

**SECRETARIAT**

3F, 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

**OFFICERS**

- Atty. Miguel B. Varela**  
*Chairman*
- Atty. Victor P. Lazatin**  
*Vice Chairman for Internal Affairs*
- Atty. Eduardo R. Ceniza**  
*Vice Chairman for External Affairs*
- Mr. Gregorio S. Navarro**  
*President*
- Atty. Beda G. Fajardo**  
*Vice-President for Internal Affairs*
- Atty. Salvador S. Panga, Jr.**  
*Vice-President for External Affairs*

- Atty. Roberto N. Dio**  
*Secretary General*
- Atty. Shirley F. Alinea**  
*Deputy Secretary General*
- Atty. Donemark Joseph L. Calimon**  
*Treasurer*
- Dr. Eduardo G. Ong**  
*Assistant Treasurer*
- Atty. Patricia-Ann T. Prodigalidad**  
*Corporate Secretary*
- Atty. Ricardo Ma. P.G. Ongkiko**  
*Assistant Corporate Secretary*
- CJ Artemio V. Panganiban**  
*Chairman Emeritus*
- Atty. Custodio O. Parlade**  
*President Emeritus*

**BOARD OF TRUSTEES**

- Atty. Shirley F. Alinea*
- Atty. Arthur P. Autea*
- Atty. Donemark Joseph L. Calimon*
- Engr. Salvador P. Castro, Jr.*
- Atty. Eduardo R. Ceniza*
- Atty. Gwen B. Grecia De Vera*
- Atty. Roberto N. Dio*
- Atty. Beda G. Fajardo*
- Atty. Simeon G. Hildawa*
- Atty. Charlie L. Ho*
- Atty. Victor P. Lazatin*
- Mr. Gregorio S. Navarro*
- Atty. Rogelio C. Nicandro*
- Dr. Eduardo G. Ong*
- Atty. Ricardo Ma. P. G. Ongkiko*
- Atty. Victoriano V. Orocio*
- Atty. Salvador P. Panga, Jr.*
- Atty. Patricia C. Prodigalidad*
- Atty. Edmund L. Tan*
- Prof. Mario E. Valderrama*
- Atty. Miguel B. Varela*

# THE PHILIPPINE ADR REVIEW

*Broadening its scope of arbitration advocacy*

WWW.PDRCI.ORG

JANUARY 2016



## PDRC launches new website

The Board of Trustees approved PDRC’s new website at the meeting of the Board on December 14, 2015. During the presentation by Asst. Secretary General Francisco Pabilla, Jr., the Trustees suggested some changes to enhance the website features.

The new PDRC website went live last January 19, 2016. It contains news on developments and upcoming events on alternative dispute resolution in the Philippines and other countries. It has custom graphics and user-friendly features like a fee calculator that estimates the cost of arbitration based on the claimant’s claim and the respondent’s counterclaim.

The site features a fully downloadable version of the 2015 PDRC Arbitration Rules; the latest and archived copies of The Philippine ADR Review monthly newsletter, which can also be viewed online; photo gallery of important events and milestones; web linkages to PDRC’s local and foreign partner organizations; and FAQs. PDRC’s members, trained arbitrators, and accredited arbitrators are listed online. To locate the PDRC office from any point in Manila, there is a built-in Google map locator.

The website can be accessed at [www.pdrci.org](http://www.pdrci.org) by using any digital device, including smartphones. 

## WHAT’S INSIDE

1	<b>PDRC launches new website</b>
2-3	<b>PART 1: Enforcement Of Arbitral Awards In India</b> <i>By: Dr. Anton G. Maurer, LI.M., MCI Arb</i>
4	<b>New Library Acquisitions</b> Member Spotlight: <b>Atty. Ben Dominic R. Yap</b>

## PART 1

# Enforcement Of Arbitral Awards In India

By: Dr. Anton G. Maurer, LL.M., MCI Arb

Enforcing a foreign arbitral award in India is extremely difficult if the arbitral award is based on an arbitration agreement which was executed prior to September 7, 2012.

In most cases, Indian courts will treat such arbitral awards issued abroad as domestic awards. Based on the judgment of the Indian Supreme Court in *Bharat Aluminium Co. v. Kaiser Aluminium Technical Service, Inc.* of September 6, 2012 and earlier precedents, courts in India will continue to misapply and misinterpret the Indian Arbitration and Conciliation Act, 1996 (Arbitration Act 1996) as well as the Convention on the Enforcement of Foreign Arbitral Awards (New York Convention) if the arbitration agreement was executed prior to September 7, 2012. The new Arbitration and Conciliation (Amendment) Act, 2015 (Arbitration Amendment Act 2015), which was published in the Gazette of India on January 1, 2016, did not change this at all; the Arbitration Amendment Act 2015 is applicable for all arbitration proceedings filed since October 23, 2015 and thereafter. The Arbitration Amendment Act 2015 did not abolish the bifurcation of the Indian Arbitration Law in one which is applicable for all arbitration disputes based upon the arbitration agreement executed up to September 6, 2012, and one which is applicable for disputes based upon arbitration agreements which are executed after September 6, 2012, and it also did not cure all the other defects and misapplications of the Arbitration Act 1996 with respect to foreign arbitral awards. However, the Arbitration Amendment Act 2015 created an additional arbitration law for arbitration agreements which were executed between September 6, 2012 and October 23, 2015, additional new rules for arbitral proceedings which were initiated since October 23, 2015 and foreign awards issued in such proceedings; further, the Arbitration Amendment Act 2015 permits interim relief in arbitration proceedings filed in one of the 47 out of 156 member states of the New York Convention since October 23, 2015.

If a foreign company is interested in an efficient arbitral proceeding and in enforcing a foreign arbitral award in India, it must replace an existing arbitration agreement or arbitration clause with a new one. Only by replacing such an old arbitration agreement with a new one, Indian courts will treat an arbitral award issued for example in the Philippines, Singapore, Hong Kong, England, France, Germany, Switzerland or U.S.A. as a foreign arbitral award which cannot be set aside by courts in India.

## New arbitration law will apply only to new arbitration agreements

For many years, India has a bad reputation with respect to enforcing foreign arbitral awards because most Indian companies do not honor and fulfil a foreign arbitral award without any enforcement



proceeding. Often, the receipt of a foreign arbitral award is only the start of the next round of litigation, and the losing domestic or foreign company may even apply to set aside a foreign arbitral award in India.

However, there is new hope. In January and February 2012, the Constitution Bench of the Indian Supreme Court heard for 20 days the arguments and pleadings in *Bharat Aluminium*. The Constitutional Bench held that the Supreme Court had, especially in the cases of *Bhatia International v. Bulk Trading S.A.* of March 13, 2002 and *Venture Global Engineering v. Satyam Computer Services Ltd.* of January 8, 2008, misinterpreted, misapplied, and distorted the Arbitration Act 1996 and violated the spirit of the New York Convention.

Despite the fact that the Indian Supreme Court explained at least eleven times why it is “unable to agree with the conclusions recorded” in the mentioned judgments, the Supreme Court surprisingly contradicted its clear and convincing reasoning and held in the last paragraph of the judgment: “Thus, in order to complete justice, we hereby order, that the law now declared by this Court shall apply prospectively, to all the arbitration agreements executed hereafter.”

Therefore, the misinterpreted, misapplied, and distorted interpretations of the Arbitration Act 1996 will remain applicable for many thousands of arbitration agreements if the parties do not execute new arbitration agreements after September 6, 2012. Only arbitration agreements which were executed after September 6, 2012 will benefit from the new interpretation of the arbitration law in the *Bharat Aluminium* judgment.

What will be different for arbitration agreements executed after September 6, 2012? In short, an award rendered in one of 47 out of the 156 in India recognized New York Convention countries will

be recognized as a foreign arbitral award even if it is governed by Indian law, and such awards cannot be set aside anymore in India. But all these positive developments will benefit domestic and foreign parties only if the arbitration agreement was executed after September 6, 2012.

**Application of Indian law will no longer transform a foreign arbitral award into a domestic award if the arbitration agreement was executed after September 6, 2012**

Prior to September 6, 2012, India misinterpreted the term “foreign arbitral award” under the New York Convention in two central points.

Under Art. I para. 1 sentence 1 of the New York Convention, foreign arbitral awards are awards which were “made in the territory of a State other than the State where the recognition and enforcement of such awards are sought.” India was among the first ten countries who signed the New York Convention on June 10, 1958, and it ratified it on June 13, 1960.

However, India has a long tradition of misinterpreting the term “foreign arbitral awards” by only recognizing awards as foreign awards if they are made in one of the 47 states out of the 156 states which ratified or acceded to the New York Convention. Not to recognize arbitral awards issued in one of the 109 other states as foreign awards is a breach of India’s obligation under Art. III of the New York Convention.

However, the 47 states include, among others, the Philippines, China, Hong Kong, Japan, Korea, Malaysia, Singapore, Russia, 18 of the EU member states, Switzerland, and the U.S.A.; therefore, the practical relevance of this violation is not really material since most arbitral proceedings with Indian companies will have their seats in one of the 47 states. The *Bharat Aluminium* decision did not address this restriction; therefore, this restriction is still valid.

But the *Bharat Aluminium* judgment addressed another restriction: Even if an award was made in one of the the 47 recognized New York Convention states, such award will not be treated as a foreign arbitral award if the dispute was governed totally or partially by Indian law if the arbitration agreement was executed prior to September 7, 2012. This restriction was stipulated in Section 9 (b) of the Foreign Awards (Recognition and Enforcement) Act, 1961; this 1961 Act had copied a similar provision in Section 9 (b) of the Indian Arbitration (Protocol and Convention) Act, 1937.

Based on Section 9 (b) of the 1961 Act, the Indian Supreme Court set aside foreign arbitral awards in the cases *National Thermal Power Corporation v. Singer Company & Ors.* and *ONGC v. Western Company of North America*. The Arbitration Act 1996 no longer contained such provision. However, the Indian Supreme Court held in *Thyssen Stahlunion GmbH v. Steel Authority of India Ltd* that this restriction would also be applicable under the Arbitration Act 1996.

This judgment was overruled in *Bharat Aluminium*, and the Supreme Court held that the Arbitration Act 1996 intentionally deleted Section 9 (b) of the Foreign Awards Act, 1961. But this

judgment will only apply to arbitration agreements executed after September 6, 2012. Therefore, only awards made under a new arbitration agreement on disputes governed by Indian law in one of the recognized 47 Convention states will be treated as foreign arbitral awards.

**Indian courts may set aside foreign awards if the arbitration agreements was executed prior September 7, 2012**

Based on the judgment of the Indian Supreme Court in the cases *Bhatia International and Venture Global*, most foreign arbitral awards can be set aside in India if the parties executed the arbitration agreement prior to September 7, 2012.

In *Bhatia International*, the Indian Supreme Court held that Part I of the Arbitration Act 1996 would apply to all arbitrations and to all proceedings relating thereto. Based on *Bhatia International*, Indian courts will assume jurisdiction to set aside any foreign arbitral award under Section 34 (2) of the Arbitration Act 1996 if the arbitration agreement was executed prior to September 7, 2012 and the parties have not contractually excluded Part I of the Arbitration Act 1996 whether or not a party wants to enforce such foreign award in India.

However, based on the Arbitration and Conciliation (Amendment) Ordinance, 2015, which also amended Art. 34 (2), a foreign arbitral award seems no longer to violate domestic public policy of India even if such award is in conflict with any part of Indian law or is contrary to the terms of the contract or if the agreement is based on unequal bargaining power.

In 2008, a bench of two judges of the Indian Supreme Court was asked by *Venture Global Engineering (VGE)*, a U.S. corporation, to set aside an arbitral award made under the LCIA Rules in London, England. *Satyam Computer Services Ltd. (Satyam)* and VGE had entered into a joint venture agreement creating an Indian JV Company. The joint venture agreement was governed by the laws of Michigan, but it was additionally stipulated that the shareholders shall at all times act in accordance with the Indian Companies Act being in force in India at any time.

[Click to view the rest of the article](#) 

**About the Author**



*Dr. Anton G. Maurer, LL.M. specializes in the arbitration of commercial, post M&A, joint venture, and IP disputes. He has represented clients for 30 years in or with respect to more than 60 countries and more than 90 jurisdictions in the negotiations of commercial, IP, joint venture and M&A agreements up to a value of US\$ 1.6 billion, and international arbitration and international litigation. He is the author of the book on “The Public Policy Defense under the New York Convention – History, Interpretation, and Application” and of several arbitration related articles.*

## MEMBER SPOTLIGHT



**Atty. Ben Dominic R. Yap** is a founding partner of Gatmaytan Yap Patacil Gutierrez & Protacio (formerly, Caguioa & Gatmaytan).

He studied legal management in Ateneo de Manila University in 1993 and finished law, with second honors, in 1997 at the Ateneo de Manila School of Law. He was the class salutatorian and the recipient of the Evelio Javier Leadership Award. Before he co-founded his firm, he worked for Sycip Salazar Hernandez & Gatmaytan as an associate, and subsequently, as senior associate.

Atty. Yap specializes in litigation and arbitration. He has handled a broad range of cases before various Philippine courts and quasi-judicial bodies, and has significant experience as counsel in a number of international arbitration involving commercial and construction disputes.

He is ranked in Dispute Resolution: Arbitration (Band 2) by Chambers & Partners in its 2015 and 2016 publications and highly recommended in Dispute Resolution - International Arbitration by AsiaLaw in its 2015 and 2016 publications.

He has co-authored (a) the Philippine Chapter of Chambers' Global Practice Guide: International Arbitration 2016, published by Chambers & Partners of the UK in 2015; (b) the Philippine Chapter of The Dispute Resolution Review, 5th Ed., published by the Law Business Research Ltd. of the UK in 2013; and (c) several articles on doing business and dispute resolution published by the American Bar Association in 2005, 2006 and 2010.

He has also attended various international and local seminars on arbitration as a delegate or speaker.

*The Philippine ADR Review is a publication of the Philippine Dispute Resolution Center. All rights reserved. No part of the newsletter may be reproduced in any form without the written permission of the authors.*

**ROBERTO N. DIO**  
Editor

**SHIRLEY ALINEA  
DONEMARK CALIMON**  
Contributors

**ARVEEN N. AGUNDAY  
LEONID C. NOLASCO  
ERIC D. LAVADIA  
RICKY A. SABORNAY**  
Staff Writers

## New Library Acquisitions

AUTHOR	TITLE	PUBLISHER, YEAR
American Arbitration Association	Handbook on Commercial Arbitration, 2nd Ed.	JurisNet, 2010
American Arbitration Association	Handbook on International Arbitration and ADR, 2nd Ed.	JurisNet, 2010
American Arbitration Association	Handbook on International Arbitration Practice	JurisNet, 2010
Arthur P. Autea	Notes and Cases on Commercial Arbitration under Philippine Law	University of the Philippines College of Law, 2013
Alexander J. Bělohávek	B2c Arbitration Consumer Protection in Arbitration	JurisNet, 2012
Nigel Blackaby & Constantine Partasides, with Alan Redfern & Martin Hunter	Redfern and Hunter on International Arbitration, Student Version, 5th Ed.	Oxford University Press, 2009
Chan Leng Sun SC	Singapore Law on Arbitral Awards (Monograph Series)	Academy Publishing, 2011
Paul D. Friedland	Arbitration Clauses for International Contracts, 2nd Ed.	JurisNet, 2007
James M. Gaitis	The College of Commercial Arbitrators Guide to Best Practices in Commercial Arbitration, 3rd Ed.	JurisNet, 2014
Thomas D. Halket	Arbitration of International Intellectual Property Disputes	JurisNet, 2012
Eduardo P. Lizares	Arbitration in the Philippines under the Alternative Dispute Resolution Act of 2004, 2nd Ed.	EPL Publications, 2011
Robert Merkin	Arbitration Law	Informa Professional, 2004
Michael J. Moser	Arbitration in Asia, 2nd Ed.	JurisNet, 2015
Lawrence W. Newman, Colin Ong	Interim Measures in International Arbitration	JurisNet, 2014
Custodio O. Parlade	International and Domestic Arbitration	Central Book Supply, Inc., 2011
Custodio O. Parlade	The Law and Practice of CIAC Arbitration	Central Book Supply, Inc., 2011
Michael Pryles, Michael J. Moser	The Asian Leading Arbitrators' Guide to International Arbitration	JurisNet, 2007
Syed Khalid Rashid, Syed Ahmad Idid	Mediation and Arbitration in Asia-Pacific, 1st Ed.	International Islamic University Malaysia, 2009
Rufus V. Rhoades, Daniel M. Kolkey, Richard Chernick	Practitioner's Handbook on International Arbitration and Mediation	JurisNet, 2005
Norton Rose	Arbitration in Asia Pacific	Norton Rose, 2010
Norton Rose	Arbitration in Europe	Norton Rose, 2005
Thomas H. Webster	Handbook of UNCITRAL Arbitration 2nd Ed.	Sweet & Maxwell, 2015
Thomas H. Webster, Michael W. Buhler	Handbook of ICC Arbitration, 3rd Ed.	Sweet & Maxwell, 2014



THE PHILIPPINE ADR REVIEW PUBLISHES MATTERS OF LEGAL INTEREST TO PDRC'S MEMBERS AND READERS. THE ARTICLES PRINTED IN THE REVIEW CONTAIN INDIVIDUAL VIEWS OF THE AUTHORS AND DO NOT STATE PDRC'S POLICY. CONTRIBUTIONS MAY BE SENT TO THE PDRC SECRETARIAT. ALL MATERIALS SUBMITTED FOR PUBLICATION BECOME PROPERTY OF PDRC AND ARE SUBJECT TO EDITORIAL REVIEW AND REVISIONS. TEXTS OF ORIGINAL LEGAL MATERIALS DIGESTED ARE AVAILABLE UPON REQUEST.