

..... THE PHILIPPINE ADR REVIEW

Broadening its scope of arbitration advocacy

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IPBA convention focuses on arbitration

By Ricky A. Sabornay

The Inter-Pacific Bar Association ("IPBA"), an international association of business and commercial lawyers who live in or have a strong interest in the Asia-Pacific Region, recently held its 25th annual meeting and conference last May 6 to 9, 2015 in Hong Kong.



One of the highlights of the conference was a concurrent session run by IPBA's Committee on Dispute Resolution and Arbitration that dealt with arbitration in emerging economies, in which Atty. Roberto N. Dio, Secretary General of the Philippine Dispute Resolution Center was one of the panelists.

The other members of the panel were the Registrar of the Singapore International Arbitration Center, Tan Ai Leen; Theodoor

Bakker, foreign counsel of the Indonesian firm of Ali Budiardjo, Nugroho, Reksodiputro; Robert Rhoda, senior associate of Smyth & Co.; and Dr. Colin Ong, President of the Arbitration Association Brunei Darussalam.

Chiann Bao, Secretary General of the Hong Kong International Arbitration Centre, and Hiroyuki Tezuka, head of international litigation practice of Nishimura & Partners, acted as moderators.

The session began with an introduction to the importance of looking at emerging economies and the state of arbitration in those jurisdictions, considering that emerging economies have become a key engine in the growth of the Asian market.

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By: Ricky A. Sabornay



Respect and obey arbitral decisions

By: Chief Justice Artemio V. Panganiban (Ret.)

Arbitration is becoming a popular mode of settling local and international disputes. The Supreme Court encourages it because it speedily dispenses justice and helps declog judicial dockets.

Notable arbitration cases. Unlike in judicial cases, the arbitral parties select their judges. Usually, the two opposing sides nominate one judge each. The arbitral body that conducts the arbitration chooses the third judge who becomes the panel chair. Every arbitral tribunal handles only one case at a time. Its decision is final and unappealable.

The Philippines has participated in several arbitration cases. It won the arbitral case concerning the construction and operation of Terminal III of the Ninoy Aquino International Airport (Naia III) against the Philippine International Air Terminal Company (Piatco). The International Chamber of Commerce (ICC) based in Paris was the arbitral body which selected the panel chair.

It also won its arbitration case concerning Naia III also, this time against Fraport AG, a German company. The International Center for the Settlement of Disputes (Icsid) based in Washington, DC appointed the panel chair.

Probably, our country's most important arbitration case involves the Spratlys and several other isles in the West Philippine Sea. The Philippines sued China in the International Tribunal on the Law of the Seas (Itlos) headquartered in Hamburg, Germany. China is a member of the international group that created the Itlos and has a judge sitting on the tribunal. However, it refused to participate in the proceedings, claiming that Itlos has no jurisdiction since, allegedly, China exercises "indisputable sovereignty" over the isles.

Nonetheless, the Itlos continued the proceedings and is poised to issue its decision early next year. Our country is confident it would win the case. The problem, however, is whether China, given its superior military clout, will respect and obey an Itlos decision dislodging it from those isles.

Rule of law. Our government, through the Metropolitan Waterworks and Sewerage System (MWSS), likewise won its arbitration case against the Manila Water Company but lost to the Maynilad Water Services in a separate case. The ICC, like in the Naia III case, appointed the chairman of both panels.

While MWSS promptly obeyed and enforced its victory over Manila Water, it refused to obey and enforce its loss to Maynilad, arguing that it had a duty to set “just and equitable rates” to all the water consumers in Metro Manila.

In stark contrast, Manila Water laudably accepted (even if it disagreed with) the decision it lost in. However, it reserved its right to compensation granted by its “Concession Agreement” with MWSS.

Palpably unreasonable is this double-faced stance of MWSS. It freely participated in the two arbitration cases with the full knowledge and acceptance of the finality and binding effect of whatever decisions may be rendered. Thus, it cannot accept and obey only the decision it won and ignore the decision it lost. That is the worst kind of selective justice.

Just because it exercises indisputable sovereignty and commands the police and the military, the government should not impose its will arbitrarily. It must set the example in following arbitral decisions regardless of their outcome. It must lead in observing the rule of law.

Otherwise, how can our government expect China to accept and obey an Itlos decision that is unfavorable to China if our government refuses to accept and obey arbitral decisions unfavorable to it?

What is good for the goose should also be good for the gander. The rule of law must be honored evenly and unconditionally. The government should not disobey an arbitral decision simply because it disagrees with it. Otherwise, it would be a worse violator of the rule of law for it willingly and actively participated in the arbitral proceedings while China did not.

Innocent bystanders. On the other hand, the arbitration between the government, represented by the Bases Conversion and Development Authority (BCDA), and the CJH Development Corp. ended in a draw. (The Philippine Dispute Resolution Center Inc. or PDRCI was the arbitral body that named the panel chair.)

The arbitral tribunal held that both parties mutually breached their lease agreement over Camp John Hay in Baguio. Consequently, it rescinded the agreement and directed CJH to deliver the leased area, together with all improvements and constructions thereon, to the BCDA which, in turn, was ordered to return to CJH all the rentals the latter had paid, amounting to almost P1.5 billion.

While the arbitral decision may have settled the dispute between BCDA and CJH, it did not touch on the rights and obligations of the investors, locators and condominium owners in Camp John Hay who were not parties to the arbitration. But, in good faith, they paid CJH for their rights over the homes, condominiums, golf club shares and other improvements built thereon by CJH.

Their payments can not just dissipate into nothingness. Surely, BCDA which was adjudged to take over Camp John Hay should treat them reasonably, equitably and fairly. After all, when they contracted with CJH, the lease agreement between CJH and BCDA was still valid and existing. It became invalid only after it was rescinded by the arbitral tribunal last February. As innocent bystanders who were not parties to the arbitration, they should not be penalized and deprived of what they had paid for in good faith.

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About the Author

Chief Justice Artemio V. Panganiban is the 21st Supreme Court Chief Justice of the Philippines. He was the former Chairman of PDRCI and now its Chairman Emeritus.

MEMBER SPOTLIGHT



Jay Santiago is from the Philippines and is a Philippine-qualified lawyer working as Counsel at the Hong Kong International Arbitration Centre ("HKIAC"). His tasks include the administration of arbitration at the HKIAC and the promotion of the use of arbitration and other forms of dispute resolution.

Prior to joining the HKIAC in 2014, Jay had five years' experience in private practice working in international arbitration and dispute resolution in Quisumbing Torres (a member firm of Baker & McKenzie International) and Angara Abello Concepcion Regala & Cruz Law Offices in the Philippines. He also provided advice regarding the formulation and drafting of arbitration and dispute resolution clauses in commercial contracts. His practice also covered commercial litigation, tax advisory and litigation, corporate housekeeping, and corporate and regulatory compliance.

He is a member of the Chartered Institute of Arbitrators East Asia Branch (Philippine Chapter) and a trained arbitrator of the Philippine Dispute Resolution Center, Inc. He is the Vice President for International Initiatives of the Philippine Institute of Arbitrators and a member of the ASEAN Law Association and Phi Kappa Phi International Honors Society. 

IPBA convention focuses on arbitration

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Each member of the panel, who came from different countries in the region, then gave an overview of the legal framework of his or her country, particularly (a) the existing laws recognizing arbitration as a mode of dispute resolution, (b) the recent attitude of the courts to arbitration and how they relate to international arbitration, especially in the case of enforcement, and (c) the various arbitral institutions in his or her home country and the role that they play in the context of developing arbitration in emerging economies.


They also discussed how lawyers are educated and trained to practice international arbitration and how international arbitration is perceived by users and other stakeholders in relation to litigation in their respective home country.

Tan Ai Leen presented the situation in India and Myanmar, which recently acceded to the New York Convention in 2013. Mr. Bakker reported on Indonesia's experience and focused on Indonesia's recent experience on enforcement, particularly the procedural difference on domestic and foreign awards.

Mr. Rhoda gave an overview of arbitration practice in China and the latest developments on arbitration in China, particularly the new China International Economic and Trade Arbitration Commission (CIETAC) Rules. Dr. Ong shared his experiences in Brunei, Cambodia, and Indonesia focusing on the plans that important stakeholders have in the immediate future about the updating of Indonesian Arbitration Law No. 30 of 1999 and also the updating of the current Indonesian National Board of Arbitration (BANI) arbitration rules.

In the case of the Philippines, Atty. Dio shared how the Philippine legal system recognized quite early the validity of a contractual stipulations on arbitration, recognizing the arbitrators' award or decision as final as early as 1950. He noted, however, that it took the Philippines almost 50 years to become an UNCITRAL Model Law country in 2004 when it adopted the UNCITRAL Model Law on International Commercial Arbitration in the Alternative Dispute Resolution Act of 2004.

Asked on how the Philippines can further promote international arbitration, Atty. Dio underscored that Philippine arbitration rules should be fully compliant with the recognition and enforcement standards of the New York Convention and the Model Law.

The session ended with an open forum in which participants were able to further discuss and exchange insights on the latest trends in international arbitration in the respective countries of the members of the panel. 

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