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ADR REVIEW
Broadening its scope of arbitration advocacy

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NEDA issues IRR of EO 78

By Ricky A. Sabornay

On May 12, 2017, the National Economic Development Authority (NEDA) issued the Implementing Rules and Regulations (IRR) of Executive Order No. 78, s. 2012. EO 78 mandates the inclusion of alternative dispute resolution (ADR) mechanisms in all contracts involving public-private partnership (PPP) projects, build-operate and transfer (BOT) projects, and joint venture (JV) agreements between the government and private entities and those entered into by local government units.

The IRR covers all contracts involving PPP projects, including, among others, contracts entered under the BOT Law, as well as JV agreements and other similar project structures entered into by any government agency, including government owned and controlled corporations (GOCCs), government corporate entities, and government financial institutions as defined under Republic Act No. 10149 (2011), the "GOCC Governance Act of 2011," and state colleges and universities, with any private entity, whether domestic or international.

Under the IRR, all contracts covered by EO 78 are required to include an ADR clause. It also requires a separate written agreement in claims or disputes to be submitted to international arbitration.

The parties may adopt their own rules of procedure to govern the various ADR mechanisms (e.g., dispute resolution boards, early warning and use of comprehensive conflict avoidance plans, negotiations, mediation, conciliation, arbitration, etc.) that they stipulate, but the IRR and the provisions of Republic Act No. 9285 (2004), the "ADR Act of 2004," will apply suppletorily.

The IRR further provides that, unless otherwise agreed by the parties, all disputes settled or resolved using any of the ADR mechanisms are immediately enforceable.

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WHAT'S INSIDE

Taking advantage of procedural flexibility in international arbitration

By Duncan Watson

International arbitration is increasingly the mechanism of choice for resolving disputes with a cross-border element. It's for good reason. Some of the benefits include:

- the ability to arbitrate in private;
- the power to choose the arbitrators best suited to the particular dispute; and
- the fact that arbitral awards can be easier to enforce internationally than court judgments, as a result of the widely-adopted New York Convention.

Supporters of arbitration also argue that it is a cheaper and more flexible process than traditional court litigation. These claims draw particular skepticism from its detractors. Both sides are right.

The consensual nature of arbitration allows parties far greater freedom to tailor procedures to best suit their dispute, and to save costs. All too often, however, parties do not take advantage of that freedom, falling back on familiar court-style procedures and eroding the important differences between the two fora.

This article surveys three aspects of international arbitration practice, which lawyers and their clients should consider adding to their arsenal. Each is the result of the alchemy of the international arbitration system, which throws together lawyers with a wide variety of backgrounds and legal training, from both the common law and civil law traditions.

Of course, the point is not that these practices are inherently better or cheaper than the court-based equivalents; rather, it is that taking full advantage of the arbitral process requires a greater openness to adopting them.

Solicitor advocates

It is increasingly common for law firms to conduct arbitral proceedings entirely in-house, without resorting to the independent bar. That is obviously true of firms that hail from fused professions, but it is not just European and American firms that provide in-house advocates to argue arbitration proceedings.

It is common even in England, the home of the split profession. In England, both solicitors and barristers may 'take silk'; and every year, arbitration partners in London firms appear on the list of new QCs.

Anecdotally, my partners and I have argued five arbitration hearings in the last six months, in London and Hong Kong, and in cases ranging from US$20-200+ million. In none of them have we used or been opposite a barrister. There are a number of reasons for this.

Advocacy in international arbitration differs substantially from advocacy in courts; the styles and techniques which play well to a judge may be ineffective or off-putting to a tribunal made up of a Korean academic, a Chinese lawyer, and an American attorney, for example. Conversely, if an arbitral panel is made up entirely of former judges, briefing a local barrister may be prudent— an example of why there should not be a 'one size fits all' approach to arbitration.

In addition, arbitral hearings are almost always far shorter than a trial of an equivalent case. A dispute that might be given a three-month hearing in court may be allocated less than two weeks in arbitration. This requires a wholly different approach to the oral presentation of the case, not least in terms of how best to utilize limited time for cross-examination.

It may be difficult for barristers steeped in one tradition to adapt to these differences – just as a U.S. trial attorney might not be a natural fit in an Australian courtroom.

Other factors driving this include:

- clients from jurisdictions with fused professions, who may not understand—or who may actively object to— the practice of out-sourcing advocacy;
- the increasing reluctance of firms to channel work (and fees) to third parties, and their efforts to retain top talent that might otherwise depart for the bar; and
- potential efficiency gains to be drawn from the same team of lawyers having the day-to-day running of a matter, and the in-depth knowledge that brings, also arguing the final hearing.

A serious debate must be had within the legal profession about how best to keep pace with our international competition in this regard. For example, a formal solicitor-advocate qualification, allowing solicitors to take silk, and permitting barristers to join law firms are all reforms that were made years ago in England, and which should be carefully considered. This debate is unfortunately beyond the scope of this article.

Memorial style pleadings

Pleadings in international arbitrations often take the form of "memorials." This style of pleading is common to civil law jurisdictions and differs from the more familiar UCPR - style pleading in at least two respects.

- Firstly, rather than a bare recitation of the key facts (and only the key facts) which provide the framework of the case, a memorial is a detailed, persuasive document. It weaves a narrative of the facts, refers in detail to the evidence, and sets out a party's legal arguments in full.
- Secondly, it is accompanied by the party's witness statements, expert reports and documentary evidence. Together with the memorial itself, this package contains the entirety of the party's case.

A claimant's memorial will generally be filed within three months of the constitution of an arbitral tribunal, with a respondent's counter-memorial following a few months later. A document production phase may then take place, followed by further memorials from both sides (which should respond to the other side's case, and build in further documents produced in disclosure).

These factors combine to ensure that the details of a party's case are flushed out from a very early stage in the dispute. This contrasts with litigation procedures in many common law jurisdictions, including Australia, where it is not unusual for evidence (including witness statements and expert reports) to be exchanged far later in the process, much closer to the final hearing.

The potential benefits of this are obvious. Firstly, it enables both sides to take a realistic, informed view of their prospects earlier in the process, which may drive prudent settlements. Secondly, it ensures that the contours of the case are clear, long before the final hearing. This minimizes the risk that the parties' cases will pass each other by or, worse, will take last minute twists wasting months or years worth of work.

Redfern Schedule disclosure

Large-scale document production is rare in international arbitration. Rather, it is common practice to conduct discovery by way of a "Redfern Schedule" (named after its creator, Alan Redfern), guided by the International Bar Association Rules on the Taking of Evidence in International Arbitration.

A Redfern Schedule typically has five columns, which are filled in over time as the schedule moves back and forth between the parties. In the first column, Party A sets out specific documents or categories of documents it seeks from Party B. In the second, Party A explains why those documents are "relevant and material to the outcome of the dispute"—not merely relevant to a fact in issue—by specific reference to the pleadings and witness statements. In the third, Party B sets out its response to the request, either that it will produce the requested documents, or its detailed reasons for objecting to the requests. In the fourth, Party A replies to Party B's position, and in the fifth, the Tribunal sets out its ordes.

The Tribunal takes into account matters such as the proportionality of requiring a party to search for and produce the documents, in light of their relevance and materiality. There is no automatic right to relevant documents. The Tribunal may allow all, some, or none of the requests.

The entire document production phase may be over in a mere few months and may result in the disclosure of relatively few crucial documents. It needs very careful thought to ensure that key documents are not missed, but with discovery being one of the most time and cost intensive phases in litigation, it can lead to very significant efficiencies.

Conclusion

This article has addressed three aspects of international arbitration practice that, if used strategically in the appropriate case, can realize the promise of arbitration as being a more flexible and cost-effective method of dispute resolution. Lawyers and their clients should consider adding these techniques to their strategic toolbox, rather than approaching arbitration as though it is the same as court litigation.

About the Author

Duncan Watson is a partner at Quinn Emanuel, Sydney and Hong Kong. He practises primarily in international commercial and investment treaty arbitration.

MEMBER SPOTLIGHT

Atty. Jocelyn G. Pesquera is an incumbent city councilor of Cebu City and a partner of the law firm of Rama & Pesquera.

She graduated cum laude in accounting in 1991 from University of San Carlos and passed the CPA licensure examination in the same year. She finished law in 1996 at the same University.

While studying law, Atty. Pesquera worked as a CITP Trader with Rizal Commercial Banking Corporation. After passing the 1996 Philippine bar examinations, she joined Isla Communications Co., Inc. and founded her present law firm in 2007.

While working in the private sector, she served as barangay councilor of Kinasang-An, Cebu City from 1994 to 1998. She was later elected as a member of the Cebu City Council from 1998 to 2007, where she served as the majority floor leader from 2001 to 2007. In 2016, she was again elected to the Cebu City Council.

Atty. Pesquera passed the Career Executive Officer Examination in June 2006 and received her Career Executive Service Eligibility in April 2011. She likewise took and passed the Real Estate Appraiser Licensure Examination in July 2014.

She has received various awards and recognitions by the Philippine Institute of Certified Public Accountants, Cebu Lady Lawyers Association, and the Philippine Councilors League. She also participated in various management and arbitration trainings organized by the Asian Institute of Technology in Thailand, Center for International Education, Asian Institute of Management, International Bar Association in Kuala Lumpur, and the Philippine Dispute Resolution Center, Inc.

In April 2017, she attended the Accelerated Route to Membership (International Arbitration) organized by the Charter Institute of Arbitrators in Singapore and in June 2017, she took the CIArb Comprehensive Course on International Arbitration in New York, which was jointly organized by Columbia Law School and CIArb New York Branch.

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With a view to creating a repository of all settlement agreements and awards for all ADR processes covered by the IRR, the ADR institution overseeing or managing the ADR process is required to submit a complete copy of settlement agreements, arbitral awards, and similar documents to the Office for Alternative Dispute Resolution, with a copy furnished to the PPP Center and the NEDA within seven days from the date of signing.

The IRR took effect 15 days after the completion of its publication or on May 27, 2017. A copy of the IRR may be downloaded from the PDRCI website, www.pdrci.org/national-laws/

PDRCI BRIEFING WITH U.P. LAW STUDENTS

PDRC Sec. Gen. Roberto Dio answers questions from University of the Philippines BGC law students Jayson Edward San Juan and Paul Nathan Beira on international commercial arbitration. The students will compete in a moot arbitration competition in Tokyo in September.

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