence by a witness or an expert that the counsel knows to be false. The Guidelines require the counsel to promptly take remedial measures upon knowing that the fact or evidence is false, such as by correcting the submission, withdrawing the evidence, or withdrawing as a Party Representative.

Guidelines 12 to 17 concern the counsel’s *conduct in document production during discovery*. They require the taking of reasonable steps to preserve, search for, and produce documents that a party has a duty to disclose. A counsel shall also not make a request to produce documents or object to one when such request or objection is aimed at harassing,

obtaining documents extraneous to the arbitration, or causing unnecessary delay.

Guidelines 26 to 27 provide *remedies and sanctions for a misconduct of counsel*, after giving the parties and their lawyers an opportunity to be heard, such as (a) admonishing the counsel; (b) drawing appropriate inferences from the evidence and arguments of the parties; (c) apportionment of cost; and (d) any other appropriate measure to preserve the fairness and integrity of the arbitration. This is similar to the “peremptory order” that a tribunal may issue under Section 41 (5) to (7) of the Arbitration Act of 1996 of the United Kingdom.

PDRCI is studying the Guidelines, with a view to adopting it to address the gap of procedure in domestic and international commercial arbitration on party representation and to help clarify the responsibility of counsel to contribute to the fairness and integrity of the arbitration. The authors are hopeful that the Guidelines would help discourage the recalcitrant behavior of parties and their counsel. 

About the Author



Atty. Dio is the editor of *The Philippine ADR Review*. He is a senior litigation partner of Castillo Laman Tan Pantaleon & San Jose, where he has practiced for the past 28 years. He is an accredited Court of Appeals mediator, construction arbitrator, and bankruptcy practitioner. He has represented claimants and respondents in both domestic and foreign arbitrations.

MEMBER SPOTLIGHT

Bernadette C. Ongoco




Bernadette C. Ongoco is currently the Executive Director (Officer-in-Charge) of the Office for Alternative Dispute Resolution, carrying out functions in addition to her

tasks as a State Counsel of the Department of Justice.

Atty. Ongoco took part in the formulation and vetting of the Implementing Rules and Regulations of the Alternative Dispute Resolution Act of 2004. She participated as Philippine Department of Justice representative in the dispute settlement negotiations of various regional agreements and cooperation arrangements with the members of the Association of Southeast Asian Nations (ASEAN) and other Asian countries such as Japan, Korea, India, Australia and New Zealand. She also participated in negotiating dispute settlement mechanisms in investment agreements.

Atty. Ongoco acted as resource speaker in the training component relative to the barangay justice system under the Access to Justice for the Poor Program sponsored by the European Commission.

She renders assistance to the Secretary of Justice in the performance of her functions as Attorney-General. Her work includes drafting of Department of Justice opinions, processing of refugee status determination applications, acting upon requests for extradition and mutual legal assistance and assisting inter-agency meetings on legal issues raised. 


DRBF holds international conference and workshop in Singapore



◀ **PAGE 1** PDRCI Trustee Salvador Castro, Jr. reported the implementation of four dispute boards in road projects in Samar, the first time it was used in the Philippines. At the close of the conference, the DRBF announced the venue of the 15th annual international conference in Genoa, Italy in 2015.

The DRBF is a non-profit organization dedicated to promoting the avoidance and resolution of construction disputes worldwide using the Dispute Resolution Board (DRB) method. It promotes the application of DRB by providing general advice and suggestions tailored to the conditions and practices existing in the areas where pertinent construction projects are being implemented.

The DRB method is a dispute-avoidance mechanism utilized in the construction industry to help the owner and the contractor resolve issues relating to a construction project before these grow into claims and erupt into disputes. It aims to avoid delays and cost in construction projects and, coincidentally, reduce legal cost by limiting arbitration and litigation.

The use of the DRB method in construction projects in the Philippines has not yet gained sufficient traction. However, according to Dr. Castro, the Philippines' country representative to DRBF, the DRB method is expected to be utilized more frequently in local infrastructure projects. 

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Roberto N. Dio, *Editor*

Shirley Alinea and Donemark Calimon
Contributors

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

