PDRCI
PHILIPPINE DISPUTE RESOLUTION CENTER, INC.

SECRETARIAT

3F, Commerce and Industry Plaza
1030 Campus Avenue cor. Park Avenue
McKinley Town Center, Fort Bonifacio
1634 Taguig City

Telefax: 822-4102
Email: secretariat@pdrci.org
Website: www.pdrci.org

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ADR REVIEW
Broadening its scope of arbitration advocacy

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OADR reports proposed amendments to ADR Act

Office for Alternative Dispute Resolution
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In a recent consultative conference, the Office of Alternative Dispute Resolution (OADR) announced the amendments proposed by the Technical Working Groups (TWG) to amend the provisions of Republic Act No. 9285 (2004), or "The Alternative Dispute Resolution Act of 2004," on arbitration and mediation.

The amendments proposed by the TWG on the chapter on arbitration were the (a) unification of the provisions on international commercial arbitration and domestic arbitration, discussed by PDRC Trustee and Past President Eduardo R. Ceniza, which was followed by an open forum facilitated by PDRC Trustee Teodoro Kalaw IV, (b) adoption of the 2006 amendments to the 1985 UNCITRAL Model Law on interim measures of protection, preliminary orders and emergency arbitration, reported by PDRC Trustee Mario E. Valderrama, which was followed by an open forum facilitated by PDRC Trustee Donemark J. L. Calimon, (c) recourses against recognition and enforcement of foreign arbitral awards and treatment of domestic awards, which was reported by PDRC member Jesusito G. Morallos, and (d) the enhanced role of the appointing authority, the tribunal's authority to administer oaths and to grant just or equitable relief in domestic arbitration, authentication of arbitral awards and agreements, and confidentiality of arbitration agreements, which was reported by PDRC Secretary General Roberto N. Dio.

The consultative conference, held on December 11, 2017, was part of the OADR's three-day observance of National Alternative Dispute Resolution Week. The OADR issued plaques of appreciation to PDRC Trustees and officers who were involved in the TWG.

WHAT'S INSIDE

Appointment of arbitrators and party autonomy

By Chet J. Tan, Jr.

Party autonomy in arbitration is understood in this jurisdiction as "the freedom of the parties to 'make their own arrangements to resolve their own disputes.'"[1] In international arbitration, it has been described to as "the autonomy of the parties to decide on all aspects of an international arbitration procedure, subject only to certain limitations of mandatory law."[2]

One of these aspects is the procedure for nominating arbitrators, as codified in Article 11 (3) of UNCITRAL Model Law. In fact, the exercise of such discretion in the selection of arbitrators is apparently considered a *given* in this jurisdiction, as can be gleaned from the decisions of the Supreme Court.

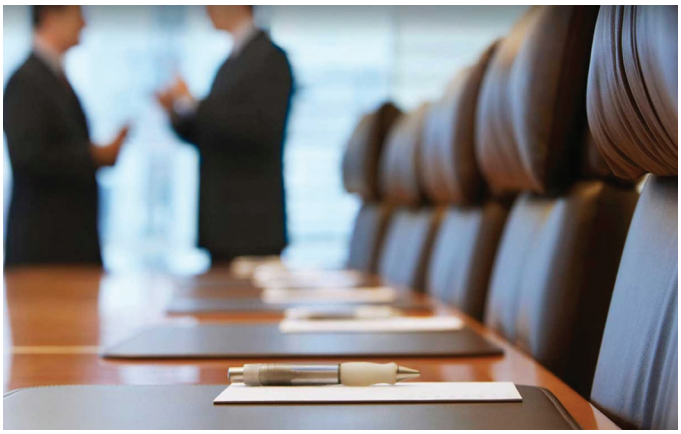
In the leading case of *Hi-Precision Steel Center, Inc. v. Lim Kim Steel Builders, Inc.*,[3] the Supreme Court declared that it "will not review the factual findings of an arbitral tribunal upon the artful allegation that such body had 'misapprehended the facts' and will not pass upon issues which are, at bottom, issues of fact, no matter how cleverly disguised they might be as 'legal questions,'" nor would it "permit the parties to relitigate before it the issues of facts previously presented and argued before the Arbitral Tribunal, save only where a very clear showing is made that, in reaching its factual conclusions, the Arbitral Tribunal committed an error so egregious and hurtful to one party as to constitute a grave abuse of discretion resulting in lack or loss of jurisdiction."

The stated objective of this policy is to, generally, "provide a speedy and inexpensive method of settling disputes by allowing the parties to avoid the formalities, delay, expense and aggravation which commonly accompany ordinary litigation, especially litigation which goes through the entire hierarchy of courts." Notably, this is premised on the assumption that the litigants "had recourse to arbitration and *chose the arbitrators themselves*; they must have had confidence in such arbitrators."[4]

The presumption in *Hi-Precision* that the arbitrators who rendered an arbitral award were chosen by the parties to the arbitration was recently iterated in *Werr Corporation International v. Highlands Prime, Inc.*,[5] where the Supreme Court went even further. There, the Supreme Court, quoting its earlier opinion in *Hi-Precision*, held that the "rule on the finality of an arbitral award is anchored on the premise that an impartial body, *freely chosen by the parties* and to which they have confidence, has settled the dispute after due proceedings."[6]

Under this policy, which generally binds parties to an arbitration to the arbitral award rendered by arbitrators presumably of their own choosing, one would suppose that such parties should have every opportunity to participate in the selection of these arbitrators, all in the spirit of party autonomy. In this jurisdiction, however, that is not always the case.

For one, the Philippine Dispute Resolution Center (PDRC) Arbitration Rules[7] includes provisions when the choice of arbitrators are taken out of the parties' hands. Thus, in the appointment of a sole arbitrator, "[i]f within thirty (30) days from receipt by a party of another party's proposal made in accordance with paragraph 1 of this Article, the parties have not reached agreement on the choice of a sole arbitrator or either party fails to make any proposal, the sole arbitrator shall be appointed by PDRCI."[8]



Similarly, in the constitution of a panel of arbitrators, "[i]f either party fails to appoint an arbitrator, PDRCI, as appointing authority, shall appoint the arbitrator for that party,"[9] and "[i]n case of failure to constitute the arbitral tribunal for any cause under the Rules, PDRCI shall, at the request of any party, constitute the arbitral tribunal and in doing so may revoke any appointment or confirmation already made and appoint or reappoint each of the arbitrators and designate one of them as the Chair."[10]

Notably, the old PDRC Arbitration Rules gave the parties more opportunities to be involved in the nomination of arbitrators. Specifically, with respect to sole arbitrators, it provided that "[i] f within thirty (30) days after receipt by a party of a proposal made in accordance with paragraph 1 the parties have not reached agreement on the choice of a sole arbitrator, the sole arbitrator shall be appointed by the appointing authority agreed upon by the parties or if the appointing authority agreed upon refuses to act or fails to appoint the arbitrator within sixty (60) days of the receipt of a party's request therefor, either party may request PDRCI to act as an appointing authority."[11] Even then, PDRC had to abide by the procedure agreed upon by the parties for the appointment of the sole arbitrator.[12]

The old PDRC Rules also gave parties more chances to have a say in the nomination of the panel of arbitrators. For one, when a party fails to nominate an arbitrator, the other party is first given the opportunity to "request the appointing authority previously designated by the parties to appoint the second arbitrator…."[13] Alternatively, "[i[f no such authority has been previously designated by the parties, or if the appointing authority previously designated refuses to act or fails to appoint the arbitrator within thirty (30) days after receipt of a party's request therefor," only then would PDRC be able to act as the appointing authority and make the appointment. Even then, PDRC could appoint the second arbitrator upon the request of the party that did not fail to nominate an arbitrator. [14]

Another example is the Construction Industry Arbitration Commission (CIAC) Revised Rules of Procedure Governing Construction Arbitration,[15] which features even more rigid provisions that curtail the parties' ability to choose their own arbitrators in favor of more discretion on the part of CIAC.[16] Generally, the CIAC Rules provides that "[i]n case of multiple parties, whether as Claimant or as Respondent, including three (3) or more parties in the arbitration, where all parties are unable to agree to a method for constitution of the Tribunal within ten (10) days from notice, CIAC shall appoint the arbitrators."[17]

For the appointment of a sole arbitrator, the CIAC Rules provides that, "[i]f any or both of the parties shall fail to submit the names of their nominees within the period/s prescribed by CIAC, a Sole Arbitrator shall be appointed by CIAC."[18] If the parties submitted their nominees but "still fail to agree on a common nominee, CIAC may appoint a Sole Arbitrator *or an Arbitral Tribunal*," despite the parties' agreement to appoint a sole arbitrator and, when appointing said sole arbitrator, the CIAC has authorized itself to "select an arbitrator who is *not a nominee of any one of the parties* and who is not disqualified and is available for appointment."[19]

With respect to the appointment of an Arbitral Tribunal, CIAC chooses and appoints its members, "one Arbitrator from the claimant's nominees and another from respondent's nominees," but "shall also choose and appoint the Third Arbitrator and notify the parties thereof for their confirmation in writing within five (5) working days from receipt of the notice." However, said Third Arbitrator is not a mere member of the Arbitral Tribunal, for "[t]he Third Arbitrator chosen and appointed by CIAC shall be the *Chairman of the Tribunal*."[20]

According to a footnote to Section 9.3 of the CIAC Rules, said section was amended in 2017 to delete the provision for the automatic appointment of common nominees to an Arbitral Tribunal "to be more in accord with the party autonomy rule by applying the parties' order of preference in their list of nominees."[21] However, as mentioned above, the amendment transferred the power to choose the third arbitrator and the Chairman of the Arbitral Tribunal from the parties' nominated arbitrators to the CIAC.[22]

Given the greater discretion given to PDRC and the CIAC in the appointment of arbitrators, the possibility that one, some or all of the members of an arbitral tribunal appointed by said institutions will *not* be among the nominees of any of the

parties to an arbitration is a very real one, more so under the current PDRC Rules and CIAC Rules.

What the foregoing brings to light is the tension between two facets of what is essentially the same policy, which is to "provide a speedy and inexpensive method of settling disputes by allowing the parties to avoid the formalities, delay, expense and aggravation which commonly accompany ordinary litigation, especially litigation which goes through the entire hierarchy of courts."[23] On the one hand, we see the increasing curtailment by arbitral institutions of the right to party autonomy in the selection of arbitrators, in the interest of promoting the expediency of alternative dispute resolution and combating delay. On the other hand, the Supreme Court is coming down hard on litigants in strictly upholding arbitral awards, on the premise that the arbitrators that rendered these arbitral awards were freely selected by the parties.

It has been observed that in international arbitration, "[l]imitations on party autonomy have been reduced more and more during recent decades, and the trend of modern national as well as international legislation on conflict of laws and on arbitration leans clearly in the direction of a maximum of party autonomy."[24] Granted, the different mechanisms adopted by arbitral institutions in this jurisdiction that transfer the discretion to choose arbitrators from the parties to the arbitral institution are no doubt designed to accomplish the worthy objective of forcing litigants not to delay, much less default, in nominating arbitrators, which is in keeping with the *raison d'être* of arbitration.

Nevertheless, any mechanism that forces a party to abdicate her right to nominate an arbitrator to an appointing authority cannot seriously be considered as more in keeping with the

concept of party autonomy. Thus, if this trend of curtailing party choice in the nomination of arbitrators continues, it is humbly suggested that the Supreme Court should take judicial notice of such mechanisms in our arbitral rules and consider relaxing its standard of review for arbitral awards when it is established that the same were rendered by arbitrators who were *not* chosen by the parties. Otherwise, the benefits of party autonomy as a hallmark of arbitration may be rendered illusory.

About the Author

Atty. Chet J. Tan, Jr. is a litigation partner of Castillo Laman Tan Pantaleon & San Jose, where he has practiced for the past 13 years. He is a trained arbitrator of the Philippine Dispute Resolution Center, Inc., and has experience in commercial, maritime and construction arbitration.

1 A.M. No. 07-11-08-SC, September 1, 2009, Rule 2.1, cited in Koppel, Inc. v. Makati Rotary Club, Inc., 705 SCRA 142, 166 (2013).
2 Karl-Heinz Böekstiegel, The Role of Party Autonomy in International Arbitration, in American Arbitration Association, HANDBOOK ON INTERNATIONAL ARBITRATION & ADR 115 (Carbonneau & Jaeggi eds. 2006). Hereafter, "Böekstiegel."
3 228 SCRA 397 (1993). Hereafter, "Hi-Precision Steel Center, Inc."
4 Id., at 405-406; emphasis supplied.
5 G.R. No. 187543, February 8, 2017. Hereafter, "Werr Corporation International."
6 Id.
7 Hereafter, "PDRCI Arbitration Rules."
8 PDRCI Arbitration Rules, Article 13, par. 2.
9 PDRCI Arbitration Rules, Article 14, par. 2.
10 PDRCI Arbitration Rules, Article 15, par. 4.
11 Old PDRCI Arbitration Rules, Article 6, par. 2.
12 Old PDRCI Arbitration Rules, Article 6, par. 3.
13 Old PDRCI Arbitration Rules, Article 7, par. 2 (a).
14 Old PDRCI Arbitration Rules, Article 7, par. 2 (b).
15 Hereafter, "CIAC Rules."
16 Granted, the CIAC is no ordinary arbitral institution, having been created by E.O. No. 1008 (s. 1988), and the arbitration of construction disputes under its auspices has been made mandatory by said law. However, the question of whether CIAC arbitration is actually arbitration in the traditional sense has been tackled by more scholarly work than this, and is not the subject of this essay.
17 CIAC Rules, Sec. 9.1.2.
18 CIAC Rules, Sec. 9.2.
19 CIAC Rules, Sec. 9.2.1; emphasis supplied.
20 CIAC Rules, Sec. 9.3; emphasis supplied.
21 Note 18, CIAC Rules.
22 CIAC Rules, Sec. 9.3, in relation to the CIAC Rules as of August 4, 2011, Sec. 9.3.1.
23 Hi-Precision Steel Center, Inc., at 405.
24 Böekstiegel, at 116-117.

MEMBER SPOTLIGHT

Arch. Alfredo A. Fernandez is a licensed architect with extensive experience in construction contracts, project management and construction claims advising.

He studied architecture at La Consolation College, Bacolod City in 1997, while working part time as a draftsman. After being board-certified as an architect in 1998 and receiving his professional license, he taught review classes on architecture and building laws at his alma mater.

In 2002, he went into aluminum door, window and screen fabrication and opened his design firm, Alfredo Fernandez & Partners, in Victorias City. While actively practicing as an architect, he obtained his Bachelor of Laws degree at the University of Negros Occidental Recoletos in Bacolod City.

In 2007, he worked in Dubai asa Quality Assurance/Quality Control Architect and, thereafter, as Assistant Contracts Administrator at Oger Dubai, LLC., a local architecture firm. He returned to the Philippines in 2009 and worked as Senior Architect at Jonathan O. Gan & Associates, while teaching part time at the De La Salle University, Technological Institute of the Philippines, Central Colleges of the Philippines, and Brown Bauhaus Architecture Studio.

From 2010 up to the present, he has worked as a Construction Contracts Administrator, Project Coordinator, and Contracts and Claims Advisor for various companies, including Sta. Clara International Corporation and Rider Levette Bucknall Philippines.

Arch. Fernandez currently serves as one of the directors of the United Architects of the Philippines-Negrense Chapter. He is also the author of The Essentials of the Practice of Architecture (R.A. No. 9266 with Commentaries), which he published in 2008.

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EDITOR ROBERTO N. DIO
CONTRIBUTOR SHIRLEY ALINEA
STAFF WRITERS CHET J. TAN, JR.
LEONID C. NOLASCO
RICKY A. SABORNAY
GRACE ANN C. LAZARO