

# THE PHILIPPINE ADR REVIEW

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BROADENING ITS SCOPE OF ARBITRATION ADVOCACY



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## Seminar on Commercial Arbitration

By Bamba B. Parungao

PDRCI will hold a seminar on “The Law and Practice of Commercial Arbitration” on May 25 to 29, 2010 at The Linden Suites, Ortigas Center, Pasig City, Philippines.

This seminar, which is open to lawyers, accountants, engineers and other professionals, will introduce the participants to commercial arbitration. It will train prospective arbitrators in conducting arbitration proceedings.


Seasoned arbitration practitioners have been tapped to speak on the fundamentals of arbitration

law and rules, and guide the participants in step-by-step fashion through the entire arbitral process starting from the drafting of the arbitration clause to the enforcement of the arbitral award.

The seminar is designed for lawyers who are interested in representing parties in arbitration as well as lawyers and other professionals who are interested in being trained as arbitrators. The seminar will cover the following topics: overview of arbitration laws and rules; pre-arbitra-

tion issues; commencing the arbitration; pre-hearing considerations; conducting the arbitration hearings; drafting and enforcement of the arbitral award and the new implementing rules and regulations of ADR Act 2004 and Special Rules of Court on ADR.

Participants who successfully complete the seminar and pass the written examination will be eligible for inclusion

in the roster of PDRCI-trained arbitrators upon completion of membership requirements. For further information, please contact the PDRCI Secretariat. 



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# The Arbitrator's Oath

By Donemark J.L. Calimon

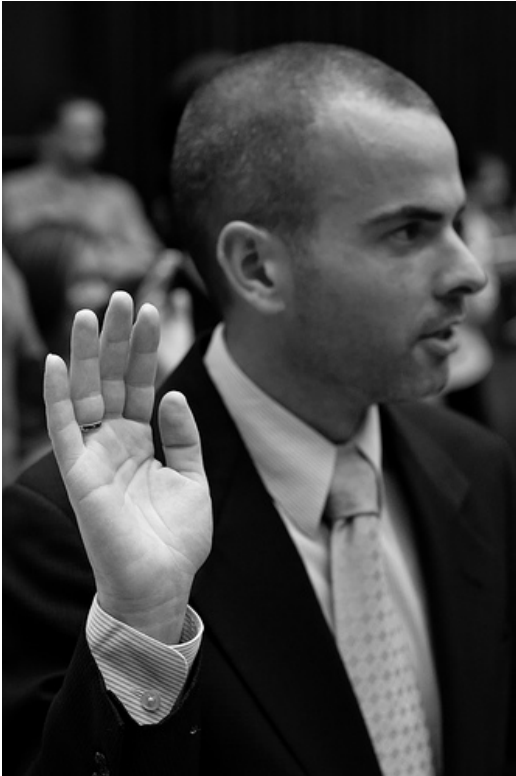
The Alternative Dispute Resolution Act of 2004 (ADR Act) defines arbitration as a voluntary dispute resolution process in which one or more arbitrators, appointed in accordance with the agreement of the parties or the rules, resolve a dispute by rendering an award. A key characteristic of arbitration, or any other mode of alternative dispute resolution (ADR), is party-autonomy or the freedom of the parties to make their own arrangements for the purpose of resolving their disputes. This freedom includes the power to choose the persons (called arbitrators, mediators or adjudicators) who will resolve their disputes.

An Arbitrator is a neutral third party, other than a presiding judge of a court or an officer of a government agency, appointed to render an award, alone or with others, in a dispute that is the subject of an arbitration agreement. Arbitrators are private individuals, not necessarily lawyers, chosen by the parties to resolve their disputes.

Being private individuals, arbitrators are not generally bound by the same rules that govern the conduct of government officials, such as members of the judiciary, or of lawyers. While the ADR Act provides that arbitrators may be held civilly liable when they act in bad faith, malice or gross negligence in the performance of their duties, no specific sets of rules or codes of conduct provide for or define an arbitrator's administrative or criminal liability. This is an area for future regulation.

Considering the recent promulgation by the Supreme Court of the Special Rules on Alternative Dispute Resolution and by a Department of Justice-led Committee of the Implementing Rules of the ADR Act, it would appear that the Philippines is finally on its way to creating an arbitration-friendly legal and judicial environment. However, if arbitration is to really become the preferred mode of dispute resolution in the country, parties to arbitration need reasonable assurance not only of their available legal remedies against each other but also of their remedies against or in relation to misconduct by their chosen arbitrators.

This article attempts to show that the Arbitrator's Oath, if properly applied and worded,



can fill the gap created by the absence of a regulatory regime to govern arbitrator conduct and address the need to assure party litigants that arbitrators are not only qualified and competent but may also be held accountable for their actions. After all, what has been said of the Lawyer's Oath as being the source of a lawyer's obligations and duties applies equally to the Arbitrator's Oath.

## "Oath" defined

An oath, in its broadest sense, includes any form of attestation by which a party signifies that he is bound in conscience to perform an act faithfully and truthfully. In *People v. Bisda, et al.*, G.R. No. 140895, July 17, 2003, the Supreme Court explained that "an oath is defined as "an outward pledge, given by the person taking it, that his attestation or promise is made under an immediate sense of his responsibility to God." The purpose of an oath, the High Court added, "is to affect the conscience of the witness and thus compel him to speak the truth, and also to lay him open to punishment for perjury in case he willfully falsifies."

An oath may be said to define the obligations and responsibilities of the person making the same. The PDRCI Administrative Guidelines, for example, require arbitrators to swear, before entering into their office, that they will faithfully and fairly hear and examine the matters in controversy and will make a just award according to the best of his ability and understanding.

In most instances, however, an oath also provides a basis for liability of the person

making it. Thus, a person who falsely testifies under oath may be held liable for perjury. The violation of an oath may also provide grounds for disciplinary actions, such as the violation of the Lawyer's Oath which are grounds for disbarment, suspension or other forms of disciplinary actions.

In other words, the purpose of an oath may be said to be two-fold. It is a source of responsibility and, at the same time, a basis of liability.

## The oath requirement

Are arbitrators required to take an oath for purposes of conducting arbitration proceedings and is the taking of an oath essential to the validity of an arbitration proceeding or of the arbitral award?

Republic Act No. 876 also known as "The Arbitration Law" (RA 876), enacted way back in 1953 but which continues to be applicable today to domestic arbitrations, requires that "before hearing any testimony, arbitrators must be sworn, by any officer authorized by law to administer an oath, faithfully and fairly to hear and examine the matters in controversy and to make a just award according to the best of their ability and understanding." (Sec. 2)

In 2004, the ADR Act was passed making RA 876 applicable only to domestic arbitrations. The ADR Act provides that international commercial arbitrations shall be governed by the UNCITRAL Model Law while construction arbitrations shall continue to be governed by Executive Order No. 1008 (EO 1008), which created the Construction Industry Arbitration Commission (CIAC). Neither the UNCITRAL Model Law nor EO 1008 requires arbitrators to take an oath of office prior to acting or serving as arbitrators. Thus, the requirement of taking an oath now only applies to domestic arbitrations, and not to international commercial arbitrations or to construction arbitrations. Notably, the oath required under the PDRCI Administrative Guidelines was patterned after RA 876.

Nevertheless, while arbitrators are required to take an oath in case of domestic arbitrations, there are no precedents which suggest that its absence will affect the validity of the arbitration proceedings or the validity of the arbitral award.

As a matter of fact, the parties may waive the requirement for arbitrators to take an oath of office. This is the implication of the Supreme Court's ruling in the early case of *Umbao v. Yap*, G.R. No. L-8933, 28 February 1957, where the Supreme Court ruled that a party should not be permitted to question the authority of the arbitrator after he voluntarily submitted his evidence to him and after the arbitrator issued an adverse award.

It has also been ruled that if a party admits proof to be taken in a case without an oath, after the testimony has been acted upon by the court, and made the basis of a judgment, such party can no longer object to the admissibility of the said testimony. There seems to be no reason why this logic is not applicable to the oath required of arbitrators. If the parties do not object to the failure of the arbitrators to take an oath, they should be considered to have waived such requirement.

It should be added that a lawyer's act of appearing as an attorney for a party to a case without authority to do so is a ground for disciplinary action against the lawyer, but does not necessarily invalidate his actions insofar as the client may be concerned. How much more with respect to an arbitrator who acts pursuant to the parties' authority – albeit without taking an oath?

Besides, and perhaps more important, arbitrators are chosen by the parties themselves. They become such with respect to a particular dispute from the time they accept their nominations, regardless of whether or not they have taken their oath. In this sense, they are different from judges and lawyers who must take their respective oaths of office in order to be admitted to the Philippine Judiciary or the Philippine Bar.

### ***The significance of the Arbitrator's Oath***

While the Arbitrator's Oath may not be relevant for purposes of the validity of the arbitration proceedings or the arbitral award, it is not a meaningless act. The real significance of the Arbitrator's Oath has to do more with the conduct and accountability of the arbitra-

tors than with the validity of the arbitration proceedings.

Under the ADR Act, an arbitrator must be independent, impartial and must possess the qualifications agreed upon by the parties. The oath required under RA 876 states that an arbitrator must faithfully and fairly hear



and examine the matters in controversy and to make a just award according to the best of their ability and understanding. After all, independence and impartiality are the basic obligations of an arbitrator.

However, the oath required by RA 876 does not have the same significance as the Lawyer's Oath or the oath taken by public officials before they assume office. A violation of the Lawyer's Oath, for example, is a ground for disciplinary action. But there is no similar rule which provides for sanctions against an arbitrator who violates his oath, such as prohibition from further acting as arbitrator in other cases. In other words, the violation of the oath required under RA 876, while it may provide grounds for the removal of the arbitrator in the particular case involved or for civil liability under certain circumstances, does not necessarily impose any disciplinary or criminal consequences on the arbitrator concerned.


In the absence of a comprehensive set of rules regulating the conduct of arbitrators, the Arbitrator's Oath acquires more significance. As already explained, the purpose of the oath is to compel a person "to speak the truth, and also to lay him open to punishment for perjury in case he willfully falsifies." Thus, the Arbitrator's Oath may be the key to ensuring or enforcing arbitrator accountability.

The Arbitrator's Oath may include statements to the effect that the arbitrator has conducted a conflicts check and has found that he is not disqualified from acting in the dispute.

Statements to this effect in the Arbitrator's Oath, inasmuch as they expose the arbitrators to possible criminal liability if false, provide assurance to party litigants that the arbitration proceedings will be fair and just. In other words, parties to arbitrations or to arbitration agreements should make use of the Arbitrator's Oath as a means to ensure that their arbitrators are independent and impartial and may be held accountable for their representations or actions.

### ***The Oath***

Bearing in mind the two-fold purpose of an oath, in addition to the statement that the arbitrator shall faithfully and fairly hear and examine the matters in controversy and will make a just award according to the best of her ability and understanding, the Arbitrator's Oath should likewise assure party litigants that the arbitrator (a) is not aware of any circumstances that may give rise to any justified doubts as to his impartiality or independence and that he will not accept any other assignments which may give rise to such doubts; (b) he has not personally acted for any of the parties or their related entities; and (c) has done a conflicts check and has found that he is not suffering from any interest disqualification with respect to the parties and controversy involved.

Indeed, since the ADR Act gives the parties freedom to choose their arbitrators, they should also use this freedom to define, to the extent possible, the obligations and liabilities of the arbitrators insofar as the resolution of their disputes is concerned. 

*A full version of this article, with citations and references, is available online at [www.pdrcci.com.ph](http://www.pdrcci.com.ph).*

### **About the Author**



Donemark J.L. Calimon is a senior associate at the Litigation and Dispute Resolution Group of Quisumbing Torres Law Offices, a member firm of Baker & McKenzie International. He is a member and an accredited arbitrator of PDRCI, an associate of

the Chartered Institute of Arbitrators, East Asia Branch (Philippine Chapter) and a director/officer of the Philippine Institute of Arbitrators. He obtained his law degree at the University of the Philippines in 2000 and was admitted to the Philippine Bar in 2001.

## MEMBER SPOTLIGHT

### Eduardo R. Ceniza




Atty. Eduardo R. Ceniza is currently the General Counsel of the Lucio Tan Group of Companies, which includes flag carrier Philippine Airlines and Allied Bank, one of the Philippines' leading commercial banks. He finished

on top of his law class, *summa cum laude*, at the Lyceum of the Philippines University. He placed 12th in the 1960 Philippine Bar examinations.

Atty. Ceniza is the Vice Chairman for External Relations of PDRCI, which he served as President for seven terms. He is also President of the Philippine Institute of Construction Arbitrators and Mediators (PICAM); Chairman of the Philippine Institute of Arbitrators (PIArb); and Chairman of the Philippine Chapter (East Asia Branch) of the Chartered Institute of Arbitrators (CIArb).


He is a Fellow of the Chartered Institute of Arbitrators (FCIArb), Hong Kong Institute of Arbitrators FHKIArb), Singapore Institute of Arbitrators (FSIArb), and Philippine Institute of Arbitrators (FPIArb). He is an accredited arbitrator of PDRCI and the Philippine Construction Industry Arbitration Commission (CIAC).

He has appeared as counsel, and has served as arbitrator, in international and domestic commercial arbitrations as well as in CIAC construction arbitration. He has been a speaker and a panelist in various conferences, seminars and symposia in international commercial arbitration in Hong Kong, Singapore and the Philippines. He has lectured in arbitration seminars sponsored by PDRCI, PICAM-CIAC, PIArb, and the Philippine Association of Law Deans jointly with the East Asia Branch of the Chartered Institute of Arbitrators.

His areas of competence in law are commercial litigation, commercial arbitration and construction arbitration. Atty. Ceniza was formerly a senior partner and head of the litigation department of SyCip Salazar Hernandez and Gatmaitan, the Philippines' biggest law firm. 


## ASEAN Law Agreement Proposed

PDRCI President Victor P. Lazatin attended the recent ASEAN Law Association (ALA) lecture series held on 19th of February 2010 at the Supreme Court. Ambassador Rosario Manalo delivered the keynote lecture at the Supreme Court. Chief Justice Reynato S. Puno delivered the response.

On the 20th, at the ALA Governing Council Meeting, Atty. Lazatin was appointed as member of the Working Group for the Philippines. The Singapore contingent proposed an ASEAN Protocol on Enforcement of Arbitral Awards to harmonize the implementation of the 1958 NY Convention in Asean countries. The proposal contained the following salient points: (1) it defined an "agreement in writing" to include "digital" or "e-documents," (2) English or English translations will be the common official language, and (3) a uniform system of certifying arbitral awards by an official registry designated by each country will be adopted. Each country was proposed to have its own registry (notified to all members) where arbitral awards will be filed and which will issue certified copies of the awards filed with it for enforcement abroad. To guard confidentiality, the registry will be a "closed registry" which will be open only to the parties involved in the particular arbitration. Non-parties will have no access to the registry. 

## Launching of ADR Law Implementing Rules

The Philippine Department of Justice has issued the Implementing Rules and Regulations (IRR) of Republic Act No. 9285, otherwise known as The ADR Act of 2004, in formal rites held by the DOJ at the Hyatt Hotel on 27 January 2010. PDRCI's Chairman Emeritus, Custodio O. Parlade, Pres. Victor P. Lazatin, and Director Mario Valderrama delivered their remarks on the IRR. The host, DOJ Sec. Agnes Devanadera, delivered the response. The affair was organized by DOJ Undersecretary Jovy B. Salazar.

The PDRCI was requested to submit the names of nominees to the Advisory Council of the Office for Alternative Dispute Resolution (OADR) composed of representatives from the (1) mediation profession, (2) arbitration profession, (3) ADR institution, (4) IBP, and (5) academe. 

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