

# THE PHILIPPINE ADR REVIEW

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BROADENING ITS SCOPE OF ARBITRATION ADVOCACY



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## *PDRCI to amend arbitration rules and issue guidelines on fees*

*By Oscar F. Cajucum*

The Philippine Dispute Resolution Center, Inc. (PDRCI) will issue amendments to the New Arbitration Rules as well as to Administrative Guideline No. 1, which was in effect since October 2005. The Ad Hoc Committee tasked with recommending the amendments proposed new provisions on deposit of costs and termination of proceedings.

PDRCI will also introduce its new Guidelines on Fees. Discussed below are some of the proposed changes to the Rules, and some notable features of the new Guidelines.

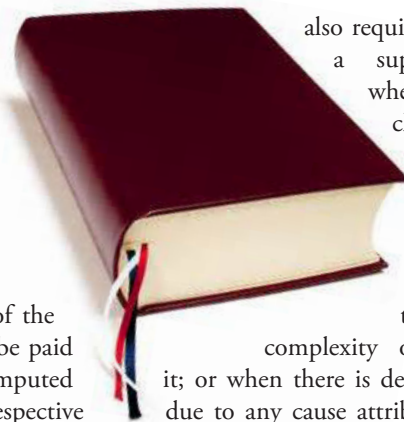
### *Deposit of costs*

Under the proposed Article 41 of the Rules, the costs of arbitration shall be paid by each party on a *pro rata* basis, computed according to the amount of the respective monetary claims or their corresponding value. The parties shall specify in their submissions the pecuniary value of their claims and state the equivalent monetary value thereof. A party who makes a claim as indemnity or alternative relief shall also make a provisional estimate of the value of the claim. The same principles shall apply to additional or supplemental claims.

In case a party fails or refuses to specify the pecuniary value of the claim, PDRCI shall make a provisional estimate of the amount of the claim, based on a recommendation by the arbitral tribunal. If a party fails to pay the full deposit within 30 days after receipt of the bill for payment, the arbitral tribunal, after hearing, may: extend the period for payment; suspend hearing of the claim the defaulting party; suspend the hearing until full payment; deny the claim; dismiss the case; or take any other appropriate action.

### *Supplementary deposits*

Under the proposed Article 42 of the Rules, PDRCI or the arbitral tribunal may



also require the parties to make a supplementary deposit when the amount of the claim is increased; the party delays the proceedings for any cause; ancillary services are performed by the PDRCI or the tribunal; the complexity of the case justifies it; or when there is delay in deciding a case due to any cause attributable to the parties. In cases where supplementary deposits are required, PDRCI or the tribunal shall decide the proportion in which each party shall pay the deposit.

### *Settlement or other grounds for termination*

The proposed Article 34 of the Rules governs the termination of the arbitration due to the parties' settlement and other grounds. It now provides that if the respondent who makes a counterclaim objects to the termination of the arbitration, the order terminating the proceedings shall only apply to the claim of the party withdrawing. ► **PAGE 4**

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## *The pre-existing duty rule in construction contracts*

*By Roberto N. Dio*

When I had my house built in 2008, I solicited bids from three contractors: one was referred by a family member, another by my law partner's architect, and another one by a fellow arbitrator. Upon opening the bids, the highest quote was almost double the lowest bid. It was good that I had friends in construction arbitration who gave me a second opinion, or I would have fallen for that old contractor's trick of submitting low and then surprising the owner with a request for price adjustment in the middle of the project.

As sometimes happens in construction contracts, the contractor submits a low bid just to clinch the award. Once the contract is signed and the advance payment is received, the contractor then delays the project or waits for the owner to issue a change order. When any of these trigger events happens, the contractor ambushes the owner by threatening to suspend the work or to stop the work unless the owner comes across and agrees to an increase in the contract price, citing

increased cost of labor and materials, fuel shortages, adverse weather, etc.

If the owner agrees to the increased price and signs a new contract, will she be liable for the additional price? The answer depends on whether the scope of work of the new contract is covered by the old contract. If the new contract involves the same work under the old contract, then the new contract is unenforceable for lack of a valid cause or consideration. This is

known in English and common law as the pre-existing duty rule.

### **Origin**

A number of authors claim that the origin of the rule and the reasons that led courts to adopt it in the first place are less than clear [Richard Rhyne, et al., "Scope of Typical Clauses," in Michael Callahan, Ed., *Construction Change Order Claims 22* (2d Ed., 2005)] or are lost to history [2

Williston on Sales 4 (2005)], but the rule may be traced to England where it originated.

According to Prof. Corneill Stephens of the Georgia State University College of Law, the pre-existing duty rule originated in a dicta in *Pinnel's Case*, an English case decided four centuries ago in 1602. The rule was later adopted in the leading case of *Foakes v. Beer*, decided in 1884. In that case, the court allowed plaintiff to recover interest on the judgment award paid by defendant in installment because the parties' agreement to allow defendant to pay over an extended period was not a sufficient consideration to discharge defendant from liability for interest, since he had a pre-existing duty to pay the judgment amount, including post-judgment interest. He only promised to pay during the extended period what he was legally obliged to do [Stephens, "Abandoning the Pre-Existing Duty Rule: Eliminating the Unnecessary," VIII Houston Business & Tax L J 355, 358 (2008); see also Kevin Teevan, Promises on Prior Obligations at Common Law 13, *et seq.*].

### Purpose of the rule

The traditional application of the rule is based on the doctrine of consideration in contract law—which is different from the concept of "cause" under civil law— but courts have recently justified the rule based on the concept of *economic duress* or as it is sometimes called, "business compulsion." Under the traditional rule, a police officer will not be entitled to claim a reward for the capture of a fugitive because he had a pre-existing legal duty to arrest the offender. There is therefore no sufficient consideration



for the reward.

The "economic duress" justification applies in the common experience of many travelers who find themselves in a deserted airport at night. Suppose that one contracts with a cab driver to bring him to his hotel on the other side of town for an agreed fare. Halfway through the journey in an isolated stretch of the highway, the driver suddenly stops the taxi and asks the passenger to alight unless he agrees to pay double the fare.

If the passenger agrees to pay the new fare, he may refuse to comply with the contract upon reaching the hotel because the cab driver had a pre-existing duty to complete the trip. By applying the rule in such situations, courts are supposed to deter coerced modifications of contracts through "hold-up" behavior [Emanuel, *Contracts* 104 (2010)] and avert abuses such as unconscionability,

coercion, bad faith, undue influence and deception (Teevan, at 18).

### Application to construction contracts

According to an author, "(I)t is certainly possible that a contractor may purposely bid low in order to get the contract, and then refuse to perform, after it is too late to obtain another contractor without loss and inconvenience, in order to induce a promise of more pay. The strict enforcement of the supposed general rule would tend to remove this temptation from bidders, since they would know that a promise so induced would not be legally enforceable." [Corbin on Contracts § 171, at 106 (1963)] The pre-existing duty rule is intended to prevent extortion and the "hold-up" game that sometimes occur in construction contracts [Roger Miller, *Fundamentals of Business Law* 171 (2012)].

*Next issue: Change orders under Philippine law and defining the scope of work to determine a contractor's pre-existing duty.*

### 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. Julius Anthony R. Omila



Atty. Julius Anthony R. Omila is a partner in Soller & Omila law offices. Since his admission to the Philippine bar in 1994, his main practice area has been court and administrative litigation. Through the years, he has successfully represented individual and major corporate clients, both local and foreign, in their various business and government transactions and cases involving civil, commercial, construction, intellectual property, procurement, criminal and labor issues, among others.

He began his interest in arbitration and other modes of amicable dispute resolution in 2009, with the enactment of the Implementing Rules and Regulations (IRR) of Republic Act No. 9285, otherwise known as the "Alternative Dispute Resolution Act of 2004". Since then, until now, he regularly attends trainings and conferences to further hone his skills in commercial arbitration, mediation and negotiation, and gain accreditations in various dispute resolution institutions both in the Philippines and abroad.

Aside from being a member and trained arbitrator of the Philippine Dispute Resolution Center, Inc. (PDRCI), Atty. Omila also serves as corporate secretary of the Philippine Institute of Arbitrators (PIArb), the first learned society of arbitration and ADR practitioners in the Philippines. In 2012, he was admitted as a member of the Chartered Institute of Arbitrators (CIArb), East Asia Branch, Philippine Chapter. A year later, in 2013, he was declared qualified as a member of the Millennium Challenge Account-Philippines (MCA-P) Bid Challenge Tribunal. He is also an accredited arbitrator of the ADR Center for Negotiation, Mediation and Arbitration. He likewise underwent intensive training in mediation as a scholar of the Department of Justice, Office of Alternative Dispute Resolution (DOJ-OADR).

Only recently, he successfully represented a major commercial bank in an international commercial arbitration dispute where he secured an interim measure of protection in aid of arbitration against a joint venture involving local and foreign information technology companies. He also assisted the same client in a private mediation where the joint venture settled their obligations with the bank. He has been involved in various mediation and negotiations of major construction, commercial, labor, and property disputes.

He studied political science at the University of the Philippines, Diliman and received his Bachelor of Laws degree from the University of the Philippines College of Law.

## PDRCI to amend arbitration rules and issue guidelines on fees

◀ **PAGE 1** If, before the final award, the arbitration becomes unnecessary or impossible to continue for any reason other than the settlement of the parties, the tribunal shall notify the parties of its intention to terminate the proceedings. The tribunal may hear the parties before issuing an order of termination. However, the exclusion of a party from the proceedings by the tribunal shall not be treated as a termination of the proceedings. Instead, the tribunal shall continue the arbitration as to the remaining claims.

Finally, the proposed Article 34 provides that grounds for avoiding the arbitration such as lack of jurisdiction over the subject matter or over the respondent, prescription, *res judicata*, or any similar ground, shall be raised as defenses in the answer.

### PDRCI Guidelines on Fees

The proposed PDRCI Guidelines on Fees shall be accepted by the parties and arbitrators involved in arbitrations administered by the PDRCI. Acceptance of the Guidelines shall be made by submitting accomplished forms to the PDRCI when the parties submit their notice of arbitration or answer, or when the arbitrator accepts his appointment, as may be applicable.

In fixing the tribunal's fees, PDRCI shall follow a schedule of fees for arbitrators, which PDRCI may issue from time to time. In exceptional cases, PDRCI may also adjust the fees for specific arbitrations.

Under the Guidelines, payments for arbitrators' fees received by PDRCI shall be understood to have been received in trust for the arbitrators. The fees shall be released directly and exclusively by PDRCI. PDRCI shall also act as the parties' agent for the purpose of withholding and remitting the proper taxes due on the arbitrator's fees. It shall release the arbitrators' fees in accordance with the Guidelines on Arbitrators' Compensation, which will be appended to the Guidelines on Fees.

Administrative fees shall also be determined in accordance with a schedule of fees. Upon payment of a non-refundable amount of P50,000.00, the notice of arbitration shall be accepted for filing. The PDRCI shall also charge a separate fee for providing a counsel in charge of the file or performing other special functions specified in the Guidelines, whether or not the arbitration is administered by it.

Advances on costs, which shall comprise the arbitrators' and administrative fees, shall also be fixed by PDRCI in accordance with a schedule of fees. Separate provisional advances on costs shall be assessed by PDRCI against the claimant and the respondent upon receipt of the notice of arbitration and the answer, respectively. The final advance on costs shall be assessed against the concerned party upon receipt of the statement of claims and the statement of defenses. Supplementary advances on costs may also be assessed. Lastly, if the arbitration is terminated before the final award, the PDRCI shall fix the cost of arbitration in accordance with the Guidelines on Arbitrators' Compensation.

PDRCI will submit the proposed amendments for study and approval by its Board of Trustees in the coming weeks.

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