

THE PHILIPPINE ADR REVIEW

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BROADENING ITS SCOPE OF ARBITRATION ADVOCACY



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PDRCI is ADR center for ASEAN Capital Markets Initiative

The Philippine Securities and Exchange Commission (SEC) has designated PDRCI as the ADR center in the Philippines to resolve capital markets disputes in the Association of Southeast Asian Nations (ASEAN).



The designation was made pursuant to ASEAN's plan to achieve regional capital market integration by 2015. The ASEAN Economic Community Blueprint ("AEC Blueprint") aims to establish a single regional market and production base with free flow of goods, services, investments, capital and skilled labor. It also sets out a broad general framework to strengthen ASEAN capital market development and integration by 2015.

Under a regionally-integrated capital market, investors can buy and sell securities in any stock market without restriction, while companies are similarly free to raise capital in any market in the region. Financial intermediaries such as banks, insurance companies and financial advisors are likewise free to offer services throughout the region once they are given the license to do so by one of the local regulators.

However, while regional integration makes it easier to transact across borders and significantly increases economic opportunities for companies and investors, the cross-border character of these transactions also creates resolution and enforcement issues should disputes arise between issuers, investors and intermediaries located in different jurisdictions.

To address this, ASEAN has created the Working Group on Dispute Resolution and Enforcement Mechanisms (WGDREM) to design a framework for the cross-border dispute resolution and enforcement of ASEAN capital market disputes and to propose the rules and guidelines for this dispute resolution system.

WGDREM is composed of representatives from both the capital market regulators as well as the Ministries of Justice of each of the ASEAN member countries. The Philippine representatives to the WGDREM are SEC Chairperson Teresita J. Herbosa and Atty. William M. Varias, Head of SEC's Compliance and Enforcement Division.

WGDREM will submit the draft dispute rules to the ASEAN Capital Markets Forum (ACMF) for approval. ACMF is composed of the ASEAN capital market regulators. The draft rules will undergo final approval by the ASEAN Finance Ministers' Forum (AFMF). Once approved by the finance ministers, the rules will be adopted as the official ASEAN capital market ADR rules.

The ASEAN regional market integration initiative is supported by the Asian Development Bank (ADB), which appointed PDRCI Secretary General Salvador Panga, Jr. last year as its cross-border ADR consultant to provide technical advice, assistance, coordination and support to WGDREM.

During its meeting in Bangkok last November 2012, the WGDREM approved a framework whereby each ASEAN member country will appoint one or more ADR centers in their respective jurisdictions to serve as the

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PART ONE

Understanding construction contracts

By Roberto N. Dio



Part 1 of this article introduces the reader to the concept of construction contracts, its definition, types, and types. Part 2 will discuss the parties to the contract, its terms and conditions, the contract documents, and the stages in construction.

It has been said that if one were repeatedly involved in construction, anything that can go wrong eventually will [Murdoch & Hughes, *Construction Contracts: Law and Management* 8 (2007)]. These events are called construction risks. Construction contracts predict and allocate these risks, which become contractual risks, by making one party financially liable should the risks occur.

The parties will estimate the likely magnitude of the cost and the likelihood of the risks happening. An owner who builds only once may avoid some or all of the risks involved in construction, but a contractor, architect or developer who regularly engages in construction

is statistically bound sooner or later to meet some of these disasters (*Ibid.*).

The allocation of risk will impact the contract price. If the risk is to be borne by the contractor, the bid price would include an element of this contingency. On the other hand, whenever the risk is transferred from the contractor to the owner, this should reflect a reduction in the price to balance the risk assumed by the owner (*Id.*, at 9).

“Claims consciousness”—or active familiarity with and awareness of potential claim situations—is essential to successful project management. To do this, the contractor must be aware of the contractual risks associated with claims. One of his highest priorities would be to manage such risks [Levin, *Construction Contract Claims, Changes and Dispute Resolution* 8 (1998)].

Early identification of a claims

situation requires (a) a good working knowledge of the contract documents by the project manager, project engineer, foreman or superintendent, and the general support staff; and (b) working familiarity with legal concepts and rights that will affect the outcome of potential claim situations (*Id.*, at 9, 10). This article aims to introduce the reader to the legal concept of construction contracts.

What is a construction contract?

Online sources define a *construction contract* as a formal agreement for construction, alteration, or repair of buildings or structures (bridges, dams, facilities, roads, tanks, etc.). A construction contract is distinct from a contract to assemble, fabricate, or manufacture (<http://www.businessdictionary.com/definition/construction-contract>).

Under Article 1713 of the Philippine

Civil Code, a construction contract falls within the general classification of a *contract for a piece of work* whereby the contractor “binds himself to execute a piece of work for the employer, in consideration of a certain price or compensation. The contractor may either employ only his labor or skill, or also furnish the material.”

The term *construction* can include the erection, repair and demolition of things as diverse as houses, offices, shops, dams, bridges, expressways, home extensions, factories and airports. Different firms may carry out specialist work relating to particular technologies, but few firms are confined to only one building type or technology. Thus, the industry—and issues that affect construction projects—is sometimes difficult to comprehend fully because:

- The relationship between the parts are not always clear.
- The boundary of the industry is unclear.¹

A construction contract encompasses a *building contract* related to the construction of a building, as distinguished from the construction of infrastructure or *engineering projects*. *Engineering contracts* refer to the engineering and construction of an industrial facility designed by engineers, such as an offshore oil and gas platform or a mineral processing facility (*Ibid.*).

Types of construction contracts

Construction contracts fall into six general types:

- **EPC/Turnkey**, where the con-

tractor takes total responsibility for the engineering, procurement and construction (EPC), and provides a fully equipped facility ready for operation “at the turn of a key”.



- **Design and construct**, in which the contractor prepares the design to satisfy the owner’s requirements and then constructs that design.

- **Construct only**, the traditional form of construction contract between an owner and contractor in which the contractor constructs the design prepared for the owner by the owner’s engineer/architect, who has a separate design contract with the owner. These contracts can be:

(a) Lump sum

This is the most basic form of agreement between a supplier of services and a customer. The supplier or contractor agrees to provide specified services for a specific price. The owner then agrees to pay the price upon completion of the work or according to a negotiated payment schedule. In developing a lump sum bid, the builder will estimate the costs of labor and materials and add to it a standard amount for overhead and the desired amount of profit.

(b) Unit price

In this contract, the work to be performed is broken into various parts, usually by construction trade, and

a fixed price is established for each unit of work. For example, painting is typically done on a square foot basis. Unit price contracts are seldom used for an entire major construction project, but they are frequently used for agreements with sub-contractors. In a unit price contract, like a lump sum contract, the contractor is paid the agreed upon price, regardless of the actual cost to do the work.

- **Project management**, where the owner engages a project manager to act as its agent with control over the whole project, which may or may not be divided into discrete parts.

- **EPCM** (Engineering, Procurement, and Construction Management), in which the contractor designs, procures and as agent for the owner manages the construction.

- **Construction management**, in which the owner engages a construction manager to program and coordinate the design and construction activities, which are divided into discrete parts.²

Next issue: Parties to the contract, its terms and conditions, the contract documents, and the stages in construction.

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 28 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.

¹Loots & Charrett, *Practical Guide to Engineering and Construction Contracts* 24 (2009).

²*Id.*, at 26-7.

MEMBER SPOTLIGHT

Atty. Simeon G. Hildawa




Atty. Simeon G. Hildawa is the managing partner of the law firm of Parlade Hildawa Parlade Eco & Panga. His practice areas include taxation, estate planning, commercial and civil litigation, construction arbitration, corporate rehabilitation, mining, energy, intellectual property, immigration and environmental law.

He joined his firm in 1996 as a junior partner. He was a former associate attorney of Meer, Meer & Meer.

Atty. Hildawa served as tax counsel for one of the leading telecommunications companies and lead arbitration counsel in several of the biggest construction cases in the Philippines. He was a member of the team that represented a major sugar refinery in its corporate rehabilitation and represented several claimants in a similar proceeding against a major water utility company.

Aside from being an arbitrator of the Philippine Dispute Resolution Center, Inc., he is also an accredited arbitrator of the Philippine Chamber of Commerce and Industry. He also served as a former member of the Supreme Court of the Philippines' Sub-Committee on E-Commerce.

Atty. Hildawa received his law degree in 1989 from the University of the Philippines College of Law, after studying political science from the same university. He was awarded a diploma in International Tax Law by Robert Kennedy University in Zurich, Switzerland in 2000. 


PDRCI sets training seminars in March and June 2013

To further enhance its arbitration advocacy, PDRCI will hold two training seminars in the first half of 2013. The first leg of the training seminar will be on March 14 to 15, 2013, while the second one will be on June 13 to 14, 2013. Practitioners, government officials, contractors, consultants, project owners, members of academia, and students are expected to attend.

The two-day training seminar in March will focus on the basics of arbitration. On March 14, Atty. Arthur P. Autea will give an overview of arbitration. Atty. Salvador S. Panga, Jr. and Atty. Gwen S. De Vera will respectively discuss pre-arbitration issues and the process of commencing arbitration.

Atty. Roberto N. Dio will lecture on pre-hearing considerations. On March 15, PDRCI President Atty. Victor P. Lazatin will share his expertise in conducting arbitration hearings, while PDRCI President Emeritus Dean Custodio O. Parlade will talk on the recognition, enforcement, challenge and vacation of awards.


The training seminar in June will deal with advanced topics such as the International Bar Association (IBA) guidelines on evidence and conflict of interest. There will also be a mock mediation and arbitration. The names of the international speakers and the venue of the trainings will be announced later.

Interested members and readers may contact the PDRCI Secretariat by telefax (+632 822 4102) or email at secretariat@pdrcci.org for inquiries and reservations. 

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FROM PAGE 1 ► official capital market ADR center for its country. The designated centers will be tasked to adopt the approved ASEAN capital market ADR rules.

Under the framework, a retail investor will be permitted to file its claim before the designated ADR center of his home jurisdiction. For example, in case of a dispute between a Philippine investor and a Malaysian broker relating to the purchase of a block of shares in a Malaysian company listed in Bursa Malaysia, the Philippine investor may refer the dispute to PDRCI (as the official capital market ADR center for the Philippines) and the Malaysian company will be bound to participate in the dispute resolution proceeding in the Philippines in accordance with the ASEAN capital market ADR rules. Any mediation settlement or award issued by PDRCI to resolve the dispute shall be binding on the parties and will be enforced in accordance with the enforcement guidelines of the ADR rules.

The ADR rules for this system are currently under development. Once the draft rules are completed, they will be sent for review and comments to the designated ADR centers in each of the ASEAN member countries prior to submission to ACMF and the ASEAN Finance Ministers. The final version of the rules is expected to be approved in the middle of 2013. 

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