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PDRCI
PHILIPPINE DISPUTE RESOLUTION CENTER INC.

Secretariat

3rd Floor, Commerce and Industry Plaza
(besides Blue Leaf and Venice Piazza Mall)
1030 Campus Avenue cor. Park Avenue
McKinley Town Center, Fort Bonifacio
1634 Taguig City

Telefax: 822-4102
Email: secretariat@pdrci.org
Website: www.pdrci.org

PDRCI holds forum on draft ASEAN Capital Market Dispute Rules

PDRCI held a round-table discussion on the draft ASEAN Capital Market ("ACM") Dispute Rules on February 28, 2013 with representatives of the Securities and Exchange Commission (SEC) and the Office for Alternative Dispute Resolution (OADR).

The discussion was part of the regional consultations conducted by the ASEAN Working Group on Dispute Resolution and Enforcement Mechanisms (WGDREM) on the draft rules for the resolution of cross-border capital market disputes in the ASEAN region. The meeting was facilitated by PDRCI Secretary General Salvador S. Panga, Jr., who is also the cross-border dispute resolution consultant to WGDREM.

The draft Rules were prepared in support of 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 ASEAN region. Financial intermediaries such as banks, insurance companies and financial advisors will be free to offer services throughout the region once they are licensed 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 may create resolution and enforcement issues if disputes arise between issuers, investors and intermediaries located in different jurisdictions.

Under the dispute resolution framework earlier approved by the WGDREM, each ASEAN capital market regulator will appoint one or more dispute resolution centers in its jurisdiction to serve as the Designated ADR Institution ("DAI") for that country. The various DAIs will then be asked by ASEAN to adopt the ACM Dispute rules as their rules for ASEAN cross-border capital market disputes.

Any issuer or intermediary applying for a license from its home regulator to conduct or offer capital market services or products across ASEAN will be required to sign, as part of its application documents, a contract agreeing to exclusively submit any future claim or dispute for resolution under the ACM Dispute Rules. The issuer or intermediary will be required to secure liability insurance to cover any adjudication award issued against it under the dispute framework. **PAGE 4** ▶

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PART TWO

Understanding construction contracts

By Roberto N. Dio

In the last issue, we introduced the reader to the concept of construction contracts, its definition, types, and types. This part will discuss the parties to the contract, its terms and conditions, the contract documents, and the stages in construction.

Parties to a construction contract

The parties generally fall into five categories: (a) builders; (b) designers; (c) regulators; (d) purchasers; and (e) users of buildings [Murdoch & Hughes, Construction Contracts: Law and Management 2-5 (2007)].

Builders. Before the Industrial Revolution (1760-1840), construction involved only a handful of technologies such as bricklaying, carpentry, thatching and stone masonry. In the absence of a designer, buildings simply evolved. Most projects were organized by master masons and a few architects.

The Industrial Revolution led to the use of new materials and new ways of working. For example, steel beams enabled large spans to be achieved. Transportation also enabled the rapid spread of new technologies. Sites became more complex, involving more specialist trades.

The general contractor then emerged, a role first undertaken by Thomas Cubitts of London in the early 19th century. The general contractor fulfilled a need by employing all the necessary skills, providing all the materials, plant and equipment and undertaking to build what the client designed.

One confusing terminology that came into vogue is the use of "employer" to indicate the client or owner in standard-form building contracts. This explains the use of the term "employer" in Articles 1713 to 1715, 1719, 1721, and 1722 of the Philippine Civil Code. As now understood, "employer" refers to the person or entity who pays the building contractor. The employer is not necessarily the owner, who may be a different entity. For example, the owner of a port or airport may be the Republic of the Philippines but the employer will be the port or airport authority who engages the contractor.

Designers. The role of architects gradually changed from project leader to being just one of the consultants managed by the project leader. The need for measurement and valuation of work in progress led to emergence of *quantity surveying*; the need for specialized understanding of new technologies led to emergence of *structural engineering* and *services engineering*; and the need for overall control of the process led to the emergence of *project management.*

In simple projects, some of these disciplines have little involvement, but their roles can be very significant in case of complex buildings.

Regulators. Buildings and structures affect everyone who comes into contact with them. There are instances where a structure can threaten the freedom, privacy or rights of an individual. Legislation has evolved to regulate the activities of those who wish to build.

Planning legislation controls the appearance of buildings; building control legislation controls safety of finished buildings; health and safety legislation controls safety of the process of building, and so on. All building work requires permission before it can proceed. Under Section 307 of the National Building Code of the Philippines, an applicant who is denied a building permit may appeal to the Secretary of Public Works and Highways within 15 days from receipt of advice of the non-issuance, suspension or revocation of the building permit.

Purchasers. All construction work is ultimately undertaken for the benefit of a client, who is often the owner. Although the owner is the ultimate purchaser or buyer, everyone who is involved in a construction project is a party to a sales contract, whether as designer, builder or owner. One party is the buyer and the other party is the supplier of goods or services. The term *purchaser* applies to everyone who buys construction work.

Users of buildings. This term is broader than purchasers, and applies to all of us who pass by buildings, enter buildings and live in buildings. Construction design caters to the needs of users. "Users" also include non-users, who may become potential users.

Contract terms and conditions

Article 1713 of the Philippine Civil Code states that "By the contract for a piece of work 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 elements of a construction contract are:

- The contractor agrees to execute a

piece of work (object)
- Employing his labor or skill
- For a certain price or compensation (price)
- He may also furnish the material

By agreeing, the contractor and the employer give their *consent*. The *object* of the contract is the piece of work to be performed, and the *cause* is the promise of the contractor to build and the promise of the employer to pay the price. The essential requisites of a valid contract, which are consent, object certain, and cause, must concur for a construction contract to be valid (Civil Code, Art. 1318).

Terms and conditions of construction contracts

Under the law, the contracting parties may establish such stipulations, clauses, terms and conditions as they may deem convenient, provided they are not contrary to law, morals, good customs, public order or public policy (Civil Code, Art. 1306). In most standard form contracts, these are the *general conditions* and *special conditions.*

General conditions establish the relationship between the owner or employer, its agents (the architects and engineers), and the contractor. They define the responsibilities of the parties to maintain this relationship. The general conditions also establish the terms of the legal contract between the owner and contractor.

The use of a standard form of General Conditions of Contract [ex., FIDIC Conditions of Contract for Construction, and the Construction Industry Authority of the Philippines Document 101 (for government contracts) and Document 102 (for private contracts)] is common in building construction. Public works contracts usually use a custom set of conditions (*ex.*, CIAP Document 101) prepared for the particular branch of government, such as the executive, legislative or judicial branches and for the local government units.

The standard form of contract conditions is widely used, as the provisions are tested and well established. They are pre-printed and are included only by reference in the construction contract. By referring to CIAP Document 102, for instance, the parties incorporate by reference all the terms and conditions found in the standard form documents in its current version.

As the basis of the legal relationship between the owner and the contractor, the General Conditions of Contract is a very important document. It typically contains the following information:

- Definitions
- Rights and responsibilities of the owner and contractor
- Administration of the contract
- Procedures for claims and disputes, including method of dispute resolution
- Sub-contracts and sub-contractor's responsibilities
- Owner's use of separate contracts
- Changes in work
- Timely completion of project
- Payment procedures and methods
- Completion of contract
- Protection of persons and property
- Insurance
- Performance and payment bonds
- Testing, inspection, and correction of works
- Termination of contract

Also known as *particular or supplementary conditions*, special conditions on the other hand are additional conditions or modifications to the General Conditions of Contract that are specific to the particular owner and project. Together with the General Conditions of Contract, they form the *Conditions of Contract.*

All actions of the owner and contractor shall be judged for compliance with the Conditions of Contract. They serve as basis for fixing the risks between the parties and determining responsibility, as well as the resulting liability, for actions done by either party during the project period.

Each sentence in the Conditions of Contract can have an impact on the construction project. Hence, complete understanding of these documents is essential to effective project management [Minks & Johnston, Construction Jobsite Management 51-2 (2010)].

Contract documents

A variety of documents are typically incorporated into the *prime contract* by reference, such as the specifications, conditions of contract, addenda issued before executing the agreement between the owner and the contractor, and modifications issued after execution of the contract such as supplements. Subcontracts incorporate by reference these documents together with the prime contract. These incorporated documents are the "Contract Documents."

Unless specifically enumerated in the contract, Contract Documents generally do not include proposals and bidding documents (invitations to bid, instruction to bidders, sample forms, bid bulletins, and contractor's bids). Under most rules of evidence, such as the Parol Evidence Rule in Rule 130, Section 9 of the Revised Rules on Evidence, these are deemed incorporated in the written contract signed by the parties.

Incorporation by reference clauses are also known as "flow-down clauses," "conduit clauses" and "flow-through clauses." They pass through to a contracting party the risks and obligations assumed by its contracting partner in a separate contract. An example is where the owner requires the contractor to impose upon all its subcontractors certain obligations set forth in the prime contract, such as submission of written notices to specified representatives. In most cases, the contractor uses the flow-down clause to require the subcontractors to assume the obligations and responsibilities that the owner has assumed toward the owner [Brennan, The Construction Contracts Book 9 (2008)].

Oftentimes, the quantity of incorporated documents can be voluminous, running into multiple annexes, which can result in internal conflicts between the documents. An "order of preference" clause is helpful to identify which contract document prevails when a conflict occurs. For example, special conditions will prevail over general conditions, and specifications will prevail over drawings.

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.

MEMBER SPOTLIGHT

Atty. Domingo G. Castillo

Domingo "Doming" G. Castillo is at present a partner of SyCip Salazar Hernandez & Gatmaitan Law Offices (the largest full service law firm in the Philippines which has a complement of 41 partners and 130 lawyers in its legal staff with branches strategically located in Cebu, Davao and Subic) which he joined in December, 1977.

Doming studied in the University of the Philippines in Diliman where he obtained a Bachelor of Science in Business Administration (BSBA) [1973] and Bachelor of Laws (Ll.B) [1977] degrees. Subsequently, he obtained his Master of Laws (Ll.M.) degree from New York University in 1981. He thereafter worked in the San Francisco Law Firm of Heller, Ehrman While and MacAuliffe (1982) and with a London firm of solicitors Sinclair, Roche and Temperley (1983).

The wealth of experience he gained in the field of Maritime Law made Doming a much sought-after speaker in a number of law conferences organized by the International Bar Association, the Inter-Pacific Bar Association, the Greek Bar and China Maritime Law Associations and various MCLE accredited firms on topics dealing with admirality and maritime law. He also contributed legal articles to the "International Maritime Law Handbook" published by Kluwer's of the Netherlands on the Philippine law on arrest of ships, priority of claims and judicial sales of vessels.

In 1998, he was cited by the Euromoney Legal Group as one of the world's leading maritime lawyers. He was formerly President of the Maritime Law Association in the Philippines (1995). Currently, Doming is a maritime arbitrator and an active member of the Maritime Law Committee of the Inter-Pacific Bar Association.

More importantly, Doming has won precedent-setting cases before the Philippine Supreme Court, notably the *Stolt-Nielsen case* (184 SCRA 682), which upheld the arbitral clause calling for New York arbitration and the *Aboitiz Shipping case* (217 SCRA 359) which ruled on the limitation of liability of the vessel based on the real and hypothecary nature of maritime law which saved the client of over Php50 million by way of cargo claims which arose from the sinking of the vessel.

Areas of Competence: Maritime Law, Insurance, Customs Practice and General Litigation.

PDRCI holds forum on draft ASEAN Capital Market Dispute Rules

FROM PAGE 3 ▶ In case of a claim or dispute in relation to any contract, dealing or transaction involving capital market services or products between parties whose addresses or places of business are located in different ASEAN jurisdictions, the draft Dispute Rules allows the claimant to file its claim before its local DAI. The latter will then notify respondent of the claim and will set the agreed ADR processes in motion. For example, where the dispute involves a Philippine investor against a Singaporean broker, the Philippine investor may file his claim before the PDRCI (as DAI for the Philippines). PDRCI will then notify the Singaporean broker of the claim, set the proceedings in motion, and oversee the dispute resolution processes provided under the Dispute Rules.

The draft Dispute Rules offers four processes for resolution of disputes, namely, investigation, mediation, adjudication and arbitration.

Case investigation and mediation will be mandatory for all disputes. If the claim remains unresolved after these processes, it will then be referred to adjudication (for claims with a value of US$100,000 or less) or to arbitration (where the claim value exceeds US$100,000). The proceeding will continue in spite of respondent's failure or refusal to participate, and any adjudication award shall be immediately enforceable against the respondent's insurance coverage.

Where the dispute is referred to arbitration, the resulting arbitral award, if adverse to the respondent, will be enforced in the respondent's home jurisdiction in a manner consistent with the framework prescribed under the New York Convention, to which all the participating ASEAN countries are parties.

As soon as WGDREM approves the final version of the ACM Dispute Rules, the next step will be to conduct training and capacity building for the selected neutrals as well as the DAIs to ensure that both the neutrals and the institutions are able to perform the services described under the rules.

The consultation with all the ASEAN capital market regulators and their respective DAIs is ongoing. The WGDREM is scheduled to meet in Bangkok on March 25, 2013 to deliberate on the draft Dispute Rules and to consider all comments received during the regional consultations.

Roberto N. Dio, *Editor*

Shirley Alinea, Donemark Calimon, Ramon Samson, *Contributors*

Arveen N. Agunday, Juan Paolo E. Colet, Leonid C. Nolasco, and Ryan P. Oliva *Staff Writers*