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International Arbitration

Philippines

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Law and Practice

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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 primarily because of the option to select neutral, independent and knowledgeable arbitrators and the generally shorter timeframe within which binding decisions are made compared to litigation. Moreover, with the strict confidentiality of arbitration proceedings, as well as the very limited scope of judicial review, stakeholders in business and government concur that arbitration is preferred over litigation.

While the majority of commercial disputes involving natural persons are still settled through litigation, there is a growing trend for companies, especially for those involved in complex transactions and/or those with foreign elements resorting to agree to arbitration to settle disputes. In the Philippines, dispute resolution clauses now tend to be multi-tiered (ie, prior resort to negotiation or mediation is made a pre-condition to the arbitration process).

1.2 Trends

Among the issues currently under significant discussion, if not debate, are the enforceability and binding nature of arbitration clauses on third parties, the procedure for multi-party proceedings, and the extent of the court's power to issue interim measures of protection prior to or during the course of arbitration. A number of legal concerns have likewise arisen relating to the enforceability of interim measures of protection issued by the tribunal, the recognition of orders of emergency arbitrators and the enforceability of awards rendered by tribunals in construction arbitration, which by legal mandate is exclusively within the jurisdiction of the Philippine Construction Industry Arbitration Commission (CIAC) and excluded from the coverage of commercial arbitration, whether international or domestic.

Another significant trend is the parties' willingness to apply for the appointment of emergency arbitrators and/or to resort to expedited procedures. The inclusion of such provisions in the arbitration rules of two Philippine arbitration institutions has heightened the familiarity of lawyers and users.

The COVID-19 pandemic initially brought the Philippine economy to a virtual standstill, followed by a major slow-down. The economic impact thereof led to disruptions and contractual breaches, providing fodder for disputes. Thus, applications for interim measures of protection and/or emergency arbitrator decisions are becoming more frequent, demonstrating that the use of international arbitration continues despite the pandemic.

As far as conduct of proceedings is concerned, the availability of and access to technology addresses the restrictions of face-to-face interactions. Arbitral institutions such as the Philippine Dispute Resolution Center (PDRC), the CIAC and the newly established Philippine International Center for Conflict Resolution (PICCR), and regional institutions, have been able to adapt and continue with the proceedings through alternative online platforms and conduct evidentiary hearings through video-conferencing.

1.3 Key Industries

Although no specific industry is exhibiting a significant rise in international arbitration activity (compared to previous years), it is notable that government contracts (especially the so-called PPPs or "public-private partnership projects") are common subjects of international arbitration, so a significant number of arbitration proceedings involve, as parties, the Philippine government and its various agencies. By executive fiat, through the implementing rules and regulations of Executive Order No 78, series of 2012, all contracts involving PPPs, build-operate and transfer projects, joint-venture agreements between the Philippine government, both national and local, and private entities, now include ADR mechanisms (especially arbitration).

1.4 Arbitral Institutions

The most commonly used arbitral institutions for international arbitration based outside the Philippines are the ICC, the HKIAC and the SIAC. Among local arbitration institutions, the commonly used provider is the PDRC. This may be principally due to the familiarity of parties with the procedures of these institutions, the recognised expertise of their accredited arbitrators, and their beneficial support services for orderly proceedings.

2. Governing Legislation

2.1 Governing Law

International arbitration in the Philippines is governed primarily by Republic Act (RA) No 9285 (the ADR Act) and its Implementing Rules and Regulations (IRR). RA No 9285 does not diverge from, and even expressly adopts the UNCITRAL Model Law, particularly that version adopted on 21 June 1985 and approved on 11 December 1985. In addition to the ADR Act and its IRR, international arbitration is likewise governed by the Special Rules of Court on Alternative Dispute Resolution (the Special ADR Rules), which provide the procedural rules for 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, similarly, govern international arbitration.

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2.2 Changes to National Law

There have been no amendments to the national arbitration law in the past year. The Philippine Office of Alternative Dispute Resolution (OADR) has organised a Technical Working Group (TWG) to propose amendments to the ADR Act, which 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. These proposed amendments are expected to be submitted to Congress in the latter part of 2020.

3. The Arbitration Agreement

3.1 Enforceability

An arbitration agreement must be in writing to be enforceable in the Philippines. 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 similarly enforceable if it is contained in a document that is specifically referred to in, or is part of, a 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 (RA No 8792) and its IRR 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 law, the general rule is that parties may submit to international arbitration in the Philippines all or specific 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, among others, the trading of goods, investment, financing, engineering, joint venture and other forms of business co-operation, contracts of carriage and construction of works. However, the law prohibits parties from arbitrating 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 the IRR of the ADR Act).

Still, the principal limitations on the arbitrability of a dispute are those created by the terms of the arbitration agreement or clause itself. Even if a dispute is excluded from the above list, a particular dispute is arbitrable only when it falls within the scope of consent of the parties as embodied by the arbitration agreement. Any doubt (as to a dispute's arbitrability) should be resolved in favour of arbitration.

3.3 National Courts' Approach

Courts have been supportive of the legal regime under the ADR Act that favours arbitration. Philippine courts exhibit a pro-arbitration bias, so, as a general rule, arbitration agreements are enforced rather than ignored. Arbitration agreements are liberally construed in favour of proceeding to arbitration and, in deciding disputes on the matter, national courts adopt the interpretation that would render effective an arbitration clause, rather than defeat it. Where the parties agreed to submit their dispute to arbitration, the Special ADR Rules mandate courts to refer them to arbitration.

3.4 Validity

The principle of separability of the arbitration clause is provided for in the Special ADR Rules and reiterated in jurisprudence. Philippine law treats arbitration clauses as independent of the other terms of the contract of which they form 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

As regards international arbitration, Philippine arbitration law does not prescribe specific limitations on the selection of 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 in selecting arbitrators (mirroring the UNCITRAL Model Law) and simply state that "[n]o person shall be precluded by reason of his or her

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nationality from acting as an arbitrator, unless otherwise agreed by the parties” (Article 4.11(a), IRR of the ADR Act). Arbitrators, however, are required to be impartial or independent.

4.2 Default Procedures

In the absence of stipulation, or if the chosen method of selection fails, the ADR Act and its IRR provide for the selection method 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, the appointing authority shall make the 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 or her authorised representative.

There is no statutorily mandated and/or default procedure for the appointment of arbitrators in multi-party arbitrations. In line with the principle of party autonomy, however, the method of appointment agreed by the parties will be followed as long as it ensures that the parties are treated equally as required by the UNCITRAL Model Law.

4.3 Court Intervention

Under the Special ADR Rules, where the appointing authority fails, is unable, or refuses to act within a reasonable period (eg, within 30 days from receipt of the request), the applicant may renew the application for appointment of an arbitrator with the appropriate court.

The court may act as the appointing authority only if a proper application is filed by a party and the other party is given an opportunity to comment thereon. In deciding whom to appoint, the ADR Act mandates the court to consider matters aimed at securing the appointment of an independent and impartial arbitrator.

4.4 Challenge and Removal of Arbitrators

For international arbitration, the ADR Act expressly adopts the grounds and procedure under the UNCITRAL Model Law for the challenge of arbitrators. Arbitrators 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 that “[a]n arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his or her impartiality or independence, or if he or she does not possess qualifications agreed to by the parties” (Article 4.12(b), IRR of the ADR Act). The ADR Act and its IRR likewise provide for termination of an arbitrator’s mandate due to him or her becoming de jure or de facto unable to perform his or her functions or otherwise failing to act without delay.

The ADR Act and its IRR grant the parties the power to agree on the procedure for challenge, removal or termination of the mandate of an arbitrator. In the absence thereof, 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

Arbitrators are required to be independent and impartial from the time of their 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 throughout and until the arbitration proceedings are terminated.

Similarly, the PDRC, the principal international arbitration institution in the Philippines, requires arbitrators to be impartial and independent. The PDRC adopted the IBA Guidelines on Conflicts of Interest in International Arbitration (IBA Guidelines), which provide direction to the arbitrators as to, among others, when disclosure shall be done. For construction arbitration under the CIAC, arbitrators are likewise required to be impartial and independent. Although the CIAC has not affirmatively adopted the IBA Guidelines, in practice these rules are followed by CIAC-accredited arbitrators.

5. Jurisdiction

5.1 Matters Excluded from Arbitration

See 3.2 Arbitrability.

5.2 Challenges to Jurisdiction

The Philippines has adopted the doctrine of kompetenz-kompetenz, both in its national law and in the Special ADR Rules. A 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 line with state policy, the Special ADR Rules expressly accord the tribunal the first opportunity to rule on whether it has jurisdiction to decide a dispute submitted to it. Whenever a court is confronted

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with an objection to the tribunal's jurisdiction, whether before or after the tribunal's constitution, the court must exercise judicial restraint, defer to the competence of the tribunal and allow the tribunal the opportunity to resolve the objection.

5.3 Circumstances for Court Intervention

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

After arbitration has commenced, a court is authorised to review the tribunal's ruling upholding or declining jurisdiction. However, when the power of a Philippine court to resolve a jurisdictional issue is properly invoked, the court is mandated to resolve the issue but must exercise judicial restraint in accordance with the doctrine of kompetenz-kompetenz.

5.4 Timing of Challenge

After arbitration has commenced, parties may go to court only to question the jurisdiction of the tribunal after a ruling thereon has been made by the tribunal itself. However, if the tribunal defers any such ruling until its final award, the aggrieved party may not raise that deferral to the courts but may seek judicial relief only 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 a tribunal's ruling on the matter of jurisdiction (especially one that upholds the existence, validity or enforceability of the arbitration agreement) is a full review of the relevant issues. In doing so, courts are tasked to apply the standard of judicial review of arbitral awards under the Special ADR Rules, ie, that they are presumed to be made and released in due course and subject to enforcement by the court. Accordingly, although courts are empowered to conduct summary hearings in relation to their review of rulings relating to jurisdiction, they often give due deference to the findings and reasoning of the tribunal. The party assailing an arbitral award (or a preliminary ruling of the tribunal) has the burden to prove the existence of specified and limited allowable grounds for any such reversal, setting aside or refusal of recognition.

5.6 Breach of Arbitration Agreement

Courts are mandated to give effect to the parties' arbitration agreement. Where the parties have agreed to submit their dispute to arbitration, courts are duty-bound to refer the parties to arbitration, since the arbitration agreement is the law between them. Just as in 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 prohibits 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 a multiplicity of suits;
- the arbitration proceeding has not commenced;
- the place of arbitration is in a foreign country;
- one or more of the issues is legal and one or more of the arbitrators is not a lawyer;
- one or more of the arbitrators is not a Philippine national; or
- one or more of the arbitrators is alleged not to possess the required qualification under the arbitration agreement or law.

5.7 Third Parties

Generally, only parties to an arbitration agreement may be compelled to submit to arbitration and thus be within a tribunal's jurisdiction. Departing 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 still be considered bound by that arbitration clause, for example when they are parties to a second contract that has expressly incorporated the contract containing the arbitration clause or if the document containing the arbitration agreement expressly references the second contract.

Moreover, assignees, heirs or any other transferee of an original contracting party may be considered parties to an arbitration agreement because the rights and obligations of the assignor, decedent or transferor 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. 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

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of a contract. Per the Philippine Supreme, “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 *Lanuza, Jr, et al v BF Corporation, et al* (G.R. No 174938, 1 October 2014), where the jurisdiction of tribunals was expanded to cover directors or officers of corporate parties bound by an arbitration agreement when there are allegations of malice and bad faith that warrant the piercing of the corporate veil. 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”.

These principles apply to both domestic and foreign third parties. The rationale of the Philippine Supreme Court in these cases, which is consistent with State policy under the ADR Act, may be invoked by domestic and similarly situated foreign third parties.

6. Preliminary and Interim Relief

6.1 Types of Relief

Unless the parties agree otherwise, a duly constituted tribunal may, at the request of a party, grant the necessary interim measures of protection 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. The permitted interim measures of protection include, but are not limited to, preliminary injunctions, appointment of receivers, and detention, preservation or inspection of property that is the subject of a dispute. Once granted, the party against whom it is directed is bound to comply with it.

6.2 Role of Courts

As far as interim measures in arbitration are concerned, the role of the courts is to “fill in the gaps”. The law empower courts to grant interim relief before the constitution of the tribunal, 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 tribunal has no power to act or is unable to act effectively. Thus, where

a tribunal is without the ability to enforce its own interim relief effectively, the court may assist in its enforcement.

The ADR Act and the Special ADR Rules do not limit the authority of Philippine courts to issue interim measures of protection only in relation to domestic-seated arbitrations. Even if the seat of arbitration is in a foreign country, Philippine courts may grant interim relief that is intended for service and enforcement in the Philippines. In particular, an interim measure affecting a party or property in the Philippines in the form of:

- a preliminary injunction directed against a party;
- a preliminary attachment against property or garnishment of funds in the custody of a bank or a third person;
- an appointment of a receiver; or
- detention, preservation, delivery or inspection of property,

may be granted by the Philippine courts (Rule 5.6 of the Special ADR Rules).

The use of emergency arbitrators is not expressly recognised or prohibited under the ADR Act and the Special ADR Rules. The definitions of the terms “arbitrator” and “award” in the ADR Act may provide a legal basis for an argument that the appointment of emergency arbitrators is allowed and their decisions are binding to the same extent as an interim relief. Currently, there is no jurisprudence on this point.

As the ADR Act does not contain specific provisions on emergency arbitrators, the relief that may be afforded and the binding nature thereof are chiefly dependent on the parties’ agreement and on the arbitration rules they use.

Although the ADR Act has no specific reference to emergency arbitrations, Philippine courts will likely allow the proceedings before an emergency arbitrator to continue, consistent with the policy of judicial restraint in favour of arbitration.

6.3 Security for Costs

Although the ADR Act is silent on security of costs, the IRR of the ADR Act expressly authorises tribunals to request that each party deposit equal amounts as an advance for certain costs (specifically, the arbitrator’s fees and expenses, and other expenses to be incurred for expert advice and other assistance required by the tribunal). If arbitration is institutional, the authority will be dependent on the rules of the arbitration institution. Moreover, considering that the ADR Act broadly defines interim measures of protection and provides a catch-all phrase empowering a 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 that definition.

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7. Procedure

7.1 Governing Rules

Other than requiring that parties be treated with equality and be given 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 tribunal in the conduct of arbitration proceedings. In the absence of any such agreement, the tribunal may conduct the arbitration in any manner as it deems appropriate. 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 with all references to the “Secretary-General of the Permanent Court of Arbitration at the Hague” 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. Proceedings are commenced by sending a request for the dispute to be referred to arbitration. After the 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 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 the 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;
- 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 expressly authorised by the parties.

For their duties, the ADR Act and its IRR require arbitrators to maintain their independence and impartiality from the commencement of the arbitration until the termination thereof. Thus, arbitrators are duty-bound to disclose any circumstances that are likely to give rise to justifiable doubts as to his or her impartiality or independence 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 or her mandate.

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

7.4 Legal Representatives

A party to an arbitration proceeding in the Philippines may be represented by any person of his or her choice. However, in the event that the representative is not licensed to practise law in the Philippines, he or she shall not be authorised to appear as counsel in any Philippine court or any other quasi-judicial body, even if that 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 upon them. However, due process requires that the parties to an arbitration be treated equally and be given full opportunity 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.

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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. Unless parties have agreed that no hearings shall be conducted, the tribunal has the discretion to hold oral hearings for the presentation of evidence, call for oral arguments, or decide the dispute on the basis only of documents and other materials. However, if a party requests a hearing, the tribunal will hold any 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, 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. In line with party autonomy, parties have the freedom to stipulate the applicable rules of procedure (which include evidentiary rules). In the absence of agreement, the tribunal shall use its discretion to determine how evidence is to be presented, what evidence is required and how to assess the evidence. Thus, as a matter of law, 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 tribunal has 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. Although an arbitral tribunal does not have contempt powers, it may sanction non-compliance with its orders through an award of damages, “including all expenses, and reasonable attorney’s fees, paid in obtaining the order’s judicial enforcement” (Sec. 28[b][7], of the ADR Act). However, an arbitrator does not have the same authority over non-parties.

To compel the production of documents or attendance of witnesses, whether they are parties to the arbitration or otherwise, a party to an ongoing arbitration may request assistance from courts in accordance with Rule 9 of the Special ADR Rules. Spe-

cifically, 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, to appear as a witness before an officer for the taking of his or her deposition upon oral examination or by written interrogatories, to allow the physical examination of the condition of persons or the inspection of things or premises and, when appropriate, to allow the recording and/or documentation of conditions of persons, things or premises, to allow the examination and copying of documents, and to perform any similar acts. In the event of disobedience, courts may impose appropriate sanctions, including declaring the 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 are, generally, considered confidential and shall not be published. Section 3(h) of the ADR Act defines “confidential information” 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”. This includes: (i) communication, oral or written, made in the arbitration proceedings, including any memoranda, notes or work product of the arbitrator(s) or a 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 (a) disclosures made with consent of the parties and (b) 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 will 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).

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Consistent with the foregoing, the Philippine Supreme Court in *FedEx, et al v Air21, et al* (G.R. No 216600, 21 November 2016) categorically rejected the argument that the confidentiality of witnesses' statements made during an arbitration may not be used as a shield in the commission of a crime. It was ruled 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 that witness through his or her statement during the arbitration).

10. The Award

10.1 Legal Requirements

Philippine law 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/terms of the arbitration clause 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. If there is more than one arbitrator, the signatures of the majority of all members of the 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: (i) 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; (ii) its date; and (iii) the place of arbitration. A copy of the signed award must be delivered to each party.

While there is no statutorily mandated period within which an award should be issued, the tribunal is expected to do so within a reasonable time from the closure of the hearings and, where institutional arbitration is involved, within the time-periods provided in the institution's rules.

10.2 Types of Remedies

Unless the parties have agreed to the contrary, the tribunal may award all 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, unless expressly granted by the parties, a tribunal in international arbitration may not grant remedies or relief based on what is just, fair and equitable.

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 these costs upon a particular party. Costs

that may be fixed by a tribunal in its award are limited to [Article 4.46(a) of the IRR of the ADR Act]:

- the arbitrator's fees;
- the arbitrator's travel and other expenses;
- costs of expert advice and of other assistance required by the tribunal, such as site inspection and expenses for the recording and transcription of the arbitration proceedings;
- a witness's travel and other expenses as are approved by the tribunal;
- costs for legal representation and assistance of the successful party, if any such costs were claimed during the proceedings, and only to the extent that the arbitral tribunal determines that the amount of those 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 relating to expert advice and assistance required by the tribunal) are 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 relating to expert advice and assistance required by the tribunal, the tribunal is free to determine which party shall bear such costs or may, depending on the circumstances, apportion them among the parties if reasonable.

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

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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 tribunal (unless that agreement is in conflict with the ADR Act) or, in the absence of agreement, the composition of the tribunal was not 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 conflicts with Philippine public policy.

To set aside an arbitral award, Rule 12 of the Special ADR Rules requires that the verified petition be filed with the appropriate court within three months from receipt of a copy of the award. Failure to do so shall preclude raising grounds to resist enforcement of the award, although it will not automatically result in the grant of a petition to recognise and enforce the award. If the court finds that a petition to set aside an award is sufficient in form and substance, it shall notify and direct the responding party 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 court is prohibited from disturbing the tribunal's determination of facts and/or interpretation of law.

The party aggrieved by the court's decision to grant or dismiss a petition to set aside an arbitral award may move for its reconsideration within 15 days from receipt of that decision. The 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 that decision (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 peti-

tion to set the award aside, which remedy is available on very limited grounds. It is the ruling of the court on a petition to set aside that is appealable.

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

Generally, the parties are free to establish any 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. Party autonomy notwithstanding, contractual stipulations that 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 award as well as appeals from court decisions on such petitions) may be inconsistent with the express provisions of the ADR Act, its IRR and the Special ADR Rules, and may also be deemed offensive to public policy.

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 them. The court resolving such a petition is further empowered to conduct an oral hearing at which 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 because of the presumption in favour of confirmation and/or enforceability. Thus, unless a ground to set aside an arbitral award is fully established, the court shall dismiss the petition to set aside. Moreover, in resolving the matter, the court is prohibited from disturbing the tribunal's factual findings and legal interpretations and from substituting its own judgment for that of the 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 I,

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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 a declaration (otherwise, a “convention award”).

The Philippines is also a party to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention), which provides for an enforcement mechanism. The Philippines is likewise 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 is thus enforceable thereunder.

12.2 Enforcement Procedure

Arbitral awards enjoy a presumption of enforceability. 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.

Rule 12 of the Special ADR Rules provides that a verified petition to recognise and enforce an arbitral award may be filed at any time from receipt thereof. However, if a petition to set aside the award is filed in a timely manner, a petition to recognise and enforce the award shall 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 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 award, 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 tribunal;

- a verification to the effect that the affiant has read the petition and the allegations therein are true and correct of his or 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 or her knowledge, no such action or claim is pending and, if there are other pending actions or claims, their present status.

Upon receipt of notice of the filing of the petition, 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 reply.

Upon completion of the exchange of pleadings, the 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 that basis. Should there be factual issues involved, the court will require the 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. Thereafter, the court must decide.

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. A convention award enjoys the presumption of enforceability and courts are prohibited from disturbing the tribunal's findings of fact and/or legal interpretations. Where 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 award 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;
- indicate the country where the award was made and whether that jurisdiction is a signatory to the New York Convention;
- state the relief sought; and
- attach an authentic copy of the arbitration agreement and an authentic copy of the arbitral award.

If the arbitral award or arbitration/submission agreement is not in English, the petitioner shall attach an English translation of these documents certified by an official or sworn translator or by a diplomatic or consular agent.

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Consistent with the provisions of the New York Convention, a foreign arbitral award that has been set aside by a court of the jurisdiction in which that award was made may be refused recognition and enforcement in the Philippines. If a petition to set aside has been filed in the jurisdiction where the award was made, the Philippine court is allowed to adjourn or defer resolving a petition to recognise and enforce a foreign arbitral award.

In *Chia National Machinery & Equipment Corp v Santamaria*, (G.R. No 185572, 7 February 2012), the Philippine Supreme Court ruled that an agreement to submit any dispute to arbitration may be construed as an implicit waiver of immunity from suit. By agreeing to submit the matter to the HKIAC for arbitration, an award against a state entity may be enforced in the Philippines in accordance with the Special ADR Rules.

The foregoing notwithstanding, if the enforcement of an award entails payment of a debt or money claim by Philippine state entities, there is still a need to file the appropriate petition before the Philippine Commission on Audit (Commonwealth Act No 327, as amended by Section 26 of Presidential Decree No 1445). The court, before which a petition to recognise and enforce an award is filed, does not have jurisdiction to levy against the funds and property of Philippine state entities.

12.3 Approach of the Courts

Arbitral awards enjoy the presumption of enforceability. In view thereof, Philippine courts tend to apply the grounds for refusal of recognition/enforcement strictly and generally enforce, rather than set aside or refuse recognition to, an arbitral award. More importantly, in resolving petitions to recognise and enforce arbitral awards, courts do not disturb, as they are prohibited from reviewing, 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. 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 therein, a court may only entertain the petition if the ground alleged for setting aside or non-recognition amounts to a violation of public policy.

The concept of "public policy" has often been discussed by the Philippine Supreme Court in relation to the validity of contracts. A contract is said to be contrary to public policy if "the consideration or thing to be done, has a tendency to injure the public, is against the public good, or contravenes some estab-

lished interests of society, or is inconsistent with sound policy and good morals, or tends clearly to undermine the security of individual rights, whether of personal liability or of private property" (*Gabriel v Monte De Piedad*, G.R. No L-47806, 14 April 1941). In another case, the Philippine Supreme Court, adopting the definition of courts in the United States and England, defined "public policy" as "that principle of the law which holds that no subject or citizen can lawfully do that which has a tendency to be injurious to the public or against the public good, which may be termed the 'policy of the law,' or 'public policy in relation to the administration of the law'[: it] is the principle under which freedom of contract or private dealing is restricted by law for the good of the public. In determining whether a contract is contrary to public policy the nature of the subject matter determines the source from which such question is to be solved" (*Ferrazzini v. Gsell*, G.R. No. L-10712, 10 August 1916).

In relation to the enforcement of arbitral awards, the Philippine Supreme Court, in *Mabuhay Holdings Corp v Sembcorp Logistics Limited*, (G.R. No 212734, 5 December 2018), ruled that the "public policy exception [] is 'a safety valve to be used in those exceptional circumstances when it would be impossible for a legal system to recognise an award and enforce it without abandoning the very fundaments on which it is based'" and adopted the "narrow approach", ie, "that the public policy defence may only be invoked 'where enforcement [of the award] would violate the forum state's most basic notions of morality and justice.'" To warrant refusal of enforcement under the public policy ground, "[t]he illegality or immorality of the award must reach a certain threshold such that, enforcement of the same would be against Our State's fundamental tenets of justice and morality, or would blatantly be injurious to the public, or the interests of the society."

13. Miscellaneous

13.1 Class-Action or Group Arbitration

The ADR Act does not specifically provide for class action or group arbitration. There is no case so far decided by the Philippine Supreme Court on this.

13.2 Ethical Codes

A member of the Philippine Bar acting as counsel in an arbitration proceeding is bound to comply with the Code of Professional Responsibility. Violation of the tenets therein may subject counsel to disciplinary action and, depending on the extent of the infraction, may lead to a revocation of his or her licence to practise law.

In addition, the ADR Act places arbitrators and other ADR practitioners (such as mediators) on the same level as public

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officers and, thus, they may be held civilly liable for acts done in the performance of their official duties when there is a clear showing of bad faith, malice or gross negligence. Nonetheless, arbitrators are not statutorily mandated to abide by any particular ethical code.

The institutions under which arbitrators are accredited may have specific guidelines to ensure ethical conduct.

13.3 Third-Party Funding

The ADR Act and the relevant rules do not categorically prohibit third-party funders. Applying the doctrines of champerty and maintenance, the Philippine Supreme Court has categorically and consistently invalidated third-party funding arrangements for litigation.

13.4 Consolidation

A tribunal can only order to consolidate separate arbitral proceedings if the parties agree (Article 4.45, IRR of the ADR Act).

13.5 Third Parties

See 5.7 **Third Parties**.

PHILIPPINES LAW AND PRACTICE

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Angara Abello Concepcion Regala & Cruz (ACCRALAW) represents multinational and local clients in international arbitration before various fora, such as the International Chamber of Commerce (ICC), the Singapore International Arbitration Centre (SIAC) and the Hong Kong International Arbitration Centre (HKIAC), in arbitrations 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 con-

sistent and outstanding track record. Its team (composed of at least 61 lawyers in its head office alone) 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 Philippines jurisprudence by successfully representing clients in landmark controversies, not only in the recent past but throughout its 48 years of existence.

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