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

OFFICERS

Atty. Victor P. Lazatin
Chairman

Amb. Francis C. Chua
Vice Chairman for Internal Affairs

Atty. Eduardo R. Ceniza
Vice Chairman for External Affairs

Atty. Edmund L. Tan
President

Atty. Beda G. Fajardo
Vice-President for Internal Affairs

Atty. Salvador S. Panga, Jr.
Vice-President for External Affairs

Atty. Roberto N. Dio
Secretary General

Atty. Shirley F. Alinea
Deputy Secretary General

Dr. Eduardo G. Ong
Treasurer

Atty. Patricia-Ann T. Prodigalidad
Corporate Secretary

Atty. Ricardo Ma. P.G. Ongkiko
Assistant Corporate Secretary

CJ Artemio V. Panganiban
Chaiman Emeritus

Atty. Custodio O. Parlade
President Emeritus

BOARD OF TRUSTEES

Atty. Shirley F. Alinea
Atty. Arthur P. Autea
Engr. Salvador P. Castro, Jr.
Atty. Eduardo R. Ceniza
Amb. Francis C. Chua
Atty. Gwen B. Grecia De Vera
Atty. Roberto N. Dio
Atty. Beda G. Fajardo
Atty. Simeon G. Hildawa
Atty. Charlie L. Ho
Atty. Teodoro A. Y. Kalaw IV
Atty. Victor P. Lazatin
Atty. Rogelio C. Nicandro
Dr. Eduardo G. Ong
Atty. Ricardo Ma. P. G. Ongkiko
Atty. Victoriano V. Orocio
Atty. Salvador P. Panga, Jr.
Atty. Patricia C. Prodigalidad
Atty. Edmund L. Tan
Prof. Mario E. Valderrama

THE PHILIPPINE
ADR REVIEW
Broadening its scope of arbitration advocacy

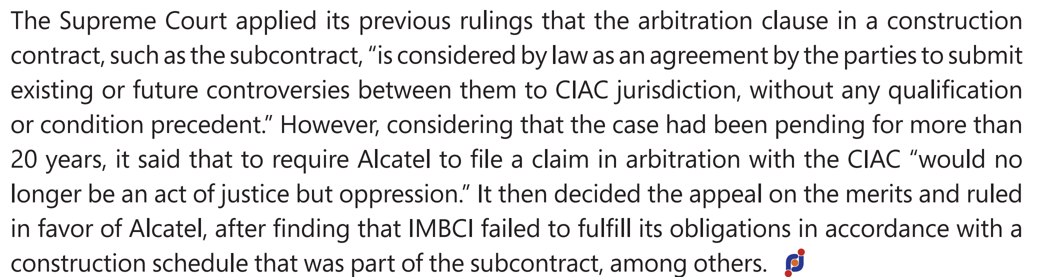
WWW.PDRCI.ORG MARCH 2018

Supreme Court decides 20-year dispute despite RTC's lack of jurisdiction

By Ricky A. Sabornay

In a Minute Resolution dated November 22, 2017 in *I.M. Bongar & Co., Inc. v. Alcatel Phils., Inc.* (available at www.pdrci.org), the Supreme Court affirmed the decisions of the Regional Trial Court ("RTC") and the Court of Appeals on appeal in a construction arbitration case, even if the RTC did not have jurisdiction over the original action, "to prevent the miscarriage of justice in its truest sense."

The case arose from a complaint for the unpaid balance of the subcontract price filed by Alcatel Philippines, Inc. ("Alcatel") against I.M. Bongar & Company, Inc. ("IMBCI") and Stronghold Insurance Company, Inc. with the trial court, despite the stipulation in the subcontract to refer any dispute between the parties to arbitration by three arbitrators under the CIAC Rules. The subcontract required IMBCI to install aerial and conduit cables for the Philippine Long Distance Telephone Company Fast Track Project in the Metro Manila area.



The Supreme Court applied its previous rulings that the arbitration clause in a construction contract, such as the subcontract, "is considered by law as an agreement by the parties to submit existing or future controversies between them to CIAC jurisdiction, without any qualification or condition precedent." However, considering that the case had been pending for more than 20 years, it said that to require Alcatel to file a claim in arbitration with the CIAC "would no longer be an act of justice but oppression." It then decided the appeal on the merits and ruled in favor of Alcatel, after finding that IMBCI failed to fulfill its obligations in accordance with a construction schedule that was part of the subcontract, among others.

WHAT'S INSIDE

1 **Supreme Court decides 20-year dispute despite RTC's lack of jurisdiction**
By Ricky A. Sabornay

2-3 **Third-Party Funding in International Arbitration**
By Marvin V. Masangkay

4 **PDRC completes 14th commercial arbitration training**
Member Spotlight: **Atty. Jose Gerardo A. Medina**

Third-Party Funding in International Arbitration

By Marvin V. Masangkay

Third-party funding, while not common in the Philippines, is not a new concept. Although previously accepted only in certain jurisdictions such as the United Kingdom and Australia, third-party funding has grown exponentially over the past decade and is now recognized as a fast growing trend.[1]

As observed by the American Bar Association Commission on Ethics 20/20, third-party funding activities "have become increasingly prominent in recent years, leading to significant attention in the legal and popular press, scrutiny by the state bar ethics committees, and scholarly commentary."[2] More, third-party funding is no longer confined to court litigation but has expanded to international arbitration as well.

What is third-party funding? A simple online search yields several definitions and different business models. In a nutshell, third-party funding is an agreement where a person not party to a dispute (third-party funder) funds the litigation and/or arbitration expenses of a party to the dispute (funded party) in exchange for a share in the award if the funded party is successful. The agreement is usually on a "non-recourse" basis such that the third-party funder bears all the risks of not getting anything in return, in case the claim of the party funded is unsuccessful.

The usual benefits of third-party funding are: (1) it gives parties with meritorious claims access to justice in the face of rising litigation costs;[3] and (2) the involvement of a third-party funder with commercial expertise may mean that the litigation is carried out more proficiently, with more consideration of the possible risks and benefits of the litigation.[4]

Traditionally, funding by a non-party to a dispute is prohibited as it is considered a form of maintenance and champerty—which are criminal offenses in common law jurisdictions. "Maintenance" is defined as "an officious intermeddling in a lawsuit by a non-party by maintaining, supporting or assisting either party, with money or otherwise, to prosecute or defend the litigation",[5] while "champerty" is "a bargain between a stranger and a party to a lawsuit by which the stranger pursues the party's claim in consideration of part of any judgment proceeds ..."[6]

Although several common law jurisdictions have declassified maintenance and champerty as criminal offenses, saving provisions were included in the laws that were later used in courts to question the propriety of third-party funding.

For instance, while the Criminal Law Act 1967 of England and Wales abolished, among others, maintenance and champerty as criminal offenses, "[a] saving provision gave them a continuing half-life as its provisions did not affect 'any rule of law as to the cases in which a contract is to be treated as contrary to public policy or otherwise illegal'."[7] New South Wales in Australia also declassified maintenance and champerty as criminal offenses in the Maintenance, Champerty and Barratry Abolition Act 1993[8] but a saving provision similar to the Criminal Law Act 1967 was included. Section 6 provides that the Act "does not affect any rule of law as to the cases in which a contract is to be treated as contrary to public policy or as otherwise illegal."[9]

However, recent legal developments in common law jurisdictions have removed such cloud.

In Australia, courts have confirmed that third-party funding does not contravene public policy for states that have abolished maintenance and champerty as criminal offenses. In the 2006 landmark case of Campbells Cash and Carry Pty Limited v Fostif Pty Ltd.,[10] the High Court of Australia held that by abolishing the crimes of maintenance and champerty "any wider rule of public policy...lost whatever narrow and insecure footing remained for such a rule."[11] According to the High Court opinion:

"The difficulties thought to inhere in the prosecution of an action which, if successful, would produce a large award of damages

but which, to defend, would take a very long time and very large resources, is a problem that the courts confront in many different circumstances, not just when the named plaintiffs represent other or not just when named plaintiffs receive financial support from third party funders. The solution to that problem (if there is one) does not lie in treating actions financially supported by third parties differently from other actions. And if there is a particular aspect of the problem that is to be solved, in the first instance, through the procedures that are employed in that kind of action, it is not to be solved by identifying some general rule of public policy that a defendant may invoke to prevent determination of the claims that are made against the defendant."[12]

In addition to court litigation in common law jurisdictions, international arbitration has also accepted third-party funding.

In Asia, Singapore and Hong Kong—the Asian hubs of international commercial arbitration and dispute resolution—recently made changes in their respective laws allowing or that will allow third-party funding.

Singapore, where third-party funding of disputes was previously prohibited, passed the Civil Law (Amendment) Act 2017 on 10 January 2017 abolishing the tort of maintenance and champerty and allowing qualified professional third-party funders to fund international arbitration.

In Hong Kong, the Legislative Council of Hong Kong passed on 14 June 2017 the Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Bill 2016, which will allow third-party funding in international arbitration. Similar to other common law jurisdictions, Hong Kong also prohibited maintenance and champerty.

In the Philippine, however, there is still doubt as to the validity of third-party funding. Third-party funding is not expressly prohibited but is also not expressly allowed. Unfortunately, Philippine jurisprudence provides minimal guidance. While the Supreme Court is consistent in ruling that "[i]n this jurisdiction, we maintain the rules on champerty, as adopted from American decisions, for public policy considerations,"[13] such ruling is limited to agreements between lawyers and their clients. The rationale for the prohibition is that "[l]awyers who obtain an interest in the subject-matter of litigation create a conflict-of-interest situation with their clients and thereby directly violate the fiduciary duties they owe their clients,"[14] which, arguably, does not apply to third-party funders.

Due to the growing acceptance of third-party funding in international arbitration, it may be the right time for the Philippines to consider moving in the same direction as Singapore and Hong Kong. This is particularly relevant in enforcement of international commercial arbitral awards in the Philippines considering that under the Special Rules of Court on Alternative Dispute Resolution (Special ADR Rules),[15] a Philippine court may set aside or refuse enforcement of an arbitral award if it finds, among others, that "the recognition or enforcement of the award would be contrary to public policy."[16]

About the Author

Marvin Masangkay is a senior associate in Quisumbing Torres' Dispute Resolution Practice Group. He has 12 years of experience handling commercial, civil, criminal and appellate litigation, and alternative dispute resolution.

His practice focuses on general civil, commercial, and criminal litigation and intra-corporate disputes, and aviation regulations. He has advised and represented various clients engaged in the energy, aviation, outsourcing, pharmaceutical, mining, and manufacturing industries.

1 Eva Boolieris, "Third Party Funding: The Effect of the Growing Third-Party Funding Industry in International Arbitration on New Zealand" (2015) at p. 6 [online] <http://researcharchive.vuw.ac.nz/xmlui/bitstream/handle/10063/4617/thesis.pdf?sequence=2> Accessed 03/16/2018

2 American Bar Association Commission on Ethics 20/20 Informational Report to the House of Delegates (2012) [online] https://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20111212_ethics_20_20_alf_white_paper_final_hod_informational_report.authcheckdam.pdf Accessed on 03/16/2018

3 Supra note 1, at p. 10.

4 Id., at p. 11.

5 Black's Law Dictionary, 953 (6th ed. 1990).

6 Black's Law Dictionary 231 (6th ed. 1990).

7 Lord Neuberger, "From Barretry, Maintenance and Champerty to Litigation Funding", Harbour Litigation Funding First Annual Lecture (2013) [online] <https://www.supremecourt.uk/docs/speech-130508.pdf> Accessed on 03/16/2018

8 Maintenance, Champerty, and Barratry Abolition Act 1993, Sections 3 and 4 [online] <https://www.legislation.nsw.gov.au/#/view/act/1993/88/sec3> and <https://www.legislation.nsw.gov.au/#/view/act/1993/88/sec4> Accessed 03/16/2018

9 Maintenance, Champerty, and Barratry Abolition Act 1993, Section 6 [online] < https://www.legislation.nsw.gov.au/#/view/act/1993/88/sec6> Accessed 03/16/2018

10 [2006] HCA 41[online]< http://eresources.hcourt.gov.au/downloadPdf/2006/HCA/41> Accessed 03/16/2018

11 Id. at p. 33.

12 Id. at p. 36.

13 Conjugal Partnership of the Spouses Cadavedo v. Lacaya, G.R. No. 173188 (15 January 2014).

14 Roxas v. Republic Real Estate Corp., G.R. Nos. 208205 & 208212 (1 June 2016).

15 A.M. No. 07-11-08 SC (1 September 2009)

16 Special ADR Rules, Rule 12.4 b(ii).

PDRC completes 14th commercial arbitration training

PDRC 14th CATS trainees. Seated, from left: Atty. Frodina Mafoxci J. Rafanan, Atty. Isabella Gianna P. Palma, Atty. Anna Cristina B. De La Paz, Atty. Trisha Isabelle F. Fernandez, Justice Santiago Javier Ranada (Ret.), Dean Jejomar C. Binay, Atty. Victor P. Lazatin (lecturer), Atty. Maria Gracia P. Tan, Atty. Angel Chona Grace Valero-Nuñez, Atty. Jewel D. Bulos, Atty. Patricia Ann M. Cruz, Atty. Keisha Trina M. Guangko, Atty. Maria Jerzy Aprille D. Torres. Standing, from left: Atty. Jeremiah P. Ja ro, Engr. Percival Adonis J. Casiño III, Atty. Pacifico Angelo S. Magno, Atty. Eduardo Danilo F. Macabulos, Atty. Felippe Mart E. Closa, Atty. Erma Marie R. Guidoriagao, Atty. Maria Rachel Victoria G. Reyes, Atty. Sid Angelo M. Bautista, Dr. Elyxzur C. Ramos, Atty. Manuel D. Gacula, Atty. Fernando T. Gallardo, Jr., Atty. Rufino A. Alicante, Jr. [Not in photo: Atty. Angela Sigrid J. Along]

PDRC recently trained 25 new arbitrators during the 14th edition of its commercial arbitration training seminar (CATS) on February 12 to 16, 2018 at the University of Makati in Makati City.

The five-day intensive training began with an Introduction to Arbitration by Prof. Mario E. Valderrama. This was followed in the afternoon by a discussion on the Arbitration Agreement and Commencement of Arbitration by PDRC Vice-President for External Affairs Salvador S. Panga, Jr.

On the second day, PDRC Secretary General Roberto N. Dio gave an overview of the arbitration process and talked on Preliminary Matters, including interim measures of protection and emergency relief. In the afternoon, Atty. Jay Patrick Santiago, talked on special topics in International Commercial Arbitration.

The third day of the training featured Atty. Arthur A. Autea's lecture on the Case Management Conference and Submissions, followed in the afternoon by PDRC Chair Victor P. Lazatin, who spoke on Arbitration Hearings and the Arbitral Award.

On the fourth day, PDRC President Emeritus Dean Custodio O. Parlade lectured on the Recognition, Enforcement, Setting Aside and Refusal to Enforce Awards. In the afternoon, Atty. Eduardo R. Ceniza discussed the Arbitral Tribunal.

The participants joined in a mock arbitration facilitated by Atty. Panga, assisted by PDRC members Attys. Grace Ann C. Lazaro and Dranyl Jared P. Amoroso. On the last day of training, the participants took a written assessment to qualify them to be PDRC-trained arbitrators.

PDRC will hold the 15th CATS in July this year.

The Philippine ADR Review is a publication of the Philippine Dispute Resolution Center. All rights reserved. No part of the newsletter may be reproduced in any form without the written permission of the authors.

EDITOR **ROBERTO N. DIO**

CONTRIBUTOR **SHIRLEY ALINEA**

STAFF WRITERS **CHET J. TAN, JR.**
LEONID C. NOLASCO
RICKY A. SABORNAY
GRACE ANN C. LAZARO

THE PHILIPPINE ADR REVIEW PUBLISHES MATTERS OF LEGAL INTEREST TO PDRCI'S MEMBERS AND READERS. THE ARTICLES PRINTED IN THE REVIEW CONTAIN INDIVIDUAL VIEWS OF THE AUTHORS AND DO NOT STATE PDRCI'S POLICY. CONTRIBUTIONS MAY BE SENT TO THE PDRCI SECRETARIAT. ALL MATERIALS SUBMITTED FOR PUBLICATION BECOME PROPERTY OF PDRCI AND ARE SUBJECT TO EDITORIAL REVIEW AND REVISIONS. TEXTS OF ORIGINAL LEGAL MATERIALS DIGESTED ARE AVAILABLE UPON REQUEST.

MEMBER SPOTLIGHT

Atty. Jose Gerardo A. Medina is the managing partner of the law firm of Solis Medina Limpingco & Fajardo. He studied philosophy at the University of the Philippines in 1984, and received his Bachelor of Laws degree from the same university in 1989.

After passing the Philippine bar examinations, he became a consultant of the Secretary of Environment and Natural Resources from 1989 to 1990 and, thereafter, worked as an associate attorney of Cuevas Dela Cuesta and Delas Alas from 1990 to 1993, where he handled civil and criminal litigation.

He returned to government service in 2000, when he was appointed as the City Legal Officer of Pasay City for one year until 2001.

He is an accredited Mandatory Continuing Legal Education lecturer on data privacy and build-operate-transfer laws, and a professor on corporation law, agency, partnership and trusts at the Philippine Law School.

He is currently the president of the Integrated Bar of the Philippines, Pasay-Parañaque-Las Piñas-Muntinlupa Chapter and the Rotary Club of Parañaque City.