



SESSION 5 – ADJUDICATION

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**Colloquium on possible future
work on dispute settlement (28
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Philippines shares *WGII.WP.225* work on adjudication

Philippines shares with the UNCITRAL Working Group II's work on adjudication (A/CN.9/WG.II/WP.225), vis-a-vis its national experience, policy and economic background, in the hope of finding a way forward on work on adjudication.

Thus, that **Adjudication** would be:

- (a) an efficient means to solve disputes in long-term contracts, and
- (b) a means to ensure provisional enforcement of decisions.

(A/CN.9/934, para. 161)

In this context, “efficient” would be both:

- a) ***expeditious***, in terms of being conducted in real time and is time-bound; and

- b) ***effective***, in terms of that the Adjudicator is:
 - 1st, an expert on the subject of a dispute;
 - 2nd, it is constituted at onset of the execution of a project or implementation of a contract; and
 - 3rd, it ought not be constrained by strict requirements of procedural due process as its work is ***investigative***.

The view that is thus advanced is:

unlike an **arbitrator** who is chosen to exercise a **judicial function** and to resolve a dispute based upon submissions by the parties,

an **adjudicator** is chosen for its expertise in a certain subject matter and often does its **own investigation or appreciation** of the issue, with or without submissions by the parties.



In point are:

[i] the taking of evidence; and

[ii] appreciation of the issues.

TAKING OF EVIDENCE

On *Taking of evidence*: it is given that the *adjudication* process must complete faster than expedited arbitration would.

However, unless the adjudicator is **empowered to make its own investigation**

i.e., dispensing with having to strictly comply with *procedural due process* requirements (that are a feature of arbitration or litigation),

it would be virtually impossible to take **evidence in the quality desired** of an expert on the subject **within the contemplated shortest time frame.**

APPRECIATION OF THE ISSUES

On *Appreciation of the issues*.- Adjudication has been used in either:

(a) single issue e.g., focused on *Progress Payments* as is typical in a *Security of Payment Act*.

A *Security of Payment Act* is seen as a mechanism to provisionally enforce cash-flow (i.e., *progress payments* do not get withheld) so that work under long-term contracts get to continue and not disrupted by a dispute, as such is thereby adjudicated away in real time.

APPRECIATION OF THE ISSUES

x x x; and

(b) multiple issues, deeper appreciation of which is already aided by having an adjudicator who is an **expert** on the subject matter, but confidence on the same is further built by having one constituted at onset of the execution of a project or implementation of a contract (and not only when a dispute has arisen), so that it would not only have been made familiar with the issues as they develop, but would have anticipated them as well from its vantage appreciation of the risks and responsibilities allocated to the parties from its observation early on of the contract configuration and the nature of the project being executed or contract being implemented.

To ensure compliance with the Adjudication:

- a) Simply making the decision of an Adjudicator enforceable through an action in court is not enough, particularly if the court system takes many years to act on it, as is the Philippine experience. But, failure to promptly comply with the decision of the Adjudicator should *by law* be deemed a breach of contract, and the amount so determined liquidated upon which (legal, if not contractual) interest would immediately run. In this way, there is an **automatic enforcement mechanism placed in the accounting ledger**, in addition to other damages that an applicable contract or law might have imposed upon such a breach.

- b) Mandating compliance with the decision of an Adjudicator as a pre-condition to arbitration (or to litigation) will also serve as a deterrence to withholding *cash-flow*.

c) The Philippine experience on constituting an adjudicator is one of hesitation, if not reluctance, even if such is called for in the contract. This is because of what is perceived to be a regrettable upfront expense that is to be made over a provisional-only disposition anyway of a matter in dispute. To overcome this:

i] A budgetary amount for it should have been mandated or agreed and thus allowed or provided for as part of the project cost, so that forking out for it should not deter or hinder adjudication moving forward.

x x x To overcome this:

i] x x x

ii] Advocate about that the economic benefits of adjudication in long-term contracts *much outweigh the upfront costs* therefor.

One report has it that the cost of adjudication would be about 0.2% only of the Project Cost; while results of one survey suggests that use of adjudication to resolve disputes achieved a 4% savings in Project Cost and a 16% saving in time. If anyhow these figures could be true, using adjudication to resolve disputes would be 20 times economically-advantageous than not.

The Philippines itself though does not yet have statistics on Adjudicator's decision being referred or escalated to arbitration or being upheld or overturned noting that (as have mentioned) the Philippine experience on constituting an adjudicator has yet been one of hesitation, if not reluctance, even if such is called for in the contract. Currently, however, the Philippine Department of Transportation (DoTr) is seeking the constitution of Dispute Boards for about twenty (20) of its infrastructure projects.

- iii] Model clauses on the same should be promoted for use in contracts.

d) On another point, a Government Procurement Agency would not submit to a dispute resolution mechanism for the provisional enforcement of a *progress payment* without a law clearly authorizing it to do so. Thus, for the Philippines, its *Government Procurement Reform Act* (or GPRA, RA 9184) expressly mandates its agencies to “agree in writing to resort to alternative modes of dispute resolution”, and in this regard, an *executive order* was issued allowing the resort to a *Dispute Resolution Board* by way of a *conflict mitigation* mechanism.

- e) An independent agency may *by law* be empowered to act as the ***appointing authority***, in default of Parties' agreement designating another, with powers to accredit adjudicators and to promulgate standards and practice rules, etc.

- f) Finally, an international *Convention* or a *Model Law* may be had for the cross-recognition and enforcement among adherent countries not only of an adjudicator's determination of a dispute but also its award of (legal or contractual) interest on the amount being provisionally enforced by way of liquidated damages.