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MARCH 2017

Supreme Court rules that a party's nominee in JVA may invoke arbitration clause

On December 7, 2016, the Second Division of the Philippine Supreme Court affirmed its earlier Decision dated January 11, 2016 in G.R. No. 173137, Bases Conversion and Development Authority (BCDA) v. DMCI Project Developers, Inc. (DMCI PDI), which directed BCDA and North Luzon Railways Corporation ("Northrail"), both government corporations, to submit their dispute with DMCI PDI to arbitration.

On June 10, 1995, BCDA entered into a Joint Venture Agreement (JVA) with the Philippine National Railways, a consortium of Spanish corporations led by Construcciones y Auxiliary de Ferrocarriles, S.A., local investors, and D. M. Consunji, Inc. (DMCI) and/or its nominee to construct a railroad system from Manila to Clark Air Base, with possible extensions to Subic Bay and La Union and later, possibly to Ilocos Norte and Nueva Ecija. The JVA contained an arbitration clause where the parties agreed that any dispute arising under the agreement that cannot be settled by mutual accord shall be referred to arbitration "in accordance with the Philippine Arbitration Law (Republic Act No 876) supplemented by the Rules of Conciliation and Arbitration of the International Chamber of Commerce."

When a dispute arose after DMCI demanded the return of its PhP300 million deposit for future subscription in the capital stock of Northrail—which failed to increase its capital stock to accommodate the subscription after BCDA applied for Official Development Assistance from the Obuchi Fund of Japan, which in turn required Northrail to be a 100% government-owned and controlled corporation—DMCI PDI, as nominee of DMCI, served a demand for arbitration on BCDA and Northrail, citing the arbitration clause in the JVA. BCDA and Northrail failed to respond to the request, despite an opinion issued by the Office of the Government Corporate Counsel on June 27, 2001 that "since no increase in capital stock was implemented, it was but proper to return the investments of ... DMCI."

DMCI PDI then filed a Petition to Compel Arbitration with the trial court sometime after August 2005, which the trial court granted in February 2006. After their motions for reconsideration were denied by the trial court, BCDA and Northrail appealed directly to the Supreme Court. More than

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PART TWO

A Report on APRAG Conference 2016

By Ricardo Ma. P.G. Ongkiko

Last issue: The author reported on the Pre-Conference Meeting and Day One, Sessions 1 and 2.

After lunch on Day One, October 7, Session 3 was held on Investment Arbitrations in Asia, which was chaired by Mr. David Bateson and Prof. Hi-Taek Shin. Among the issues discussed and their discussants were (a) has investment arbitration had any effect in shaping investment treaties of states? (Stephen Jagusch), (b) are investment treaty arbitration cases dominated by the same arbitrators and law firms from U.S. and Western European countries? (Ms. Cheng), (c) do Asian witnesses and Asian law firms face cultural disadvantages in appearing before European Tribunals? (DLA Piper's Yu Jin Tay), (d) as some Asian states have withdrawn from bilateral investment treaties and investment treaty arbitration: is this an opportunity for the ICC and UNCITRAL to flourish? (Centre for International Law Director Lucy Reed), (e) Indonesia's experience in investment arbitration (Badan Koordinasi Penanaman Modal's Dr. Ir. Fritz H. Silalahi), and (f) the UNCITRAL Arbitration Rules as a unifying set of arbitration rules for the ASEAN Economic Community (AEC) (United Nations Office of Legal Affairs' Jae Sung Lee).

Session 4 was on Current Issues on Commercial and Investment Arbitration within the new AEC, which was chaired by Mr. Umar. Among the issues discussed and the discussants were (g) prospects for harmonization of commercial and investment arbitration within the new AEC (ICC's Abhinav Bhushan), (h) are there unique attributes of international arbitration culture in ASEAN? (Prof. Rajoo), (i) how should commercial arbitration complement the current dispute resolution mechanisms in ASEAN? (Frans Winarta & Partners Law Firm's Prof. Frans H. Winarta), (j) what are the opportunities for the international arbitration community to assist in developing best practices for international arbitration within the AEC? (WongPartnership LLP's Chou Sean Yu), (k) a harmonized system of international commercial arbitration within the AEC and beyond (Singapore Management University's Prof. Locknie Hsu).

Day 1 ended with the gala dinner attended by the APRAG delegates and their spouses and guests. The gala dinner was highlighted by the performance of the traditional Balinese Kecak dance, an onomatopoeic title for the sound of the chant. The gala dinner closed with inspired dancing from outgoing APRAG

President Mr. Yu, incoming APRAG President Mr. Umar, and past President and present CI Arb President Prof. Rajoo.



Colorful Balinese kecak dancers during the APRAG gala dinner.

Day 2 of Conference, Oct. 8

Saturday, October 8 was devoted for members' update and collaboration perspectives, which was chaired by APRAG President Mr. Yu.

Session 1 included updates from the following APRAG members by their official delegates (a) Australian Centre for International Commercial Arbitration (Deborah Tomkinson), (b) BAC (Dr. Chen, Deputy Secretary General), (c) CIETAC (Mr. Yu), (d) HKIAC (Chiann Bao), and (e) Japan Commercial Arbitration Association (Prof. Tatsuya Nakamura).

Session 2 included the updates from the following APRAG members by their official delegates: (f) Korean Commercial Arbitration Board, (g) KLRCA (Smrithi Ramesh), (h) PDRCI (by the author), (i) SIAC (Lim Seok Hui), and (j) BANI (Prof. Huala Adolf).

The author reported that PDRCI, unlike other APRAG member-arbitration institutions, had not had great success in attracting disputants to resolve their disputes under the PDRCI Arbitration Rules. The author reported that PDRCI has a five-year average of slightly more than eight cases filed, six of which were domestic arbitration cases and two of which were international commercial arbitration cases.



Session 2 speakers on APRAG member updates, including the author (far right) representing PDRC.



Dr. Michael Pryles delivering the closing remarks for the APRAG Conference 2016.

These cases involved disputes that averaged about USD 8.7 Million total claims per case. (The three-year average was similar, with an average of 8 cases filed, 5 of which are domestic arbitration cases and 3 of which are international commercial arbitration cases, and an average of USD 2 Million total claims per case.)

The author noted the need for PDRC to promote the arbitration of disputes under the its Arbitration Rules, especially medium-size disputes with total claims from USD 20,000 to USD 200,000. In this connection, the author reported that PDRC has recently launched road shows to promote PDRC arbitration in Philippine cities outside Manila.

PDRC also approved major amendments to its Arbitration Rules in 2014, which were inspired by the 2010 UNCITRAL Arbitration Rules, 2012 ICC Arbitration Rules, 2013 SIAC Arbitration Rules, and 2013 HKIAC Administered Arbitration Rules. The amendments applied to arbitrations commenced after 1 January 2015, unless the parties agreed otherwise.

The PDRCI Committee on Revisions, of which the author was a member, was tasked to revise the PDRC Arbitration Rules to achieve (a) ease of use (especially for parties and their counsel who were new to commercial arbitration, (b) competitiveness (vis-à-vis court litigation and arbitration offered by other international providers), and (c) compatibility (with the UNCITRAL Model Law, the UNCITRAL Arbitration Rules, and the revised rules of international arbitration centers).

Among the amendments that sought to achieve ease of use were (1) Article 5 on Response to the Notice of Arbitration, which sets out the requirements of a respondent’s Response, including timing, contents, and payments of provisional advance on costs, (2) Article 26 on Terms of Reference, which codified the practice of adopting Terms of Reference either in the form of a procedural order or the parties’ joint submission or other form, which sets out among others a summary of the parties’ claims and reliefs sought, list of issues, particulars of applicable rules, and conferment on tribunal of the power to act as amiable

compositeur or to decide ex aequo et bono, (3) Article 34 on Case Management Conference and Procedural Timetable, to be held upon issuance of the Terms of Reference, to discuss procedural measures, including the procedural timetable.

Among the amendments to the PDRC Arbitration Rules that sought to achieve competitiveness and compatibility were (a) Article 7 on Joinder of Additional Parties, (b) Article 8 on Claims between Multiple Parties, (c) Article 9 on Multiple Contracts, (d) Article 10 on Consolidation of Arbitration, (d) Article 15 on Multiple Parties and Arbitrators, Constitution of Arbitral Tribunal, (e) Article 52 on Expedited Procedure, and (f) Article 53 on Emergency Arbitrator.

The APRAG Conference 2016 ended with the closing remarks from Dr. Pryles, who noted the great success of the conference and thanked BANI for hosting the event. Here’s looking forward to the next APRAG Conference in 2018! 🇵🇭

About the Author

Atty. Ongkiko is the Head of the Litigation Department at SyCip Salazar Hernandez & Gatmaitan, a leading law firm in the Philippines. He obtained an AB Economics degree, magna cum laude, from the University of the Philippines. He also obtained his law degree, cum laude, and graduated class salutatorian, from the same university.



He was admitted to the Philippine Bar in 1989. He later obtained his Master of Laws from the University of Michigan Law School in 1992. Aside from being a Trustee and Assistant Secretary of PDRCI, he is the President of the Philippine Institute of Arbitrators, a learned society dedicated to promoting private dispute resolution within the Philippines. He is also a Fellow of the Chartered Institute of Arbitrators (UK), and is an accredited arbitrator of PDRC, CIAC, the Philippine Intellectual Property Office, and the Wholesale Electricity Spot Market, as well as the Kuala Lumpur Regional Centre for Arbitration, the Vienna International Arbitration Centre, and the National Arbitration and Mediation (New York).

MEMBER SPOTLIGHT




Atty. Luis Gregorio Batiller De La Paz is the founding partner of De La Paz Paulino & Associates.

Atty. De La Paz obtained his economics degree in 2003 and juris doctor degree in 2007 both from the Ateneo de Manila University. Prior to becoming a lawyer, he was employed in Preyso Panalo Express, Inc. as a junior consultant in 2002 and marketing head in 2003.

In 2007, he served as the Chief Executive Assistant for the Office of the Speaker, Batasang Pambansa. Two years later, he joined Gonzales Batiller David Leabres Reyes as a junior associate, and transferred to Anover Anover San Diego & Primavera as a senior associate. Concurrently, he served as a member of the Board of Trustees of Tapulanga Foundation, Inc. from 2009 to 2015.

In 2015, he set up his law firm. He is currently the legal counsel of World Wildlife Fund Philippines.

Atty. De La Paz has written two academic papers entitled "Peace and Economics In Mindanao" and "A Study on the Legal Implications of Allowing Manpower Cooperatives to Job-Contract in Light of the rule in San Miguel v. Aballa." He has attended various seminars on the ASEAN Economic Cooperation and the DENR Environmental Awareness Program. 

Supreme Court rules that a party's nominee in JVA may invoke arbitration clause


(Continued from page 1)

ten years after DMCI PDI filed its petition in the trial court, the Supreme Court affirmed the trial court's judgment.

In a unanimous opinion written by Associate Justice Marvic M.V.F. Leonen, the Supreme Court—

- affirmed the state policy in favor of arbitration, which it described as "a product of the meeting of minds of parties submitting a pre-defined set of disputes" to alternative dispute resolution "that avoids extended litigation."
- explained that the policy in favor of party autonomy in resolving disputes has been in place as early as 1949 when the Civil Code was approved, and later recognized in Republic Act No. 876 (1953).
- held that arbitration agreements are liberally construed in favor of proceeding to arbitration, as made explicit in Sec. 25 of Republic Act No. 9285 (2004) which codified the state policy in favor of arbitration.

However, BCDA and Northrail challenged the trial court's ruling, on the argument that DMCI PDI was not a party to the JVA containing the arbitration clause. In resolving this argument and denying it, the Supreme Court considered not only the JVA but two other contracts between the parties: the Amended JVA signed on February 8, 1996 to include DMCI and/or its nominee as a party and the Memorandum of Agreement ("MOA") Signed on the same date by the same parties to the Amended JCA "to set up the mechanics for rising the seed capitalization needed by Northrail." According to the Supreme Court, "There is no rule that a contract should be contained in a single document. A whole contract may be contained in several documents that are consistent with one another." The JVA, the Amended JVA, and the MOA should be treated as one contract because they all form part of a whole agreement.

Hence, the arbitration clause in the original JVA should not be interpreted as applicable only to the JVA's original parties. Based on DMCI PDI's letter to BCDA and Northrail on April 4, 1997, DMCI designated DMCI PDI as its nominee for the agreements. Since the succeeding agreements are deemed part or a continuation of the JVA, the arbitration cause should extend to all the agreements and its parties since it is still consistent with all the terms and conditions of the amendments and supplements. 

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