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Broadening its scope of arbitration advocacy

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PACV Arbitration Center ceremonial ribbon-cutting. From left: Atty. Joenar Pueblo, Atty. Ricardo Ongkiko, Atty. Roberto Dio, RTC Executive Judge Gloria Madero, and Atty. Donemark Calimon

PDRC joins PACV launching

By: Leonel O. Ocana

The Philippine Arbitration Center in the Visayas (PACV) and the Philippine Dispute Resolution Center Inc. (PDRCI), in cooperation with the Integrated Bar of the Philippines (IBP) Iloilo Chapter, formally launched the first university-based arbitration center in Western Visayas on March 17, 2018 at the College of Law, University of San Agustin (USA), Iloilo City.

A symposium was held to kick start the ceremonial opening of the PACV Arbitration Center. Atty. Roberto Dio, PDRC Secretary General, talked about Institutional Arbitration and the Role of PDRCI, while Atty. Donemark L. Calimon, President, Philippine Institute of Arbitrators (PIArb) and Executive Director, IBP ADR Center, spoke on the Role of Appointing Authority and Choosing/Challenging an Arbitrator, and PDRC Trustee Atty. Ricardo Ma. P.G. Ongkiko discussed Ad hoc Domestic Arbitration.

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PART 2

Writing dissents

By Roberto N. Dio

In Part 1, the author discussed the nature of dissents, its origin and its usefulness. This part discusses the disadvantages of dissents and recent trends.

Disadvantages of dissents

On the other hand, writing a dissent or a separate opinion means devoting time and attention to an issue that has been mooted by the majority decision. If the opinion will not be published or released to the parties, why bother? The challenge of writing a dissent is addressed first to the arbitrator, who will not be remunerated for the extra effort he will put into his separate opinion.

An arbitrator who comes from a legal background where dissents are allowed will most likely issue one. The practice of writing dissents is thought to have originated in England, where case law plays a prominent role, later adopted in the United States [Albert van den Berg, "Dissenting Opinions by Party-Appointed Arbitrators in Investment Arbitration," in Mahnoush Arsanjani et al., eds., Looking to the Future: Essays on International Law in Honor of W. Michael Reisman 48 (2010)], where it played a critical role in shaping future legislation and jurisprudence.

In contrast, civil law states generally disallow dissents, principally because of their emphasis on collegiality in dispensing justice (*Id.*). One exception is the Philippines, which is a civil law jurisdiction with hybrid common law features, because of its exposure first to Spanish and later to American legal systems.

The 1899 Hague Convention on the Pacific Settlement of Disputes does not allow dissents, nor does the European Court of Justice. But the Permanent Court of International Justice and its successor, the International Court of Justice, permit dissenting opinions. Dissents are also heavily discouraged in the adjudicative bodies of the World Trade Organization. But most international courts and tribunals, including the International Criminal Court, International Tribunal for the Law of the Sea, and the International Centre for Settlement of Investment Disputes Convention, allow dissenting opinions.

Ideally, final awards in arbitration should be unanimous. Most arbitrators in a multi-member tribunal seek to produce unanimous awards, which are less susceptible to challenge by the losing party during enforcement. Where a dissent is issued to the parties or attached to the final award, it may weaken the award by raising possible arguments against its recognition and

enforcement. In most cases, the party against whom the award is rendered adopts the dissent to discredit the final award.

One major objection to dissents is that they breach the confidentiality of the deliberative process, especially where the opinion contains improper disclosures of the individual positions made by the arbitrators. Born (*supra, 299*) wisely cautions that "The fact that arbitrators are permitted to issue dissenting or separate opinions does not mean that they should—or even are permitted to—issue *any* dissenting or separate opinion that they choose. On the contrary, the arbitrator's personal duties of impartiality, confidentiality and diligence require that any separate or dissenting opinion respect the secrecy of the arbitral deliberations (e.g., not disclose or comment upon statements made during deliberations or prior drafts of awards), respect the collegiality of the tribunal (e.g., not make offensive comments) and respect the arbitrator's duties of impartiality (e.g., not adopt a partisan approach merely advocating one party's position)."

In the heat of writing the dissent, an arbitrator may be tempted to resort to personal accusations or to introduce information that undermines the credibility of the tribunal or the enforceability of the award. Classic examples include the separate and dissenting opinions issued by members of the *ad hoc* Iran-United States Claims Tribunal and some bilateral investment treaty tribunals. Opinions of this character, Born observed, are inappropriate and arguably a breach of the arbitrators' obligation of impartiality (Id.).

The majority, whose award may be challenged by the dissent or separate opinion, may also feel aggrieved (by the extra work required to respond to the issues raised by the dissenter) or disparaged (by what may be rightly or wrongly construed as a personal attack on the majority's competence or integrity). The natural response is to avoid having the dissenter as a co-arbitrator in a future tribunal.

In one case where this author issued a dissent, that was exactly what happened. Because arbitrators practice in a small community, dissenters may find themselves kept out of the exclusive club of perennially-busy non-dissenters. This, according to an author, is the "social cost" of writing a dissent [Anton Strezhnev, You Only Dissent Once: Re-Appointment and Legal Practices in International Investment Arbitration 4 (2015)]. The pressure to maintain collegiality and to reach unanimity within the tribunal may ultimately result in the issuance of unanimous but less-than-high-quality awards.

In 1986, the International Chamber of Commerce's (ICC) Commission on International Arbitration decided that it was "neither practical nor desirable" to attempt to suppress dissenting opinions in ICC arbitrations, despite the strong view expressed by the French National Committee that dissents should be prohibited in international commercial arbitration because the awards are not reviewed by national courts on the merits. After three more reports, the ICC Commission on International Arbitration decided on April 21, 1988 that in general, "dissenting opinions should be notified to the parties by the Court of Arbitration. Relevant information should not be concealed from the parties."

Recent trends

Despite some criticisms of the usefulness of dissenting opinions, most recent authors remain in its favor, effectively saying that its benefits in promoting transparency far outweigh the disadvantages. In the words of Born, dissents serve an important role in the deliberative process and can provide a valuable check on arbitrary or indefensible decision-making (*supra*).

A notable exception is in the case of investment treaty arbitration, where authors uniformly question its usefulness because of the low level of dissents (14.5% of decisions from January 1972 to April 2015) and the fact that a vast majority of the dissents were written by the appointee of the losing party (Strezhnev, 1-2, 6).

However, in the past decade, there has been an increasing call for publication of arbitral awards to serve as precedents on certain recurring features of international trade law. Once arbitral awards are published, dissenting opinions will serve an even more important role in the development of arbitration law and practice.

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

Atty. Maria Gracia M. Pulido-Tan served as Chairperson of the Philippine Commission on Audit (COA) from 2011 to 2015. Prior to her appointment as the country's chief government auditor, she had over 30 years of experience and international expertise in law, accounting, finance, management, and governance.

A certified public accountant and a lawyer, she studied accountancy (1976) and law (1981) in the University of the Philippines in Diliman, Quezon City. In law school, she was a member of the honor society Order of the Purple Feather, a member of the editorial board of the Philippine Law Journal, and team captain of the 1980 Jessup Moot Court Competition in International Law in Washington, D.C., U.S.A. She finished seventh in the U.P. College of Law Class of 1981.

In 1987, she obtained her Masters of Law in Taxation at New York University School of Law as a Gerald L. Wallace Scholar.

In 1988, Atty. Pulido-Tan co-founded Tan Venturanza Valdez, a Philippine law firm specializing in tax, corporate, and securities laws. In 1997, she was elected President of the Tax Management Association of the Philippines.

In 2002, she entered public service as a commissioner of the Presidential Commission on Good Government, where she was in charge of finance and asset management and director of sequestered companies. In 2003, she became Undersecretary of Finance for Revenue Operations. Thereafter, she returned to the private sector and worked as an international consultant in tax reform and administration before being tapped to head the COA.

One of her programs at the COA, the Citizen Participatory Audit (CPA), which engaged citizens in the government transparency effort, won the "Bright Spots" Award at the London Open Government Partnership Summit in November 2013. In February 2015, she was awarded "Filipino of the Year" by the *Philippine Daily Inquirer*.

She currently serves as Chairperson, United Nations Independent Audit Advisory Committee; Trustee, International Budget Partnership; member, Panel of Experts, Capacity Development Working Group, Office of the Auditor General, Asian Development Bank; member, Panel of Arbitrators of the International Centre for Settlement of Investment Disputes; and as an accredited arbitrator of the Construction Industry Arbitration Commission. She is an adjunct professor at the U.P. College of Law and writes the "Qualified Opinion" column in the *Manila Bulletin*.

PDRC joins PACV launching

(Continued from page 1)

The event, which was participated by around 60 legal practitioners and law students, was organized by PACV President Atty. Joenar Pueblo, in coordination with the IBP Iloilo Chapter, USA President Rev. Fr. Frederick Commendador, Regional Trial Court Executive Judge Gloria Madero, Fr. Jessie Tabobo, USA College of Law Batch 2020, Oso Pueblo & Associates, Treñas Law Office, and Defensor Teodosio Law Office.

PACV blessing: (from left) Atty. Vicente Go, Atty. Roberto Dio, RTC Executive Judge Gloria Madero, Atty. Joenar Pueblo, Atty. Ricardo Ongkiko, Atty. Donemark Calimon and Rev. Fr. Jessie Tabobo.

Atty. Dio talks on PDRC and institutional arbitration. At the foreground are Atty. Pueblo (in dark coat) and Atty. Calimon (in white shirt).

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