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MAY 2017



PDRC to brief MTRCB on ADR

PDRC Trustee Atty. Charlie Ho and Deputy Secretary General Francisco Pabilla, Jr. recently met with Movie and Television Review Classification Board (MTRCB) Executive Director Atty. Ann Nemenzo and Board Member Jeremiah Jaro to discuss the implementation of the Memorandum of Understanding (MOU) signed by both sides on November 17, 2016.

Under the MOU, PDRC will collaborate with MTRCB to design an alternative dispute resolution (ADR) framework for the entertainment industry to promote the amicable resolution of disputes. Some of the support activities envisioned in the MOU are seminars, lectures, road shows and other information dissemination, training, and capacity-building activities.

MTRCB welcomed the meeting with PDRC, which took place on May 31, 2017, as timely since most of the members of the MTRCB Board, including Chairperson Rachel Arenas, were new. PDRCI will hold a half-day seminar for MTRCB Board members to introduce them to PDRC and ADR, with a focus on arbitration and mediation. The seminar will help MTRCB adopt a suitable ADR mode to settle disputes in the entertainment industry.

MTRCB also expressed interest in having its Board members undergo training in commercial arbitration and mediation by PDRC.

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PART TWO

The human element in arbitration

By Roberto N. Dio

The first part of the article explored the promise of artificial intelligence and its application to arbitration. This concluding part looks at the critical role of the human element in safely landing an airliner in the middle of the Hudson River and in arbitration.

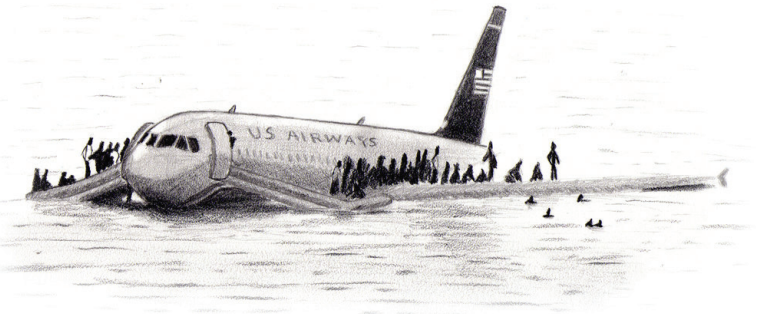
Sully

The critical role played by the human element was demonstrated during the investigation into the water landing of U.S. Airways Flight 1549 at 3:26 p.m. on Thursday, January 15, 2009, when a flock of Canada geese took out both engines of the Airbus A320-214 airliner bound from New York to Charlotte, North Carolina, U.S.A. The domestic flight was a routine one that would have taken approximately an hour and 25 minutes on an ordinary day. But that day was anything but ordinary.

The plane was in the air for about five minutes and 20 seconds after taking off from New York's La Guardia Airport when it hit the 12-pound birds, each one about the weight of a tenpin bowling ball, sucking several of them into the engine's titanium propulsion fans and causing the blades to bend, erode and fracture, instantly snuffing both engines and causing them to lose thrust. At just 2,818 feet, it was not a high-enough altitude for the plane's co-pilot to flip through the plane's instruction manual—which was designed to restart stalled engines at 30,000 feet—and to direct the plane's pilot to the nearest airport for an emergency landing.

Because the plane was losing altitude at the rate of 14.4 feet per second, the pilot, 58-year-old Chesley Sullenberger, and his co-pilot had to turn the plane, now essentially a 66-ton glider, in a wide loop to attempt an emergency landing back into La Guardia, to the left of the flight path, or to try a landing at another airport at Teterboro in New Jersey, to their right and almost 11 miles (17.79 km) away. In the middle of both airports loomed the wide and icy Hudson River and, closer to the plane, the towering George Washington Bridge that crossed it.

They did not know it yet, but the cockpit voice recorder and the subsequent video of the water landing showed that the pilot and co-pilot had exactly 208 seconds—three-and-a-half minutes—left to live before all 155 passengers and crew perished in a deadly crash.



Sullenberger, known as “Sully” since his F-4 Phantom fighter pilot days, made the decision to ditch the plane on the nearest extended flat surface that offered no obstacle, the Hudson River. In his mind, there was no question that landing the plane at La Guardia or Teterboro would have risked bringing the plane down into a densely populated area, killing all passengers and risking the lives of hundreds of people on the ground. He made the decision quickly and calmly, maneuvering the plane to a safe landing on the cold river at a perfect speed and angle, without breaking the fuselage or drowning the passengers.

In the incident dubbed as “The Miracle on the Hudson,” dumbfounded office workers and people inside buildings who saw the plane coming in low and skiing to a stop in the middle of the river called 911 to report the water landing. In minutes, eight ferry boats reached the half-sunken plane, with wet and shivering passengers and crew crowding into its slippery wings and inflatable emergency slides, and rescued all 155 people on board.

None of the passengers and crew suffered a major injury, except a passenger who broke his sternum on impact when he hit his chest with his knee while in the brace position and four other passengers who sustained other serious injuries. Sullenberger was instantly hailed as a hero by the media and the Mayor of New York City.

Flight simulations

Enter the robots. In reports submitted to the U.S. National Transportation Safety Board (NTSB) by the aircraft and engine manufacturers, Airbus Industrie and GE Aviation/Snecma, flight simulations reported that Flight 1549 could have returned safely to La Guardia or Teterboro. All four simulated attempts to reach the nearest Runway 22 at La Guardia were successful, according to the computers.

In the movie *Sully* about the ill-fated flight, which starred Tom Hanks as Sullenberger, he was shown testifying before the NTSB investigators as the video simulations of the successful landings were shown on the screen. When asked if he agreed with the simulations, he calmly said no because they “lacked the human element.”

The simulations were unrealistic, Hanks' character said, because the scenarios assumed that the pilot made an instant decision without taking any time to assess the situation, which took about 30 to 35 seconds. The real Sullenberger maintained in his testimony before the NTSB that there was "no time" to execute the maneuver needed to return the plane to any airport.



When another simulation was conducted with a delay of 35 seconds to account for the pilot's assessment of the emergency conditions, the plane crashed. The NTSB ultimately rejected the results of the simulations as unrealistic because "The immediate turn made by the pilots during the simulations did not reflect or account for real-world considerations." It found after 15 months of investigation that Sullenberger made the right decision to ditch the airplane.

The human element in arbitration

Although computer simulations similar to what the NTSB uses will someday become routine tools in arbitration hearings, in the same manner that building information modeling (BIM) and 3D structural analysis and design software are now widely used in construction arbitration, the credibility of arbitration will continue to depend on the human actors involved in the process. The quality of the arbitration and the process itself can be made consistent, but the results of arbitration will remain unpredictable for as long as there is a human element.

From the parties and their witnesses to the advocates and the arbitrators, each brings into the arbitration their unique experience and perspectives of the dispute and the claims, defenses and counterclaims involved, the evidence in support of the parties' respective positions, and the law, rule or contract that applies to each issue. The claimant may view the dispute as a simple claim for specific performance, yet the respondent may view it as an attempt to enforce a void agreement. The claimant may resort to arbitration in an attempt to force a settlement or merely to preserve its interest.

On the part of the advocates, the parties' counsel may struggle with the lack of suitable witnesses, lost or incomplete data, or issues of confidentiality. His experience, or lack of it, will determine if the submissions are pleaded well or are submitted on time. She may also avail of interim reliefs and resort to discovery or completely avoid them, preferring to meet the issues directly on the merits. She may find the correct rule or stipulation and cite them in her submissions, or completely miss it.

Finally, as usually happens, she will recommend the arbitrators who will be appointed by the client. Much of this will depend not only on competence and reputation of the arbitrator but on the

level of comfort that he brings to the parties and to the process. A machine or a program does not evoke the same feelings, especially if it breaks down or hangs in the middle of the arbitration.

For their part, the arbitrators are called under Article 18 of the Model Law to treat the parties equally and to give each party a full opportunity to present its case. How a robot will do this may depend on a mathematical

equation that gives numerical values to submissions and incidents, such that five witnesses by the claimant will entitle respondent to an equal number of witnesses, even if the additional testimonies are only corroborative.

Then again, the arbitrators preferred by the parties may not be available, or they may not have adequate background and experience in the subject of the dispute, especially when it is of a technical nature such as biological patents or aircraft design. On the other end, although the arbitrators may be technically competent, some may be non-lawyers unfamiliar with procedural rules. The arbitrators may also be from common law jurisdictions but the issues involve civil law. The possibilities are many and varied.

All the human actors are susceptible to bias, stress, health and age issues, jet lag, emotions, and a host of other factors that make people human. But these are also what makes the human element so important in arbitration. The subjective, not the objective, is what makes a Picasso's Guernica a moving masterpiece—and an arbitration a creative, efficient and effective alternative to costly litigation.

As observed by Time Magazine in its November 14, 2016 issue, "humans aren't machines, tasked with delivering the most logical solution at all times. We are complex creatures, driven by emotions beyond our comprehension. And at its core, the human experience remains a deeply, truly analog one, no matter how many virtual platforms we embrace." That driverless car? It will have to wait until 2022.

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About the Author

Atty. Dio is the editor of The Philippine ADR Review. He is a senior litigation partner of Castillo Laman Tan Pantaleon & San Jose, where he has practiced for the past 25 years. He is an accredited Court of Appeals mediator, construction arbitrator, and bankruptcy practitioner. He has represented claimants and respondents in both domestic and foreign arbitrations.



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MEMBER SPOTLIGHT



Atty. Jeric Jimeno Jucaban is a partner since 2014 in the law firm of Rosas & Jucaban.

He studied political science in 1992 from University of San Agustin, Iloilo City and received his law degree in 1997 from the University of the Philippines, Diliman.

After being admitted to the Philippine Bar in 1998, Atty. Jucaban worked as an associate of Benitez Parlade Africa Herrera Parlade and Panga before joining Balane Tamase Alampay and, later, Ocampo Manalo & Associates.

In 2000, he became a partner in De Guzman Dionido Caga Jucaban & Associates, where he served as legal counsel and corporate secretary of the National Book Development Board, President of Dyip Mobile Solutions, Inc., Paycheck. Net, Inc., and Pharmatrix Corporation.

In 2012 he worked with Senator Teofisto "TG" Guingona III as Head of the Political Affairs Office. From 2013 to 2016, he served as the legal consultant for the Senate Blue Ribbon Committee, helping in the legal research of matters being investigated by the Committee. He also represented the Committee and its Chairman and assisted in the investigation of misfeasance or malfeasance of government officials.

Atty. Jucaban's practice includes corporate matters, information and communications technology (ICT)-related criminal and civil litigation, ICT-related documentation, real estate transactions, intellectual property registrations and disputes, employment, and arbitration.



Participants listen to resource speakers (from left) Sara Grimmer, HKIAC Secretary General, Atty. Perry Pe, Olga Boltenko, and Atty. Marjorie O. Ramos-Samaniego, Director of Legal and Investment Compliance Service, Board of Investments.

PDRC at HKIAC forum

PDRC joined the Hong Kong International Arbitration Centre forum *The Belt and Road Initiative: Investment in the Philippines* on March 28, 2017 at the Bernas Center of the Ateneo Professional Schools, Rockwell Center, Makati City. PDRC set up a booth, staffed by its Secretariat, to display its commercial arbitration handbook, booklet and flyer at the forum.

Around 50 participants, mostly lawyers, were treated to complimentary copies of the PDRC Booklet and flyer. The PDRC Handbook on Commercial Arbitration was sold at the event.

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