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BROADENING ITS SCOPE OF ARBITRATION ADVOCACY

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New ADR Rules for disputes between national government agencies

By: Arveen N. Agunday

On March 22, 2011, the Office of the Solicitor General (OSG) promulgated the Rules on Alternative Dispute Resolution for Disputes between National Government Agencies.

In enacting the Rules, the OSG relied on its authority under Presidential Decree No. 242 (1973), in relation to Sections 66-71, Chapter 14 of Executive Order No. 292 (1987), to settle the claims, disputes, and controversies between or among the departments, bureaus, offices and other agencies of the national government.

The Rules do not apply to disputes involving constitutional issues, public order, public policy, morals, principles of public exemplarity or other matters of public interest, which shall be resolved through adjudication.

Under the Rules, the Solicitor General is empowered to choose the most appropriate mode of dispute resolution depending on the nature of the interests involved. However, while the Rules encourage the resort to alternative modes of dispute resolution, such as mediation, arbitration, or early neutral evaluation, they only outline the procedure for mediation and arbitration.

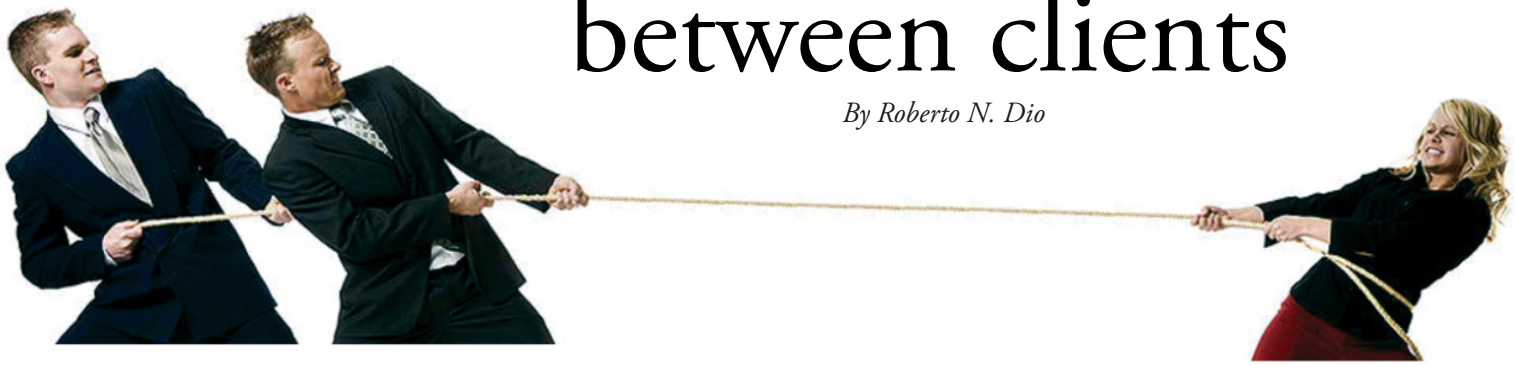
Under the section on mediation, the Rules contain the following terms and provisions, among others: (a) authority of the Solicitor General to determine whether a dispute is appropriate for mediation; (b) preliminary mediation conference, during which the process and benefits of mediation, as well as the risks and costs of pursuing litigation, shall be explained; (c) procedure for selection of mediators from among the roster of accredited OSG lawyers-mediators; (d) initial and succeeding joint conferences, during which the parties shall disclose how the controversy arose, their respective positions therein, and various options in resolving the dispute, among others; (e) confidentiality of proceedings and prohibition on the introduction in evidence of the matters discussed during mediation; (f) execution and enforcement of settlement agreements, in case mediation is successful; and (g) costs of mediation.

Under the section on arbitration, the Rules provide for the following, among others: (a) coverage and commencement of arbitration proceedings; (b) contents of petition for arbitration; (c) that the refusal of the respondent to arbitrate shall not affect the proceedings; (d) manner of selecting the sole arbitrator or the arbitral tribunal; **PAGE 4** ▶

CONTENTS

THE PHILIPPINE ADR REVIEW PUBLISHES MATTERS OF LEGAL INTEREST TO PDRCI'S MEMBERS AND READERS. THE ARTICLES PRINTED IN THE REVIEW CONTAIN INDIVIDUAL VIEWS OF THE AUTHORS AND DO NOT STATE PDRCI'S POLICY. CONTRIBUTIONS MAY BE SENT TO THE PDRCI SECRETARIAT. ALL MATERIALS SUBMITTED FOR PUBLICATION BECOME PROPERTY OF PDRCI AND ARE SUBJECT TO EDITORIAL REVIEW AND REVISIONS. TEXTS OF ORIGINAL LEGAL MATERIALS DIGESTED ARE AVAILABLE UPON REQUEST.

Mediating a dispute between clients



By Roberto N. Dio

One of the toughest cases a mediator can handle is resolving a dispute between two clients. What makes the assignment difficult is not the amount involved or the complexity of the issues, but the emotions attached by the parties to the dispute.

It started almost two years ago when one of my clients mentioned that he was having a hard time dealing with one of his shareholders, who was asserting a right against the client's corporation. When the client identified the shareholder, I had to restrain myself from falling off my chair and cautioned the client not to disclose any further information about their dispute.

"That shareholder happens to be one of our clients," I said. That triggered an outburst from my client, producing exactly the opposite effect of what I intended. To cut a long story short, the client asked me if I could help mediate the dispute. Having trained as a mediator, I accepted the request but advised the client that I would need the consent of his adversary, who was my other client. At this point, I had not been formally designated as a mediator in the dispute as my engagement was merely exploratory.

It took a while before I had an opportunity to sit down with my other client to broach the idea of mediation. It happened when I was preparing that client for trial.

We were having breakfast and going through possible questions on cross-examination. Very casually, I mentioned the name of my first client and disclosed that the person also happened to be a client of mine. I still vividly remember the reaction in my other client's face. The client gently placed the fork and knife on the table, looked me in the eye and broke into a wry smile. "We have a dispute …," the other client said before I waived my hand to signal a stop to any further disclosures.

To cut another long story short, the second client put a positive spin to this development and suggested that I help mediate their dispute. I said I would, but that both sides would have to formally appoint me as a mediator and that they would undergo a formal mediation process. The second client agreed.

Once I informed my first client of this development, I drew up a mediation agreement and emailed it to both parties. After getting their comments and clarifying their queries, we finalized the agreement, including my fees (which was paid to my firm), and agreed on the first two of several mediation conferences.

We opted for the boardroom of the Tower Club, a neutral venue, as the site of the mediation conferences. The parties were assisted by counsel of their choice and were asked to bring original documents and powers of attorney to negotiate and enter into a compromise agreement. The proceedings were not recorded but both sides were asked to bring a laptop in case a compromise would have to be signed.

Before commencing the mediation conference, I informed the parties of my training and experience and gave a road map of the process. It helped overcome the parties' and their counsel's anxiety about the mediation process and initial reluctance to disclose information to the other side and to make concessions caused.

I also issued written ground rules that included the conference agenda, the introduction of each party and his or her spokesperson, statement of the claim and counterclaim, rules of decorum, interruptions, caucuses with the parties, break-outs and adjournments. This was the easy part.

After the opening statements and the issuance of the opening positions, the recriminations began in earnest. Each side blamed the other for the dispute,

made personal comments that slighted the other, and frequently interrupted the other side. It was a challenge just to keep the discussions going because each side felt that he or she was entitled to speak *as my client*. I did not get to bang the gavel but had to repeatedly remind the parties to observe the ground rules.

Both sides went into the mediation with the usual litigation mindset of not giving an inch to the adversary. They refused to concede at the outset, and every statement, whether true or not, invited a response, some of it sarcastic. At one point, the discussion turned into a verbal slugfest that threatened to reduce my role to that of a boxing referee.

It almost came true in the afternoon of the first day, when explosive words were fired in exasperation and a gauntlet was suddenly thrown. The adversaries stood from their seats and started to move towards each other. I had to assert my authority as a mediator to avert a fistfight and warned the parties that I would withdraw from the mediation if they refused to behave in accordance with the ground rules.

After a brief adjournment to cool off steam, the mediation resumed. I went into several private caucuses to help each side address his or her issues and needs and to come up with concessions. However, after two straight days of mediation, the parties were still far apart in their bargaining positions.

It took several months more of on-and-off negotiations before the parties began to close the gap in their demands. At one point, I terminated the mediation and collected my fees after one side signified that it was no longer interested in a compromise. It turned out not to be the case, because the same party later asked for a resumption of the mediation. That party had a hard time disabusing itself of the notion that I was favoring the other side whenever I suggested a term or condition that involved a concession.

When the parties finally broke through their conceptual barriers and agreed on the commercial terms of settlement, the compromise was threatened anew by the negotiation on the draft settlement agreement. At the last minute, the deal was almost called off by a disagreement on the applicable penalty in case of default and the discount rate in case of prepayment.

What moved the mediation to a successful conclusion was not my "expert" handling of the process, which actually went by the book, nor the terms that I helped the parties to craft in their compromise agreement. The mediation ended successfully, nine months after it formally started, because of the parties' desire to put an end to their dispute in a speedy, inexpensive and convenient way.

Although they initially doubted the usefulness of mediation as an alternative means of dispute resolution, they gradually developed confidence in the process as they became more and more involved. In the end, both sides accepted that they could live better with a mediated settlement than with an adjudicated result that could be far more costly and cumbersome, and still be subject to appeal and enforcement.

Next: Lessons learned in mediating disputes between clients.

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 25 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. Victor P. Lazatin

Atty. Victor P. Lazatin is in his second term as President of PDRCI. He is a senior partner of Angara Abello Concepcion Regala and Cruz (ACCRA), where he specializes in litigation and dispute resolution.

Atty. Lazatin is heavily involved in civil and commercial litigation as well as arbitration. His practice spans a wide range of areas, including alternative dispute resolution, construction and infrastructure, estate proceedings, intra-corporate disputes, mining and natural resources, real estate and telecommunications.

He is an accredited arbitrator of the Construction Industry Arbitration Commission (CIAC), PDRCI, and the Singapore International Arbitration Centre. He was a past President of the Philippine Institute of Construction Arbitrators and Mediators (PICAM) in 2005 and 2006.

Atty. Lazatin was also President of the Philippine Bar Association in 2006-2007 and is active in other organizations, including the Inter-Pacific Bar Association, ASEAN Law Association, Integrated Bar of the Philippines and Philippine Council of the International Chamber of Commerce.

He authored two handbooks on commercial and construction arbitration and co-wrote articles on arbitration and dispute resolution in International Commercial Arbitration in Asia (2002) and Dispute Resolution in Asia (2002). Atty. Lazatin is a regular speaker in international and local seminars and conferences on alternative dispute resolution.

Atty. Lazatin graduated cum laude from the University of the Philippines College of Law. He was a Clyde Dewitt Fellow at the University of Michigan, where he obtained his Masters of Law.

New ADR Rules for disputes between national government agencies

FROM PAGE 1 ▶ (e) the Solicitor General's authority to determine whether to appoint a sole arbitrator or a three-person panel depending on the complexities and intricacies of the dispute; (f) qualifications and powers of arbitrator/s; (g) preliminary conference, during which the parties may agree on the procedure to govern the arbitration proceedings, among others; (h) procedure for challenge to the appointment of arbitrator/s; (i) order of and procedure for presentation and offer of evidence; (j) the issuance and contents of an arbitral award; (k) motion to vacate the arbitral award; (l) transmittal of the award to the Secretary of Justice, for the latter's approval or modification; (m) procedure for appeal or execution of arbitral award; (n) confidentiality of proceedings; and (o) costs of arbitration.

The Rules will take effect 15 days after its publication in a newspaper of general circulation.

NEA adopts ADR to resolve disputes between electric cooperatives

By: Gerrmai C. Abella

The Philippine National Electrification Administration (NEA) formally adopted alternative dispute resolution (ADR) in resolving disputes submitted to it, in accordance with Republic Act No. 9285 (2004) or The ADR Act of 2004.

Pursuant to its enabling law, Presidential Decree 269 (1973), as amended, NEA issued Memorandum No. 2011-007 on December 28, 2010 to implement ADR in the process of resolving complaints, conflicts or cases brought by or against electric cooperatives (EC), including their Board of Directors, general managers, officials, employees, member-consumers and other stakeholders. The Memorandum took effect immediately.

NEA's Deputy Administrator for Electric Distribution Utilities Services (DA-EDUS) is responsible for the implementation of the ADR policy, with the support of an organized ADR Secretariat. Any complaint against EC officials and employees received by NEA, as well as reports gathered by NEA officials on a controversy that will affect operations, will be endorsed to the Office of the DA-EDUS for validation. The official, together with ADR specialists, will then determine whether mediation is feasible.

If mediation is feasible, it will be conducted by trained and accredited ADR specialists. If mediation fails, the dispute will be endorsed to the NEA Administrative Committee (ADCOM) for appropriate action. The ADCOM is no longer mandated to conduct mediation or conciliation.

In adopting the ADR policy, NEA seeks to promote party autonomy, ensure a speedy and inexpensive settlement of disputes, and to avoid further escalation of conflicts.

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