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Philippines

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A. Legislation and rules

A.1 Legislation

Republic Act No. 9285, or the Alternative Dispute Resolution Act (the "ADR Act"), to which no legislative amendment has been made since its enactment in 2004, continues to govern arbitration in the Philippines.

In 2015, the Office for Alternative Dispute Resolution (OADR)[3] set up two Technical Working Groups (TWG), one for arbitration and another for mediation, to propose revisions to the ADR Act, taking into account recent developments and best practices in international arbitration.

The TWG for arbitration held at least four separate sessions in 2016 to discuss the matter. The notable proposals include: (a) the adoption of the 2006 UNCITRAL Model Law to update the law on international commercial arbitration, which is presently governed by the 1985 version; (b) having a single law, the UNCITRAL Model Law, govern both domestic and international arbitrations seated in the Philippines,

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

as opposed to the present system where domestic arbitration continues to be governed by an old law partially based on the US Federal Arbitration Act; (c) the inclusion of provisions on adjudication as a form of alternative dispute resolution; (d) corresponding amendments to arbitration provisions of other Philippine statutes; and (e) the creation of a registry for the voluntary registration of arbitral awards, to facilitate issuance of authentic copies.

If finalized, these proposed amendments will be subject of public consultations and discussions, after which they will be submitted to the Philippine Congress for consideration. The OADR hopes to be able to finalize its proposals for submission to Congress by 2017.

A.2 Institutions, rules and infrastructure

The Philippine Dispute Resolution Center, Inc. (PDRC) is the main arbitration institution in the Philippines. It revised its rules of arbitration in 2015 to include, among others, provisions on consolidation of arbitrations, multiparty and multicontract arbitrations, expedited procedure and emergency relief. The PDRC has a total of 277 members, of whom 176 are trained arbitrators and 53 are accredited arbitrators.

B. Cases

B.1 *Bases Conversion Development Authority v. DMCI Project Developers, Inc.*[4]

In *Bases Conversion Development Authority* (BCDA) *v. DMCI Project Developers*, the Supreme Court held that "an arbitration clause in a document of contract may extend to subsequent documents of contract executed for the same purpose."

BCDA entered into a Joint Venture Agreement (JVA), containing an arbitration clause, with Philippine National Railways (PNR) and other foreign corporations for the purpose of constructing a railroad system.

[4] G.R. No. 173137, 11 January 2016.

Pursuant to, and for purposes of implementing, the JVA, BCDA incorporated a separate entity named "Northrail." The JVA was later amended to include DMCI Project Developers, Inc. (DMCI-PDI) as a party. DMCI-PDI injected money into Northrail on the understanding that it would be an additional investor of Northrail after the latter increased its authorized capital stock.

The increase in the authorized capital stock of Northrail did not materialize, as a result of which DMCI-PDI demanded the return of its deposit. When BCDA and Northrail refused, DMCI-PDI served a demand for arbitration invoking the arbitration clause in the original JVA. BCDA and Northrail failed to respond, prompting DMCI-PDI to file a petition before the trial court to compel BCDA and Northrail to arbitrate. DMCI-PDI's petition was granted by the trial court, a decision that was eventually appealed by BCDA to the Supreme Court. BCDA argued that only parties to an arbitration agreement can be bound by that agreement and that the arbitration clause that DMCI-PDI sought to enforce was found only in the original JVA, to which DMCI-PDI was not a party.

The Supreme Court denied the petition, ruling that DMCI-PDI, when the JVA was amended, became a party to the original JVA. It became bound to the terms of both the JVA and its amendment. The Supreme Court explained that the original JVA, its amendment and the MOA must be read together, as they were all executed to achieve the single purpose of implementing the railroad project. In other words, they should be treated as one contract because they all form part of the whole agreement. Hence, the arbitration clause in the JVA should be interpreted as applicable to all the parties to the JVA, including those which became parties after its amendment.

B.2 *Andrew D. Fyfe et al. v. Philippine Airlines, Inc.*[5]

The Supreme Court ruled in *Andrew D. Fyfe et. al. v. Philippine Airlines, Inc.* that an arbitral tribunal has no jurisdiction to resolve a claim against corporations undergoing insolvency rehabilitation.

PAL underwent insolvency rehabilitation proceedings before the Securities and Exchange Commission (SEC), which issued an order decreeing, among others, the suspension of all claims for payment against PAL. To convince its creditors to approve its rehabilitation plan, PAL engaged Regent Star Services Ltd. (Regent Star) under a Technical Services Agreement (TSA). Pursuant to the TSA, PAL submitted a side letter, which provided, among other things, that in the event PAL terminated the TSA, the liability would be to the aggrieved parties, that is, the advisers to be engaged by Regent Star.

PAL later terminated the TSA on the ground of lack of confidence. This prompted petitioners (the advisers engaged by Regent Star) to initiate arbitration proceedings in the PDRC pursuant to the TSA. The tribunal ordered PAL to pay the petitioners termination penalties, but PAL moved to vacate the award in the trial court. The trial court ruled in favor of PAL.

On appeal to the Supreme Court, it was held that a claim for payment brought against a distressed corporation cannot prosper following the issuance of the suspension order by the SEC, regardless of when the claim arose or when the action was filed. As long as a corporation is under a management committee or a rehabilitation receiver, all actions for claims against it, whether for money or otherwise, must yield to the greater imperative of corporate rehabilitation, excepting only claims for payment of obligations incurred by the corporation in the ordinary course of business.

This case was filed prior to the Philippine Financial Rehabilitation and Insolvency Act (FRIA) coming into effect. Under the FRIA, a dispute relating to the rehabilitation plan or the rehabilitation proceeding may

[5] G.R. No. 160071, 06 June 2016.

be referred to arbitration or other modes of dispute resolution should the court determine that such mode will resolve the dispute more quickly, fairly and efficiently than the court. Unfortunately, the Supreme Court did not provide guidance on how the FRIA, if applicable, would be applied to situations such as that in the case of *Fyfe*.

B.3 *Department of Foreign Affairs v. BCA International Corporation*[6]

Department of Foreign Affairs (DFA) *v. BCA International Corporation* (BCA) holds that "deliberative process privilege" can be invoked in arbitration proceedings under the ADR Act.

In an Amended Build-Operate-Transfer Agreement (the "Agreement"), the petitioner DFA awarded the Machine Readable Passport and Visa Project (MRP/V Project) to the respondent BCA. DFA later sought to terminate the Agreement in the course of its implementation. BCA opposed the termination and commenced *ad hoc* arbitration proceedings.

In the course of the arbitration, BCA sought the assistance of the court in issuing subpoena *ad testificandum* and subpoena *duces tecum* to certain officials of the DFA. DFA objected on the ground that the presentation of the witnesses and documents relating to the MRP/V Project was prohibited by law and protected by deliberative process privilege, that is, a principle that considers communications by an officer of an executive department, which are "pre-decisional" or "deliberative" in nature, to be privileged. The purpose is to allow discussion of issues without fear of criticism for holding unpopular positions or fear of humiliation for one's comments. The trial court granted the application for subpoena.

On appeal, the Supreme Court held that deliberative process privilege can be invoked in arbitration proceedings. The court ruled that if an official is compelled to testify before an arbitral tribunal and the order

[6] G.R. No. 210858, 29 June 2016.

of an arbitral tribunal is appealed to the courts, this official can be inhibited by fear of later being subject to public criticism, preventing such official from making candid discussions within their agency. The Supreme Court remanded the case to the trial court to determine if the documents sought to be produced in the pending arbitration were protected by the deliberative process privilege.

The *DFA* case provides an insight into the Supreme Court's position on the extent to which privileged communications may be invoked in arbitration proceedings. Parties to arbitration proceedings should be able to invoke the privileged character of certain information and documents in an arbitration proceeding. This is naturally subject to the arbitral tribunal's determination as to whether the information is indeed privileged. Notably, though, the Supreme Court seemed to suggest that arbitral awards are appealable to the courts. It should be clarified that arbitral awards are not appealable on the merits, but may be challenged on limited grounds. In addition, although court proceedings may lead to disclosure of arbitration records, this would be the exception rather than the rule. In any event, even in arbitration-related court proceedings, there are remedies available to protect a party against disclosure of certain information and documents provided during the arbitration.

B.4 *Federal Express Corporation and Rhicke Jennings v. Airfreight 2100, Inc. and Alberto D. Lina*[7]

In the recent case of *Federal Express Corporation* ("FedEx") *and Rhicke Jennings v. Airfreight 2100, Inc.* ("AF2100") *and Alberto D. Lina*, the Supreme Court held that the confidentiality of arbitration proceedings is designed to encourage parties to ventilate their claims or disputes in a less formal, but spontaneous manner. Thus, a person who participates in such a proceeding is entitled to speak their mind without fear of being prejudiced (in this case, of being criminally prosecuted).

[7] G.R. No. 216600, 21 November 2016.

FedEx and AF2100 were parties to an arbitration administered under the rules of the PDRCI. In the course of the arbitration proceedings, FedEx's witnesses executed and submitted their respective statements. While the arbitration was pending, AF2100's owner filed a criminal case for slander against one of FedEx's witnesses on the ground that his statements in the arbitration were defamatory against AF2100's owner. In the complaint, AF2100's owner quoted certain portions of the statements of the FedEx witness during the arbitration.

FedEx applied for a Confidentiality/Protective Order with the trial court. The trial court eventually dismissed the Petition, the dismissal of which, on appeal, was upheld by the Court of Appeals (CA). The CA ruled that the statements were not relevant to the issues in the arbitration, were "made without any bearing on the subject proceedings are not confidential in nature."

The Supreme Court, on appeal by FedEx, reversed the findings of the trial court and the CA and ruled that information, to be considered confidential, only need to be "relative to the subject of mediation or arbitration." It "need not be strictly confined to the discussion of the core issues in the arbitral dispute" and, by definition, "relative" simply means "connected to." It means that "parties are encouraged to discuss openly their grievances and explore the circumstances that might have any connection to identifying the source of the conflict in the hope of finding a better alternative to resolve the parties' dispute." Even granting that the weight of the statements was not fundamental to the issues in the arbitration, the court ruled, they were still connected to, and propounded by, a witness who relied upon the confidentiality of the proceedings. Thus, they could not be used to support the criminal complaint for slander against one of FedEx's witnesses.

The court also noted that both the parties agreed in their Terms of Reference to keep arbitration proceedings as confidential and, thus, they should be bound by such agreement.

The *FedEx* ruling is a significant and positive development in Philippine arbitration, particularly because it re-affirms the

confidentiality of arbitration proceedings and lays down the parameters in determining whether the rules on confidentiality and protective orders apply to particular information disclosed in the arbitration, namely that: (1) an ADR proceeding is pending; (2) a party, counsel or witness disclosed information or was otherwise compelled to disclose information; (3) the disclosure was made under circumstances that would create a reasonable expectation, on behalf of the source, that the information shall be kept confidential; (4) the source of the information or the party who made the disclosure has the right to prevent such information from being disclosed; (5) the source of the information or the party who made the disclosure has not given their express consent to any disclosure; and (6) the applicant would be materially prejudiced by an unauthorized disclosure of the information obtained, or to be obtained, during the ADR proceeding.

Citing the Implementing Rules of the ADR Act, the court in *FedEx* likewise held that arbitration proceedings, including the records, evidence, award and other confidential information, are not just confidential, but are privileged in character.

C. Trends and observations

C.1 The Philippine SEC to adopt ADR in resolving Intra-Corporate Disputes

In July 2016, the Philippine SEC announced that it will adopt ADR as a mode of resolving intra-corporate disputes. At present, intra-corporate disputes are heard by trial courts under special rules of procedure. Although the procedure is intended to be summary in nature, litigation in the Philippines is generally protracted. Thus, to address this problem, the SEC is considering allowing the parties to resolve their disputes privately through arbitration. The SEC is also looking into including a provision in the proposed new Corporation Code that will encourage corporations to provide in their articles of incorporation and bylaws the use of ADR as the dispute resolution mechanism.

C.2 The IBP to issue guidelines on *ad hoc* arbitrations

The National President of the Integrated Bar of the Philippines (IBP) is the designated appointing authority in *ad hoc* arbitrations. After 12 years, since the adoption of the UNCITRAL Model Law as the Philippine Law on international commercial arbitrations, the IBP is now in the process of finalizing its guidelines for *ad hoc* arbitrations. The guidelines define the rules governing the IBP National President's exercise of powers as the default appointing authority in *ad hoc* arbitrations.

The IBP also recently designated part of its facilities as an arbitration center to be available to parties to arbitration proceedings. The center was inaugurated on 9 December 2016.

In addition, the IBP has resolved to advocate and promote the use of ADR in the resolution of disputes and actively cooperate in making the Philippines a preferred dispute resolution venue. The IBP has further resolved to: (a) support the continuous improvement of, and amendment of, the ADR Act; (b) conduct training programs to develop the ADR expertise of lawyers and judicial officers; and (c) conduct activities to establish and strengthen ADR in the Philippines, taking into account the experience of ADR practitioners who have developed expertise in the field.