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# ..... THE PHILIPPINE ..... ADR REVIEW

*Broadening its scope of arbitration advocacy*

**MARCH 2015**

## PDRCI adopts ICC rule to resolve impasse in awards



In its new Arbitration Rules, which took effect on January 1, 2015, PDRCI adopted a new Rule 42, which allowed the chairman of an arbitral tribunal to break an impasse by rendering a final award in case the tribunal fails to reach a majority:

“When there is more than one arbitrator, any award or decision of the arbitral tribunal shall be made within one (1) year from constitution of the arbitral tribunal by a majority of the arbitrators. If there is no majority, unless the parties agree otherwise, the award may be made by the Chair of the arbitral tribunal alone.”

The new rule departs from the former procedure where the tribunal was considered in delay if it failed to render an award within one year from the constitution of the tribunal and the file counsel was required to submit a full report to the Secretary General. The Secretary General would then meet with the tribunal to ascertain the cause of delay and submit to the Board of Trustee his recommendation whether to give the tribunal a reasonable extension or to replace the chairman, an arbitrator or the entire tribunal.

Because it was deemed inconsistent with party autonomy to remove the tribunal or any arbitrator in case of an impasse, PDRCI’s Board of Trustees unanimously adopted Article 25, paragraph 1 of the Rule of Arbitration of the International Chamber of Commerce (ICC), which empowered the chairman of the tribunal to render an award “if there be no majority.” Since the parties indirectly agree to this rule when they submit their dispute to PDRCI arbitration, the requirement in Section 20 of the Arbitration Law [(Rep. Act 876 (1955)] that the award must be made in writing and “signed and acknowledged by a majority of the arbitrators, if more than one” is deemed satisfied.

However, unlike the ICC rule, the new Rule 42 allows the parties to agree on another procedure to break the impasse, such as by a coin toss.

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## The 2014 IBA Guidelines on Conflicts of Interest in International Arbitration

By: Camille Khristine I. Aromas and Grace Anne C. Lazaro

*Note: Part I of the article described the background of the 2014 Guidelines and discussed some of its salient provisions such as the identity of the arbitrators and their firms, disclosure of third-party funding requirements, and application of the Guidelines to arbitrators who are non-lawyers. Part II discusses the other salient provisions.*

#### 4. Advance waivers do not discharge the arbitrator's ongoing duty of disclosure.

One of the issues that the 2014 Guidelines discussed is the use of "advance waivers." Under an advance waiver, parties waive their right to challenge an arbitrator's independence or impartiality in respect of facts or circumstances that may arise in the future and the possible conflicts of interest that may result therefrom.

The 2014 Guidelines do not expressly state whether such waivers are enforceable but merely say that the advance waivers "do not discharge the arbitrator's ongoing duty of disclosure under General Standard (3)(a)" [see explanation to General Standard 3(b)]. This is consistent with the fundamental principle that each arbitrator must be impartial and independent not only at the time he or she accepts an appointment to act as arbitrator but also so during the entire course of the arbitration proceeding, including the time period for the correction or interpretation of a final award under the relevant rules, assuming such time period is known or readily ascertainable (see explanation to General Standard 1). In view of the arbitrator's ongoing duty of disclosure, the "advance waiver" should not prevent any future challenges to the arbitrator's appointment.

#### 5. The parties have the duty to disclose the identity of their counsel, including whether or not their counsel is a member of the same chambers as the arbitrator.

General Standard 7(b) of the 2014 Guidelines impose a duty on a party to "inform an arbitrator, the arbitral tribunal, the other parties and the arbitration institution or other appointing authority (if any) of the identity of its counsel appearing in the arbitration, as well as of any relationship, including membership of the same barristers' chambers, between its counsel and the arbitrator." While this circumstance is already provided under Article 3.3.2. of the Orange List in the 2004 Guidelines, the reference in the General Standards expressly provide that the parties have the said duty of disclosure in relation to their counsel.

The duty to make this disclosure applies at the start of the proceedings or, otherwise, at the earliest opportunity, on the parties' initiative, and upon any change in the parties' counsel team.

#### 6. An arbitrator may assist the parties in reaching a settlement of the dispute, through conciliation, mediation or otherwise, at any stage of the proceedings.

The language used in General Standard 4(d) was also revised to say that the assistance of the arbitrator in the settlement of the dispute may be had by way of conciliation or mediation. This guideline, however, contravenes Republic Act No. 876 (1953) or the Philippine Arbitration Law, which prohibits an arbitrator from acting as a mediator in any proceeding in which

he is acting as arbitrator (Sec. 20, par. 2). Section 20 of the Philippine Arbitration Law further provides that all negotiations towards settlement of the dispute must take place without the presence of the arbitrators.

Notably, this prohibition finds an exception in the case of the arbitration of construction disputes. Under the Republic Act No. 9285 (2004) or the Alternative Dispute Resolution Act of 2004, an arbitrator may act as mediator and a mediator may act as arbitrator by written agreement of the parties to a dispute in construction-related arbitration (Section 36).

## 7. Clarifications of and Revisions to the Orange List

The Orange List is an enumeration of situations that, in the eyes of the parties, may give rise to justifiable doubts as to the arbitrator's impartiality or independence. In these situations, the arbitrator is called upon to disclose the potential conflict of interest to the parties [see General Principle 3(a)]. If no timely objection is made within thirty days after disclosure, the parties are deemed to have accepted the arbitrator [see General Standard 4(a)].

Because the Orange List is a non-exhaustive list of examples, the 2014 Guidelines emphasized that there may be situations not mentioned that may need to be disclosed by an arbitrator depending on the circumstances, e.g., in the event of repeat past appointments by the same party or the same counsel beyond the three-year period provided for in the Orange List or when an arbitrator concurrently acts as counsel in an unrelated case in which similar issues of law are raised (see Part II, practical application of the standards, item 7).

Further to these examples, the 2014 Guidelines explains that the arbitrator is under a duty to assess on a case-by-case basis whether the fact of having frequently served as counsel with, or as an arbitrator on, arbitral tribunals with another member of the tribunal may create a perceived imbalance within the tribunal. This is a departure from the 2004 Guidelines where situations not falling under the Orange List are deemed to fall under the Green List thereby not requiring any disclosure.

The Orange List was also revised to include new situations requiring disclosures, namely: (a) where the arbitrator and another arbitrator, or counsel for one of the parties, have acted together as co-counsel within the past three years (see Orange List, 3.3.8); and (b) where enmity exists between an arbitrator and counsel appearing in the same arbitration (see Orange List, 3.3.7).

## 8. Clarifications of and Revisions to the Green List

The 2014 Guidelines also reflect the increased use of social media. Under the 2014 Guidelines, a relationship of the arbitrator with another arbitrator, or with the counsel for one of the parties, or with one of the parties or through their affiliates through a social media network, falls under the Green List and does not warrant disclosure (Green List, 4.3.1/4.4.4).

In conclusion, it bears to stress that the 2014 Guidelines, as with the 2004 Guidelines, are not binding. However, considering that the Guidelines are a reflection of best practices in international arbitration and offer a set of standards that provide some form of legal certainty in arbitral proceedings, arbitral institutions refer to the Guidelines in deciding challenges of arbitrators. Ultimately, the revisions and clarifications to the Guidelines will support the efficient conduct of arbitration proceedings through the reduction of arbitrator challenges.

On 23 October 2014, the International Bar Association (IBA) Council adopted the 2014 IBA Guidelines on Conflicts of Interest in International Arbitration ("2014 Guidelines") to address the evolution of the global practice of international arbitration, including a number of issues that have received attention in international arbitration practice since the IBA Guidelines were first issued in 2004 ("2004 Guidelines").

### About the Authors



*The authors are associate attorneys of Quisumbing Torres, a member firm of Baker & McKenzie International in Manila. They specialize in litigation and commercial arbitration.*

*Camille Khristine I. Aromas (left) studied economics and law at the University of the Philippines Diliman, while Grace Anne C. Lazaro studied law at the same school, where she received the Dean's Medal for Academic Excellence. They were certified as lawyers in 2010 and 2013.*

MEMBER SPOTLIGHT



Atty. Asuncion de Leon Omila obtained both her Bachelor of Arts (major in Psychology) and Bachelor of Laws degrees from the University of the Philippines, Diliman.

After passing the bar examinations, she worked at the Supreme Court of the Philippines as a member of the legal staff of Associate Justice Isagani Cruz. Thereafter, she was appointed as an Associate Solicitor at the Office of the Solicitor General, where she trained extensively in litigation and appellate practice.

In 1998, she was appointed as a Branch Clerk of Court in a Regional Trial Court, where she gained experience in trial court work and administration. In 2004, she successfully completed the Pre-Judicature Program of the Philippine Judicial Academy.

In 2005, instead of pursuing a career in the judiciary, she engaged in private law practice and specialized in litigation and appellate practice. At present, she is a partner at Soller and Omila Law Offices, where she specializes in family law, property and commercial transactions, and alternative dispute resolution (ADR), among others.

To keep abreast of ADR developments and to further enhance her dispute resolution skills, she regularly undergoes training in commercial arbitration and mediation. In recent years, she obtained accreditations from various ADR institutions in the Philippines and abroad.

A seminar on

**“The Changing Landscape of International Arbitration and Mediation: Perspectives from Singapore”**

Launched in November 2015, the Singapore International Mediation Centre (SIMC) is the first centre of its kind to focus on providing world-class mediation services targeted at the needs of parties facing cross-border commercial disputes. SIMC builds on Singapore’s reputation for quality legal services and the success of the Singapore International Arbitration Centre (SIAC), which has been recognised as the fourth most preferred arbitral institution in the world. Come and hear experts from the Singapore International Arbitration Centre, the Singapore International Mediation Centre and the Philippines Dispute Resolution Inc. discuss the latest developments in international arbitration and mediation in Singapore, including the new SIAC-SIMC Arb-Med-Arb service, and share their perspectives about what this could mean for international businesses in the Philippines.

**TIME:** Wednesday, 22 April 2015, at 1.00 pm

**VENUE:** IPOP HL Multipurpose Hall, Ground Floor, Intellectual Property Center World Finance Plaza, No. 28 Upper McKinley Road, McKinley Hill Town Center, Taguig City

**TO REGISTER:** PDRCI Secretariat telephone: 555-0798 / 822-4102 or email: secretariat@pdrcci.org

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**JOINTLY PRESENTED BY:**



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