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PDRC signs partnership with University of Makati School of Law

By: Francisco Pabilla, Jr.

PDRC President Edmundo L. Tan signed a Memorandum of Agreement (MOA) with the University of Makati (UMak) School of Law, represented by Dr. Elyxzur C. Ramos, Vice President for Academic Affairs, on November 29, 2017 at the UMak campus in Makati City.

From left: PDRC Secretary General Roberto N. Dio, PDRC President Edmundo E. Tan, and Dr. Elyxzur Ramos, UMak Vice President for Academic Affairs, presenting the signed MOA.

The signing ceremony coincided with UMak's annual Industry Partners Recognition Day. Makati Mayor Mar-len Abigail Binay-Campos, Vice-Mayor Monique Lagdameo, and other Makati City officials were present to witness the awarding of Certificates of Recognition to UMak's industry partners for their contribution in realizing UMak's and Makati City's mandate in promoting educational excellence and student employability.

The MOA between PDRC and UMak formalizes their partnership in the establishment of an ADR Center in UMak and the conduct of training and information dissemination campaigns on alternative dispute resolution (ADR).

Under the agreement, UMak, through its School of Law, shall provide adequate facilities for training and orientation seminars conducted jointly with PDRC, refer to PDRC any dispute for settlement through ADR, and serve as venue for any ADR case referred to PDRC. In turn, PDRC shall collaborate with UMak, through SLAW, on the setting up of an ADR Center, conduct training and information dissemination jointly with the UMak ADR Center, and allow participants from UMak to attend the training and seminars free of charge.

PDRC Secretary General Roberto Dio and UMak SLAW Secretary Angel Velero witnessed the MOA signing.

WHAT'S INSIDE

PART TWO

The need to harmonize the arbitration laws of ASEAN countries

By: Eduardo R. Ceniza

Note: In Part 1, the author discussed the need to harmonize the arbitration laws of ASEAN countrues based on the UNCITRAL Model Law and recommends the adoption of a uniform standard of public policy. In this concluding part, he recommends the harmonization of the concept of arbitrability and the creation of an ASEAN Center for the Settlement of Investment Disputes.

The vexing question: What is arbitrability?

The term "arbitrability" has a precise and limited meaning, i.e., whether specific classes of disputes are barred from arbitration because of national legislation or judicial authority. Courts often refer to public policy as the basis of the bar.

What law applies to arbitrability is indeed a vexing question.

Because of the public interest involved, States understandably want to apply their own national laws to the issue of arbitrability. The New York Convention recognizes this concern when it directs courts to apply the national law in determining the arbitrability of a dispute. The same reference to the national law is found in the UNCITRAL Model Law.

However, an international arbitral tribunal does not form part of the judicial system of any country and, therefore, does not have a national law to rely on. The tribunal, therefore, has to choose among the various national laws before it to be able to determine arbitrability. Arbitrability can be as divergent and multifarious as there are national laws involved.

Recommendation: Harmonize the concept of arbitrability

In line with the proposal for ASEAN to harmonize the region's commercial laws and international commercial arbitration laws, it is further proposed that the notion of arbitrability be harmonized, at least insofar as it applies to the arbitration of investment disputes.

By a convention or multilaterla treaty, the ASEAN countries may provide that all disputes arising from or related to foreign investments are arbitrable, notwithstanding any provision to the contrary in the national statutes and judicial precedents of the States involved.

The idea is to delocalize the arbitrability of investment disputes.

A center for the settlement of investment disputes for ASEAN

Many countries in the world have become disillusioned with the International Center for the Settlement of Investment Disputes (ICSID).

Indonesia is not extending expired bilateral invetment treaties (BITs) and is not entering into new ones. It seems inclined to withdraw from the ICSID for various reasons, one of which is that the cost of ICSID arbitration is so immense, amounting to millions of U.S. dollars. One author has said:

> "ICSID is in general far too expensive, reserving arbitration for the biggest and richest.
>
> The average administrative cost for arbitration in the ICSID is 4 million per party and the arbitration takes on average 3.6 years. This would limit 'mom and pop' investors from effectively using ICSID. Furthermore, the range and distribution of costs vary largely depending on the case, some costing significantly more. The combination of these facts, and in the context of geopolitical considerations, suggests that only the biggest investors in the economy are in control of critical industries . . . "

Several Latin countries have withdrawn from the ICSID. Bolivia, Ecuador and Venezuela have withdrawn from ICSID. Argentina is about ready to withdraw. Canada, Cuba, México and Dominican Republic have not ratified the ICSID Convention. The Caribbean states that remain outside the ICSID jurisdiction are Antigua, Barbuda, Belize, Dominica, and Suriname. Brazil has not approved (and not even signed) the ICSID Convention.

The criticism against ICSID arbitration may be summed up as follows:

- ICSID's umbilical cord with the World Bank raises concerns by some countries that hostility toward ICSID may hamper access to World Bank credit;
- The hardship to developing countries in resorting to ICSID arbitration due to extremely expensive foreign law firms;
- A shadow of arbitrator bias in favor of investors, with different ad hoc tribunals analyzing similar cases and reaching disparate results;
- The absence of an appeals process; annulment procedure is only on limited grounds.

The ASEAN Center for the Settlement of Investments Disputes

It is proposed that, as an essential component of the ASEAN integration, a regional center for the resolution of investment disputes among the ASEAN countries be established as an alternative to ICSID. Such a regional center may be patterned after the ICSID but with institutional changes, as may be appropriate, to address the objections to and the perceived institutional faults of ICSID.

The Center may be called the "ASEAN Center for Resolution of Investment Disputes." As proposed, the Center shall have jurisdiction over any legal dispute arising directly out of an investment, between an ASEAN member State (or any constituent subdivision or agency of such member State designated to the Centre by that State) and a national of another ASEAN member State, which the parties to the dispute consent in writing to submit to the Center.

The Center will have a Panel of Arbitrators and a Panel of Mediators appointed by the member countries. Each member country, for example, may appoint 10 arbitrators to each Panel. It is proposed that a comprehensive appeals facility competent to review all awards rendered by a panel of arbitrators be established as an integral component of the Center. This appeals facility may be called the Appellate Panel. Each member country, for example, may appoint 10 arbitrators to the Appellate Panel.

It is proposed that a Technical Working Group be formed to draft the framework of the Center and all the relevant details for the consideration of the ASEAN at the ministerial level.

About the Author

Eduardo R. Ceniza, FCIArb, FHKIArb, FSIArb, FPIArb, is the Managing Partner of the law firm of Eduardo R. Ceniza & Partners. He is the Chairman of the Philippine Institute of Arbitrators (PIArb) and of the Philippine Chapter of the East Asia Branch of the Chartered Institute of Arbitrators (CIArb). He was a former President of the Philippine Dispute Resolution Center, Inc. (PDRCI) and of the Philippine Institute of Construction Arbitrators and Mediators (PICAM).

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[1] UNCITRAL Model Law, Arts. 34((2)(b)(ii) & 36(1)(b)(ii).

[2] Hikmahanto Juwana, "Indonesia Should Withdraw From the ICSID," at http://www.thejakartapost.com/news/2014/04/02/indonesia-should-withdraw-icsid.html, last accessed on Sept. 17, 2017.

[3] Leif Cocq-Rasmussen, "An Analysis of Geopolitical Considerations of Investor State Dispute Settlement and the Pursuit of Impartial Justice," ALF Amsterdam Law Forum 40, VU University Amsterdam, at http/www.amsterdamlawforum.org/article/view/354, last accessed on Sept. 17, 2017.

[4] Nicolas Boeglin, ICSID and Latin America: Criticisms. Withdrawals and regional alternatives, http://www.cadtm.org/ICSID-and-Latin-America-criticisms.

[5] Nicolas Boeglin, Supra.

[6] Nicolas Boeglin, Supra; see also Leif Cocq-Rasmussen, op cit.

[7] ICSID does not have this feature.

PDRC arbitration suggested to resolve PBA Commissioner impasse

The Philippine Star has reported on November 14, 2017 that the Philippine Basketball Association (PBA), the professional basketball league composed of 12 company-franchised men's basketball teams, is considering arbitration by an independent expert to settle the impasse with regard to Commissioner Chito Narvasa's tenure and the conflicting interpretations of the process of renewing or terminating his contract.

According to columnist and sports analyst Joaquin Henson who wrote the news item, the PBA Board of Governors met early last month to discuss how to resolve the impasse on Narvasa's renewal. Seven governors wanted him out while five wanted him in. Under the terms of the 2010 PBA By-Laws, a 2/3 vote from the Board is required to expel the commissioner and a similar 2/3 vote is needed to appoint one. It is silent on the matter of renewal.

Under the terms of the 2015 By-Laws, the positions of chief executive officer and chief operating officer were given a tenure of one year with the Board's option to renew. The intention was for another person to act as CEO and Narvasa as COO but the plan was scuttled to retain the commissioner as the man in charge. Narvasa was designated commissioner when the person who was to be the CEO resigned.

Henson noted in his article that "In the Philippines, commercial arbitration has become increasingly popular as an option to settle disagreements without court intervention. There are laws that govern the process of arbitration usually lodged with the Philippine Dispute Resolution Center. Opposing parties resort to arbitration to avoid costly and tedious court proceedings but must agree on an arbiter with the authority to pass judgement fairly. Decisions made by the arbiter are final and unappealable. Arbiters are chosen for their special knowledge, skills and experience."

PDRC has written the paper's editor-in-chief to offer to help the PBA resolve its internal dispute on the reelection of Narvasa as commissioner. PDRC offered to brief the PBA Board of Governors on PDRC's ADR services and introduce the Board to some of the mediators and arbitrators, one of whom is a trained sports arbitrator.

MEMBER SPOTLIGHT

Atty. Rosalia S. Bartolome-Alejo is a partner at Martinez Vergara Gonzalez & Serrano, which she joined in 2006. Her fields of expertise are banking and finance, securities, mergers and acquisitions, business formation and foreign investment.

She was formerly a partner at Picazo Buyco Tan Fider & Santos from 2005 to 2006 and served as Internal Legal Counsel of Calenergy International Services, Inc. from 2001 to 2002. From 1996 to 1997, she was an associate attorney of Carpio Villaraza & Cruz.

Atty. Alejo placed eighth in the Philippine bar examinations in 1996. She received her Bachelor of Laws degree from the University of the Philippines in 1996, where she studied political science, cum laude, in 1992.

She is a member of the Tax Management Association of the Philippines (TMAP), U.P. Women Lawyers Circle, and Federacion Inernationale de Abogadas (FIDA). She is a trained commercial arbitrator of the Philippine Dispute Resolution Center (PDRC).

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