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THE PHILIPPINE ADR REVIEW

Broadening its scope of arbitration advocacy

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SEPTEMBER 2019



2019-2020 BOARD OF TRUSTEES. From left: Teodoro Kalaw IV, Roberto Dio, Eduardo Ong, Roger Nicandro, Victoriano Orocio, Salvador Panga, Jr, Victor Lazatin, Chief Justice Lucas P. Bersamin, Edmundo Tan, Arthur Autea, Beda Fajardo, Patricia-Ann Prodigalidad, Mario Valderrama, Charlie Ho, Joenar Pueblo and Salvador Castro, Jr.

PDRCI holds annual meeting

The Philippine Dispute Resolution Center, Inc. held its annual general membership meeting on July 11, 2019 at the venue of office in the Commerce and Industry Plaza, Taguig City.

Twelve new members were inducted by the guest of honor, Chief Justice Lucas P. Bersamin. The inductees were Anna Cristina de la Paz, Erwin Del Mundo, Janellee Dumanat, Veronica Nakpil Lladoc, Alfredo Pablo Malvar, Christopher Louie Ocampo, Jarie Osias, Joaquin Ma. Tamano, Jr., JuanVictor Valdez, Paul Edgar Villaroza, Fidel Valeros and Daryl Yanga.

PDRCI President Edmundo Tan reported on PDRC's activities and accomplishments for the past year. He highlighted the signing of the Memorandums of Agreement with the Intellectual Property Office of the Philippines on intellectual property arbitration and with

WHAT'S INSIDE



PART II

Hidden arbitrator bias

By Roberto N. Dio

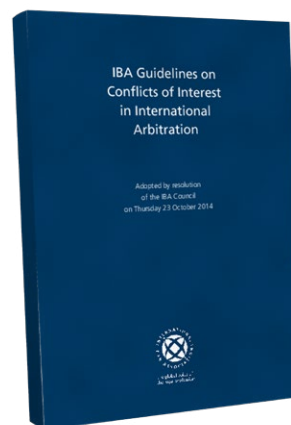
Part 1 discussed apparent bias and its elements, lack of independence and lack of impartiality. In this issue, the author writes about problems arising from disclosure and how it was addressed by the International Bar Association.

Disclosure

Disclosures following the IBA Ethics Rules soon created problems of their own. As arbitrators made more disclosures in the expectation that it would overcome the appearance of apparent bias, it also gave parties—especially recalcitrant ones—more opportunities to use challenges to delay arbitrations or to deny the opposing party the arbitrator of its choice.

The IBA noted that disclosure of any relationship, no matter how minor or serious, too often led to objections, challenges, and the withdrawal or removal of the arbitrator. Since unaccepted challenges are sometimes referred to judicial review, the parties, arbitrators, arbitral institutions, and courts then faced complex decisions about what to disclose and what standards to apply. Institutions and courts faced difficult decisions if an objection or a challenge was made after a disclosure.

To avoid delay in the arbitration, arbitrators sometimes defaulted to non-disclosure, expecting that parties would have no time to discover any past or current relationships or a former action that could result in a challenge before the award was rendered. This defeated the purpose of disclosure and denied parties the right to a fair and impartial hearing in case there were circumstances that reasonably call into question an arbitrator's impartiality or independence.



Too much disclosure, on the other hand, invited challenges, which undermined the parties' right to select arbitrators of their choosing. This tension between the right to a fair and impartial hearing and the right to appoint an arbitrator of one's choice led the IBA to issue the IBA Conflicts Guidelines, in the hope that consistent standards would result in fewer unnecessary

challenges and arbitrator withdrawals and removals.

The IBA added a caveat, however. It said that the Guidelines, which were not legal provisions, should be applied “with robust common sense and without pedantic and unduly formalistic interpretations.” It viewed the Guidelines as a beginning, rather than as an end, of the process of reducing the growing incidents of conflicts of interest in arbitration.

After affirming the general principle that “(e)very arbitrator shall be impartial and independent of the parties” throughout the arbitration, the Guidelines directed arbitrators to decline an appointment or refuse to continue as one in case of doubts as to his or her ability to be impartial or independent. Just like apparent bias, justifiable doubts exist if (a) there is an identity between a party and the arbitrator, or (b) if the arbitrator is a legal representative of a party, or (c) if the arbitrator has a significant financial or personal interest in the matter at stake. The test is if a “reasonable and informed third party” would conclude from facts or circumstances that the arbitrator would likely be influenced by factors other than the merits of the case.

If the arbitrator decides to continue after applying the third-party test to himself, he or she may then take the view of the parties (the “eyes of the parties” test) and disclose the same facts or circumstances. The Guidelines clarified that an arbitrator who made a disclosure considers himself or herself to be impartial and independent of the parties and therefore capable of performing his or her duties as arbitrator. Otherwise, he or she would have declined the nomination or appointment or resigned as an arbitrator.

Although disclosure is not an admission of a conflict of interest by the arbitrator, IBA recognized that unnecessary disclosures can invite challenges, while excessive disclosures can undermine the parties’ confidence in the process. Despite this, it decided that any doubt should be resolved in favor of disclosure. To balance this, any challenge should be successful only if an objective third-party test, such as that provided in General Standard 2 (b) of the Guidelines, is met.

For instance, in a nod to the reality of the growing size and complexity of modern law firms, the Guidelines recognized



that mere relationship with a law firm whose activities involved one of the parties would not automatically constitute a source of conflict of interest or a reason for disclosure.

However, it also imposed on the parties a (a) duty to disclose to the tribunal, the other party, and to the arbitral institution about any direct or indirect relationship between it and the arbitrator, (b) duty to provide reasonable information already available to it, and (c) duty to perform a reasonable search of publicly available information.

Similarly, the Guidelines imposed on the arbitrator an additional duty—as part of its duty to disclose—to “make reasonable enquiries” to investigate any potential conflict of interest as well as any facts or circumstances that may cause his or her impartiality or independence to be questioned.

Next issue: Implicit bias of arbitrators.



About the Authors

Roberto N. Dio is the Secretary General of Philippine Dispute Resolution Center. He has been a commercial and construction arbitrator for close to 15 years. He is a senior litigation partner of Castillo Laman Tan Pantaleon & San Jose, www.cltpsj.com.ph, and serves as a volunteer supervising lawyer of the University of the Philippines Office of Legal Aid.




NEW PDRCI MEMBERS TAKE THEIR OATH BEFORE CHIEF JUSTICE LUCAS P. BERSAMIN. From left: Atty. Janellee Dumanat, Atty. Juan Victor Valdez, Atty. Fidel Valeros, Jr., Atty. Alfredo Pablo Malvar, Atty. Jarie Osias, Atty. Veronica Lladoc, Mr. Joaquin Ma. Tamano, Atty. Daryl Yanga, Atty. Christopher Louie Ocampo, Atty. Paul Edgar Villarosa, Atty. Anna Cristina de la Paz and Atty. Erwin del Mundo.

PDRCI holds annual meeting

the Philippine Olympic Committee on sports arbitration. He also reported PDRCI's accreditation as an ADR service provider Organization by the Office for Alternative Dispute Resolution.

Treasurer Dr. Ong reported on PDRCI's healthy financial condition.

The members of the Board of Trustees who were elected for the 2019-2020 were Shirley Alinea, Arthur Autea, Salvador Castro, Jr.,

Eduardo Ceniza, Francis Chua, Gwen de Vera, Roberto Dio, Beda Fajardo, Simeon Hildawa, , Charlie Ho, Teodoro Kalaw IV, Victor Lazatin, Rogelio Nicandro, Eduardo Ong, Ricardo Ongkiko, Victoriano Orocio, Salvador Panga, Jr., Patricia-Ann Prodigalidad, Joenar Pueblo, Edmund Tan, and Mario Valderrama. Messrs. Lazatin and Tan were reelected as Chairman and President for the new term. 

MEMBER SPOTLIGHT

Atty. Ma. Christina V. Abalos is a Director III at the Office for Alternative Dispute Resolution (OADR) of the Department of Justice (DOJ).

She studied Agricultural Economics (1998) at the University of the Philippines, Los Baños before attending San Beda College of Law (2003) and, Arellano University Law School (2004), where she obtained her Bachelor of Laws degree.


In 2015, she received her Master's Degree in Public Management, Major in Public Policy and Program Administration the University of the Philippines, Diliman.

Atty. Abalos began her career as a public servant at the National Economic and Development Authority, where she was a research assistant. After studying law, she became a legal assistant at the Office of the Presidential Adviser on the Peace Process, Executive Assistant IV at the Labor Relations


Commission, and Attorney III at the Department of Labor and Employment (2007).

She joined DOJ as State Counsel I until she became State Counsel III in 2013. While at the DOJ, she worked in the Office for Competition (OFC), the DOJ Refugee Processing Unit, and the OADR.

She briefly served as an officer of the Bangko Sentral ng Pilipinas, International Operations Department before returning to the DOJ as State Counsel in the OFC in late 2014. In 2015 to 2018, she worked as Attorney IV and, later, Attorney V at the Court of Tax Appeals, in the chambers of Associate Justice Lovell R. Bautista.

She returned to the DOJ in June 2018, where she heads the OADR's Policy, Compliance, and Monitoring Service. 



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