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THE PHILIPPINE
ADR REVIEW
Broadening its scope of arbitration advocacy

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PDRC to collaborate with DRBF, PIArb in pushing dispute avoidance

The Philippine Dispute Resolution Center has joined hands with the Dispute Resolution Board Foundation (DRBF) and the Philippine Institute of Arbitrators (PIArb) to promote dispute adjudication as a mode of avoiding or resolving commercial disputes.

On November 11, 2015, PDRC President Greg Navarro signed the Memorandum of Understanding (MOU) with Engr. Salvador Castro, Jr., DRBF Country Representative for the Philippines, and Atty. Teodoro Kalaw IV, PIArb President. The MOU formalized the strategic partnership between them. The signing ceremony was held at the office of Mr. Navarro at the Rizal Boardroom, Navarro Amper and Co., and witnessed by members and officers of the ADR institutions.

Under the MOU, the three ADR institutions will combine their efforts to promote and develop dispute adjudication, including the training of dispute board (DB) practitioners, to achieve real-time dispute avoidance and the resolution of local and international disputes relating to construction, commercial and information technology.

Atty. Kalaw acknowledged the key role played by Atty. Sit Morallos in pushing the three ADR institutions to sign the MOU, which symbolized their commitment to work together to promote and accomplish the common goal of making ADR and the DB effective tools in dispute avoidance and resolution.

WHAT'S INSIDE

PART 1

The Philippine Arbitration Case and China's Dispute Resolution Culture

By: Chito Sta. Romana

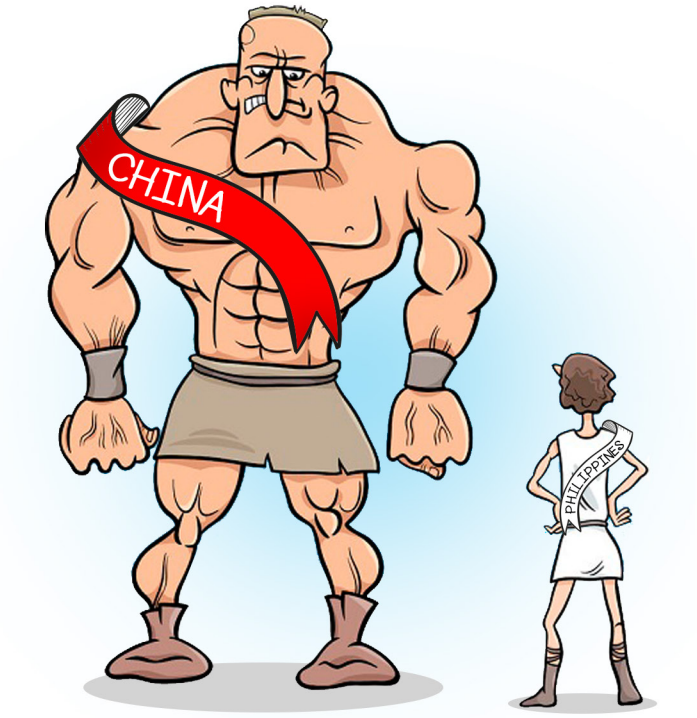
China's approach towards the arbitration case filed by the Philippines has two seemingly contradictory aspects: on one hand, China has rejected arbitration and declared that it will not participate in it nor recognize its results; on the other hand, it issued a public position paper explaining its legal arguments questioning the jurisdiction of the arbitral tribunal over the case and the admissibility of the Philippine case.

Why did China bother to issue what appears to be a well-researched legal brief even though it has already announced that it won't participate in the arbitration case? It almost seems like China is seeking to participate in the arbitration, albeit from outside the courtroom, by publicly presenting its legal position in a bid to influence the outcome of the case.

In a sense, China's moves are very revealing of its dispute resolution culture and its evolving view of international adjudication: they show a growing clash between the traditional Chinese attitude of aversion to judicial adjudication and the emerging pragmatic attitude towards international law and the advantages of resorting to international adjudication.

The traditional Chinese attitude is deeply rooted in the influence of Confucian culture and philosophy, which encourage disputants to resolve their differences through dialogue rather than through litigation. According to Confucianism, social conflicts are shameful aberrations from the natural order of society. This view gave rise to the traditional preference for consultation and mediation over formal methods of dispute resolution.

According to Confucian philosophy, litigation is to be avoided in resolving disputes. In the Analects of Confucius, there is a passage that goes like this: "The



Master said, I could try a civil suit as well as anyone. But better still to bring it about that there were no civil suits!" Thus, the preference for mediation over adjudication can be attributed to the centrality of harmonious social relations in Chinese culture. (Junwu Pan, 2011)

In ancient China, law referred exclusively to criminal law. The Chinese word for court (fayuan) originally meant a place to conduct a severe punishment instead of a place to seek justice. Thus, the word "court" became closely associated with punishing criminals in a harsh way and it was common to regard adjudication as a kind of shame and a loss of face.

This is why there are quite a number of Chinese proverbs that colorfully describe the general aversion to adjudication. To cite several examples: "in death avoid hell,

in life avoid the courts of law," "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." Another saying expresses it vividly: "to file a lawsuit against a neighbor is to insult, to humiliate the neighbor." (Junwu Pan, 2011)

Harmony is a central concept in Chinese culture that acts like an axis in the wheel of conflict management and resolution. This axis of harmony is supported by two spokes: guanxi (relationship between individuals) and mianzi ("face" or respect). Thus, the Chinese endeavor to establish a good relationship (guanxi) and "give face" (mianzi) to others to reach a state of harmony in social interaction in order to avoid confrontation and conflict. (Guo-Ming Chen and William J. Starosta, 1997-8)

It is the centrality of harmonious social relations in Chinese culture that explains the preference for mediation or negotiation over litigation, which is actually viewed as a sign of bad faith and as a costly and unpleasant process. Using the law to handle disputes is perceived as harmful to social relations.

When it comes to international courts, it is even more difficult for China, as a longtime outsider in the international system, to trust these courts to be impartial. Given its historical experience with Western powers that invaded and partitioned China, it is not surprising that China has considered international courts as biased courts dominated by the West. This attitude partially explains why China remains reluctant to using the International Court of Justice to settle its international disputes and why it is not willing to accept the arbitration case filed by the Philippines.

This attitude is even more pronounced when it comes to resolving territorial and boundary disputes. China has resorted to direct negotiations to resolve such disputes since the Communists took over in 1949. During the historic Afro-Asian conference in Bandung, Indonesia, in 1955, then Chinese Premier Zhou Enlai explained Beijing's method of resolving its land border disputes with neighboring countries: first, before negotiating a settlement, both parties should maintain the status quo and recognize the undefined boundary lines as lines yet

The nine-dash line indicating China's claim over the West Philippine Sea

to be defined; second, if one round of negotiations cannot produce any results, further negotiations should be held to cover the entire disputed border; and third, the ultimate goal is to for both parties to negotiate a new border treaty. (Junwu Pan, 2011)

Evidently, the most prominent feature of this approach is adherence to negotiations, which remains a key aspect of China's framework for settlement of territorial and boundary disputes. China's sensitivity towards issues involving sovereignty and its opposition to any intervention in its internal affairs are significant factors behind its insistence on direct negotiations and its aversion to international adjudication when it comes to border disputes.

Next issue: A shift in China's attitude towards international arbitration.

About the Author

Chito Sta. Romana is the President of the Philippine Association for Chinese Studies and a professorial lecturer on Chinese governance and politics at the Asian Center, University of the Philippines. He lived and worked in China for more than three decades and was the former Beijing bureau chief for ABC News.

MEMBER SPOTLIGHT

Atty. Abraham Rey M. Acosta is the principal of A Acosta & Associates, a Cebu-based law firm, where he specializes in arbitration, commercial litigation, corporate registrations and housekeeping.

He studied electronics and communications engineering at the University of the Philippines in Diliman, where he also received his Bachelor of Laws degree. During his sophomore year in law school, Abe was an editor of the Philippine Law Journal. He was the Philippine team captain and oralist during the international rounds of the Philip C. Jessup International Law Moot Court Competition in Washington, DC.

In 2006, he won the Supreme Court's National Essay Writing Competition and received the Justice Irene Cortez Prize for Best Paper in Constitutional Law.

Before setting up his own firm, Atty. Acosta was an associate attorney in two major firms in Makati City and Bonifacio Global City, where he handled arbitrations before the International Chamber of Commerce (ICC) and the Construction Industry Arbitration Commission (CIAC).

He has acted as counsel in several domestic and international arbitrations. Presently, he is an arbitration counsel for a mining contractor in a domestic arbitration against a nickel mine operator. He also appeared as arbitration co-counsel in a case before the Singapore International Arbitration Centre (SIAC) involving a major North Luzon real estate development dispute, which was recently settled.

Atty. Acosta teaches remedial law at the University of San Jose-Recoletos in Cebu. He is also a lecturer on international commercial arbitration in mandatory continuing legal education courses.

Philippine Senate holds hearings on bills to promote arbitration

By: Francisco Pabilla, Jr.

The Philippine Senate has started hearing three bills to promote and strengthen arbitration.

Senate Bill (SB) No. 231, introduced by Senator Nancy S. Binay, proposes to create the Philippine Arbitration Commission (PAC). The bill seeks to introduce mandatory arbitration of disputes involving medical malpractice, insurance, maritime, intellectual property and intra-corporate matters. The PAC will have original and exclusive jurisdiction over such disputes.

SB No. 427, introduced by Senator Francis Escudero, seeks to provide the benefit of lowering the penalty, in case of conviction in criminal cases by at least two degrees lower, or from the minimum to the next lower penalty prescribed by law, where the civil aspect of the case is settled through alternaitve dispute resolution (ADR). The bill envisions that more criminal cases will be resolved with dispatch.

The SB proposes to add under Chapter 8 of Republic Act No. 9285 (ADR Act of 2004) the following Section 54: "Effects of ADR on Criminal Cases.— In criminal cases where the civil aspect is settled with finality by ADR, the penalty to be imposed shall be at least two (2) degrees lower than that prescribed by law. If the subject offense cannot be lowered by two (2) degrees pursuant to Article 61 of the Revised Penal Code (RPC), then the penalty to be imposed shall be from the minimum to the next lower penalty prescribed by law."

SB No. 676, introduced by Senator Loren Legarda, aims to strengthen the construction industry by creating the Philippine Construction Industry Development Authority (PhilCIDA), replacing the existing Construction Industry Authority of the Philippines (CIAP), to effectively address the emerging challenges affecting the growth and development of the Philippine construction industry.

The Construction Industry Arbitration Commission (CIAC) shall continue to exercise original and exclusive jurisdiction over disputes arising from, or connected with, contracts entered into by parties involved in construction in the Philippines, whether the dispute arises before or after the completion of the contract, or after its abandonment or breach.

PDRC will submit a position paper on SB 231 and 427.

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