



REPUBLIC OF THE PHILIPPINES

NATIONAL ECONOMIC AND DEVELOPMENT AUTHORITY

IMPLEMENTING RULES AND REGULATIONS OF EXECUTIVE ORDER NO. 78, SERIES OF 2012, MANDATING THE INCLUSION OF PROVISIONS ON THE USE OF ALTERNATIVE DISPUTE RESOLUTION MECHANISMS IN ALL CONTRACTS INVOLVING PUBLIC-PRIVATE PARTNERSHIP PROJECTS, BUILD-OPERATE AND TRANSFER PROJECTS, JOINT VENTURE AGREEMENTS BETWEEN THE GOVERNMENT AND PRIVATE ENTITIES AND THOSE ENTERED INTO BY LOCAL GOVERNMENT UNITS

Pursuant to Section 2 of Executive Order (EO) No. 78 dated 04 July 2012 and consistent with Republic Act (RA) No. 9285, otherwise known as the "*Alternative Dispute Resolution Act of 2004*," the following rules and regulations are hereby promulgated and adopted:

PART I GENERAL PROVISIONS

RULE 1—DECLARATION OF POLICY

It is hereby declared a policy of the State to provide a more inviting climate for private investments by making the resolution of disputes arising out of contracts—especially for large-scale, capital-intensive infrastructure and development contracts—less expensive, tedious, complex and time-consuming.

Toward this end, all contracts involving Public-Private Partnership (PPP) projects shall include provisions on the use of Alternative Dispute Resolution (ADR) mechanisms. These include contracts entered into under RA No. 6957 entitled "*The Act Authorizing the Financing, Construction, Operation and Maintenance of Infrastructure Projects by the Private Sector, and for Other Purposes*," as amended by RA No. 7718, otherwise known as the "*Build-Operate-and-Transfer (BOT) Law*," as well as Joint Venture (JV) Agreements between the government and private entities, issued by the National Economic and Development Authority (NEDA) pursuant to EO No. 423, s. 2005. Local government units (LGUs) are likewise encouraged to stipulate the use of ADR mechanisms, in accordance with their own rules, guidelines or procedures.

RULE 2—SCOPE OF APPLICATION

These Implementing Rules and Regulations (IRR) shall cover all contracts involving PPP projects, including, among others, contracts entered into under the BOT Law, as well as JV Agreements and other similar project structures entered into by any government agency, including government owned and controlled corporations (GOCC's), government corporate entities and government financial institutions as defined under Republic Act No. 10149, otherwise known as the "GOCC Governance Act of 2011" and State Colleges and Universities, with any private entity, whether domestic or international.

LGUs may stipulate, in accordance with this IRR, the use of ADR mechanisms in contracts entered into pursuant to the provisions of the BOT Law and JV Guidelines.

The parties are encouraged to incorporate in their contracts the ADR mechanisms that are most suitable to the type of project undertaken. These mechanisms may include processes designed to prevent, avoid or minimize conflict before they arise (i.e., pre-dispute processes such as dispute

resolution boards, early warning and use of comprehensive conflict avoidance plans), or those intended to resolve or mitigate disputes after they have arisen, (i.e., post-dispute mechanisms such as negotiation, mediation, conciliation, arbitration, early neutral evaluation, mediation-arbitration, mini-trial, or a combination of any of these processes).

The parties may adopt/promulgate their own rules of procedure to govern these ADR mechanisms: *provided*, that this IRR shall be supplementary to the procedures agreed upon by the parties; *provided, further*, that the provisions under the ADR Act of 2004 shall also apply suppletorily.

RULE 3—ADR CLAUSE

The parties shall stipulate an ADR Clause in all contracts covered by EO No. 78. The parties are encouraged to conduct or actively use Negotiation, Conciliation/Mediation and Arbitration to avoid costly expenses and to adhere to the government's thrust to adopt austerity.¹

The submission of a dispute to international arbitration shall be conditioned upon the execution of a separate written agreement between the contracting parties defining the terms of reference of such arbitration. For this purpose, the Guidelines on the execution of the separate written agreement is provided under Annex "A" hereof.

The execution of a separate written agreement shall be embodied in all contracts involving Public-Private Partnership (PPP) projects and/or those entered into under Republic Act No. 6957, otherwise known as the "Build-Operate and Transfer (BOT) Law and Joint Venture Agreements pursuant to Executive Order No. 423 dated 30 April 2005. ADR Model clauses are provided under Annex "B" hereof.

RULE 4—DEFINITION OF TERMS

For purposes of this IRR, the following terms shall be understood to mean as follows:

- 4.1. **ADR Mechanism.** Any process or procedure used to resolve a conflict, dispute, or controversy, other than by adjudication of a court of law or an officer of a government agency, wherein the parties themselves or neutral third person participates to assist in avoiding, managing, or resolving, conflicts, disputes or controversy.
- 4.2. **ADR Provider.** Any institution or person accredited as mediator, conciliator, arbitrator, arbitral tribunal, neutral evaluator, or any person exercising similar functions in any ADR mechanism.
- 4.3. **Arbitral Award.** Any partial or final decision made by an arbitral tribunal to resolve any issue in a dispute.
- 4.4. **Arbitral Tribunal.** A sole arbitrator or a panel of arbitrators.
- 4.5. **Arbitration.** A voluntary dispute resolution process wherein one (1) or more arbitrators or the arbitral tribunal, appointed in accordance with either the agreement of the parties or applicable laws and/or rules, resolves the issues in a dispute by rendering an arbitral award.
- 4.6. **Arbitration Agreement.** An agreement by the parties to submit to arbitration all or certain disputes that have arisen or that may arise between them with respect to a defined legal relationship, whether contractual or not. It may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

¹ Refer to Annex "B" for the suggested Model Clauses to be adopted in a Joint Venture, PPP, and similar contracts.

- 4.7. **Arbitrator.** A person appointed to render an arbitral award, alone or with others, in a dispute that is the subject of an arbitration agreement.
- 4.8. **Commercial Arbitration.** An arbitration that covers matters arising from all relationships of commercial nature, whether contractual or not. Relationships of a commercial nature include, but not limited to, the following transactions:
- (a) any trade transaction for the supply or exchange of goods or services;
 - (b) distribution agreements;
 - (c) construction of works;
 - (d) commercial representation or agency;
 - (e) factoring;
 - (f) leasing;
 - (g) consulting;
 - (h) engineering;
 - (i) licensing;
 - (j) investment;
 - (k) financing;
 - (l) banking;
 - (m) insurance;
 - (n) joint venture and other forms of industrial or business cooperation; or
 - (o) carriage of goods or passengers by air, sea, rail or road.

Despite this definition, however, if the dispute relates to or arises from construction in the Philippines, jurisdiction to resolve the dispute shall remain within the exclusive and original jurisdiction of the Construction Industry Arbitration Commission (CIAC).

- 4.9. **Confidential Information.** Any information on the subject of mediation or arbitration that the source expressly intended not to disclose, or that was obtained under circumstances where the source would have a reasonable expectation that the information shall not be disclosed, shall be deemed as privileged communication. It shall include the following:
- (a) Communication, oral or written, made in a dispute resolution proceedings, including any memoranda, notes or work product of the neutral party or non-party participant, as defined under the ADR Act of 2004;
 - (b) An oral or written statement made or that occurs during mediation for purposes of considering, conducting, participating, initiating, continuing or reconvening mediation or retaining a mediator; and
 - (c) Pleadings, motions manifestations, witness statements, reports filed or submitted in arbitration or for expert evaluation.
- 4.10. **Dispute Resolution Board.** A panel of three or more independent technical experts chosen by the contracting parties, or in accordance with the rules agreed by the parties, to assist them, on a standby basis, in resolving any dispute that may arise from the implementation of the project.
- 4.11. **Domestic Arbitration.** An arbitration that is not international as defined in Article 1 (3) of the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration (Model Law).
- 4.12. **Early Neutral Evaluation.** An ADR process wherein the parties and their lawyers are brought together early in a pre-trial phase to present summaries of their cases and

receive a nonbinding assessment by an experienced neutral third person, with expertise in the subject in the substance of the dispute.

- 4.13. **Expert Panel.** A person or a group of persons that the Arbitral Tribunal may consult to obtain expert opinion on a specific subject matter.
- 4.14. **Government Agency.** Any of the various units of the Government, including a department, bureau, office, instrumentality, GOCC, local government or a distinct unit therein.
- 4.15. **Investment Dispute.** Dispute arising from breach of contract.
- 4.16. **Joint Venture (JV).** An arrangement whereby a private sector entity or a group of private sector entities, on one hand, and a Government Entity or a group of Government Entities, on the other hand, contribute money/capital, services, assets (including equipment, land, intellectual property or anything of value), or a combination of any or all of the foregoing to undertake an investment activity. The investment activity is intended to facilitate private sector initiative in a particular industry or sector toward accomplishing a specific goal. It shall eventually be transferred to either the private sector under competitive market conditions or to the government. The JV involves a community or pooling of interests in the performance of the investment activity, and each party shall have the right to direct and govern the policies in connection therewith, with the intention to share profits, risks and losses, subject to agreement by the parties. A JV may be a Contractual JV or a Corporate JV (JV Company).
- 4.17. **Mediation.** A voluntary process in which a mediator, selected by the disputing parties, facilitates communication and negotiation, and assists the parties in reaching a voluntary agreement regarding a dispute.
- 4.18. **Mediation-Arbitration.** A two-step dispute resolution process involving both Mediation and Arbitration.
- 4.19. **Mediator/Conciliator.** Any neutral third person tasked to eliminate obstacles arising from affective emotions due to misunderstanding, misconception, or misperception; assist the disputing parties to understand their true intentions in the dispute; and to help end disagreements for the purpose of settlement.
- 4.20. **Mini-Trial.** A structured dispute resolution method wherein the merits of the case are argued before a panel comprising of senior decision makers, with or without the presence of a neutral third person, after which the parties seek a negotiated settlement.
- 4.21. **Negotiation.** A voluntary dispute resolution process wherein two (2) or more parties who have a perceived or actual conflict of interest voluntarily come together to educate each other about their needs and interests, exchange specific resources, and attempt to resolve their differences through face-to-face bargaining to arrive at a settlement.
- 4.22. **Neutral Agency.** Any impartial agency that has no personal, pecuniary, or fiduciary interest in a conflict, dispute, or controversy between the parties.
- 4.23. **Party.** Any contracting party involved in a grievance, conflict, dispute, or controversy.
- 4.24. **Party Autonomy.** Freedom of the parties to make their own arrangements to resolve their disputes.
- 4.25. **Public-Private Partnership.** A contractual agreement between the public sector and the private sector, wherein the latter shall engage in the financing, designing,

construction, operation, and/or maintenance of infrastructure or development projects, among others, that are usually provided by the public sector. The private sector earns a return on their investments through either user fees or payments from the government, or both.

PART II CONFLICT AVOIDANCE AND MITIGATION

RULE 5—CONFLICT AVOIDANCE

Rule 5.1. Conflict Avoidance

5.1.1. **Early Warning.** The parties shall ascertain whether and when a conflict can be expected to occur, with the objective of preventing this from happening through early response.²

RULE 6—CONFLICT MITIGATION³

Rule 6.1. **Negotiation.** Unless the parties adopt a different procedure, the parties shall attempt in good faith to settle any dispute, grievance, conflict, or controversy, and may choose to directly conduct Negotiation by themselves and meet at a venue mutually agreed upon by them. The disputing parties shall resolve their differences within thirty (30) calendar days from their first meeting, or within a reduced or extended period that the parties may jointly agree upon in writing. During this period, the parties may seek advice or assistance from their respective experts on any technical or legal issues involving interpretation of contracts, delayed completion, additional works, quantities, inflation, and other issues.

Rule 6.2. **Early Neutral Evaluation.** Early Neutral Evaluation shall be governed by the rules and procedure agreed upon by the parties. In the absence of an agreement between the parties, the rules and procedure in Rule 2, Chapter 7 of DOJ Department Circular No. 98, s. 2009 or the IRR of the ADR Act of 2004 shall apply.

Rule 6.3 **Dispute Resolution Board.** Dispute Resolution Boards shall be governed by the rules jointly agreed upon by the parties or in accordance with such rules and procedures of the institution selected by them.

PART III ALTERNATIVE DISPUTE RESOLUTION⁴

RULE 7—CONCILIATION/MEDIATION

Rule 7.1. Conciliation/Mediation shall be governed the rules and procedures agreed upon by the parties. In the absence of an agreement between the parties, those provided in Chapter 2 of the ADR Act of 2004 and Chapter 3 of its IRR shall apply.

Rule 7.2. During the conduct of mediation, consideration must be made to the need to promote candor of parties and mediators through confidentiality of the mediation process, the policy of fostering prompt, economical and amicable resolution of disputes in accordance with principles of integrity of determination by the parties and the policy that the decision-making authority in mediation rests with the parties.

² Refer to Annex “C” for the recommended processes/procedures on Conflict Avoidance.

³ Refer to Annex “D” for the recommended processes/procedures on Conflict Mitigation.

⁴ Refer to Annex “E” for discussion on the different modes of Alternative Dispute Resolution.

RULE 8—COMMERCIAL ARBITRATION

- Rule 8.1. **Domestic Arbitration.** Domestic Arbitration shall be governed by RA No. 876, otherwise known as the “*Arbitration Law*,” Articles 8, 10, 11, 12, 13, 14, 18, 19, 29 to 32 of the Model Law adopted by the UNCITRAL on 21 June 1985 and Sections 22 to 31 of Chapter 5 of the ADR Act of 2004.
- Rule 8.2. **International Arbitration.** International commercial arbitration shall be governed by the Model Law, Chapter 4 of the ADR Act of 2004 and its IRR.
- Rule 8.3. **Construction Arbitration.** The arbitration of construction disputes shall be governed by Executive Order No. 1008, s. 1985, otherwise known as the “*Construction Industry Arbitration Law*,” and by Chapter 6 of the ADR Act of 2004.

PART IV OTHER ADR MECHANISMS

RULE 9—RESOLUTION OF DISPUTES THROUGH OTHER ADR FORM

The parties may agree to refer one or more or all issues in a dispute during its pendency to other ADR mechanisms such as, but not limited to, the following: (a) Mini-Trial; (b) Mediation-Arbitration; or (c) a combination thereof.

- Rule 9.1. **Mini-Trial.** The Mini-Trial shall be governed by the rules and procedures agreed upon by the parties. In the absence of an agreement between the parties, Rule 3, Chapter 7 of the IRR of ADR Act of 2004 shall apply.
- Rule 9.2. **Mediation-Arbitration.** The Mediation-Arbitration shall be governed by the rules and procedures provided in Rule 4, Chapter 7 of the IRR of the ADR Act of 2004.

RULE 10—FORM OF AGREEMENTS

- Rule 10.1. **Negotiation.** Any negotiated agreement shall be made in writing and properly executed by, or on behalf of, the parties.
- Rule 10.2. **Conciliation/Mediation.** Any compromise agreement reached in Conciliation/Mediation shall be in writing and properly executed by, or on behalf of, the parties.
- Rule 10.3. **Arbitration Agreement.** Subject to Rule III of this IRR, the arbitration agreement shall be in writing. An agreement is in writing if it is contained in a document signed by the parties or in an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement, or in an exchange of statements of claim and defense in which the existence of an agreement is alleged by one party and not denied by another. The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement: *Provided*, that the contract is in writing and the reference is such as to make that clause part of the contract.
- Rule 10.4. **Other ADR Mechanisms.** All agreements/discussion agreed on all other ADR mechanisms shall be in writing and properly executed, for and on behalf of the parties.

RULE 11—ENFORCEMENT

- Rule 11.1. Unless otherwise agreed by the parties, all disputes settled or resolved using any of the ADR mechanisms shall be immediately enforceable. Any action related to court relief,

assistance or recourse regarding any ADR processes shall be governed by the Special Rules of Court on ADR.

- Rule 11.2. With a view of creating a repository of all settlement agreements and awards for all ADR processes covered by this IRR, the ADR institution overseeing or managing the ADR process shall submit a complete copy of settlement agreements, arbitral awards, and similar documents to the Department of Justice-Office for Alternative Dispute Resolution (DOJ-OADR), with a copy furnished to the PPP Center and the NEDA within seven (7) days from the date of signing thereof. The OADR shall take steps to ensure the confidentiality of the documents.

RULE 12—INFORMATION CAMPAIGN

The DOJ, through the OADR, the NEDA, through the PPP Center, and the government media instrumentalities shall conduct a massive information campaign on this policy directive and the different ADR mechanisms to all national and local government agencies/entities, the private sector and the general public.

RULE 13—CONFIDENTIALITY

The provisions on confidentiality under Articles 3.21 and 4.41 of the IRR of the ADR Act of 2004 shall apply to this IRR. The waiver and exceptions to the privilege of confidentiality of information under the ADR Act of 2004 shall also be applicable.

RULE 14—ACCOUNTABILITY

It shall be the duty of the head of the Agency and government counsel⁵ of the contracting agency to ensure that all government contracts shall incorporate an ADR clause. They shall likewise consider the financial implications⁶ of the agreed ADR mechanism in the contract and ensure that the same is not grossly disadvantageous to the government.⁷

Government agencies may hire private counsel to enforce or protect the interest of the government in all contracts involving PPP projects, including among others, contracts entered into under the BOT Law, as well as JV Agreements and other similar project structures entered into by any government agency. Pursuant thereto, all retainerhip agreements/contracts require prior approval of the Office of the Government Corporate Counsel and/or the Office of the Solicitor General, and with the written concurrence of the Commission on Audit (COA). In case of money judgements, the same shall be submitted to the COA before any execution may proceed.⁸

It is also the duty of the heads of the agency of the contracting government agency to ensure that all agreements entered into arising from an ADR process shall conform to the provision on Contract Variation under the Revised IRR of the BOT Law.

PART V FINAL PROVISIONS

RULE 15—FEES, COSTS AND CHARGES

- Rule 15.1. The schedule of fees, expenses or costs of the ADR institution selected by the parties to manage or implement the selected ADR mechanism/s shall be followed. The parties shall each bear their own cost and expenses for the ADR proceedings. Where the

⁵ Include both government statutory and privately hired counsel by the agency concerned.

⁶ Refer to Annex "E" for the Potential Cost of Dispute Proceedings.

⁷ If the contract is grossly disadvantageous to the government, the same may be considered a violation of Sec. 3 (e) of Republic Act No. 3019, otherwise known as the "Anti-Graft and Corrupt Practices Act."

⁸ Supreme Court Administrative Circular No. 10-2000, 25 October 2000.

proceedings are ad hoc in character, the parties shall agree with the neutral/s concerned as to the amount of fees or costs to be paid, subject to such ceilings as may be set by the contracting agency or the COA.

Rule 15.2. For mediation proceedings, a mediator shall not enter into a contingent fee agreement upon the result of the mediation or the amount of the settlement. In the event of a withdrawal, the mediator shall return to the parties any unearned fee and unused deposit.

Rule 15.3. In arbitration, the fees of the arbitrators shall be shared by the parties proportionally on the basis of the parties' respective claim/s and counterclaim/s, without prejudice to the determination of the Tribunal or sole arbitrator as to who among the parties shall be liable for costs. In institutional arbitration, the arbitrator's fees set by the ADR provider shall govern.

RULE 16— INTERPRETATION AND OVERSIGHT

Pursuant to its mandate to promote, develop and expand the use of ADR in the private and public sectors, the OADR may call upon concerned agencies such as, but not limited to, NEDA, PPP Center, BOI, OES, OGCC, OSG, and shall issue resolutions/opinions on matters/issues raised in the interpretation, application and monitoring of compliance with this IRR and its Guidelines.

RULE 17—AMENDMENT CLAUSE

No amendment, change or modification to this IRR shall be effective or enforceable unless it is in writing and approved by the NEDA.

RULE 18—REPEALING CLAUSE

All issuances, orders, rules and regulations or parts thereof which are inconsistent with the provisions of this IRR are hereby repealed, amended or modified accordingly.

RULE 19—SEPARABILITY CLAUSE

If for any reason or reasons any portion or provision of this IRR shall be held unconstitutional or invalid, all other parts or provisions not affected shall remain in full force and effect.

RULE 20—TRANSITORY PROVISIONS

The parties to contracts executed prior to the effectivity of this IRR may mutually agree in writing to avail of ADR mechanisms through a supplemental agreement.

RULE 21—EFFECTIVITY CLAUSE

This IRR shall be effective fifteen (15) days after the completion of its publication, either in the Official Gazette or in a newspaper of general circulation in the Philippines.

SIGNED AND APPROVED:



ERNESTO M. PERNIA
Socioeconomic Planning Secretary

ANNEX A

GUIDELINES ON THE EXECUTION OF A SEPARATE WRITTEN AGREEMENT IN CLAIMS OR DISPUTES TO BE SUBMITTED TO INTERNATIONAL ARBITRATION

1. **Applicability.** The requirement of a separate written agreement affords an opportunity for the contracting parties to discuss and settle any dispute, controversy or claim arising from contracts involving Public-Private Partnership (PPP) projects and/or those entered into under the BOT Law and Joint Venture Agreements, where possible, before the same could be submitted to international arbitration.

This process is similar to a pre-trial conference, whereby the contracting parties could: (a) forge a settlement during the consultation process, or (b) simplify the issues and stipulate such other matters as may aid in the prompt disposition of the claim or dispute, when the consultation process fails, through the execution of a separate written agreement.

2. **Creation of an Ad-hoc Inter-Agency Committee.** Subject to laws, rules and regulations, an Ad-hoc Inter-Agency Committee (IAC) shall be established to implement this Guidelines, with the following composition:

Chair: Office of the President (OP)
Vice-Chair: Board of Investments (BOI)
Members: Department of Foreign Affairs (DFA)
Department of Finance (DOF)
National Economic Development Authority (NEDA)
Department of Justice (DOJ)
Office of the Solicitor General (OSG)

The Secretary or the Head of Agency shall sit as the representative of each agency, who may designate an alternate, with the rank not lower than an Assistant Secretary or its equivalent and whose acts shall be considered the acts of the principal. The BOI shall designate one of its units to act as the Secretariat of the Ad-hoc IAC.

3. **Powers and Functions of the Ad-hoc IAC.** The Ad-hoc IAC shall:
 - (a) act as the negotiating team for the Philippine government during the consultation process;
 - (b) evaluate and consider the comprehensive report submitted and recommendations made by the OSG;
 - (c) execute any amicable settlement agreed upon with the investor, subject to existing laws, rules and regulations;
 - (d) prepare and execute, upon written request by the investor, the separate written agreement to submit a claim or dispute to international arbitration, in the event that the consultation process fails;
 - (e) enlist the assistance of any department, bureau, office or instrumentality, necessary to carry out its functions; and
 - (f) perform such other functions as may be necessary and consistent with the functions of the IAC.

4. **Procedure for Consultation.** The consultation process shall be undertaken as follows:
- a. Any written notice of intent to conciliate or arbitrate, claim or request for consultations shall be submitted by the investor to the DFA.
 - b. The written notice, claim or request for consultations shall be immediately endorsed by the DFA to the OSG, and copy furnished the other members of the IAC and the concerned agencies.
 - c. Upon receipt of the endorsement from the DFA, the OSG shall make an assessment of the written notice of intent, claim or request for consultations. It may create a Task Force that shall be participated in by the relevant agencies concerned. For contracts involving PPP Projects under the BOT Law, the PPP Center shall be a member of the Task Force.
 - d. A comprehensive report shall be submitted by the OSG to the IAC within sixty (60) days from receipt of the DFA endorsement.
 - e. Upon receipt of the OSG report, the IAC shall immediately convene to evaluate and consider the report and adopt the terms of reference for the conduct of the actual consultations with the investor.
 - f. The IAC shall, whenever feasible and considered desirable, undertake to forge an amicable settlement with the investor within one hundred eighty (180) days or the period specified in the relevant contracts involving Public-Private Partnership (PPP) projects and/or those entered into under the BOT Law and Joint Venture Agreements from receipt by the DFA of the written notice of intent, claim or request for consultations, which period shall not exceed 180 days.
5. **Contents of the Notice of Intent to Conciliate or Arbitrate, Claim or Request for Consultations.** The written notice of intent to or conciliate or arbitrate, claim or request for consultations shall specify:
- a. the name and address of the party and, where a claim or dispute is made by an investor on behalf of a juridical person, the name and address of such juridical person;
 - b. the provisions of the relevant contracts involving Public-Private Partnership (PPP) projects and/or those entered into under the BOT Law and Joint Venture Agreements, alleged to have been breached;
 - c. the factual and legal basis of the claim or dispute;
 - d. the kind of investment involved pursuant to the definition set out in the relevant contracts involving Public-Private Partnership (PPP) projects and/or those entered into under the BOT Law and Joint Venture Agreements;
 - e. the relief sought and the approximate amount of damages claimed;
 - f. undertaking that the investor shall submit to and conform with the processes under this Guidelines; and
 - g. other relevant information.
6. **Execution of the Separate Written Agreement.** Upon termination of the consultation process and the parties have not reached an amicable settlement, the IAC shall, upon the written request by the investor, undertake the execution of the separate written agreement within a period of thirty (30) days from receipt of such request, unless extended as agreed by the parties, which extension shall not be more than 60 days from receipt of such request. The IAC shall take into account the following:
- a. Simplification of issues;
 - b. Possibility of obtaining admissions or stipulation of facts and of documents to avoid unnecessary proof; and
 - c. Such other matters as may aid in the prompt disposition of the claim or dispute.

Upon expiration of the period stated above, the Chair or the Vice-Chair of the IAC and the investor shall prepare and sign the separate written agreement. Thereafter, an investor may submit a claim or dispute to international conciliation or arbitration provided that the other

procedural and substantive requirements provided in the applicable contract have been satisfied and complied with.

Further, the separate written agreement shall not prejudice any right of the State under the conciliation or arbitration process, including the right to raise any objections at any stage of the proceedings. This proviso shall also be incorporated in the separate written agreement.

7. Interpretation.

- a. The terms used herein shall be construed in accordance with the definitions used in the applicable contract involving Public-Private Partnership (PPP) projects and/or those entered into under the BOT Law and Joint Venture Agreements.
- b. The official commencement of the consultation process shall be reckoned from the date of receipt by the DFA of the written notice of intent to conciliate or arbitrate, claim or request for consultations from the investor.
- c. Noting that the objective of the consultation process is to achieve an amicable settlement, the written notice of intent to conciliate or arbitrate, claim or request for consultations that fails to conform with the prescribed contents under Section 5 hereof shall not be given due consideration and shall toll the prescriptive period for consultation. This shall be without prejudice to the prescriptive period for submission of claims and disputes laid down in the contracts involving Public-Private Partnership (PPP) projects and/or those entered into under the BOT Law and Joint Venture Agreements.

ANNEX “B” MODEL ADR CLAUSES

General Guidelines on Negotiating/ Formulating the ADR Clause

1. **Negotiating/Formulating the ADR Clause.** Lawyers negotiating or preparing a JV, BOT, PPP or similar contract must understand that the ADR clause is an integral part of the agreement, and is equally important as its commercial terms. Consequently, in negotiating or preparing the contract, detailed consideration should be given to ensure that the ADR clause incorporates a dispute process or a series of processes that shall appropriately address in a prompt, fair, efficient, confidential and cost-effective manner the likely disputes or conflicts that may develop in the course of contract interpretation, execution or performance.

Moreover, the terms of the ADR clause, which include the process/es selected, the administering institution, the rules to be used, the process of selecting the neutrals, the allocation of costs, and similar matters, must be precisely set out in the clause to ensure that the dispute goes through the agreed process if and when it does arise, and that once there, the parties will not be distracted by extraneous matters that might delay the proceedings significantly.⁹

2. **Factors to consider.** While not intended to be a comprehensive list, the following factors shall be considered when designing or negotiating the dispute resolution clause:
 - a. ***Selection of appropriate dispute process/processes.*** The most critical decision to be made when preparing the ADR clause is deciding on which ADR mechanism to incorporate in the event of a dispute. Given the variety of available mechanisms and the different approaches taken to dispute resolution, the following points may be helpful:
 - i. For high value, complex construction projects that would take months or years to complete and involving multiple contracts or trades, it may make sense to think about incorporating a dispute protocol that would make dispute management an integral part of the project planning and implementation. Thus, incorporating mechanisms such as early warning systems and dispute resolution boards would promote a proactive approach to dispute resolution and allow everyone involved in the project to respond quickly and manage or mitigate disputes as they arise. Requiring such system and the neutrals to be in place on standby basis over the life of the project may incur costs, but these are minimal compared to the savings from the disputes resolved or avoided, the cost-overruns prevented, and executive time saved.
 - ii. The ADR mechanism should consider a subsequent dispute layer when attempts to manage the dispute are unsuccessful. It is helpful to put in place a mediation or conciliation mechanism, followed by binding arbitration.
 - iii. However, if the project involved is straightforward or stand-alone, it might be unnecessary or too costly to set up a comprehensive early warning or dispute resolution board system. For these types of projects, a simple two-stage dispute resolution process (mediation or conciliation, followed by arbitration) may be appropriate. When it is anticipated that a future dispute may likely involve

⁹See R. Doak Bishop, “A Practical Guide to Drafting International Arbitration Clauses,” available at <http://www.kslaw.com/library/pdf/bishop9.pdf>.

determination of factual or highly technical issues,¹⁰ it may also be appropriate to make an early neutral evaluation mechanism before conducting mediation and arbitration.

- b. ***Selection of ADR provider.*** ADR proceedings may either be ad hoc or institutional. Institutional proceedings are those administered by an ADR institution under a set of rules and / or administrative guidelines. The institution typically has procedures and monitoring mechanisms in place to ensure that the proceedings move forward promptly and efficiently and that the selected neutrals perform their duties with independence, impartiality and fairness. On the other hand, ad hoc proceedings are administered by the neutrals themselves without the oversight or support of an administering institution.

The selection of ADR provider must be in accordance with DOJ Circular No. 49 dated 17 August 2012 (“Accreditation Guidelines for ADR Provider Organizations and Training Standards for ADR Practitioners”).

- c. ***Venue / place of ADR proceedings.*** All things being equal, it is obvious that ADR proceedings conducted outside the country would be more expensive than those conducted in the Philippines because of travel and accommodation costs incurred by the arbitrators, counsel, the parties and their respective witnesses. Accordingly, the drafters of the contract must strongly consider conducting any ADR proceedings in the Philippines.

Moreover, it must be noted that in arbitration, the term “*place of arbitration*” should not be confused with the “*venue*” of the proceedings. Venue is the location where the proceedings are conducted, while “*place of arbitration*” fixes the arbitration law that would govern the proceedings (the “*lex loci arbitri*”).

The legal significance of this designation is that if the place of arbitration is in another country, then the arbitral proceedings will be, as far as the Philippines is concerned, deemed a foreign arbitration. On the other hand, if the place of arbitration is in the Philippines, the proceedings will be considered a domestic proceeding (which may either be a purely domestic arbitration governed by the Arbitration Law or an international arbitration proceeding governed by the Model Law). The legal remedies available to a party, as well as the periods for taking action, will be different depending on whether the arbitration is classified as foreign or domestic. Similarly, the authority of the court over the award will also be different depending on whether the arbitration proceedings are deemed domestic or foreign.¹¹

Since local courts have greater authority in regard to court enforcement of, and recourse against, domestic international awards than foreign awards,¹² then serious consideration should be given to insisting that the place of arbitration should be conducted in the Philippines.

¹⁰ For example, whether the concrete poured into a wall is of the required strength, or whether a computer software system delivered by a contractor is compliant with the required contract specifications

¹¹ Confirmation, correction or vacation of domestic non-international awards is governed by Rule 11, Special ADR Rules of Court (Special ADR Rules). On the other hand, recognition, enforcement or setting aside of international awards is governed by Rule 12, while recognition and enforcement of a foreign arbitral awards is governed by Rule 13.

¹² For example, an award in an international commercial arbitration proceeding may be set aside by a local court upon a finding that one of the grounds enumerated in Rule 12.4, Special ADR Rules is present. Once set aside, the award is nullified and may no longer be enforced anywhere else. On the other hand, the most that the court can do in regard to a foreign award under Rule 13, Special ADR Rules is to refuse its recognition if it finds that one of the grounds under Rule 13.4 is present. However, the prevailing party can still take the award, present it before the appropriate court of another country, and petition to have it enforced there. That court may still take cognizance of the award unless it had earlier been set aside in the “*place of arbitration*.”

- d. ***Selection of neutrals/ qualifications or nationality.*** Serious consideration must also be given to neutrals who shall perform the ADR services. While it is probably not a good idea to identify the designated neutral by name in the ADR clause (because of the possibility of that neutral's unavailability, death or incapacity at the time the dispute arises), it makes sense to think about what professional, technical or other qualifications the ideal neutral should possess so that the dispute can be handled competently, efficiently and fairly, and to incorporate those qualifications in the clause to.
- e. ***Use of standard ADR clauses.*** In general, most ADR institutions have boilerplate clauses that they recommend to parties for incorporation in their contracts. These standard clauses are either contained in the institutions' rules or in their respective websites. These clauses typically state that in the event of a dispute, the same shall be referred to the dispute institution, pursuant to its rules of procedure. Since these rules are usually comprehensive and contain default provisions on issues (such as procedures and timetables for filing pleadings, procedures for appointment, challenges to and replacement of neutrals, manner of conducting the proceedings, interim measures, cost allocation, case management, and other administrative details), simply adopting these clauses will give the parties the comfort of knowing that any dispute will be referred to the selected institution, and that they are reasonably assured that the process will unfold in a timely and orderly fashion.

However, even when the standard clauses are adopted, it should likewise be noted that it is possible, and sometimes even desirable, for the parties to tweak these standard clauses to reflect their agreement on certain aspects of the dispute procedure, and this agreement will generally be binding on the administering institution and the selected neutrals, based on the principle of party autonomy in ADR proceedings. This is particularly important in arbitration.

Examples of areas where the parties can add to or revise the standard arbitral clauses include, among others:

- (i) Agreement on a specific number, nationality requirement or educational and professional qualifications for neutrals;
- (ii) Designating a specific place and / or venue of the proceedings;
- (iii) Governing law;
- (iv) Conditions precedent that need to be complied with prior to the institution of arbitration proceedings; and
- (v) Cost sharing.

As discussed in greater detail below, some of these issues will have a significant impact on costs of the proceedings and the extent of the authority of the courts on matters such as court assistance, recourse and enforcement.

While it is true that the parties may still discuss and agree on these issues even after the dispute arose, it is much better to get an agreement on these and similar items earlier and incorporate them into the ADR clause, since personality differences, legal disagreements and heated tempers often complicate discussions on these issues if these matters are not agreed upon beforehand. This will in turn delay and often derail the dispute proceedings altogether.

3. The following are the Model ADR Clauses which may be adopted in a joint venture, BOT, PPP or similar contract:¹³

a. For Commercial Arbitration only (Domestic or International, except Construction Arbitration)

“Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be settled by arbitration before the (name of arbitration institution or rules); The appointing authority shall be the _____, and the number of arbitrators shall be (one or three). The venue of the proceedings and the place of arbitration shall be in _____, and the language of arbitration shall be _____; Provided that, in the event of international arbitration, the submission of a dispute therein shall be conditioned upon the execution of a separate written agreement between the contracting parties defining the terms of reference for such arbitration.”

(note: if the dispute is to be referred to a local arbitration institution, the last sentence shall be deleted.)

b. For Construction Arbitration only (for construction-related disputes only, as defined under EO 1008):

“Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be settled by arbitration before the Construction Industry Arbitration Commission (CIAC) in accordance with the CIAC Arbitration Rules as are at present in force.

The appointing authority shall be the CIAC, and the number of arbitrators shall be (one or three). The venue of the proceedings and the place of arbitration shall be at the CIAC offices in Makati City, Philippines, and the language of arbitration shall be English or Filipino.”

c. For Mediation, followed by binding Arbitration:

“Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall first be referred to mediation before _____ (name of OADR-accredited mediation institution). If the settlement proceedings are successful, the mediated settlement agreement shall be deposited by either party with the Clerk of Court of the Regional Trial Court in accordance with the provisions of Rule 15 of the Special ADR Rules of Court, and may be enforced by a party pursuant to those Rules in case of breach by the other.

If the mediation is unsuccessful, or if the mediation proceedings are not completed within thirty (30) days from referral to the above-mentioned mediation institution (unless a longer period is jointly agreed upon in writing by both parties), the mediation proceedings shall be deemed automatically terminated and either party may then refer the dispute to arbitration; provided however that the submission of the dispute to international arbitration shall be subject to the execution of a separate written agreement between the contracting parties defining the terms of reference for such arbitration.

¹³ This section discusses generic model clauses. If adopted verbatim, they will ensure that the dispute will be referred to the designated institution in accordance with the agreed dispute resolution process. However, if there are specific conditions/stipulations that the user wishes to add based on the specific circumstances of the project, the agency concerned, the complexity of the transaction and the dispute, please refer to the discussion in item 4 for guidance.

In case of arbitration, either party may submit any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, to arbitration in accordance with the arbitration rules of the (name of institution); The appointing authority shall be the _____, and the number of arbitrators shall be (______). The venue of the proceedings and the place of arbitration shall be in _____, and the language of arbitration shall be _____; Provided that in the event of international arbitration, the submission of the dispute before such institution shall be conditioned upon the execution of a separate written agreement between the contracting parties defining the terms of reference of such arbitration.”

(Note: if the dispute is to be referred to a local arbitration institution, the last sentence is to be deleted.)¹⁴

d. For Dispute Resolution Boards:

“The Parties hereby agree to establish a Dispute Review Board (‘DRB’) in accordance with the Dispute Board Rules of _____ (the ‘Rules’), which are incorporated herein by reference. The DRB shall have [one/three] member[s] appointed in this Contract or appointed pursuant to the Rules.

All disputes arising out of or in connection with the present Contract shall be submitted, in the first instance, to the DRB in accordance with the Rules. For any given dispute, the DRB shall issue a Recommendation in accordance with the Rules.

If any Party fails to comply with a Recommendation when required to do so pursuant to the Rules, the other Party may refer the failure itself to Arbitration under the (name of institution accredited with the OADR), as are at present in force, by a panel of three arbitrators appointed in accordance with the _____ (name of institution accredited with the OADR) Arbitration. If any Party sends a written notice to the other Party and the DRB expressing its dissatisfaction with a Recommendation, as provided in the Rules, or if the DRB does not issue the Recommendation within the time limit provided in the Rules, or if the DRB is disbanded pursuant to the Rules, the dispute shall be finally settled under the _____ (name of institution accredited with the OADR)) Arbitration Rules by a panel of three arbitrators appointed in accordance with the said Arbitration Rules.”

4. Recommended Arbitration Clauses in joint venture agreements, PPP projects, BOT projects and similar contracts:

Issue	Recommended provision
Venue of arbitration and place of arbitration	<i>“Philippines”</i> (Alternatively, a specific place in the Philippines, e.g., Metro Manila, Davao, Cebu, etc.)
Governing law	Philippine law
Arbitral institution	Commercial disputes (except construction-related): <i>Institution accredited with the OADR</i>

¹⁴ Note that if the project relates to a construction project in the Philippines, the Arbitration institution should be CIAC or the CIAC Arbitration Rules as appropriate.

	Construction-related disputes: <i>CIAC</i>
Arbitration rules	Commercial disputes (except construction-related): <i>Institution accredited with the OADR</i>
	Construction-related disputes: <i>CIAC Arbitration Rules</i>
Appointing Authority	Commercial disputes (except construction-related): <i>Institution accredited with the OADR</i>
	Construction-related disputes: <i>CIAC</i>
Number of arbitrators	One arbitrator, if the claim, exclusive of interests, does not exceed PhP10 million (or its equivalent in foreign currency); otherwise, 3 arbitrators.
Manner of selecting arbitrator/s	<ul style="list-style-type: none"> • As provided by the rules of the Institution accredited with the OADR • Already provided in the CIAC Rules¹⁵
Qualifications of arbitrators	Recommendation to indicate the qualifications required or desired by the parties
Nationality requirement	Recommendation for government entity to appoint a Filipino neutral if qualified
Costs and Fees	Recommendation for each party to advance the cost of arbitrators' fees and administrative fees in proportion to their respective claims and counterclaims, without prejudice to final determination by the arbitral tribunal of liability for costs and fees.

¹⁵ Under CIAC Rules, the parties are asked to nominate arbitrators from a list of CIAC-accredited arbitrators, but it is the CIAC that decides the composition of the tribunal from those nominated.

ANNEX “C” CONFLICT AVOIDANCE

Early warning. Early warning is a general approach designed to enable parties and lawyers to resolve disputes as early as reasonably possible. It may take several forms, but among the best developed approaches is the “*Planned Early Dispute Resolution*” (PEDR) approach. As defined in the American Bar Association’s PEDR User Guide”:

“PEDR essentially is a risk management system that enables parties to take control of disputes at the earliest possible stage instead of merely reacting to actions by the other side and the courts. With their lawyers’ help, counterparties can jointly design a procedure tailored to satisfy their interests. By proactively managing disputes from the outset, parties can preserve business relationships and reputations, minimize the diversion of attention from business activities, reduce the time and expense of litigation, reduce litigation risks, and achieve their highest priorities.”¹⁶

The User Guide identifies the following components of a comprehensive PDR system:

- *General plans for preventing and resolving disputes;*
- *Early warning systems for issues that may lead to disputes;*
- *Identification and monitoring of disputes;*
- *Early case assessments to determine the best way to manage each dispute; and*
- *Efficient and effective procedures for handling and resolving disputes.*

The PEDR system aims to avoid the trap that companies commonly fall into, which is to deal with a dispute only after it arises, often taking aggressive or retaliatory action that inflames the parties further and exacerbates their dispute. Under this approach, the parties already anticipate that a dispute or disputes will arise at some point, and they design a plan for dealing with the disputes as early as possible. This may be by designing a dispute protocol requiring the parties to meet on a regular basis to flag potential disputes and to work through these problems as part of the ongoing business relationship. Dispute planning is done comprehensively, with plans or protocols in place on how to manage problems both pre- and post-dispute.¹⁷

¹⁶ See John Lande, Kurt Dettman and Katherine Shanks, “Planned Early Dispute Resolution User Guide”, p. 3. Available at http://www.americanbar.org/content/dam/aba/events/dispute_resolution/committees/PEDR/abadr_pedr_guide.authcheckdam.pdf.

¹⁷ Ibid. For a comprehensive description of PEDR, refer to the Planned Early Dispute Resolution User Guide.

ANNEX “D” CONFLICT MITIGATION

1. **Negotiation.** In the event the parties opt to include negotiation in their contracts, the following shall be applicable:
 - 1.1. In case of a successful negotiation, the settlement agreement shall be converted into a mediated settlement agreement with the assistance of the duly accredited mediator of the OADR. Either party shall submit and deposit the mediated settlement agreement before the Clerk of Court of the Regional Trial Court, as provided under Rule 15.3 of the Special ADR Rules of Court. In case of breach of the agreement, the same shall be enforced in accordance with Rule 15 of the said Rules.
 - 1.2. If a party serves upon another a written notice that no settlement has been reached, despite attempts in good faith to settle, either party may then resort to the ADR mechanisms, as agreed by them in their Contract.
2. **Early Neutral Evaluation.** It is an ADR process wherein parties and their lawyers are brought together early in a pre-trial phase to present summaries of their cases and receive a non-binding assessment by an experienced and neutral person with expertise in the subject and the substance of the dispute. This is typically used when the positions of the parties are far apart because they differ significantly in their perception of the relative strengths of their respective cases.

For example, in a construction dispute filed by the owner against the contractor for damages arising from delayed construction works, a significant barrier to settlement may be on perceptions as to which party is responsible for the delay. In such a situation, the parties can agree to appoint an independent expert to assess the relevant project documents, conduct necessary site visits, speak with the representatives of the various trades, and generally inform himself about the dispute at hand. The expert then gives a non-binding expert opinion on who he believes to be the party at fault and the probable amount that may be awarded if the dispute ends up in court or, alternatively, in arbitration. Since the expert opinion has the effect of providing a “*reality check*” on the often extreme positions taken, the opinion of the expert on the contested factual or legal issues is usually accepted by the parties as an established fact or conclusion. Consequently, it then becomes easier for the parties to come to a settlement because they are now proceeding from a common understanding of the previously disputed fact or issue.

3. **Process/Procedure for Early Neutral Evaluation.** Unless the parties have agreed on a different procedure/process on Early Neutral Evaluation, the rules and procedure in Rule 2, Chapter 7 of the IRR of the ADR Act of 2004 shall apply.
4. **Dispute Resolution Board.** Also referred to as dispute review boards, dispute boards or dispute adjudication boards, DRBs are panels of independent experts (oftentimes composed of three [3] persons who have experience and expertise in different disciplines) appointed by the parties prior to or upon the commencement of a construction project to serve on standby basis over the life of the project and assist the parties in resolving disputes as and when they arise. The panel members are typically required to meet with the project team on a regular basis, conduct regular site visits, and familiarize themselves with all the project documents and reports. In that way, once a dispute arises, they are able to make a speedy assessment of the problem and, depending on the terms of their engagement, either make recommendations to the parties or decide on how the matter in dispute should be settled. In the latter case, it is common for the parties to provide in the DRB agreement that, while the decision will have to be complied with immediately, either party would have the right to

question the decision in an arbitration proceeding within a designated period. Failing to do so would make the decision final and non-reviewable.

Among the major institutions offering the dispute review board model are the American Arbitration Association (AAA) and the Dispute Review Board Foundation (DRBF).

5. **Procedures/Processes of Dispute Resolution Board.** Unless the parties have agreed on a procedure, the parties may adopt the following process/procedures:

- 5.1. The parties shall constitute the DRB within 30 days from commencement of the project.

- 5.2. The parties shall agree on the selection, term of office and fees of the DRB.

- 5.3. The resolution of the DRB, once accepted by the parties, shall be final and binding unless referred to Arbitration within twenty eight (28) days from receipt of the Resolution of the DRB.

ANNEX “E”

ALTERNATIVE DISPUTE RESOLUTION AND OTHER ADR MECHANISMS

1. **Conciliation/ Mediation.** Mediation is a voluntary process in which a mediator, selected by the disputing parties, facilitates communication and negotiation, and assists the parties in reaching a voluntary agreement regarding a dispute.¹⁸ In mediation, the mediator has no authority to impose a binding decision upon parties. The settlement agreement is usually enforceable as any ordinary contract (i.e., either party can file an action in court to have it enforced in case the other party breaches the agreement). In this jurisdiction, mediated settlements arrived at in private mediations¹⁹ may be deposited with the Regional Trial Court and in case of breach, either party may petition the court to have it immediately enforced.²⁰

Conciliation, on the other hand, is similar to mediation and in fact the terms are sometimes used interchangeably. However, in certain jurisdictions, conciliation has been taken to mean a settlement process in which the conciliator has expert knowledge in the subject matter of the dispute and is expected to make settlement proposals and offer expert advice to the parties. Like mediation, however, the conciliator is not empowered to impose a binding decision upon the parties.

2. **Commercial Arbitration / Construction Arbitration.**

Arbitration is a voluntary dispute resolution process in which one or more arbitrators, appointed in accordance with the agreement of the parties or rules promulgated pursuant to the ADR Act, resolve a dispute by rendering an award.

An arbitration is commercial if it covers matter arising from all relationships of a commercial nature, whether contractual or not. Relationships of commercial nature include but are not limited to the following transactions: trade transaction for the supply or exchange of goods or services; distribution agreements; construction of works; commercial representation or agency; factoring; leasing, consulting; engineering; licensing; investment; financing; banking; insurance; joint venture and other forms of industrial or business cooperation; carriage of goods or passengers by air, sea, rail or road.²¹

While construction is one of the commercial activities falling under the scope of commercial arbitration, in the Philippines, exclusive and original jurisdiction over construction disputes is vested upon the CIAC.²² Thus, even if the parties agree in writing to submit the dispute to another arbitral institution, if the dispute involves a construction-related project in the Philippines, the case may still be filed directly before the CIAC.²³

In arbitration, the parties execute a written agreement binding themselves to submit a dispute to arbitration. If the arbitration clause (or submission agreement) designates a specific arbitral institution to administer the dispute, the arbitration is said to be an “*institutional*” arbitration. If no institution is designated, then the arbitration is said to be an “*ad hoc*” arbitration.

¹⁸ Section 3, ADR Act of 2004.

¹⁹ Private mediations are mediation proceedings conducted outside the court system. These are typically conducted by a private mediator hired by the parties to help settle a dispute before the case is filed in court. In contrast, court-annexed mediations are mediations conducted under the auspices of the court after the case is filed in court and the court acquires jurisdiction over it. In court-annexed mediations in the Philippines, the parties are unable to select their own mediator. Rather, one is assigned to them by the Philippine Mediation Center, which is the mediation center overseeing all court-annexed mediations acting under the authority of the Supreme Court. In court-annexed mediations, the parties present the settlement agreement to the court for approval. Once approved, it becomes a judgment of the court.

²⁰ Rule 15, Special ADR Rules.

²¹ Section 21, ADR Act of 2004.

²² Section 4, Executive Order No. 1008.

²³ See *Hutama-RSEA Joint Operations, Inc., vs. Citra Metro Manila Tollways Corp.*, G.R. No. 180640, 24 April 2009; *China Chang Jiang Energy Corp. vs. Rosal Infrastructure Builders*, G.R. No. 125706, 30 September 1996.

In institutional arbitration, the arbitral institution typically has a comprehensive set of arbitration rules that covers all aspects of the arbitration proceedings from the filing of the notice of arbitration all the way to the issuance of the final award.

In ad hoc arbitration, the arbitrators will bear the responsibility of managing the arbitral proceedings and ensure that they move forward, since there is no institution that will administer the arbitration.

In the Philippines, arbitrations may be classified as either “*domestic*” or “*foreign*,” depending on the place of arbitration. If the place of arbitration is in the Philippines, the arbitration is considered as domestic. On the other hand, if the place of arbitration is outside the Philippines, it is considered as foreign.

However, domestic arbitration can, in turn, either be “*international*” or “*non-international*.” The arbitration is said to be international if it contains an international element as provided under Art. 1(3) of Model Law.²⁴ Otherwise, it is classified as a domestic non-international arbitration or simply, as a domestic arbitration.

Knowing the distinctions between these types of arbitrations is critical because the modes of recourse, timelines and powers of the court with respect to the corresponding arbitral awards would vary depending on the nature of the arbitral proceedings.²⁵

Arbitral awards are not appealable or reviewable on their merits.²⁶ Depending on the nature of the award (i.e., international, domestic or foreign), the court may set aside, vacate or refuse to recognize it.²⁷

Some of the more prestigious arbitral institutions include the ICC International Court of Arbitration,²⁸ the Singapore International Arbitration Centre,²⁹ the Hong Kong International Arbitration Centre,³⁰ the London Court of International Arbitration,³¹ and the American Arbitration Association³².

The commercial arbitration center in the Philippines is the Philippine Dispute Resolution Center, Inc. (PDRCI),³³ while construction arbitration is conducted by the CIAC.³⁴ The PDRCI’s Arbitration Rules are patterned after the UNCITRAL Arbitration Rules.

3. **Adjudication.** Adjudication is similar to arbitration in that both are directive processes that result in a decision that the parties are expected to comply with. It differs from arbitration in that the period within which the adjudicator is required to take action is much tighter (typically 28 days, extendible by up to 14 days, with the consent of referring party, or for a longer period, if both parties agree). Moreover, the procedure in adjudication is more informal, with the adjudicator deciding the procedure to be followed and being given great leeway to ascertain the facts and the law in an expeditious manner. Most importantly, the adjudicator’s decision is

²⁴ The 1985 version of the Model Law has been incorporated to form part of Philippine law by the ADR Act (See Sec. 19, Republic Act No. 9285). It is the law that governs international commercial arbitrations in the Philippines. Conversely, domestic arbitration is governed by Republic Act No. 876 (the Arbitration Law, as amended by the ADR Act), while construction arbitration is governed by Executive Order No. 1008. (See Secs. 19, 32 and 34, ADR Act).

²⁵ Rules 11, 12 and 13, Special ADR Rules.

²⁶ The exception is in the case of CIAC arbitrations, which are appealable to the Court of Appeals by petition for review under Rule 43, Revised Rules of Court.

²⁷ Rules 11, 12 and 13, Special ADR Rules.

²⁸ The ICC website can be found at www.iccwbo.org.

²⁹ The SIAC website can be found at www.siac.org.sg.

³⁰ The HKIAC website can be found at www.hkiac.org.

³¹ The LCIA website can be found at www.lcia.org.

³² The AAA website can be found at www.adr.org.

³³ The PDRCI website can be found at www.pdrcl.org.

³⁴ The CIAC website can be found at <http://www.dti.gov.ph/dti/index.php?p=180>.

subject to subsequent legal proceedings, such as arbitration, which must be taken within a specified deadline. Failing to do so, the adjudicator's decision becomes final. There is generally no appeal process in adjudication; the evidence is heard anew in case of arbitration.³⁵

4. **Mini-Trial.** A mini-trial is a structured dispute resolution method in which the merits of a case are argued before a panel comprising senior decision makers, with or without the presence of a neutral third person. After which, the parties seek a negotiated settlement.³⁶ The concept behind mini-trials is that, typically, senior corporate decision-makers receive the details of the dispute (including the potential risks of the case, the case's strengths and weaknesses, the quality of the evidence, etc.) only from their own lawyers or subordinates. This means that the information that reaches them is already filtered and is sometimes colored by the personal opinions or biases of the representatives. Thus, oftentimes, the senior decision-makers have unrealistic high expectations on the strength of their case, simply because they have not yet seen the evidence or positions of the other party. In a mini-trial, the lawyers of both sides are asked to make brief presentations (or sometimes even present the key witnesses) to illustrate the highlights of their respective case. These presentations are made before a panel of senior decision-makers of both sides. The decision-makers are free to raise any clarificatory questions during the mini-trial to clarify any confusing points. Thereafter, as the main evidence have been presented by both sides, the proceedings are concluded, and the decision-makers then meet either to negotiate directly with each other or through a mediator. Because the decision-makers have heard from the representatives of both sides, they become better informed about the facts, the legal issues and its ramifications, and are therefore in a better position to make reasoned and reasonable settlement deals.
5. **Mediation-Arbitration.** It is a two-step dispute resolution process involving both mediation and arbitration.³⁷ In this process, the parties proceed with the understanding that they will first undergo a mediation process to attempt to settle the proceedings, but in the event the settlement process fails, they bind themselves to submit to an immediate arbitration process. In this manner, both parties are assured that whatever happens, there will be a final resolution of the dispute, either voluntarily through a common agreement or through an award imposed by the arbitrator. Oftentimes, simply knowing that the matter will be referred to arbitration, if unresolved during the mediation phase, makes the parties come into mediation with more reasonable proposals and with a settlement-oriented mindset, rather than risk having an adverse award imposed upon them if the neutral perceives them as the party that is being unreasonable.
6. **Comparative Matrix of ADR Processes.** Below is a table comparing each of the foregoing processes in terms of process description, procedure and speed thereof. The cost of these processes has not been indicated because costs and fees will vary widely depending on the process selected, the complexity of the dispute, the amounts involved, the skill and experience of the neutrals, the reputation and expertise of the administering institution, the projected time to be spent on the dispute, the manner of charging fees³⁸ and many other factors.³⁹ It is strongly recommended that, before agreeing to a particular dispute process or to a specific administering institution, the user conducts due diligence to ascertain the probable cost of the dispute resolution process in light of the factors mentioned.

³⁵ See "Good Practice Guide: Adjudication", available at <http://www.ribabookshops.com/cms/product/preview/74618gpgadjudicationextract.pdf>.

³⁶ Section 3, ADR Act of 2004.

³⁷ Section 3, ADR Act of 2004.

³⁸ i.e., time rates, value of the disputed amounts, complexity of the dispute, etc.

³⁹ However, since arbitral institutions typically fix their fees solely on the basis of the amounts in dispute, a comparative table of costs for selected arbitral institutions is set forth below.

ADR Process	Process Description	Procedure	Appropriate For	Speed
Early Warning	Risk management system that enables parties to take control of disputes at the earliest possible stage instead of merely reacting to actions by the other side and the courts.	At the commencement of the project, both parties and their respective representatives and counsel agree on a plan to minimize, manage, mitigate and resolve disputes as and when they arise. The parties then meet on a regular basis to identify potential problems as early as possible, and how to address them	All projects	Difficult to measure, because dispute management is undertaken as part of the entire project and, therefore, the system will continue over the entire project duration.
Partnering	Formal process that brings key project participants together to communicate effectively and work as a team to define and achieve mutually beneficial goals. Mutual commitment by the parties to facilitate improved contract performance which relies on each stakeholder understanding the communication styles, goals and organizational interests of the other members.	Partnering is one of the processes used by early warning approaches. Representatives of both parties are required to meet on a regular basis to identify potential problems as early as possible, and work through problems together in a collaborative, problem-solving approach.	All projects	Difficult to measure, because partnering is undertaken as part of the entire project and, therefore, the system will continue over the entire project duration.

ADR Process	Process Description	Procedure	Appropriate For	Speed
Dispute Resolution Board	Panels of independent experts (oftentimes composed of 3 persons who have experience and expertise in different disciplines) appointed by the parties prior to or upon the commencement of a construction project to serve on standby basis over the life of the project to assist the parties in resolving disputes as and when they arise.	The panel members are typically required to meet with the project team on a regular basis, conduct regular site visits, and familiarize themselves with all the project documents and reports. In that way, once a dispute arises, they are able to make a speedy assessment of the problem and, depending on the terms of their engagement, either make recommendations to the parties or decide on how the matter in dispute should be settled. In the latter case, it is common for the parties to provide in the DRB agreement that, while the decision will have to be complied with immediately, either party would have the right to question the decision in an arbitration proceeding within a designated period. Failing to do so, the decision becomes final and non-reviewable.	Usually for construction-related activities	Moderate. The process used by the DRB usually involves adjudication (see speed of adjudication below). However, the DRB members stay on standby status over the project duration.
Early Neutral Evaluation	Parties and their lawyers are brought together early in a pre-trial phase to present summaries of their cases and receive a non-binding assessment by an	Typically used where the positions of the parties with respect to the dispute are far apart because they differ significantly on their perception of the relative strengths of their respective cases. The	All projects	Fast to Moderate. The neutral evaluator is expected to complete his independent assessment and to make his recommendation within a few days to several

ADR Process	Process Description	Procedure	Appropriate For	Speed
	experienced, neutral person, with expertise in the subject in the substance of the dispute.	independent expert will assess the relevant project documents, conduct necessary site visits, speak with the representatives of the various trades, and generally inform himself about the dispute at hand. The expert then gives a non-binding expert opinion on who he believes to be the party at fault and the probable amount that may be awarded if the dispute ends up in court or, alternatively, in arbitration. Parties then use the recommendation as basis for settlement negotiations.		weeks, depending on the magnitude of the problem and complexity of the dispute.
Conciliation/ Mediation	<p>Mediation is a voluntary process in which a mediator, selected by the disputing parties, facilitates communication and negotiation, and assists the parties in reaching a voluntary agreement regarding a dispute.</p> <p>Conciliation, on the other hand, is similar to mediation but the conciliator has expert knowledge in the subject matter of the dispute and is expected to</p>	<p>Mediator / conciliator talks to the parties either in joint session or in caucus to determine the issues in dispute, get both sides of the story, or identify possible areas of convergence. Parties are then asked about their respective interests to formulate creative settlement proposals and generate value-creating options to meet those interests.</p> <p>Positional negotiation is avoided.</p> <p>In conciliation, conciliator helps out in making settlement proposals and generating options.</p>	All projects	Typically fast. Many mediations are completed in a single day. However, mediations of complex multi-party disputes involving significant amounts can take several weeks or months.

ADR Process	Process Description	Procedure	Appropriate For	Speed
	make settlement proposals and offer expert advice to the parties.			
Commercial Arbitration	A voluntary dispute resolution process in which one or more arbitrators, appointed in accordance with the agreement of the parties or rules promulgated pursuant to the ADR Act, resolve a dispute by rendering an award.	The parties select a sole arbitrator or arbitral tribunal to resolve the dispute. Unless the parties decide in their arbitration agreement which arbitration rules shall be used (usually the rules of an established arbitral institution), the tribunal would have to get the parties to agree on the rules to be used. Tribunal hears the evidence and issues a final and binding arbitral award, which is enforceable by filing a petition for enforcement in court. The enforcement process is summary in character.	All projects	Moderate to Lengthy. This typically takes a few weeks to several months depending on the complexity of the dispute, the number of parties, and the amounts involved.
Adjudication	Process whereby adjudicator appointed by the parties makes a decision on a dispute that arises over the course of a project	Similar to arbitration in that both are directive processes that result in a decision that the parties are expected to comply with. It differs from arbitration in that the period within which the adjudicator is required to take action is much tighter (typically 28 days, extendible by up to 14 days with	Usually for construction-related activities	Moderate. This is usually expected to be completed within 28 days, extendible by another 14 days with consent of the referring party, or longer if the parties agree.

ADR Process	Process Description	Procedure	Appropriate For	Speed
		the consent of referring party or for a longer period, if both parties agree). Moreover, the procedure in adjudication is more informal, with the adjudicator deciding the procedure to be followed and being given great leeway to ascertain the facts and the law in an expeditious manner. Most importantly, the adjudicator's decision is subject to subsequent legal proceedings, such as arbitration, which must be taken within a specified deadline. Failing such, the adjudicator's decision becomes final.		
Mini-Trial	A structured dispute resolution method in which the merits of a case are argued before a panel comprising senior decision makers with or without the presence of a neutral third person. After which, the parties seek a negotiated settlement.	The lawyers of both sides are asked to make brief presentations to illustrate the highlights of their respective case. These presentations are made before a panel of senior decision-makers of both sides. The decision-makers are free to raise any clarificatory questions during the mini-trial to clarify any confusing points. Thereafter, the proceedings are concluded, and the decision-makers then meet either to negotiate directly with each other or through a mediator.	All projects	Fast. The presentations of both parties expected to be completed in one day, and the negotiations among the principals / senior decision-makers expected to be completed soon after.

ADR Process	Process Description	Procedure	Appropriate For	Speed
Mediation-Arbitration	Two-step dispute resolution process involving both mediation and arbitration.	The parties proceed on the understanding that they will first undergo a mediation process to attempt to settle the proceedings, followed by binding arbitration in the event the settlement process fails.	All projects	Fast. The mediation is usually expected to be completed within a few days, and since the arbitration will cover only the unresolved matters in mediation, the arbitral proceedings are expected to be completed within a few days.