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A. Legislation and rules

A.1 Legislation

Republic Act No. 9285, or the Alternative Dispute Resolution Act, which has not been amended since its enactment in 2004, continues to govern arbitration in the Philippines.

The Office for Alternative Dispute Resolution (OADR)⁴ has set up a Technical Working Group for Arbitration (TWG) to propose revisions to the ADR Act. The TWG has completed seven workshops this year and has already submitted a draft to the OADR for review and approval. The notable proposals include: (a) a single regime for both international and domestic arbitrations; (b) the adoption of the 2006

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⁴ OADR, an attached agency of the Department of Justice, was created to promote, develop and expand the use of ADR in the Philippines (Republic Act No. 9285, Section 49).

amendments to the UNCITRAL Model Law on interim measures and preliminary orders; (c) provisions allowing enforcement of emergency arbitration awards; and (d) the inclusion of provisions on adjudication as a form of ADR. A consultative conference, where the proposed amending provisions were presented to stakeholders, was held on 11 December 2017. The OADR intends to submit the draft to Congress by early 2018.

In addition, the implementing rules and regulations (IRR) of Executive Order (EO) No. 78 took effect on 27 May 2017. The IRR implements the mandate of EO 78 to all government agencies in the Executive Department to include provisions on ADR in contracts involving public-private partnership projects, build-operate-and-transfer projects and joint venture agreements with the government. The IRR require government contracts to include ADR mechanisms which are designed to prevent or minimize conflicts before they arise (ie, pre-dispute processes such as negotiation and a dispute resolution board) or those intended to resolve or mitigate disputes after they have arisen (ie, post-dispute processes such as mediation or arbitration). Parties agreeing to include an arbitration clause in their contract can find guidance from the IRR, which provides for recommendations on the specific terms of the ADR clause, such as the place of arbitration, governing law and arbitration rules.

A notable provision of the IRR is that the arbitration clause should state that the subsequent submission of a dispute to arbitration shall be conditioned upon the execution of a separate written agreement between the contracting parties defining the terms of reference (TOR) of such arbitration. Thus, in preparing the arbitration clause, the following should be carefully considered:

- (a) As the execution of a TOR is a condition precedent to arbitration, to what extent can a party refuse to sign a TOR and thereby avoid arbitration? Can a party seek to amend the arbitration clause through the TOR?



- (b) Will designating a locally based arbitration institution avoid the TOR requirement and what are the pros and cons?
- (c) If the arbitration is domestic, will the TOR requirement still apply even if the administering institution is not locally based?

A.2 Institutions, rules and infrastructure

The Philippine Dispute Resolution Center, Inc. (PDRC) is the main arbitration institution in the Philippines. As of December 2017, it has a total of 308 members, 201 of which are trained arbitrators while 53 are accredited. So far, the institute has completed thirteen sessions of its five-day arbitration training aimed to equip participants with knowledge and skills in resolving commercial disputes through arbitration.

Separately, the Integrated Bar of the Philippines, the national organization of all qualified Philippine lawyers, is currently looking to form an arbitration institution which can administer arbitration proceedings using its own rules. To make arbitration a more readily available and accessible mode of dispute resolution throughout the country, the IBP arbitration center seeks to provide ADR services to those who cannot afford the commercial rates of established ADR institutions. While it is an IBP initiative, the arbitration center will not be a lawyer-only body. It is contemplated that membership in the IBP will not be made a condition to becoming a trustee or officer of the center, or to being appointed as an arbitrator in an arbitration under its rules.

B. Cases

B.1 *Federal Builders, Inc. v. Power Factors, Inc.*⁵

In *Federal Builders, Inc. v. Power Factors, Inc.* (Federal), the Supreme Court ruled that an agreement to submit a construction

⁵ G.R. No. 211504, 8 March 2017.

dispute to arbitration need not be contained in a signed and finalized construction contract; it is enough that the agreement be in writing.

Federal, the respondent in an arbitration initiated by Power Factors, Inc. (Power) before the Construction Industry Arbitration Commission (CIAC), sought to dismiss the claim because CIAC allegedly had no jurisdiction. Federal argued that the Contract of Service between it and Power, which contained an arbitration clause, was a mere draft that was never finalized and signed.

The arbitral tribunal denied Federal's motion to dismiss and proceeded with the arbitration without its participation. The tribunal then rendered a final award against Federal, which Federal appealed to the Court of Appeals (CA). The CA affirmed the final award, with modification.

On further appeal, the Supreme Court rejected Federal's position. Citing the CIAC Revised Rules of Procedure Governing Construction Arbitration (CIAC Rules), the Supreme Court held that all that was required for CIAC to acquire jurisdiction was for the parties to a construction contract to agree to submit their disputes to arbitration. Under the CIAC Rules, this agreement need not be signed or be formally agreed upon, as it could be in the form of other written communication such as an exchange of letters or electronic mail.

The Supreme Court explained that this liberality in the form of the arbitration agreement conforms to the intent of Executive Order No. 1008 (1985), the law creating the CIAC, which is to achieve the speedy and efficient resolution of disputes and to alleviate court dockets.

The Supreme Court further noted that: (a) under the Civil Code, a contract need not be in writing to be obligatory and effective, unless the law specifically requires it; (b) Federal did not sign the Contract of Service because it rejected the provision relating to down payment, but it did not challenge the arbitration clause in the draft until the dispute arose; and (c) Federal asserted the same contract to support its



claim against Power. Thus, it was inconsistent for Federal to rely on the draft when it was beneficial to it and then to reject the draft's efficacy and existence to relieve itself of the unfavorable award.

This ruling is favorable to arbitration because it upholds the parties' intention to submit the dispute to arbitration, regardless of the form by which such intention is expressed, as long as it is in writing. This is also in line with Articles 7(2) and (3) of the UNCITRAL Model Law, which states that an arbitration agreement is in writing "if its content is recorded in any form."

B.2 *Department of Foreign Affairs v. BCA International Corporation, et.al.*⁶

In *Department of Foreign Affairs v. BCA International Corporation, et.al.*, the Supreme Court dismissed the petition of the Department of Foreign Affairs (DFA) for *certiorari* for the DFA's failure to observe the rules on court intervention, as allowed under the ADR Act and the Special Rules of Court on Alternative Dispute Resolution (Special ADR Rules).

The petition, which was directly filed by the DFA with the Supreme Court, assailed the procedural orders of the arbitral tribunal in the ad hoc arbitration proceedings between the DFA and BCA International Corporation (BCA). The orders admitted BCA's amended Statement of Claim, after BCA had already presented its evidence, and allowed for the submission of additional documentary evidence from the parties.

In dismissing the case, the Supreme Court held that under the Special ADR Rules, its power to review is limited to an appeal by *certiorari* from a judgment or final order or resolution of the CA, raising only questions of law. While the Supreme Court recognized that there have been previous instances when it overlooked the rule on hierarchy of courts, and took notice of a petition for *certiorari* alleging grave abuse

⁶ G.R. No. 225051, 19 July 2017.

of discretion by a lower court, those cases involved issues that were of transcendental importance or where their resolution on the merits would better serve the ends of justice. The Supreme Court impliedly held that this is not the case here. Also, since the petition was from an interlocutory order of the arbitral tribunal, and not from a final order of the CA or the Regional Trial Court, the Supreme Court held that the petition must be dismissed.

This ruling further strengthens the legal framework for arbitration in the Philippines, as it upholds the rule that courts only have a limited role in respect of ongoing arbitral proceedings.

B.3 *CE Construction Corporation v. Araneta Center, Inc.*⁷

In *CE Construction Corporation v. Araneta Center, Inc.*, the Supreme Court upheld the limited grounds for appeal from awards rendered by the CIAC and cautioned that court appeal should not become an ingenious means for undermining the integrity of arbitration or for conveniently setting aside the conclusions arbitral processes make.

In this case, the respondent Araneta Center, Inc. (ACI) sent invitations to different construction companies, including CE Construction Corporation (CECON), to bid for the design and construction of the Gateway Mall. The tender documents described the Project’s contract sum to be a “lump sum fixed price.”

CECON offered the lowest tender amount but was only informed orally that the project was awarded to it a month after its proposal lapsed. ACI later accepted CECON’s tender for an adjusted contract sum, but no formal contract documents were delivered or executed.

From the commencement of CECON’s engagement, several changes in the project caused CECON to request cost adjustments and time extensions and, eventually, to initiate arbitration before the CIAC. The arbitral tribunal mainly ruled in favor of CECON, noting that CECON could claim cost adjustments because the initial lump sum offer was

⁷ G.R. No. 192725, 9 August 2017.



no longer availing in view of the events which actually unfolded. ACI appealed to the CA. The CA reduced the award in favor of CECON and increased the award to ACI on the ground that the lump sum fixed price arrangement between ACI and CECON was inviolable. Thus, the CA deleted much of the tribunal's monetary award to CECON. CECON appealed to the Supreme Court.

The Supreme Court reinstated the arbitral tribunal's award primarily on the ground that there was never a meeting of minds on the lump sum price. Subsequent events not only showed that there was no meeting of minds on the initial offer contract sum, but there was no meeting of the minds on the contract sum at all. Thus, it was necessary for the CIAC to unravel the terms binding on the parties from sources other than the documents. This was well within the CIAC's jurisdiction.

The Supreme Court reiterated that by reason of the technical expertise of the CIAC, its decisions must be accorded primacy and deference. There is only very narrow scope for assailing CIAC's rulings and any appeal must be limited to questions of law. Consistent with this approach, the Supreme Court is duty-bound to be extremely watchful and to ensure that an appeal does not become an artifice for the parties to undermine the process in which they voluntarily elected to engage. Consequently, the Supreme Court's instinctive inclination must be to uphold the factual findings of arbitral tribunals.

Unfortunately, this ruling will likely result in confusion as to the scope of court review of CIAC awards. In previous decisions, the Supreme Court held that factual issues may be reviewed on appeal by the CA. However, without expressly reversing these decisions, this ruling now limits review of CIAC decisions to purely legal questions.

C. Funding in international arbitration

There is no specific Philippine law which allows or disallows third-party funding for arbitrations in the Philippines.

What is prohibited under Philippine law, for being contrary to public policy, are champertous agreements or those whereby a third person undertakes to carry on a litigation at their own cost and risk, in consideration of receiving, if successful, a part of the proceeds or the subject sought to be recovered (*Nocom v. Camerino, et.al.*, G.R. No. 182984, 10 February 2009).

Particularly, Philippine rules on legal ethics forbid a lawyer from contracting with their client for part of the matter in litigation in exchange for conducting the case at the lawyer's expense. This is designed to prevent the lawyer from acquiring an “*additional stake in the outcome of the action which might lead them to consider their own recovery rather than that of their client, or to accept a settlement which might take care of their interest in the verdict to the sacrifice of that of their client in violation of their duty of undivided fidelity to their client's cause*” (*The Conjugal Partnership of the Spouses Vicente Cadavedo, et.al. v. Victorino Lacaya*, G.R. No. 173188, 15 January 2014). This should be distinguished from a contingency fee arrangement, which is an agreement in writing where the fee, often a fixed percentage of what may be recovered in the action, is made to depend upon the success of the litigation. In this case, the client still pays for the litigation expenses. Although the lawyer may, in good faith, advance expenses, this is subject to reimbursement.

However, it is arguable that the rules on champertous contracts do not apply to arbitration, it being a private dispute resolution process different from litigation. It can also be argued that Philippine rules on legal ethics are binding only on lawyers and, thus, do not apply to non-lawyer third-party funders or party representatives. Notably, other jurisdictions which recognize the common law doctrine of champerty have recently legalized third-party funding in arbitration, subject to appropriate financial and ethical safeguards.⁸

Currently, there are no initiatives to push for third-party funding in arbitrations in the Philippines. It also remains to be seen whether the

⁸ See chapters in this *Yearbook* on Hong Kong and Singapore.



Philippines will adopt a policy similar to that of Hong Kong and Singapore, considering that the Philippine Supreme Court has been very conservative with respect to the treatment of the practice of law, compared to Hong Kong and Singapore.