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NOVEMBER 2018

Supreme Court refers tort claims to arbitration and applies arbitration clause to a non-party

By Remy Rose A. Alegre

In its Decision dated August 1, 2018 in *Strickland v. Ernst & Young LLP* (G.R. Nos. 193782 and 210695), the Second Division of the Supreme Court affirmed the Court of Appeals' reversal of the Regional Trial Court ("RTC") judgment in (a) referring the dispute between the global company Ernst & Young LLP ("EYLLP") and its former partner, Dale Strickland ("Strickland"), to arbitration pursuant to the arbitration clause in their Partnership Agreement; and (b) suspending Strickland's related civil case against Punongbayan & Araullo ("PA"), the Philippine member of EYLLP, on the basis of the same arbitration clause.



Both disputes arose from the complaint filed by Strickland to recover equitable compensation from EYLLP and PA for professional services he rendered as Lead Due Diligence Partner in connection with the Financial Advisory Services Agreement ("FASA") entered into by the National Home Mortgage Finance Corporation ("NHMFC") and PA (as agent of EYLLP) for the liquidation of the Unified Home Lending Program in 2002.

WHAT'S INSIDE

PART 1

Negotiation and mediation in the era of Trump politics

By Francisco D. Pabilla, Jr.

PDRC Executive Director Bing Pabilla reports on the highlights of the 5th AMA Conference in Jakarta, Indonesia.

Regional mediators gathered last month in Jakarta, Indonesia for the 5th Asian Mediation Association (AMA) conference to discuss and learn new ways of thinking in an era of negotiations highly influenced by the politics of U.S. President Donald Trump.

As if to underscore the impact of Trump's negotiating style, the conference had the theme "Can mediation survive in a world of Trumpian negotiators? Thought provoking – New thinking." Organized by Pusat Mediasi Nasional (PMN), the Indonesian Mediation Center, the conference was attended by close to 300 delegates from 17 countries, with the Philippines having the largest contingent.

The author was one of two Filipinos whose paper was among those selected by PMN for presentation during the conference. His paper, "Learning from Experience: Travails of a Court-Annexed Mediator," was a modified version of the article he wrote for the June and July 2015 issues of the *The Philippine ADR Review*, PDRC's monthly newsletter.

The other Philippine paper, "Judicial Dispute Resolution in the Philippines," was presented by Hon. Selma P. Alaras, Executive Judge of the National Capital Regional Trial Court in Makati City and Professorial Lecturer I of the Philippine Judicial Academy (PhilJA).

AMA is an organization of major mediation centers in Asia established in Singapore on August 17, 2007, with the Philippines as one of its founding members. It aims to promote the application of mediation and ADR in resolving business and commercial disputes through close cooperation between its members.

AMA has held four conferences since its establishment: (i) in 2009, hosted by the Singapore Mediation Centre; (ii) in 2011, hosted by the Malaysian Mediation Center; (iii) in 2014, the Hong Kong Mediation Centre; and (iv) in 2016, hosted by the China Council for the Promotion of International Trade (CCPIT) Mediation Center.



The welcome address by Mr. Fahmi Shahab, AMA Chair for 2018 to 2019 and PMN Executive Director, signaled the formal opening of the conference. This was followed by the keynote speeches of Mr. Fauzi Yusuf Hasibuan, Chair of the Indonesian Bar Association (PERADI) and Hon. Anies R. Baswedan, Governor of DKI Jakarta.

Mr. Hasibuan said, among others, that lawyers must prioritize peaceful out-of-court settlement of disputes with other lawyers, while Hon. Baswedan emphasized that the role of government is to be an effective mediator.

A total of 34 papers were presented in the two-day conference: one paper for each of the four plenary sessions, and 30 papers for the twelve breakout sessions.



Mr. Francisco D. Pabilla, Jr. (left), shown here with Mr. Fahmi Shahab, Chair of the Asian Mediation Association (AMA) for 2018 to 2019 and Executive Director, Pusat Mediasi Nasional (PMN) or the Indonesian Mediation Center.



The author, in the middle, listens attentively with the help of an interpreter in one of the presentations during one of the Plenary Sessions.

In the first plenary session on the first day (October 24), Mr. Danny McFadden¹ presented a paper on “Culture, Cultural Dimensions, Business Negotiation and Mediation.” He said that culture determines how a person acts or communicates and impacts on the way a mediator: (a) builds rapport with the parties; (b) understands the needs and interests of the parties; (c) interprets body language and other communication signals; and (d) understands the behavior and negotiation tactics of the parties.

He pointed out that parties in cross-cultural mediation must be aware of cultural differences and try to build communication “bridges” into the process.

In the second plenary session, held later in the morning of the same day, Dr. Paul Gibson² read his paper on “Blame, Shame and Fame: Understanding the Critical Role of the Social Brain in Dispute Resolution.” He explained how the brain reacts to social and physical pain.

With colorful magnetic resonance imaging (MRI)³ images of the human brain, Dr. Gibson demonstrated that negative social experience and threatening physical experiences activate the same part of the brain as physical pain. In mediation, he said, what mediators want is to maximize the function of the prefrontal cortex⁴. Dr. Gibson’s analysis of the workings of the human brain as it relates to mediation was very impressive since he was not a medical doctor or a neuroscientist by profession.

Mr. Raymond Lee⁵ and Mr. Said Faisal led a very lively discussion of their paper, “How will Trumpian Negotiators Impact Mediation?” in the third plenary session held in the morning of the second day (October 25). Messrs. Lee and Faisal believe that Trumpian negotiators are like poker players because they adopt poker tactics in order to win. They use bluffing and leveraging as ways of pushing one’s opponent to a deal. Their aim is to win, and therefore someone else must lose.

Next issue: The Singapore Convention on Mediation.

About the Author

Francisco Pabilla, Jr. was a court-annexed mediator for 12 years and at the same time the Executive Director of the Philippine Mediation Foundation, Inc. He earned his bachelor’s degree in Political Science in University of the Philippines in Diliman and Master of Arts degree in Development Studies at the Institute of Social Studies, The Hague, The Netherlands. He is currently the Assistant Secretary General of PDRCI.



1 Mr. McFadden is the Managing Director of Center for Effective Dispute Resolution (CEDR) based in Hong Kong.
 2 Dr. Gibson is the Executive Director of the Center for Conflict Management, Australia.
 3 MRI is a type of scan that uses strong magnetic fields, radio waves and a computer that produce detailed picture of the inside of the body and may help diagnose or monitor treatment (www.radiologyinfo.org).
 4 The prefrontal cortex is that part of the human brain that has been implicated in a variety of complex behaviors, including planning, and greatly contributes to personality development (www.Goodtherapy.org).
 5 Mr. Lee is the World Bank Regional Mediator for East Asia Pacific Region, while Mr. Faisal served as Senior Advisor to the Special Envoy Secretary General of ASEAN and former Executive Director of the ASEAN Center for Humanitarian Assistance on Disaster Management.

MEMBER SPOTLIGHT

Oscar Carlo F. Cajucom

is a senior associate at Gulapa Law Office and is an adjunct professor in several law schools.



He studied Political Science at the University of the Philippines, Diliman and took up law at the Ateneo de Manila University School of Law (ALS), where he obtained his Juris Doctor degree in 2012, finishing 12th in his class.

In law school, he interned at the Ateneo Human Rights Center. He was also a member of the Executive Committee of the Ateneo Law Journal (2011-12), the Lead Editor of the Ateneo Law Journal Legal Citation Guide (2012), and a member of the ALS and Philippine Delegation to the 22nd Criminal Justice Trial Advocacy Competition (Mock Trial) sponsored by the American Bar Association and the John Marshall Law School, held in March 2012 in Chicago, Ill., U.S.A.

He joined the law firm of Castillo Laman Tan Pantaleon & San Jose as an associate attorney in January 2013. After three years, he became senior manager in the legal department of the Filinvest Group, until 2018. He returned to law firm practice as a senior associate at Gulapa Law Office from April 2018 until the present.

Currently, he teaches at ALS and at the University of Makati Law School. He is also a consultant at the Office of the Dean, University of the Philippines College of Law and at the Special Protection of Children Against Sexual Abuse and Exploitation Program of the Asia Foundation.

He has written several articles in the Ateneo Law Journal.

Supreme Court refers tort claims to arbitration and applies arbitration clause to a non-party

(Continued from page 1)

The relationship between the parties disintegrated when PA tried to remove Strickland from the engagement team following his resignation from EYLLP on July 2, 2004. Strickland then sued PA for collection after the local firm objected to Strickland’s proposed terms of compensation in the revisions to the FASA.



In the opinion penned by Jardeleza, J., the Supreme Court denied Strickland’s insistence on the adjudication of his claims against PA for tortious conduct before Philippine courts, on the ground that his alleged causes of action were hinged primarily on contract, i.e., the Partnership Agreement and Strickland’s assignment letter from EYLLP.

Moreover, because Strickland’s allegations against PA were “undoubtedly hinged” and “unavoidably linked” to his previous contractual relationship with EYLLP, the Supreme Court applied the arbitration clause to PA and stayed the proceedings against it, even if PA was not a party to the arbitration contract in the Partnership Agreement.

The Supreme Court also found that Strickland’s cases against EYLLP and PA comprised of a foreign element, involving foreign parties and international transactions. Based on these circumstances, referral to arbitration would result in the expeditious resolution of the conflicts.

The Supreme Court also applied the doctrine of separability of the arbitration clause from the container contract in resolving Strickland’s argument that EYLLP allegedly failed to properly prove and authenticate the Partnership Agreement.

Finally, even if the parties did not question the jurisdiction of the RTC, the Supreme Court held that the lower court may still refuse to assume jurisdiction over Strickland’s claim based on the arbitration clause in the Partnership Agreement.

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