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THE PHILIPPINE
ADR REVIEW
Broadening its scope of arbitration advocacy

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Participants of the OADR Conference for ADR Stakeholders, with OADR Executive Director Bernadette Ongoco (front row, fourth from left), OADR Director of Training Yul Aguila (seated, leftmost), and resource persons Atty. Salvador Panga, Jr. (front row, second from left) and Francisco Pabilla, Jr. (seated, rightmost)

PDRC joins OADR roadshow on ADR

PDRC participated in the Office for Alternative Dispute Resolution (OADR) conference for alternative dispute resolution (ADR) stakeholders' conference on March 22, 2018 in Hotel Pontefino, Batangas City. The conference is a continuing program of the OADR, consistent with its mandate to promote, develop and expand the use of ADR in the private and public sectors.

The participants included members of the Integrated Bar of the Philippines Batangas City Chapter, Batangas City officials, and local barangay officials. Atty. Salvador S. Panga, Jr., PDRC Vice-President for External Affairs, talked on PDRC and Arbitration, while Francisco D. Pabilla, Jr., PDRC Assistant Secretary General, discussed mediation.

WHAT'S INSIDE

PART 1

Writing dissents

By Roberto N. Dio

Recently, a fellow arbitrator begged off from his promise to contribute an article to this publication because he was busy writing a dissent in a case that was submitted for decision. He did not expect to take a contrarian position, he said, but there were "lots of differences" between him and the majority in the analysis and evaluation of the case.

Having been in a similar situation before, I advised him to write his article instead of wasting his time on his dissent. I had written two dissents, and I felt I knew a little about it to give him "sage" advice. Since then, I have thought about the subject and decided to shed some light into it.

Dissent in arbitration

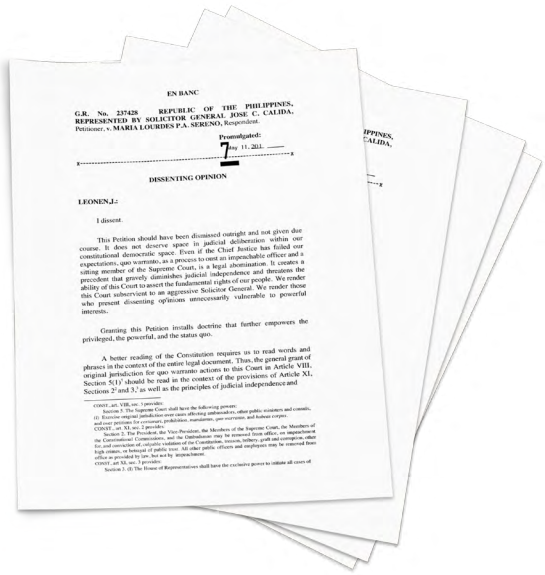
A *dissent* in arbitration is an opinion by one or more arbitrators who disagree with the decision reached by the majority in the final award. The disagreement must be both in the reasoning and result of the arbitration.

Where the arbitrator agrees with the result but disagrees with the reasoning, he may write a *concurring opinion*. A dissent and a concurring opinion are both *separate opinions*, but a separate opinion may be both concurring and dissenting.

In case there are three separate opinions without any concurrence on the result, some statutes and institutional rules provide that the presiding arbitrator shall render the award. For instance, Article 42 of the PDRC Arbitration Rules provides that "If there is no majority, unless the parties agree otherwise, the award may be made by the Chair of the arbitral tribunal alone." [Sec. (1)]

However, where the arbitration law requires a valid award to be made by a majority of its members, an award can be made only if the presiding arbitrator and one of the co-arbitrators compromise their initial views and agree upon a common position [Born, International Arbitration: Law & Practice 298 (2016, 2d ed.)].

Where the plurality of opinions results in a fractured award, this may present problems in enforcement. In that case, the parties may move to have the award interpreted by the tribunal. If the period for interpreting the award has lapsed and the award has been submitted to the courts for enforcement, Philippine courts may adopt the so-called "Marks rule" of the United States Supreme Court. In *Marks v. United States, 430 U.S. 188, 97 S. Ct. 990 (1977)*, it held that the opinion of the justices concurring in the judgment on the narrowest ground—the legal standard



EN BANC

G.R. No. 237428 REPUBLIC OF THE PHILIPPINES, REPRESENTED BY SOLICITOR GENERAL JOSE C. CALIDA, Petitioner, v. MARIA LOURDES P.A. SERENO, Respondent.

Promulgated: May 11, 2018

DISSENTING OPINION

LEONEN, J.:

I dissent.

This Petition should have been dismissed outright and not given due course. It does not deserve space in judicial deliberation within our constitutional democratic space. Even if the Chief Justice has foiled our expectations, quo warranto, as a process to oust an impeachable officer and a sitting member of the Supreme Court, is a legal abomination. It creates a precedent that gravely diminishes judicial independence and threatens the ability of this Court to assert the fundamental rights of our people. We render this Court subservient to an aggressive Solicitor General. We render those who present dissenting opinions unnecessarily vulnerable to powerful interests.

Granting this Petition installs doctrine that further empowers the privileged, the powerful, and the status quo.

A better reading of the Constitution requires us to read words and phrases in the context of the entire legal document. Thus, the general grant of original jurisdiction for quo warranto actions to this Court in Article VIII, Section 5(1)[1] should be read in the context of the provisions of Article XI, Sections 2[2] and 3,[3] as well as the principles of judicial independence and

on which the majority of the Supreme Court would agree—is considered the Court's ruling.

The value of dissents

Most national laws on arbitration are silent on separate opinions (Born, *supra*). Republic Act 897 (1953), which applies to domestic arbitration; Executive Order 1008 (1985), which governs construction arbitration; as well as Republic Act 9285 (2004), The Alternative Dispute Resolution Act of 2004, which adopted the 1985 UNCITRAL Model law, do not provide for dissents or separate opinions.

During the drafting of UNCITRAL Model law, proposals were made to permit dissenting opinions, but no sufficient need was seen for it and the proposals were eventually dropped *(Id.)*. Nonetheless, institutional rules sometimes allow dissents or separate opinions.

For instance, the Rules of Construction Arbitration of the Philippine Construction Industry Arbitration Commission states that, "A dissent from the decision of the majority or a portion thereof shall be in writing, specifying the portion/s dissented from, with a statement of the reason/s thereof, and signed by the dissenting member." (Rule 16, Sec. 16.2)

Even where the law is silent, a dissent is impliedly allowed by statutory language providing that awards be made by a majority of the arbitrators. Where there is no unanimity in the final award, there must be a dissenting minority. In a tribunal composed of three or more arbitrators, a dissent or separate opinion is always a possibility, especially where the dispute involves complex issues or substantial sums.

As Born points out (at 299), a dissent or separate opinion is only an "opinion," not an "award." It reflects only the views of the arbitrator writing it and is not an act of the tribunal. It is not a part of the award and is not subject to annulment or recognition. Hence, unless the institutional rules or the majority of the tribunal permits it, the dissent cannot be attached to the final award or issued separately by the author (at 298).

Still, a dissent serves a useful purpose in arbitration, even if the proceedings are considered confidential (ADR Act, Sec. 23) and the dissent is not published. Often, the dissent is addressed to the majority of the tribunal to give them an opportunity to revisit their position before the final award is issued. For this to happen, the dissent must be issued early, with sufficient notice to the presiding arbitrator to give the tribunal time to revise the draft award, if needed, before it is finalized.

Since arbitral awards are generally not published, there is no body of precedents that can guide future tribunals in deciding similar or related disputes. Dissents and separate opinions, however, enhance knowledge through an exchange of information and opinions. If the dissent is well written, it may even call for improvement of techniques and rulings so that better arbitrations may result.

Most importantly, a dissent preserves the integrity of the arbitration process and guarantees that the tribunal reaches its decision after a careful deliberation, often after a vigorous debate of the issues. It recognizes the right of individual arbitrators to express their views freely, without fear of being overwhelmed by the majority.

Next issue: The disadvantages of dissents and recent trends.

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 32 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.

MEMBER SPOTLIGHT

Vice President Jejomar C. Binay was the 13th Vice President of the Republic of the Philippines.

He studied Political Science (1962) and law (1967) at the University of the Philippines in Diliman, Quezon City.

He passed the bar examinations in 1968 and involved himself in human rights advocacy. During the martial law regime of President Ferdinand Marcos in the 1970s, he represented political prisoners *pro bono* and founded the Movement of Attorneys for Brotherhood, Integrity, and Nationalism (MABINI), together with other human rights lawyers.

He obtained his master's degree in National Security Administration from the National Defense College of the Philippines in 1990, Doctor of Public Administration (*honoris causa*) from the Polytechnic University of the Philippines in 1992, and Master in Management degree from the Philippine Christian University in 1998, along with other postgraduate degrees and diplomas.

From 1986 to 1987, he was appointed as acting Mayor of Makati, which was then only a municipality. He was the first local executive to be appointed after the EDSA Revolution. From 1988 to 1998, he was elected as Mayor of Makati and served for three consecutive terms. When Makati was converted into a highly-urbanized city in 1995 by virtue of Rep. Act. No. 7854 (1994), he became the first Chief Executive of the Makati City Government.

From 1990 to 1992, while serving as Makati Mayor, he concurrently served as Metro Manila Authority chair for two terms under the administration of then Pres. Corazon C. Aquino. From 1998 to 2001, he chaired the Metropolitan Manila Development Authority under the administration of then Pres. Joseph Ejercito Estrada.

From 2001 to 2007, after a break in the statutory three-term limit for local chief executives, he was again elected as Makati City Mayor and served for another three terms.

In 2010, he won the Vice-Presidential election and served as the Philippine Vice President from June 30, 2010 to June 30, 2016. He ran in the 2016 Philippine Presidential election but lost to incumbent Pres. Rodrigo R. Duterte.

Now away from the political limelight, he devotes his time running his JC Binay Foundation, a non-stock, non-profit foundation that he and his friends established in 2005 to undertake charitable projects in Makati City.

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