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..... THE PHILIPPINE ADR REVIEW

Broadening its scope of arbitration advocacy

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MARCH 2020



PDRCI Secretary General Atty. Roberto N. Dio responding to a question raised by one of the participants during the open forum.

PDRCI holds ADR road shows in Davao City and Gen. Santos City

The Philippine Dispute Resolution Center (PDRCI) successfully held back-to-back road shows last month in Davao City and Gen. Santos City to generate interest in and promote alternative dispute resolution (ADR) as an alternative to costly litigation.

The first road show was on February 7, 2020 in Davao City in partnership with the School of Law, Ateneo de Davao University (AdeDU) and PDRCI's local champion, Prof. Irene Dango-Lavares. The event was graced by Davao City Vice Mayor Sebastian 'Baste' Z. Duterte as guest speaker and attended by local lawyers, including Dean Israelito P. Torreon of the College of Law, Jose Maria College, and the third year Manresa class of AdeDU School of Law. Law Dean Manuel P. Quibod gave the opening remarks, while the Integrated Bar of the Philippines (IBP) Davao City Chapter Vice President, Atty. Maceste Uy, delivered the closing remarks.

WHAT'S INSIDE



PART 2

Balancing speed and due process in private commercial arbitration

By Atty. Julius Anthony R. Omila

Last issue, the author discussed time limits in rendering an arbitral award as part of procedural fairness. In this issue, he discusses the fact of delay and dealing with it in a fair manner.

The reality of delay

Modern arbitration rules clearly take into account the reality that delay is not uncommon in arbitration.

In conducting the arbitral proceedings and to ensure the fairness of the arbitral process, the arbitral tribunal must consider, above all, the reasonableness, or lack thereof, of any possible delay that arises during the proceedings. To illustrate this point, I refer to my recent experience in two arbitrations where I sat as a member of the arbitral panel.

Upon the commencement of an arbitration proceeding, it is normally the claimant who is most prepared. Once it initiates the arbitration proceedings, the claimant is already armed with the theory of its case and knows beforehand not only the timing when it will initiate the arbitration but also everything else that is supportive of its case, such as the number and availability of its witnesses and pieces of evidence, among others. Claimant's advantage is further emphasized when it is backed by a highly competent legal team who collaborates in the preparation of its case.

Once claimant commences the arbitration, the burden is shifted to respondent to address the claims against the latter. At times, respondent may not be able to anticipate if and when the claimant will actually initiate the arbitration. Thus, once arbitration is commenced against it,

the respondent usually scampers in gathering witnesses and pieces of evidence to support its defense and counterclaims.

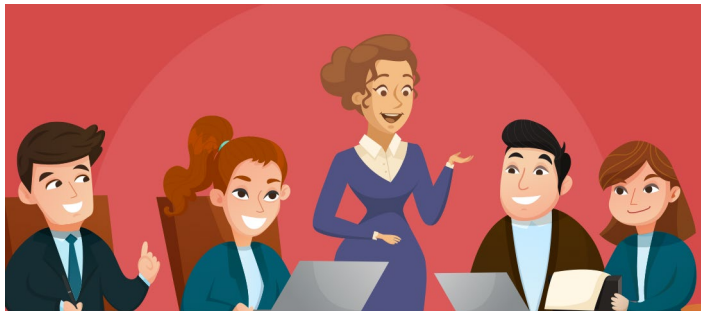
Delay sets in when respondent needs to locate key witnesses who are no longer available or connected with it. Vital pieces of evidence may not be that easily accessible as well.

Avoiding and resolving possible delays in a fair manner

In one international construction arbitration, the respondent Philippine corporation's officers who were conversant with the disputed transaction were no longer in the respondent's employ and already stationed abroad. Securing these former officers' commitment to cooperate and help their former employer in the pending arbitration posed a difficult challenge to the respondent.

Also, ensuring the availability of those witnesses on specific hearing dates when respondent can no longer compel them to do so (the officers were no longer in respondent's employ) posed an equally challenging task. There was also the practical yet very vital side of this issue—persuading those witnesses to faithfully recall, gather, and study vital pieces of evidence that will support respondent's position in that arbitration, not to mention the incentive, or lack of it, on the part of these former officers to fully cooperate in the arbitration.

Thus, in that arbitration, respondent was prompted to request the panel of arbitrators that it be given enough time to require its former officers, who will now serve as its vital witnesses in the arbitration, to submit their witness statements and vital pieces of evidence, among others.



In effect, given its unique situation, respondent asked the arbitral tribunal to give it some leeway and time extensions, invoking its right to be heard and present its case. For its part, claimant objected by pointing out that the time extensions requested by respondent were too long and would cause so much delay in the arbitration.

The arbitral tribunal was thus faced with the task of balancing between expediting the arbitral proceeding and conducting it in such manner that the substantive and procedural rights of the parties, including the respondent, were not prejudiced.

In that case, the arbitral tribunal considered the respondent’s situation, found that respondent’s request for time extensions was reasonable, and granted it. Foremost, the arbitral tribunal found that the parties, especially the claimant, would be not be prejudiced if respondent were allowed more time to submit the written statements of its witnesses and its pieces of evidence.

Even if respondent’s request for time extensions were granted, the arbitral tribunal would still have enough time to prepare and issue its award within the period agreed upon in the TOR and the applicable institutional rules.

In another domestic arbitration administered by PDRCI, respondent corporation promised to produce on the last hearing date allotted to it the last set of evidence, consisting of documents that respondent would secure from the Bureau of Internal Revenue (BIR). On the scheduled hearing date, however, respondent failed to produce the promised documents and, instead, asked for one “last chance” to secure the documents from the BIR, citing that the documents were vital to its defense and counterclaims and that tedious government bureaucracy caused the delay in securing the BIR documents. Claimant vehemently objected, stating that respondent should deemed to have waived its right to produce the documents.

The arbitral tribunal found the grounds raised by respondent as “good reasons” and granted the latter’s request.

The arbitral tribunal considered these circumstances together: the hearings were not yet declared closed at that time and, in compliance with the PDRCI Rules, the tribunal had more than enough time to prepare and issue its award within the period agreed in the TOR. The claimant would likewise not be prejudiced if respondent were given additional time to secure the identified documents.

On the other hand, respondent would be prejudiced if it were not allowed to present its documents, which were vital to its defense and

counterclaim. Thus, the tribunal accorded the respondent its right to be heard. As promised, respondent produced the promised documents on the next hearing date. Thereafter, with no further evidence from the parties, the arbitral tribunal declared the hearings closed.

The tribunal relied on Article 39 (1) of the PDRCI rules, which provides:

The arbitral tribunal may inquire of the parties if they have any further evidence to offer or witnesses to be heard or submissions to make and, if there are none, it may declare the hearings closed.

Most importantly, in both instances cited above, the arbitral tribunal considered the respondents’ procedural behavior and “good faith” during the proceedings, particularly the way respondents cooperated during the arbitral process.

Full opportunity to be heard

Equal treatment of the parties and full opportunity to be heard are both duties of the arbitral tribunal and a right of the parties, including the respondent, in the arbitration.

How “full” is full opportunity to be heard? How is it distinguished from “reasonable” opportunity to be heard, as may be found in some arbitration rules?

A commentary on Article 17 of the UNCITRAL Arbitration Rules is instructive on this point:

... the reference to a full opportunity naturally draws meaning in contradistinction to an incomplete opportunity. One would certainly not expect any difference in behavior between arbitrators called on to afford a full opportunity and those called on to afford a reasonable opportunity to present a case. *Where reference is made to ‘full’, ‘reasonable’ or adequate’, the opportunity must be a complete one, allowing each and every tenable argument to be presented in an appropriate format.* Whichever adjective is used, the intent is never to afford an unlimited opportunity as to timing, extent or manner of presentation of a case. [Clyde Croft, et. al., A Guide to the UNCITRAL Arbitration Rules 177 (2013); italics supplied]

Certainly, the expeditious conduct of the arbitration and resolution of the dispute cannot be done at the expense of the parties’, including the respondent’s, right to be heard.

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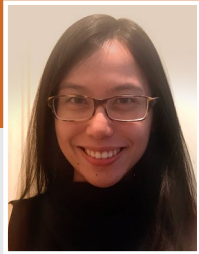
About the Authors

Atty. Julius Anthony R. Omila is a PDRCI member. He is a Trustee of the Philippine Institute of Arbitrators (PIArb) and a member of the Chartered Institute of Arbitrators (CIArb). He is also the corporate secretary of the Philippine International Center for Conflict Resolution, Inc. (PICCR) and an accredited arbitrator of the Construction Industry Arbitration Commission (CIAC) and Wholesale Electricity Spot Market (WESM).

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MEMBER SPOTLIGHT

**Atty. Maria Luisa
Dominique D. Mauricio**



Atty. Mauricio is an Associate Solicitor at the Office of the Solicitor General of the Philippines (OSG).


She studied speech communication, *magna cum laude*, in 2011 at the University of the Philippines, Diliman, where she also obtained her Juris Doctor (JD) degree in 2015. She was the marketing head of the U.P. Bar Operations Committee and the U.P. Golf Association.

She also worked as a volunteer for the U.P. Law Student Government and the Philippine Human Rights Victims Claims Board. Her JD thesis delved on the *Proposed Policy Recommendations to Govern Surrogacy in the Philippines*.

After passing the Philippine Bar in 2016, she joined the OSG as an Attorney II and was later on promoted to Associate Solicitor in 2017. At the OSG, she represented the Republic of the Philippines in various litigations before the Court of Appeals and the Supreme Court, including assisting in the defense of the State's prosecution of public officers accused of graft and corruption, and aiding in the defense of state interest in criminal cases.

In 2019, she obtained her Master of Laws at Columbia Law School in New York, U.S.A., where she was awarded the Parker School Recognition of Achievement in International and Comparative Law. Her LL.M. research paper was on *Railroading the Right to be Heard for the Sake of Time: A Critical Evaluation of the Balancing of Interests Between Expediency in the Resolution of Disputes and Upholding the Parties' Due Process Rights in Emergency Arbitration*.

She currently assists the Philippine Government in an ongoing UNCITRAL investment arbitration. In addition to her work at the OSG, she renders volunteer work for Gawad Kalinga Community Development Foundation, Inc. and organizes the Peace and Conflict seminars for Rotary International, District 3810.

Atty. Mauricio is a member of the PDRC Arbitration Rules Revision Committee. 


**PDRCI holds ADR road shows in
Davao City and Gen. Santos City**



Atty. Shirley Alinea emphasizing a point during this lecture on Careers in ADR to the participants, which include Dean Quibod of the College of Law, Atenero de Davao University and Davao City Vice Mayor Hon. Sebastian Z. Duterte.

The second road show was on February 8, 2020 in General Santos City, which was co-sponsored by the College of Law, Notre Dame Marbel University (NDMU), the IBP SOCGEN Chapter, the GenSan Chamber of Commerce and Industry, and IBP Sarangani Chapter. NDMU Dean Gerard Mosquera opened the roadshow, which was attended by members of the academe (students and faculty members), businessmen, Regional Trial Court Executive Judge Panambulan Mimbisa, government employees, including barangay officials, and civil society organizations. Atty. Donna Ann Balboa moderated the event.

PDRC Secretary General Roberto Dio talked on negotiation, while Asst. Sec. Gen. Francisco Pabilla, Jr. discussed mediation. PDRC Trustee Joenar Pueblo spoke on arbitration, after which Deputy Sec. Gen. Shirley Alinea gave a presentation on careers in ADR.

The two road shows combined were attended by approximately 130 participants, sixty in Davao City and seventy in General Santos City. All the participants expressed interest in being trained as PDRC commercial arbitrators. 

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