

# THE PHILIPPINE ADR REVIEW

JUNE 2013

BROADENING ITS SCOPE OF ARBITRATION ADVOCACY



## SECRETARIAT

3rd Floor, Commerce and Industry Plaza  
(besides Blue Leaf and Venice Piazza Mall)  
1030 Campus Avenue cor. Park Avenue  
McKinley Town Center, Fort Bonifacio  
1634 Taguig City

Telefax: 822-4102  
Email: [secretariat@pdrcci.org](mailto:secretariat@pdrcci.org)  
Website: [www.pdrcci.org](http://www.pdrcci.org)

## OFFICERS

Chief Justice Artemio V. Panganiban (Ret.)  
*Chairman*

Atty. Custodio O. Parlade  
*President Emeritus*

Atty. Victor P. Lazatin  
*President*

Atty. Miguel B. Varela  
*Vice Chairman, Internal Affairs*

Atty. Eduardo R. Ceniza  
*Vice Chairman, External Affairs*

Atty. Beda G. Fajardo  
*Vice-President*

Atty. Salvador S. Panga, Jr.  
*Secretary General*

Atty. Mario E. Valderrama  
*Deputy Secretary General*

Mr. Gregorio S. Navarro  
*Treasurer*

Dr. Eduardo G. Ong  
*Assistant Treasurer*

Atty. Gwen Grecia-De Vera  
*Corporate Secretary*

Atty. Ricardo Ma. P.G. Ongkiko  
*Assistant Corporate Secretary*

## BOARD OF TRUSTEES

Atty. Shirley F. Alinea  
Atty. Daisy P. Arce  
Atty. Arthur P. Autea  
Atty. Donemark J.L. Calimon  
Engr. Salvador P. Castro, Jr.  
Atty. Eduardo R. Ceniza  
Atty. Gwen Grecia-De Vera  
Atty. Roberto N. Dio  
Atty. Beda G. Fajardo  
Atty. Jose A. Grapilon  
Atty. Victor P. Lazatin  
Mr. Gregorio S. Navarro  
Atty. Rogelio C. Nicandro  
Dr. Eduardo G. Ong  
Atty. Ricardo Ma. P. G. Ongkiko  
Atty. Victoriano V. Orocio  
Atty. Salvador S. Panga, Jr.  
Atty. Edmund L. Tan  
Atty. Mario E. Valderrama  
Atty. Miguel B. Varela



Wholesale Electricity  
Spot Market

## Philippine Electricity Market Board accredits WESM arbitrators

By Jesusito G. Morillos

During its meeting in March 2013, the Philippine Electricity Market Board (PEM Board), which governs the Wholesale Electricity Spot Market (WESM), approved the accreditation of 12 new WESM arbitrators, ten of them from PDRCI. They are PDRCI President Victor P. Lazatin, Chairman Emeritus Dean Custodio O. Parlade, trustees Eduardo Ceniza, Mario Valderrama, Donemark Calimon, Ricardo Ongkiko, Arthur Autea, and Salvador Castro, Jr., and members Zenaida Ongkiko-Acorda and Teodoro Kalaw IV. They joined trustee Salvador Panga, Jr. and two others who were earlier accredited as members of the former WESM Dispute Resolution Group.

The PEM Board also designated the Philippine Institute of Arbitrators, Inc. (PIArb) as lead third-party service provider to accredit new WESM arbitrators. PIArb, with the support of PDRCI, the Philippine Institute of Construction Arbitrators and Mediators (PICAM), and the Institute of Integrated Electrical Engineers (IEEE), will offer Basic WESM and Basic Arbitration courses on September 24 to 27, 2013 at the Traders Hotel Manila. PIArb will announce details of the course offerings beginning June 2013.

The courses will introduce aspiring arbitrators and practitioners to the WESM, its structure and operation, and the management of disputes market participants.

Republic Act No. 9136 (2001) or the Electric Power Industry Reform Act of 2001 (EPIRA) removed the government monopoly of electric power generation and transmission through the National Power Corporation. The EPIRA allowed competition in power generation among many private generators, while power transmission became regulated (since there was only one national grid for this purpose) and privatized, and power distribution was regulated and likewise privatized. **PAGE 4 ►**

### CONTENTS

Philippine Electricity Market Board accredits WESM arbitrators .....	1 & 4
Post-mortem conference in arbitration .....	2-3
Member Spotlight: Atty. Eloy E. Bello IV .....	4



# Post-mortem conference in arbitration

By Roberto N. Dio

Some years back, I represented a respondent in an international commercial arbitration where we sought to prove our counterclaims against several subsidiaries of the claimant, a global conglomerate. We wanted to prove that under the applicable law, which happened to be Philippine law, the claimant was liable for the acts of its subsidiaries.

During the oral hearing, we presented documentary evidence in support of our counterclaim as well as object evidence in the form of links to the claimant's website, which we projected on a screen for the tribunal and the witnesses to follow. When we examined the claimant's witness, we asked him to lead us through the claimant's website and to the linked sites of its subsidiaries.

The witness obliged and described the matrix of relationships between the claimants and its subsidiaries, essentially affirming our version of the transactions. We argued at the close of the oral hearing that since the subsidiaries were acting for the claimant, then their liabilities to the respondent should be set off against its liability to the claimant.

We felt certain that the tribunal would rule our way. The opposing counsel, who tried in vain to block our examination, sank in his chair at the end of the hearing. My team was cheerful as we packed our bags, returned the case folders to the document boxes, and rolled the projector screen for the trip back to the office. It was another day, another case terminated.

A month later, we received the Final Award. The tribunal found in favor of the claimant and threw out our counterclaims, ruling that these were not arbitrable. We read and reread the award but we could not understand the ruling. It was a bare

decision that did not bother to examine the evidence we presented for the respondent; it simply said in short, choppy sentences that our counterclaim had no merit and therefore was rejected.

Our client, who shared our confidence in the aftermath of what we thought was a slam-dunk hearing, was shocked. As counsel, we could not explain what happened. Since there was no appeal from the adverse award, our client was disappointed at the process. It was no understatement that our client became disenchanted with arbitration after reading the award.

More recently, I sat in a tribunal that resolved a complex commercial dispute between two Philippine corporations. The award held both parties liable for damages to each other but respondent was found to have acted in bad faith, resulting in a judgment for punitive damages against it. As I signed the Final Award, I wondered how the parties and their counsel would react to the result of the arbitration.

Would the claimant and the respondent agree with the verdict of the tribunal? Would their counsel wonder, as I did years earlier, how and why the tribunal reached its decision? Would their counsel be put in a predicament trying to explain our findings and conclusions to their clients?

As I pondered the questions, I realized



that the absence of an appeal from the arbitral award deprived the parties of a meaningful opportunity to review the soundness of the tribunal's judgment. Rightly or wrongly, the Final Award became a part of their contract and bound them to the result of the arbitration. In not a few instances when the Final Award was not well crafted, parties often felt that the result was no better than a coin toss: heads the claimant wins, tails the respondent prevails.

While the Final Award may be vacated under the New York Convention, the grounds are narrow and limited. In many jurisdictions, the Philippines included, the courts' policy has been one of non-intervention in the arbitration process. Unless the petitioner demonstrates a clear and convincing ground to vacate the Final Award, the courts will generally decline to review the arbitral award.

## Post-mortem conferences

As a rule, the arbitral tribunal's jurisdiction ends upon the release of the Final Award. Unless there is a request to clarify an ambiguity in the Final Award



or to correct obvious typographical or calculation errors in it, the tribunal becomes *functus officio* and ceases to exist as a neutral body.

For a brief time prior to the lapse of the period to file the request for correction or clarification, however, the tribunal may convene *sua sponte* or at the request of the parties to hear them in a *post-mortem* conference.

“Post mortem” is a Latin phrase that literally means “after death.” Commonly used in chess matches, it is a post-game analysis made by both players or by either player and their coaches and analysts to see what went right and what went wrong in the game and the alternatives available to the players during the match. In pathology, it is an examination of a dead body to determine the cause of death. In most cases, including in warfare and in arbitration, it is simply an analysis or discussion of an event held soon after it has occurred, especially to determine the cause of a failure.

Instead of terminating their jurisdiction upon the release of the Final Award, the

tribunal may invite the parties and their counsel to a post-mortem conference to explain how each member of the tribunal voted on the issues, how they arrived at their conclusions, how they appreciated the parties’ evidence, and what each party—and their counsel—did right or could have done right. The parties themselves may ask for a post-mortem conference if the tribunal does not issue an invitation.

During the post-mortem conference, the parties and their counsel may ask questions to clarify any ambiguity or correct any typographical or calculation error in the award. The witnesses may attend and understand what was lacking in their testimonies and what part of their testimonies were accepted or rejected by the tribunal. The parties may ask the tribunal to explain its findings, with a view to better understanding the arbitral award and facilitating compliance with it.

The post-mortem conference will not be an extension of the arbitration process but it will be part of the post-arbitration services of the tribunal. During the conference, the tribunal may listen to complaints and criticisms of the parties and their counsel, such as delays and costs.

While explaining the Final Award, the tribunal may educate the parties and their counsel on the advantages and finer points of arbitration, suggesting possible alternative theories and evidence to improve the claims and defenses. In the exchange, the parties and their counsel will acquire a better understanding of the arbitration process and get to know the arbitrators better. The next time they have a dispute, they will be in a better position to prepare for arbitration.

### Procedure

Once the tribunal sets the post-mortem conference, it may prepare an agenda, which will include a condition that anything discussed in the conference will be confidential and will not be a part of the arbitration process. The conference need not be recorded. Hence, nothing said or disclosed during the conference may be

used by any party to challenge the tribunal or the Final Award.

The post-mortem conference may be included in the procedural rules of the tribunal or it may be included in the agreed Terms of Reference of the arbitration. In any event, the post-mortem conference will be contractual in nature and transactional in character. It will be part of the closing services to be performed by the tribunal to the parties and their counsel.

Before the conference is called, the parties and their counsel may be required to sign a confidentiality and non-disclosure agreement as well as a waiver of the right to rely on any information disclosed during the conference as a ground to challenge the arbitrators or the Final Award. To make the agreement and waiver compelling, it may include a penalty or liquidated damages clause.

The post-mortem conference benefits the parties and their counsel, who get a better understanding of the Final Award and the arbitration process. The tribunal also benefits from post-mortem conferencing by getting feedback from the parties and their counsel, who are usually the principal stakeholders in arbitration. The arbitration process ultimately benefits from the conferencing by improving the procedure, eliminating roadblocks, and making arbitration more transparent and efficient. 

### About the Author



Atty. Dio is the editor of *The Philippine ADR Review*. He is a senior litigation partner of Castillo Laman Tan Pantaleon & San Jose, where he has practiced for the past 28 years. He is an accredited Court of Appeals mediator, construction arbitrator, and bankruptcy practitioner. He has represented claimants and respondents in both domestic and foreign arbitrations.

**MEMBER SPOTLIGHT**

## Atty. Eloy E. Bello IV

Eloy Bello is a senior partner and head of the intellectual property department of Jimenez Gonzales Bello Valdez Caluya & Fernandez (JGLaw). He was former head of its litigation department.



He finished law from the Ateneo de Manila University in 1984, after receiving his BA degree in Political Science in 1979. He was a silver medalist in law school for being a consistent member of the Dean's List. During his senior year, he was elected President of the Law Student Council. He was a member of the editorial staff of the Ateneo Law Journal and a member of the Ateneo Legal Aid.

After passing the Philippine bar examinations, he joined JGLaw as a litigation associate. Atty. Belo has acted as a member or chairman of the arbitral tribunal as well as counsel for the parties in various arbitrations before the Philippine Dispute Resolution Center, Inc. (PDRCI) and the Philippine Construction Industry Arbitration Commission (CIAC).

Currently, he is an associate member of The Chartered Institute of Arbitrators (CIArb), and a member of the Philippine Institute of Arbitrators, Inc. (PIArb) and the Dispute Resolution Board Foundation. He is also an accredited arbitrator of PDRCI.

He is a member of the Philippine Bar Association (PBA), Law Association for Asia and the Pacific (LAWASIA), and *Association Internationale Pour La Protection Dela Propriete Industrielle* (AIPPI). He is the representative of his law firm in the International Trademark Association (INTA).

Since 2002, Atty. Bello sat in the Board of Trustees of The Law Foundation of Makati, Inc. He served as its President in 2004. 

## Philippine Electricity Market Board accredits WESM arbitrators

◀ **PAGE 1** Consistent with the principles in Physics that electricity cannot be economically stored in large quantities and that it travels at the speed of light in a vacuum, and to optimize supply and demand, EPIRA mandated the establishment of WESM as a centralized exchange for trading of electric power.

The WESM is initially autonomous but will eventually become independent, with the government Department of Energy (DOE) maintaining policy oversight and the government Energy Regulatory Commission maintaining regulatory oversight over the market. This autonomy led to the adoption of agreement-based arbitration as a mode of settling disputes within this closed circuit, self-governing market. The idea that separating the adjudication and regulatory functions of WESM was a good governance tool—since one would serve to check and balance the other—paved the way for arbitration to replace the former regulatory adjudication as the mode of dispute resolution.

In the absence of a bilateral contract, the WESM Rules serves as the framework that defines the legal relationship between and among trading participants on matters of their rights and obligations and other essentials of contract like pricing.

The WESM Rules requires that all market participants sign an “Arbitration Agreement At-Large,” so called because power transmission is gross-pooled and it is not known among the WESM members who would, or would not, be participating in a particular hourly bidding. The WESM Rules also provides that any and all disputes shall be settled by arbitration in accordance with the Dispute Resolution Market Manual (DRMM). Only *inter-partes* cases, or disputes between WESM members, will be resolved by arbitration.

Disputes involving violations of law or regulations, e.g., abuse of market power/position, cartelization, anti-competitive or discriminatory behaviors, and economic and physical withholding shall continue to be within the exclusive jurisdiction of the Energy Regulatory Commission. 

*The Philippine ADR Review is a publication of the Philippine Dispute Resolution Center, Inc.  
All rights reserved. No part of the newsletter may be reproduced in any form  
without the written permission of the authors.*

Roberto N. Dio, *Editor*

Shirley Alinea, Donemark Calimon,  
and Ramon Samson, *Contributors*

Arveen N. Agunday, Leonid C. Nolasco,  
and Ryan P. Oliva, *Staff Writers*