

# THE PHILIPPINE ADR REVIEW

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BROADENING ITS SCOPE OF ARBITRATION ADVOCACY



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## PSE Maharlika Board Rules mandate PDRCI arbitration

By Juan Paolo E. Colet

The Philippine Stock Exchange released on August 8, 2010 its latest draft of the Maharlika Board Listing and Disclosure Rules.



The Maharlika Board is a special listing segment in the PSE composed exclusively of listed companies that voluntarily subscribe to higher corporate governance standards. Numerous domestic blue chip companies are expected to list in the Maharlika Board.

One of the features of the Maharlika Board Rules is a requirement for Maharlika Board-listed companies to adopt an arbitration process whereby any dispute, controversy or claim between or among the company, its shareholders, directors and officers, or between such entities and the PSE shall be submitted to the PDRCI for resolution in accordance with its Arbitration Rules. The dispute must be intra-corporate in nature or must relate to the operation and implementation of the Maharlika Board Rules, Maharlika Board Listing Agreement or PSE Listing and Disclosure Rules.

For purposes of the Maharlika Board Rules, intra-corporate disputes are those defined in Section 5 of Presidential Decree No. 902-A and Section 1(a) of the Interim Rules of Procedure Governing Intra-Corporate Controversies.

To make the arbitration... **PAGE 4** ►

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# The new ADR Rules on Disputes between National Government Agencies

By: Shirley F. Alinea

On March 22, 2010, the Office of the Solicitor General (OSG) issued the new Rules on Alternative Dispute Resolution (ADR) for Disputes Between National Government Agencies, which became effective on May 28, 2010.

The Rules further implement Presidential Decree No. 242 (1973) prescribing the procedure for administrative settlement or adjudication of disputes, claims and controversies between or among government offices, agencies and instrumentalities, including government-owned or controlled corporations, and Chapter 14, Sections 66 to 71 of the Administrative Code of 1987 ("Code").

The Rules provide that claims, disputes or controversies involving solely National Government Agencies (NGA), shall be settled through a non-judicial process or ADR to ensure harmonious and friendly relationships between or among the parties. The Solicitor General shall choose the most appropriate ADR mode according to the nature of the interests involved.

While the Rules recognize other forms of ADR, it only provides for the procedure in mediation and arbitration.

## Mediation Procedure

The procedure in the mediation of claims, disputes or controversies involving NGAs is set forth in Rule 2 of the Rules. It covers "all disputes, claims and controversies, including incipient ones and those ongoing or pending with the OSG, between or among NGAs that do not involve constitutional issues, public order, public policy, morals, principles of public exemplarity or other matters of public interest" that are better resolved

by adjudication. The involvement of a private third party, which may be indispensable to the final resolution of the dispute, will not preclude the application of the Rules.

The Solicitor General will determine whether the nature of the dispute is appropriate for mediation.



mediation will be explained to the parties, together with an assessment of the risks and costs of pursuing litigation. An agreement to submit the dispute to mediation will be made through the representatives.

After the agreement is signed, the parties will select the Mediator from a list of accredited OSG lawyer-mediators. In case of disagreement, the ASG shall select the Mediator.

Once the Mediator is selected, an initial joint conference will be held. The Mediator will make an opening statement by introducing himself, informing the parties of the process flow, and stressing the confidentiality of the proceedings. The parties shall make their respective statements on how the dispute arose and their positions. The parties, with the assistance of the Mediator, will then endeavor to resolve their dispute.


In there is no settlement at the initial joint

conference, the Mediator may, with the consent of both parties, hold separate caucuses with each to determine their respective interests in the disputes. Thereafter, another joint conference may be held to consider various options, including assessment (on a non-binding basis) of the strengths and weaknesses of each party's case, proposed by the Mediator to resolve the dispute.

The parties' lawyers may attend the mediation and cooperate with the Mediator towards securing a settlement of the dispute.

If no settlement is reached after 30 working days from the initial mediation conference, the mediation shall be terminated. However, the parties may agree to continue the mediation, in which case the Mediator will grant a 30-working day extension, with the written approval of the Solicitor General.

If a full or partial compromise is reached, the Mediator shall ensure that it is reduced in writing with the concurrence of the parties or counsel. The Mediator shall provide legal assistance to the parties in drafting the compromise agreement. The final compromise agreement shall be signed by the parties' representatives and their counsel.

The approved compromise agreement may be converted into an arbitral award under the Alternative Dispute Resolution Act of 2004 ("ADR Act") and submitted to the Solicitor General, and later to the Secretary of Justice, for the latter's final approval. The rules for the deposit and enforcement of mediated settlement agreements under the ADR Act shall apply. 

*Next issue: Part 2 of the article will discuss the arbitration procedure and the peculiarities and ambiguities in the Rules.*

## About the Author



Shirley F. Alinea specializes in arbitration, litigation, labor and employment, and intellectual property law. She received her Bachelor of Laws degree from the University of the Philippines in 1996 and until 2008 was a partner of Quisumbing & Torres.

# Supreme Court holds project manager liable for breach of its duty of administration<sup>1</sup>

By: Germai C. Abella

In a Decision dated July 26, 2010, the Supreme Court held that a project manager in breach of its duty of construction administration was liable for actual and temperate damages to the project owner. This was the ruling in G.R. No. 162608, entitled *Adrian Wilson International Associates, Inc. vs. TMX Philippines, Inc.*

TMX Philippines, Inc. (TMX), manufacturer of “Timex” watches, engaged the services of Adrian Wilson International Associates, Inc. (AWIA) to provide “basic and detailed architectural designs, plans and specifications, as well as structural, mechanical and electrical engineering services” for the construction of a watch assembly plant at the Mactan Export Processing Zone in Cebu. Based on their Agreement dated December 29, 1978, AWIA was in charge of construction administration, i.e., to protect TMX from defects and deficiencies during the construction phase and ensure that the general contractor, P.G. Dakay Construction Company, worked in accordance with the design specifications.

Construction began in 1979 and was completed in 1980. Five years after the plant was turned over, TMX noticed numerous cracks and deflections along the roof girders and beams of the building.

When informed of the situation, AWIA maintained that its structural roof design was correct and that the cracks were caused by the incorrect pouring of concrete during a heavy rainfall on July 18, 1979 based on the construction report of AWIA’s site representative, Engr. Gavino Lacanilao.

To correct the roof problem, TMX stopped operations of its plant in December 1985 and installed 118 steel lally columns. TMX spent P2,385,499.00 for shoring and P1,546,084.00 for wages paid to its employees during the plant shutdown.

TMX sued AWIA for damages with the Regional Trial Court in

Makati City to recover the costs incurred for the corrective work and payment of workers’ salaries. The trial court ruled that AWIA faithfully complied with its obligations and that only 11 columns should have been installed to correct the roof defects. But it ordered AWIA to reimburse TMX for the 11 columns installed as its just and equitable share in the expenses incurred. The trial court denied TMX’s claim for reimbursement of the wages paid.

On appeal, the appellate court reversed the trial court’s decision and held AWIA liable for its failure to promptly and adequately notify TMX of the defects and deficiencies in the construction and how this could be rectified by the contractor. AWIA was ordered

to reimburse TMX for the 11 columns installed and for the total amount of salaries paid to its workers. AWIA filed a further appeal with the Philippine Supreme Court.

AWIA argued that it kept TMX adequately informed of the weak cement mixture through Engr. Lacanilao’s report, but TMX’s engineers found no reason to take remedial measures after being informed. It further argued that it could not be held liable for the employees’ salaries for the entire period of the shutdown, which would have been shorter had TMX installed only 11 columns instead of 118, and in the absence of proof that TMX actually paid said wages.

The Supreme Court rejected AWIA’s arguments and held it liable for breach of its duty of construction administration when it failed to adequately inform TMX of the possible implications of the contractor’s mistake in the concrete pouring. The report relied upon by AWIA was a mere narration of what transpired during the night of July 18, 1979 as to the pouring of concrete, but it did not in any way warn TMX that the quality of the roof may be in jeopardy and that it had to be rectified. Had the effects on the marginal strength of the concrete been promptly disclosed to TMX, the roof problem could have been corrected by the contractor and TMX could have been spared from further expenses.

Since AWIA’s breach of duty of construction administration was a crucial factor that caused TMX to spend for the repairs, TMX was entitled to recover actual damages for the expenses incurred. The Supreme Court ordered TMX to pay costs of the 11 columns installed but deleted the award of actual damages for the salaries for failure to prove the exact amount of wages paid. Instead, as a matter of equity, it awarded temperate damages to TMX in the amount of P500,000.00.



<sup>1</sup>Editor’s note: Although the case emanated from the Regional Trial Court, the ruling applies to construction arbitration.

## MEMBER SPOTLIGHT

### Ricardo Ma. P.G. Ongkiko



Ricardo “Ricky” Ongkiko is a litigation partner at SyCip Salazar Hernandez & Gatmaitan, a leading full-service law firm in the Philippines, which is celebrating its 65th Anniversary this year.

Mr. Ongkiko obtained his degree in B.S. Economics in 1984 from the University of the Philippines, magna cum laude. He finished law from the same University in 1988, graduating class salutatorian and cum laude. He was a member of the Order of the Purple Feather Honor Society, and became its Chancellor in his last year. He was also a member of the editorial board of the Philippine Law Journal, and member of the Philippine Team to the 1987 Jessup Moot Court Competition on International Law held in Boston, Massachusetts, U.S.A.

He was admitted to the Philippine Bar in 1989. He later obtained his Master of Laws degree from the University of Michigan Law School in Ann Arbor, Michigan, U.S.A. in 1992.

Mr. Ongkiko joined SyCip Salazar Hernandez & Gatmaitan in November 1988 and became partner in January 1997. His practice areas include international and domestic arbitration, construction arbitration, mediation, civil and commercial litigation, corporation Law, and contract Law. He has acted as arbitrator under the PDRCI Rules of Arbitration, and as counsel in various international and domestic arbitration under the ICC Rules of Arbitration, UNCITRAL Arbitration Rules, Philippine arbitration law, and the Philippine Construction Industry Arbitration Commission Rules of Arbitration. He is also a speaker on ADR in various Philippine Mandatory Continuing Legal Education programs.

Aside from being a Trustee and Assistant Secretary of PDRCI, he is a Trustee of the Philippine Institute of Arbitrators, a learned society dedicated to promoting private dispute resolution within the Philippines. He is also an Associate Member of The Chartered Institute of Arbitrators, and an Accredited Mediator of the Philippine Court of Appeals. Until recently, he was a radio host of Kasangga Mo sa Batas-Veritas Action Line, a legal aid program at Radio Veritas.



### HKIAC holds 25th Anniversary Conference in November 2010

The Hong Kong International Arbitration Centre (HKIAC) marks its 25th anniversary this year with a series of events from November 17 to 20, 2010.

A highlight of the celebration is the HKIAC 25th Anniversary Conference to be held on November 18 to 19, 2010 at the JW Marriott Hotel, Hong Kong. The conference theme is “Rethinking International Arbitration.”

The keynote speaker of this event will be International Council for Commercial Arbitration President Jan Paulsson. The conference is expected to draw distinguished practitioners from around the world who will serve as presenters or moderators of the various sessions.

PDRCI is among the supporting organizations of the conference. For more information, please contact the PDRCI Secretariat.

### PSE Maharlika Board Rules Mandate PDRCI Arbitration



► **FROM PAGE 1** ... binding on stakeholders, Article VI, Section 1.2(5) of the Maharlika Board Rules provides for an arbitration clause that a Maharlika Board-listed company shall include in its Articles of Incorporation, by-laws and stock certificates.

Atty. Rissa L. Oflada, officer-in-charge of the PSE Corporate Governance Office, said that the current draft of the Maharlika Board Rules will be subject to further consultations, after which it will be submitted to the PSE Governance Committee by September this year. The Maharlika Board Rules will then have to be approved by the PSE Board of Directors and the Securities and Exchange Commission before it can be implemented.

The Maharlika Board was inspired by the successful “Novo Mercado” system of the Bolsa de Valores, Mercadorias e Futuros, Brazil’s securities exchange. The project is supported by the British Embassy in Manila through the UK Government Special Programme Fund and partly by the International Finance Corporation.

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