
CHAMBERS GLOBAL PRACTICE GUIDES

International Arbitration 2023

Definitive global law guides offering
comparative analysis from top-ranked lawyers

**Philippines: Law & Practice
and Trends & Developments**

Ricardo Ma P G Ongkiko, John Christian Joy A Regalado
and Ma. Patricia B. Paz-Jacoba
SyCip Salazar Hernandez & Gatmaitan

PHILIPPINES



Law and Practice

Contributed by:

Ricardo Ma P G Ongkiko, John Christian Joy A Regalado
and Ma. Patricia B. Paz-Jacoba

SyCip Salazar Hernandez & Gatmaitan

Contents

1. General p.6

- 1.1 Prevalence of Arbitration p.6
- 1.2 Key Industries p.6
- 1.3 Arbitral Institutions p.6
- 1.4 National Courts p.6

2. Governing Legislation p.6

- 2.1 Governing Legislation p.6
- 2.2 Changes to National Law p.7

3. The Arbitration Agreement p.7

- 3.1 Enforceability p.7
- 3.2 Arbitrability p.7
- 3.3 National Courts' Approach p.7
- 3.4 Validity p.8

4. The Arbitral Tribunal p.8

- 4.1 Limits on Selection p.8
- 4.2 Default Procedures p.8
- 4.3 Court Intervention p.8
- 4.4 Challenge and Removal of Arbitrators p.9
- 4.5 Arbitrator Requirements p.9

5. Jurisdiction p.9

- 5.1 Matters Excluded From Arbitration p.9
- 5.2 Challenges to Jurisdiction p.9
- 5.3 Circumstances for Court Intervention p.10
- 5.4 Timing of Challenge p.10
- 5.5 Standard of Judicial Review for Jurisdiction/Admissibility p.10
- 5.6 Breach of Arbitration Agreement p.11
- 5.7 Jurisdiction Over Third Parties p.11

6. Preliminary and Interim Relief p.11

- 6.1 Types of Relief p.11
- 6.2 Role of Courts p.11
- 6.3 Security for Costs p.12

7. Procedure p.12

- 7.1 Governing Rules p.12
- 7.2 Procedural Steps p.13
- 7.3 Powers and Duties of Arbitrators p.13
- 7.4 Legal Representatives p.14

8. Evidence p.14

- 8.1 Collection and Submission of Evidence p.14
- 8.2 Rules of Evidence p.14
- 8.3 Powers of Compulsion p.14

9. Confidentiality p.14

- 9.1 Extent of Confidentiality p.14

10. The Award p.15

- 10.1 Legal Requirements p.15
- 10.2 Types of Remedies p.15
- 10.3 Recovering Interest and Legal Costs p.15

11. Review of an Award p.16

- 11.1 Grounds for Appeal p.16
- 11.2 Excluding/Expanding the Scope of Appeal p.17
- 11.3 Standard of Judicial Review p.17

12. Enforcement of an Award p.18

- 12.1 New York Convention p.18
- 12.2 Enforcement Procedure p.18
- 12.3 Approach of the Courts p.20

13. Miscellaneous p.21

- 13.1 Class Action or Group Arbitration p.21
- 13.2 Ethical Codes p.21
- 13.3 Third-Party Funding p.21
- 13.4 Consolidation p.22
- 13.5 Binding of Third Parties p.22

Contributed by: Ricardo Ma P G Ongkiko, John Christian Joy A Regalado and Ma. Patricia B. Paz-Jacoba, SyCip Salazar Hernandez & Gatmaitan

SyCip Salazar Hernandez & Gatmaitan was founded in 1945 and presently has offices in Makati City (the business centre of the Philippines), as well as in Cebu, Davao and the Subic Freeport. SyCipLaw's litigation department consists of 13 partners, two of-counsel, and 18 associates doing dispute resolution work in various degrees. It has a wide-ranging litigation practice at virtually all court levels – from the municipal and regional trial courts to the Court of Appeals and the Supreme Court – and with various administrative agencies. SyCipLaw also has a very extensive arbitration practice involv-

ing international arbitrations, commercial and other domestic arbitrations, and construction arbitrations. The firm handles some of the most significant, high-value and complex Philippine commercial law disputes, a number of which involve the Philippine government. SyCipLaw represents a wide array of foreign and local clients, ranging from public utilities to large companies in industries such as mining, power, banking, construction, transportation, pharmaceuticals, hospitals, airlines, hotels, food manufacturing, and distilled spirits.

Authors



Ricardo Ma P G Ongkiko is a senior partner at SyCip Salazar Hernandez & Gatmaitan and heads its litigation department. He has extensive experience both as arbitrator and arbitration

counsel in international and domestic arbitrations involving commercial and construction disputes. Ricardo has acted in ad hoc arbitrations under the Philippine Alternative Dispute Resolution Act and the UNCITRAL arbitration rules. He has also acted in institutional arbitrations under the rules of the ICC, the SIAC, the Philippine Dispute Resolution Center, Inc and the Construction Industry Arbitration Commission. He is a fellow of the Chartered Institute of Arbitrators (East Asia branch) and a member of the International Council for Commercial Arbitration.



John Christian Joy A Regalado is a partner of SyCip Salazar Hernandez & Gatmaitan and is a member of the firm's litigation department. He specialises in commercial arbitration, having

represented clients in disputes before the ICC's International Court of Arbitration, the Philippine Construction Industry Arbitration Commission, ad hoc arbitral tribunals, and before the Philippine courts in applications for interim relief. John's experience in arbitration covers the aviation, banking and finance, construction, distribution, e-commerce, energy, insurance, M&A and real estate sectors.

PHILIPPINES LAW AND PRACTICE

Contributed by: Ricardo Ma P G Ongkiko, John Christian Joy A Regalado and Ma. Patricia B. Paz-Jacoba, SyCip Salazar Hernandez & Gatmaitan



Ma. Patricia B. Paz-Jacoba is a partner and a member of the SyCip Salazar Hernandez & Gatmaitan's litigation and arbitration, tax, and intellectual property practice groups. She

has deep experience in dispute resolution including in domestic and international arbitrations both institutional and ad hoc, and in court procedures in aid of arbitration. Patricia has represented clients in all levels of the Philippine judiciary, in matters before international and domestic arbitral tribunals, as well as in proceedings before administrative agencies. She is an accredited arbitrator of the Philippine International Center for Conflict Resolution, and is a recognised ADR Practitioner in Arbitration by the Philippine Department of Justice - Office for Alternative Dispute Resolution. She is also a member of the Philippine Institute of Arbitrators and the Intellectual Property Association of the Philippines, Inc.

SyCip Salazar Hernandez & Gatmaitan

SyCipLaw Center
105 Paseo de Roxas
Makati City 1226
Philippines

Tel: +63 2 8982 3500
Fax: +63 2 8817 3896
Email: info@syciplaw.com
sshg@syciplaw.com
Web: www.syciplaw.com



Contributed by: Ricardo Ma P G Ongkiko, John Christian Joy A Regalado and Ma. Patricia B. Paz-Jacoba, SyCip Salazar Hernandez & Gatmaitan

1. General

1.1 Prevalence of Arbitration

There is a continued rise in the use of international arbitration to resolve disputes in the Philippines, in line with the public policy of favouring arbitration and increasing efforts to incorporate arbitration agreements in commercial contracts. While disputes between only domestic parties are still largely resolved through court litigation, there is now a preference to resort to international arbitration in matters involving foreign counterparties or transactions with an offshore element in the interest of expeditiousness, predictability, and ensuring minimal court intervention. International arbitration results from a combination of being the selected mode of dispute resolution (where there is a foreign counterparty) and in relation to the enforcement of foreign arbitral awards.

1.2 Key Industries

There does not appear to be any particular industry that experienced a significant increase or decrease in international arbitration activity in 2021–22. Although there was a slowdown in international arbitration in the Philippines at the beginning of the pandemic, probably owing to the economic uncertainty, international arbitration activity has since normalised and even improved.

1.3 Arbitral Institutions

Among the domestic arbitral institutions, the one most used for international arbitration involving construction disputes is the Construction Industry Arbitration Commission (CIAC). However, the Philippine Dispute Resolution Center, Inc (PDRCI) is used the most for other commercial disputes.

Under a unique Philippine construction arbitration law, the CIAC is granted original and exclusive jurisdiction over construction disputes in which the parties have agreed to arbitration. Where the parties have named another arbitration institution in their arbitral agreement, the Supreme Court has interpreted the law to still incorporate the CIAC as an alternative choice of arbitration institution into the agreement. On the other hand, the PDRCI is the most established arbitral institution in the country for commercial disputes, having been founded in 1996.

Although no new arbitral institutions were established in the Philippines in 2021–22, Philippine advocates and practitioners continue to promote the use of the Philippine International Center for Conflict Resolution (PICCR), which was established only in 2019 by the Integrated Bar of the Philippines (IBP).

1.4 National Courts

There are no specific courts in the Philippines that are designated to hear disputes related to international arbitrations and/or domestic arbitrations. The regional trial courts, which are the regular trial courts in the Philippines, have original jurisdiction over petitions relating to arbitration under the Special Rules of Court on Alternative Dispute Resolution (“Special ADR Rules”).

2. Governing Legislation

2.1 Governing Legislation

Republic Act No 9285, or the Alternative Dispute Resolution Act of 2004 (the “ADR Act”), is the national legislation governing arbitration in the Philippines. It provides that international commercial arbitration shall primarily be governed by the 1985 UNCITRAL Model Law (the “UNCITRAL Model Law”). The ADR Act does not diverge in

Contributed by: Ricardo Ma P G Ongkiko, John Christian Joy A Regalado and Ma. Patricia B. Paz-Jacoba, SyCip Salazar Hernandez & Gatmaitan

any significant way from the UNCITRAL Model Law.

2.2 Changes to National Law

There have been no significant changes to the ADR Act and related issuances. There is currently a pending bill in the Senate (Senate Bill No 1308, filed 12 September 2022) to adopt the 2006 amendments to the UNICTRAL Model Law “to update the commercial arbitration practices in the Philippines in conformity with international standards”.

Philippine case law has also affirmed the public policy favouring arbitration as a mode of dispute resolution, in a 2021 ruling declaring that a CIAC arbitral award may only be challenged on limited grounds (*Global Medical Center of Laguna, Inc v Ross Systems International, Inc*, GR No 230119, 11 May 2021). Further, the Revised Corporation Code, which took effect in 2019, now provides that a company’s articles of incorporation or by-laws may contain an arbitration clause, which is an express recognition on the arbitrability of intra-corporate disputes. The Philippines is also now in the process of completing the requirements for its ratification of the Singapore Convention on Mediation.

3. The Arbitration Agreement

3.1 Enforceability

Consistent with the UNCITRAL Model Law, Philippine law requires that an arbitration agreement must be in writing. This requirement is satisfied if the arbitration agreement is:

- an electronic document;
- in a document signed by the parties;
- in an exchange of letters, telegrams or other means of telecommunication; or

- even in an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other party.

Furthermore, the Supreme Court has ruled that an arbitration agreement is a contract. As such, it must comply with the Philippine Civil Code’s requirements for a valid contract, which are consent, object and consideration.

3.2 Arbitrability

Commercial disputes in the Philippines are generally arbitrable. However, the Implementing Rules and Regulations (IRR) of the ADR Act provide that the following matters cannot be referred to arbitration:

- labour disputes covered by the Labor Code of the Philippines and its rules;
- civil status of persons;
- validity of marriage;
- any ground for legal separation;
- jurisdiction of courts;
- future legitime;
- criminal liability;
- disputes that by law cannot be compromised; and
- disputes referred to court-annexed mediation.

3.3 National Courts’ Approach

The Supreme Court has ruled that the law agreed upon by the parties in the arbitration agreement shall govern considering that party autonomy is the essence of arbitration. In the absence of such designation, the law determined by the conflict of law rules applicable shall govern.

Courts are mandated to favour arbitration. The Supreme Court has ruled that arbitration agreements are to be liberally construed in favour of proceeding to arbitration and that courts should

Contributed by: Ricardo Ma P G Ongkiko, John Christian Joy A Regalado and Ma. Patricia B. Paz-Jacoba, SyCip Salazar Hernandez & Gatmaitan

generally adopt the interpretation that renders an arbitration clause effective if the terms of an agreement allow for such interpretation. As such, courts must refer matters to arbitration if the case were improperly or prematurely referred to them despite an arbitration agreement.

3.4 Validity

The Supreme Court has upheld the validity of an arbitration clause despite the invalidity of the main contract, consistent with the rule of separability. It is settled that an arbitration agreement is independent of the main contract, and it does not automatically terminate when the contract of which it is part ends.

4. The Arbitral Tribunal

4.1 Limits on Selection

It is a recognised state policy to respect party autonomy in the resolution of disputes. Thus, there are no limitations on the parties' freedom to select arbitrators in international commercial arbitration or to agree on the qualifications of the arbitrators. In a similar vein, the ADR Act's IRR provides that no person shall be precluded from acting as an arbitrator because of their nationality, unless otherwise agreed by the parties.

4.2 Default Procedures

The parties are free to determine the number of arbitrators but, in the absence of such agreement, there shall be three arbitrators.

The parties are free to agree on a procedure for appointing the arbitrator or arbitrators. In the absence of such agreement, if the parties had agreed to have a sole arbitrator but are unable to agree on the arbitrator, a party may request that the arbitrator be appointed by the appointing authority.

If the parties agree to have three arbitrators, each party shall appoint an arbitrator and then the two appointed arbitrators shall appoint the third arbitrator. If a party fails to appoint the arbitrator within 30 days of receiving a request to do so from the other party – or if the two arbitrators fail to agree on the third arbitrator within 30 days of their appointment – the appointing authority shall make the appointment upon request of the other party.

The appointing authority is the person or institution named as such in the arbitration agreement, or else the regular arbitration institution under whose rules the arbitration is conducted. Where the parties have agreed to submit their dispute to institutional arbitration rules, they are deemed to have agreed for arbitrators to be selected and appointed under said rules – unless they have agreed to a different procedure.

In ad hoc arbitration, the default appointment of an arbitrator shall be made by the National President of the IBP or his duly authorised representative.

However, there is no default procedure specifically for multiparty arbitrations.

4.3 Court Intervention

The court intervenes in the selection of arbitrators and may act as the appointing authority at the request of a party in the following circumstances:

- if a party fails or refuses to appoint an arbitrator, or when the parties fail to agree on the sole arbitrator, or when the two designated arbitrators fail to agree on the third arbitrator; and
- the arbitral institution fails or is unable to perform its duty as an appointing authority within

Contributed by: Ricardo Ma P G Ongkiko, John Christian Joy A Regalado and Ma. Patricia B. Paz-Jacoba, SyCip Salazar Hernandez & Gatmaitan

a reasonable time upon receiving a request for appointment.

In an ad hoc arbitration, the court may intervene when:

- the parties failed to provide a method for appointing or replacing an arbitrator or substitute arbitrator, or the method agreed upon is ineffective; and
- the National President of the IBP fails or refuses to act within:
 - (a) such period as may be allowed under the pertinent rules of the IBP;
 - (b) such period as may be agreed upon by the parties; or
 - (c) 30 days of receiving such request for appointment.

4.4 Challenge and Removal of Arbitrators

An arbitrator may be challenged on any of the grounds provided for in the ADR Act and its IRR, Republic Act No 876 or the UNCITRAL Model Law. The nationality or professional qualification of an arbitrator are not grounds to challenge an arbitrator unless the parties have specified the arbitrator's nationality and/or professional qualification in their arbitration agreement.

An arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to his impartiality or independence, or if he does not possess qualifications agreed to by the parties. A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made.

4.5 Arbitrator Requirements

Arbitrators must disclose any circumstances likely to give rise to justifiable doubts as to their impartiality or independence. From the time of

their appointment and throughout the arbitral proceedings, an arbitrator shall disclose any such circumstances to the parties without delay – unless they have already been informed of these circumstances by the arbitrator.

5. Jurisdiction

5.1 Matters Excluded From Arbitration

The matters that cannot be referred to arbitration under Philippine law include:

- labour disputes covered by the Labor Code of the Philippines and its rules;
- civil status of persons;
- validity of marriage;
- any ground for legal separation;
- jurisdiction of courts;
- future legitime;
- criminal liability;
- disputes that by law cannot be compromised; and
- disputes referred to court-annexed mediation.

5.2 Challenges to Jurisdiction

An arbitral tribunal has the first opportunity or competence to rule on whether it has jurisdiction to decide a dispute submitted to it, including any objections that a party may have concerning:

- the existence or validity of the arbitration agreement; or
- the fulfilment of any condition precedent before filing a request for arbitration.

Philippine courts must enforce the policy on judicial restraint and give the arbitral tribunal the first opportunity to rule upon issues on jurisdiction and competence.

Contributed by: Ricardo Ma P G Ongkiko, John Christian Joy A Regalado and Ma. Patricia B. Paz-Jacoba, SyCip Salazar Hernandez & Gatmaitan

Unless the court concludes (on no more than a prima facie determination) that the arbitration agreement is null and void, inoperative, or incapable of being performed, the court must suspend the action before it and refer the parties to arbitration pursuant to the arbitration agreement.

5.3 Circumstances for Court Intervention

The courts may address the issue of an arbitral tribunal's jurisdiction:

- immediately after the arbitral tribunal makes a preliminary determination of such issue; or
- at the enforcement stage, when the party against which an award is issued contests the award on the ground of the arbitral tribunal's lack of jurisdiction.

Under the Special ADR Rules, when a court is asked to rule upon issues affecting an arbitral tribunal's competence or jurisdiction, the court is mandated to exercise judicial restraint and defer to the competence or jurisdiction of the arbitral tribunal by allowing the arbitral tribunal the first opportunity to rule upon the issue of its competence or jurisdiction.

5.4 Timing of Challenge

As Philippine courts must follow the principle of judicial restraint, parties have the right to challenge the jurisdiction of an arbitral tribunal only after the arbitral tribunal makes such a determination.

This may either be:

- immediately after the arbitral tribunal makes a preliminary determination of such issue; or
- at the enforcement stage, when the party against whom an award is issued contests the award on the ground of the arbitral tribunal's lack of jurisdiction.

5.5 Standard of Judicial Review for Jurisdiction/Admissibility

Philippine courts must follow a deferential standard of judicial review for questions of admissibility and jurisdiction.

The Supreme Court has ruled that courts must uphold factual findings of arbitral tribunals and should not permit the parties to relitigate issues of facts that have been previously presented and argued before the arbitral tribunal.

As an exception, Philippine courts will allow relitigating factual issues on a de novo basis in domestic arbitration when:

- there is an allegation of a violation of the Philippine Constitution or positive law; or
- the integrity of the arbitral tribunal is challenged.

A challenge to the integrity of the arbitral tribunal includes allegations that:

- the award was procured by corruption, fraud or other undue means;
- any one of the arbitrators were evidently partial or corrupt;
- the arbitrators were guilty of misconduct;
- one or more of the arbitrators were disqualified to act and wilfully refrained from disclosing such disqualifications;
- one or more of the arbitrators wilfully refrained from disclosing any other misbehaviour by which the rights of any party have been materially prejudiced; or
- the arbitrators exceeded their powers – or so imperfectly executed them – that a mutual, final and definite award upon the subject matter submitted to them was not made.

Contributed by: Ricardo Ma P G Ongkiko, John Christian Joy A Regalado and Ma. Patricia B. Paz-Jacoba, SyCip Salazar Hernandez & Gatmaitan

5.6 Breach of Arbitration Agreement

When a party to an arbitration agreement commences court proceedings in breach of an arbitration agreement, Philippine courts must refuse to exercise jurisdiction and instead refer the matter to arbitration, provided that at least one party so requests no later than the pre-trial conference.

5.7 Jurisdiction Over Third Parties

Philippine laws generally do not allow an arbitral tribunal to assume jurisdiction over individuals or entities that are neither party to an arbitration agreement nor signatories to the contract containing the arbitration agreement, for as long as such individuals or entities refuse to submit their dispute to arbitration.

6. Preliminary and Interim Relief

6.1 Types of Relief

An arbitral tribunal may award preliminary or interim relief, which it may consider necessary to the subject matter of the dispute, unless otherwise agreed upon by the parties to an arbitration agreement. Such relief is binding in nature and may be granted to:

- prevent irreparable loss or injury;
- provide security for the performance of any obligation;
- produce or preserve any evidence; or
- compel any other appropriate act or omission.

Such interim relief or interim measures of protection include:

- preliminary injunction directed against a party;
- appointment of receivers; and

- detention, preservation or inspection of property that is the subject of the dispute in arbitration.

The party seeking such interim relief may apply to Philippine courts for assistance with implementing or enforcing an interim measure ordered by an arbitral tribunal.

6.2 Role of Courts

Philippine courts can either be the grantor or facilitator of interim relief.

Grantor of Relief

Philippine courts may grant an application for interim relief before the constitution of an arbitral tribunal, whether before or after the commencement of arbitration proceedings.

After constitution of an arbitral tribunal and during arbitral proceedings, courts may grant a request for interim relief only if the arbitral tribunal has no power to act or is unable to act effectively. The arbitral tribunal is deemed constituted when the sole arbitrator or the chair of the tribunal has accepted the nomination and the parties are notified.

Similar to an arbitral tribunal, courts may grant interim relief to:

- prevent irreparable loss or injury;
- provide security for the performance of any obligation;
- produce or preserve any evidence; or
- compel any other appropriate act or omission.

Facilitator in the Implementation or Enforcement of Relief

Philippine laws allow a party seeking interim relief to apply to the courts for assistance with

Contributed by: Ricardo Ma P G Ongkiko, John Christian Joy A Regalado and Ma. Patricia B. Paz-Jacoba, SyCip Salazar Hernandez & Gatmaitan

implementing or enforcing an interim measure ordered by an arbitral tribunal.

Although Philippine laws do not specifically allow Philippine courts to grant interim relief in aid of foreign-seated arbitrations, neither do they specifically prohibit such a grant. Thus, Philippine courts may arguably grant interim relief in aid of foreign-seated arbitrations in the same way Philippine courts grant interim relief for Philippine-seated arbitrations, provided that other requirements for jurisdiction and venue are complied with.

Under the Special ADR Rules, the venue for a petition for an interim measure of protection is the regional trial court that has jurisdiction over:

- the principal place of business of any of the parties;
- the residence of any of the parties;
- the place where the acts sought to be enjoined are being performed or threatened to be performed or not performed; or
- the place where the real property subject to arbitration (or a portion thereof) is situated.

Philippine laws do not provide for the appointment of emergency arbitrators. The ADR Act was enacted by the Philippine legislature in 2004 and the Special ADR Rules were issued by the Supreme Court in 2009 – both before the appointment of emergency arbitrators was practised. Nevertheless, the rules for some Philippine arbitral institutions now provide for the appointment for emergency arbitrators.

It is therefore not clear whether Philippine courts may still entertain applications for interim measures of protection when an emergency arbitrator has been appointed, considering that the arbitral tribunal, strictly speaking, has not been consti-

tuted at that point in time. It is also not clear if Philippine courts can assist in implementing or enforcing an interim measure that has been ordered by an emergency arbitrator, given that the latter is separate and distinct from the arbitral tribunal. Having said that, Philippine courts may consider the issuance of an interim measure of protection by an emergency arbitrator at their discretion if it supports their own case for issuing interim relief.

6.3 Security for Costs

Philippine laws do not expressly permit the grant of security for costs, which would serve as an interim measure of protection to secure a future award for the legal or other costs of any party (usually the respondent) by way of a deposit or bank guarantee.

However, there are grounds to argue that Philippine law may allow security for costs to be granted on the basis that such relief:

- provides security for the performance of an obligation, in particular the obligation to arbitrate disputes; or
- compels appropriate action to provide security for legal or other costs, especially where a respondent must participate in the arbitration to avoid a default award.

7. Procedure

7.1 Governing Rules

Parties are free to agree on the procedure to be followed by the arbitral tribunal. In the absence of an agreement, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, subject to Chapter 4, Rule 5 of the ADR Act's IRR which provides that, unless considered inappropriate by the arbitral tribu-

Contributed by: Ricardo Ma P G Ongkiko, John Christian Joy A Regalado and Ma. Patricia B. Paz-Jacoba, SyCip Salazar Hernandez & Gatmaitan

nal, the 1976 UNCITRAL Arbitration Rules shall apply.

Under the ADR Act, international commercial arbitration seated in the Philippines would be primarily governed by the UNCITRAL Model Law.

7.2 Procedural Steps

There are no mandatory procedural steps required by law. As mentioned in 7.1 **Governing Rules**, parties are free to agree on the procedure to be followed by the arbitral tribunal during its conduct of the arbitration proceeding and, in the absence of an agreement, the arbitral tribunal may conduct arbitration proceedings in a manner it considers appropriate.

7.3 Powers and Duties of Arbitrators

Philippine law mandates that the parties shall be treated equally, and each party shall be given full opportunity to present its case. The law imposes duties on arbitrators to:

- hold hearings if requested by a party, unless the parties agreed otherwise;
- give sufficient advance notice to parties of any hearing and any meeting of the arbitral tribunal for the purpose of inspecting goods, other property, or documents;
- decide the dispute in accordance with such rules of law that:
 - (a) are chosen by the parties as appropriate for the substance of the dispute; or
 - (b) in the absence of such choice, are determined by the conflict of law rules considered applicable by the arbitrators;
- decide *ex aequo et bono* or as *amiable compositeur* only if the parties have expressly authorised them to do so; and

- decide in accordance with the terms of the contract in all cases, taking into account any applicable trade usages.

Philippine law recognises the power of an arbitral tribunal, *inter alia*, to:

- determine the admissibility, relevance, materiality and weight of any evidence;
- order that any documentary evidence be translated into the language of the proceedings;
- disallow amendments by a party of its statement of claim or defence when the delay in making the amendment is considered inappropriate;
- request assistance from a Philippine court in taking evidence or allow a party to make such a request;
- administer oaths to - or require affirmation from - witnesses;
- require any person to:
 - (a) attend a hearing as a witness; or
 - (b) produce documents through a subpoena;
- require the exclusion of any witness while any other witness is giving evidence; and
- order interim measures of protection.

Furthermore, in the absence of an agreement by the parties concerning the following circumstances, Philippine law recognises the power of the arbitral tribunal to:

- terminate the proceedings if the claimant fails to communicate their statement of claim;
- continue with the proceedings and make an award on the evidence before it if:
 - (a) a respondent fails to communicate their statement of defence; or
 - (b) a party fails to:
 - (i) appear at a hearing; or
 - (ii) produce documentary evidence;

Contributed by: Ricardo Ma P G Ongkiko, John Christian Joy A Regalado and Ma. Patricia B. Paz-Jacoba, SyCip Salazar Hernandez & Gatmaitan

- decide whether to:
 - (a) hold oral hearings for the presentation of evidence (or oral arguments); or
 - (b) conduct the proceedings on the basis of documents and other materials;
- appoint expert witnesses; and
- order the party to give the expert any relevant information or produce any relevant document, goods or other property for the expert's examination.

7.4 Legal Representatives

A party may be represented by any person of their choice. Philippine laws do not specify any particular qualification or requirement necessary for representing a party or appearing before an arbitral tribunal. This is true both for domestic and international commercial arbitration.

A representative who is not authorised to practise law, however, is not authorised to appear as counsel in any Philippine court or any other quasi-judicial body - even if such appearance may be in relation to the arbitration in which they appear.

8. Evidence

8.1 Collection and Submission of Evidence

There are no specific rules that apply to the collection and submission of evidence, including discovery, disclosure, privilege, use of witness statements, and cross-examination. As mentioned in **7.1 Governing Rules**, the parties are free to agree on the procedure to be followed by the arbitral tribunal during its conduct of the proceedings and, in the absence of such agreement, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate.

8.2 Rules of Evidence

There are no specific rules of evidence applicable to arbitral proceedings seated in the Philippines. However, it is generally accepted that the technical rules of evidence that apply in Philippine court proceedings are not applicable to arbitration. As mentioned in **7.3 Powers and Duties of Arbitrators**, the arbitrators have the power and discretion to determine the admissibility, relevance, materiality and weight of the evidence submitted by the parties.

8.3 Powers of Compulsion

Arbitrators have the power to issue subpoenas to compel:

- the production of documents, where relevant and material to the case; and
- the attendance of any person at a hearing as a witness.

However, Philippine law neither expressly grants arbitrators contempt powers nor recognises that they have inherent contempt powers. Arbitrators (or a party, with the arbitrators' approval) may therefore apply to the proper court for a subpoena to assist in the evidence-taking process.

9. Confidentiality

9.1 Extent of Confidentiality

The ADR Act provides that the arbitration proceedings (including the records, evidence and arbitral award) shall be considered confidential and should not be generally published, except:

- with the parties' consent; or
- for the limited purpose of disclosing relevant documents to the court in cases where resorting to court is allowed.

Contributed by: Ricardo Ma P G Ongkiko, John Christian Joy A Regalado and Ma. Patricia B. Paz-Jacoba, SyCip Salazar Hernandez & Gatmaitan

However, these exceptions do not include information containing secret processes, developments, research and other sensitive matters (eg, business or trade secrets) if there is evidence that the applicant will be materially prejudiced by authorising the disclosure of such information.

Under the Special ADR Rules, any person, counsel or witness who disclosed or who was compelled to disclose information related to the subject of the arbitration in circumstances where one might reasonably expect that the information would be kept confidential may file a petition with the regional trial court for a protective order to:

- prohibit the confidential information from being divulged; or
- suppress the confidential information unless written consent is obtained from the source or the party who made the disclosure.

10. The Award

10.1 Legal Requirements

Philippine law requires the arbitral award to be in writing and signed by either the sole arbitrator or the majority of arbitrators in the arbitral tribunal, with a statement outlining the reason for any omitted signature.

The arbitral award shall state the reasons upon which it is based, unless the parties have agreed otherwise or the award is based on agreed terms. The arbitral award shall also state the date of the award and the place of arbitration. Copies of the signed award shall be delivered to each party.

Philippine laws do not specify time limits for issuing an award. However, the arbitral tribunal is expected to render a decision within a reason-

able timeframe once the hearings have closed and, if an institutional arbitration is involved, within the period provided in the institution's rules.

10.2 Types of Remedies

There are no limits on the types of remedies that an arbitral tribunal may award, as long as they may be granted:

- under the rules of law as are chosen by the parties to be applicable to the substance of the dispute;
- ex aequo et bono or by amiable compositeur, if expressly authorised by the parties; or
- under the terms of the contract (in all cases), taking into account the trade usages that apply.

However, the arbitral tribunal cannot exceed its authority. Thus, it may not grant any remedy for a dispute that is not contemplated by – or does not fall within – the terms of its submission to arbitration.

10.3 Recovering Interest and Legal Costs

Philippine laws allow parties to recover their legal costs and interests.

The ADR Act's IRR provide that the arbitral tribunal shall fix the costs of arbitration in its award, which include:

- fees of the arbitral tribunal;
- travel and other expenses incurred by the arbitrators;
- cost of expert advice and other assistance required by the arbitral tribunal;
- travel and other expenses for witnesses, to the extent that such expenses are approved by the arbitral tribunal;

Contributed by: Ricardo Ma P G Ongkiko, John Christian Joy A Regalado and Ma. Patricia B. Paz-Jacoba, SyCip Salazar Hernandez & Gatmaitan

- cost of legal representation and assistance for the successful party, to the extent that is deemed reasonable by the arbitral tribunal, if such costs are claimed; and
- any fees and expenses for the appointing authority.

Under the ADR Act's IRR, the costs of arbitration shall, in principle, be borne by the unsuccessful party. However, taking into account the circumstances of the case, the arbitral tribunal may apportion each of these costs between the parties if it so deems reasonable.

For costs of legal representation and assistance, the arbitral tribunal is free to determine which party bears these costs. Alternatively, having taken into account the circumstances of the case, it may deem it reasonable to apportion the costs between the parties. The arbitral tribunal may also refuse to grant such costs of legal representation and assistance if none of the limited grounds for the grant of attorney's fees under the Civil Code is present.

11. Review of an Award

11.1 Grounds for Appeal

An arbitral award in an international commercial arbitration cannot be appealed merely on the ground that the arbitral tribunal committed errors of fact or errors of law. Rule 19.7 of the Special ADR Rules provides that an agreement to refer a dispute to arbitration means that the arbitral award shall be final and binding. The same provision prohibits a party to an arbitration from filing an appeal or petition for certiorari to question the merits of an arbitral award.

However, the losing party may file a petition to set aside the arbitral award in an international com-

mercial arbitration no later than three months after receiving the award. This is the exclusive recourse against such an arbitral award.

The courts can vacate or set aside the arbitral award only on the grounds cited under the UNCITRAL Model Law, to wit:

- incapacity of a party to the arbitration agreement;
- invalidity of the arbitration agreement under the law to which the parties have subjected it or, failing any indication thereof, under Philippine law;
- lack of proper notice of an arbitrator's appointment or of the arbitral proceedings;
- inability of the party making the application to set aside the arbitral award to present their case;
- the award being beyond the scope of the arbitration agreement or resolving a dispute outside the scope of the submission to arbitration;
- the arbitration procedure or the composition of the arbitral tribunal not being in accordance with the parties' agreement or, in the absence of such agreement, not being in accordance with Philippine law;
- incapability of the subject matter of the dispute of being settled by arbitration under Philippine laws; and
- the recognition or enforcement of the award being contrary to Philippine public policy.

Philippine courts are mandated to disregard any grounds to set aside or vacate the arbitral award other than those listed.

Procedure for Setting Aside the Arbitral Award

A verified petition must be filed with the regional trial court within three months of receiving the

Contributed by: Ricardo Ma P G Ongkiko, John Christian Joy A Regalado and Ma. Patricia B. Paz-Jacoba, SyCip Salazar Hernandez & Gatmaitan

arbitral award; it cannot be filed after the three-month period has elapsed. If a petition to recognise and enforce the arbitral award is already pending, the petition to set aside shall be filed in opposition to the petition to recognise. Failure to file a petition to set aside shall preclude a party from raising grounds to resist enforcement of the award.

If the petition filed is sufficient both in form and in substance, the court shall issue notice to the other party directing them to file an opposition thereto within 15 days of receiving the petition.

The court will then determine whether the issue is one of law or if there are issues of fact:

- When the issues are of law - parties will be required to submit legal argument briefs within 15 days of receiving the order;
- When there are issues of fact - the court will require the parties to submit their:
 - (a) witness affidavits (attaching all documents relied upon) within the same 15-day period; and
 - (b) reply.

If the court finds, on the basis of the pleadings and the affidavits, that there is a need to conduct oral hearings, the court shall set the case for hearing. At such hearing, the witnesses' affidavits constitute their direct testimonies, and these witnesses will immediately undergo cross-examination. The court shall have full control over the proceedings to ensure that the case is heard without delay.

Unless a ground to set aside has been fully established, the court shall dismiss the petition to set aside. If, in the same proceedings, a petition to recognise and enforce the arbitral award was filed in opposition to the petition to

set aside, the court shall recognise and enforce the arbitral award.

The decision of the regional trial court in the petition to set aside can be reviewed by the Court of Appeals via a verified petition for review filed within 15 days from notice of the court's decision or denial of petitioner's motion for reconsideration.

The decision of the Court of Appeals may be reviewed by the Supreme Court - not as a matter of right, but only of sound judicial discretion - if there are serious and compelling reasons resulting in grave prejudice to the aggrieved party, as per those grounds listed in Rule 19.36 of the Special ADR Rules, or those closely analogous thereto.

11.2 Excluding/Expanding the Scope of Appeal

Philippine laws provide that recourse to the court against an international commercial award may only be made by an application to set aside in accordance with the provisions in the UNCITRAL Model Law, which also sets out the specific grounds on which the arbitral award may be set aside.

It is generally accepted that the grounds to set aside/vacate an arbitral award are exclusive. Although there has been no Supreme Court decision on this point, it is reasonable to conclude that parties may not exclude or expand the grounds on which an arbitral award may be challenged through a contractual agreement.

11.3 Standard of Judicial Review

In *Fruehauf Electronic Philippines Corporation v Technology Electronics Assembly and Management Pacific Corporation* (GR No 204197, 23 November 2016), the Supreme Court ruled that

Contributed by: Ricardo Ma P G Ongkiko, John Christian Joy A Regalado and Ma. Patricia B. Paz-Jacoba, SyCip Salazar Hernandez & Gatmaitan

courts cannot delve into the merits of an arbitral award and substitute their judgment with regard to the findings of fact and the interpretation and application of laws.

Specifically, as regards construction disputes resolved through CIAC arbitration, as held by the Supreme Court in *Global Medical Center of Laguna, Inc v Ross Systems International, Inc* (GR No 230112, 11 May 2021), such awards rendered may be appealed to:

- the Supreme Court on questions of law, through a petition for review; or
- the Court of Appeals on questions of fact, through a petition for certiorari, provided that the appellant:
 - (a) challenges the integrity of the CIAC arbitral tribunal; or
 - (b) alleges that the arbitral tribunal violated the Philippine Constitution or positive law.

Courts can set aside or vacate an arbitral award only on the grounds provided under the Special ADR Rules and the ADR Act. Notably, these grounds do not concern the correctness of the arbitral award. Rather, they address the validity of the arbitration agreement and/or the regularity of the arbitration proceedings.

12. Enforcement of an Award

12.1 New York Convention

The Philippines signed and ratified the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the “New York Convention”) on 6 July 1967. The Philippines declared that, on the basis of reciprocity, it will apply the New York Convention only to:

- the recognition and enforcement of awards made in the territory of another contracting state; and
- differences arising from legal relationships - whether such relationships are contractual or otherwise – that are considered commercial relationships by the national law of the state making the declaration.

12.2 Enforcement Procedure International Commercial Arbitral Award

Rule 12 of the Special ADR Rules provides that a verified petition can be filed to recognise and enforce an arbitral award any time after the award is received, unless a timely petition to set aside an arbitral award is filed, in which case the opposing party must file in the same proceedings, and in opposition thereto, the petition for recognition and enforcement of the same award, within the period for filing an opposition.

The verified petition shall be filed with the relevant regional trial court, based on:

- where the arbitration proceedings were conducted;
- where any of the assets to be attached or levied are located;
- where the act to be enjoined will be or is being performed; or
- where any of the parties resides or has its place of business.

Alternatively, it can be filed in the National Capital Judicial Region.

The verified petition shall state the following:

- the registered addresses, or any change thereof, of the parties to arbitration;
- that the arbitration agreement or submission exists;

Contributed by: Ricardo Ma P G Ongkiko, John Christian Joy A Regalado and Ma. Patricia B. Paz-Jacoba, SyCip Salazar Hernandez & Gatmaitan

- the names of the arbitrators and proof of their appointment;
- that an arbitral award was issued and when the petitioner received it; and
- the relief sought.

In addition, the following shall be attached to the petition for enforcement and recognition:

- an authentic copy of the arbitration agreement;
- an authentic copy of the arbitral award;
- a verification and certification against forum shopping executed by the applicant; and
- an authentic copy or authentic copies of the appointment of an arbitral tribunal.

Upon receiving notice that the petition has been filed, the respondent may file an opposition thereto within 15 days of receiving the petition. In lieu thereof, the respondent may instead seek to oppose by filing a petition to set aside the award within the same 15-day period. The petitioner may reply within 15 days of receiving the petition to set aside filed in opposition.

The court then has the discretion to either:

- require the submission of briefs/legal memoranda only; or
- set the case for a hearing.

Based on the parties' submissions and/or hearing, the court will thereafter decide.

Foreign Arbitral Award

Rule 13 of the Special ADR Rules sets out the procedure for recognising and enforcing foreign arbitral awards. The procedure outlined above is essentially the same for the foreign arbitral awards. The court shall only recognise and enforce a foreign arbitral award made in a

country that is not a signatory to the New York Convention if such country extends comity and reciprocity to awards made in the Philippines.

The contents of the verified petition, however, are not the same as those of a petition to recognise and enforce an international commercial arbitral award. In particular, the verified petition shall contain:

- the addresses of the parties to arbitration;
- the country where the arbitral award was made (if not indicated in the award) and whether such country is a signatory to the New York Convention; and
- the relief sought.

The following should also be attached to the verified petition:

- an authentic copy of the arbitration agreement;
- an authentic copy of the arbitral award; and
- a translation of the foreign arbitral award or agreement - if such award or agreement is not in English - which should be certified by:
 - (a) an official or sworn translator; or
 - (b) a diplomatic or consular agent.

Petition to Set Aside in the Foreign Seat

If a foreign arbitral award has been set aside by the courts in the foreign seat of arbitration, Philippine courts may refuse recognition and enforcement of the same.

The recognition of a foreign arbitration award may be refused on exclusive grounds, including where an award has:

- not yet become binding on the parties; or

Contributed by: Ricardo Ma P G Ongkiko, John Christian Joy A Regalado and Ma. Patricia B. Paz-Jacoba, SyCip Salazar Hernandez & Gatmaitan

- been set aside or suspended by the court in which – or under the law of which – the award was made.

There is no express rule on what Philippine courts, before which a petition for recognition and enforcement of a foreign arbitral award has been filed, will do if there are ongoing setting-aside proceedings at the seat. However, considering the exclusive grounds that justify a refusal to recognise and enforce the foreign arbitral award, it is possible that Philippine courts will suspend proceedings while awaiting the outcome of the petition to set aside in the foreign seat. It is also possible for Philippine courts to dismiss the proceedings without prejudice to the refiling of the petition for recognition and enforcement if the setting-aside petition is denied in the foreign seat.

State Immunity

State immunity is not among the grounds to set aside or resist the enforcement of an arbitral award under the Special ADR Rules. The Supreme Court ruled in *China National Machinery & Equipment Corp v Santamaria* (GR No 185572, 7 February 2012) that:

- an agreement to submit any dispute to arbitration may be construed as an implicit waiver of immunity from suit; and
- the doctrine of state immunity cannot be extended to commercial, private and proprietary acts.

However, money claims against the government are within the primary jurisdiction of the Commission on Audit (COA). The Supreme Court ruled in *Department of Environment and Natural Resources v United Planners Consultants, Inc* (GR No 212081, 23 February 2015) that the settlement of any money claim against the Philip-

pine government is still subject to the primary jurisdiction of the COA, despite the finality of the confirmed arbitral award by the regional trial court pursuant to the Special ADR Rules.

Thus, money claims must still be approved by the COA through a petition filed before them, unless an appropriation law was already enacted to cover the prevailing party's money claim against the government. Significantly, the Supreme Court ruled in a 2022 case that the COA cannot relitigate and reexamine the issues and evidence passed upon in a CIAC arbitral award, or reverse or modify such award. The COA's jurisdiction is therefore limited only to determining the source of funds for settlement and validating the clerical or mathematical accuracy of the amounts in the award (*Sunway Builders v Commission on Audit*, GR 252986, 20 September 2022).

12.3 Approach of the Courts

Rule 12.12 of the Special ADR Rules provides for a presumption that an arbitral award was made and released in due course and is subject to enforcement by the court, unless a ground for setting aside the arbitral award was established. Thus, the courts tend to apply the grounds for setting aside or refusal of recognition strictly.

Under the New York Convention, a court may refuse to recognise and enforce an international commercial award if doing so would be contrary to the public policy of the State in which enforcement is sought. Philippine laws provide, therefore, that being contrary to the public policy of the State in which enforcement is sought is one of the exclusive grounds to set aside or refuse recognition and enforcement of an international commercial or foreign arbitral award. Although neither the New York Convention nor Philippine law defines this public policy ground, the follow-

Contributed by: Ricardo Ma P G Ongkiko, John Christian Joy A Regalado and Ma. Patricia B. Paz-Jacoba, SyCip Salazar Hernandez & Gatmaitan

ing recent Supreme Court decision offers guidance on this matter.

Mabuhay Holdings Corp v Sembcorp Logistics Limited

Here, the Supreme Court adopted the same narrow and restrictive approach in defining public policy that has been adopted by most arbitral jurisdictions pursuant to the pro-enforcement policy of the New York Convention. The court ruled that that “[m]ere errors in the interpretation of the law or factual findings would not suffice to warrant refusal of enforcement under the public policy ground. The illegality or immorality of the award must reach a certain threshold such that, enforcement of the same would be against [the Philippines’] fundamental tenets of justice and morality, or would blatantly be injurious to the public, or the interests of society” (GR No 212734, 5 December 2018). This approach was reiterated by the Supreme Court in *Maynilad Water Services, Inc v National Water and Resources Board* (GR No 181764, 7 December 2021).

13. Miscellaneous

13.1 Class Action or Group Arbitration

The ADR Act and the Special ADR Rules do not have provisions for class action or group arbitration. There are also no judicial precedents yet on this matter.

13.2 Ethical Codes

Various Philippine arbitration organisations and institutions have adopted ethical codes and professional standards for arbitrators and arbitration counsel. To the extent that they do not conflict with any provisions in Philippine law, the Code of Ethics for Arbitration in the PDRCI’s administrative guidelines expressly incorporates:

- the IBA Rules of Ethics for International Arbitrators;
- the 2014 IBA Guidelines on Conflicts of Interest in International Arbitration; and
- the IBA Guidelines on Party Representation in International Arbitration.

Similarly, the PICCR has expressly adopted the original IBA Rules of Ethics for International Arbitrators (1987) and the 2014 IBA Guidelines on Conflicts of Interests in International Arbitration as a Code of Ethics in its guidelines for complaints against arbitrators.

On the other hand, the Philippine Institute of Arbitrators issued its own Code of Professional Responsibility for Members, which provides a uniform benchmark for the application of professional and ethical standards that should govern its members’ conduct at all times.

Further, if the counsel or arbitrator is a Philippine lawyer, they are also bound to observe and comply with the Code of Professional Responsibility and Accountability promulgated by the Supreme Court in April 2023. Lawyers are subject to discipline when they violate or attempt to violate these rules, with the most severe penalty being disbarment.

Lastly, the ADR Act expressly provides that ADR providers (which include arbitrators) and practitioners (which include arbitration counsels) are deemed public officers. Thus, they can also be held civilly liable for acts performed during their official duties that clearly show bad faith, malice, or gross negligence.

13.3 Third-Party Funding

There are no Philippine laws expressly providing for rules or restrictions on third-party funders. However, the use of third-party funders may

Contributed by: Ricardo Ma P G Ongkiko, John Christian Joy A Regalado and Ma. Patricia B. Paz-Jacoba, SyCip Salazar Hernandez & Gatmaitan

arguably be objectionable in that contracts with third-party funders may be deemed champertous, or a contract between a stranger and a party to a lawsuit, in which the stranger pursues the party's claim with the aim of receiving part or any of the proceeds recovered under the judgment. The Supreme Court ruled in *Conjugal Partnership of the Spouses Cadavedo v Lacaya* (GR No 173188, 15 January 2014) that champertous contracts are void for being against public policy.

Although champertous contracts are generally prohibited for lawyers only, in *Nocom v Camerino* (GR No 182894, 10 February 2009), the Supreme Court extended the same prohibition to a third party (ie, an attorney-in-fact) who colluded with a party's lawyer to finance the litigation and invalidated the agreement for being contrary to law and public policy.

13.4 Consolidation

Article 4.45 of the ADR Act's IRR expressly provides that there can be consolidation of arbitration proceedings only if the parties agree to the consolidation. Nevertheless, the rules of Philippine arbitral institutions now provide for the procedures for consolidation.

13.5 Binding of Third Parties

An arbitration agreement generally can only bind and be invoked by those who are parties to the agreement. However, there are certain circumstances in which third parties, who are not parties to the arbitration agreement, may be bound by the arbitration agreement. Similarly, only parties are generally bound by an arbitral award, yet there are certain exceptional instances where the arbitral award may be enforced against third parties.

In this regard, Rule A.6 of the Special ADR Rules provides that third-party security providers will be bound by the arbitration agreement only if the third-party that secures the loan has agreed in the accessory contract (either directly or by reference) to be bound by such arbitration agreement.

Furthermore, heirs and assigns are generally bound by contracts (including arbitration agreements) entered into by their predecessors-in-interest, except when the rights and obligations arising therefrom are not transmissible by their nature, by parties' stipulation, or by provision of law.

Another possible exception occurs if a representative of a corporation that is party to an arbitration agreement, who signs the arbitration agreement or a contract in which an arbitration clause is contained, is then deemed to have agreed to such arbitration agreement or clause (see 5.7 **Jurisdiction Over Third Parties**).

On the other hand, an arbitral award may possibly be enforced on such third parties when the separate juridical personality of the corporation that is a party to the arbitration is disregarded – and the corporate veil pierced – on grounds recognised by Philippine law and jurisprudence.

Jurisdiction of Philippine Courts over Foreign Third Parties

Philippine courts may bind foreign third parties only if they acquire jurisdiction over such foreign third parties. In ordinary court actions, if the defendant is a foreign private juridical entity doing business in the Philippines, summons may be served on its resident agent. If the defendant has no such resident agent, summons may be served on any of its officers, directors or trustees

Contributed by: Ricardo Ma P G Ongkiko, John Christian Joy A Regalado and Ma. Patricia B. Paz-Jacoba, SyCip Salazar Hernandez & Gatmaitan

within the Philippines or a government official designated by law.

If the foreign private juridical entity is not registered in the Philippines and does not have a resident agent, but has transacted or is doing business in the Philippines, Philippine courts may authorise the service of summons outside the Philippines in the following ways:

- by personal service coursed through the appropriate foreign court, with the assistance of the Philippine Department of Foreign Affairs;
- by publication in a newspaper in general circulation in the country where the defendant may be found and, at the same time, by serving a copy of the summons and the court order by registered mail at the defendant's last known address;
- by facsimile;
- by electronic means with proof of service; or
- by such other means as the court may direct at its discretion.

Significantly, Rule 22.1 of the Special ADR Rules expressly provides that the provisions of the Philippine Rules of Court that apply to petitions under the Special ADR Rules have either been included and incorporated in the Special ADR Rules or specifically referred to therein. The above-mentioned rules on methods for acquisition of jurisdiction by Philippine courts have not been included and incorporated in the Special ADR Rules nor specifically referred to therein. Indeed, Rule 1.9 even provides that "in cases covered by the Special ADR Rules, a court acquires authority to act on the petition or motion upon proof of jurisdictional facts, ie, that the respondent was furnished a copy of the petition and the notice of hearing." Consequently, since the technical rules on services of summons do not apply to these proceedings, "the method of service resorted to must be such as to reasonably ensure receipt thereof by the respondent to satisfy the requirement of due process."

Trends and Developments

Contributed by:

Ricardo Ma P G Ongkiko, John Christian Joy A Regalado and Ma. Patricia B. Paz-Jacoba
SyCip Salazar Hernandez & Gatmaitan

SyCip Salazar Hernandez & Gatmaitan was founded in 1945 and presently has offices in Makati City (the business centre of the Philippines), as well as in Cebu, Davao and the Subic Freeport. SyCipLaw's litigation department consists of 13 partners, two of-counsel, and 18 associates doing dispute resolution work in various degrees. It has a wide-ranging litigation practice at virtually all court levels – from the municipal and regional trial courts to the Court of Appeals and the Supreme Court – and with various administrative agencies. SyCipLaw also has a very extensive arbitration practice involv-

ing international arbitrations, commercial and other domestic arbitrations, and construction arbitrations. The firm handles some of the most significant, high-value and complex Philippine commercial law disputes, a number of which involve the Philippine government. SyCipLaw represents a wide array of foreign and local clients, ranging from public utilities to large companies in industries such as mining, power, banking, construction, transportation, pharmaceuticals, hospitals, airlines, hotels, food manufacturing, and distilled spirits.

Authors



Ricardo Ma P G Ongkiko is a senior partner at SyCip Salazar Hernandez & Gatmaitan and heads its litigation department. He has extensive experience both as arbitrator and arbitration

counsel in international and domestic arbitrations involving commercial and construction disputes. Ricardo has acted in ad hoc arbitrations under the Philippine Alternative Dispute Resolution Act and the UNCITRAL arbitration rules. He has also acted in institutional arbitrations under the rules of the ICC, the SIAC, the Philippine Dispute Resolution Center, Inc and the Construction Industry Arbitration Commission. He is a fellow of the Chartered Institute of Arbitrators (East Asia branch) and a member of the International Council for Commercial Arbitration.



John Christian Joy A Regalado is a partner of SyCip Salazar Hernandez & Gatmaitan and is a member of the firm's litigation department. He specialises in commercial arbitration, having

represented clients in disputes before the ICC's International Court of Arbitration, the Philippine Construction Industry Arbitration Commission, ad hoc arbitral tribunals, and before the Philippine courts in applications for interim relief. John's experience in arbitration covers the aviation, banking and finance, construction, distribution, e-commerce, energy, insurance, M&A and real estate sectors.

PHILIPPINES TRENDS AND DEVELOPMENTS

Contributed by: Ricardo Ma P G Ongkiko, John Christian Joy A Regalado and Ma. Patricia B. Paz-Jacoba, SyCip Salazar Hernandez & Gatmaitan



Ma. Patricia B. Paz-Jacoba is a partner and a member of the SyCip Salazar Hernandez & Gatmaitan's litigation and arbitration, tax, and intellectual property practice groups. She

has deep experience in dispute resolution including in domestic and international arbitrations both institutional and ad hoc, and in court procedures in aid of arbitration. Patricia has represented clients in all levels of the Philippine judiciary, in matters before international and domestic arbitral tribunals, as well as in proceedings before administrative agencies. She is an accredited arbitrator of the Philippine International Center for Conflict Resolution, and is a recognised ADR Practitioner in Arbitration by the Philippine Department of Justice – Office for Alternative Dispute Resolution. She is also a member of the Philippine Institute of Arbitrators and the Intellectual Property Association of the Philippines, Inc.

SyCip Salazar Hernandez & Gatmaitan

SyCipLaw Center
105 Paseo de Roxas St.
Makati City, 1226
Philippines

Tel: +63 2 8982 3500
Fax: +63 2 8817 3896
Email: info@syciplaw.com
sshg@syciplaw.com
Web: www.syciplaw.com

— SYCIP —
— SALAZAR —
— HERNANDEZ —
— & GATMAITAN —

Contributed by: Ricardo Ma P G Ongkiko, John Christian Joy A Regalado and Ma. Patricia B. Paz-Jacoba, SyCip Salazar Hernandez & Gatmaitan

Public Policy as a Ground to Vacate Domestic Arbitral Awards

The Philippines recognises public policy as among the exclusive grounds to set aside or refuse the enforcement of foreign arbitral awards. Republic Act No. 9285, or the Alternative Dispute Resolution Act of 2004 (“ADR Act”), provides that the New York Convention shall govern the recognition and enforcement of arbitral awards covered by the Convention. In this connection, A.M. 07-11-08-SC, or the Special Rules on Alternative Dispute Resolution (“Special ADR Rules”) promulgated by the Philippine Supreme Court, provide that a foreign arbitral award may be set aside or refused recognition if its recognition or enforcement would be contrary to public policy.

The Philippine Supreme Court has adopted a narrow and restrictive definition of public policy. In *Mabuhay Holdings Corporation v Sembcorp Logistics Limited* (G.R. No. 212734, 5 December 2018), the Philippine Supreme Court ruled that the “illegality or immorality of the award must reach a certain threshold such that, enforcement of the same would be against [the] State’s fundamental tenants of justice and morality, or would blatantly be injurious to the public, or the interests of society.” This means that mere errors made by the arbitral tribunal in the interpretation of the law or its factual findings would not amount to a public policy violation and would therefore not justify a Philippine court to refuse the recognition and enforcement of a foreign arbitral award on the ground of public policy.

Public policy, however, is not expressly recognised under Philippine law as a ground to vacate a domestic arbitral award. Republic Act No. 876, or the Arbitration Law (“Arbitration Law”), provides that a domestic arbitral award may be vacated by a Philippine court if a party proves that:

- (a) the award was procured by corruption, fraud, or other undue means;
- (b) there was evident partiality or corruption in the arbitrators or any of them;
- (c) the arbitrators were guilty of misconduct in refusing to postpone the hearing upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy;
- (d) one or more of the arbitrators was disqualified to act as such under Section 9 hereof, and wilfully refrained from disclosing such disqualifications or of any other misbehaviour by which the rights of any party have been materially prejudiced; or
- (e) the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final and definite award upon the subject matter submitted to them was not made.

Under the ADR Act, a Regional Trial Court may only vacate a domestic arbitral award under the foregoing grounds enumerated under the Arbitration Law and it must disregard other grounds. In this connection, the Special ADR Rules expressly provide that a Philippine court can only vacate a domestic arbitral award “upon a clear showing that the award suffers from any of the infirmities or grounds for vacating an arbitral award” under the Arbitration Law. However, the Special ADR Rules allow a Regional Trial Court of the Philippines to entertain a ground to vacate a domestic arbitral award other than those provided in the Rules if the ground amounts to a violation of public policy.

The Philippine Supreme Court has recently applied the public policy ground under the Special ADR Rules in vacating domestic arbitral awards.

Contributed by: Ricardo Ma P G Ongkiko, John Christian Joy A Regalado and Ma. Patricia B. Paz-Jacoba, SyCip Salazar Hernandez & Gatmaitan

The Protection of Indigenous Cultural Communities/Indigenous Peoples

Lone Congressional District of Benguet Province v Lepanto Consolidated Mining Company (G.R. No. 244063, June 21, 2022) involved a Mineral and Production Sharing Agreement (“Agreement”) executed in 1990 by the Republic of the Philippines and Lepanto Consolidated Mining Company and Far Southeast Gold Resources, Inc. (the “Mining Companies”). Under the Agreement, the Mining Companies were authorised to conduct mining operations in a piece of land located in Mankayan, Benguet. The Agreement was effective for 25 years and may be renewed for another 25 years. The land area of the Agreement covers part of the ancestral domain of the Mankayan Indigenous Cultural Communities/Indigenous Peoples.

In 1997, the Philippine Congress passed the Indigenous People’s Rights Act (IPRA) that enjoined the government and its agencies from granting, issuing, or renewing any concession, licence, or lease, or from entering into a production sharing agreement without a prior certification from the National Commission on Indigenous Peoples (“NCIP Certification”) that the area does not overlap with any ancestral domains. One of the requirements for the issuance of an NCIP Certification is the free and prior informed consent (FPIC) of the affected indigenous cultural communities or indigenous peoples (the requirement is referred to as the “FPIC and NCIP Certification Precondition”).

In 2015, the Mining Companies sought to renew the Agreement for another 25 years and were advised that they needed to secure the FPIC and NCIP Certification Precondition as a condition for the renewal. The Mining Companies argued that this requirement did not apply to them because they already had a vested right

in the 25-year renewal, pursuant to the Agreement. The Mining Companies pointed out that, under the IPRA, property rights within ancestral domains already existing and/or vested upon the effectivity of the IPRA should be respected.

The disagreement resulted in the commencement of arbitration proceedings. In the arbitral award, the arbitral tribunal ruled in favour of the Mining Companies. The arbitration tribunal explained that the Mining Companies had a vested right in the renewal of the Agreement under its original terms and conditions, especially since the Mining Companies made significant investments in the mining operations in consideration of the renewal provision. The government petitioned a Regional Trial Court to vacate the arbitral award, which was granted by the Court. The decision of the Regional Trial Court was reversed by the Court of Appeals. The decision of the Court of Appeals was then appealed by the government to the Supreme Court.

In its decision, the Philippine Supreme Court reversed the Court of Appeals and vacated the arbitral award because the award was contrary to public policy. Although the Supreme Court recognised that public policy is a ground to refuse the recognition and enforcement of foreign arbitral awards and is not among the grounds to vacate a domestic arbitral award under the Arbitration Law, the Supreme Court nevertheless applied this ground and cited the Special ADR Rules to justify its ruling.

According to the Supreme Court, the arbitral tribunal’s determination of exemption from the FPIC and NCIP Certification Precondition is not a mere error in the interpretation or application of the law. Rather, such determination contravened a strong and compelling public policy on the protection of the rights of the Mankayan

Contributed by: Ricardo Ma P G Ongkiko, John Christian Joy A Regalado and Ma. Patricia B. Paz-Jacoba, SyCip Salazar Hernandez & Gatmaitan

Indigenous Cultural Communities/Indigenous Peoples to their ancestral domains, which is recognised by the Philippine Constitution. The general requirement of consent of the indigenous cultural communities/indigenous peoples was only made specific and concrete through the FPIC and NCIP Certification Precondition as mandated in the IPRA. The Supreme Court concluded that, in so manifestly disregarding this, the arbitral tribunal undoubtedly “exceeded [its] powers, [and] so imperfectly executed them, that a mutual, final and definite award upon the subject matter submitted to [it] was not made,” which is one of the grounds to vacate a domestic arbitral award under the Arbitration Law.

In vacating the arbitral award, the Supreme Court had to strike a balance between the interests of the Mining Companies and the protection of the Mankayan Indigenous Cultural Communities/Indigenous Peoples and their ancestral domain. According to the Supreme Court, the investments made by the Mining Companies in view of the renewal provision in the Agreement do not outweigh the interests of the indigenous cultural communities/indigenous peoples to their ancestral land. However, the Supreme Court gave the Mining Companies the opportunity to fully comply with the consent requirement under the IPRA for the renewal of the Agreement.

The Equal Protection Clause

In *Maynilad Water Services, Inc. v National Water and Resources Board* (G.R. No. 181764, 7 December 2021), the Supreme Court En Banc vacated a domestic arbitral award on the ground of public policy because the award violated the equal protection clause of the Philippine Constitution.

The case involves two water concessionaries – Manila Water Company, Inc. (“Manila Water”)

and Maynilad Water Services, Inc. (“Maynilad”), which cover the Service Area East and the Service Area West, respectively. The Concession Agreements provide for the mechanism of setting the rates chargeable to consumers, which provided a 12% limit on the rate of return. The Concession Agreements also provide that the base from which the net rate of return is calculated shall be recomputed every five years, in an exercise called rate rebasing. In addition to the 12% return, Manila Water and Maynilad may recover by way of tariff the operational costs, capital maintenance, and investment expenditures efficiently and prudently incurred, Philippine business taxes, and payment corresponding debt service on the loans and concessionaires’ loans incurred to finance such expenditures.

The controversy arose in the third exercise of rate rebasing, when the water concessionaires were prohibited from including corporate income taxes as expenditures recoverable from the consumers through the tariff, because they are not considered “Philippine business taxes”. The water concessionaires instituted separate arbitration proceedings before Appeals Panels pursuant to the arbitration agreements under their respective Concession Agreements.

The Appeals Panels’ rulings on the same issue on whether corporate income tax is recoverable by the water concessionaire diverged. On one hand, in the arbitration instituted by Manila Water, the Appeals Panel ruled that corporate income taxes were not an allowable expenditure. On the other hand, in the arbitration instituted by Maynilad, the Appeals Panel decided that corporate income taxes may be recovered by way of tariff.

Contributed by: Ricardo Ma P G Ongkiko, John Christian Joy A Regalado and Ma. Patricia B. Paz-Jacoba, SyCip Salazar Hernandez & Gatmaitan

The arbitral award rendered in favour of Maynilad was confirmed by the Regional Trial Court and the Court of Appeals. In its decision, the Supreme Court reversed the Court of Appeals and vacated the arbitral award on the ground of public policy. The Philippine Supreme Court recognised that public policy is a ground to refuse the recognition and enforcement of foreign arbitral awards and is not among the grounds to vacate a domestic arbitral award under the Arbitration Law. However, the Supreme Court applied this ground and cited the Special ADR Rules to justify its ruling.

The Supreme Court recognised the narrow and restrictive definition of public policy that it adopted in Mabuhay. However, unlike Mabuhay that involved purely private interests, the Supreme Court emphasised that the enforcement of the Maynilad arbitral award would adversely affect the public at large. According to the Supreme Court, the arbitral award rendered in favour of Maynilad must be vacated because the enforcement of the award would result in a disproportionate price difference between the water rates in the Service Area East and Service Area West. This is because the arbitral tribunal in the arbitration instituted by Manila Water ruled that Manila Water cannot pass on its corporate income taxes to consumers. This will lead to a situation where the water prices in the Service Area East and Service Area West would differ disproportionately, without any substantial distinction between the consumers in the service areas. Thus, the enforcement of the Maynilad arbitral award would result in discriminatory water rates, which is violative of the equal protection clause under the Philippine Constitution.

The enforcement of the Maynilad arbitral award would also violate the mandate of the relevant government agency tasked to provide just, equitable, and non-discriminatory rates because a large segment of the water consuming public will be made to pay for something that has no direct benefit to them, while some will enjoy water services without shouldering the same burden.

Moving Forward

Lone Congressional District and Maynilad are landmark decisions. For the first time, the Supreme Court vacated domestic arbitral awards on the ground of public policy using the Special ADR Rules. This notwithstanding the clear language of the Arbitration Law and the ADR Act that a domestic arbitral award may be vacated only under the exclusive grounds enumerated under the Arbitration Law. Public policy is not among those grounds.

To be clear, the Supreme Court cannot promulgate rules that are inconsistent with laws passed by Congress. Nevertheless, the Special ADR Rules shall remain effective until they are amended by the Supreme Court. Meanwhile, the rulings in Lone Congressional District and Maynilad shall remain good case law until they are modified or reversed by the Supreme Court En Banc. Until these changes take place, domestic parties and their arbitration counsels, as well as the arbitral tribunal they constitute, must consider the possible public policy implications of their commercial transaction disputes in determining how best to move forward and resolve their dispute.

CHAMBERS GLOBAL PRACTICE GUIDES

Chambers Global Practice Guides bring you up-to-date, expert legal commentary on the main practice areas from around the globe. Focusing on the practical legal issues affecting businesses, the guides enable readers to compare legislation and procedure and read trend forecasts from legal experts from across key jurisdictions.

To find out more information about how we select contributors, email Katie.Burrington@chambers.com