Republic of the Philippines
Supreme Court
Manila

SECOND DIVISION

DEPARTMENT OF FOREIGN AFFAIRS, Petitioner,	**G.R. No. 210858**
	Present:
- versus -	CARPIO, *J.*, Chairperson, BRION, DEL CASTILLO,* MENDOZA, and LEONEN, *JJ.*
BCA INTERNATIONAL CORPORATION, Respondent.	Promulgated: 29 JUN 2016

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DECISION

CARPIO, *J.*:

The Case

This petition for review[1] assails the Orders dated 11 October 2013[2] and 8 January 2014,[3] as well as the Resolution dated 2 September 2013,[4] of the Regional Trial Court of Makati City (RTC), Branch 146, in SP. PROC. No. M-7458.

The Facts

In an Amended Build-Operate-Transfer Agreement dated 5 April 2002 (Agreement), petitioner Department of Foreign Affairs (DFA) awarded the Machine Readable Passport and Visa Project (MRP/V Project) to respondent BCA International Corporation (BCA), a domestic corporation. During the

* On official leave.

1 *Rollo*, pp. 17-45. Under Rule 45 of the 1997 Rules of Civil Procedure.

2 Id. at 46-49. Penned by Presiding Judge Encarnacion Jaja G. Moya.

3 Id. at 50.

4 Id. at 51-56.

implementation of the MRP/V Project, DFA sought to terminate the Agreement. However, BCA opposed the termination and filed a Request for Arbitration, according to the provision in the Agreement:

> *Section 19.02. Failure to Settle Amicably* – If the Dispute cannot be settled amicably within ninety (90) days by mutual discussion as contemplated under Section 19.01 herein, the Dispute shall be settled with finality by an arbitrage tribunal operating under International Law, hereinafter referred to as the *"Tribunal"*, under the **UNCITRAL Arbitration Rules contained in Resolution 31/98 adopted by the United Nations General Assembly on December 15, 1976**, and entitled "*Arbitration Rules on the United Nations Commission on the International Trade Law"*. The DFA and the BCA undertake to abide by and implement the arbitration award. The place of arbitration shall be Pasay City, Philippines, or such other place as may be mutually agreed upon by both parties. The arbitration proceeding shall be conducted in the English language.[5] (Emphasis supplied)

On 29 June 2009, an *ad hoc* arbitral tribunal[6] was constituted. In an Order dated 15 April 2013,[7] the arbitral tribunal approved BCA's request to apply in court for the issuance of subpoena, subject to the conditions that the application will not affect its proceedings and the hearing set in October 2013 will proceed whether the witnesses attend or not.

On 16 May 2013, BCA filed before the RTC a Petition for Assistance in Taking Evidence[8] pursuant to the Implementing Rules and Regulations (IRR) of "The Alternative Dispute Resolution Act of 2004," or Republic Act No. 9285 (RA 9285). In its petition, BCA sought the issuance of subpoena *ad testificandum* and subpoena *duces tecum* to the following witnesses and documents in their custody:[9]

Witnesses	Documents to be produced
1. Secretary of Foreign Affairs or his representative/s, specifically Undersecretary Franklin M. Ebdalin and Ambassador Belen F. Anota	a. Request for Proposal dated September 10, 1999 for the MRP/V Project; b. Notice of Award dated September 29, 2000 awarding the MRP/V Project in favor of BCA and requiring BCA to incorporate a Project Company to implement the MRP/V Project; c. Department of Foreign Affairs Machine Readable Passport and Visa Project Build-Operate-Transfer Agreement dated February 8, 2001; d. Department of Foreign Affairs Machine Readable Passport and Visa Project Amended Build-Operate-Transfer Agreement dated April 5, 2002;

5 Id. at 264.

6 Composed of Atty. Danilo L. Concepcion as chairman, and Dean Custodio O. Parlade and Atty. Antonio P. Jamon, as members.

7 *Rollo*, pp. 83-84.

8 Id. at 68-80.

9 Id. at 72-77.

	e. Documents, records, papers and correspondence between DFA and BCA regarding the negotiations for the contract of lease of the PNB building, which was identified in the Request for Proposal as the Central Facility Site, and the failure of said negotiations; f. Documents, records, reports, studies, papers and correspondence between DFA and BCA regarding the search for alternative Central Facility Site; g. Documents, records, papers and correspondence between DFA and BCA regarding the latter's submission of the Project Master Plan (Phase One of the MRP/V Project); h. Documents, records, papers and correspondence among DFA, DFA's Project Planning Team, Questronix Corporation, MRP/V Advisory Board and other related government agencies, and BCA regarding the recommendation for the issuance of the Certificate of Acceptance in favor of BCA; i. Certificate of Acceptance for Phase One dated June 9, 2004 issued by DFA; j. Documents, records, papers and correspondence between DFA and BCA regarding the approval of the Star Mall complex as the Central Facility Site; k. Documents, records, papers and correspondence among DFA, Questronix Corporation, MRP/V Advisory Board and other related government agencies, and BCA regarding the recommendation for the approval of the Star Mall complex as the Central Facility Site; l. Documents, records, papers and correspondence between DFA and BCA regarding the DFA's request for BCA to terminate its Assignment Agreement with Philpass, including BCA's compliance therewith; m. Documents, records, papers and correspondence between DFA and BCA regarding the DFA's demand for BCA to prove its financial capability to implement the MRP/V Project, including the compliance therewith by BCA; n. Documents, records, papers and correspondence between DFA and BCA regarding the DFA's attempt to terminate the Amended BOT Agreement, including BCA's response to DFA and BCA's attempts to mutually discuss the matter with DFA; o. Documents, records, papers and correspondence among DFA and MRP/V Advisory Board, DTI-BOT Center, Department of Finance and Commission on Audit regarding the delays in the implementation of the MRP/V

	Project, DFA's requirement for BCA to prove its financial capability, and the opinions of the said government agencies in relation to DFA's attempt to terminate the Amended BOT Agreement; and p. Other related documents, records, papers and correspondence.
2. Secretary of Finance or his representative/s, specifically former Secretary of Finance Juanita D. Amatong	a. Documents, records, papers and correspondence between DFA and Department of Finance regarding the DFA's requirement for BCA to prove its financial capability to implement the MRP/V Project and its opinion thereon; b. Documents, records, papers and correspondence between DFA and DOF regarding BCA's compliance with DFA's demand for BCA to further prove its financial capability to implement the MRP/V Project; c. Documents, records, papers and correspondence between DFA and DOF regarding the delays in the implementation of the MRP/V Project; d. Documents, records, papers and correspondence between DFA and DOF regarding the DFA's attempted termination of the Amended BOT Agreement; and e. Other related documents, records, papers and correspondence.
3. Chairman of the Commission on Audit or her representative/s, specifically Ms. Iluminada M. V. Fabroa (Director IV)	a. Documents, records, papers and correspondence between DFA and COA regarding the COA's conduct of a sectoral performance audit on the MRP/V Project; b. Documents, records, papers and correspondence between DFA and COA regarding the delays in and its recommendation to fast-track the implementation of the MRP/V Project; c. Documents, records, papers and correspondence between DFA and COA regarding COA's advice to cancel the Assignment Agreement between BCA and Philpass "for being contrary to existing laws and regulations and DOJ opinion"; d. Documents, records, papers and correspondence between DFA and COA regarding DFA's attempted termination of the Amended BOT Agreement; and e. Other related documents, records, papers and correspondence.
4. Executive Director or any officer or representative of the Department of Trade	a. Documents, records, papers and correspondence between DFA and BOT Center regarding the delays in the implementation of the MRP/V Project, including DFA's delay in the

and Industry Build-Operate-Transfer Center, specifically Messrs. Noel Eli B. Kintanar, Rafaelito H. Taruc and Luisito Ucab	issuance of the Certificate of Acceptance for Phase One of the MRP/V Project and in approving the Central Facility Site at the Star Mall complex; b. Documents, records, papers and correspondence between DFA and BOT Center regarding BCA's financial capability and the BOT Center's opinion on DFA's demand for BCA to further prove its financial capability to implement the MRP/V Project; c. Documents, records, papers and correspondence between DFA and BOT Center regarding the DFA's attempt to terminate the Amended BOT Agreement, including the BOT Center's unsolicited advice dated December 23, 2005 stating that the issuance of the Notice of Termination was "precipitate, and done without first carefully ensuring that there were sufficient grounds to warrant such an issuance" and was "devoid of merit"; d. Documents, records, papers and correspondence between DFA and BOT Center regarding the DFA's unwarranted refusal to approve BCA's proposal to obtain the required financing by allowing the entry of a "strategic investor"; and e. Other related documents, records, papers and correspondence.
5. Chairman of the DFA MRP/V Advisory Board or his representative/s, specifically DFA Undersecretary Franklin M. Ebdalin and MRP/V Project Manager, specifically Atty. Voltaire Mauricio	a. Documents, records, papers and correspondence between DFA and the MRP/V Advisory Board regarding BCA['s] performance of its obligations for Phase One of the MRP/V Project, the MRP/V Advisory Board's recommendation for the issuance of the Certificate of Acceptance of Phase One of the MRP/V Project and its preparation of the draft of the Certificate of Acceptance; b. Documents, records, papers and correspondence between DFA and the MRP/V Advisory Board regarding the latter's recommendation for the DFA to approve the Star Mall complex as the Central Facility Site; c. Documents, records, papers and correspondence between DFA and the MRP/V Advisory Board regarding BCA's request to allow the investment of S.F. Pass International in Philpass; d. Documents, records, papers and correspondence between DFA and the MRP/V Advisory Board regarding BCA's financial capability and the MRP/V Advisory Board's opinion on DFA's demand for BCA to further prove its financial capability to implement the

	MRP/V Project; e. Documents, records, papers and correspondence between DFA and the MRP/V Advisory Board regarding the DFA's attempted termination of the Amended BOT Agreement; and f. Other related documents, records, papers and correspondence.

On 1 July 2013, DFA filed its comment, alleging that the presentation of the witnesses and documents was prohibited by law and protected by the deliberative process privilege.

The RTC Ruling

In a Resolution dated 2 September 2013, the RTC ruled in favor of BCA and held that the evidence sought to be produced was no longer covered by the deliberative process privilege. According to the RTC, the Court held in *Chavez v. Public Estates Authority*[10] that acts, transactions or decisions are privileged only before a definite proposition is reached by the agency and since DFA already made a definite proposition and entered into a contract, DFA's acts, transactions or decisions were no longer privileged.[11]

The dispositive portion of the RTC Resolution reads:

> WHEREFORE, the petition is granted. Let subpoena *ad testificandum* [and subpoena] *duces tecum* be issued to the persons listed in paragraph 11 of the Petition for them to appear and bring the documents specified in paragraph 12 thereof, before the Ad Hoc Tribunal for the hearings on October 14, 15, 16, 17, 2013 at 9:00 a.m. and 2:00 p.m. at the Malcolm Hall, University of the Philippines, Diliman, Quezon City.[12]

On 6 September 2013, the RTC issued the subpoena *duces tecum* and subpoena *ad testificandum*. On 12 September 2013, DFA filed a motion to quash the subpoena *duces tecum* and subpoena *ad testificandum,* which BCA opposed.

In an Order dated 11 October 2013, the RTC denied the motion to quash and held that the motion was actually a motion for reconsideration, which is prohibited under Rule 9.9 of the Special Rules of Court on Alternative Dispute Resolution (Special ADR Rules).

On 14, 16, and 17 October 2013, Undersecretary Franklin M. Ebdalin (Usec. Ebdalin), Atty. Voltaire Mauricio (Atty. Mauricio), and Luisito Ucab (Mr. Ucab) testified before the arbitral tribunal pursuant to the subpoena.

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10 433 Phil. 506 (2002).
11 *Rollo,* pp. 54-55.
12 Id. at 55.

In an Order dated 8 January 2014, the RTC denied the motion for reconsideration filed by DFA. The RTC ruled that the motion became moot with the appearance of the witnesses during the arbitration hearings. Hence, DFA filed this petition with an urgent prayer for the issuance of a temporary restraining order and/or a writ of preliminary injunction.

In a Resolution dated 2 April 2014, the Court issued a temporary restraining order enjoining the arbitral tribunal from taking cognizance of the testimonies of Usec. Ebdalin, Atty. Mauricio, and Mr. Ucab.

The Issues

DFA raises the following issues in this petition: (1) the 1976 UNCITRAL Arbitration Rules and the Rules of Court apply to the present arbitration proceedings, not RA 9285 and the Special ADR Rules; and (2) the witnesses presented during the 14, 16, and 17 October 2013 hearings before the *ad hoc* arbitral tribunal are prohibited from disclosing information on the basis of the deliberative process privilege.

The Ruling of the Court

We partially grant the petition.

Arbitration is deemed a special proceeding[13] and governed by the special provisions of RA 9285, its IRR, and the Special ADR Rules.[14] RA 9285 is the general law applicable to all matters and controversies to be resolved through alternative dispute resolution methods.[15] While enacted only in 2004, we held that RA 9285 applies to pending arbitration proceedings since it is a procedural law, which has retroactive effect:

> **While RA 9285 was passed only in 2004, it nonetheless applies in the instant case since it is a procedural law which has a retroactive effect.** Likewise, KOGIES filed its application for arbitration before the KCAB on July 1, 1998 and it is still pending because no arbitral award has yet been rendered. Thus, RA 9285 is applicable to the instant case. Well-settled is the rule that procedural laws are construed to be applicable to actions pending and undetermined at the time of their passage, and are deemed retroactive in that sense and to that extent. **As a general rule, the retroactive application of procedural laws does not violate any personal rights because no vested right has yet attached nor arisen from them.**[16] (Emphasis supplied)

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13 The Arbitration Law or Republic Act No. 876, Section 22; Special ADR Rules, Rule 1.2.

14 Rules of Court, Rule 72, Section 2 provides: "In the absence of special provisions, the rules provided for in ordinary actions shall be, as far as practicable, applicable in special proceedings."

15 *Department of Foreign Affairs v. Judge Falcon,* 644 Phil. 105 (2010).

16 *Korea Technologies Co., Ltd. v. Judge Lerma,* 566 Phil. 1, 27 (2008).

The IRR of RA 9285 reiterate that RA 9285 is procedural in character and applicable to all pending arbitration proceedings.[17] Consistent with Article 2046 of the Civil Code,[18] the Special ADR Rules were formulated and were also applied to all pending arbitration proceedings covered by RA 9285, provided no vested rights are impaired.[19] Thus, contrary to DFA's contention, RA 9285, its IRR, and the Special ADR Rules are applicable to the present arbitration proceeding. The arbitration between the DFA and BCA is still pending, since no arbitral award has yet been rendered. Moreover, DFA did not allege any vested rights impaired by the application of those procedural rules.

RA 9285, its IRR, and the Special ADR Rules provide that any party to an arbitration, whether domestic or foreign, may request the court to provide assistance in taking evidence such as the issuance of subpoena *ad testificandum* and subpoena *duces tecum*.[20] The Special ADR Rules specifically provide that they shall apply to assistance in taking evidence,[21] and the RTC order granting assistance in taking evidence shall be immediately executory and not subject to reconsideration or appeal.[22] An appeal with the Court of Appeals (CA) is only possible where the RTC denied a petition for assistance in taking evidence.[23] An appeal to the Supreme Court from the CA is allowed only under any of the grounds specified in the Special ADR Rules.[24] We rule that the DFA failed to follow the procedure and the hierarchy of courts provided in RA 9285, its IRR, and the Special ADR Rules, when DFA directly appealed before this Court the RTC Resolution and Orders granting assistance in taking evidence.

DFA contends that the RTC issued the subpoenas on the premise that RA 9285 and the Special ADR Rules apply to this case. However, we find that even without applying RA 9285 and the Special ADR Rules, the RTC still has the authority to issue the subpoenas to assist the parties in taking evidence.

The 1976 UNCITRAL Arbitration Rules, agreed upon by the parties to govern them, state that the "arbitral tribunal shall apply the law designated by the parties as applicable to the substance of the dispute. Failing such designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable."[25]

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17 IRR of RA 9285, Article 8.4.

18 Civil Code, Article 2046: "The appointment of arbitrators and the procedure for arbitration shall be governed by the provisions of such rules of court as the Supreme Court shall promulgate."

19 Special ADR Rules, Rule 24.1: "Considering its procedural character, the Special ADR Rules shall be applicable to all pending arbitration, mediation or other ADR forms covered by the ADR Act, unless the parties agree otherwise. The Special ADR Rules, however, may not prejudice or impair vested rights in accordance with law."

20 IRR of RA 9285, Rules 4.27 and 5.27; Special ADR Rules, Rules 9.1 and 9.5.

21 Special ADR Rules, Rule 1.1 (g).

22 Special ADR Rules, Rules 9.9 and 19.1.

23 Special ADR Rules, Rules 19.12 and 19.26.

24 Special ADR Rules, Rules 19.36 and 19.37.

25 Article 33(1) of the 1976 UNCITRAL Arbitration Rules.

Established in this jurisdiction is the rule that the law of the place where the contract is made governs, or *lex loci contractus*.[26] Since there is no law designated by the parties as applicable and the Agreement was perfected in the Philippines, "The Arbitration Law," or Republic Act No. 876 (RA 876), applies.

RA 876 empowered arbitrators to subpoena witnesses and documents when the materiality of the testimony has been demonstrated to them.[27] In *Transfield Philippines, Inc. v. Luzon Hydro Corporation,*[28] we held that Section 14 of RA 876 recognizes the right of any party to petition the court to take measures to safeguard and/or conserve any matter which is the subject of the dispute in arbitration.

Considering that this petition was not filed in accordance with RA 9285, the Special ADR Rules and 1976 UNCITRAL Arbitration Rules, this petition should normally be denied. However, we have held time and again that the ends of justice are better served when cases are determined on the merits after all parties are given full opportunity to ventilate their causes and defenses rather than on technicality or some procedural imperfections.[29] More importantly, this case is one of first impression involving the production of evidence in an arbitration case where the **deliberative process privilege** is invoked.

Thus, DFA insists that we determine whether the evidence sought to be subpoenaed is covered by the deliberative process privilege. DFA contends that the RTC erred in holding that the deliberative process privilege is no longer applicable in this case. According to the RTC, based on *Chavez v. Public Estates Authority*,[30] "acts, transactions or decisions are privileged only before a definite proposition is reached by the agency," and since, in this case, DFA not only made "a definite proposition" but already entered into a contract then the evidence sought to be produced is no longer privileged.[31]

We have held in *Chavez v. Public Estates Authority*[32] that:

> Information, however, on *on-going evaluation or review* of bids or proposals being undertaken by the bidding or review committee is not immediately accessible under the right to information. While the evaluation or review is still on-going, there are no "official acts, transactions, or decisions" on the bids or proposals. However, once the committee makes its *official recommendation*, there arises a "*definite proposition*" on the part of the government. From this moment, the public's right to information

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26 *Korea Technologies Co., Ltd. v. Judge Lerma,* supra note 16.

27 Section 14 of RA 876.

28 523 Phil. 374 (2006).

29 *Department of Foreign Affairs v. Judge Falcon,* supra note 15, *citing Ateneo de Naga University v. Manalo*, 497 Phil. 635 (2005).

30 Supra note 10.

31 *Rollo,* pp. 54-55.

32 Supra note 10, at 531-532, 534.

> attaches, and any citizen can access all the non-proprietary information leading to such definite proposition.
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> The right to information, however, does not extend to matters recognized as privileged information under the separation of powers. The right does not also apply to information on military and diplomatic secrets, information affecting national security, and information on investigations of crimes by law enforcement agencies before the prosecution of the accused, which courts have long recognized as confidential. The right may also be subject to other limitations that Congress may impose by law.
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> There is no claim by PEA that the information demanded by petitioner is privileged information rooted in the separation of powers. The information does not cover Presidential conversations, correspondences, or discussions during closed-door Cabinet meetings which, like internal deliberations of the Supreme Court and other collegiate courts, or executive sessions of either house of Congress, are recognized as confidential. This kind of information cannot be pried open by a co-equal branch of government. **A frank exchange of exploratory ideas and assessments, free from the glare of publicity and pressure by interested parties, is essential to protect the independence of decision-making of those tasked to exercise Presidential, Legislative and Judicial power.** This is not the situation in the instant case.
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> We rule, therefore, that the constitutional right to information includes official information on ***on-going negotiations*** before a final contract. The information, however, must constitute definite propositions by the government and should not cover recognized exceptions like **privileged information**, military and diplomatic secrets and similar matters affecting national security and public order. Congress has also prescribed other limitations on the right to information in several legislations. (Emphasis supplied)

Contrary to the RTC's ruling, there is nothing in our *Chavez v. Public Estates Authority*[33] ruling which states that once a "definite proposition" is reached by an agency, the privileged character of a document no longer exists. On the other hand, we hold that before a "definite proposition" is reached by an agency, there are no "official acts, transactions, or decisions" yet which can be accessed by the public under the right to information. Only when there is an official recommendation can a "definite proposition" arise and, accordingly, the public's right to information attaches. However, this right to information has certain limitations and **does not cover privileged information** to protect the independence of decision-making by the government.

Chavez v. Public Estates Authority[34] expressly and unequivocally states that the right to information "**should not cover recognized exceptions like privileged information**, military and diplomatic secrets and similar matters affecting national security and public order." Clearly, *Chavez*

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33 Supra note 10.

34 Supra note 10.

v. Public Estates Authority[35] expressly mandates that "**privileged information**" should be outside the scope of the constitutional right to information, just like military and diplomatic secrets and similar matters affecting national security and public order. In these exceptional cases, even the occurrence of a "definite proposition" will not give rise to the public's right to information.

Deliberative process privilege is one kind of privileged information, which is within the exceptions of the constitutional right to information. In *In Re: Production of Court Records and Documents and the Attendance of Court Officials and Employees as Witnesses,*[36] we held that:

> **Court deliberations are traditionally recognized as privileged communication.** Section 2, Rule 10 of the IRSC provides:
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> Section 2. Confidentiality of court sessions. - Court sessions are executive in character, with only the Members of the Court present. Court deliberations are confidential and shall not be disclosed to outside parties, except as may be provided herein or as authorized by the Court.
>
> Justice Abad discussed the rationale for the rule in his concurring opinion to the Court Resolution in *Arroyo v. De Lima* (TRO on Watch List Order case): the rules on confidentiality will enable the Members of the Court to "freely discuss the issues without fear of criticism for holding unpopular positions" or fear of humiliation for one's comments. **The privilege against disclosure of these kinds of information/communication is known as deliberative process privilege, involving as it does the deliberative process of reaching a decision.** "Written advice from a variety of individuals is an important element of the government's decision-making process and that the interchange of advice could be stifled if courts forced the government to disclose those recommendations;" the privilege is intended "to prevent the 'chilling' of deliberative communications."
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> The privilege is not exclusive to the Judiciary. We have in passing recognized the claim of this privilege by the two other branches of government in *Chavez v. Public Estates Authority* (speaking through J. Carpio) when the Court declared that -
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> [t]he information x x x like internal deliberations of the Supreme Court and other collegiate courts, or executive sessions of either house of Congress, are recognized as confidential. This kind of information cannot be pried open by a co-equal branch of government. A frank exchange of exploratory ideas and assessments, free from the glare of publicity and pressure by interested parties, is essential to protect the independence of decision-making of those tasked to exercise Presidential, Legislative and Judicial power. (Emphasis supplied)

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35 Supra note 10.

36 *In Re: Production of Court Records and Documents and the Attendance of Court Officials and Employees as Witnesses under the Subpoenas of February 10, 2012 and the Various Letters for the Impeachment Prosecution Panel Dated January 19 and 25, 2012,* 14 February 2012 (unsigned Resolution).

In *Akbayan v. Aquino,*[37] we adopted the ruling of the U.S. Supreme Court in *NLRB v. Sears, Roebuck & Co,*[38] which stated that the deliberative process privilege protects from disclosure "advisory opinions, recommendations, and deliberations comprising part of a process by which governmental decisions and policies are formulated." We explained that "[w]ritten advice from a variety of individuals is an important element of the government's decision-making process and that the interchange of advice could be stifled if courts forced the government to disclose those recommendations"; thus, the privilege is intended "to prevent the 'chilling' of deliberative communications."[39]

The privileged character of the information does not end when an agency has adopted a definite proposition or when a contract has been perfected or consummated; otherwise, the purpose of the privilege will be defeated.

The deliberative process privilege applies if its purpose is served, that is, "to protect the frank exchange of ideas and opinions critical to the government's decision[-]making process where disclosure would discourage such discussion in the future."[40] In *Judicial Watch of Florida v. Department of Justice,*[41] the U.S. District Court for the District of Columbia held that the deliberative process privilege's "ultimate purpose x x x is to prevent injury to the quality of agency decisions by allowing government officials freedom to debate alternative approaches in private," and this ultimate purpose would not be served equally well by making the privilege temporary or held to have expired. In *Gwich'in Steering Comm. v. Office of the Governor,*[42] the Supreme Court of Alaska held that communications have not lost the privilege even when the decision that the documents preceded is finally made. The Supreme Court of Alaska held that "the question is not whether the decision has been implemented, or whether sufficient time has passed, but whether disclosure of these preliminary proposals could harm the agency's future decision[-]making by chilling either the submission of such proposals or their forthright consideration."

Traditionally, U.S. courts have established two fundamental requirements, both of which must be met, for the deliberative process privilege to be invoked.[43] *First*, the communication must be **predecisional,**

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37 580 Phil. 422 (2008).

38 421 U.S. 132 (1975).

39 *In Re: Production of Court Records and Documents and the Attendance of Court Officials and Employees as Witnesses under the Subpoenas of February 10, 2012 and the Various Letters for the Impeachment Prosecution Panel Dated January 19 and 25, 2012,* supra note 35.

40 *Vandelay Entm't, LLC v. Fallin,* 2014 OK 109 (16 December 2014); *City of Colorado Springs v. White,* 967 P.2d 1042 (1998).

41 102 F. Supp. 2d 6 (2000).

42 10 P.3d 572 (2002).

43 *Pacific Coast Shellfish Growers Association v. United States Army Corps of Engineers,* 2016 U.S. Dist. LEXIS 68814 (W.D. Wash. 24 May 2016); *Judicial Watch, Inc. v. Department of Justice,* 306 F. Supp. 2d 58 (D.D.C. 2004); *Gwich'in Steering Comm. v. Office of the Governor,* supra note 41; *Judicial Watch of Florida v. Department of Justice,* supra note 40; *City of Colorado Springs v. White,* 967 P.2d 1042 (1998); *Judicial Watch v. Clinton,* 880 F. Supp. 1 (D.D.C.1995); *Strang v.*

i.e., "antecedent to the adoption of an agency policy." *Second*, the communication must be **deliberative**, i.e., "a direct part of the deliberative process in that it makes recommendations or expresses opinions on legal or policy matters." It must reflect the "give-and-take of the consultative process."[44] The Supreme Court of Colorado also took into account other considerations:

> Courts have also looked to other considerations in assessing whether material is predecisional and deliberative. The function and significance of the document in the agency's decision-making process are relevant. Documents representing the ideas and theories that go into the making of policy, which are privileged, should be distinguished from "binding agency opinions and interpretations" that are "retained and referred to as precedent" and constitute the policy itself.
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> Furthermore, courts examine the identity and decision-making authority of the office or person issuing the material. A document from a subordinate to a superior official is more likely to be predecisional, "while a document moving in the opposite direction is more likely to contain instructions to staff explaining the reasons for a decision already made."
>
> Finally, in addition to assessing whether the material is predecisional and deliberative, and in order to determine if disclosure of the material is likely to adversely affect the purposes of the privilege, courts inquire whether "the document is so candid or personal in nature that public disclosure is likely in the future to stifle honest and frank communication within the agency." As a consequence, **the deliberative process privilege typically covers recommendations, advisory opinions, draft documents, proposals, suggestions, and other subjective documents that reflect the personal opinions of the writer rather than the policy of the agency.**[45] (Emphasis supplied)

Thus, "[t]he deliberative process privilege exempts materials that are 'predecisional' and 'deliberative,' but requires disclosure of policy statements and final opinions 'that have the force of law or explain actions that an agency has already taken.'"[46]

In *City of Colorado Springs v. White*,[47] the Supreme Court of Colorado held that the outside consultant's evaluation report of working environment and policies was covered by the deliberative process privilege because the report contained observations on current atmosphere and suggestions on how to improve the division rather than an expression of final agency decision. In *Strang v. Collyer*,[48] the U.S. District Court for the District of Columbia held that the meeting notes that reflect the exchange of opinions between agency personnel or divisions of agency are covered by the deliberative process privilege because they "reflect the agency's group thinking in the process of working out its policy" and are part of the

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Collyer, 710 F. Supp. 9 (D.D.C. 1989); *Fulbright & Jaworski v. Dep't. of the Treasury*, 545 F. Supp. 615 (D.D.C. 1982).

44 Id.

45 *City of Colorado Springs v. White*, 967 P.2d 1042 (1998).

46 *Fulbright & Jaworski v. Dep't. of Treasury*, 545 F. Supp. 615 (D.D.C. 1982).

47 Supra.

48 710 F. Supp. 9 (D.D.C. 1989).

deliberative process in arriving at the final position. In *Judicial Watch v. Clinton*,[49] the U.S. District Court for the District of Columbia held that handwritten notes reflecting preliminary thoughts of agency personnel were properly withheld under the deliberative process privilege. The U.S. District Court reasoned that "disclosure of this type of deliberative material inhibits open debate and discussion, and has a chilling effect on the free exchange of ideas."

This Court applied the deliberative process privilege in *In Re: Production of Court Records and Documents and the Attendance of Court Officials and Employees as Witnesses*[50] and found that court records which are "predecisional" and "deliberative" in nature – in particular, documents and other communications which are part of or related to the deliberative process, i.e., notes, drafts, research papers, internal discussions, internal memoranda, records of internal deliberations, and similar papers – are protected and cannot be the subject of a subpoena if judicial privilege is to be preserved. We further held that this privilege is not exclusive to the Judiciary and cited our ruling in *Chavez v. Public Estates Authority*.[51]

The deliberative process privilege can also be invoked in arbitration proceedings under RA 9285.

"Deliberative process privilege contains three policy bases: *first*, the privilege protects candid discussions within an agency; *second,* it prevents public confusion from premature disclosure of agency opinions before the agency establishes final policy; and *third,* it protects the integrity of an agency's decision; the public should not judge officials based on information they considered prior to issuing their final decisions."[52] Stated differently, the privilege serves "to assure that subordinates within an agency will feel free to provide the decision[-]maker with their uninhibited opinions and recommendations without fear of later being subject to public ridicule or criticism; to protect against premature disclosure of proposed policies before they have been finally formulated or adopted; and to protect against confusing the issues and misleading the public by dissemination of documents suggesting reasons and rationales for a course of action which were not in fact the ultimate reasons for the agency's action."[53]

Under RA 9285,[54] orders of an arbitral tribunal are appealable to the courts. If an official is compelled to testify before an arbitral tribunal and the

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49 880 F. Supp. 1 (D.D.C.1995).

50 Supra note 36.

51 Supra note 10.

52 *City of Colorado Springs v. White,* supra note 45.

53 *Judicial Watch v. Clinton,* supra.

54 RA 9285, Section 32 provides that: "Domestic arbitration shall continue to be governed by Republic Act No. 876, otherwise known as "The Arbitration Law" as amended by this Chapter. x x x." RA 876, Section 29 provides that: "An appeal may be taken from an order made in a proceeding under this Act, or from a judgment entered upon an award through certiorari proceedings, but such appeals shall be limited to questions of law. The proceedings upon such an appeal, including the judgment thereon shall be governed by the Rules of Court in so far as they are applicable."

order of an arbitral tribunal is appealed to the courts, such official can be inhibited by fear of later being subject to public criticism, preventing such official from making candid discussions within his or her agency. The decision of the court is widely published, including details involving the privileged information. This disclosure of privileged information can inhibit a public official from expressing his or her candid opinion. Future quality of deliberative process can be impaired by undue exposure of the decision-making process to public scrutiny after the court decision is made.

Accordingly, a proceeding in the arbitral tribunal does not prevent the possibility of the purpose of the privilege being defeated, if it is not allowed to be invoked. In the same manner, the disclosure of an information covered by the deliberative process privilege to a court arbitrator will defeat the policy bases and purpose of the privilege.

DFA did not waive the privilege in arbitration proceedings under the Agreement. The Agreement does not provide for the waiver of the deliberative process privilege by DFA. The Agreement only provides that:

> ***Section 20.02*** None of the parties shall, at any time, before or after the expiration or sooner termination of this Amended BOT Agreement, **without the consent of the other party,** divulge or suffer or permit its officers, employees, agents or contractors to divulge to any person, other than any of its or their respective officers or employees who require the same to enable them properly to carry out their duties, **any of the contents of this Amended BOT Agreement or any information relating to the negotiations concerning the operations, contracts, commercial or financial arrangements or affair[s] of the other parties hereto.** Documents marked "CONFIDENTIAL" or the like, providing that such material shall be kept confidential, and shall constitute prima facie evidence that such information contained therein is subject to the terms of this provision.
>
> ***Section 20.03*** **The restrictions imposed in Section 20.02 herein shall not apply to the disclosure of any information:**
>
> x x x x
>
> **C. To a court arbitrator or administrative tribunal the course of proceedings before it to which the disclosing party is party;** x x x[55] (Emphasis supplied)

Section 20.02 of the Agreement merely allows, ***with the consent of the other party***, disclosure by a party to a court arbitrator or administrative tribunal of the contents of the "Amended BOT Agreement or **any information relating to the negotiations** concerning the operations, contracts, commercial or financial arrangements or affair[s] **of the other parties hereto."** There is no express waiver of information forming part of DFA's predecisional deliberative or decision-making process. Section 20.02

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55 *Rollo*, pp. 264-265.

does not state that a party to the arbitration is compelled to disclose to the tribunal privileged information in such party's possession.

On the other hand, **Section 20.03 merely allows a party, if it chooses, *without the consent of the other party*, to disclose to the tribunal privileged information in such disclosing party's possession. In short, a party can disclose privileged information in its possession, even without the consent of the other party, if the disclosure is to a tribunal. However, a party cannot be compelled by the other party to disclose privileged information to the tribunal, where such privileged information is in its possession and not in the possession of the party seeking the compulsory disclosure.**

Nothing in Section 20.03 mandates compulsory disclosure of privileged information. Section 20.03 merely states that "the restrictions imposed in Section 20.02," referring to the "consent of the other party," shall not apply to a disclosure of privileged information by a party in possession of a privileged information. This is completely different from compelling a party to disclose privileged information in its possession against its own will.

Rights cannot be waived if it is contrary to law, public order, **public policy**, morals, or good customs, or prejudicial to a third person with a right recognized by law.[56] There is a **public policy** involved in a claim of deliberative process privilege – "the policy of open, frank discussion between subordinate and chief concerning administrative action."[57] Thus, the deliberative process privilege cannot be waived. As we have held in *Akbayan v. Aquino*,[58] the deliberative process privilege is closely related to the presidential communications privilege and protects the public disclosure of information that can compromise the quality of agency decisions:

> Closely related to the "presidential communications" privilege is the **deliberative process privilege** recognized in the United States. As discussed by the U.S. Supreme Court in *NLRB v. Sears, Roebuck & Co*, deliberative process covers documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated. Notably, the privileged status of such documents rests, not on the need to protect national security but, on the **"obvious realization that officials will not communicate candidly among themselves if each remark is a potential item of discovery and front page news," the objective of the privilege being to enhance the quality of agency decisions.** (Emphasis supplied)

As a qualified privilege, the burden falls upon the government agency asserting the deliberative process privilege to prove that the information in

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56 Civil Code, Article 6.

57 *Kaiser Aluminum & Chemical Corp. v. United States,* 157 F.Supp. 939 (1958).

58 Supra note 37, at 475.

question satisfies both requirements – predecisional and deliberative.[59] "The agency bears the burden of establishing the character of the decision, the deliberative process involved, and the role played by the documents in the course of that process."[60] It may be overcome upon a showing that the discoverant's interests in disclosure of the materials outweigh the government's interests in their confidentiality.[61] "The determination of need must be made flexibly on a case-by-case, *ad hoc* basis," and the "factors relevant to this balancing include: the relevance of the evidence, whether there is reason to believe the documents may shed light on government misconduct, whether the information sought is available from other sources and can be obtained without compromising the government's deliberative processes, and the importance of the material to the discoverant's case."[62]

In the present case, considering that the RTC erred in applying our ruling in *Chavez v. Public Estates Authority*,[63] and both BCA's and DFA's assertions of subpoena of evidence and the deliberative process privilege are broad and lack specificity, we will not be able to determine whether the evidence sought to be produced is covered by the deliberative process privilege. The parties are directed to specify their claims before the RTC and, thereafter, the RTC shall determine which evidence is covered by the deliberative process privilege, if there is any, based on the standards provided in this Decision. It is necessary to consider the circumstances surrounding the demand for the evidence to determine whether or not its production is injurious to the consultative functions of government that the privilege of non-disclosure protects.

WHEREFORE, we resolve to **PARTIALLY GRANT** the petition and **REMAND** this case to the Regional Trial Court of Makati City, Branch 146, to determine whether the documents and records sought to be subpoenaed are protected by the deliberative process privilege as explained in this Decision. The Resolution dated 2 April 2014 issuing a Temporary Restraining Order is superseded by this Decision.

SO ORDERED.

ANTONIO T. CARPIO
Associate Justice

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59 *Vandelay Entm't, LLC v. Fallin*, 2014 OK 109 (16 December 2014); *City of Colorado Springs v. White*, supra note 45.

60 *Strang v. Collyer*, supra note 48.

61 *City of Colorado Springs v. White*, supra note 45.

62 Supra note 45.

63 Supra note 10.

WE CONCUR:

ARTURO D. BRION
Associate Justice

(on official leave)
MARIANO C. DEL CASTILLO
Associate Justice

JOSE CATRAL MENDOZA
Associate Justice

See separate concurring opinion

MARVIC M.V.F. LEONEN
Associate Justice

ATTESTATION

I attest that the conclusions in the above Decision had been reached in consultation before the case was assigned to the writer of the opinion of the Court's Division.

ANTONIO T. CARPIO
Associate Justice
Chairperson

CERTIFICATION

Pursuant to Section 13, Article VIII of the Constitution, and the Division Chairperson's Attestation, I certify that the conclusions in the above Decision had been reached in consultation before the case was assigned to the writer of the opinion of the Court's Division.

MARIA LOURDES P. A. SERENO
Chief Justice