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Technical Working Groups set up to review amendments to ADR laws

The Office for Alternative Dispute Resolution (OADR) has set up two Technical Working Groups (TWG) to propose revisions to current alternative dispute resolution (ADR) laws and rules.


Department of Justice Building

At the initiative of PDRC member Atty. Jesusito Morallos, the OADR issued on September 17, 2015 its Office Order 1419 creating a TWG on mediation headed by Prosecutor Rodan G. Parocha and a TWG on arbitration headed by State Counsel Nancy G. Lozano.

The TWGs were tasked to develop the amendatory provisions to Chapters 3, 4, 5, 6 and 7 of Republic Act 9285 (2004) or the ADR Act of 2004. The OADR Office Order directed the TWGs to seek the assistance of ADR organizations like PDRC in drafting the amendatory provisions.

Last March 2, 2016, Atty. Morallos convened the organizational meeting of the TWG on arbitration in an online meeting. He circulated to PDRC, OADR and the Philippine Institute of Arbitrators ("PIArb") an agenda that included the work plan of the TWG. PDRC was represented in the TWG by its President Emeritus Dean Custodio Parlade and trustees Victor Lazatin, Roberto Dio, Arthur Autea, Salvador Panga, Jr., and Gwen Grecia-de Vera.

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WHAT'S INSIDE

American Bar Association Building

PART THREE

The U.S. arbitration debate and why it matters to us

By: Ricky A. Sabornay

In late October 2015, The New York Times *published a series of three articles on complaints against big businesses' use of arbitration to limit consumers' ability to sue before regular courts. This article summarizes the report. Part 1 discussed the criticisms of arbitration by consumers and Part 2 reported two recent decisions by California courts that disallowed arbitration as too restrictive. This final part responds to the attacks on arbitration.*

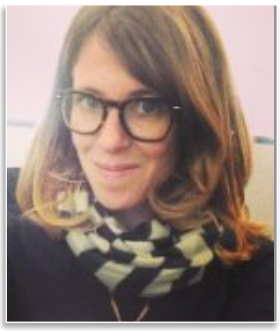
However, The Heritage Foundation's Edwin Meese III Center for Legal and Judicial Studies senior legal fellow Hans von Spakovsky thinks the attacks on arbitration are unfair and are in fact harming consumers and businesses. He argues that arbitration is not "forced" on consumers and that consumers in fact have many choices. Most importantly, he disputes that arbitration clauses are universally used in consumer contracts and that consumers have no choice.

"One study of 161 companies in more than 30 different industries," Spakovksy writes, "found that only 33 percent of surveyed companies had arbitration clauses."It found that usage varied significantly by industry (e.g., the financial services sector used them 69.2% of the time while other industries such as food and entertainment never use them).

Citing statistics from the American Arbitration Association (AAA), Spakovksy also emphasized that arbitration is faster and less expensive than litigation. The statistics show that the average length of time from the filing of an arbitration request to the final award is just 6.9 months; the average for business claimants is 6.6 months, and the average for consumer claimants is seven months, compared to lawsuits filed by businesses against individuals, which have a median length of 15 months, in some cases even longer.

He adds that "[c]laims that arbitration somehow removes a consumer's right to a jury trial are therefore exaggerated given how few civil cases ever reach a jury. By contrast, '50 percent of consumer claims in [AAA] arbitrations made it to a hearing before an arbitrator,' so a consumer in arbitration is much more likely than a plaintiff in court to have his story heard in person by a neutral fact-finder."


HANS VON SPAKOVSKY


JESSICA SILVER-GREENBERG


ROBERT GEBELOFF

Arbitration is also less expensive and gives consumers with smaller claims the ability to pursue remedies that would be impossible to pursue in litigation because of the enormous expense, including attorneys' fees, says Spakovksy. He pointed out that a study of California arbitration cases found that in claims brought by businesses against consumers, businesses paid an average of $149.50 in arbitration fees and that in claims brought against businesses, consumers paid an average of $46.63 in fees. Moreover, the quick resolution of claims in arbitration makes pursuing claims more affordable because attorneys' fees are "by far the most significant cost of litigation, and they increase in direct proportion to the time to resolution of the case."

Spakovksy also disputes the allegations that arbitration is biased in favor of business. He pointed out the due process rules of organizations like the AAA and JAMS (formerly Judicial Arbitration and Mediation Services) that are designed to protect both parties to an arbitration and achieve a fair, objective result. The rules are administered by arbitrators who are ethical professionals, often retired state and federal judges.

That arbitrators have a strong incentive to favor business clients because they are repeat players in arbitration is also repudiated by Spakovky. He pointed out that a study of over 200 AAA employment arbitrations over a three-year period found no evidence that employers were being systematically favored.

To the extent that there is any "repeat-player" effect in arbitration, the study found that it is likely the result of "case selection and settlement rather than systematic bias" because businesses are "better able to screen meritorious cases and, thus, will settle them rather than proceed to the award stage."

Unlike in the United States where employment contracts may include arbitration clauses, the Philippine Alternative Dispute Resolution Act of 2004 expressly excludes arbitration in labor disputes. Issues involving the (a) civil status of persons; (b) the validity of a marriage; (c) ground for legal separation; (d) the jurisdiction of courts; (e) future legitime; (f) criminal liability; and (g) those that by law cannot be compromised are also not arbitrable.

Compared to the U.S. Federal Arbitration Act of 1925, the Philippine ADR Law is fairly recent. Hence, local jurisprudence on the law has yet to be developed. Thus, the issues discussed in the *Times* report may be far in the offing insofar as the Philippines is concerned.

Nonetheless, the arbitration debate in the U.S. is instructive and provides local practitioners ample guidance on the limits of arbitration. For instance, the ruling in *Mohammed* and similar cases in the United States is instructive in that a party to an arbitration agreement may not always be able to compel arbitration. Courts retain the ability to carve out exceptions to this contractual stipulation.

Depending on how an arbitration clause is presented and crafted, an arbitration agreement may be refused enforcement for being procedurally (depending how it was presented to the other party) or substantively restrictive (when its terms are unduly oppressive).

About the Author

Atty. Sabornay is a litigation associate at Castillo Laman Tan Pantaleon & San Jose. His practice focuses on arbitration, commercial and construction litigation, real estate, labor and criminal law. He graduated from the University of the Philippines College of Law in 2012, where he received the Dean's Medal for academic excellence. He was an editor of the Philippine Law Journal from 2009 to 2011 and the U.P. Law team captain for the 2010 Asia Cup Moot Court in Tokyo, Japan and 2011 International Environmental Law Moot Court in Maryland, USA.

MEMBER SPOTLIGHT

Atty. Rodolfo R. Waga, Jr. teaches labor law at the University of the Philippines and corporation law, partnership, agency, labor law, torts and damages, and credit transactions at the San Sebastian College of Law.

He is also a member of the University of the Philippines Law Centennial Commission.

Atty. Waga studied economics, minor in philosophy, at the Ateneo de Cagayan (Xavier University), where he graduated *magna cum laude* in 1979 and was later recognized with the Outstanding Alumnus Award in Professional Service by the same university in 2011.

He received his law degree from the University of the Philippines in 1983, where he was a member of the Order of the Purple Feather honor society. He later finished the Executive Master in Business Adminstration program of the Asian Institute of Management.

Atty. Waga served as vice-president for legal of First Philippine Holdings from 1991 to 2014 where he was awarded for honesty, trustworthiness and loyalty to the company.

Atty. Waga has written a book, the *Handbook on Contract Drafting*.

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ATTY. JESUSITO MORALLOS

The work plan proposed by Atty. Morallos included, among others, the (a) identification of problems and issues with current arbitration laws; (b) data gathering by drawing from local or international experience and comparing local laws with laws of other countries as well as the Model Law and the New York Convention; (c) analysis of the situation; (d) development of alternatives; (e) selection of a preferred alternative; and (g) action on the decision.

He also proposed the designation of sponsors who will make studies and submit specific recommendations and amendments to the TWG. Once the amendments are submitted, they will be subjected to interpellations in the TWG prior to finalization. Once finalized, the proposed amendments will be collated and submitted to public consultations and discussions, after which they will be submitted to the Department of Justice through the OADR before being filed with the Philippine Congress under an appropriate resolution of endorsement.

The TWG set deadlines for the submission of topical items for review and revision. It will continue to meet online until the Secretariat collates the topics assigned to each sponsor. Atty. Jay Santiago, who works as counsel in the Hong Kong International Arbitration Centre, volunteered to submit a comparative table of RA 9285 and its Implementing Rules and Regulations and Hong Kong's Arbitration Ordinance (Cap 609).

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