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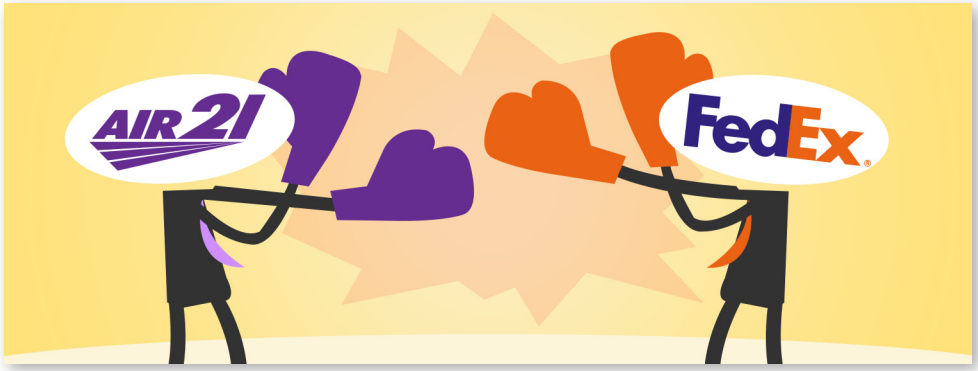

Court of Appeals dismisses challenge to arbitrator

By: Leonid C. Nolasco

In a Decision dated July 24, 2015 released last month, the Court of Appeals dismissed Airfreight 2100, Inc.'s ("A21") appeal from the National Capital Regional Trial Court's resolution dismissing its petition, which sought to nullify PDRC's rejection of A21's challenge to the appointment of Atty. Salvador Panga, Jr. as part of a three-man arbitration panel.

The arbitration panel was appointed pursuant to a Submission Agreement dated May 11, 2011 between A21 and Federal Express Corporation ("FedEx") to resolve the pending contract disputes between them. The Agreement stipulated that the parties' dispute would be referred to arbitration under PDRC's Arbitration Rules.

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WHAT'S INSIDE

China expert talks at PDRC annual meeting

By Francisco Pabilla, Jr.

Chito Sta. Romana, a renowned expert on China, was the guest speaker at the PDRC general membership meeting on August 24, 2015. Mr. Sta. Romana shared his insights in a lecture on "Understanding China: Its Position on the West Philippine Sea Arbitration Case." His talk was a synthesis of what he had observed and understood about China after living there for three decades.

On the Philippine-China arbitration, Mr. Sta. Romana explained that the issue on the jurisdiction of the international tribunal established under the United Nations Convention on the Law of the Sea (UNCLOS) remains pending. In response to the Philippine claim, China issued a position paper stating that it would not accept nor participate in the arbitration under the UNCLOS.

The international arbitral tribunal requested the Philippines to respond to the position of China on the issue of jurisdiction. Under Article 9 of Annex VII to UNCLOS, "Absence of a party or failure of a party to defend its case shall not constitute a bar to the proceedings. Before making its award, the arbitral tribunal must satisfy itself not only that it has jurisdiction over the dispute but also that the claim is well founded in fact and in law."

As contained in the position paper issued by China,(1) the essence of the Philippine claim has to do with territorial sovereignty, which is beyond the scope of UNCLOS and does not involve the interpretation or application of UNCLOS; (2) the issues raised in the arbitration have to do with the process of maritime delimitation and fall within the scope of China's 2006 declaration excluding disputes concerning maritime delimitation from compulsory arbitration; and (3) the Philippines unilaterally initiated the arbitration and breached its obligation under international law since China and the Philippines have agreed to settle disputes through negotiation.

Mr. Sta. Romana explained that what the Philippines sought was not a ruling on sovereignty or maritime delimitation

Scarborough Shoal

but a clarification of maritime entitlements under UNCLOS, since the status of disputed features will be the same whoever owns them.

He further clarified that the Philippines was not seeking from the arbitral tribunal (1) a resolution of sovereignty issue over the disputed islands; in other words, the territorial dispute would continue for some time; and (2) the delimitation of maritime boundaries or exclusive economic zone (EEZ) but a clarification of maritime entitlements. The claims excluded by China from arbitration in its 2006 declaration were boundary delimitations, historic basis of titles as well as military and law enforcement activities.

Mr. Sta. Romana said that the Philippines wanted the international arbitral tribunal to declare that (1) China's claims based on the nine-dash line theory was contrary to UNCLOS and invalid under international law; (2) China's occupation of the four submerged features was unlawful; and (3) Scarborough Shoal and three other reefs that China occupied as "rocks" were entitled only to a 12-mile territorial sea.

Mr. Romana stresses a point during his lecture at the PDRC General Membership Meeting in July.

He said that the problem was that the four submerged features were converted into artificial islands by China to bolster its claim and undermine the possible outcome of the arbitration. If the ruling favored the Philippine position, then the international arbitral tribunal would say that it should be enforced. If this happens, Mr. Sta. Romana believed that the Chinese would simply say "Come and get us if you can." This was the dilemma the Philippines faced, he said.

Mr. Sta. Romana also believed that there was a cultural factor involved in the arbitration. One of the tenets of Confucianism that weigh heavily on China's thinking is the saying "To sue a neighbor is to humiliate the neighbor." The Chinese gives a lot of importance to "saving face" and quiet diplomacy in resolving disputes.

Prof. Junwu Pan, who teaches in China, wrote in his book Chinese Philosophy and International Law that "It was common [for Chinese] to regard adjudication as a kind of 'shame and loss of face' process. There are many vivid Chinese proverbs related to the general aversion to adjudication, for example the saying –'in death avoid hell, in life avoid the legal courts,' 'to enter a court of law is to enter a tiger's mouth,' and 'it is better to die of starvation than to be a thief, it is better to be vexed to death than to bring a lawsuit.'"

Prof. Julian Ku, a Chinese-American from Hofstra University School of Law, also wrote a paper on "China and the Future of International Adjudication." He said that "China has generally avoided any treaty that would obligate it to submit to compulsory dispute resolution."

However, Mr. Sta. Romana also cited some notable exceptions to this observation, viz.: (1) China joined the Convention on Settlement of Investment Disputes in 1990, which meant that it was willing to have arbitration in investment issues; and (2) China also entered the World Trade Organization in 2001 and agreed to its dispute-settlement mechanism. That was why China was willing to submit trade or economic disputes to arbitration

In closing, Mr. Sta. Romana hoped that the Philippines would overcome the issue on jurisdiction and submit the merits of its claim to the international arbitral tribunal. However, the international arbitral tribunal would not resolve the territorial dispute, which would continue even if the Philippines won in the arbitration. The international arbitral tribunal could resolve the maritime dispute to a certain degree by providing clarity on some legal issues.

The only way to resolve the territorial dispute and the maritime delimitation under existing international law is through bilateral negotiation, unless the Philippines could convince the Chinese to undergo mediation, conciliation or some other modes of dispute resolution.

The ultimate question for China, according to Mr. Sta. Romana, was what kind of power was it going to be? We saw the rise of China as a major power in the region and in the world. Did it want to be viewed as a benign and responsible power? Or, did it want to be viewed as an aggressive power similar to Imperial Japan in World War II or similar to Hitler's Germany? This was something that China should resolve internally, and there was a debate now going on in China.

About the Author

Francisco Pabilla, Jr. was a court-annexed mediator for 12 years and at the same time the Executive Director of the Philippine Mediation Foundation, Inc. He earned his bachelor's degree in Political Science in University of the Philippines in Diliman and Master of Arts degree in Development Studies at the Institute of Social Studies, The Hague, The Netherlands. He is currently the Assistant Secretary General of PDRCI.

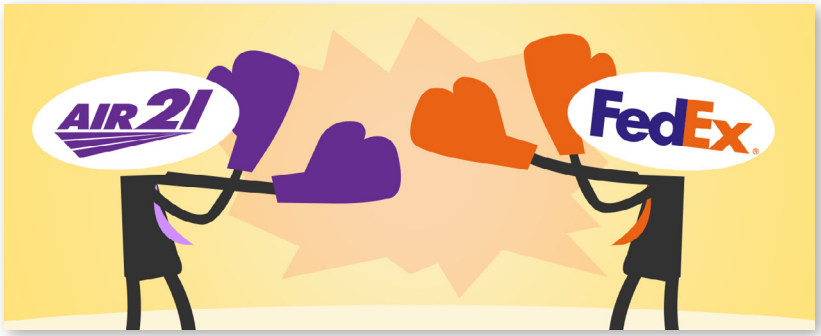
MEMBER SPOTLIGHT

Atty. Ian Ray P. Malilong is a litigation partner in the law firm of Solis Medina Limpingco & Fajardo Law. He is an accredited mediator and arbitrator of the Wholesale Electricity Spot Market, a trained arbitrator of the Philippine Dispute Resolution Center, Inc., and a member of the Philippine Institute of Arbitrators.

As corporate secretary, director, or legal counsel of several multinational companies, he oversees their regulatory compliance with government agencies, documents their corporate acts, and drafts or reviews various contracts with their business partners.

Atty. Malilong studied psychology at the University of the Philippines in Diliman, where he graduated *cum laude* in 1999. He received his law degree in 2004 at the same university, where he received the Professor Esteban B. Bautista Prize for best paper in intellectual property law. His article "Fruit of the Poisonous Tree? A Discussion on the Constitutionality of Civil Search and Seizure" was published in the *Philippine Law Journal*, volume 79, No. 3.

In addition to dispute resolution, he specializes in corporate law, arbitration, telecommunications, and government regulations.



Court of Appeals dismisses challenge to arbitrator

(Continued from page 1)

Following the Agreement, A21 appointed its nominee arbitrator while FedEx appointed Atty. Panga as arbitrator. The two party-appointed arbitrators then appointed PDRC President Gregorio Navarro as third and presiding arbitrator. Apprehensive about the independence of FedEx's appointed arbitrator, A21 challenged Atty. Panga, who rejected it. When the challenge was renewed with PDRC, it also rejected the challenge to Atty. Panga.

A21 then filed a petition for certiorari with the trial court to nullify PDRC's acton on the ground of grave abuse of discretion. In its Resolution dated August 24, 2012, however, the trial court dismissed A21's petition on the ground of lack of jurisdiction because there was no law allowing PDRC to exercise quasi-judicial functions even in its private capacity; hence, the first requisite for the issuance of a writ of certiorari was missing.

On appeal, the Court of Appeals agreed with the trial court's dismissal of A21's petition but on a different ground. According to the appellate court, A21's correct remedy was to renew its challenge before the trial court pursuant to Section 11 of Republic Act No. 876 (1953), otherwise known as the "Arbitration Law," and Rule 7.2 of the Special Rules of Court on Alternative Dispute Resolution (ADR). Certiorari was improper because A21 had a speedy and adequate remedy by renewing its challenge. A21 has moved for reconsideration of the appellate court's decision.

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