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ADR REVIEW

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JULY 2016

Court Sheriffs may no longer enforce CIAC awards


By Leonid C. Nolasco

Acting on the May 12, 2015 letter of Atty. Jennifer H. dela Cruz, President of the Association of Clerks of Court and Ex-Officio Sheriffs (ACCES), the Supreme Court (SC) issued a Resolution dated February 2, 2016 in A.M. No. 15-07-12-SC, clarifying that that court sheriffs may not enforce writs of execution issued by quasi-judicial bodies such as the Construction Industry Arbitration Commission (CIAC).



The Resolution affirmed the Supreme Court's earlier Resolution dated August 26, 2014 in A.M. No. 14-7-224-RTC denying the request of General Santos City Regional Trial Court Clerk Marion Gay Mirabueno to designate a court sheriff to implement a writ of possession issued by the National Commission on Indigenous Peoples, a quasi-judicial or executive agency. The SC held in that case that "the NCIP is an agency under the executive, rather than the judicial, branch of government. Its orders are not judicial orders, which are within the authority of sheriffs, as judicial officers, to execute."

This development has put the CIAC in a quandary since Rule 18.5 of the 2010 CIAC Revised Rules of Procedure provides that "(a)s soon as a decision, order or final award has become executory, the Arbitral Tribunal (or the surviving remaining member/s), shall, motu proprio or on motion of the prevailing party issue a writ of execution requiring any sheriff or proper officer to execute said decision, order or final award. If there are no remaining/surviving appointed arbitrator/s, the Commission shall issue the writ prayed for."

Following the SC Resolution, writs of execution issued by the CIAC may no longer be implemented by court sheriffs. As of this writing, the CIAC has no official sheriffs to enforce its awards on construction arbitration. However, this will not prevent the parties from voluntarily complying with the award. 

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PART TWO

To negotiate or not to negotiate:

The West Philippine Sea dispute between the Philippines and China

By Atty. Julius Anthony R. Omila

In Part 1, the author discussed the backdrop of the current dispute between the Philippines and China on the West Philippine Sea and analyzed how Great Britain dealt with Nazi Germany before the Second World War. In this final part, the author explores why negotiation with China is not a viable option.

Did Great Britain, under Winston Churchill, eventually negotiate with Nazi Germany? No. Why?

Based on available historical records studied by Mr. Mnookin, while Great Britain was considering negotiating with Nazi Germany and trying to avoid a confrontation with it, the latter was invading and annexing several countries in Europe to the point of threatening Great Britain's independence. Looking at Germany's pattern of behaviors at that time, Great Britain's leadership concluded that Germany's Hitler cannot be trusted and was a "completely unreliable negotiating partner". Hence, Great Britain did not pursue negotiation with Germany.

One insight that Mr. Mnookin shares is this: As a general rule, always consider negotiation as a mode of resolving your

dispute. But don't negotiate if your prospective counterparty is not a reliable negotiating partner.

Transposing that lesson now to the Philippines' West Philippine Sea dispute with China, can the Philippines properly treat and consider China as a reliable negotiation counterparty given that China, while insisting that bilateral negotiation between it and the Philippines is the only effective mode of resolving their present dispute, simultaneously and actively occupies various reefs in the disputed areas, building artificial islands and military installations?

Rights-based approach in dispute resolution

Instead of pursuing bilateral negotiations with China, which the latter has been insisting on all along, the Philippines has pursued arbitration of its claims against China before the United Nations tribunal in the Hague on the basis of the Philippines' claims of maritime entitlement over the disputed areas. Does this move on the part of the Philippines find support under sound principles of dispute resolution?

As matters stand at the moment, there is apparently a huge power imbalance between China and the Philippines. China is now on its massive reclamation spree of the many reefs found within what the Philippines claims to be its territory. The Philippines, likewise, is also not in a position, militarily, to deter or stop China from doing so. Given this situation, what else could be a good option for the Philippines?

It is submitted that in case of obvious power imbalance between the disputing parties, when one party cannot possibly expect to pursue its interests or have its interests respected by its counterparty, negotiation is not a viable option. Instead, the “weaker” party, if it has stronger rights in the given situation, should pursue a rights-based dispute resolution approach (Frank E. A. Sander & Lukasz Rozdeiczer, “Matching Cases and Dispute Resolution Procedure,” 2006 Harvard Negotiation Law Review).

In the Philippines’ case, does it have stronger rights against China? In pursuing arbitration, the Philippines obviously thinks so. As of the moment, while China refuses to acknowledge the tribunal’s jurisdiction, the same tribunal has declared that it has jurisdiction over the main claims brought by the Philippines. A ruling on the merits of the case, including a ruling of the legality of China’s “nine-dash line” is expected in May or June of this year.

Third parties’ involvement in the dispute

Faced with China’s overtly aggressive and hardline posture, the Philippine government is now pursuing a policy of modernizing and strengthening its military. Even then, however, the Philippines’ military capability pales in comparison with China’s firepower. Be that as it may, an adversarial confrontation, short of war, is definitely not a welcome option given that it is very costly in terms of loss of resources and lives.

However, we also find in the news that the United States (and Australia), among others, is asserting its “right of navigation” over the disputed areas. However, the U.S. does not maintain exactly the same position or interest as the Philippines in the latter’s dispute with China. Likewise, the G7 nations, composed of Canada, France, Germany, Italy, Japan, the United Kingdom and the United States, as well as some ASEAN countries, were reported to have issued statements opposing and condemning the massive reclamation activities of China within the disputed area.



The venue of the arbitration proceedings is the 100-year-old Peace Palace in The Hague, which also houses the International Court of Justice. Photo courtesy of PCA

In cases of power imbalance between disputing parties, another good approach of the “weaker” party is to build alliances with third parties. Hence, the Philippines has found allies among the U.S. and Australia, who are asserting their “rights of navigation” over the disputed area, and other states which oppose and condemn China’s reclamation activities within the disputed area.

The Philippines’ alliance-building efforts find support in sound dispute-resolution principles. However, alliances are most effective only to the extent that the interests of the parties in the alliance are fully aligned with each other (Leigh L. Thompson, *The Mind and Heart of the Negotiator*). How the Philippines’ present “alliance” with the U.S. and other states will impact the present dispute between the Philippines and China, as it evolves, is worth watching. 🇵🇭



About the Author

Atty. Julius Anthony R. Omila is a Partner in Soller & Omila Law Offices. He is a member of the Philippine Dispute Resolution Center, Philippine Institute of Arbitrators, and Chartered Institute of Arbitrators. He is also an accredited arbitrator and mediator of the Wholesale Electricity Spot Market (WESM) and accredited arbitrator of the ADR Center for Negotiation, Mediation and Arbitration.

MEMBER SPOTLIGHT




Atty. Luis A. Vera Cruz, Jr. was a senior partner and member of the Executive Committee of the law firm of Angara Abello Concepcion Regala & Cruz (ACCRA), where he specialized in litigation, trial practice and arbitration.

He is currently an of counsel to the firm and serves as director of ACCRA Holdings, Inc., ACCRA Investment, Inc., and PR Savings Bank. He is also the corporate secretary of Chemical Industries of the Philippines, Inc.

Atty. Vera Cruz studied business administration at the University of the Philippines Diliman, where he graduated in 1970. He received his law degree from the same university in 1974 and subsequently placed 10th in the 1974 Philippine bar examinations. He obtained his Master of Laws from Cornell University in 1986.

After passing the bar examinations, he joined ACCRA Law as an associate in 1975. He became a senior associate in 1979, partner in 1981, and senior partner in 1987. He was the co-managing partner of ACCRA from 1992 to 2002.

In his more than 40 years of experience as a litigation and trial practice lawyer, Atty. Vera Cruz has appeared in all levels of the judiciary, various administrative agencies and arbitration tribunals with numerous appearances in the Court of Appeals, Supreme Court, and the Commission on Elections. 

11th PDRC Arbitration Training Seminar

IPOPHL Multi-Purpose Hall, Intellectual Property Center
28 Upper McKinley Road, Fort Bonifacio, Taguig City

DAY 1 : MONDAY, JULY 25, 2016

**Session I:
Introduction to Arbitration**

Atty. Mario Valderrama
8:30 am to 12:30 pm

**Session II:
Arbitration Agreement**

Atty. Salvador S. Panga, Jr.
1:30 pm to 5:30 pm

DAY 2 : TUESDAY, JULY 26, 2016

**Session III: Commencing the
Arbitration and Constitution
of the Arbitral Tribunal**

Atty. Eduardo R. Ceniza
8:30 am to 12:30 pm

**Session IV: Preliminary
Matters**

Atty. Roberto N. Dio
1:30 pm to 5:30 pm

DAY 3 : WEDNESDAY, JULY 27, 2016

**Session V: Case
Management Conference**

Atty. Arthur A. Autea
8:30 am to 12:30 pm

**Session VI: Arbitration
Hearings and Arbitral
Award**

Atty. Victor P. Lazatin
1:30 pm to 5:30 pm

DAY 4 : THURSDAY, JULY 28, 2016

**Session VII: Recognition,
Enforcement, Setting Aside
and Refusal to Enforce Awards**

Dean Custodio O. Parlade
8:30 am to 12:30 pm

**Session VIII: International
Arbitration**

Atty. Anton Maurer,
LL. M., MCI Arb
1:30 pm to 5:30 pm

DAY 5 : FRIDAY, JULY 29, 2016

Session IX: Mock Arbitration

8:30 am to 12:30 pm

Session X: Written Examination

2:00 pm to 5:00 pm

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