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# ..... THE PHILIPPINE ..... ADR REVIEW

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## PDRC, IBP President explore ADR cooperation

PDRC Secretary General Roberto Dio and Asst. Sec. Gen. Francisco Pabilla, Jr. met last December with Integrated Bar of the Philippines (IBP) President Egon Cayosa and Philippine International Center for Conflict Resolution (PICCR) President Sixto Antonio to explore how they could work together to promote alternative dispute resolution (ADR), particularly arbitration.

PDRC gave the IBP and PICCR a briefer on its history, current status, and its objective of training as many commercial arbitrators to build capacity so PDRC could handle the volume of arbitration cases as they come. Training, PDRC explained, develops arbitrators and promotes the use of arbitration clauses in contracts. Its plan was to build the product first and offer the stakeholders the arbitration option in the litigation and ADR menu.

PDRC said that its current focus was on domestic arbitration. Once it develops its expertise in domestic arbitration, PDRC will go into international arbitration. Unlike other regional arbitration centers, PDRC does not enjoy state funding or support but it can accomplish the same results with the support of the IBP.



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## WHAT'S INSIDE

# Can virtual hearings work in domestic and international arbitration in the Philippines?

By Augusto A. San Pedro, Jr. & Rashel Ann C. Pomoy

With the Covid-19 pandemic, and the consequent community quarantine imposed by the Philippine government, it may be imprudent or even impossible to conduct in-person arbitration hearings where the parties, their counsel, their witnesses and the arbitral tribunal all stay in the same room. This current situation is forcing parties and arbitral tribunals to innovate and consider holding hearings virtually, especially if the alternative is to not have hearings at all.

Even the Philippine Supreme Court has recognized the importance of remote hearings and has greenlit court hearings through videoconferencing for civil and criminal cases. There is, thus, a strong impetus for arbitration in the Philippines to follow suit and consider the use of communication technology in conducting arbitration hearings remotely.

While there is no doubt that most of the steps in arbitration process can be done virtually, including sending request for arbitration, selecting and confirming arbitrators, holding case management conferences and deliberations among arbitrators, physical meetings remain to be the choice of parties and arbitral tribunals in the evidence-taking portion of the arbitration process.

This article will examine the legality and practicability of virtual hearings in domestic arbitration and international arbitration seated in the Philippines. Domestic arbitration, as defined under Republic Act No. 9285, the Alternative Dispute Resolution Act of 2004 (ADR Act) and the 1985 UNCITRAL Model Law, is an arbitration where: all the parties have their places of business in the Philippines, or where the Philippines is the seat of the arbitration, or where the Philippines is the place with which the subject matter of the dispute is most closely connected. On the other hand, international arbitration seated in the Philippines.

The choice of limiting the focus of the article to domestic arbitration and Philippine-seated international arbitration is deliberate since international arbitration seated elsewhere, especially those seated in London, Paris, Singapore or Hong Kong, may already be comfortable with and be less resistant to conducting hearings remotely.

## National framework for remote hearings

Philippine laws governing domestic arbitration, particularly the ADR Act, the Domestic Arbitration Law, and even the 1985 UNCITRAL Model



Law, are silent on remote hearings. The same is true for international arbitration seated in the country.

There is likewise little institutional guidance on virtual hearings in the Philippines. The Philippine International Center for Conflict Resolution, an institution administering arbitration in the Philippines, does not expressly provide for the virtual conduct of hearings.

It is only the Philippine Dispute Resolution Center, Inc. (PDRCI), another institution administering arbitration in the country, that expressly allows examination of witnesses through telecommunication. Article 36 of the 2015 PDRCI Rules provides that “[t]he taking of evidence shall be subject to conditions as the arbitral tribunal shall prescribe. In appropriate cases, the arbitral tribunal may direct the examination of witnesses, including expert witnesses, by means of telecommunication (such as audio or video conference) that do not require their physical presence at the place of the hearing.”

Given the absence of an express provision on virtual arbitration hearings in Philippine law, one may look at other principles of arbitration for guidance, such as autonomy of the parties in arbitration or the arbitral tribunal’s broad power to organize procedural matter for the arbitration. Section 30 of the ADR Act, which applies to both international and domestic arbitration, provides that “[t]he arbitral tribunal may, unless otherwise agreed by the parties, meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts, or the parties, or for inspection of goods, other property or documents.”

As such, absent any agreement or provision in the arbitration agreement to the contrary, the arbitral tribunal's broad power to conduct the proceedings includes the decision on whether hearings should be held physically or remotely.



**Why virtual hearings?**

Travel restrictions and social distancing measures imposed during the Covid-19 pandemic pose a challenge for in-person arbitration hearings. However, even beyond the pandemic, virtual hearings could be a potent tool in innovating domestic arbitration and Philippine-seated international arbitration with more efficiency and less cost.

Pandemic or not, the parties and the arbitral tribunal should consider several factors in deciding whether the dispute is compatible with the features of a virtual hearing.

- The complexity of the case should be considered in determining whether it can be conducted remotely. A case that would involve thousands of documents and many witnesses and experts may be difficult to conduct virtually, while a dispute where the documents are not voluminous and the witnesses are few would be much more readily manageable remotely.
- The parties and the arbitral tribunal should also consider whether the parties and their witnesses have equal or comparable technological facilities, including access to reliable technology and to a stable internet connection. An inequality in the technological capacity of the parties may pose a challenge at the enforcement stage of the award, as will be explored below.
- Protecting the privacy and security of the online connection is also a critical issue. Certain platforms have experienced security problems, and particularly in sensitive cases the selection of the video platform is significant.

**Challenges to virtual hearings**

Before fully embracing virtual arbitration hearings, certain critical issues should first be threshed out.

First, in cases where a witness' testimony is decisive, such as when there are differing versions of facts, the party cross-examining the witness may perceive a disadvantage in not being with the witness in the same room. Impeaching the witness may not be not as effective when the witness, the cross-examining counsel and the arbitral tribunal are not together in one venue.


Second, precautions must be adopted to mitigate the risk of coaching or improper assistance to witnesses being examined via videoconference. The parties and the arbitral tribunal should agree on measures in maintaining the integrity of the presentation of the witness to eliminate any illicit interference or suggestions to the witness.

Third, there is also the question of whether arbitrators have the power to direct a virtual hearing, notwithstanding the reluctance of one of the parties. The arbitral tribunal's broad powers to regulate the procedure of the arbitration has to be balanced with the interest of the parties. A party who opposes the virtual hearing may leverage the denial of an in-person hearing by the arbitral tribunal to claim its inability to present its case properly.

Fourth, as mentioned above, a party who also has inferior technology or internet connection may claim later on that it was deprived of the opportunity to fully present its case, and resist enforcement of the award on this ground.

Given these, it is advisable that the parties agree in advance as regards the procedures and technicalities of the virtual hearing, to avoid challenges at the enforcement stage. An agreement to look into the possibility of conducting hearings virtually at earlier stages, such as in the drafting the arbitration clause or during the case management conference, may address the issues raised here. Early on, parties may already regulate what happens in case of technical interruptions affecting one or more parties; whether the video hearing should be recorded; whether to introduce electronic hearing bundles; how to ensure sequestration of a witness; how to ensure that the witnesses will not be coached during their presentation, and so on.

**Conclusion**

The current pandemic is forcing arbitration in the Philippines to adapt and innovate. However, virtual hearings are not a carte blanche solution. As emphasized above, the assessment of whether arbitration hearings should be done remotely is on a case-to-case basis according to the circumstances of the parties and the dispute involved. Nevertheless, with its undeniable advantages, virtual hearings should be an available option to parties even beyond the Covid-19 pandemic. 



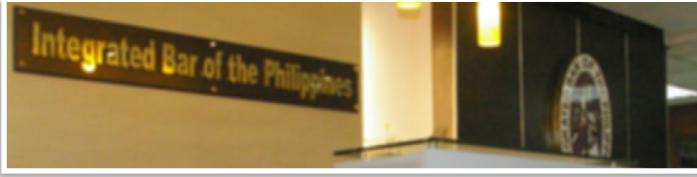
**About the Authors**

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*Atty. Rashed Ann C. Pomoy is a senior associate of Villaraza & Angangco. Apart from her membership in PDRCI, she is a member of the Chartered Institute of Arbitrators, the Young International Council for Commercial Arbitration, and the Philippine Institute of Arbitrators. She practices litigation, alternative dispute resolution, and employment.*





## PDRC, IBP President explore ADR cooperation

IBP said that it handled only a handful of ad hoc arbitrations a year. It has an ADR Center with hearing rooms in its head office, which it wanted to be used more often. For its part, PICCR, whose Board of Trustees was composed of former IBP governors, had done one commercial arbitration training and planned to have more. It still has to administer its first arbitration case. IBP said that it wanted PICCR to become more busy.

After identifying some common problems, PDRCI offered to collaborate with IBP in (a) proposing legislation to improve the judicial system by amending the ADR Act of 2004 and providing documentary tax incentives to parties who agree to an ADR clause in their contracts, (b) holding nationwide training of ADR practitioners, where PDRC and PCCR will provide trainers, speakers, and materials, while IBP will subsidize the cost of the road shows and seminars, including mandatory continuing legal education accreditations, (c) capacity building, where PDRC can provide its list of accredited and trained arbitrators to assist the IBP regional and provincial chapters handle actual disputes and the IBP National President or his duly authorized representative can make their ad hoc appointments from such list. IBP may subsidize the cost of arbitration fees, including travel, accommodation, food and per diems, as well as incidental costs such as stenographer’s fees, rentals, etc., and (d) promotion and education, in which PDRC will partner with IBP, PICCR, and the Office of Alternative Dispute Resolution in holding road shows to promote ADR and in educating administrative agencies and courts on ADR.

PDRC also said that it can (e) partner with IBP in including ADR in the high school, college, and law school curriculums, (f) invite leading international arbitrators to train local arbitrators and enhance their knowledge and skills of best practices in international arbitration, and (g) formulate guidelines on how the IBP can effectively perform its function as the default appointing authority for ad hoc arbitration.

IBP and PICCR said that they are willing to enter into a Memorandum of Agreement with PDRC to formalize their collaboration.

## MEMBER SPOTLIGHT

### Mark Chan Acoymo



Atty. Acoymo heads the legal and claims unit of the Commercial Risk and Management Department of International Container Terminal Services, Inc. (ICTSI).

He studied public administration at the University of the Philippines, Diliman, where he graduated *cum laude* in 2000. While working, he studied law at the San Beda College of Law and, thereafter, at the Recoletos de Manila School of Law, where he graduated in 2005. He was admitted to the Philippine Bar in 2007.

He worked as a litigation associate for seven years at David Cui-David Buenaventura & Ang, practicing general litigation with focus on criminal defense, arbitration, and insurance, before transferring to ICTSI in 2013.

He is the author of the book *ONSE: Restatements of Acts of Corruption and Other Related Misdeeds by Public Officers*.

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