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# International Arbitration

**Philippines**

Angara Abello Concepcion Regala & Cruz (ACCRALAW)

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# PHILIPPINES

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## **LAW AND PRACTICE:**

**p.3**

*Contributed by Angara Abello Concepcion Regala & Cruz (ACCRALAW)*

The 'Law & Practice' sections provide easily accessible information on navigating the legal system when conducting business in the jurisdiction. Leading lawyers explain local law and practice at key transactional stages and for crucial aspects of doing business.

# Law and Practice

*Contributed by Angara Abello Concepcion Regala & Cruz (ACCRALAW)*

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**Angara Abello Concepcion Regala & Cruz** represents multinational and local clients in international arbitration before international arbitration commissions such as the International Chamber of Commerce (“ICC”), the Singapore International Arbitration Center (“SIAC”) and the Hong Kong International Arbitration Centre (“HKIAC”); domestic arbitration before the Philippine Dispute Resolution Center, Inc. (“PDRC”) and other arbitration centres in the Philippines; and construction arbitration before the Construction Industry Arbitration Commission (“CIAC”).

It has a deep bench of litigators and ADR practitioners with a consistent and outstanding track record. Its team of litigators and ADR practitioners has extensive expertise in handling large-scale, complex and cross-border disputes. It has unmatched trial experience in Philippine courts, including the Supreme Court, and in many administrative agencies as well as ADR fora. The firm has contributed to Philippine jurisprudence by successfully representing clients in landmark legal controversies not only in the recent past but throughout its more than 46 years of existence.

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## 1. General

### 1.1 Prevalence of Arbitration

International arbitration is steadily becoming the go-to mode of commercial dispute resolution in the Philippines. This is primarily because of the option to select neutral, independent and knowledgeable arbitrators and the generally shorter timeframe within which binding decisions are made as compared to litigation. Moreover, with the strict confidentiality of arbitration proceedings as well as the very limited scope of judicial review, business owners and even the Philippine government concur that arbitration is preferred over litigation.

### 1.2 Trends

Among the live issues affecting arbitration and, thus, currently subject of significant discussion in the Philippines are the enforceability and binding nature of arbitration clauses on third parties, the procedure for multi-party proceedings, the coverage of the legally mandated cloak of confidentiality and the extent of the court's power to issue interim measures of protection prior to or in the course of arbitration. In addition, a number of legal concerns have arisen relating to arbitration such as the enforceability of interim measures of protection issued by the arbitral tribunal, the recognition of orders of emergency arbitrators and the enforceability of awards rendered by tribunals in construction arbitration, which is, by legal mandate, exclusively within the jurisdiction of the Philippine Construction Industry Arbitration Commission (CIAC) and excluded from the coverage of commercial arbitration, whether international or domestic.

### 1.3 Key Industries

Though there is no specific industry that is exhibiting a significant rise in international arbitration activity as compared to prior years, it is of note that government contracts (especially including the so-called PPPs or "public-private partnership projects") are common subjects of international arbitration and, as such, a significant number of arbitration proceedings involve, as parties, the Philippine government and its various agencies. On 27 May 2017, the implementing rules and regulations of Executive Order No 78, series of 2012, took effect and, thereby, the inclusion of ADR mechanisms (especially arbitration) in all contracts involving PPPs, build-operate and transfer projects, joint venture agreements between the Philippine government, both national and local, and private entities, became executive fiat.

### 1.4 Arbitral Institutions

The most commonly used arbitral institutions for international arbitration based outside the Philippines are the International Chamber of Commerce (ICC), the Hong Kong International Arbitration Centre (HKIAC) and the Singapore International Arbitration Centre (SIAC). In terms of

local arbitration institutions, the commonly used provider is the Philippine Dispute Resolution Center, Inc. (PDRC).

## 2. Governing Law

### 2.1 Governing Law

International arbitration in the Philippines is governed primarily by the Republic Act (RA) No 9285 (also known as the "ADR Act") and its implementing rules and regulations (IRR). RA No 9285 expressly adopts the UNCITRAL Model Law, particularly that version adopted on 21 June 1985 and approved on 11 December 1985, as the governing legislation for international commercial arbitration. In addition to the ADR Act and its IRR, international arbitration is likewise governed by the Special Rules of Court on Alternative Dispute Resolution (or the "Special ADR Rules"), which provide for the procedural rules promulgated by the Supreme Court to govern, and prescribe limitations to, judicial intervention and review. Further, recognition and enforcement of foreign arbitral awards are governed by the New York Convention. Lastly, decisions of the Philippine Supreme Court form part of the law and, thus, likewise govern international arbitration.

### 2.2 Changes to National Law

Although there have been no amendments to the national arbitration law in the past year, the Philippine Office of Alternative Dispute Resolution (OADR) is spearheading efforts to amend the ADR Act and has organised a Technical Working Group (TWG) for this purpose. The proposed amendments are primarily aimed at aligning the national arbitration law with international best practices. These proposals include providing for a single regime for both domestic and international arbitration, adopting the 2006 amendments to the UNCITRAL Model Law, specifically those on interim measures of protection, and providing for enforcement of emergency arbitration awards. Presently, domestic arbitrations are governed primarily by RA No 876, a piece of legislation enacted in 1953 and that was patterned after the US Federal Arbitration Act.

## 3. Arbitration Agreement

### 3.1 Enforceability

In international arbitration, the arbitration agreement, to be enforceable in the Philippines, must be in writing. Consistent with the UNCITRAL Model Law, 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 defence in which the existence of an agreement is alleged by one party and not denied by another. An arbitration clause is

likewise enforceable if it is contained in a document that is specifically referred to in, or made part of such, written contract. The requirement of a written arbitration agreement, however, does not discount an arbitration clause contained in an electronic document. Notably, the ADR Act specifically states that the provisions of the Electronic Signatures in Global and E-Commerce Act (or RA No 8792) and its Implementing Rules and Regulations shall apply to arbitration and other ADR modes. In terms of intrinsic validity, however, an arbitration agreement that gives one party the power to choose more arbitrators than the other – whether for international or domestic arbitration – is void and of no effect.

### 3.2 Arbitrability

Under Philippine arbitration law, the general rule is that parties may submit to international arbitration in the Philippines all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship that is commercial in nature, whether contractual or not. The definition of a commercial dispute is broad and includes transactions related to the trading of goods, investment, financing, engineering, joint venture and other forms of business co-operation, contracts of carriage as well as construction of works. However, by express statutory prohibition, parties may not, in the Philippines, arbitrate the following:

- labour disputes;
- civil status of persons;
- validity of a marriage or legal separation;
- any ground for legal separation;
- jurisdiction of courts;
- future legitime;
- criminal liability;
- future support;
- disputes which by law cannot be compromised; and
- disputes referred to court-annexed mediation (Article 1.3 of IRR of the ADR Act).

Notwithstanding the foregoing, the foremost limitations on the arbitrability of a dispute are those created by the terms of the arbitration agreement or arbitration clause itself. Obviously, even if a dispute is excluded from the list of matters that may not be submitted to arbitration, a particular dispute is arbitrable only when it falls within the scope of consent of the parties as embodied by the arbitration clause. In the Philippines, any doubt (as to a dispute's arbitrability) should be resolved in favour of arbitration

### 3.3 National Courts' Approach

Consistent with state policy, the courts have been supportive of the legal regime under the ADR Act that favours arbitration. Consequently, arbitration agreements are liberally construed in favour of proceeding to arbitration and, in deciding disputes on the matter, national courts adopt the interpreta-

tion that would render effective an arbitration clause, rather than defeat it. Thus, where necessary and whenever possible, courts harmonise provisions within a contract to give life to the arbitration agreement.

### 3.4 Validity

The principle of separability of the arbitration clause is provided for in the Special ADR Rules as well as reiterated in jurisprudence. In this jurisdiction, arbitration clauses are treated as an agreement independent of the other terms of the contract of which it forms part. Thus, the nullity of a contract does not necessarily entail the nullity of the arbitration clause that is found within it. In fact, the party who repudiates the main contract has been expressly recognised as having the right to enforce the arbitration clause contained therein.

## 4. The Arbitral Tribunal

### 4.1 Limits on Selection

Insofar as international arbitration is concerned, Philippine arbitration law does not prescribe specific limitations as to who may be selected as arbitrators. Unlike the applicable law for domestic arbitration, the ADR Act and its IRR do not provide for specific qualifications. Rather, for arbitrators in an international arbitration, the ADR Act and its IRR recognise party autonomy and simply state that “*[n]o person shall be precluded by reason of his/her nationality from acting as an arbitrator, unless otherwise agreed by the parties*” (Article 4.11(a), IRR of the ADR Act). Further, arbitrators are required to be impartial or independent.

In regard to the manner of selection, the ADR Act and its IRR mirror the UNCITRAL Model Law in primarily allowing the parties the freedom to lay down their own procedure, which procedure must be followed to ensure enforceability of any award.

### 4.2 Default Procedures

In the absence of stipulation, or should the chosen method of selection fail, the ADR Act and its IRR provide for the method of selection that follows the UNCITRAL Model Law. As a default, in an arbitration with three arbitrators, each party shall appoint one arbitrator and the two party-appointed arbitrators shall appoint the third. Should a party fail to appoint within the prescribed period or if the party-appointed arbitrators fail to agree, then the appointing authority shall make the requisite appointment. When an arbitration clause provides for a sole arbitrator and a party fails to appoint the arbitrator within the prescribed period reckoned from receipt of a request from the other party, the appointment shall likewise be made, upon request of a party, by the appointing authority. In institutional arbitration, the appointing authority is the arbitration institution under whose rules the parties

have chosen to resolve their dispute. In ad hoc arbitration, the default appointing authority is the National President of the Integrated Bar of the Philippines or his authorised representative.

### 4.3 Court Intervention

Under the Special ADR Rules, where the appointing authority shall fail, be unable or refuse to act within a reasonable period (such as within 30 days from receipt of the request), the applicant may renew the application for appointment of an arbitrator with the appropriate Regional Trial Court in accordance with Rule 6 of the Special ADR Rules.

### 4.4 Challenge and Removal of Arbitrators

For international arbitration, the ADR Act expressly adopts the UNCITRAL Model Law and, necessarily, the provisions therein on the grounds and procedure for the challenge of arbitrators. As such, arbitrators duly appointed by the parties (or in whose appointment a party has participated) may be challenged only for circumstances that may have been discovered by the parties (or by the party who participated in the appointment) after the appointment has been made. As to the permissible grounds for a challenge, the ADR Act and its IRR echo the UNCITRAL Model Law and state “[a]n arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his/her impartiality or independence, or if he/she does not possess qualifications agreed to by the parties” (Article 4.12(b), IRR of the ADR Act). In addition, the ADR Act and its IRR likewise provide for termination of an arbitrator’s mandate due to his/her becoming de jure or de facto unable to perform his/her functions or otherwise fails to act without undue delay.

In the matter of procedure for challenge, removal or termination of mandate of an arbitrator, the ADR Act and its IRR grant the parties the power to agree thereon. In the absence of any such agreement, however, the default procedure under the ADR Act and its IRR, which are aligned with the UNCITRAL Model Law, shall be followed.

### 4.5 Arbitrator Requirements

Under the national law governing international arbitration, an arbitrator is required to be independent and impartial from the time of his or her appointment and throughout the arbitral proceedings. In line therewith, a potential arbitrator is mandated to disclose any circumstance likely to give rise to justifiable doubts as to his or her impartiality or independence, which duty continues to exist until the arbitration proceedings are terminated.

Similarly, the PDRC, the principal international arbitration institution in the Philippines, requires arbitrators to be impartial and independent. For this purpose, the PDRC has affirmatively adopted the IBA Guidelines on Conflicts of Interest in International Arbitration (IBA Guidelines), which

provide direction to the arbitrators as to when disclosure shall be undertaken, among others. For construction arbitration under the CIAC, arbitrators are likewise required to be impartial and independent. Though the CIAC has not affirmatively adopted the IBA Guidelines, the same are followed as a matter of practice by the CIAC-accredited arbitrators.

## 5. Jurisdiction

### 5.1 Matters Excluded from Arbitration

Under the ADR Act, parties may not, in the Philippines, arbitrate the following:

- labour disputes;
- civil status of persons;
- validity of a marriage or legal separation;
- any ground for legal separation;
- jurisdiction of courts;
- future legitime;
- criminal liability;
- future support;
- disputes which by law cannot be compromised; and
- disputes referred to court-annexed mediation.

### 5.2 Challenges to Jurisdiction

The Philippines has adopted the doctrine of competence-competence both in its national law as well as in the Special ADR Rules. As such, an arbitral tribunal is expressly allowed to decide any challenge to its jurisdiction over the dispute, including any question as to the existence or validity of the arbitration agreement or any condition precedent to the filing of a request for arbitration. In fact, in line with state policy, the Special ADR Rules expressly provide that the arbitral tribunal shall be accorded the first opportunity to rule on whether it has jurisdiction to decide a dispute submitted to it. As such, whenever a court is confronted with an objection to the arbitral tribunal’s jurisdiction, whether before or after the tribunal’s constitution, the court must exercise judicial restraint, defer to the competence of the arbitral tribunal and allow the said tribunal to have the first opportunity to resolve the same.

### 5.3 Circumstances for Court Intervention

A court may address issues of jurisdiction in relation to a petition for determination on a question concerning the existence, validity and enforceability of an arbitration agreement filed pursuant to Rule 3 of the Special ADR Rules. Such a petition may be filed before or after arbitration has commenced, provided the seat thereof is the Philippines. In cases where the petition is filed before arbitration is commenced, the court’s determination does not preclude a party from raising the same issues before the arbitral tribunal after arbitration is commenced.

After arbitration has commenced, a court may be asked to address jurisdictional issues relating to the existence, validity and enforceability of an arbitration agreement as a form of relief from a preliminary ruling of the arbitral tribunal, whether the same is for upholding or declining jurisdiction. However, should the arbitral tribunal defer ruling on the jurisdiction issue until its final award, then the aggrieved party cannot go to court to question the deferral but rather must await the final arbitral award before seeking appropriate judicial recourse.

### 5.4 Timing of Challenge

After arbitration has commenced, parties may only go to court to question the jurisdiction of the arbitral tribunal after a ruling thereon has been made by the arbitral tribunal itself. Thus, should the arbitral tribunal issue a preliminary ruling on the jurisdictional objection, the aggrieved party may seek judicial relief to avail the same in the manner allowed under Rule 3 of the Special ADR Rules. However, should the arbitral tribunal defer such a ruling until its final award, then the aggrieved party may not raise to the courts such deferral but may only seek judicial relief after the final award has been rendered (ie, to vacate or set aside the award or to resist the recognition and enforcement of the award on jurisdictional grounds).

### 5.5 Standard of Judicial Review for Jurisdiction/ Admissibility

The court's review of an arbitral tribunal's ruling on the matter of jurisdiction (especially one upholding the existence, validity or enforceability of the arbitration agreement) shall be a full review of the relevant issues. In doing so, courts are tasked to give regard to the standard of judicial review of arbitral awards under the Special ADR Rules, which mandate that arbitral awards are presumed to be made and released in due course and is subject to enforcement by the court. Accordingly, although courts are empowered to conduct summary hearings in relation to their judicial review of rulings relating to jurisdiction, it is still the burden of the party seeking to reverse, set aside or refuse recognition to an arbitral award (or a preliminary ruling of the arbitral tribunal) to prove the existence of specified and limited allowable grounds for such reversal, setting aside or refusal of recognition. In line with this, courts often give due deference to the findings and reasoning of the arbitral tribunal.

### 5.6 Breach of Arbitration Agreement

Consistent with state policy, courts are mandated to give effect to the parties' arbitration agreement. As such, where the parties have agreed to submit their dispute to arbitration, courts are duty-bound to refer the parties to arbitration considering that such arbitration agreement is the law between them. Just like a contract, the parties to an arbitration agreement are expected to abide by it in good faith. More specifically, Rule 2.2 of the Special ADR Rules expressly pro-

hibit courts from refusing to refer parties to arbitration for reasons including, but not limited to, the following:

- the referral tends to oust a court of its jurisdiction;
- the court is in a better position to resolve the dispute aspect of arbitration;
- the referral would result in multiplicity of suits;
- the arbitration proceeding has not commenced;
- the place of arbitration is in a foreign country;
- one or more of the issues are legal and one or more of the arbitrators are not lawyers;
- one or more of the arbitrators are not Philippine nationals; or
- one or more of the arbitrators are alleged not to possess the required qualification under the arbitration agreement or law.

The New York Convention may also be invoked to enforce an arbitration agreement.

### 5.7 Third Parties

Generally, only parties to an arbitration agreement may be compelled to submit to arbitration and thus be within an arbitral tribunal's jurisdiction. Jumping off from the expanded definition of an arbitration agreement under the UNCITRAL Model Law (as adopted by the ADR Act), entities or individuals who are neither parties to an arbitration agreement nor signatories to a contract containing an arbitration clause may be considered bound by such arbitration clause – for instance, when such entities or individuals are parties to a second contract that has expressly incorporated the contract containing such arbitration clause, or if the document containing the arbitration agreement expressly references the second contract.

Moreover, assignees or heirs of an original contracting party may be considered parties to an arbitration agreement because the assignor's or decedent's rights and obligations are transferred to them upon assignment.

Further, a nominee of a party to a contract that contains an arbitration agreement may be deemed bound by the arbitration clause if, after reviewing all relevant documents (including subsequent documents executed for the same purpose), it is evident that all documents constitute the parties' entire agreement and must be read as an integrated whole (Bases Conversion Development Authority v DMCI Project Developers, Inc., G.R. No 173137, 11 January 2016). In addition, a non-signatory allowed to invoke rights or obligations under a contract – eg, a named third-party beneficiary thereof – may be considered bound by an arbitration agreement that forms part of a contract. Per the High Court, "a beneficiary who communicated his or her acceptance to the terms of the agreement before its revocation may be compelled to abide by the terms of an agreement, including the arbitration

clause” (Bases Conversion Development Authority v DMCI Project Developers, Inc., G.R. No 173137, 11 January 2016).

An extreme case is provided in the case of Lanuza, Jr, et al v BF Corporation, et al (G.R. No 174938, 1 October 2014). In Lanuza, Jr, the jurisdiction of arbitral tribunals was further expanded to cover individuals who are directors or officers of corporate parties bound by an arbitration agreement whenever there are allegations of malice and bad faith that warrant the piercing of the veil of separate corporate personality. Per the Philippine Supreme Court, to avoid a multiplicity of suits and unnecessary delay, *“in cases alleging solidary liability with the corporation or praying for the piercing of the corporate veil, parties who are normally treated as distinct individuals [such as directors and officers] should be made to participate in the arbitration proceedings in order to determine if such distinction should indeed be disregarded and, if so, to determine the extent of their liabilities”* (Lanuza, Jr, et al v BF Corporation, et al, G.R. No 174938, 1 October 2014).

## 6. Preliminary and Interim Relief

### 6.1 Types of Relief

Unless the parties agree otherwise, a duly-constituted arbitral tribunal may, at the request of a party, grant such interim measures of protection as may be necessary to prevent irreparable loss or injury, provide security for the performance of an obligation, to produce or preserve evidence or to compel any other act or omission. Accordingly, the allowable interim measures of protection include preliminary injunctions, appointment of receivers, and detention, preservation or inspection of property subject of a dispute.

### 6.2 Role of Courts

Insofar as interim measures in arbitration are concerned, the role of the courts is to fill in the gaps, so to speak. Thus, as a matter of law, courts are empowered to grant interim relief before the constitution of the arbitral tribunal and even before the commencement of arbitration itself. After a tribunal is constituted and during the arbitration proceedings, courts are still empowered to order interim relief (or modify measures already granted by the tribunal) to the extent that the arbitral tribunal has no power to act or is unable to act effectively. Thus, where a tribunal is without the ability to effectively enforce its own interim relief, the court may aid in its enforcement.

### 6.3 Security for Costs

Although the ADR Act is silent on security of costs, the IRR of the ADR Act expressly authorises arbitral tribunals to request each party to deposit equal amounts as an advance for certain costs (specifically, the arbitrator’s fees and expenses as well as other expenses to be incurred for expert advice and other assistance required by the tribunal). If arbitration

is institutional, the authority would be dependent on the rules of such arbitration institution. Moreover, considering the ADR Act broadly defines interim measures of protection and provides a catch-all phrase empowering an arbitral tribunal as well as a court to grant relief *“to compel any other appropriate acts or omissions”*; it is reasonable to assert that orders for security for costs are within such definition.

## 7. Procedure

### 7.1 Governing Rules

Other than requiring that parties shall be treated with equality and shall be given a full opportunity to present their respective case, the ADR Act and its IRR allow parties to agree on the procedure to be followed by the arbitral tribunal in the conduct of arbitration proceedings. In the absence of such agreement, the arbitral tribunal may conduct the arbitration in such manner as it deems appropriate. Notably, unless the arbitral tribunal considers it inappropriate, the UNCITRAL Arbitration Rules adopted by the UNCITRAL on 28 April 1976 and the UN General Assembly on 15 December 1976 shall apply, subject only to the clarification that all references to the “Secretary-General of the Permanent Court of Arbitration at the Hague” shall be deemed to refer to the appointing authority.

### 7.2 Procedural Steps

In the absence of agreement of the parties, international arbitration in the Philippines is governed primarily by the UNCITRAL Model Law. Accordingly, the ADR Act and its IRR mirror the procedural steps identified therein. Thus, proceedings must be commenced by sending a request for the dispute to be referred to arbitration. After the arbitral tribunal has been constituted, the claimant must communicate the statement of claim while the respondent must communicate the statement of defence. Although the conduct of an oral hearing is not mandatory, the tribunal may hold such hearings. If it does, the parties are required to be given sufficient advance notice of any such hearing. The arbitration proceedings are terminated upon rendition of the final award or by an order to that effect of the arbitral tribunal.

### 7.3 Powers and Duties of Arbitrators

Under the ADR Act and its IRR, arbitrators have the power to:

- rule on their own jurisdiction;
- determine the admissibility, relevance, materiality and weight of evidence;
- issue interim measures of protection;
- decide on the appropriate manner to conduct the proceedings in the absence of parties’ agreement thereon;
- require any person to attend a hearing as a witness;

- subpoena relevant and material witnesses and/or documents;
- appoint experts;
- require the retirement of any witness during the testimony of another;
- determine the law to be applied in resolving the substance of the dispute failing parties' designation thereof;
- decide in accordance with the terms of the contract taking into account the usages of trade applicable to the transaction;
- record any settlement in the form of an award;
- terminate the proceedings when it finds the continuation thereof has become unnecessary or impossible; and
- correct and/or interpret its award.

Consistent with the UNCITRAL Model Law, arbitrators are not allowed to decide based on what is just and fair unless the parties expressly authorise them to do so.

Insofar as duties are concerned, the ADR Act and its IRR require arbitrators to maintain their independence and impartiality from the commencement of the arbitration until the termination thereof. As a necessary consequence, arbitrators are duty-bound to disclose such circumstances that are likely to give rise to justifiable doubts as to his/her impartiality or independence. As mentioned, such duty exists until the proceedings are terminated. Unless the parties agree to the contrary, arbitrators are required to state the reasons supporting their award. Further, an arbitrator is required to act without undue delay – otherwise, the parties may request the termination of his/her mandate. Inferring from the UNCITRAL Model Law, the ADR Act and its IRR, arbitrators are duty-bound to:

- refrain from preventing a party presenting his/her case;
- refrain from rendering an award on a dispute not contemplated by, or not falling within, the terms of the submission to arbitration;
- refrain from rendering an award that contains decisions on matters beyond the scope of the submission to arbitration; and
- avoid conducting the arbitral proceedings in a manner not in accordance with the procedure agreed upon by the parties unless such agreement violates the law.

#### 7.4 Legal Representatives

A party to an international arbitration proceeding in the Philippines may be represented by any person of his/her choice. However, in the event such representative is not admitted to the practice of law in the Philippines, he/she shall not be authorised to appear as counsel in any Philippine court or any other quasi-judicial body even if such appearance relates to the arbitration.

## 8. Evidence

### 8.1 Collection and Submission of Evidence

In line with party autonomy, Philippine arbitration law does not prescribe any particular approach to the collection and submission of evidence as parties are free to agree thereon. However, due process requires that the parties to an arbitration be allowed to present their case along with all supporting evidence, whether documentary or testimonial, and be allowed to object to the arguments and evidence presented by the other side. Moreover, further to the requirement of equal treatment, each party shall be given a full opportunity to present his/her case.

Generally, arbitration proceedings in the Philippines are conducted orally with evidence being presented at the scheduled hearings after an exchange of written submissions and witness statements (ie, statements of fact, law and expert witnesses). During these hearings, witnesses may be cross-examined. Thus, unless parties have agreed that no hearings shall be conducted, the arbitral tribunal shall decide whether to hold oral hearings for the presentation of evidence or for oral arguments, or whether the proceedings shall be conducted on the basis only of documents and other materials. However, if a party requests a hearing, the arbitral tribunal shall hold such hearings at an appropriate stage of the proceedings and give parties advance notice thereof.

Upon the communication of all the statements, presentation of all documents and submission of all the evidence, both testimonial and documentary, the arbitrators shall declare the proceedings closed and subsequently render an award.

In the Philippines, availing of discovery measures as part of the arbitration proceeding is more an exception rather than the rule. Accordingly, disclosure of evidence generally rests on the discretion and determination of each party. However, arbitral tribunals are empowered (and have, on occasion, exercised the power) to subpoena relevant and material documents and/or witnesses.

### 8.2 Rules of Evidence

Philippine arbitration law does not prescribe the evidentiary rules to be applied in international arbitration proceedings. As a matter of party autonomy, parties have the freedom to stipulate on the applicable rules of procedure (which include evidentiary rules). In the absence of agreement, the arbitral tribunal shall use its discretion to determine how evidence is to be presented, what evidence is required and how to appreciate the evidence. Thus, as a matter of law, arbitral tribunals have the power to determine, among others, the admissibility, relevance, materiality and weight of any piece of evidence.

### 8.3 Powers of Compulsion

Under the ADR Act and its IRR, the arbitral tribunal shall have the power to require any person to attend a hearing as a witness as well as the power to subpoena material and relevant witnesses and documents. Notably, although an arbitral tribunal does not have contempt powers, it may sanction non-compliance with its orders through an award of damages. By express provision of the ADR Act and its IRR, a party who does not comply with the arbitral tribunal's order directing, among others, the production of evidence shall be *"liable for damages resulting from noncompliance, including all expenses, and reasonable attorney's fees, paid in obtaining the order's judicial enforcement"* (Section 28[b][7], ADR Act). As to non-parties, however, an arbitrator does not have the same authority.

To compel the production of documents or attendance of witnesses, whether parties to the arbitration or otherwise, a party to an ongoing arbitration may request assistance from a Philippine court in taking evidence in accordance with Rule 9 of the Special ADR Rules. Specifically, with due regard to the Philippine rules of evidence (on competence and admissibility), courts may direct any person found in the Philippines to:

- comply with a subpoena ad testificandum and/or subpoena duces tecum;
- appear as witness before an officer for the taking of his/her deposition upon oral examination or by written interrogatories;
- allow the physical examination of the condition of persons or the inspection of things or premises and, when appropriate, allow the recording and/or documentation of conditions of persons, things or premises;
- allow the examination and copying of documents; and
- perform any similar acts.

In the event of disobedience, courts may impose appropriate sanctions including declaring such disobeying person in contempt.

## 9. Confidentiality

### 9.1 Extent of Confidentiality

By express statutory mandate, the arbitration proceedings – including the records, evidence and the arbitral award – shall, generally, be considered confidential and shall not be published. As to what is "confidential information", Section 3(h) of the ADR Act defines the same as *"any information, relative to the subject of mediation or arbitration, expressly intended by the source not to be disclosed, or obtained under circumstances that would create a reasonable expectation on behalf of the source that the information shall not be disclosed"*. The term includes: (i) communication, oral or written, made

in the arbitration proceedings, including any memoranda, notes or work product of the arbitrator/s or non-party participant, as defined in the ADR Act; and (ii) pleadings, motions, manifestations, witness statements, reports filed or submitted in an arbitration. Exceptions to this general rule of confidentiality are, firstly, disclosures made with consent of the parties and, secondly, disclosures to the court for the limited purpose of adducing relevant documents in judicial proceedings permitted under the ADR Act, its IRR and the Special ADR Rules. In the latter situation, the court in which the action or the appeal is pending may issue a protective order to prevent or prohibit disclosure of documents or information containing secret processes, developments, research and other information where it is shown that the applicant shall be materially prejudiced by an authorised disclosure thereof. As guidance to courts when confronted with petitions or motions for protective orders, the Special ADR Rules state that *"[c]onfidential information shall not be subject to discovery and shall be inadmissible in any adversarial proceeding, whether judicial or quasi-judicial. However, evidence or information that is otherwise admissible or subject to discovery does not become inadmissible or protected from discovery solely by reason of its use therein"* (Rule 10.8, Special ADR Rules).

Consistent with the guiding principle in the Special ADR Rules, the Supreme Court in the recent case of *FedEx, et al v Air21, et al* (G.R. No 216600, 21 November 2016) categorically rejected the argument that the confidentiality of witness' statements made during an arbitration may not be used as a shield in the commission of a crime. Thus, the court decreed that the statements in an arbitration of a witness who relied upon the confidentiality of the proceedings (and any communication made towards that end) should be regarded as confidential, privileged and thus inadmissible in evidence (even in a preliminary investigation of a crime allegedly committed by such witness through his or her statement during the arbitration).

## 10. The Award

### 10.1 Legal Requirements

Philippine arbitration law governing international arbitration demands that arbitral awards comply with certain substantive and procedural requirements. Substantively, an award must deal with a matter that is capable of arbitration and resolve a dispute that is within the scope of the arbitration clause and/or within the terms of the submission agreement. Procedurally, the award must comply with certain formalities. The award must be in writing and shall be signed by the arbitrator or arbitrators. In arbitral proceedings with more than one arbitrator, the signatures of the majority of all members of the arbitral tribunal shall suffice, provided that the reason for any omitted signature is stated. Further, the

award should be confined to those matters that have been submitted for arbitration and should state:

- the reasons upon which it is based, unless the parties have agreed that no reasons are to be given or the award is an award on agreed terms;
- its date; and
- the place of arbitration.

A copy of the signed award must likewise be delivered to each party.

## 10.2 Types of Remedies

Unless the parties have agreed to the contrary, the arbitral tribunal may award all such remedies or relief as may be warranted by the evidence before it and as authorised by the terms of the submissions or scope of the arbitration agreement. However, in compliance with the UNCITRAL Model Law, an arbitral tribunal in international arbitration may not grant remedies or relief based on what is just, fair and equitable unless the parties have expressly granted such authority.

## 10.3 Recovering Interest and Legal Costs

Unless the parties have agreed otherwise, arbitrators have the power to include in the award an assessment of the “costs” of arbitration and to fix the same upon a particular party. As to what “costs” may be fixed by an arbitral tribunal in its award, Article 4.46(a) of the IRR of the ADR Act limits the same to the following:

- arbitrator’s fees;
- arbitrator’s travel and other expenses;
- costs of expert advice and of other assistance required by the arbitral tribunal, such as site inspection and expenses for the recording and transcription of the arbitration proceedings;
- witness’ travel and other expenses as are approved by the arbitral tribunal;
- costs for legal representation and assistance of the successful party, if such costs were claimed during the arbitral proceedings, and only to the extent that the arbitral tribunal determines that the amount of such costs is reasonable; and
- fees and expenses of the appointing authority, if any.

Generally, under the IRR of the ADR Act, the costs of arbitration (except legal representation fees and costs relative to expert advice and assistance required by the tribunal) shall be borne by the unsuccessful party as a matter of principle. However, the tribunal may apportion costs between the parties if it determines apportionment reasonable under the circumstances of each case. For legal representation fees and costs relative to expert advice and assistance required by the tribunal, the arbitral tribunal is free to determine which party shall bear such costs or may, depending on the circumstances, apportion the same among the parties if reasonable.

The ADR Act and its IRR are silent on the power of arbitral tribunals to award interest to the parties. However, under Philippine substantive law, pre-judgment interest is recoverable only when the same is expressly stipulated in writing. Post-judgment interest may be granted on money judgments, at legal rate, until the same is fully paid. Although these legal principles govern litigation, these rules have been relied upon by arbitral tribunals in the Philippines.

## 11. Review of an Award

### 11.1 Grounds for Appeal

There is no right to appeal an arbitral award because the existence of an arbitration agreement is interpreted as a stipulation that the arbitral award shall be final and binding. Consequently, parties to arbitration are precluded from appealing the merits of an arbitral award and any appeal therefrom shall be dismissed.

Though not appealable, arbitral awards in international arbitration may, upon petition of an aggrieved party, be set aside but only for the limited and exclusive grounds available under Article 34 of the UNCITRAL Model Law and Article 4.34 of the IRR of the ADR Act, namely:

- the incapacity of a party;
- the invalidity of the arbitration agreement;
- lack of notice to a party of the appointment of an arbitrator;
- the inability of a party to present his or her case;
- the award being beyond the scope of the arbitration agreement or resolving a dispute outside the scope of the submission to arbitration;
- non-compliance with the parties’ agreement on the composition of the arbitral tribunal (unless such agreement is in conflict with the ADR Act) or, in the absence of agreement, the composition of the tribunal not being in accord with the ADR Act.

Further, the award may be vacated or set aside if the subject matter thereof may not be submitted to arbitration or due to conflicts with Philippine public policy.

The procedure governing a petition to set aside an arbitral award is laid down in Rule 12 of the Special ADR Rules. Notable among its procedural requirements is that a verified petition to set aside may only be filed with the appropriate Regional Trial Court within three months from receipt of a copy of the award. Failure of a party to file a petition to set aside shall preclude such party from raising grounds to resist enforcement of the award, although it shall not automatically result in the grant of a petition to recognise and enforce the same. If the court finds that a petition to set aside an award is sufficient in form and substance, it shall notify the responding party thereof and direct it to file an opposition, which

may be in the form of a petition to recognise and enforce the award. Upon receipt, the petitioner may file a reply. The court is empowered to determine whether the issue will be resolved on the basis only of documents and/or legal briefs or whether an oral hearing shall be conducted. If the matter is set for hearing, affidavits of witnesses shall be submitted, which shall constitute their direct testimonies. These witnesses shall be subjected to cross-examination during the hearing. The petition must be heard and resolved without undue delay. In deciding a petition to set aside an arbitral award, the Regional Trial Court is prohibited from disturbing the tribunal's determination of facts and/or interpretation of law.

The party aggrieved by the Regional Trial Court's decision granting or dismissing a petition to set aside an arbitral award may move for its reconsideration within 15 days from receipt of such decision. The Regional Trial Court's decision granting or dismissing a petition to set aside an arbitral award (or its decision on a motion for reconsideration therefrom) is appealable to the Court of Appeals via a verified petition for review within 15 days from notice of such decision in accordance with the procedure under Rule 19 of the Special ADR Rules.

Rulings of the Court of Appeals may be elevated to the Supreme Court via a petition for review on certiorari that raises only questions of law. Notably, however, review by the Supreme Court is not a matter of right but a matter of its sound discretion, which will be granted only for serious and compelling reasons resulting in grave prejudice to the aggrieved party.

### 11.2 Excluding/Expanding the Scope of Appeal

There is no appeal available to assail the merits of an arbitral award. Instead, to challenge the award, a party must file a petition to set the same aside, which remedy is available on very limited grounds. It is the ruling of the Regional Trial Court on a petition to set aside that is appealable.

Philippine arbitration law is silent on whether contracting parties may expand or reduce the scope of an appeal or challenge of an arbitral tribunal's award (or of the appeals process from a court's ruling on a petition to set aside). As of this date, there is no jurisprudence directly resolving the matter.

Generally, the parties are free to establish such stipulations, clauses, terms and conditions as they may deem convenient, provided these are not contrary to law, morals, good customs, public order, or public policy. Despite the due recognition of party autonomy under the Philippine legal regime governing international arbitration, parties may not be free to expand or limit the scope of judicial review of an arbitral award as provided by the ADR Act, its IRR and the Special ADR Rules (especially the processes to set aside the

same as well as appeals from court decisions on such petitions). Limiting the scope of judicial review, especially as to completely oust the courts of their statutorily vested authority, would be inconsistent with the express provisions of the ADR Act and may be deemed offensive to public policy. On the other hand, expanding the court's jurisdiction to review arbitral awards (such as to afford an appeal on the merits) is likewise impermissible as it would similarly violate the provisions of the ADR Act, its IRR and the Special ADR. It is settled jurisprudence that jurisdiction of courts is vested by law and not by the parties' agreement.

### 11.3 Standard of Judicial Review

The procedure laid down for the resolution of a petition to set aside an arbitral award includes the parties' submission of the affidavits and reply affidavits of their respective witnesses as well as all documentary evidence supporting the same. The Regional Trial Court resolving such a petition is further empowered to conduct an oral hearing whereat witnesses may be cross-examined on their affidavits. Essentially, therefore, the resolution of a petition to set aside entails the introduction of evidence and, albeit in an expedited manner, a new trial.

This prescribed procedure notwithstanding, courts generally have a deferential approach towards the arbitral award. This is because, under the Special ADR Rules, a presumption in favour of confirmation and/or enforceability is laid down, viz: "*[i]t is presumed that an arbitral award was made and released in due course and is subject to enforcement by the court, unless the adverse party is able to establish a ground for setting aside or not enforcing an arbitral award*" (Rule 12.12, Special ADR Rules). Accordingly, unless a ground to set aside an arbitral award is fully established, the court shall dismiss the petition to set aside. However, in resolving the matter, the court is prohibited from disturbing the arbitral tribunal's factual findings and legal interpretations and from substituting its own judgment for that of the arbitral tribunal. Accordingly, an arbitral award may not be set aside on the ground that the tribunal committed errors of fact, of law or of fact and law.

## 12. Enforcement of an Award

### 12.1 New York Convention

The Philippines signed and ratified the New York Convention. In its accession thereto in 1965, the Philippines declared that it will apply the New York Convention, on the basis of reciprocity, to the recognition and enforcement of awards made only in the territory of another contracting state pursuant to Article 1, paragraph 3 thereof and only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under

the national law of the state making such declaration (otherwise, a “convention award”).

The Philippines is likewise a party to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention), which provides for an enforcement mechanism. In addition, the Philippines is a party to the ASEAN Comprehensive Investment Agreement, which indicates that a claim between an investor and a member state under the agreement that is submitted for arbitration shall be considered to arise out of a commercial relationship or transaction for purposes of Article 1 of the New York Convention and thus enforceable thereunder.

### 12.2 Enforcement Procedure

Arbitral awards enjoy a presumption of enforceability. Thus, unless one of the limited grounds to set aside an arbitral award is fully established, a petition to recognise and enforce the arbitral award filed in opposition to the petition to set aside shall be granted and the award recognised and enforced.

As to the procedure, the provisions of Rule 12 of the Special ADR Rules apply. Briefly, a verified petition to recognise and enforce an arbitral award may be filed anytime from receipt thereof. However, if a petition to set aside the same is filed in a timely manner, then a petition to recognise and enforce the same may be incorporated in the opposition to the petition to set aside. The petition to recognise and enforce an arbitral award may be filed, at the option of the petitioner, with the appropriate Regional Trial Court:

- where the arbitration proceedings were conducted;
- where any of the assets to be levied upon is located;
- where the act to be enjoined will be or is being performed;
- where any of the parties to the arbitration resides or has its place of business; or
- in the National Capital Judicial Region.

The verified petition must state, among others: the addresses of record of the parties; the existence of an arbitration or submission agreement; the names of the arbitrators and the proof of their appointment; the issuance of an arbitral award and the date thereof, as well as the date when the petitioner received the same; and the relief sought. The petitioner must attach to the verified petition the following documents:

- an authentic copy of the arbitration agreement;
- an authentic copy of the arbitral award;
- an authentic copy/copies of the appointment of the arbitral tribunal;
- a verification to the effect that the affiant has read the petition and the allegations therein are true and correct to his/her personal knowledge or based on authentic records; and

- a certification against forum shopping executed by the petitioner principally to the effect that the petitioner has not previously commenced any action or filed any claim involving the same issues in any court, tribunal or quasi-judicial agency and, to the best of his knowledge, no such action or claim is pending and, if there are other pending actions or claims, the present status thereof.

Upon receipt of notice of the filing of the petition to recognise and enforce an arbitral award, the respondent may file an opposition thereto or, in lieu thereof, the respondent may, if still within the allowable period, file a petition to set aside the award as its opposition. The petitioner may then file a reply.

Upon completion of the exchange of pleadings, the Regional Trial Court may, where the issue is mainly one of law, decide to direct the parties to submit briefs of legal arguments and resolve the petition on the basis thereof. Should there be factual issues involved, the court will require submission of each party’s affidavits and reply affidavits of their respective witnesses. These affidavits must attach all supporting documents. A hearing thereon may or may not be conducted. Where an oral hearing is conducted, witnesses shall be subject to cross-examination thereat.

Unless a ground to set aside is fully established, the court shall recognise and enforce the arbitral award.

For a foreign arbitral award rendered in a convention state, the standard of review and procedure are largely the same as those for international commercial arbitration awards rendered in the Philippines. As such, a convention award enjoys the presumption of enforceability and courts are likewise prohibited from disturbing the arbitral tribunal’s findings of fact and/or legal interpretations. Insofar as a foreign arbitral award is rendered in a state that is not a signatory to the New York Convention, the court may, upon grounds of comity and reciprocity, recognise and enforce the same as if it were a convention award. In terms of procedure, however, a petition to recognise and enforce a foreign arbitral award must be verified, must indicate the country where the award was made and whether such country is a signatory to the New York Convention, must state the relief sought and must attach an authentic copy of the arbitration agreement and an authentic copy of the arbitral award. Should the arbitral award or arbitration/submission agreement not be in English, the petitioner shall attach to the petition a translation of these documents into English, which shall be certified by an official or sworn translator or by a diplomatic or consular agent.

### 12.3 Approach of the Courts

Arbitral awards enjoy the presumption of enforceability. As such, unless one of the limited grounds to set aside or refuse recognition has been fully established, the courts shall rec-

ognise and enforce the arbitral award. In resolving petitions to recognise and enforce arbitral awards, courts shall not disturb the arbitral tribunal's determination of facts and/or interpretation of law.

Like the UNCITRAL Model Law and the New York Convention, the ADR Act, its IRR and the Special ADR Rules all provide that international commercial arbitration awards and foreign arbitral awards may be set aside or refused recognition, as the case may be, when recognition or enforcement of an arbitral award would violate public policy. Moreover, the Special ADR Rules expressly state that, whenever a petition to set aside (or refuse recognition and enforcement) alleges a ground other than those provided in the Special ADR Rules, a court may only entertain the same if the ground alleged for setting aside or non-recognition amounts to a violation of public policy.

To date, there is limited jurisprudence discussing public policy as a ground to refuse recognition to or enforcement of an arbitral award. Nevertheless, courts are generally strict in evaluating the existence of such public policy exception and, thus, narrowly construe its applicability. In fact, in view of the presumption of enforceability and the statutory limits of judicial review of arbitral awards, Philippine courts tend to strictly apply the requirements of all the grounds for refusal of recognition/enforcement. As such, there is a growing trend illustrating the courts' preference to enforce, rather than set aside or refuse recognition to, an arbitral award.

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