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PDRCI to hold intensive training in mediation

By Ricky A. Sabornay

PDRCI will offer an intensive four-day training workshop on *The Art and Skills of Mediation* in April 2014. The program is open to all professionals, especially those who have a background in arbitration. Participants will learn the art of mediation by understanding the right skills and competence to effectively settle disputes.

The training will be handled by leading coaches such as former Court of Appeals Justice Teresita Dy-Liacco Flores, who served as Executive Director for Mediation of the Intellectual Property Office of the Philippines (IPOPHIL); Vilmi S. Quipit of the Philippine Mediation Center; Victory Terry A. Medina, who managed the model courts of the Justice Reform Initiatives Support Project (JURIS); Isagani G. Tan, governor for Central Luzon of the Integrated Bar of the Philippines Governor; Atty. Maria Imelda Q. Tuazon; and Engr. Salvador P. Castro, Jr., chair of the PDRCI Mediation Committee.

The first part of the course, "Understanding Mediation," discusses the impact of mediation on business, pragmatic depositions, the legal basis of mediation, conflicts, disputes and resolution of disputes, and Filipino social values that are helpful in mediation. ▸ **PAGE 4**

CONTENTS

PART TWO

The pre-existing duty rule in construction contracts

By Roberto N. Dio

Last issue: Origin and purpose of the pre-existing duty rule and its application to construction contracts.

Change orders under Philippine law

The rule under Philippine law is stated in Article 1724 of the Civil Code:

> The contractor who undertakes to build a structure or any other work for a stipulated price, in conformity with plans and specifications agreed upon with the landowner, can neither withdraw from the contract nor demand an increase in the price on account of the higher cost of labor or materials, save when there has been a change in the plans and specifications, provided:
>
> (1) Such change has been authorized by the proprietor in writing; and
>
> (2) The additional price to be paid to the contractor has been determined in writing by both parties.

Article 1724 applies to fixed lump-sum contracts, where the owner agrees to pay the contractor a specified amount to complete a scope of work involving a variety of unspecified items of work but without requiring a cost breakdown. The contractor estimates the project cost based on the scope of work and schedule and considers probable errors in measurement and changes in the price of materials [Leighton Contractors Phils., Inc. v. CNP industries, Inc., 614 SCRA 645, 657-8 (2010)]. In such contracts, the contractor assumes the risk of incurring a loss due to errors in measurement. By the nature of a *fixed lump-sum contract*, the owner will only be liable to pay the stipulated contract price (*Id.*, at 658).

Article 1724 governs the recovery of additional costs in fixed lump-sum contracts and the increase in price for additional work due to change in plans and specifications. Such added cost can only be allowed upon the (a) written authority from the developer or project owner ordering or allowing the written changes in work; and (b) written agreement of parties with regard to the increase in price or cost due to the change in work or design modification. Compliance with these two requisites is a condition precedent for the recovery. The absence of one or the other condition bars the recovery of additional costs. Neither the authority for the changes made nor the additional price to be paid therefor may be proved by any other evidence [Sps. Chung v. Ulanday Construction, Inc., 632 SCRA 485, 497-8 (2010)]. The requirement for the owner's written consent to any change or alteration in the specifications, plans and works under Article 1724 is deemed written in the contract between the parties (*Id.*, at 499).

A mere act of tolerance, such as by accepting and paying for certain change order billings that were not agreed in writing by the owner, does not do away with the contractual terms on change orders nor with the application of Article 1724. The payments for the change order billings are at best acts of tolerance by the owner that could not modify the contract (*Ibid.*)

Article 1724 amended the old rule

under Article 1593 of the Spanish Civil Code, which allowed the contractor to demand an increase in the price "when any change increasing the work is made in the plans, provided the owner has given his consent thereto," without specifying that the consent must be in writing. The evident purpose of the amendment is to prevent litigation for additional costs incurred by reason of additions or changes in the original plans [San Diego v. Sayson, 2 SCRA 1175, 1178 (1961)]. It does not only prohibit admission of oral testimony over the objection of the adverse party, but was adopted as a substantive provision or a condition precedent to recovery (*Id.*, at 1179).

Scope of work

Even if the owner has consented in writing to the change in price, it may refuse payment of the additional cost if there was no change in the work or modification in the design. In general, the contractor must establish the following elements in order to obtain additional compensation for extra work:

1. That the work was outside the scope of the original contract between the parties;

2. That the extra items or changes were ordered at the direction of the owner;

3. That the owner either expressly or impliedly agreed to pay extra;

4. That the extra items were not furnished voluntarily by the contractor; and

5. That the extra items were not rendered necessary by any fault of the contractor [Richard Rhyne, *et al.*, "Scope of Typical Clauses," in Michael Callahan, Ed., Construction Change Order Claims § 2.02, 20-21 (2d Ed., 2005)].

The contractor has the burden of proving each and every element by clear and convincing evidence (*Id.*, at 21). In most cases, the right of the contractor to recover will hinge on the scope of work clause. According to one author,

> The need for this clause is obvious: The owner wants as much work as possible for the payment, whereas the contractor wants to do as little as possible. Therefore the owner tries to define the scope as broadly as possible ("all labor, materials, services, and other work necessary to erect the building"); in contrast, the contractor seeks to define specific tasks ("install roof trusses, plywood and asphalt shingles"), with everything else being an "extra." [S. M. Siegfried, Introduction to Construction Law 21 (1987), cited in Rhyne, at 25]

The drafter of the scope of work clause, advised Rhyne, *et al.*, should carefully examine all the documents related to the project: plans and specifications, instructions to bidders, bid and bid estimates, correspondence, shop drawings, and all other terms of the agreement even if these documents may not be a part of the contract documents (Rhyne, *supra*). Because the scope of work clause will determine what each party's obligation will be, it should be the last provision drafted and it should not be done in haste (*Id.*, at 26).

The details of the scope of work are often found in the summary of works, bill of quantities, specifications, project schedules, and the designs, particularly the detailed plans. If these documents or any of them are not incorporated by reference in the scope of work clause or in the definition of contract documents, then the priority rules on contract interpretation will apply. If there are no priority rules in the contract, then statutory rules of interpretation, including customs and industry practice, will apply.

The threshold questions are (1) what is the "duty" (i.e., the scope of work) the contractor agreed to perform under the contract?; and (2) what is the contractor fairly entitled to be paid for the work actually performed? To answer these questions requires an assessment of the parties' intent as expressed in the language they used in the contract. Unfortunately, in complex construction cases, the strictures of the pre-existing duty rule's premise—a well-defined scope of work clause—do not provide tribunals a sufficient legal framework to resolve disputes. Thus, courts and tribunals have turned to other legal doctrines to resolve these questions (Rhyne, at 45).

In the next installment, we will look at the exceptions to the pre-existing duty rule.

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.

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Atty. Jose P. Crisostomo

Jose P. Crisostomo, Jr. is a senior partner of Siguion Reyna Montecillo & Ongsiako. He practices in the field of dispute resolution, principally in product liability, commercial disputes, taxation, family law and admiralty.

His experience has involved extensive appearances before regular and special courts, as well as quasi-judicial agencies and other tribunals. He has engaged in practice at all levels of litigation, both in the trial and the appellate levels.

He was involved in several notable cases. He has been counsel for parties in separate cases before the Sandiganbayan (the Philippine anti-graft court) involving a Philippine telecommunications company and a major newspaper publishing company. He represented consumers against manufacturers and distributors of soft drinks and beverages, tobacco products, cars and automotive products. He successfully defended physicians who were wrongfully sued for organ harvesting and a popular world champion Philippine boxer against a criminal complaint related to a paternity claim.

Mr. Crisostomo was counsel for a major airline in an international arbitration involving a commercial dispute with its general sales agents. In a landmark case that he handled, the Supreme Court reiterated the continued preference enjoyed by lienholders over specific properties of the debtor in case of insolvency.

He is a member of the Integrated Bar of the Philippines, the Philippine Bar Association, Maritime Law Association of the Philippines and the Philippine Dispute Resolution Center, Inc.

He obtained his degree in Bachelor of Science in Business Economics in the University of the Philippines in 1976 and in Bachelor of Laws also in the University of the Philippines in 1981. He passed the bar examinations in 1982, placing 8th that year with a grade of 87.7%. He attended the Southampton University Course on Maritime Law in 1999.

Before joining his firm, he was an investment and economics analyst at Ayala Investment and Development Corporation and a trial attorney at the Office of the Solicitor General.

PDRCI to hold intensive training in mediation

◀ **PAGE 1** The second part, "Important Basic Communication Hurdles," focuses on the barriers to effective communication, the art of active listening, verbal and non-verbal communication, and effectively responding to stimuli during mediation.

The third part of the program, "Effective Communication Tools and Techniques," will teach participants the detoxification of statements, using probing questions, dealing with impasse, and conducting caucuses.

The next part on "Stages, Mediation Process and Assimilations" introduces the participants to the stages and the processes of mediation including the opening statement, identification of issues, generating options, identification of common interest by the parties, crafting and enforcing a compromise agreement, and closing.

Finally, participants will have the opportunity to apply what they have learned during the role play, which will be facilitated by the trainers and coaches.

For more details about the program, interested parties may contact the PDRCI secretariat at telephone 555-0798 or by email at secretariat@pdrci.org.

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