Kluwer Arbitration Blog

SIAC Manila Conference 2023: Deep Dive into Arbitration Trends in the Philippines

Mark Dean D.R. Itaralde · Sunday, November 5th, 2023

The Singapore International Arbitration Centre (SIAC) returned to Manila in full force in 2023. While the last SIAC Manila Conference 2019 was an intimate gathering of only 80 participants, this year's '*SIAC Manila Conference 2023: Deep Dive into Arbitration Trends*' held on 25 May 2023 attracted more than 800 registrants, and SIAC had to cap the conference attendees at 500 practitioners, government representatives, and in-house counsel. These attendance figures alone demonstrate the extent to which arbitration and alternative dispute resolution (ADR) are gaining prominence in the Philippines. SIAC appears to be on the frontlines of influencing this progress, having administered cases involving 169 parties from the Philippines with a total sum in dispute in excess of SGD 5 billion in the last five years.

Ms. Gloria Lim, CEO of SIAC, and *Ms. Irene Alogoc*, the Executive Director of the Office for Alternative Dispute Resolution – Philippines (OADR), opened the conference. Ms. Lim emphasized the global surge in popularity of arbitration, along with SIAC's rise to become the world's second most-preferred arbitration institution, with users over the past five years spanning over 100 jurisdictions. Ms. Lim also highlighted that some of the largest Philippine companies have been entrusting high-value disputes to SIAC. The total sum in dispute with Philippine parties in 2021 was USD 1.9 billion and USD 1.7 billion in 2018. Ms. Alogoc then highlighted how ADR mechanisms in the Philippines were evolving through the respective contributions of the different branches of the government. OADR, with a fresh vision to develop and expand the use of ADR and elevate the standards of all available ADR mechanisms in the country based on international standards and best global practices, has now been able to complete accrediting about 100 arbitrators and five ADR institutions operating in the Philippines.

The conference featured engaging panel discussions on four topics to capture the attendees' diverse interests.

Panel No. 1: Dispute Resolution Clauses and the Arbitral Process

The first session discussed the rudiments of drafting dispute resolution clauses and certain issues relating to arbitral process. *Mr. Kevin Nash*, SIAC's Registrar, moderated the panel, which included *Mr. Chris Bailey*, a Partner at Stephenson Harwood LLP; *Mr. Elmar B. Galacio*, a Senior Partner at Cruz Marcelo & Tenefrancia Law; *Mr. Arleo Magtibay*, the Executive Director of the

Philippine Dispute Resolution Center Inc. (PDRCI) and Managing Partner of Magtibay Angeles & Alfelor Law Offices; and *Prof. Mario Valderrama*, who serves as General Counsel in the Philippine Construction Industry.

All of the panelists emphasized the importance of using model clauses provided by reputable arbitral institutions, such as SIAC, to ensure efficiency and completeness of procedural requirements, instead of drafting from scratch. Mr. Bailey then highlighted key considerations when drafting arbitration clauses, including determination of the arbitral seat, governing law, and institution, and enforceability of arbitral awards in domestic courts. For multi-tier dispute resolution clauses, Prof. Valderrama suggested that requirements of pre-arbitral mechanisms must be precisely defined to ensure their applicability.

Mr. Galacio stressed the need for thorough preparation and collation of materials before serving a Notice of Arbitration, given the time limitations once arbitration is triggered. Finally, Mr. Magtibay advised focusing on essential details when drafting and serving the Notice, which, under PDRCI, include the details on the parties, their relationship, dispute resolution clause, prayer sought, and the payment of filing fees.

Panel No. 2: Technology Disputes

The second session explored technology industries, underscoring various disputes arising within this context and how the existing ADR principles relate. *Ms. Adriana Uson*, Director & Head (Americas) of SIAC moderated the panel, which included *Mr. Francisco Viceni II G. Alba*, Operations Head of the Alternative Dispute Resolution Services and Adjudication Officer of the Intellectual Property Office of the Philippines (IPOPHL); *Mr. Nathan Marasigan*, a Partner at M Law; *Mr. Christopher Louie D. Ocampo*, a Partner at ACCRALAW; *Ms. Kristine Claire Ongcangco*, the Founder of Parlon and Partner of Ongcangco Ponce and Associates Law; and *Ms. Lars Serzo*, a Partner at Disini Law.

Mr. Ocampo integrated the discussion of other panelists to come up with certain characteristics of technology disputes. First, technology disputes frequently involve cross-border parties, raising issues of conflicts of laws and jurisdictional complexities. Mr. Marasigan proved this by explaining the decentralized, distributed, and immutable nature of blockchain technology, WEB 3.0, and cryptocurrencies, which transcend traditional jurisdictions and enable global transactions, at any given time, anywhere.

Second, technology disputes are extremely technical which raises doubts as to effectiveness of traditional dispute resolution mechanisms to fairly resolve technology disputes. Ms. Serzo demonstrated the complexities arising from financial technology application created by the disparity between constantly evolving online systems and the familiarity of users with old centralized systems. The extreme technicalities involve issues that traditional dispute resolution mechanisms may not be able to address.

Third, the time sensitivity of rapidly evolving technology necessitates robust protection for highly confidential information. The fast evolution of start-up applications, as discussed by Ms. Ongcangco, underscores the need for enhanced safeguards for classified technology configurations. Mr. Alba related the potential adverse outcomes of counterfeiting and online piracy, necessitating swift regulatory action to prevent uncontrollable proliferation on the web.

Fourth, technology disputes create novel issues, or unconventional parties without relevant precedents. Mr. Marasigan introduced Kleros, a decentralized arbitration service functioning based on a decentralized autonomous organization (DAO) structure, as a potential solution for resolving technology disputes. However, this option remains costly and does not enjoy the support of experts. Also, Mr. Ocampo expressed reservations about the compatibility of DAOs with established legal frameworks, democratic principles, and centralized systems.

As to the suitability of various ADR methods for technology disputes, Mr. Marasigan considered amicable settlement or mediation as more effective means due to time sensitivity. Ms. Serzo agreed that for disputes involving cross-border parties, arbitration is preferred, given its flexibility. Ms. Ongcangco stressed that ADR clauses in borderless contracts should be non-negotiable, as availing of traditional dispute resolutions is impossible. The discussion concluded with the speakers still advocating for arbitration as a suitable ADR method for technology disputes, citing the United Kingdom's Digital Dispute Resolution Rules as an example of an efficient resolution procedure with accelerated timelines.

Panel No. 3: Corporate Disputes

The third session explored two key areas of corporate disputes: the evolving concept of arbitration of intra-corporate disputes, and the current trends in mergers and acquisitions conflicts. *Ms. Thea Elyssa Vega*, SIAC Counsel, moderated the panel comprised of *Mr. Dranyl Jared Amoroso*, a Partner at the Dispute Resolution Practice Group of Quisumbing Torres; *Mr. Enrique Dela Cruz Jr.*, a Senior Partner at Divina Law; *Mr. Prakash Pillai*, a Partner at Clyde & Co Classis Singapore Pte Ltd; and *Mr. Roland Glenn Tuazon*, a Partner at Romulo Mabanta Buenaventura Sayoc & De Los Angeles.

Mr. Amoroso introduced Section 181 of the Philippines' Revised Corporation Code, as further implemented by the Securities and Exchange Commission's Memorandum Circular No. 8, Series of 2022, which now allows for arbitration as a mechanism to resolve intra-corporate disputes (see a previous post on this development here). As clarified, Section 181 only applies to disputes that arise from implementation of articles of incorporation or bylaws, and those which arise from intra-corporate relations. It does not apply to listed corporations, criminal offenses, or disputes involving third parties. Peculiar to Section 181 is the need to indicate the number of arbitrators and the procedure for their appointment in the arbitration agreement itself, to make it enforceable. Mr. Pillai noted the similarity in Singapore, where corporate minority oppression claims are likewise arbitrable, although not all reliefs may be available through arbitration, as the tribunal may not have jurisdiction if the subject is *in rem* or involves other parties.

Mr. Dela Cruz explained that arbitration for intra-corporate disputes remains obscure in the Philippines as parties prefer going to regular courts due to availability of immediate reliefs or urgent intervention from the courts. He proposed that adopting the Emergency Arbitration Rules of SIAC could potentially make arbitration a viable alternative for obtaining immediate relief for intra-corporate disputes.

Mr. Tuazon shifted to M&A conflicts by categorizing these into either pre-closing or post-closing disputes. Pre-closing disputes cover issues such as withdrawal from the transaction, application of the material adverse effect clauses, and discrepancies over representations and warranties. Under

pre-closing disputes, Mr. Tuazon highlighted the trends of seeking injunctive relief and the treatment for irreparable harm. Mr. Tuazon shared the trend in share-purchase contracting to acknowledge irreparable harm even if damages can be quantified. Additionally, Mr. Tuazon proposed defining Efforts clauses and Material Adverse Effect clauses with precision, for ease in interpretation.

Post-closing disputes involve failure to meet expectations or disputes over valuations. For these disputes, he underscored the need to clearly define the experts' scope of work and the binding nature of their determinations, since expert determination in post-closing disputes, particularly in true-ups or purchase price adjustments may become an additional issue, if the arbitral tribunal is also faced with the issue concerning the validity or binding nature of an expert determination.

Panel No. 4: Investor-State Dispute Settlement

The final session covered recent trends and the trajectory of Investor-State Dispute Settlement (ISDS) while touching on the relevance of climate change in renegotiating investment treaties. Mr. Nash returned to moderate the panelists including *Ms. Joanne Lau*, a Partner at Allen & Overy; *Ms. Wendy Lin*, Co-Chair of YSIAC Committee and also Partner at Wong Partnership LLP; *Mr. Albert Marsman*, a Partner at De Brauw Blackstone Westbroek; and *Ms. Jane E. Yu*, a Senior State Solicitor at the Office of the Solicitor General of the Philippines.

Ms. Lau gave a primer on ISDS, linking ISDS to investment treaties that basically introduce protections extended by host states to investors. In exploring the processes available for administering ISDS, Ms. Lau identified three approaches: the ICSID Convention and Rules, UNCITRAL Arbitration Rules, and other arbitral institutions with ISDS arbitration rules (e.g., SIAC). Ms. Lau then shared the criteria that must be satisfied to invoke ISDS provisions, particularly the Double-Barreled Test, requiring investors to be qualified in their home state and to possess qualified investments in the host state.

Ms. Lin then discussed the interplay between Public International Law and domestic commercial law in ISDS in understanding state consent and qualifying investments. Since jurisdictional objections are both raised during ISDS arbitration, and enforcement proceedings, Ms. Lin noted a Singapore Court's ruling that jurisdictional objections not raised during the underlying ISDS proceeding may no longer be raised as new arguments during an enforcement proceeding. Ms. Lin therefore suggested that, even if some small arguments may not be meritorious, it is important to still include these in writing memorials so they can be reargued once jurisdictional objections are raised before the enforcement courts.

Shifting to the intersection of ISDS and climate change issues, Mr. Marsman emphasized that climate change can serve as a driving force to establish new framework for renegotiating investment treaties and incentivize regulatory changes among states. Given the impacts of climate change, society and states must actively pursue the energy transition which requires substantial foreign private funding. These critical foreign private investments heavily rely on investment treaties for protections, hence the need to also adjust investment treaties in this regard.

Finally, Ms. Yu addressed recent innovations and proposed changes in ISDS arbitration to restore the public nature and enhance the effectiveness of the ISDS mechanism while considering a more fair and balanced procedural framework. These include creation of Code of Conduct for

Arbitrators, the advocate mechanism, and enhanced due process. Procedural advancements, such as allowing counterclaims and the participation of non-parties as *amicus curiae*, are also being considered to enhance transparency and inclusivity in the ISDS process.

In concluding the day-long conference, Ms. Uson, a Filipino herself, affirmed SIAC's unwavering commitment to the Philippines. Based on the enthusiasm of the attendees, it would seem that this commitment flows in both directions.

The author is currently a Legal Counsel for renewable energy projects at ACEN Corporation. This article is submitted in a personal capacity.

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