

# THE PHILIPPINE ADR REVIEW

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BROADENING ITS SCOPE OF ARBITRATION ADVOCACY



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## ADR now mandatory in PPP projects

By Leonid C. Nolasco

National and local government agencies are now required to include provisions on the use of alternative dispute resolution (ADR) mechanisms in all contracts involving projects with the private sector. This is the mandate of Executive Order No. 78 (EO 78), which was issued by the President on July 4, 2012.

EO 78 mandates the inclusion of ADR mechanisms in all Public-Private Partnership (PPP) projects, build-operate-and-transfer (BOT) contracts, and joint venture agreements

(JVAs) between the Philippine government and private entities. Local government units (LGUs) are also encouraged to stipulate on ADR mechanisms in accordance with their own rules when they enter into similar contracts with the private sector.


EO 78 envisions a more inviting climate for private investments by making the resolution of disputes arising from contracts less expensive, tedious, complex, and time-consuming, especially for large-scale, capital-intensive infrastructure and development contracts. It also aims to encourage and actively promote the use of ADR mechanisms as efficient tools in achieving speedy and impartial justice, thus de-clogging the court dockets.

EO 78 directs the National Economic and



Development Authority (NEDA), in consultation with the appropriate government agencies, to issue the implementing rules and regulations for the EO, which will be binding on

all government agencies and which shall guide LGUs who enter into PPP or BOT contracts and JVAs with the private sector.

It also orders the Department of Justice, through the Office of the Alternative Dispute Resolution, NEDA through the PPP Center, and the government media instrumentalities to conduct a massive information campaign on the policy directive and the different alternative dispute resolution mechanisms. 

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# Going off the record

Turning off the audio recorder can save time and costs.

By Roberto N. Dio

*In the last issue, the author discussed the requirement of oral hearings in domestic and international arbitration.*

## Due process

What aggravates the time and cost of oral hearings is the norm of recording the hearing for future reference by the tribunal and the parties. When counsel argues or a witness testifies on record, they tend to become self-conscious. An objection elicits a response, which in turn draws a counter-argument. The examination of the witness may repeat what is already stated in the written statement or documents or can veer away from relevant matters, sometimes revealing the ignorance or lack of preparation of counsel. The witness can say too much or debate with counsel, and use the hearing as an opportunity to vent against the other party.



Because of the importance of giving the parties a full and equal opportunity to present their case, the tribunal may feel powerless to stop the tit-for-tat or to limit the examination only to matters arising from the agreed issues. The tribunal may also be hampered by a desire to please the parties and counsel who nominated them. The threat of a challenge to the arbitrators or the vacation of the award can likewise be daunting.

However, it is important to note that oral hearings can suffer from diminishing returns over time. According to Cairns, an advocate allowed 15 minutes for argument

will only address the most fundamental issues but another one allowed an entire day will discuss many peripheral issues (at 185). The same principle applies to the examination of witnesses (*Ibid.*).

## Party agreement

Because party autonomy is the foundation of arbitration, the parties may sometimes reach a detailed agreement on the conduct of the arbitral hearing, including the provision for oral testimony on direct examination, generous amounts of time for cross-examination, opening and closing statement, and legal submissions.

This is likely to occur, observed Cairns, “where both parties are represented by lawyers from common law jurisdictions who agree on an extended oral hearing on the common law model.” (at 191)

## Going off the record

One way of shortening the oral hearing is by the tribunal and the parties agreeing to turn off the audio recorder and discussing the agenda or roadmap at the start of the hearing. The tribunal used this approach in two arbitration hearings attended by the author.

In the first one, the oral hearing was threatened with delay due to several motions filed by the parties. While the respondent filed a motion to amend the signed Terms of Reference, the claimant filed its own motion to amend its Statement of Claims to include an individual who was not a party to the arbitration agreement.

The claimant’s ingenious argument in support of its motion was, since respondent denied the authority of the signatory to the contract containing the arbitration clause, then the signatory acted as if he were the principal and was therefore bound by the arbitration clause. In addition to the two motions, respondent filed another motion to substitute the written statements of its witnesses with evidence to be gathered during the ocular inspection of the project site in dispute.

Instead of recording the oral hearing and ruling on the merits of the motions after hearing the oral arguments of counsel, which would have delayed the hearing for several weeks, the tribunal invited the parties to go off the record to discuss the agenda of the hearing. As the tribunal discussed each item on the agenda beginning with the motion filed by the respondent, the parties began to move forward from their initial hostile positions and eventually agreed to appoint a common expert to inspect the project site and to submit a report in two weeks.

As common expert, they jointly nominated an engineer who was a witness for one of the parties. The witness, who was already at the hearing, accepted her appointment and quickly agreed to her terms of reference. The parties also agreed to accept the expert's report and recommendation and to let it serve as basis for the tribunal's award. As icing on the cake, the parties agreed to waive their statutory right to appeal from the award and to comply with it after 15 days from notice.

In the other case, the tribunal called the parties to a second preliminary conference to stipulate on the issues of fact and law involved in the dispute. The parties had earlier submitted a joint stipulation of facts and documents but they were unable to reach agreement on the issues. Each side submitted a list of several issues they wanted the tribunal to resolve. To avoid a possible *ultra petita* objection in case the tribunal grants a broader relief than that specified by the parties, the tribunal invited them and their counsel to discuss the issues off the record.

Instead of both counsel fighting each other on record and debating the language of each proposed issue, the tribunal proposed that both sides dovetail their issues by basing it on specific contractual

clauses or legal provisions, such as "Whether claimant or respondent is liable for cost under Art. 38 of the PDRCI Rules and, if so, how much?"

After about two hours of collaborative discussion, the parties reached agreement on several issues that were recast by the tribunal in the form of a supplemental Terms of Reference. No voices were raised and no egos were bruised during the exchange of views, which involved not only the parties and their counsel but all three members of the tribunal. The tribunal then officially went on record and briefly summarized the proceeding, making sure that the parties confirmed what transpired. As a bonus, the parties agreed to stipulate on two more items of fact suggested by the tribunal.

Had the parties gone on record in those two cases, the oral hearings would have proceeded in the usual way of objections, arguments and heated discussions. The oral hearings would have been longer and costlier for the parties, the record thicker and heavier, and the issues more complex for the tribunals to resolve. 📌

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**About the Author**



Atty. Roberto N. Dio is a senior litigation partner of Castillo Laman Tan Pantaleon & San Jose. He is an accredited construction arbitrator and a mediator of the Court of Appeals.

He is also a trained intellectual property arbitrator. He serves as a trustee of PDRCI and editor of *The Philippine ADR Review*. In August, he will undergo dispute board adjudication training under the auspices of the Japan International Cooperation Agency and *FIDIC*.

**MEMBER SPOTLIGHT**

**Atty. Maria Lourdes E. Rivera**



Atty. Lourdes E. Rivera finished law in 2006 at the Ateneo de Manila University, where she was in the top 290% of her class. She studied philosophy at De La Salle University, where

she graduated *magna cum laude* in 2001. Atty. Rivera showed early interest in arbitration by discussing the enforceability of arbitral clauses in line with Republic Act 9285 (Alternative Dispute Resolution Act of 2004) in her *Juris Doctor* thesis at the Ateneo.

Atty. Rivera is licensed to practice in the Philippines and in New York State, U.S.A. She is a registered foreign associate lawyer of Michael Hwang, SC in Singapore since 2010. She assisted in several Dubai International Financial Centre cases, where Mr. Hwang sits as Chief Justice.

In 2010, Atty. Rivera was appointed as Tribunal Secretary in a London Court of International Arbitration (LCIA) case involving a US\$37 million financial derivatives dispute between an international bank and a company under an International Swap Dealers Association (ISDA) Master Agreement governed by English law.

From 2007 to 2009, she worked for Engelin Teh Practice, LLC's litigation and arbitration department. Before joining Engelin Teh, Atty. Rivera was an associate in a local firm where she successfully handled an election contest for a client. She also interned at the Singapore International Arbitration Centre (SIAC), Public Attorneys' Office (PAO), and *Bantay Katarungan*, a non-government organization that monitors appointments to the Philippine judiciary.

During her spare time, Atty. Rivera runs, plays the piano, and organizes outreach activities for various orphanages and homes for the aged.

Currently she is a regular columnist of *Pilipino Mirror*, a business tabloid, Director of K&R United Inc., an export company, and a Principal at Maria Rivera Law Office. 📌

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**THEME: ADR PRACTICES AND PPP OPPORTUNITIES**

**November 8 - 9, 2012**

**INTERCONTINENTAL HOTEL MAKATI, PHILIPPINES**

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## CONFERENCE HIGHLIGHTS:

Discover the latest trends in alternative dispute resolution:

- Regional developments (Trends and best practices)
- IBA Guidelines on Disclosure
- Ethical conduct and challenges of arbitrators
- Dispute Resolution in PPP – International perspective
- Recent developments in the concept of “public policy”
- Procedural due process and evidence
- Public policy and the enforcement/recognition of arbitral awards
- Arbitrator discretion and due process
- Institutional arbitration – Recent challenges

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